PROPOSED AMENDMENT TO CFTC RULE 1.3(ggg)(4)
RE SPECIAL ENTITY DE MINIMIS THRESHOLD

July 2, 2014

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

Re: Proposed Rule, Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities, RIN No. 3038-AE19

Dear Ms. Jurgens:

The NFP Electric Coalition[1] appreciates the Commodity Futures Trading Commission (the "Commission") proposing the rule amendment captioned **Proposed Rule, Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities** (the "Proposed Rule Amendment"), and respectfully submits these comments on the Proposed Rule Amendment, as well as comments on the questions posed in the release accompanying the Proposed Rule Amendment (the "Release").[2]

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[1] The National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), the Large Public Power Council ("LPPC") and the Bonneville Power Administration (collectively, the "NFP Electric Coalition"). See **Attachment A** for a description of each member of the NFP Electric Coalition. The comments contained in this filing represent the comments and recommendations of the NFP Electric Coalition, but not necessarily the views of any particular member of the NFP Electric Coalition. The NFP Electric Coalition is 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: ACES and The Energy Authority.

[2] Proposed Rule, Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities, 79 Fed. Reg. 31,238 (June 2, 2014) (17 CFR Part 1), RIN No. 3038-AE19. The NFP Electric Coalition will respond to the Commission's specific questions in the Release in **Attachment B**.

Members of the NFP Electric Coalition have been active participants in the Commission's rulemakings implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"),[3] often in conjunction with other energy industry trade associations and representatives. The NFP Electric Coalition members are not "swap dealers," "major swap participants," "financial entities," or otherwise registered with or regulated by the Commission. The NFP Electric Coalition members do not engage in swap dealing activities, do not speculate in swaps or other commodity interests, and do not buy, sell, invest in or trade such commodity interests as financial instruments or investments. Conversely, as such terms are used in Commission rulemakings, interpretations and guidance, the NFP Electric Coalition members are "non-registrants," "end-users" and "commercial end-users."[4] The NFP Electric Coalition members enter into energy and energy-related swaps, nonfinancial commodity trade options and forward contracts, and other commercial transactions that involve nonfinancial energy and energy-related commodities, to hedge or mitigate commercial risks that arise from ongoing utility operations ("utility operations-related swaps").[5]

On July 12, 2012, members of the NFP Electric Coalition submitted a petition for rulemaking jointly with the American Public Gas Association and requested an amendment to Regulation 1.3(ggg)(4) to exclude "utility-operations related swaps" with "utility special entities" from the $25 million special entity de minimis threshold for swap dealing activity (the "Special Entity De Minimis Threshold").[6] The rationale provided in the Petition for the rule

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[3] The focus of the NFP Electric Coalition's comments has been on non-cleared nonfinancial energy and energy-related commodity transactions that take place off-facility and, in many cases, without the involvement of a swap dealer or a "major swap participant" or any other registrant (so-called "end-user-to end-user" swaps), and on bilateral commercial transactions involving energy and energy-related commodities that are intrinsically related to the NFP Electric Coalition members' electric utility operations.

[4] Although this term is not defined in the Commission's rules, we use the term to mean a nonfinancial (or commercial) entity that enters into a swap to hedge or mitigate commercial risks (as such phrase is used in CEA2(h)(7)) arising from its utility business operations.

[5] Congress did not intend the Commission to regulate commercial end-users that are hedging or mitigating commercial risks in the same way it regulates financial institutions, and financial markets traders, dealers and speculators trading in the financial markets. Congress intended the Commission to protect commercial end-users' continued access to nonfinancial commodity swaps and other derivatives as cost-effective commercial risk management tools, and not to burden commercial end-users with unnecessary regulatory obligations. See the letter from Chairmen Christopher Dodd and Blanche Lincoln to Chairmen Barney Frank and Colin Peterson, 156 Cong. Rec. H5248 (June 30, 2010) ("Dodd-Lincoln Letter") letter expressing Congressional intent (available at http://online.wsj.com/public/resources/documents/dodd-lincoln-letter070110.pdf).

[6] The Petition is available on the Commission's website at: http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/appallpcapgatapsbpaltr071212.pdf (the "Petition"). The NFP Electric Coalition will not repeat in this comment letter the Petition's rationale for the rule amendment, but instead incorporates the Petition by reference. Note that the two key terms defined in the Petition, "utility operations-related swap" and "utility special entity," are the same terms as those in the Proposed Rule Amendment, although the definitions vary in minor ways. These comments address the terms as defined in the Proposed Rule Amendment. Additional material filed in support of the Petition can also be found on the Commission's website at: http://sirt.cftc.gov/sirt/sirt.aspx?Topic=PendingFilingsandActionsAD&Key=23845.

amendment is as valid today as it was nearly two years ago. Three themes from the Petition underlie the NFP Electric Coalition's current comments:

First, utility special entities are government-owned electric or natural gas ***utilities***. These utilities should not be treated differently under the Commission's rules than comparably-situated investor-owned utilities that are also seeking to hedge commercial risks of utility operations. Differential treatment puts utility special entities at a competitive disadvantage when it comes to cost-effective access to the narrow category of nonfinancial commodity swaps that all such utilities use to hedge or mitigate commercial risks arising from operations. Due to the customized nature of such swaps, they are typically available only from a relatively limited number of counterparties in each geographic region of the country (each such counterparty, an "Available USE Counterparty").

There will typically be a different, but limited, group of Available USE Counterparties in each geographic market. Any regulatory burden or cost imposed on an Available USE Counterparty in transacting with a utility special entity in a particular region, that is not required when transacting with another market participant located in the same region, discourages the Available USE Counterparty from transacting with such utility special entity. Such regulatory burdens and costs cumulatively disadvantage the utility special entity, by driving away Available USE Counterparties and driving up transaction costs for commercial risk hedging transactions.[7] If an Available USE Counterparty sees the regulatory burdens and risks of dealing with a utility special entity as comparatively higher or as involving more regulatory risk, the Available USE Counterparty will simply walk away (and offer its swaps to other utilities in the market). Moreover, there is nothing that a utility special entity can do to convince the Available USE Counterparty to assume any material regulatory risk for the benefit of the utility special entity counterparty. And the regulatory risk of intentionally (or unintentionally) exceeding the $25 million Special Entity De Minimis Threshold is certainly material. An Available USE Counterparty could unexpectedly find itself required to register as a "swap dealer," with all of the ongoing costs and compliance burdens that such a registration entails.

Second, when a utility special entity is hedging commercial risks arising from its utility operations, the utility special entity is not engaged in commodity or derivatives trading or dealing activity or speculation. Nor is it making financial investments in utility operations-related swaps.[8] To the contrary, the utility special entity is hedging commercial risks that arise

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[7] Because the utility special entities are government-owned, there are no shareholders to bear these additional costs, so they "pass-through" as dollar-for-dollar increases in electric rates to the utility special entity's business and residential electric customers.

[8] The NFP Electric Coalition has not challenged the Special Entity De Minimis Threshold level in general, despite the fact that it is not required by the statute. Nor has the NFP Electric Coalition challenged the Commission's broad statement about the intent of Congress to protect special entities from making bad financial investment decisions by entering into complex swaps/financial instruments. Those types of investment decisions/financial instruments are not within the exclusion in the Proposed Rule Amendment, and so will still be measured under the Special Entity De Minimis Threshold of $25 million.

from its ongoing utility ***operations***. Each utility operations-related swap, as a commercial risk hedging transaction, reduces commercial risks of utility operations. Managing its utility operations is the core competency of a utility special entity. In managing its utility operations, the utility special entity does not benefit from (nor did Congress intend it to burden the utility operations with) additional regulatory supervision by the Commission.

Finally, the $25 million threshold is unreasonably low for utility operations-related swaps when used as commercial risk hedging transactions, for several reasons: the commercial risks of utility operations are localized, non-standard and long-term in nature. Such commercial risks involve commodities with significant price volatility and constraints on availability/deliverability (and storage) of the underlying commodity (resulting in periodic, regional scarcity pricing). For these reasons, each utility operations-related swap may have a significant and fluctuating "notional amount."[9] The utility special entity ***doesn't choose*** to assume such large, fluctuating and long-term commercial risks. The size, location and fuel sources for a particular utility's operations, and supply and demand factors including generation availability, electric demand or "load" and weather, dictate the nature, size and scope of the commercial risks to be hedged.[10]

When a utility special entity hedges such significant commercial risks using utility operations-related swaps, the $25 million Special Entity De Minimis Threshold that would be applicable to each of its Available USE Counterparties (not to the utility special entity itself) is a severe regulatory limitation. One or two such swaps with one or two utility special entities can easily create the potential for an Available USE Counterparty to exceed that unreasonably low threshold. Consequently, those one or two utility operations-related swaps will take that Available USE Counterparty entirely out of the market for 12 months in terms of offering any additional swaps to utility (or any other) special entities.

In addition to reiterating these three themes from the Petition, the NFP Electric Coalition respectfully notes that the rationale for the Proposed Rule Amendment is even stronger today than it was in July of 2012. When the Petition was filed, the Commission had not yet published its interpretations in the "Product Definitions Release," describing the scope of its jurisdiction over nonfinancial commodity transactions as "swaps," as defined in CEA Section 1a(47).[11] Since

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[9] Notional amount is a concept that is not easily applied to a non-cleared, off-facility, nonfinancial commodity swap, as energy industry commenters have noted in comments and raised with the Commission on a number of occasions. Due to the ambiguities in the Commission's interpretation of "swap," the calculation of "notional amount" is even more difficult and inappropriate when the concept is applied to a long-term commodity trade option or a nonfinancial commodity transaction where the parties intend physical settlement, but which may contain one or more "embedded optionalities."

[10] For an overview of the diverse commercial risks associated with utility special entity operations, see Section III of the Petition, beginning on page 6.

[11] See footnote 6 in the Petition, filed July 12, 2012, and accompanying text, where the NFP Electric Associations noted that the Commission had not at that time published rules to further define the term "swap," as Congress

that time, there has been nearly continuous discussion about the need for reconsideration or clarification of the Commission's interpretations in the Product Definitions Release and the related Commodity Options Release and Interim Final Rule.[12] There is ongoing confusion in the energy commodity markets as to whether certain long-term nonfinancial commodity transactions are, or are not, "swaps." The ambiguous interpretations of what is, and is not, a "swap" exponentially compound the regulatory risk faced by a potential Available USE Counterparty when it decides whether to offer or enter into a commercial contract involving nonfinancial commodities, or a nonfinancial commodity forward transaction with any type of "optionality," with a special entity. The NFP Electric Coalition's eagerness to have the Commission address the Special Entity De Minimis Threshold issue has only increased since July of 2012, due to this ongoing regulatory uncertainty created by the Commission's interpretations.

In the late summer/early fall of 2012, Available USE Counterparties began informing the NFP Electric Coalition's members regularly that they were leaving certain already-illiquid markets that utility special entities had relied on to hedge commercial risks, or they were no longer offering utility operations-related swaps or other transactions involving nonfinancial commodities to utility special entities. In October 2012, the Commission staff issued a highly-conditional no-action letter (the "2012 No-Action Letter"). Members of the NFP Electric Coalition told the staff and the Commission on numerous occasions that Available USE Counterparties for utility operations-related swaps (and other transactions) were not willing to rely on the 2012 No-Action Letter, due to the conditions it contained. On March 21, 2014, the Commission staff issued a "clean" no-action letter (the "2014 No-Action Letter") for the benefit

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directed the Commission to do in the Dodd-Frank Act. In August of 2012, the Commission issued "Joint final rule; interpretations; request for comment on an interpretation –Further Definition of 'Swap" Further Definition of "Swap," "Security-Based Swap,"' and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping," 77 Fed. Reg. 48,208 (August 13, 2012) (the "Product Definitions Release"). The Product Definitions Release contained several significant interpretations of the Dodd-Frank Act amendments to the Commodity Exchange Act (the "CEA"). The interpretations were published by the Commission without notice or public comment. The Commission requested comments on the interpretations, including input on a number of questions specifically applicable to the energy industry. Noting the interplay between the Commodity Options Release and Interim Final Rule (see footnote 12 below) and the interpretations in the Products Definition Release, the Commission concurrently reopened the comment period on the Commodity Options Release as well. The NFP Electric Coalition filed comments on October 12, 2012, including the request for reconsideration of one of the Commission's interpretations. See Section X of the comment letter, dated October 12, 2012, at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59235&SearchText=. The Commission has not yet responded to the request or the comments, although the Commission staff has noted that the Commission is still considering the issues raised by the Commodity Options Release and the Commission's Product Definitions Release interpretations. See footnotes 4 and 10 to No-Action Letter 13-08 (April 5, 2013).

[12] Final rule and interim final rule – Commodity Options, 77 Fed. Reg. 25,320 (April 27, 2012) (the "Commodity Option Release"). Most recently, the Commission held a Public Roundtable in April 2014 to continue the discussion of the Commission's interpretations of CEA 1a(47), and the continuing regulatory uncertainty particularly in the energy industry. See http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59822&SearchText= for the comments filed by the NFP Electric Association in conjunction with the April 2014 Public Roundtable on this issue.

of the utility special entities. The 2014 No-Action Letter drew from the Petition the narrow focus on utility operations-related swaps, utility special entities and their Available USE Counterparties, but removed most of the unworkable conditions that appeared in the 2012 No-Action Letter.[13]

Members of the NFP Electric Coalition reported to the Commission at the April 3, 2014 Public Roundtable that Available USE Counterparties have now begun to offer utility operations-related swaps to utility special entities in reliance on the 2014 No-Action Letter. But utility special entities and Available USE Counterparties alike requested the Commission to make the relief "permanent" by means of a rule amendment.[14]

Since the Petition was filed, the Commission has addressed the question of what types of nonfinancial commodity swaps (and other transactions involving nonfinancial commodities) are associated with utility operations in the "Order Exempting, Pursuant to Authority of the Commodity Exchange Act, Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives" (the "Between NFP Electrics Order").[15] Members of the NFP Electric Coalition (including utility special entities) are "Exempt Entities" as such term is defined in the Between NFP Electrics Exemption Order.[16] The Between NFP Electrics Order is important to the operations staff at virtually every utility special entity, because virtually every utility special entity enters into nonfinancial commodity transactions with other "Exempt Entities."

The NFP Electric Coalition and its utility special entity members have a direct and significant interest in the Commission amending Rule 1.3(ggg)(4), and doing so in a manner that is consistent with other Commission rules, interpretations and orders impacting utility special entities. The Commission should structure its Proposed Rule Amendment carefully to exclude from the Special Entity De Minimis Threshold all utility operations-related swaps (and other transactions involving nonfinancial commodities where the parties intend to settle physically) used by utility special entities to hedge or mitigate commercial risks of ongoing utility operations. The Commission should impose no more regulatory burdens on Available USE

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[13] The two key terms "utility operations-related swap" and "utility special entity" are also defined in the March 2014 No-Action Letter, although the definitions vary in minor ways from the definitions in the Proposed Rule Amendment. These comments will address the terms as defined in the Proposed Rule Amendment.

[14] A copy of the comments filed by APPA, LPPC and BPA after the April 2014 Public Roundtable on this issue can be found at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59820&SearchText=. The comments include links to, or copies of, prior filings on the need for a rule amendment and the costs and burdens imposed on utility special entities by the Special Entity De Minimis Threshold.

[15] 78 Fed. Reg. 19,670 (April 2, 2013). Because the Between NFP Electrics Exemption Order was entered in the spring of 2013, well after the Petition was filed, that Exemption Order represents the most recent and relevant Commission precedent (as distinguished from a staff no-action letter) for articulating the types of activities that are "associated with utility operations."

[16] 78 Fed. Reg. 19,670 (April 2, 2013) at 19,688.

Counterparties transacting with utility special entities than it imposes on such counterparties when they transact with comparably-situated investor-owned utilities or other commercial end-users. To do otherwise would be to ignore Congressional intent, leave utility special entities at a competitive disadvantage in the illiquid regional marketplaces, increase utility special entities' costs of hedging commercial risks arising from ongoing utility operations, and increase the cost of electricity for residential and business customers.

SUMMARY OF COMMENTS

The NFP Electric Coalition respectfully requests:

- **The Commission should clarify the scope of the defined term "swap" prior to or concurrently with acting on the Proposed Rule Amendment.**

- **Alternatively, the Commission should broaden the defined term "utility operations-related swap" in the Proposed Rule Amendment to reference all "utility operations-related nonfinancial commodity transactions (intended to be physically settled)," as well as transactions excluded or exempted by interpretation or order from the Commission's swap regulations, to clarify that to all such transactions are excluded from the Special Entity De Minimis Threshold.**

- **The Commission should conform the conditions to, and the definition of, "utility operations-related swap" to the Between NFP Electrics Exemption Order.**

- **The Commission should incorporate into the Proposed Rule Amendment the ability of the counterparty (the "Available USE Counterparty") to reasonably rely on representations of the utility special entity for matters within the utility special entity's knowledge and control.**

- **The Commission should eliminate the requirement in the Proposed Rule Amendment that an Available USE Counterparty must file a notice with the National Futures Association of its intention to rely on the exclusion.**

I. THE COMMISSION SHOULD CLARIFY THE SCOPE OF THE DEFINED TERM "SWAP" PRIOR TO OR CONCURRENTLY WITH ACTING ON THE PROPOSED RULE AMENDMENT.

The Petition, and the 2012 and 2014 No-Action Letters, focused on excluding utility operations-related "swaps" from the overly-restrictive $25 million Special Entity De Minimis Threshold, for the benefit of the utility special entities. However, due to the ambiguities in the Commission's interpretations in the Product Definitions Release and the Commodity Option Release as to what is, and is not, a "swap," the NFP Electric Coalition must now respectfully request a sequenced rulemaking to clarify which transactions are excluded (and assure that the

exclusion is broad enough). Otherwise, the regulatory uncertainty remains as to whether certain utility operations-related transactions that ***may be*** "swaps" remain under the Special Entity De Minimis Threshold.

The same Available USE Counterparties that offer and enter into utility operations-related "swaps" oftentimes also offer energy and energy-related commodity trade options or other types of utility operations-related transactions involving nonfinancial commodity as part of their swap dealing activities in a region. In each case, at the time the transaction is executed, the Available USE Counterparty will need to be certain whether (or not) the transaction is excluded from the $25 million Special Entity De Minimis Threshold. Unless this ambiguity is clarified, Available USE Counterparties will continue to treat utility special entities differently than they treat neighboring investor-owned utilities for these utility operations-related "maybe-swap" transactions – transactions that are just as critical to the utility special entities' ability to hedge commercial risks of ongoing utility operations as "real swaps."

The NFP Electric Coalition respectfully requests that, prior to or concurrently with finalizing the Proposed Rule Amendment, the Commission act on the request for reconsideration of the Commission's interpretation of CEA Section 1a(47), added to the CEA by Section 721 of the Dodd-Frank Act, that all commodity options are "swaps,"[17] and clarify the scope of its jurisdiction over nonfinancial commodity "swaps."

II. ALTERNATIVELY, THE COMMISSION SHOULD BROADEN THE PROPOSED RULE AMENDMENT TO REFERENCE "UTILITY OPERATIONS-RELATED NONFINANCIAL COMMODITY TRANSACTIONS (INTENDED TO BE PHYSICALLY SETTLED)" OR OTHERWISE CLARIFY THAT "UTILITY OPERATIONS-RELATED SWAP" INCLUDES ALL SUCH TRANSACTIONS, TO ASSURE THAT ALL SUCH UTILITY OPERATIONS-RELATED TRANSACTIONS ARE EXCLUDED FROM THE SPECIAL ENTITY DE MINIMIS THRESHOLD.

Alternatively, the NFP Electric Coalition must respectfully request that the Commission broaden the scope of the defined term "utility operations-related ***swap***," and use instead the term "utility operations-related ***transaction,***" and be sure that such term includes all nonfinancial commodity transactions for deferred shipment or delivery where the parties intend physical settlement at the time the transaction is executed (including stand-alone or embedded options or optionalities), in order to provide utility special entities with the relief they require and enable them, in turn, to assure their Available USE Counterparties.[18]

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[17] See Section X of the comment letter, dated October 12, 2012, linked in footnote 11, infra.

[18] If the Proposed Rule Amendment solves the utility special entities' problem with the Special Entity De Minimis Threshold for "real swaps," but leaves these other utility operations-related transactions potentially within the

In addition, the NFP Electric Coalition respectfully requests that the Commission provide guidance that all transactions used by a utility special entity to hedge or mitigate commercial risks, and that have the benefit of a Commission exclusion by interpretation, or an exemption order from the Commission's jurisdiction over "swaps," are also excluded from the Special Entity De Minimis Threshold. For example, a transaction that an Available USE Counterparty enters into as part of its swap dealing activities with a utility special entity under an RTO/ISO tariff should be excluded from the Special Entity De Minimis Threshold.[19]

III. THE COMMISSION SHOULD CONFORM CLAUSE (iii) AND (iv) OF PROPOSED REGULATION 1.3(ggg)(4)(i)(B)(3) TO THE COMMISSION'S OTHER RULES, INTERPRETATIONS AND ORDERS APPLICABLE TO "SWAPS" TO WHICH UTILITY SPECIAL ENTITIES ARE PARTIES, TO STREAMLINE AND SIMPLIFY COMPLIANCE.

A. *The Commission should eliminate the requirement in Clause (B)(3)(iii) that a utility operations-related swap be "related to an exempt commodity," or clarify the term "exempt commodity" and add the words "or an agricultural commodity."*

The requirement in Clause (iii) of proposed Regulation 1.3(ggg)(4)(i) (B)(3) that a utility operations-related swap be "related to an exempt commodity" does not appear in the Petition, the Between NFP Electric Exemption Order, or the 2014 No-Action Letter. The condition is instead drawn from the now-superseded and unworkable 2012 No-Action Letter. The NFP Electric Coalition respectfully requests that this condition be deleted, as it adds ambiguity to the Proposed Rule Amendment. Clause (iv) provides the definition of "utility operations-related swap," and requires that a utility operations-related swap be "associated

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$25 million threshold, Available USE Counterparties will still discriminate against utility special entities when offering commercial risk hedging transactions that ***may or may not be*** "swaps."

[19] 78 Fed. Reg. 19,880 (April 2, 2013). As another example, the Commission's interpretation that customary commercial arrangements, such as equipment or inventory purchases, are not intended to be "swaps" under the Dodd-Frank Act amendments to the CEA. See Section IIB3 of the Product Definitions Release. It is important that a utility special entity is able to assure a counterparty to such a transaction is not a "swap" such that it would not be included in the Special Entity De Minimis Threshold. However, neither a utility special entity nor any other market participant in the energy industry can make a representation as to what is and is not a "swap" under the Commission's rules, interpretations and guidance. To reiterate: there is no reason whatsoever for an Available USE Counterparty to incur the significant regulatory risk of exceeding the $25 million threshold, which would require it to register as a swap dealer, in order to enter into such transactions with utility special entities. There are plenty of other utility counterparties interested in transacting with that Available USE Counterparty in these illiquid, regional energy commodity markets.

with" ongoing utility operations of the utility special entity, and not with financial assets or financial investments.

Clause (iii) adds ambiguity to the Proposed Rule Amendment by utilizing the term "exempt commodity."[20] The Dodd-Frank Act amendments to the CEA, and the Commission's rules and interpretations implementing such amendments, do not use this term in describing the different asset classes and categories of "swaps." Instead, the Dodd-Frank Act added new CEA Section 1a(47), which distinguishes swaps in certain respects from transactions involving "nonfinancial commodities." The Commission's new rules and interpretations implementing the Dodd-Frank Act incorporate this distinction from the statute, and delineate four asset classes for financial commodity swaps (involving rates, credit, currencies and equities), and one "other commodity" asset class for nonfinancial commodity swaps (including metals, energy and agricultural).

The Product Definitions Release includes important Commission interpretations about the term "nonfinancial commodity" as used in relation to swaps, and transactions involving nonfinancial commodities, implementing new CEA 1a(47). The Commission's rules and interpretations implementing its new jurisdiction over swaps do not consistently use the pre-Dodd-Frank Act categorizations of "exempt commodity," "agricultural commodity" and "excluded commodity" to classify swaps.[21]

If the Commission does not amend the Proposed Rule Amendment to delete Clause (iii), the NFP Electric Coalition respectfully requests that the Commission clarify that all "nonfinancial commodities" (other than agricultural commodities) are "exempt commodities," and that the Commission expand Clause (iii) to include the concept that a utility operations-related swap may be related to an "agricultural commodity." As discussed in the preamble to the Between NFP Electrics Order,[22] there are agricultural commodities that are used as fuel for electric generation, or that may otherwise be "associated with utility operations." If Clause (iii) is not deleted or clarified, it will not be clear that a utility operations-related swap that otherwise meets the definition in Clause (iv), but that may be related to a nonfinancial commodity or an agricultural commodity, should have the benefit of the exclusion.

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[20] Prior to the Dodd-Frank Act amendments, futures contracts and exchange-traded options were and still are categorized in three buckets: those based on "exempt commodities," "excluded commodities," and "agricultural commodities."

[21] In comments on the Commodity Options Release and Interim Final Rule and the Product Definitions Release, the energy industry requested the Commission to reconcile the use of terms for purposes of making the rules applicable to "swaps" consistent with the language of CEA 1a(47). See the comment letter linked in footnote 11 infra, at Sections IX and X.

[22] See 78 Fed. Reg. 19,670 at 19,675.

As discussed at the beginning of this comment letter, utility special entities are "Exempt Entities" with the benefits provided by the Commission's "Between NFP Electrics Exemption Order." Under such Exemption Order utility special entities can enter into certain types of operations-related transactions (called "Exempt Non-Financial Energy Transactions") with other Exempt Entities without being concerned about most of the Commission's rules applicable to "swaps." When crafting the Between NFP Electrics Exemption Order, the NFP Electric Coalition members met over the course of many months in 2012 and 2013 with the Commission and Commission staff to discuss the scope of the Exemption Order, its definition of "Exempt Non-Financial Energy Transactions," and how such transactions were intrinsically related to or associated with utility operations.

In the Between NFP Electric Entities Order, the Commission used language drawn from new CEA 1a(47), and consistent with its other swap rules, when it categorized the commodities underlying "Exempt Non-Financial Energy Transactions." That definition contains the following limiting language in terms of asset class and category of commodities that would ***not*** be considered to be associated with utility operations: "In addition, the term "excludes agreements, contracts, and transactions based upon, derived from, or referencing any interest rate, credit, equity or currency [financial commodity] asset class, or any grade of a metal, or any agricultural products or any grade of crude oil or gasoline [nonfinancial commodities]that is not used as a fuel for electric generation *(explanations provided in brackets)*."[23] The NFP Electric Coalition respectfully requests that the Commission delete Clause (iii) of proposed Regulation 1.3(ggg)(4)(i)(B)(3), or revise it to incorporate language consistent with the language in the NFP Electrics Exemption Order.

B. ***The Commission should include in the definition of "utility operations-related swaps" all of the categories of utility operations that appear in the Between NFP Electrics Order definition of "Exempt Nonfinancial Energy Transaction."***

As described above, the NFP Electric Coalition respectfully recommends that the Commission leverage its prior efforts to understand and circumscribe what types of transactions involving nonfinancial commodities are associated with utility operations. The Commission has not provided any regulatory policy reason for the seeming inconsistencies in language between its Between NFP Electrics Exemption Order and proposed Regulation 1.3(ggg)(4)(i)(B)(3)(iv). For example, the defined term "utility operations-related swap" in Clause (iv) of proposed Regulation 1.3(ggg)(4)(i)(B)(3) would not seem to clearly include transportation and transmission agreements, or agreements associated with the utility special entity's reliability obligations.[24] And yet such transactions are clearly associated with the utility special entity's operations, and fall squarely within the categories in the NFP Electrics Exemption Order.[25] The

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[23] See 78 Fed. Reg. 19,670 at 19,688.

[24] See 79 Fed. Reg. at 31,247 (Proposed Regulation 1.3(ggg)(i)(4)(B)(3)).

[25] Compare proposed Regulation 1.3(ggg)(4)(i)(B)(3) to the NFP Electrics Exemption Order at 78 Fed. Reg. 19,688 (Categories 2 and 3).

NFP Electric Coalition respectfully requests the Commission to refine the definition of "utility operations-related swap" in Clause (iv) of proposed Regulation 1.3(ggg)(4)(i)(B)(3) to be consistent with the NFP Electrics Exemption Order.

C. ***The Commission should simplify and streamline compliance with its swap regulations by utility special entities and their Available USE Counterparties.***

When entering into a utility operations-related swap (or other transaction) with a utility special entity, an Available USE Counterparty will require a representation by the utility special entity that the utility operations-related swap (or other transaction) complies with the definition and the conditions in the Proposed Rule Amendment, and thus will benefit from the exclusion from the Special Entity De Minimis Theshold.

The NFP Electric Coalition respectfully requests that the Commission incorporate into Clause (iii) and (iv) of proposed Regulation 1.3(ggg)(4)(i)(B)(3) the commodity category terms and utility operations concepts that are found in the definition of "Exempt Nonfinancial Energy Transactions" in the Commission's Between NFP Electrics Exemption Order. Regulatory consistency and simplicity will facilitate regulatory compliance by utility special entities, and will reduce unnecessary transaction burdens as utility special entities make representations to their Available USE Counterparties in order to enter into transactions that fit within the exclusion provided by the Proposed Rule Amendment.

IV. THE COMMISSION SHOULD INCORPORATE INTO THE PROPOSED RULE AMENDMENT THE ABILITY OF THE COUNTERPARTY (THE "AVAILABLE USE COUNTERPARTY") TO REASONABLY RELY ON REPRESENTATION OF THE UTILITY SPECIAL ENTITY FOR MATTERS WITHIN THE UTILITY SPECIAL ENTITY'S KNOWLEDGE AND CONTROL.

The NFP Electric Coalition appreciates the guidance provided in the Release that "the Commission intends to take the position that a person seeking to rely on the (proposed) exclusion may reasonably rely upon a representation by the utility special entity that it is a utility special entity and that the swap is a utility operations-related swap, as such terms are defined in proposed Regulation 1.3(ggg)(4)(i)(B), so long as such person was not aware, and should not reasonably have been aware, of facts indicating the contrary."[26] However, such an additional representation adds a transaction step that is not required if an Available USE Counterparty enters into such a swap with a comparably situated investor-owned utility or another market participant. Such a representation will also require modifications to some of the electronic confirmation platforms and counterparties' automated transaction confirmation forms. But, the NFP Electric Coalition understands and appreciates that the Commission has put the burden of such representations on the utility special entity, to avoid an additional due diligence step for the Available USE Counterparty.

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[26] See 79 Fed. Reg. at 31,242.

To avoid any question as to whether the Available USE Counterparty can rely on such a representation, the NFP Electric Coalition respectfully requests that the Commission put the guidance directly into the Proposed Rule Amendment. The NFP Electric Coalition proposes a new Clause that reads:

> "(_) Any person relying upon the exclusion in paragraph (ggg)(4)(i)(B) of this section may rely on a representation of the utility special entity that it satisfies the requirements of Clause (2) and that the transaction satisfies the requirements of Clause (3), so long as such person is not aware, and should not reasonably have been aware, of facts indicating that such representation is untrue."

It is critical that, when a utility special entity provides an Available USE Counterparty with such a representation, the Available USE Counterparty can quickly and easily confirm that it is not incurring additional regulatory risk when transacting with the utility special entity. Utility special entities can more easily work with counterparties on standardized representations and with electronic confirmation platforms to incorporate such standardized representations, if the safe harbor appears directly in the rule, rather than in guidance. The NFP Electric Coalition notes that the Commission has provided similar safe harbor provisions elsewhere in the Commission's swap dealer rules.[27]

V. THE COMMISSION SHOULD ELIMINATE THE REQUIREMENT IN THE PROPOSED RULE AMENDMENT THAT A PERSON MUST FILE A NOTICE WITH THE NATIONAL FUTURES ASSOCIATION PRIOR TO RELYING ON THE EXCLUSION.

In the Release, the Commission discusses the general Congressional intent to protect special entities, and then makes the conclusory statement that "it is important that the Commission be able to know who the persons are that rely on the exclusion under the Propos[ed Rule Amendment.]"[28] But the Commission does not explain for what specific regulatory purpose this information/data collection is important. The NFP Electric Coalition respectfully requests that the Commission eliminate the requirement in 1.3(ggg)(4)(i)(B)(4) for a notice filing. As further discussed in **Attachment C**, the NFP Electric Coalition respectfully notes that there is no such notice filing required when an entity decides to offer, or enter into, any other type or category of swap with a special entity, and therefore to become subject to the Special Entity De Minimis Threshold to begin with. Nor is there such a notice filing required when an entity decides to engage in swap dealing activity with counterparties (special entities or others) that would subject the entity to the General De Minimis Threshold. There is no filing required when an entity decides to offer or enter into a utility operations-related swap with an entity that is not a utility special entity.

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[27] See, for example, Rules 23.402, 23.430 and 23.505.

[28] See 79 Fed. Reg. at 31,242.

If the Commission declines to eliminate the notice requirement from the Proposed Rule Amendment, the NFP Electric Coalition respectfully requests the Commission to delete the requirement that the notice contain "a statement signed by an individual with authority to bind the person that the person meets the criteria for the exclusion in Regulation 1.3(ggg)(4)(i)(B)…" The NFP Electric Coalition members have been told that Available USE Counterparties will not undertake such a certification or "attestation" requirement without understanding the scope of the individual officer's liability for such signed statement and for what regulatory purpose the Commission intends to use such statement. As the Commission is aware, the scope of potential individual liability (for fines or even criminal prosecution) for certifying compliance with ambiguous regulatory requirements has been noted as a serious implementation concern by energy industry commenters.[29]

Turning to the substance of the individual representation or certification: the NFP Electric Coalition respectfully notes that there are, in fact, no "criteria for the exclusion" that the Available USE Counterparty "must meet" in proposed Regulation 1.3(ggg)(4)(i)(B). Consequently, there is no regulatory reason to require any Available USE Counterparty officer or employee to certify anything, either prior to relying on the exclusion (as is called for under the Proposed Rule Amendment) or when a utility operation-related swap is entered into with a utility special entity. Section (1) of proposed Regulation 1.3(ggg)(4)(i)(B) explains the calculations for the exclusion, which are made during the course of relying on the exclusion, not before the person begins to rely on the exclusion. Section (2) of proposed Regulation 1.3(ggg)(4)(i)(B) identifies characteristics or criteria applicable to the utility special entity, not the Available USE Counterparty, and will the subject of the representations discussed in Section IV above. Similarly, Section (3) of proposed Regulation 1.3(ggg)(4)(i)(B) describes criteria applicable to the utility operations-related swap (or other transaction), and will also be the subject of the representations discussed in Section IV above. Finally, Section (5) of proposed Regulation 1.3(ggg)(4)(i)(B) contains a recordkeeping requirement, but does not include any criteria in respect of the person relying on the exclusion.

If the Commission declines to delete the notice requirement, the NFP Electric Coalition also respectfully request the Commission to explain how this particular data collection activity (name and contact information for a person intending to rely on this exclusion to a de minimis threshold from registration with, or regulation by, the Commission) enables it to fulfill a specific regulatory objective that the Commission would be unable to fulfill by seeking such information from alternative sources. For example, the Commission could seek such information directly from entities that the Commission has reason to believe are misusing the exclusion, or entities that are otherwise suspected of being in violation of the Commission's swap dealer registration rules. Instead, the Proposed Rule Amendment seeks this information from non-registrants, with

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[29] See, for example, comments submitted by the International Energy Credit Association in connection with the April 3, 2014 Public Roundtable, commenting on the energy industry concerns with the individual certification required by the Commission's Form TO. http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59825&SearchText= at page 30.

no explanation of how collecting contact data from every person that ***may*** want to rely in good faith on an exclusion from one de minimis threshold in the Commission's registration requirements (with no information on the more general de minimis or on the special entity de minimis itself), enables the Commission to identify entities that ***may not*** be relying on the exclusion in good faith. Imposing such a notice requirement on all non-registrants that intend to act in compliance with the rules is not justified by the Commission's generalized desire to catch those that may be in violation of the exclusion, the Commission's registration requirements or other rules.

VI. THE COMMISSION MUST CONSIDER THE IMPACT OF ITS PROPOSED RULE AMENDMENT ON "SMALL ENTITIES,"[30] INCLUDING THE MAJORITY OF UTILITY SPECIAL ENTITIES WHICH ENTER INTO UTILITY OPERATIONS-RELATED SWAPS (OR OTHER TRANSACTIONS) TO HEDGE OR MITIGATE COMMERCIAL RISKS OF UTILITY OPERATIONS.

Section IVA of the Release (the Regulatory Flexibility Act "RFA" discussion) notes that the Proposed Rule Amendment will ***relieve*** counterparties of a regulatory obligation (to register as a swap dealer if a counterparty exceeds the Special Entity De Minimis Threshold), rather than impose new regulatory obligations. The NFP Electric Coalition notes, in response, that the Proposed Rule Amendment in fact corrects an unintended consequence of the Commission's swap dealer rule, that should never have imposed such a regulatory obligation to begin with.[31]

The Commission also acknowledges in its RFA discussion that there is the new notice filing required by proposed Rule 1.3(ggg)(4)(i)(B)(iv) -- for each and every counterparty that intends to rely on the exclusion and enter into one or more utility operations-related swaps (or other nonfinancial commodity transactions) with utility special entities.[32] The Commission

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[30] The Regulatory Flexibility Act, as amended by SBREFA (collectively, "SBREFA"), incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA").

[31] The Commission tries to justify the notice requirement by noting that the Proposed Rule Amendment, if adopted, will relieve Available USE Counterparties from otherwise being subject to the Special Entity De Minimis Threshold, and potentially having to register as "swap dealers." This avoided cost theory analysis is incorrect. The utility special entities have demonstrated to the Commission that Available USE Counterparties have avoided the risk of having to incur significant regulatory costs by simply declining to enter into utility operations-related swap transactions with utility special entities. As a result, Available USE Counterparties choose not to enter into transactions subject to the Special Entity De Minimis Threshold, and do not risk the potential for swap dealer registration. Indeed, this predictable reaction by Available USE Counterparties is a primary reason for the Commission's proposal to fix the rule by amendment. The Commission cannot claim credit in its Regulatory Flexibility Act analysis for fixing the rule that was a mistake to begin with. 79 Fed. Reg. 31,241.

[32] Using the SBREFA criteria for small business size regulations, the vast majority of the 2000 public power systems represented by APPA meet the definition of "small entity" (13 C.F.R. §121.201, as modified effective January 22, 2014. See 78 Fed. Reg. 77343 (December 23, 2013)). The Commission cannot continue to ignore

extrapolates that such notice filing will not have a significant economic impact on those entities (or on utility special entities) based on an unexplained assumption that the number of potential counterparties seeking to rely on the (proposed) exclusion **may be** limited, given the local nature of the relevant markets.

The NFP Electric Coalition respectfully disagrees with both this conclusion and the Commission's assumption. In terms of the assumption, the localized nature of the regional markets for these non-standardized utility operations-related swaps (or other transactions) means just the opposite is likely to be true. Across the country, there will hopefully be many, many Available USE Counterparties required to file the notice in order to rely on the exclusion in the Proposed Rule Amendment to enter into one or more utility operations-related swaps (or other transactions) -- once the regulatory risk of having to register as a "swap dealer" is removed. There will be regional natural gas producer counterparties that, prior to the effective date of the Commission's swap dealer rules, might have offered one natural gas swap to one utility special entity located close to its production. In another region of the country, there might be an existing or a new merchant generator that would offer electricity or capacity swaps (or trade options) to an electric utility special entity. In another region, a new entrant might decide to offer or enter into utility operations-related swaps, or enter into nonfinancial commodity transactions intending to physically settle but with embedded "optionalities," with multiple utility special entities in the region. For each unique regional market and for each type of utility operations-related swap (or other transaction), the Available USE Counterparties will be different.

If each Available USE Counterparty has to make a notice filing, and each utility special entity has one or more different Available USE Counterparties for power swaps, natural gas swaps, coal swaps, capacity, emissions and other utility-related swaps, there will likely be multiple such notice filings for each utility special entity across the country. The number of filings will be large. However inconsequential the time commitment is to make the filing of name and contact information, the cumulative burden on utility special entities must be weighed against the lack of any comparable filing to offer the same nonfinancial commodity swap to a neighboring investor-owned utility, and weighed against an unexplained and unquantified regulatory benefit that the Commission assumes from its collection of such notice information. And the Commission must take into account the fact that some Available USE Counterparties may simply not be willing to make even an inconsequential notice filing if they can turn immediately to offer and transact with a non-utility special entity counterparty.

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its responsibilities under the RFA by repeatedly citing its own dated and unsupported assertion that "eligible contract participants" are not "small entities." See p. 75784 footnote 847. The case repeatedly cited by the Commission contains no analysis as to why the Commission made such an assertion, and provides no analysis applying the SBREFA criteria to various categories of "eligible contract participants." In some rulemakings, the Commission acknowledges that some number eligible contract participants may be "small entities," but dismisses NFP Electric Coalition requests to conduct the required SBREFA analysis by saying there are only a few such "small entities." *See*, for example, the Trade Option IFR at 77 Fed. Reg. 25320 and 25335-25336 (April 27, 2012). The NFP Electric Coalition respectfully submits that the nearly 2000 "small entity" members of APPA deserve the full regulatory review afforded them by SBREFA.

The NFP Electric Coalition respectfully notes that any disparate cost or burden placed on utility special entities, as compared to comparably situated investor-owned utilities, must be weighed as significant for "small entities." Available USE Counterparties to a utility special entity cannot be expected to altruistically absorb cost or incur regulatory risk, when counterparties other than utility special entities do not require such costs or risks. Indeed, the NFP Electric Coalition has previously demonstrated to the Commission that their counterparties are risk averse, and how a unique regulatory requirement imposed on an Available USE Counterparty will foreclose such persons from entering into swap transactions with utility special entities which in turn, drives up costs for utility special entities in managing their operational risks.[33] According to the Commission, "a significant reduction in the number of swap counterparties available to utility special entities could be especially harmful to the public interest in view of the importance of the energy services provided by the utility special entities."[34]

The NFP Electric Coalition also respectfully notes that the vast majority of utility special entities (including all but a few dozen public power systems represented by APPA) are "small entities." The NFP Electric Coalition requests that the Commission fulfill its statutory requirements under SBREFA to show the steps it has taken, and the alternatives it has considered (including the alternatives proposed by the NFP Electric Coalition), to reduce costs and regulatory burdens that its Proposed Rule Amendment imposes on "small entities.[35]

The NFP Electric Coalition reserves the right to assess the full impact of the rulemakings being promulgated by the Commission to implement and interpret the Dodd-Frank Act, and to require a SBREFA analysis be conducted with respect to those regulations as a whole. The Commission must demonstrate that such costs and burdens for "small entities" are necessary to accomplish an identified regulatory objective, and that such regulatory objectives cannot otherwise be achieved by alternative regulatory approaches that commenters recommend, while reducing the costs and regulatory burdens imposed on "small entities."[36]

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[33] See Letter from American Public Power Association to CFTC Chairman Gary Gensler, dated November 19, 2012, at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/appabpallpctaps111912.pdf; and Letter from American Public Power Association to CFTC Acting Chairman Mark Wetjen, dated March 6, 2014 ("March Letter") attached to April 2014 Public Roundtable comments, linked at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59820&SearchText .

[34] 79 Fed Reg. 31,240.

[35] The vast majority of utility special entities are "small entities" under the regulatory definitions in SBREFA. It is not within the Commission's authority to ignore those definitions, or to assume away its obligations under SBREFA to "small entities" in general or, or to vast majority of the 2000 public power systems represented by APPA that meet the definition of "small entities" in particular.

[36] The NFP Electric Coalition respectfully requests that the Commission evaluate the aggregate costs and benefits of its rules as well as its interpretations, no-action letters and guidance provided in other forms, to the extent that such statements of policy have the effect of rules and impose regulatory costs and burdens on "small

VII. CONCLUSION

The NFP Electric Coalition commends the Commission for the Proposed Rule Amendment, and respectfully requests the Commission to consider these comments as improvements, not objections or impediments to the speedy adoption of the Proposed Rule Amendment. The comments are intended to make the Proposed Rule Amendment consistent with the Commission's existing rules, interpretations, guidance and exemption orders, and to streamline and facilitate compliance. In **Attachment B**, the NFP Electric Coalition addresses each of the Commission's questions in the Release, some of which address the Proposed Rule Amendment, and others of which address other rulemaking areas. In **Attachment C**, the NFP Electric Coalition provides comment on the Paperwork Reduction Act aspects of the Commission's proposed notice and recordkeeping requirements.

Please contact any of the NFP Electric Coalition's undersigned representatives or Patricia Dondanville, Reed Smith LLP, 10 South Wacker Drive, 40th Floor, Chicago, Illinois 60606, telephone (312) 207-3911 or at pdondanville@reedsmith.com for more information or assistance.

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entities" (even if the Commission does not give notice or seek public comments as required by the Administrative Procedures Act).

NFP Electric Coalition Comment Letter
Melissa D. Jurgens, Secretary
July 2, 2014

PROPOSED AMENDMENT TO CFTC RULE 1.3(ggg)(4)
RE SPECIAL ENTITY DE MINIMIS THRESHOLD

Respectfully submitted,

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ATTACHMENT A - DESCRIPTION OF THE NFP ELECTRIC COALITION (AND MEMBERS)

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 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.

BPA is a self-financed, non-profit Federal agency created in 1937 by Congress that primarily markets electric power from 31 federally owned and operated projects, and supplies 35 percent of the electricity used in the Pacific Northwest. BPA also owns and operates 75 percent of the high-voltage transmission in the Pacific Northwest. BPA's primary statutory responsibility is to market its Federal system power at cost-based rates to its "preference customers."[37] BPA also funds one of the largest wildlife protection and restoration programs in the world.

[37] BPA has approximately 130 preference customers made up of electric utilities which are not subject to the jurisdiction of the Federal Energy Regulatory Commission, including Indian tribes, electric cooperatives, and state and municipally chartered electric utilities, and other Federal agencies located in the Pacific Northwest.

ATTACHMENT B - QUESTIONS FROM THE COMMODITY FUTURES TRADING COMMISSION IN THE RELEASE,[1] AND NFP ELECTRIC COALITION COMMENTS IN RESPONSE (IN BLUE)

1. Will the Proposal enable utility special entities to adequately hedge their operational risks in a cost-effective manner by entering into utility operations-related swaps? If not, explain why, and indicate ways in which the Proposal could be modified in order to accomplish this goal.

> The NFP Electric Coalition has provided comments on the Proposed Rule Amendment. With the changes recommended by the NFP Electric Coalition, utility special entities should be able to compete on a level playing field for commercial risk hedging swaps (or other transactions involving nonfinancial commodities) when seeking to transact with counterparties that are engaged in "swap dealing activity," but not required to register with the Commission as swap dealers ("Available USE Counterparties"). The NFP Electric Coalition comments are intended to streamline and simplify reliance on the exclusion, for the benefit of utility special entities and a wide variety of Available USE Counterparties. Some Available USE Counterparties may only offer, or enter into, one or a few utility operations-related swaps with a single or a few utility special entities during the course of a 12-month period. Others may be involved in swap dealing activities in multiple types of transactions in different nonfinancial commodity categories with multiple utility special entities in diverse geographic regions of the country. Each Available USE Counterparty is important to the utility special entity that needs a specific, non-standardized, utility operations-related swap offered in its regional geographic market to cost-effectively (and adequately) hedge commercial risks arising from its unique ongoing utility operations.

2. Are there factual errors or omissions in the Commission's understanding and analysis of the issues faced by utility special entities and the efforts to date to resolve those issues?

> The NFP Electric Coalition has not identified any material omissions in the Commission's analysis in the Release. However, the comment letter challenges the Commission's underlying assumption that Congress intended that special entities ***always*** be treated differently by counterparties engaged in swap dealing activities, when considering and entering into "swaps" and other

[1] *Proposed Rule, Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities*, 79 Fed. Reg. 31,238 (June 2, 2014) (17 CFR Part 1), RIN No. 3038-AE19.

transactions involving nonfinancial commodities. When utility special entities enter into utility operations-related swaps to hedge or mitigate commercial risks from ongoing utility operations, they should not be treated differently than neighboring investor-owned utilities or other counterparties. In such circumstances, utility special entities are not making financial investments or trading, dealing or investing in such swaps (or other transactions involving nonfinancial commodities) for profit. The utility special entities are acting within their core competency -- to manage, and hedge or mitigate commercial risks that arise from, ongoing utility operations. Utility operations-related swaps (or other transactions) are operational risk-reduction transactions, not financial or investment risk-assuming transactions.

3. Is it appropriate to treat utility operations-related swaps with utility special entities differently than other swaps with special entities for purposes of determining whether a person is a swap dealer?

Yes. The Commission's swap dealer registration requirements, its swap dealer compliance rules, and the business conduct standards applicable to registered swap dealers are structured to provide protections for customers, including special entities, that are being offered, recommended and advised in respect of financial investments (including commodity interests), as well as commodity interests used as hedges for those financial investments.

Utility special entities are not making investments in utility operations-related swaps as financial instruments, to assume financial risk, or to deal, speculate or trade such contracts for profit. Each utility special entity is entering into such swaps to hedge or mitigate commercial risks arising from its ongoing utility operations. Managing such utility operations, and hedging the diverse and interdependent commercial risks that arise from such operations, is the core competency of its utility operations management and staff.

4. Does the definition of utility operations-related swap in proposed Regulation 1.3(ggg)(i)(4)(B)(3) adequately encompass the range of swap transactions with respect to which it is appropriate to, in effect, set a higher de minimis threshold in the context of persons dealing with utility special entities? If not, in what way(s) should the definition be expanded or narrowed and why? More specifically, should the scope of the swaps identified in Regulation 1.3(ggg)(i)(4)(B)(3)(iv) be expanded or narrowed? Are there swaps that would meet the requirements of Regulation 1.3(ggg)(i)(4)(B)(3)(i), (ii) and (iii), but not of Regulation 1.3(ggg)(i)(4)(B)(3)(iv) that should be included? Is Regulation 1.3(ggg)(i)(4)(B)(3)(iv) too restrictive or not restrictive enough?

As discussed in the comment letter, the NFP Electric Coalition respectfully requests that the Commission conform the conditions in proposed Regulation 1.3(ggg)(4)(i)(B)(3)(iii) and the characteristics of a "utiity operations-related swap" in proposed Regulation 1.3(ggg)(4)(i)(B)(3)(iv) to the comparable concepts and language in the Commission's Between NFP Electrics Exemption Order.

A utility special entity should be able to hedge or mitigate commercial risks associated with and arising from its unique ongoing utility operations, and to do so by transacting with all Available USE Counterparties, on an equal footing with neighboring investor-owned utilities.

5. One of the conditions to coming within the definition of the term "utility operations-related swap" is that the party to the swap that is a utility special entity is using the swap in the manner prescribed in Regulation 50.50(c) - i.e., to hedge or mitigate commercial risk. What issues might there be in determining whether a swap constitutes hedging activity for purposes of complying with this proposed rule? Is reference to Regulation 50.50(c) for defining hedging activities appropriate? Are there alternative definitions that should be considered (e.g., Regulation 1.3(ggg)(6)(iii))? Should the definitions for hedging activities in Regulation 50.50(c) and Regulation 1.3(ggg)(6)(iii) be harmonized? If so, how (e.g., by following Regulation 50.50(c) or Regulation 1.3(ggg)(6)(iii) or some iteration of both) and why? Please provide any estimates of costs of compliance with any proposed alternative as compared to the cost of compliance with Regulation 50.50(c).

The condition referencing Regulation 50.50(c) is appropriate, as is the use of this definition of hedging in the Proposed Rule Amendment. Regulation 50.50(c) is the "hedging" definition that appears in the Dodd-Frank Act amendments that added the new Commission jurisdiction over "swaps." Regulation 50.50(c) was developed for the benefit of, and with input from, commercial enterprises and entities (aka "commercial end-users") that transact in nonfinancial commodity swaps (and other transactions involving nonfinancial commodities where the parties intend physical settlement) to hedge commercial risks of operations, not merely financial risks of trading markets activity. Other hedging definitions, such as the definition used in the "swap dealer" rules, or the term "bona fide hedging" used in the speculative position limits rules, may be appropriate for dealers, speculators or financial markets traders.

As was discussed with the Commission and the staff when a different hedging definition was used as a condition in the 2012 No-Action Letter, these other hedging definitions are not appropriate when intended for application by utility special

entities, which do not engage in dealing activity, trading in the financial markets, or speculative activity.

In the Proposed Rule Amendment, it is the utility special entity (the "commercial end user") that is charged with analyzing, and making a representation to its counterparty, that the "utility operations-related swap" is being used in compliance with proposed Regulation 1.3(ggg)(4)(i)(B)(3)(ii). Consequently, using the hedging definition with which a commercial end-user is familiar (Regulation 50.50) is appropriate.

The NFP Electric Coalition would not object to the Commission proposing an amendment to Regulation 1.3(ggg)(6)(iii) or other hedging terms in the Commission's regulations to harmonize or conform those provisions to current Commission Regulation 50.50(c). However, if the Commission proposes an amendment to Regulation 50.50(c), the NFP Electric Coalition respectfully note that a formal rulemaking, with notice and a public comment period would be required, along with a cost-benefit analysis of the Proposed Rule Amendment, as well as an analysis under the RFA/SBREFA for the rule amendment's effect on "small entities." Utility special entities and other commercial end-users have invested in IT systems and personnel, and implemented compliance plans and secured management approvals among other implementation and compliance steps, based on Regulation 50.50, to enable them to elect the end-user exception to clearing. Any rule amendment would require a reassessment, and potential costly revisions to those already-completed corporate IT and personnel investments, which were undertaken based on the current Regulation 50.50.

6. Another condition to coming within the proposed definition of the term "utility operations-related Swap" is that the swap be related to an exempt commodity (as defined in CEA Section 1a(20)). Is this condition appropriate? If not, why not and/or how and why should it be modified?

No. This additional condition is not appropriate. See Section III of the comment letter.

7. Should the definition of utility operations-related swap be limited to swaps in which both parties to the swap transact as part of the normal course of their physical energy businesses?

No. The additional condition is not appropriate. The 2012 No-Action Letter contained this unworkable condition, and the Commission has provided no explanation as to why the Commission considered or considers such a condition to be

appropriate or necessary. The words in the condition are undefined, imprecise and capable of multiple interpretations. A number of Available USE Counterparties reported to NFP Electric Coalition members that this ambiguous condition in the 2012 No-Action Letter was a material disincentive for such Available USE Counterparties to transact with utility special entities, especially considering the regulatory risk of being required to register as a swap dealer.

If the Commission intends to include such a condition in a rule amendment, the NFP Electric Coalition respectfully requests notice, along with the Commission's rationale for the condition and a cost-benefit analysis as to why such condition is necessary and for what regulatory purpose.. Such a condition is not applicable when an Available USE Counterparty enters into a utility operations-related swap with a neighboring investor-owned utility, and the additional condition puts the utility special entity at a distinct competitive disadvantage in an illiquid market for such a swap.

8. The Proposal would allow persons to, in effect, treat utility operations-related swaps in which the counterparty is a utility special entity like swaps with a counterparty that is not a special entity in determining whether the person has exceeded a de minimis threshold under Regulation 1.3(ggg)(4)(i)(A). Thus, utility operations-related swaps with utility special entities would be subject to the General De Minimis Threshold under Regulation 1.3(ggg)(4)(i), which is currently set at the $8 billion phase in level. Is that an appropriate threshold, or should the de minimis threshold for such swaps be higher or lower? What considerations support using a different amount? Should the de minimis threshold for utility operations-related swaps be set at $3 billion, the level of the General De Minimis Threshold without application of the $8 billion phase-in level, in light of the special protections afforded to special entities under the CEA? Should the threshold be set at an amount equal to a percentage of the gross notional amount of the General De Minimis Threshold, such that an increase or decrease in the gross national amount of the General De Minimis Threshold would result in a proportional change in the de minimis threshold for utility operations-related swaps?

The General De Minimis Threshold is the appropriate threshold, and the Proposed Rule Amendment strikes the appropriate regulatory policy balance. See the response to Question 2 above in terms of the Commission's overbroad reading of Congress' intent to protect all special entities from entering into any swap, whether as a financial investment or hedge for that investment, or as part of utility operations or to hedge or mitigate commercial risks arising from such ongoing utility operations. When utility special entities use nonfinancial commodity swaps (or other transactions involving nonfinancial commodities) to hedge commercial risks of ongoing utility operations, they are engaged in matters that are within the

core competency of the utility. Such swaps should be evaluated under the same General De Minimis Threshold as a swap that is offered to or entered into by an Available USE Counterparty (as part of its swap dealing activities) with an investor-owned utility.

9. Should the nature of the person entering into swaps with a utility special entity determine whether the person can rely on the exclusion for utility operations-related swaps under the Proposal (e.g., by limiting the exclusion to persons who are not "financial entities," as Staff Letter 12-18 limited relief to such persons)? If so, what characteristics or factors should be considered?

No. The 2012 No-Action Letter contained this unworkable condition, with no explanation as to why the Commission considered such a condition to be appropriate or necessary for evaluating (or limiting) counterparties to a utility special entity for these types of swaps. In the June 3, 2011 Roundtable on "Swap Dealer" Regulation, members of the NFP Electric Coalition explained that, in the bilateral non-cleared markets for these types of non-standardized, nonfinancial commodity swaps, utility special entities evaluate the creditworthiness and performance abilities of each counterparty with which they transact, regardless of the "nature of the person."[2]

The condition in the 2012 No-Action Letter, which required that the Available USE Counterparty be confident that it was not a "financial entity," was another of the unexplained and unworkable conditions in that letter. As the Commission is aware, the term "financial entity" is, in and of itself, an ambiguous term with an embedded cross-reference to the banking regulations. The defined term is difficult to interpret or apply, especially when applied to a commercial enterprise structured as a holding company and subsidiaries, as distinguished from a financial institution (with managed accounts) traditionally regulated by the banking or prudential regulators. A number of Available USE Counterparties reported to NFP Electric Coalition members that this ambiguous condition was a material disincentive to transact with utility special entities, especially considering the regulatory risk of being required to register as a swap dealer.

If the Commission intends to include such a condition in a final rule amendment, the NFP Electric Coalition respectfully requests notice, along with the Commission's rationale for the condition, a cost-benefit analysis and an opportunity for public comment. Such

[2] See, *e.g.*, testimony of John Winter at the Commission's June 3, 2011 Public Roundtable, available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission6_060311-transcri.pdf.

a condition is not applicable when an Available USE Counterparty enters into a utility operations-related swap with a neighboring investor-owned utility, and the condition puts the utility special entity at a distinct competitive disadvantage in an illiquid regional market for such a swap.

10. Should the Commission specify the books and records a person must maintain to substantiate that the person may rely on the (proposed) exclusion for utility operations-related swaps?

There is no need for the Commission to do so. Every non-swap dealer/ non-major swap participant counterparty to a swap is required to comply with Regulation 45.2(b). The Commission has not explained what books and records in addition to those required by Regulation 45.2(b) it would expect such person to keep in order to comply with the Proposed Rule Amendment, and for what regulatory purpose.

11. Would the Proposal impact the Commission's ability to carry out its market oversight responsibilities with regard to the overall derivatives market? If so, how?

The NFP Electric Coalition does not foresee any impact whatsoever on the Commission's market oversight responsibilities with regard to the overall derivatives market, and respectfully requests the Commission to explain if the Commission holds a different view. Utility-operations related swaps are just one of many categories of swaps within the "Other Commodity" (or "nonfinancial commodity") asset class of swaps. Industry publications estimate the entire asset class to be less than one-half of one percent of the global swaps markets. The Proposed Rule Amendment will simply allow utility special entities to compete on a level playing field with other market participants in this tiny slice of the nonfinancial commodity swaps markets that utility special entities need to cost-effectively hedge the commercial risks of ongoing utility operations.

12. To what extent, if any, would the Proposal reduce transparency with regard to utility operations-related swaps, counterparties to such transactions or the broader derivatives market?

The NFP Electric Coalition does not foresee any reduction in pre- or post-transaction transparency from the Proposed Rule Amendment, either for counterparties or prospective counterparties, or for the broader derivatives market, and respectfully requests the Commission to explain its concern if the Commission holds a different view. Utility operations- related swaps will still be subject to the Commission's swap reporting

rules. Utility operations-related swaps will still be subject to the General De Minimis Threshold. The Proposed Rule Amendment will simply allow the utility special entities to compete on a level playing field with other market participants in these regional, illiquid, nonfinancial commodity swaps markets that utility special entities need to hedge commercial risks of ongoing utility operations. If anything, by streamlining the Proposed Rule Amendment, and eliminating the risk of an Available USE Counterparty being unexpectedly subject to swap dealer regulation for entering into such a swap with a utility special entity, the NFP Electric Coalition anticipates that more Available USE Counterparties will participate in these markets and offer these important commercial risk management tools to utility special entities.

13. Does the Proposal serve the public interest? In what ways? How could the Proposal be improved to better serve the public interest?

Yes. The NFP Electric Coalition respectfully incorporates by reference the rationale provided in the Petition[3] and the comment letter. Utility special entities provide affordable, reliable utility service 365/24/7 to residential and business customers throughout the United States. The utility special entities' commercial risk hedging activities directly benefit these electric customers, by keeping utility rates reasonably insulated from seasonal and even daily fluctuations as the supply, demand and weather in a region varies.

As members of the NFP Electric Coalition explained at the April 3, 2014 Public Roundtable, when the Available USE Counterparties stopped entering into utility operations-related swaps with utility special entities in 2012 and 2013, some of those utility special entities were forced to cut back commercial risk hedging (for the benefit of their customers) and leave the risk of electricity price volatility to pass through to their electric customers.[4] The NFP Electric Coalition have suggested in the comment letter several ways in which the Proposed Rule Amendment could be streamlined to facilitate compliance and reduce unnecessary costs and burdens for Available USE Counterparties relying on the exclusion. The benefits of the exclusion, reducing the price and

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3 A copy of the Petition is available on the Commission's website at: http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/appallpcapgatapsbpaltr071212.pdf .

4 See, *e.g.*, statements of Randy Howard, Los Angeles Department of Water and Power, made at the Commission's April 3, 2014 Public Roundtable, a video of which is available on the Commission's website at http://www.cftc.gov/Exit/index.htm?http://youtu.be/zvrvBgOHHGI.

volatility of costs associated with utility operations, will flow directly through these government-owned utility special entities to residential and business electric customers.

14. How should the Commission balance the public interest in having the additional protections that a de minimis threshold for transactions with utility special entities that is lower than the General De Minimis Threshold would afford, versus the public interest in maintaining the ability for utility special entities to enter hedging transactions?

The NFP Electric Coalition refers the Commission to its answer to Question 2. There is no public interest in having the Commission provide additional and unnecessary regulatory oversight of the manner in which a utility special entity hedges the commercial risks arising from its unique and ongoing utility operations. Such operations are the core competency of a utility -- to provide reliable, affordable electricity to its customers.

15. As noted above, it is important that the Commission be able to know who the persons are that rely on the exclusion under the Proposal to monitor compliance with the swap dealer registration requirement, and better ensure that the exclusion under the Proposal serves the intended purpose of enabling utility special entities to manage operational risks in a cost-effective way. Will the notice requirement in proposed Regulation 1.3(ggg)(4)(i)(B)(4) enable the Commission to achieve these objectives? If not, why? Is there an alternative method for the Commission to obtain the relevant information and achieve the stated objectives without requiring a notice filing?

The NFP Electric Coalition responded to this question in the comment letter. The requirement for a notice filing should be deleted. The NFP Electric Coalition has also commented in the OMB process. See Attachment C. The Commission has not explained why collecting such data (names and addresses of entities that intend to enter into one or a thousand utility operations-related swaps with one or many utility special entities in one or many categories of utility operations-related swaps or other transactions) is important,. The Commission has not explained how collecting such data will enable it to achieve a specific regulatory objective.

The NFP Electric Coalition respectfully requests that the Commission explain specifically (and then allow comments on) how it intends to use the data collected, in conjunction with other data it already collects, to monitor its swap dealer registration rules. The NFP Electric Coalition respectfully recommends instead that, if the Commission believes a person is misusing the exclusion, or in some other manner not properly identifying, classifying or measuring its swap dealing activities, or not properly measuring its swap dealing activity with special entities (or with

utility special entities) or not abiding by the Commission's registration requirements or other rules, the Commission should open an investigation of that person, rather than requiring every other entity in the markets to make a notice filing.

16. Are there any special entities (or types of special entities) who come within the proposed definition of "utility special entity" (as set forth in proposed Regulation 1.3(ggg)(4)(i)(B)(2)), but are not likely to have expertise in utility operations-related swaps? If yes, describe those entities. Should persons dealing in swaps with those entities be treated differently than persons dealing with other utility special entities under the Proposal?

Utility special entities have the expertise in utility operations, and in hedging the commercial risks arising from such ongoing utility operations, as part of their core competency. The NFP Electric Coalition agrees with the definition of "utility special entity" in the Proposed Rule Amendment. The utility special entities that are members of the NFP Electric Coalition provide electric power—a largely non-storable commodity—on a real time basis to their customers 24 hours a day, 365 days a year. The majority of electric power utility special entities have been in operation since 1917. More than three-quarters have been in operation since 1945. They have demonstrated the consistent ability to reliably provide power at affordable and predictable rates in a financially responsible manner. Their ability to cost-effectively hedge the commercial risk of ongoing utility operations represent an important component of their operations management expertise.

It is worth noting that, during the recent global financial crisis, not a single utility special entity was forced into financial distress. While some state and local governmental entities became entangled in interest rate and other financial commodity swap transactions as part of financial investment activities, and such financial investment activities may have been considered egregious enough to merit Congressional intervention, there is no indication that utility special entities engaged similar imprudent practices.

17. Should the description of swap dealing activity in the swap dealer definition be more specifically described for the purposes of defining swap dealing with utility special entities? What specific dealing or non-dealing activities should be taken into account give the nature of utility special entities? Have any compliance issues arisen with respect to the description of swap dealing activity in the swap dealer definition? If so, how should the Commission clarify the description?

The NFP Electric Coalition is not requesting a change to the description of swap dealing activity, and does not believe such a rule amendment is appropriate to differentiate such activity in

relation to utility special entities as counterparties. Such a rule amendment, if proposed, would discriminate against utility special entities, and would once again put utility special entities at a competitive disadvantage to investor-owned utilities.

18. Will utility special entities benefit if the Commission revised its interpretation regarding forward contracts with embedded volumetric optionality as described in the swap definition adoption release?[5] If so, how? Is the seven element interpretation appropriate for determining whether a forward contract with volumetric optionality qualifies for the forward contract exclusion from the definition of a swap? If not, should the Commission revise the interpretation or adopt an alternative standard? If so, what should the revised interpretation or standard be?

Yes. Utility special entities and all "commercial end-users" of nonfinancial commodity swaps and other commercial transactions involving nonfinancial commodities, where such transactions are intended to physically settle, would benefit. As noted in the comment letter, the NFP Electric Coalition respectfully requests that, prior to or concurrently with finalizing the Proposed Rule Amendment, the Commission should act on the request for reconsideration of the Commission's interpretation of CEA Section 1a(47), added to the CEA by Section 721 of the Dodd-Frank Act, that all commodity options are "swaps,[6] and clarify the scope of its jurisdiction over transactions involving nonfinancial commodities.

The NFP Electric Coalition and many others in the energy industry have provided the Commission with numerous comments and recommendations for withdrawing or clarifying its interpretations in the Product Definitions Release and the Commodity Options Release. Members of the NFP Electric Coalition's most recent summary of the energy industry's comments/pending requests in respect of the Commission's interpretations of CEA 1a(47) appears in the April 3, 2014 Public Roundtable docket.[7] All those comments and filings are incorporated by reference.

19. Regulation 1.3(ggg)(6)(iv) provides that swaps entered into by a floor trader who meets certain conditions do not need to be counted in determining whether the floor trader is a swap dealer. Should the Commission afford similar treatment to swaps entered into with utility special entities by their counterparties? For purposes of the de minimis calculation under the swap dealer definition, why should the Commission hold floor traders and entities dealing with utility special entities to different standards?

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5 See 77 Fed. Reg. 48,238 (Aug. 13, 2012).

6 See Section X of the comment letter, dated October 12, 2012, at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59235&SearchText=.

7 See, http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59822&SearchText=.

The NFP Electric Coalition would not object if the Commission proposed a rule amendment to exclude swaps entered into by swap dealing counterparties with utility special entities from ***both*** the special entity de minimis and the general de minimis threshold. That is not what the Proposed Rule Amendment focuses on at this juncture, and not what was requested in the Petition. The pending Proposed Rule Amendment is much, much narrower and, with the minor changes and clarifications recommended in the comment letter, should adequately provide utility special entities with the relief they have requested.

ATTACHMENT C – PAPERWORK REDUCTION ACT

July 2, 2014

Office of Information and Regulatory Affairs
Office of Management and Budget, Room 10235
New Executive Office Building
Washington, DC 20503
Attention: Desk Officer of the Commodity Futures Trading Commission

Via Electronic Mail

Re: Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities

Desk Officer for the Commodity Futures Trading Commission:

The NFP Electric Coalition[1] respectfully submits these comments in response to questions posed by the Commodity Futures Trading Commission (the "Commission") in the above-captioned proceeding (the "Release").[2] In the Release, the Commission seeks comment on two elements of its proposed rule changes that qualify as collections of information, which require analysis under the Paperwork Reduction Act ("PRA").[3] The first element for which the Commission seeks a new control number from the Office of Management and Budget ("OMB"), would require a person seeking to rely on an exclusion from the Special Entity De Minimis Threshold for utility operations-related swaps to file an electronic notice (the "Notice Requirement") with the National Futures Association (the "NFA"). The proposed Notice Requirement requires submission of a notice containing the person's name, main business

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1 The National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), the Large Public Power Council ("LPPC") and the Bonneville Power Administration (collectively, the "NFP Electric Coalition"). See **Attachment A** for a description of each member of the NFP Electric Coalition. The comments contained in this filing represent the comments and recommendations of the NFP Electric Coalition, but not necessarily the views of any particular member of the NFP Electric Coalition. The NFP Electric Coalition is 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: ACES and The Energy Authority.

2 Proposed Rule, Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities, 79 Fed. Reg. 31,238 (June 2, 2014) (17 CFR Part 1), RIN No. 3038-AE19.

3 See 79 Fed. Reg. 31,238 at 31,244 (June 2, 2014).

address and main telephone number, the name of a contact ***and a signed representation that the person meets the criteria of the exclusion for utility operations-related swaps in Regulation 1.3(ggg)(4)(i)(B)***.[4]

The second element for which the Commission seeks to amend OMB Control Number 3038-0090, requires each person relying on the proposed exclusion for utility operations-related swaps to maintain certain books and records substantiating its eligibility for the exclusion (the "New Recordkeeping Requirement").

The Commission is required to describe the specific regulatory purpose for each such new information collection requirement, to evaluate whether the information collected will have practical regulatory use or utility, and finally to explain why the regulatory requirement is necessary and the least burdensome way of fulfilling the identified regulatory purpose.[5] The NFP Electric Coalition respectfully submits that the Commission has not fulfilled its obligations under the PRA for either the Notice Requirement or the New Recordkeeping Requirement.

A. Notice Requirement

The Commission's rationale for the Notice Requirement is described in the supporting statement submitted to the OMB.[6] Specifically, the Commission asserts that the Notice Requirement will (1) enable the Commission to know which persons will rely on the proposed exclusion; (2) help the Commission monitor compliance with the swap dealer registration requirement; and (3) help ensure that the proposed exclusion serves the intended purpose of enabling utility special entities to manage operational risks in a cost-effective way.

Neither the Release nor any documentation submitted to the OMB support these three assertions. In general, any person not currently registered as a "swap dealer" may enter into swap transactions in connection with swap dealing activities that, in the aggregate, do not exceed the "General De Minimis Threshold." The Commission does not require the person to first identify itself to the Commission or the NFA, or make any sort of certification, in order commence swap dealing activities or to commence reliance on that General De Minimis Threshold. Similarly, any person not currently registered as a "swap dealer" may enter into swap transactions in connection with swap dealing activities with special entity counterparties that, in the aggregate, do not exceed the "Special Entity De Minimis Threshold." The Commission does not require the person to first identify itself to the Commission or the NFA, or make a certification, in order commence reliance on that Special Entity De Minimis Threshold. In fact, it is in the very nature of a de minimis threshold ***not*** to require a person (that is not otherwise a registrant with the Commission) to make a regulatory filing unless and until its swap dealing activities exceed the established de minimis threshold(s). As a policy matter, the Commission has decided that those activities are de minimis.

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4 See 79 Fed. Reg. at 31,244. By operation of Regulation 1.3(ggg)(4)(i)(B)(3), a person would be required to certify that the one of the counterparties is a utility special entity using the swap in the proscribed manner, that the swap is related to an exempt commodity, and that the swap meets certain specified characteristics.

5 See 44 U.S.C. 3506(c)(3).

6 A copy of the submission is available from the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, (202) 418-5160 or from http://regInfo.gov.

If the Commission staff believes a person is misusing either of the de minimis thresholds or the exclusion to the Special Entity De Minimis Threshold, or the person in some other manner is not properly identifying, classifying or measuring its swap dealing activities or not complying with the Commission's registration requirements or other rules, the Commission has the authority to open an investigation of that person. Simply put, it is not necessary for every compliant person to make a filing in order for the Commission to investigate a person that is potentially ***not*** compliant.

The Release proposes to apply the General De Minimis Threshold to utility operations-related swaps with utility special entities instead of the lower Special Entity De Minimis Threshold. However, the Commission fails to explain specifically (and then allow comments on) how it intends to use the data it proposes to collect as to what entities are relying on the exclusion, in conjunction with other data it already collects, to monitor its swap dealer registration rules or to achieve any other regulatory objective. Such a Notice Requirement is not applicable when a person intends to enter into a utility operations-related swap with a neighboring investor-owned utility. Thus, the Notice Requirement puts the utility special entity at a distinct competitive disadvantage in an illiquid market for such a utility operations-related swap.

The Commission's third justification for the Notice Requirement, that it is needed to help ensure that the revised exclusion serves the intended purpose of enabling utility special entities to manage operational risks in a cost-effective way, is similarly unsupported and has been soundly rejected by the very utility special entities that are the subject of the Release. The opposite is true. The Notice Requirement is likely to drive away entities that might be considering offering, or entering into, utility operations-related swaps with special entities, by encouraging them instead to transact with the neighboring investor-owned utility or another market participant. The Notice Requirement would also increase the cost of swaps with counterparties as a result of potential regulatory risk associated with the proposed certification, and the cost of collecting data, establishing an account with the NFA (not all energy market participants are members or registered), and submitting the notice electronically.

The NFP Electric Coalition has previously explained to the Commission that their counterparties are risk adverse when it comes to potentially having to register as "swap dealers." Any unique regulatory requirement imposed on offering or entering into a utility operations-related swap with a utility special entity will deter such persons, and drive up costs for utility special entities to manage commercial risks of ongoing utility operations.[7] As stated by the Commission, "a significant reduction in the number of swap counterparties available to utility special entities could be ***especially harmful to the public interest*** in view of the importance of the energy services provided by the utility special entities (emphasis added).[8] The Notice

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[7] See Letter from American Public Power Association to CFTC Chairman Gary Gensler, dated November 19, 2012, at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/appabpallpctaps111912.pdf; and Letter from American Public Power Association to CFTC Acting Chairman Mark Wetjen, dated March 6, 2014 ("March Letter") attached to April 2014 Public Roundtable comments, linked at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59820&SearchText .

[8] 79 Fed. Reg. at 31,240.

Requirement would be harmful to the public interest because any reduction in the number of swap counterparties available to utility special entities in illiquid regional markets is a significant reduction – especially when the Commission has not established any specific regulatory benefit from collecting such information.

For the foregoing reasons, the NFP Electric Coalition respectfully submit that the Commission has not fulfilled the predicate requirements of the PRA. The Commission's justifications for the Notice Requirement are not supported, place the utility special entity at a distinct competitive disadvantage in an illiquid market for utility operations-related swaps, and would be harmful to the public interest.

The Commission acknowledges that "an accurate estimate of the persons who may rely on the exclusion under the Proposal, if adopted, cannot be made."[9] It then estimates without supporting data that there are 100 potential respondents that would respondents, as "Available USE Counterparties" to all utility special entities in all nonfinancial commodity categories in all regional markets for purposes of the PRA paperwork burden calculations. The number proposed by the Commission is wholly insufficient – the NFP Electric Coalition estimates that the number of respondents would instead be in the thousands.

On March 14, 2014, APPA identified to the Commission approximate numbers of Available USE Counterparties for certain utility special entities prior to the imposition of the Special Entity De Minimis Threshold, the threshold that is being eliminated by the proposed rule changes:

Utility Special Entity	**Number of Counterparties**
Oklahoma Municipal Power Authority	3
Benton County Public Utility District	14
Grays Harbor PUD	28
Sacramento Municipal Utility District	8-10
The Energy Authority	11
Austin Energy	16
New York Power Authority	20 (approx.)

As shown in the table above, there were more than 100 counterparties for just seven (7) utility special entities. APPA also states in its March Letter that many of the 120 or so largest public power utilities rely (or relied) on utility operations-related swaps to hedge the commercial risks

[9] See 79 Fed. Reg. at 31,244.

of their ongoing utility operations.[10] There are approximately 2000 municipally-owned utilities and public power districts that are members of APPA, including the 26 largest government-owned electric utilities represented by the LPPC, and BPA, a self-financed Federal power marketing agency. Even if each utility special entity only had an average of 14 counterparties (extrapolating from the table above), and some of those counterparties dealt with multiple utility special entities, the number of respondents for purposes of the PRA could exceed 10,000 counterparties.

Moreover, the NFP Electric Coalition respectfully submits that, due to the ambiguities in the Commission's interpretations of CEA 1a(47) as to what types of nonfinancial commodity transactions constitute (or may constitute) "swaps," the NFP Electric Coalition believes that there would be substantially more respondents who would make a Notice Filing. In fact, virtually any entity engaged in "swap" dealing activity, and that enters into just a single nonfinancial commodity transaction with any form of standalone option or embedded "optionality" with a utility special entity may feel compelled to rely on the exclusion and submit the notice.[11] Based on the NFP Electric Coalition members' real-world data and experience with nonfinancial commodity swaps and other transactions, the NFP Electric Coalition believes that Commission's estimate grossly understates the number of respondents for its PRA burden calculations by a factor of twenty. Using the Commission's estimate of the average burden hours per response of 1.2 hours, the actual estimated gross annual reporting burden could be approximately $1,593,600 instead of $79,680, as estimated by the Commission.[12]

Finally, the NFP Electric Coalition respectfully submit that the Commission has failed to explain how it would use the information collected by the Notice Requirement – and how it would justify any burden imposed by its regulatory action. Accordingly, the NFP Electric Coalition respectfully requests that the Commission delete the Notice Requirement.

B. New Recordkeeping Requirement

The Commission has not explained what types of data would be collected and maintained under its New Recordkeeping Requirement, that would not already be kept under its existing swap recordkeeping rules. Every non-swap dealer/non-major swap participant that enters into a "swap" is required to comply with Rule 45.2(b).[13] Unless the Commission can identify what additional data would be kept as a result of the New Recordkeeping Requirement, the additional Recordkeeping Requirement is redundant, and should be deleted.

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10 March Letter at p. 4.

11 The Commission has not yet clarified its interpretations in the CFTC's Products Definitions Release and the related Commodity Options Release, 77 Fed. Reg. 48,208 (August 13, 2012) and Interim Final Rule, 77 Fed. Reg. 25,320 (April 27, 2012) to bring regulatory certainty to the term "swap," as used in the context of energy industry transactions involving nonfinancial commodities..

12 79 Fed. Reg. at 32,244.

13 17 C.F.R. § 45.2(b) which states in pertinent part that "[a]ll non-SD/MSP counterparties subject to the jurisdiction of the Commission shall keep full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty, including, without limitation, all records demonstrating that they are entitled, with respect to any swap, to elect the clearing requirement exception in CEA section 2(h)(7)."

As described above, based on the NFP Electric Coalition's real-world data experience with nonfinancial commodity swaps and other nonfinancial commodity transactions that may or may not be "swaps," the NFP Electric Coalition believes that Commission's preliminary estimate grossly understates the number of respondents for its PRA burden calculations.

Using the Commission's estimate of the average burden hours per response of 1.0 hours, the actual estimated gross annual reporting burden could be approximately $322,000 instead of merely $16,100 as estimated by the Commission.[14]

The Commission fails to explain specifically (and then allow comments on) how it intends to use the data it proposes to collect as to whether a person is entitled to rely on the exclusion, in conjunction with other data it already collects, to monitor its swap dealer registration rules or to achieve any other regulatory objective. Such a new, yet ambiguous, Recordkeeping Requirement is not applicable when a person intends to enter into a utility operations-related swap with a neighboring investor-owned utility. Thus, the ambiguous New Recordkeeping Requirement puts the utility special entity at a distinct competitive disadvantage in an illiquid market for such a utility operations-related swap, and places burdens on the utility special entities without any identifiable regulatory benefit. Accordingly, the NFP Electric Coalition respectfully requests that the Commission delete the New Recordkeeping Requirement.

Please contact any of the NFP Electric Coalition's undersigned representatives or Douglas Everette, Reed Smith LLP, 1301 K Street, N.W., Suite 1100 – East Tower, Washington, D.C. 20005, telephone (202) 414-9348 or at deverette@reedsmith.com for more information or assistance.

Respectfully submitted,

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[14] 79 Fed. Reg. at 32,244.

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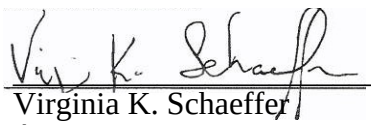

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ATTACHMENT A - DESCRIPTION OF THE NFP ELECTRIC COALITION (AND MEMBERS)

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 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.

BPA is a self-financed, non-profit Federal agency created in 1937 by Congress that primarily markets electric power from 31 federally owned and operated projects, and supplies 35 percent of the electricity used in the Pacific Northwest. BPA also owns and operates 75 percent of the high-voltage transmission in the Pacific Northwest. BPA's primary statutory responsibility is to market its Federal system power at cost-based rates to its "preference customers."[15] BPA also funds one of the largest wildlife protection and restoration programs in the world.

[15] BPA has approximately 130 preference customers made up of electric utilities which are not subject to the jurisdiction of the Federal Energy Regulatory Commission, including Indian tribes, electric cooperatives, and state and municipally chartered electric utilities, and other Federal agencies located in the Pacific Northwest.