



SPECULATIVE POSITION LIMITS FOR DERIVATIVES: CERTAIN EXEMPTIONS AND GUIDANCE (2016)

July 13, 2016

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

Re: Supplemental Notice of Proposed Rulemaking: Position Limits for Derivatives: Certain Exemptions and Guidance, 81 Fed. Reg. 38458 (June 13, 2016) (RIN 3038-AD99) (the “Supplemental Proposal”)

Dear Mr. Kirkpatrick:

The National Rural Electric Cooperative Association (“NRECA”) and the American Public Power Association (“APPA”) (collectively referred to herein as the not-for-profit or “NFP Electric Associations”),¹ respectfully submit these comments on the Supplemental Proposal of Commodity Futures Trading Commission (the “Commission” or the “CFTC”) with respect to the Commission’s speculative position limits rules (the “Speculative Position Limits Rules”). The NFP Electric Associations are generally supportive of the concepts behind the Supplemental Proposal: 1) eliminate the incidental test and the orderly trading requirement from the bona fide hedging position definition, 2) leverage the expertise and experience of the designated contract markets (“DCMs”) in granting exemptions from speculative position limits, and 3) delay implementation of Speculative Position Limits Rules where reliable, accurate and complete data is not yet available. However, the NFP Electric Associations urge the Commission to modify and streamline the Supplemental Proposal to provide regulatory certainty and reduce unnecessary regulatory burdens and costs. Moreover, the NFP Electric Associations reiterate pending requests for certain exemptions, and for more phased implementation periods, contemporaneous with finalizing the Speculative Position Limits Rules.

The NFP Electric Associations and other energy industry entities and associations have been active participants throughout the Commission’s rulemakings on Federal speculative

¹ See Attachment A for a description of the members of each of the NFP Electric Associations. The comments contained in this filing represent the comments and recommendations of the NFP Electric Associations, but not necessarily the views of any particular member of any NFP Electric Association on any issue. The NFP Electric Associations are authorized to note the involvement of the following organization to the Commission, and to indicate full support of these comments and recommendations: ACES. ACES provides commercial risk management and energy advisory and operations services for electric cooperatives and government-owned electric utilities.

position limits to implement Title VII of the Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”). The NFP Electric Associations commented when the Commission initially proposed such rules after the Dodd-Frank Act was enacted in 2010 (such rules were later vacated).² We commented on the Commission’s re-proposal of Speculative Position Limits Rules in late 2013,³ and again when the Commission reopened the comment period in this docket after the Public Roundtable discussion of commercial risk hedging practices in the energy industry in July of 2014.⁴ Representatives of the NFP Electric Associations participated in the February 26, 2015 Energy and Environmental Markets Advisory Committee (“EEMAC”) Meeting (the “February 2015 EEMAC Meeting”),⁵ and most recently filed supplemental comments on the proposed Speculative Position Limits Rules following that meeting (the “2015 NFP Electric SPL Comments”).⁶ Representatives of the NFP Electric Associations also participated in the EEMAC Committee meeting that took place on July 29, 2015 to discuss how the Commission could leverage the expertise and experience of the DCMs in administering the Speculative Position Limits Rules (the “2015 EEMAC Meeting”).⁷

² 2011 NFP comment letter on initial post-Dodd-Frank Act speculative position limits rule proposal is available on the Commission’s website at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=33909&SearchText=wasson> (the “2011 NFP Electric SPL Comments”). The focus of the 2011 NFP Electric SPL Comments was broad, because the Commission’s Dodd-Frank Act rulemaking process was at a much earlier stage. When this first version of the post-Dodd-Frank Act speculative position limits rules was proposed, the Commission had just recently proposed its rules for the “end-user exception” to clearing and trade execution mandates for swaps entered into by commercial enterprises “to hedge or mitigate commercial risks” (as such phrase is used in CEA Section 2(h)(7)). As a result, the 2011 NFP Electrics SPL comment letter had attached and cross referenced regulatory concepts from the “end-user exception” rules, and requested exemptions from speculative position limits for entities that acted only as “end-users” or “bona fide hedgers” when entering into nonfinancial commodity swaps. See Section III.

³ The 2014 NFP Electric comment letter on the Speculative Position Limits Rules is available on the Commission’s website at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59679&SearchText=> (the “2014 NFP Electric SPL Comments”).

⁴ The NFP Electric comment letter on commercial risk hedging practices in the energy industry is available on the Commission’s website at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59934&SearchText=> (the “2014 NFP Electrics CRH Comments and, collectively with the 2014 NFP Electrics SPL Comments, the “2014 NFP Electrics Comments”). The 2014 NFP Electric Comment Letters reiterated the request in the 2011 NFP Electrics SPL Comments for a broad entity exemption, and also requested a series of transaction exclusions or exemptions for Referenced Contracts that are swaps, and other transactions entered into by commercial end-users to hedge or mitigate commercial risks arising from ongoing business operations. See Section II of the 2014 NFP Electrics CRH Comments on commercial risk hedging practices in the energy industry.

⁵ We incorporate by reference the transcript of the February 2015 EEMAC Meeting here: <http://www.cftc.gov/About/CFTCCcommittees/EnergyEnvironmentalMarketsAdvisory/ssLINK/emactranscript022615>.

⁶ The 2015 NFP Electric comment letter on the Speculative Position Limits Rules is available on the Commission’s website at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60393&SearchText=wasson>. The 2015 NFP Electrics SPL Comments added more specific requests for exemptions under new CEA 4a(a)(7) for NFP Electric Entities and for Electric Operations-Related Referenced Contract transactions, particularly swaps.

⁷ We incorporate by reference the transcript of that 2015 EEMAC meeting here: <http://www.cftc.gov/About/CFTCCcommittees/EnergyEnvironmentalMarketsAdvisory/ssLINK/emactranscript072915>.

Throughout prior comments, the NFP Electric Associations have requested that the Commission grant certain entity-based and transaction-based exemptions pursuant to Section 4a(a)(7) of the Commodity Exchange Act (the “CEA”), contemporaneously with finalizing its Speculative Position Limits Rules. We have also made recommendations for alternative, and less burdensome, approaches to recordkeeping and reporting for entities that are speculators or engaged in speculative transactions, and are also not registered with or regulated by the Commission. We reiterate those requests and recommendations.⁸

We also reiterate our prior recommendation that the Commission implement its Speculative Position Limits Rules in phases, both 1) by commodity or Core Reference Futures Contract (“CRFC”) underlying a particular “set” of Referenced Contracts and, 2) within each “set,” for futures and exchange-traded options before implementing the rules for swaps transacted over-the-counter. This type of phased implementation recognizes the different stages of market structure development within the futures market and in the swaps markets, particularly those markets for energy commodity swaps. Phased implementation also makes sense due to the relative availability (or lack thereof) of reliable, comprehensive and current data about different types of Referenced Contracts, particularly “positions” involving energy commodity swaps to which commercial end-users are parties.⁹ Such a phased implementation process will also help

⁸ Unfortunately, the Commission has not responded to the NFP Electric Associations’ recommendations and requests for exemptions. Nor has the Commission re-issued its Speculative Position Limits Rules as a whole, with responsive proposals for review. We appreciate the statements in the Supplemental Proposal that the Commission is still considering comments on many aspects of the proposed rules, including the definition of “Referenced Contract.” See, e.g., 81 Fed. Reg. at 38462, footnote 4. As time passes, and other rules are finalized or amended, or interpretations issued or clarified, it becomes difficult to cross-reference and integrate the comments and recommendations made in each of the open rulemaking dockets.

The Commission’s 2013 Speculative Position Limits Rules define and discuss “bona fide hedging positions,” but do not recognize as “bona fide” the circumstances where a commercial end-user entity or enterprise enters into Referenced Contracts to hedge or mitigate the legitimate or “bona fide” commercial risks arising its ongoing operations. Nor do the Commission’s proposals acknowledge that such an end-user often enters into a Referenced Contract transaction, particularly a bilateral swap, to hedge or mitigate one or more such commercial risks of ongoing operations, *i.e.*, as a “bona fide” commercial risk hedge. The NFP Electric Associations respectfully request the Commission to review CEA 4a(a) as a whole and as amended by the Dodd-Frank Act. The narrow focus in the 2013 Speculative Position Limits Rules and the Supplemental Proposal on exemptions for bona fide hedging positions, but not on bona fide hedging transactions or on end-user entities or enterprises facing commercial risks, is at odds with Congressional intent in the Dodd-Frank Act. The narrow focus on amending pre-Dodd-Frank Act rules, which were not applicable to bilateral swaps, also explains the disconnect identified by commercial end-users in the energy industry in the Commission’s implementation of Speculative Position Limits Rules.

⁹ See, for example, the discussion that begins on page 4 of the 2014 NFP Electric SPL Comments and in Section V of the 2015 NFP Electric Comments. Nothing in CEA 4a(a) requires a one-size-fits-all speculative position limits regime or a single implementation schedule. See Attachment B for a diagram of futures trading market development for different types of CRFCs, by category of underlying commodity. Futures trading markets for agricultural commodities and metals have been regulated by the Commission for decades, and the Commission has speculative position limits experience in certain “legacy agricultural” futures markets. By contrast, as discussed at the July 2015 EEMAC meeting, futures trading markets for energy products are much less well developed (e.g., ICE Futures was registered as a DCM in 2000). Energy futures contracts trade differently and different types of commercial end-users enter into agricultural futures. The NFP Electric Associations urge the Commission to prioritize implementation of speculative position limits for the CRFCs in respect of which both the Commission and the

the Commission prioritize its resources, focusing first on those sets of Referenced Contracts with which both the Commission and the DCMs have the most experience and expertise in utilizing speculative position limits to prevent excessive speculation.

Contemporaneous exemptions, phased implementation periods and a streamlined process for hedging exemptions, are crucially important to NFP Electric Associations' members ("NFP Electric Entities") and other energy end-users, so as not to interrupt or unnecessarily restrict the ordinary course commercial risk hedging practices in the electric utility industry.¹⁰ Otherwise, the regulatory costs and burdens for NFP Electric Entities (non-speculators) to comply with the new Speculative Position Limits rule will unnecessarily increase the cost of electricity for consumers and businesses in areas where electric service is provided by NFP Electric Entities, with no benefit in terms of the Commission's efforts to diminish, eliminate or prevent the burdens of excessive speculation.¹¹

I. SUMMARY OF COMMENTS

In summary, the NFP Electric Associations:

- Strongly support the Commission's continuing efforts to supplement and revise, and phase implementation of, its Speculative Position Limits Rules to ensure that such rules "first, do no harm"
- Generally support the concepts behind the Supplemental Proposal, including allowing DCMs to grant exemptions for certain Referenced Contract transactions and positions from Speculative Position Limits Rules, but support changes requested by the DCMs and other energy industry commenters
- Support the Supplemental Proposal to phase or defer implementation of the Speculative Position Limits Rules for DCMs and SEFs, and reiterate requests for more phasing by CRFC, and by associated Referenced Contract type
- Request an affirmative finding that the Commission (or a designee) has reliable data on the basis of which to establish and monitor limits for a set of Referenced

DCMs have experience and expertise (those in the center of the concentric circles), and accordingly to phase implementation periods from CRFCs in the center circle outward.

¹⁰ NFP Electric Entities are not speculators, and do not enter into Referenced Contract transactions for speculative purposes. Many NFP Electric Entities enter into bilateral swaps linked in some way to certain physical energy commodities. Some NFP Electric Entities may also enter into CRFCs, including NYMEX Henry Hub Natural Gas, and exchange-traded options. In either case, such NFP Electric Entities enter into such Referenced Contract transactions *exclusively* to hedge or mitigate commercial risks arising from ongoing electric operations ("Electric Operations-Related Referenced Contracts"). See Section IV of the 2015 NFP Electrics SPL Comments.

¹¹ In theory, the NFP Electric Associations support the general concept of position limits rules to prevent the burden of excessive speculation by traders without a legitimate current or anticipated business need for a particular commodity or a product derived therefrom. Nevertheless, the NFP Electric Associations are aware of no policy reason for Speculative Position Limits Rules to be drafted with broad regulatory application to all market participants and all Referenced Contract transactions, as those proposed by the Commission.

Contracts linked to a CRFC prior to implementation of the Speculative Position Limits rules

- Reiterate requests that the Commission provide certain CEA 4a(a)(7) exemptions contemporaneous with implementation of its final Speculative Position Limits Rules for energy Referenced Contracts for the benefit of NFP Electric Entities, which are “small entities”
- Request that the Commission provide expressly in the final Speculative Position Limits Rules that commodity trade options are excluded

II. THE NFP ELECTRIC ASSOCIATIONS STRONGLY SUPPORT THE COMMISSION’S CONTINUING EFFORTS TO SUPPLEMENT AND REVISE, AND PHASE IMPLEMENTATION OF, SPECULATIVE POSITION LIMITS RULES TO ENSURE THAT SUCH RULES “FIRST, DO NO HARM”

The NFP Electric Associations strongly support the Commission’s continuing efforts to ensure that new Speculative Position Limits Rules applicable to specific sets of Referenced Contracts, and the implementation schedule for such new rules, “first, do no harm”¹² to the industries for which certain physical commodities are necessary inputs or outputs of the commercial business operations, or to the ability of end-users to continue to enter into Referenced Contracts to hedge or mitigate the diverse commercial risks arising from ongoing business operations.

The Commission’s rulemaking efforts to implement the Dodd-Frank Act amendments to the CEA must be a balance. The Commission understandably wants to move forward with Speculative Position Limits Rules as it deems necessary to diminish, eliminate or prevent the burden of excessive speculation on the markets for particular sets of Referenced Contracts tied to a particular CRFC.¹³ At the same time, the Commission clearly has the authority to establish different transaction or position limits for different commodities, different markets, and different types of market participants or transactions, as well as broad statutory authority to grant exemptions from such rules under its new Dodd-Frank Act authority in CEA 4a(a)(7).¹⁴ Congress intended the Commission to establish such rules, define terms and grant such exemptions “to permit producers, purchasers, sellers, middlemen and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs...”¹⁵ When the Dodd-Frank Act was enacted, Congress reiterated its intent that the Commission allow end-users to manage, hedge and mitigate commercial risks without unnecessary burdens or costs, in

¹² See comments from the February 2015 EEMAC Meeting, cited in footnote 15 of the 2015 NFP Electric SPL Comments.

¹³ The Commission has initially proposed rules applicable to sets of Referenced Contracts linked to 28 CRFCs.

¹⁴ See CEA 4a(a)(1) and 4a(a)(7).

¹⁵ See CEA 4a(c)(1)

recognition that end-users did not cause the 2008-2009 financial markets crisis and should not bear the costs of financial market reforms.¹⁶

III. THE NFP ELECTRIC ASSOCIATIONS GENERALLY SUPPORT THE CONCEPTS BEHIND THE SUPPLEMENTAL PROPOSAL, INCLUDING ALLOWING DCMs TO GRANT EXEMPTIONS FOR CERTAIN TRANSACTIONS AND POSITIONS IN REFERENCED CONTRACTS, BUT ALSO SUPPORT THE CHANGES REQUESTED BY DCMs AND OTHER ENERGY INDUSTRY COMMENTERS

The NFP Electric Associations generally support the concepts behind the Supplemental Proposal, including allowing DCMs to use their experience and expertise to exempt certain Referenced Contract transactions and positions from the both DCM and Federal speculative position limits.¹⁷ However, the NFP Electric Associations respectfully support the changes requested by the DCMs and other energy industry commenters in response to the Supplemental Proposal -- in order to provide regulatory certainty for end-users, and to streamline reporting and other compliance obligations that are not necessary to accomplish the Commission's purpose of monitoring speculative trading activity or preventing excess speculation in Referenced Contracts.¹⁸

¹⁶ See the Lincoln-Dodd letter, dated June 30, 2010, available at <http://online.wsj.com/article/SB10001424127887324059704578473310943230002.html>.

¹⁷ The NFP Electric Associations support the Commission's Supplemental Proposal to eliminate the incidental test and the orderly trading requirement in the bona fide hedging position definition. The NFP Electric Associations respectfully disagree with the statement in the preamble to the Supplemental Proposal that the Commission nonetheless "interprets risk, in the economically appropriate test [for a bona fide hedging transaction or position], to mean [only] price risk" (see 81 Fed. Reg. 38463). We urge the Commission to re-read the statutory language in CEA 4a(c)(2)(A)(ii) – the economically appropriate test itself, which is quoted on the same page of the Supplemental Proposal (at footnote 57). The test itself uses the plural "risks" when referring to risks to be hedged by commercial end-users using an economically appropriate hedging transaction or position. This statutory language mirrors CEA 2(h)(7), which contains the Congressional directive in the Dodd-Frank Act that the Commission not limit the ability of end-user entities or enterprises "to hedge or mitigate commercial risks." Execution, logistics (transportation and storage) and credit risk are just some of the many legitimate, bona fide commercial risks that end-users hedge or mitigate using Referenced Contracts. Financial traders and regulated trading facilities, such as DCMs focused on standardized CRFCs, may be focused only on market price risk only. But commercial end-users and enterprises are also appropriately focused on hedging or mitigating the diverse commercial risks arising from their unique ongoing operations in their particular industry sector.

¹⁸ There was broad consensus at the July 2015 EEMAC Meeting in favor of the DCMs' current exemption processes. Unfortunately, in the Supplemental Proposal, the Commission sets those processes aside, and proposes a different, detailed, time-consuming, confusing and duplicative set of exemption processes, along with ongoing reporting and annual renewal of exemptions. Such rules are not workable, flexible or principles-based. In addition to supporting process amendments recommended by the DCMs and other energy industry commenters in this docket and this round of comments in this docket, the NFP Electric Associations support the many requests by EEI, EPSA, the Commercial Energy Working Group, AGA and others in the energy industry in comments and at the 2015 EEMAC Meetings for specific enumerated exemptions for anticipatory hedging and anticipatory merchandising transactions or positions and for cross-commodity hedging transactions or positions, relative to energy commodity Referenced Contracts. See the industry requests and comments in the EEI/EPSC comment letter filed in respect of the Supplemental Proposal.

The NFP Electric Associations support the Commission relying on the DCMs to issue rules for industry-wide, industry sector-specific, commercial enterprise and individual market participant exemptions applicable to transactions or positions in the energy CRFCs listed on such DCMs, and related Referenced Contract swaps. The DCMs that list energy futures contracts (CME, ICE Futures and Nodal) have invested in understanding diverse energy industry market participants' commercial risk hedging strategies, and granting appropriate and workable exemptions from the DCM's position limits regime. Moreover, the DCMs have experience with monitoring how trading in such CRFCs responds to the interplay between limits and exemptions, in terms of changes in position concentration, tenor, liquidity and other market conditions for each specific CRFC. The DCMs' processes for establishing, monitoring and adjusting limits for each CRFC, and granting appropriate exemptions, are known to be workable and responsive to the needs of end-users in different sectors of the energy industry. The DCMs' dynamic market monitoring process keeps speculative position limits and bona fide hedging exemptions calibrated to effectively protect the market from the burdens of excessive speculation, while allowing commercial risk hedging by end-users, as well as promoting market strength, depth and liquidity out the curve.¹⁹

The NFP Electric Associations support the comments requesting that the Commission streamline, and step back, its oversight role with respect to the DCMs' bona fide hedging exemption process. There is no need to create new, duplicative layers of complexity and redundancy in place of the DCM's current processes. The Commission should simply expand the DCM's current authority to grant bona fide hedging exemptions for transactions or positions in a CRFC listed on the DCM's market, to include the authority to grant hedging exemptions from the Commission's aggregate Federal Speculative Position Limits rules in respect of the set of Referenced Contract linked to that CRFC. The Commission would then maintain its ongoing oversight role in respect of DCM processes and rules under core principles, in recognition of the DCMs' historical role as self-regulatory organizations.²⁰

The NFP Electrics support the specific requests to eliminate the Commission's ability to review or revoke bona fide hedging exemption applications on an ongoing basis, in parallel with DCM processes. Such duplicative regulatory processes undermine the benefits²¹ and regulatory certainty provided by reliance on the DCMs' exemption processes. Any decision by the Commission to review a DCM rule, or to revoke a DCM exemption, should take place only after notice and an opportunity for public comment, and be based on a Commission finding of error or bias in the process by which the DCM made its determination, not a difference of opinion between the DCM and the Commission or its staff as to whether the rule should have been adopted, or the exemption granted, in the first place.

¹⁹ See the Transcript of the 2015 EEMAC Meetings, and other energy industry comments, for specific examples.

²⁰ The NFP Electric Associations also support comments that the Commission should not impose new, potentially burdensome recordkeeping and ongoing reporting obligations on the DCMs in its Speculative Position Limits Rules. Any such costs will be passed through to DCM members and ultimately to end-users of such CRFCs and other Referenced Contracts.

²¹ The Supplemental Proposal discards, rather than leverages, the DCMs' tested exemption processes, requires duplicative efforts by the DCM and Commission staff in reviewing exemption applications and reports, and multiplies the number of reports coming into the Commission from market participants and DCMs.

Energy industry end-users that enter into Referenced Contracts to hedge complex commercial risks must be allowed to rely on DCM bona fide hedging exemptions. If the Commission decides to revise or revoke a DCM determination, end-users must have sufficient time to develop and implement changes to commercial risk hedging strategies and systems, and to adjust ongoing operations.²² For energy industry end-users in certain sectors, such a change may require approval for a change in commercial risk management policy or strategy from their governing board, state or local regulatory or other oversight authority.²³

IV. THE NFP ELECTRIC ASSOCIATIONS SUPPORT THE SUPPLEMENTAL PROPOSAL TO PHASE OR DEFER IMPLEMENTATION OF ITS RULES FOR DCMs AND SEFs; AND REITERATE REQUESTS FOR MORE PHASING BY CRFC AND BY ASSOCIATED REFERENCED CONTRACT TYPE

The NFP Electric Associations support the phased implementation in the Supplemental Proposal for the benefit of DCMs and SEFs, until such time as an individual DCM or SEF has the data necessary to perform obligations to monitor Referenced Contracts (including swaps) that are or may be linked to a particular CRFC listed on its exchange. However, the NFP Electric Associations respectfully reiterate a prior request that the Commission use its exemption authority under CEA 4a(a)(7) to phase or defer implementation much more broadly, based on the same reasoning.

It would be premature for the Commission to begin implementation of its Speculative Position Limits Rules for any set of Referenced Contracts (those linked to a particular CRFC) until the Commission itself makes an affirmative finding that there is reliable, accurate and

²² An NFP Electric Entity may be hedging one or more of the long-term commercial risks associated with providing reliable 24/7/365 electric service to customers in a specific geographic region for the next several decades. Or it might be hedging commercial risks associated with generating X MW of electricity under extreme weather conditions in the Northeast United States over the next 25 years from a natural gas-fired generating station to be financed and built 20 miles from the nearest gas storage facility. The alternative to a bona fide hedging transaction or position may be building a pipeline interconnect or lateral line, building an LNG conversion facility or a generating unit using a different or alternative fuel source, or entering into a 20 year, full-requirements contract for the Referenced Contract energy commodity.

²³ The NFP Electric Associations respectfully disagree with the statement in the Supplemental Proposal that it might be commercially reasonable for an end-user to change its commercial risk hedging strategy and exit a Referenced Contract or Referenced Contract transaction or position in one business day or less (see the discussion in the December 2013 preamble to the Speculative Position Limits rule proposal cited in the Supplemental Proposal at 81 Fed. Reg. 38476, footnote 168). A financial trader or investor hedging single commodity price risk may be able to quickly substitute a transaction, or adjust a position, with another standardized futures contract if a bona fide hedge exemption is revised or revoked for a CRFC. By contrast, it may take an electric utility much longer to negotiate an over-the-counter, bilateral energy commodity swap Referenced Contract, and the associated credit support documentation, as a substitute and effective commercial risk hedge for its unique operational needs. This again demonstrates the gap in understanding as to how an end-user hedges its ongoing commercial risks, particularly in the energy industry, using Referenced Contracts. The NFP Electric Entities establish commercial risk hedging policies and strategies to manage the risks of their electric operations over the long term. If a bona fide hedging exemption recognized by a DCM is revised or revoked by the Commission, a commercially reasonable timeframe for an NFP Electric Entity to find a replacement hedge for such commercial risk(s), as well as secure necessary approvals or consents and execute contract documentation, may well be months or even years.

timely data available to the Commission (or its staff or designee) with respect to the Referenced Contracts comprising such set. The Commission must have such data in order to establish appropriate limits, assure that all hedging exemptions are in place to allow end-users to continue ongoing commercial risk hedging using such Referenced Contracts, and to enable the Commission (or its designee) to monitor ongoing Referenced Contract positions and applicable hedging exemptions, including for swaps.

The NFP Electric Associations respectfully note that reliable, accurate and timely data is not currently available to support the Speculative Position Limits Rules being applicable to any set of energy Referenced Contracts, particularly for any category of energy commodity swaps. The Commission does not have available to it the data to identify swaps that are, or may be, Referenced Contracts linked to a particular CFRC. The Commission and the DCMs have little experience in ascertaining deliverable supply, open interest or other concepts used in establishing or monitoring speculative position limits in the context of over-the-counter, bilaterally-transacted energy commodity swaps.²⁴ There are virtually no energy Referenced Contracts transacted on DCMs as swaps,²⁵ and no energy Referenced Contracts transacted on SEFs, at this time. Virtually all of the discussion in comment letters and at the EEMAC Meetings had to do with transactions and positions in energy CRFCs, and Referenced Contracts that are futures contracts and options traded on DCMs. The geographic characteristics of energy Referenced Contracts and energy commodity markets, related to supply, demand or consumption (“load” for a utility”), constrained transportation/transmission, storage (or lack thereof) and weather, create more market variables than for other Referenced Contracts or categories of physical commodities. Such market variables include pricing, volatility, market liquidity, congestion, deliverable supply, weather/seasonal dependencies, and energy and environmental regulatory requirements.

The Supplemental Proposal appropriately defers implementation of the Speculative Position Limits Rules requiring DCMs and SEFs to establish and monitor position limits on Referenced Contract swaps, until such time as an individual DCM or SEF has reliable, accurate and timely data available to it, including data about Referenced Contracts on other exchanges and about swap transactions and positions.²⁶ But the Supplemental Proposal then merely

²⁴ The Commission was first given authority to establish speculative position limits for standardized physical commodity swaps traded on an electronic facility that performed a “significant price discovery function with respect to a particular futures contract” in the 2008 Farm Bill. The implementing rules went into effect in April of 2009. See CFTC rule 36.3(c)(3). Shortly thereafter in the summer of 2009, discussion of the financial reform legislation that resulted in the Dodd-Frank Act began and quickly superseded the Commission’s focus on position limits for “SPDC” swaps. While the designation of a standardized pre-Dodd-Frank Act swap traded electronically as a “SPDC” swap was determined by the Commission via a public rulemaking, in the Speculative Position Limits Rules the determination of whether an “economically equivalent” swap is a Referenced Contract is left to each market participant. Commenters have noted that such a regulatory approach will lead to inconsistent determinations with respect to whether similar or even identical swaps are or are not Referenced Contracts. This will add substantial ambiguity to a DCM, a SEF or the Commission’s ability to identify a complete “set” of Referenced Contracts, or to establish quantitative measures relative to Speculative Position Limits.

²⁵ See 81 Fed. Reg. at 38467.

²⁶ See 81 Fed. Reg. at 38462. The Commission notes that it would be impracticable if not impossible for an exchange to monitor and enforce position limits for swaps with only the transaction data from that particular exchange.

hypothesizes when, under what circumstances and with what additional regulatory changes or developments over time, a DCM or a SEF would ever be in a position for such deferral to end. In addition to data about swap transactions and positions, such a DCM or SEF would also need comprehensive data about the bona fide hedging and other exemptions available to each such market participant in respect to its Referenced Contract transactions or positions, including swaps, from other exchanges or from the Commission itself.²⁷

Under the present rules, no DCM or SEF has any ongoing data or access to data about bilateral swaps that are (or may be) Referenced Contracts.²⁸ As the Supplemental Proposal acknowledges, an individual DCM or SEF that lists a CRFC will not have electronic access to data from other exchanges that may list a Referenced Contract linked to such CRFC or with respect to a Referenced Contract that is a bilateral swap.²⁹ Nor would an individual DCM or SEF have access to all necessary bona fide hedging exemptions on which a particular market participant might be relying in calculating its ongoing compliance with aggregate Federal limits. Such exemptions may be granted by other DCMs or SEFs, or even the Commission itself, and are not reported in any quantitative way to a centrally-accessible facility.³⁰

V. THE NFP ELECTRIC ASSOCIATIONS REQUEST AN AFFIRMATIVE FINDING THAT THE COMMISSION (OR A DESIGNEE) HAS RELIABLE DATA ON WHICH TO ESTABLISH AND MONITOR LIMITS FOR A SET OF REFERENCED CONTRACTS LINKED TO A CRFC PRIOR TO IMPLEMENTATION OF THE SPECULATIVE POSITION LIMITS FOR SUCH SET OF REFERENCED CONTRACTS, OR AT LEAST FOR SWAP REFERENCED CONTRACTS

The Supplemental Proposal remarks, almost in passing, that the quality of the swap position data in large trader reports being submitted to the Commission under Part 20 “has

²⁷ See 81 Fed. Reg. at 38461 et seq.

²⁸ See 81 Fed. Reg. 38461, as well the comment in footnote 24 above about ambiguities in whether a swap is economically equivalent and therefore a Referenced Contract. The question in footnote 32 as to whether a DCM or SEF with affiliated DCOs and an SDR might have such access raises serious concerns about an SDR’s confidentiality obligations with respect to the data it warehouses, and clear lines of separation between affiliates registered with and regulated by the Commission.

²⁹ Id.

³⁰ It is unclear why a DCM or a SEF would accept regulatory responsibility to monitor limits or exemptions over which it had no control, or for transactions which are not listed on its trading facilities. Bona fide hedging exemption proposals submitted to one or more DCMs by energy industry end-user entities or enterprises may also vary due to the diverse characteristics of supply and delivery constraints, demand fluctuation, weather extremes, and unique market participants (regulated utilities) applicable to individual companies or relevant in certain sectors of the energy industry and markets. And, it may be that different DCMs, listing different CRFCs, will grant differently structured hedging exemptions for particular Referenced Contracts and/or market participants. The electric utility sector is potentially the most “different” sector, given that it is currently impossible to store the commodity or transmit it over long distance in commercial quantities, the multiple fuel commodities that can be used to generate electricity, the Federal and state energy and environmental regulations governing energy production, transportation/transmission and distribution, and the fact that the market participants include not-for-profit cooperatives, government-owned utilities and Indian tribes, all with public service obligations.

improved” since 2013. On that basis, the Commission intends to press forward with finalizing its Speculative Position Limits Rules.³¹ The NFP Electric Associations appreciate that the quality of the available swap position data has improved from those reporting parties for whom Part 20 compliance has begun, and that the Commission is engaged in ongoing efforts to improve the quality of the swap transaction data reported to SDRs as well. However, the NFP Electric Associations respectfully request that, prior to implementing Speculative Position Limits Rules for a set of Referenced Contracts linked to a particular CRFC, the Commission should make an affirmative finding that it (or its designee) has access to at least 12 months of reliable, comprehensive, accurate and timely data to support and monitor limits established for such set of Referenced Contracts, including swaps. In order to make such a finding, the Commission (or its designee) must also have ongoing access to qualitative and quantitative information about bona fide and other hedging exemptions, whether granted by a DCM, a SEF or the Commission itself, for the Referenced Contract transactions or positions of any market participant required to comply with such limits.

VI. THE NFP ELECTRIC ASSOCIATIONS REITERATE REQUESTS THAT THE COMMISSION PROVIDE CERTAIN CEA 4A(A)(7) EXEMPTIONS CONTEMPORANEOUS WITH IMPLEMENTATION OF ITS FINAL SPECULATIVE POSITION LIMITS RULES FOR ELECTRIC OPERATIONS-RELATED REFERENCED CONTRACTS FOR THE BENEFIT OF NFP ELECTRIC ENTITIES, WHICH ARE “SMALL ENTITIES”

The NFP Electric Associations reiterate prior requests that the Commission use its CEA 4a(a)(7) exemption authority to defer implementation of Speculative Position Limits Rules for NFP Electric Entities and for Electric Operations-Related Referenced Contracts, particularly swaps.³² In addition, for the reasons explained in the February 2014 NFP Electric SPL Comments and as requested in the 2015 NFP Electrics SPL Comments, if the Commission declines to grant the NFP Electric Associations’ requests for CEA 4a(a)(7) exemptions contemporaneous with implementing such rules for Electric Operations-Related Referenced Contracts, the Commission must consider the impact of its Speculative Position Limits Rules for

³¹ See 81 Fed. Reg. at 38459. The Commission is also currently reviewing its rules for reporting swap transaction data under Part 45, which the Commission has stated do not contain data elements necessary for the Commission to fulfill its regulatory duties. The NFP Electric Associations submitted comments in response to the Commission’s Review of Swap Data Recordkeeping and Reporting Requirements, 79 Fed. Reg. 16,689 (March 26, 2014) and the Commission Staff’s Draft Technical Specifications for Certain Swap Data Elements, December 22, 2015. The NFP Electric Associations respectfully note that the most incomplete, inconsistent and unusable swap transaction data currently in swap data repositories (“SDRs”) is most likely data for energy commodity swaps, for which the Commission only recently clarified certain 2012 interpretations regarding forward contracts with embedded volumetric optionality, and amended the commodity trade option exemption rules. See Forward Contracts with Embedded Volumetric Optionality, Revised Interpretation, 80 Fed. Reg. 28239 (May 18, 2015) and Trade Option, Final Rule Amendment, 81 Fed. Reg. 14966 (March 21, 2016), and where much of the transaction data is submitted by end-users that are not registered with the Commission or experienced with financial markets data reporting. This is yet another reason for the Commission to defer implementation of its Speculative Position Limits Rules applicable to energy commodity swaps and such end-users.

³² See Section IV of the 2015 NFP Electrics SPL Comments.

energy Referenced Contracts on “small entities,” including more than 2500 NFP Electric Entities.³³

VII. THE NFP ELECTRIC ASSOCIATIONS RESPECTFULLY REQUEST THAT THE COMMISSION PROVIDE IN THE FINAL SPECULATIVE POSITION LIMITS RULES THAT COMMODITY TRADE OPTIONS ARE EXPRESSLY EXCLUDED

The NFP Electric Associations appreciate the Commission’s confirmation that the Commission’s Speculative Position Limits Rules are not intended to cover commodity trade options in the adopting release for the most recent amendments to Part 32.³⁴ Nevertheless, in light of the complexity of the Commission’s rules, interpretations and guidance applicable to nonfinancial commodity swaps, the NFP Electric Associations respectfully request the Commission to make appropriate changes in the final Speculative Position Limits Rules to expressly implement the Commission’s statement.

VIII. CONCLUSION

The NFP Electric Associations are available to assist the Commission and Commission staff as they develop final Speculative Position Limits Rules. Our members need workable Speculative Position Limits Rules for Electric Operations-Related Referenced Contracts, and broad CEA 4a(a)(7) exemptions in place at the time such rules are finalized and implemented.

³³ See Section VII of the 2015 NFP Electrics SPL Comments.

³⁴ See 81 Fed. Reg. 14966 (March 21, 2016) 14966, at 14971.

**SPECULATIVE POSITION LIMITS FOR DERIVATIVES:
CERTAIN EXEMPTIONS AND GUIDANCE (2016)**

Respectfully submitted,

**NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION**

Russ Wasson

Russell Wasson
Director, Tax Finance and Accounting Policy

4301 Wilson Blvd., EP11-253
Arlington, VA 22203
Tel: (703) 907-5802
E-mail: russell.wasson@nreca.coop

AMERICAN PUBLIC POWER ASSOCIATION

James C. Cater

James C. Cater, Director of Economic and
Financial Policy

2451 Crystal Drive
Suite 1000
Arlington, VA 22202-4804
Tel: (202) 467-2979
E-mail: jcater@publicpower.org

cc: Honorable Timothy Massad, Chairman
Honorable Sharon Bowen, Commissioner
Honorable Christopher Giancarlo, Commissioner
Jonathan Marcus, General Counsel
Lee Ann Duffy, Assistant General Counsel, Office of the General Counsel
Vincent McGonagle, Director, Division of Market Oversight
Riva Spear Adriance, Senior Special Counsel, Division of Market Oversight
Stephen Sherrod, Senior Economist, Division of Market Oversight
Kenneth Danger, Senior Economist, Division of Market Oversight
Steven Benton, Industry Economist, Division of Market Oversight

ATTACHMENT A - DESCRIPTION OF THE NFP ELECTRIC ASSOCIATIONS

NRECA is the national service organization for more than nine hundred rural electric utilities and public power districts that provide electric energy to approximately forty-two million consumers in forty-seven states or thirteen percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately eleven percent of all electric energy sold in the United States. Because an electric cooperative's electric service customers are also members and owners of the cooperative, the cooperative operates on a not-for-profit basis and all the costs of the cooperative are directly borne by its members/owners.

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.

ATTACHMENT B

DCM MARKET STRUCTURE DEVELOPMENT CHARACTERISTICS BY TYPE OF CORE REFERENCED FUTURES CONTRACT (“CRFC”)



Attachment B

