



**FURTHER DEFINITIONS OF “SWAP DEALER,”...  
“MAJOR SWAP PARTICIPANT”... AND  
“ELIGIBLE CONTRACT PARTICIPANT”**

**RIN 3235-AK65**

February 22, 2011

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

**Re: Comments on Notice of Proposed Rulemaking on Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”)**  
**(17 CFR Part 240)**

Dear Mr. Stawick:

The trade associations comprising the “Not-For-Profit Electric End User Coalition” (the “Coalition”)<sup>1</sup> respectfully submit these comments to the Commodity Futures Trading Commission (the “Commission”) on the **Notice of Proposed Rulemaking on Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,”**

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<sup>1</sup> The National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council (see Section I for a description of the members of each such trade association). The comments contained in this filing represent the comments and recommendations of the organizations comprising the “Coalition,” but not necessarily the views of any particular member with respect to any issue.

**“Major Security-Based Swap Participant” and “Eligible Contract Participant,”** issued December 21, 2010 (the “Entity Definitions NOPR”).<sup>2</sup>

The Coalition’s members are commercial enterprises, not swap dealers or major swap participants, and not financial entities. Our members engage in swaps only to mitigate or hedge commercial risks that arise in the course of their public service activities. We are submitting these comments on the definitions used in the Commodity Exchange Act, as amended by the Act (the “CEA”). We are not commenting on the definitions of “Security-Based Swap Dealer” or “Major Security-Based Swap Participant.”

Our comments focus primarily on the aspects of the Proposed Rules under Part 240 that would affect the ability of an “end user”<sup>3</sup> of non-cleared “swaps,”<sup>4</sup> of a type that the NFP Electric End Users define as “Energy Commodity Swaps”<sup>5</sup> to represent or certify that it is an

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<sup>2</sup> 75 Fed. Reg. 80,174 (Dec. 21, 2010).

<sup>3</sup> This term is not defined in the Act, but is used to describe an entity that is not a “financial entity” (so we use the term “non-financial entity”), that utilizes swaps to hedge or mitigate commercial risk, and that notifies the Commission how it generally meets its financial obligations associated with entering into non-cleared swaps. CEA 2(h)(7)(A). Such a non-financial entity may except a “swap” to which it is a party from the clearing requirements of the Commodity Exchange Act, as amended by the Act (the “CEA”) pursuant to what is called the “end-user exception.” The NFP Electric End Users anticipate utilizing the “end-user exception” in respect of all Energy Commodity Swaps to which they are parties.

<sup>4</sup> We have footnoted this term, and direct the reader to the comment letter submitted by the Not-For-Profit Energy End User Coalition dated September 20, 2010, submitted in response to the Commission’s “Definitions ANOPR,” and in particular to the comments on the definition of “swap” in that letter. A web link to such comment letter is available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26217&SearchText>. The comments herein are predicated on certain assumptions about how the Commission will define that term, and we reserve the right to change or expand our comments once the Commission’s final rules in respect of that definition are issued. We use the term “non-cleared” in this comment letter, rather than “uncleared,” so that our comments to the Commission on different rulemakings on identical concepts are consistent. The Act, and the CEA as amended by the Act, use the terms interchangeably. We respectfully request that the Commission confirm in the rules, for the sake of clarity, that the terms are synonyms.

<sup>5</sup> We use the term “Energy Commodity Swaps” to mean (a) those non-cleared swaps referencing or derived on energy commodities in which the NFP Electric End Users transact in the ordinary course of their core public service activities, such as electric energy, natural gas, and other fuels for electric generation, including coal and fuel oil (but excluding crude oil, gasoline or refined petroleum products other than fuel oil -- these commodities are not germane to the NFP Electric End Users’ public service activities, and the markets for these commodities and related derivatives are distinguishable from the markets in which the NFP Electric End Users

“eligible contract participant” (an “ECP”) as required by CEA Section 2(e) -- to the Commission, to a “registered entity” (as defined in the CEA) or to its swap counterparty. One or more of these entities may require such a representation or certification in order to assure itself that the swap is not “unlawful,” and the NFP Electric End Users need regulatory certainty that they can utilize the end-user exception.

The NFP Electric End Users are concerned that ambiguities in the statutory definitions of ECP and “eligible commercial entity” (“ECE”), when read in conjunction with new CEA Section 2(e), create uncertainty as to whether some of the NFP Electric End Users can engage in swaps other than on a designated contract market. The NFP Electric End Users respectfully request the Commission to confirm in its regulations that **an ECE is an ECP** for swaps referencing or derived on the underlying commodities in which the ECE transacts in connection with its business. This confirmation in the Commission’s rules is necessary to preserve the ability of the NFP Electric End Users to elect the “end-user exception” for all of their Energy Commodity Swaps, and to rely on Section 2(h)(8) to except such swaps from the requirement to execute on a designated contract market or on a swap execution facility. CEA Section 2(e) should not be a “catch-22” that strips ECEs of their ability to use the end-user exception. This comment is consistent with our comment letter, dated October 15, 2010, on the Advanced Notice of Proposed Rule-making on Definitions.<sup>6</sup>

As the Commission (along with the Securities and Exchange Commission and the prudential regulators) embarks on the complex and interrelated rule-makings necessary to implement the Act, the Coalition respectfully requests that the regulators keep in mind at each step along the way how its Proposed Rules will impact the commercial enterprises that are “end users” of commodities and swaps. These are not financial entities, and they have not previously been regulated by the Commission. On the day after the effective date of the Act, each of these non-financial entities will still have a commercial enterprise to run, commercial risks to manage and, for the NFP Electric End Users, retail energy customers to serve.

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participate), (b) those non-cleared swaps referencing or derived on transmission, transportation, generation capacity or storage concepts or services related to the energy commodities described in (a), and (c) those non-cleared swaps referencing or derived on environmental or emissions regulations, or renewable energy or other environmental attributes, applicable to the NFP Electric End Users. All of these “Energy Commodity Swaps” reference or are derived on “nonfinancial commodities,” are intrinsically related to our members’ core public service activities, and many are subject to the continuing jurisdiction of regulators other than the Commission.

<sup>6</sup> See footnote 4 for a web link. In the alternative, the Commission could expressly provide in its rules that a non-financial entity which elects the end-user exception for a swap used to hedge or mitigate commercial risk is exempt from the exchange-trading requirement in CEA Section 2(e).

The Act was intended by Congress to regulate the financial markets more effectively, to provide regulatory oversight to financial entities and to reduce risk to the financial system. It was also intended to bring more transparency to the swap markets. We fully support these policy objectives. However, the regulations must tell commercial enterprises which of their ongoing activities will now be regulated by the Commission and how to comply with the Commission's new rules. The regulations must be clear as to the ability of non-financial entities to utilize the end-user exception from mandatory clearing and the related exception from transacting on a designated contract market or a swap execution facility. The regulations should not impose unnecessary new regulatory costs and burdens on these non-financial commercial enterprises.

## **I. THE COALITION MEMBERS**

The Coalition is comprised of three trade associations representing the interests of not-for-profit, consumer-owned electric utilities in the United States (collectively, the "NFP Electric End Users").<sup>7</sup> The primary business of these NFP Electric End Users has been for well over 75 years, and still is today, to provide reliable electric energy to their retail consumer customers every hour of the day and every season of the year, keeping costs low and supply predictable, while practicing good environmental stewardship. The NFP Electric End Users are public service entities, owned by and accountable to the American consumers they serve.

### **A. NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION ("NRECA")**

Formed in 1942, NRECA is the national service organization for more than 900 not-for-profit rural electric utilities and public power districts that provide electric energy to approximately 42 million consumers in 47 states or 12 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. NRECA members generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. The vast majority of NRECA members are not-for-profit, consumer-owned cooperatives which distribute electricity to consumers. NRECA's members also include approximately 66 generation and transmission ("G&T") cooperatives, which generate and transmit power to 668 of the 846 distribution cooperatives. The G&T cooperatives are owned by the distribution cooperatives they serve. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the

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<sup>7</sup> The Coalition is grateful to the following organizations and associated entities who are active in the legislative and regulatory policy arena in support of the NFP Electric End Users, and who have provided considerable assistance and support in developing these comments. The Coalition is authorized to note the involvement of these organizations and associated entities to the Commission, and to indicate their full support of these comments and recommendations: the Transmission Access Policy Study Group (an informal association of transmission dependent electric utilities located in more than 30 states), ACES Power Marketing and The Energy Authority.

lowest reasonable cost. All these cooperatives work together pursuant to their common public service mandate from their members, often without the type of contracts that exist between for-profit entities. Rather, many cooperatives deal with each other under take and pay “all requirements contracts” which set forth the terms of service/energy sales, but not necessarily the price for such service/energy sales. For example, as between a G&T cooperative and its distribution cooperative owner-members, the price is often determined based on a “cost of service” rate, with no market price component.

Electric cooperatives own approximately 43% of the distribution lines in the U.S., reaching some of the country’s most sparsely populated areas, from Alaskan fishing villages to remote dairy farms in Vermont. In an electric cooperative, unlike most electric utilities, its owners -- called “members” of the cooperative -- are also customers, who are able to vote on policy decisions, directors and stand for election to the board of directors. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members.

The vast majority of NRECA’s members meet the definition of “small entities” under the Small Business Regulatory Enforcement Fairness Act (“SBREFA”). 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. SBREFA incorporates by reference the definition of “small entity” adopted by the Small Business Administration (the “SBA”). The SBA’s small business size regulations state that entities which provide electric services are “small entities” if their total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. 13 C.F.R. §121.201, n.1.

#### B. AMERICAN PUBLIC POWER ASSOCIATION (“APPA”)

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and serve 45 million people. APPA’s member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. These systems take various forms, including departments of a municipality; a utility board or a public utility district formed under state or local law; a joint action agency or joint power agency formed under state law to provide wholesale power supply and transmission service to distribution entity members; a state agency, authority or instrumentality; or other type of political subdivision of a state. Like the members of NRECA, the vast majority of APPA’s members are “small entities” under SBREFA.

Public power utilities perform a variety of electric utility functions. Some 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. All these systems work together pursuant to their common statutory and regulatory mandates. Some are “vertically integrated” electric utilities (engaging in generation, transmission, distribution and retail sales), while others are vertically integrated by contract with other “201(f) entities”

(entities that are exempt from full Federal Power Act rate regulation under Section 201(f) of that statute), or by contract with third parties.

Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable, safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

### C. LARGE PUBLIC POWER COUNCIL ("LPPC")

The Large Public Power Council is an organization representing 24 of the largest locally owned and operated public power systems in the nation. LPPC members own and operate over 75,000 megawatts of generation capacity and nearly 34,000 circuit miles of high voltage transmission lines. Collectively, LPPC members own nearly 90% of the transmission investment owned by non-federal public power entities in the U.S. Our member utilities supply power to some of the fastest growing urban and rural residential markets in the country. Members are located in 11 states and Puerto Rico -- and provide power to some of the largest cities in the country including Los Angeles, Seattle, Omaha, Phoenix, Sacramento, Jacksonville, San Antonio, Orlando and Austin.

Members of the LPPC are also members of APPA. LPPC members are larger in size than other APPA members due to the size and population density of the communities to which they provide power. LPPC members often require larger, more complex and more diverse types of resources to serve their communities as well, and therefore LPPC members own and operate more complex generation and transmission assets than many other APPA members. However, despite being larger in size and resources, LPPC members' public service mission remains the same -- to provide reliable, safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

### D. THE COALITION'S MEMBERS ARE UNIQUE, AS ARE THE "MARKETS" IN WHICH THEY TRANSACT AND THE TRANSACTIONS IN WHICH THEY ENGAGE

The NFP Electric End Users represented by the Coalition include public power utilities and rural electric cooperatives. Some are quite large, but most of these NFP Electric End Users are very small, reflecting the communities they serve, the success of those communities in providing reliable essential services for their citizens at the lowest reasonable rates and, in the case of rural electric cooperatives, the contribution to Americans' quality of life of the Rural Electrification Act of 1936.

Some NFP Electric End Users generate, transmit and sell electric energy to their fellow public power systems and cooperatives and to third parties at wholesale. Others purchase electric energy (from associated public power systems and cooperatives or from third parties), and distribute it to retail consumers. Still others perform all or a combination of these commercial functions. The Coalition's members are unique among "end users" whose

transactions are potentially subject to the Commission's regulation as "swaps" (even among those who are "end users" of energy and energy-related commodities and swaps) in that the public power entities which are NFP Electric End Users have no stockholders and are accountable to elected and/or appointed officials, and ultimately to the consumers of their services. Similarly, the electric cooperatives which are NFP Electric End Users are directly accountable to their consumer-members and boards. Any gains or losses on an NFP Electric End User's energy transactions result in higher or lower energy costs to American businesses and consumers. The NFP Electric End Users do not seek profit for shareholders or investors. Their public service mission is the singular purpose and reason for their existence. The interconnected Federal, state and local system of laws and financial regulation within which they operate is designed specifically to support this public service mission.

The market for power in North America is comprehensively regulated at the Federal, state and local level, with a focus on reliability of service and regulated rates payable by the retail customer. In addition, the electric industry in North America (including the NFP Electric End Users) is subject to extensive environmental regulations and, in many states, renewable energy standards. Unlike other markets for over-the-counter ("OTC") derivatives and/or "swaps" (as newly defined by the Act), these are not unregulated markets. They are comprehensively regulated, and any new regulatory structure must be carefully tailored so as not to conflict with existing regulatory structures.

Some of the NFP Electric End Users' energy transactions are conducted through, "on," or "in" the "markets" operated by various regional transmission organizations or independent system operators (collectively, "RTOs"). Each RTO operates its "market" in a defined geographic area of the United States, and all RTOs operate under a comprehensive regulatory structure established by the Federal Energy Regulatory Commission ("FERC"). The FERC-regulated markets are established by tariff in many instances, rather than by contract, and analogies between these FERC-created/FERC-regulated "markets," and the bilateral contract markets between independent and arm's length third parties, are inapt. Although, in some ways, the markets conducted by the various RTOs are similar in structure, no two RTO markets are exactly alike and their "products" or "transactions" are not fungible between RTOs. Each RTO also has in place credit risk mitigation policies and procedures to protect market participants from credit risk from other market participants, and to protect the RTO markets from disruption due to market participant default. These RTO credit risk mitigation policies are established and maintained in accordance with the principles established by FERC.<sup>8</sup>

FERC's mandate from Congress under the Federal Power Act is to regulate in the "public interest" -- which is interpreted as the delivery of reliable electric energy to American consumers at "just and reasonable" rates. It is under this regulatory mandate that the RTOs (overseen by FERC) have established, and currently maintain and operate, the FERC-regulated markets. The

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<sup>8</sup> Such policies were recently updated by FERC in its Final Rule on Credit Reforms in Organized Wholesale Electric Markets, 18 CFR Part 35, Docket No. RM10-13-000, Order No. 741 (issued October 21, 2010).

RTO markets are intrinsically tied to the reliable physical transmission and ultimate delivery of electric energy in interstate commerce at just and reasonable rates.

Most of the Energy Commodity Swaps in which the NFP Electric End Users are engaged are currently conducted under exemptions or exclusions from the Commodity Exchange Act (the “CEA”), whether conducted in the bilateral OTC contract market (as most are, including RTO transactions) or on exempt commercial markets. The participants in these markets are “eligible contract participants” either by virtue of their size and financial characteristics, or by virtue of their use of underlying cash commodities relevant to their businesses (as “eligible commercial entities”). Other than a few large industrial companies, retail energy consumers generally do not participate in these markets directly. The physical and financial commodity transactions occur principal to principal, through agents and energy brokers, with a wide range of counterparties.

NFP Electric End Users engage in a substantial number of non-cleared, “end-user-to-end-user” Energy Commodity Swaps.<sup>9</sup> Counterparties for these Energy Commodity Swaps are

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<sup>9</sup> In several places in various NOPRs issued to date, the Commission assumes that there are only a small number of swap transactions in which no swap dealer to major swap participant plays a role. See footnote 18 in this Entity Definitions NOPR, 75 Fed. Reg. 80,174 at 80,180. The Commission’s assumption is based on the Commission’s reliance on two publicly-available, but financial-entity-dominated survey sources on over-the-counter derivatives markets: first, the survey by the International Swaps and Derivatives Association (“ISDA”) of its members, and second, the quarterly surveys by the Office of the Comptroller of the Currency (the “OCC”) of regulated financial institutions. These surveys may reflect comprehensive information about the scope of the global swap markets **where at least one of the counterparties is a financial entity**. However, ISDA is a trade association comprised primarily of large financial institutions and other financial entities who transact regularly or act as dealers in the global derivatives markets. Only a few United States energy companies, other than major oil companies, are ISDA members. Moreover, in the Energy Commodity Swap markets, many non-financial entities transact using the ISDA master agreement without being members of the ISDA trade association. In fact, ISDA facilitates this practice by providing physical energy annexes along with other annexes to the ISDA Master Agreement, so counterparties can engage in physical commodity and commodity derivatives transactions (that by their terms settle financially) under the same ISDA master agreement. An ISDA survey of its members would not capture many end-user-to-end-user transactions. The OCC surveys reflect the derivatives activities of the financial institutions regulated by the OCC. Therefore, in the case of the OCC surveys, no end-user-to-end-user transactions would be reflected. **As a result, the Commission’s underlying assumption that there are relatively few “end-user-to-end-user swaps” is inaccurate, and it results in a fundamental misunderstanding by the Commission of the markets for Energy Commodity Swaps.** The NFP Electric End Users reserve the right to submit additional or revised comments on this topic once the Commission issues its final definition of “swap” and other definitions, including “swap dealer” and “major swap participant.” There will be an even higher percentage of these end-user-to-end-user swaps if the Commission does not clarify its definition of “swap”



typically the NFP Electric End Users' traditional commercial (physical energy commodity) counterparties, rather than financial entities (whether financial intermediaries or financial institutions) from whom the NFP Electric End Users secure financing. In the markets for Energy Commodity Swaps, an end user may be a buyer one day and a seller the next, as its seasonal commercial needs for one or more energy commodities fluctuate. And the end user may be a buyer of one type of energy commodity or derivative, and a seller of another type of energy commodity or derivative. In the markets for Energy Commodity Swaps, a single energy company may buy natural gas swaps and sell electric energy swaps for the same month. Or it may buy natural gas swaps for one month and sell natural gas swaps for the next month. Most energy companies' commercial risks are geography-specific and seasonal, and risk management decisions are made based on changing long-term weather forecasts, generation availability and/or load projections. Some energy companies hedge multiple commodity risks, such as an electric utility hedging the commercial risks of its input (natural gas as fuel) and output (electric generation/deliverable electric energy). Cross-commodity hedging is also commonplace. There is no "sell-side/buy-side" dichotomy in the non-cleared Energy Commodity Swap market, and there are often no financial intermediaries -- many non-financial entities play multiple commercial end user roles.<sup>10</sup>

The transactions contain customized, non-quantitative operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between commercial businesses. Although legal and administrative terms are standardized through the use of master agreements, the negotiated schedules to such master agreement and individual transaction confirmations are highly negotiated and differ based on the needs and preferences of each pair of counterparties. These are commercial transactions, when viewed through the traditional lens of "goods" and "services" used by American businesses. It is only when the transactions are viewed through the financial markets lens that these transactions are described using the financial market regulatory labels such as "exempt commodities," "swap agreements," "swaps" or "nonfinancial commodities" -- and analogized to "futures contracts" or "positions" created or engaged in by financial entities on a transaction-by-transaction basis for profit or speculation, and potentially subject to regulation traditionally applicable to such financial market transactions.

Credit risk management in the bilateral contract world of non-cleared Energy Commodity Swaps is grounded in broad-based, continuing and reciprocal commercial credit risk analysis and credit risk management between each set of counterparties, backstopped by credit support and collateralization principles. This type of credit risk management is not analogous to the

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to exclude or exempt commercial energy and energy-related transactions in which NFP Electric End Users engage every day.

<sup>10</sup> See footnote 4. Please let us know if the NFP Electric End Users can provide the Commission with further information on this unique aspect of the markets for Energy Commodity Swaps.

transaction-by-transaction margining (without regard to counterparty identity) that takes place in today's CFTC-regulated futures and options markets.

The NFP Electric End Users currently have the commercial risk management choice to conduct some Energy Commodity Swap transactions on CFTC-regulated contract markets, or to clear some of these transactions through CFTC-regulated centralized clearing entities. CFTC-regulated exchanges have only recently begun to list these types of contracts; and central clearing entities have only recently begun to clear energy transactions. Listed and cleared transactions are typically those delivered at "hubs," in tradable increments and for tradable durations -- transactions or "products" that are "standardized" and "fungible" in financial market terms, and with sufficient contract trading liquidity to allow for financial markets to function. As the CFTC-regulated financial markets have evolved, some of the larger NFP Electric End Users have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments. But the vast majority of NFP Electric End Users' commercial commodity transactions and Energy Commodity Swaps are still conducted "the old fashioned way:" under tariffs within the public power and cooperative systems or by contract with known and reliable physical commodity suppliers and customers, and not with CFTC-regulated financial intermediaries or on exchanges or with clearing entities. And the vast majority of NFP Electric End Users do not either post collateral to their counterparties or require that their counterparties post collateral to them.<sup>11</sup>

Due to the Act's wholesale deletion of applicable exemptions in the CEA, and the potentially sweeping nature of the Act's new definitions, these everyday business transactions of the NFP Electric End Users are at some risk of being redefined as "swaps." Although Congress has repeatedly indicated that its intention was NOT to reduce risk management options for end users or to impose new regulatory costs on end users hedging the risks of traditional commercial enterprises, Congress is relying on the regulators to implement understandable rules consistent with that intent. Congress did not intend for the regulators to read the expansive language of the

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<sup>11</sup> For examples of the diversity of credit support and collateral (or "margin") relationships which the NFP Electric End Users have in place with their Energy Commodity Swap counterparties, as well as the diversity of assets, load (customers served within the utility's geographic service territory), energy hedging and risk management policies, and swap usage within the Coalition's membership, see the profiles attached to the NFP Electric End Users' comment letter to the Capital and Margin Task Force, dated December 14, 2010 (such comment letter can be found at the following link: [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5\\_121410-0017.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5_121410-0017.pdf)). None of these profiles purport to be "typical" of large, medium or small NFP Electric End Users (by number of customers). No NFP Electric End User is typical, given their diverse commercial profiles. However, the Commission's regulations have to work for all NFP Electric End Users who share the identical public service mission.

Act without regard to legislative intent or to regulate and impose costs on end users as if they were financial entities or professional financial market participants.<sup>12</sup>

## II. GENERAL COMMENTS

### A. THE COMMISSION SHOULD CONFIRM IN THE RULES THAT AN ELIGIBLE COMMERCIAL ENTITY IS AN ELIGIBLE CONTRACT PARTICIPANT FOR SWAPS REFERENCING OR DERIVED ON A COMMODITY IN WHICH THE ECE TRANSACTS IN CONNECTION WITH ITS BUSINESS

The Commission should reconcile the statutory ambiguities in the Act in a manner that preserves access to the non-cleared swap markets for ECEs who use swaps to hedge commercial risks which arise in connection with their commodity-based business activities. The role of a regulator is not merely to restate the statutory language, but to provide clear guidance to explain the regulatory process to those who must comply with the rules, while implementing the intent of Congress.<sup>13</sup>

Section 2(e) of the CEA, as amended by the Act, provides that **it is unlawful** for any person who is not an ECP to execute a swap, unless the swap is executed on a designated contract market. A few sections later, CEA Section 2(h) provides an “end-user exception” which allows a non-financial entity executing a swap to hedge commercial risk (and that has made certain representations to the Commission) to except the swap from mandatory clearing and, in doing so also to except the swap from the requirement to execute on a designated contract market or a swap execution facility. See CEA Section 2(h)(8).

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<sup>12</sup> The Commission should not, in its rule-making under the Act, be distracted by those commentators who intone or invoke the names “AIG” or “Enron,” without analysis. In fact, neither AIG nor Enron would be entitled to the end-user exception under the CEA as amended by the Act, and neither would be exempt from margin requirements applicable to cleared swaps by clearing entities. AIG, whose substantial positions in non-cleared credit default swaps allegedly endangered the financial system, would be registered and regulated as an MSP in credit default swaps. Enron, with its notorious “one-to-many” electronic interface offering to buy or sell swaps from energy to broadband, is the poster child for the Act’s definition of “swap dealer,” and would be registered and regulated as such. The NFP Electric End Users, and other end users hedging commercial risk with Energy Commodity Swaps and other types of non-cleared swaps, simply do not represent the types of systemic risk that the mere mention of those entities’ names implies.

<sup>13</sup> When Congress passes legislation that delegates rulemaking powers to an administrative agency, that agency has a duty “to interpret any vague or imprecise language” in that statute to “(1) identify the scope of its authority, (2) determine the precise meaning to be given to imprecise language; (3) identify the specific legislative goals to be achieved; and (4) identify the exact methods it is authorized to use to achieve the desired results.” John H. Reese, *Administrative Law Desk Reference For Lawyers* (Release No. 1, February 2003).

The NFP Electric End Users engage in Energy Commodity Swaps only to hedge commercial risks that arise in connection with their public service activities. But some of the NFP Electric End Users may not meet the financial tests listed in the definition of ECP due to the relatively small size of their physical assets (e.g., distribution-only electric utilities). See Section ID above. It is important that the Commission confirm in the regulations that such NFP Electric End Users, and other similarly situated non-financial entities qualify as ECPs, so that they can continue to engage in “swaps” under the Act, without transacting on a designated contract market.<sup>14</sup> The NFP Electric End Users and other commercial entities will need to be able to represent or certify their status as an ECP to registered entities, and to their counterparties and prospective counterparties.

1. Electric Cooperatives. For electric cooperatives, the relevant portion of the definition of “eligible contract participant” is found in clause (v) of Section 1a(18) of the CEA, which reads as follows:

(v) A corporation, partnership, proprietorship, organization, trust or other entity

(I) That has total assets exceeding \$10,000,000;

(II) The obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I), in clause (i), (ii), (iii), (iv), or (vii), or in subparagraph (C); or

(III) That --

(aa) Has a net worth exceeding \$1,000,000; and

(bb) Enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the

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<sup>14</sup> Obviously this issue becomes even more important if the Commission's definition of “swap” is not clarified to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day in the course of their public service activities. NFP Electric End Users cannot execute such highly-customized transactions on a designated contract market, and yet must execute such transactions to fulfill their public service commitments. See footnote 4.

entity in the conduct of the entity's business;  
(Emphasis added)

Under this definition, an electric cooperative can qualify as an ECP if it has \$1,000,000 net worth **and** it engages in swaps to manage commercial risk. But some of the smaller distribution cooperatives may not meet the financial test. Such a small electric cooperative would meet the definition of “eligible commercial entity” (“ECE”), which has no net worth test, except for the requirement that an ECE must also be an ECP. See Section IIA2 below. Accordingly, we respectfully request that the Commission confirm in the regulations that an electric cooperative that performs the functions or is engaged in the activities described in clauses (i), (ii) or (iii) of Section 1a(17)(A) of the CEA (the definition of ECE) is an ECP, regardless of its net worth.

2. Public Power Utilities. For public power utilities, the relevant portion of the definition of “eligible contract participant” is found in clause (vii) of Section 1a(18) of the CEA, which reads as follows:

(vii) (I) *a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity; (II) a multinational or supranational government entity; or (III) an instrumentality, agency, or department of an entity described in subclause (I) or (II);*

except that such term does not include an entity, instrumentality, agency, or department referred to in subclause (I) or (III) of this clause unless (aa) the entity, instrumentality, agency, or department **is a person** described in clause (i), (ii), or (iii) of paragraph (17)(A)<sup>15</sup>; (bb) the entity, instrumentality,

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<sup>15</sup> The relevant language from the definition of “exempt commercial entity” reads as follows:

“The term ‘eligible commercial entity’ means, with respect to an agreement, contract or transaction in a commodity -- (A) **an eligible contract participant described in clause . . . (v)[electric cooperative] . . . or (vii)[public power and/or gas entity] . . . of paragraph (18)(A)** that, in connection with its business --

- (i) *has a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity;*
- (ii) *incurs risks, in addition to price risk, related to the commodity; or*
- (iii) [not relevant to NFP Electric End Users].” (Emphasis added)

agency, or department owns and invests on a discretionary basis \$50,000,000 or more in investments; or (cc) the agreement, contract, or transaction is offered by, and entered into with, an entity that is listed in any of subclauses (I) through (VI) of section 2(c)(2)(B)(ii). (Emphasis added)

Under this definition, a public power utility can qualify as an ECP if it “is a person” that qualifies as an ECE under Section 1a(17)(A)(i), (ii) or (iii). But the entity references in the two definitions are circular. In order to be an ECE, an entity must be an ECP, and in order to be an ECP, an entity must be an ECE.

A public power entity should qualify as an ECE if it is a person that **performs the functions or is engaged in the activities** described in any of Section 1a(17)(A)(i), (ii) or (iii). And, in that case, the public power entity should also be an ECP under Section 1a(18)(vii). We respectfully request that the Commission confirm in the regulations that a person described in Section 1a(18)(vii) that performs the functions or is engaged in the activities described in any of Sections 1a(17)(A)(i), (ii) or (iii) of the CEA in that it “has a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity,” and/or it “incurs risks, in addition to price risks, related to the commodity,” is an ECE, and is also an ECP under Section 1a(18)(vii).

3. *The Commission has the authority to promulgate such rules.* In clause (C) of the definition of ECP, the Commission is given the authority to determine that any other person may be an ECP “in light of the financial or other qualifications of the person.”

We respectfully request the Commission promulgate such rules clarifying that the NFP Electric End Users are ECPs so that the NFP Electric End Users, and similarly situated commodity-based commercial entities, can confirm their status to registered entities and counterparties, and utilize the end-user exception to mandatory clearing provided for in CEA Section 2(h)(7) and the corollary exception to exchange trading under CEA Section 2(h)(8).

**B. THE COMMISSION SHOULD ADOPT THE BROAD AND COMMERCIAL PRACTICABLE DEFINITION OF “HEDGING OR MITIGATING COMMERCIAL RISK,” AND SHOULD CLARIFY IN RULE 1.3(ttt) THAT A NFP ELECTRIC END USER HAS “COMMERCIAL RISK”**<sup>16</sup>

We concur with the comments in Section VII of the EEI/EP SA Letter. In addition, we support the Commission’s statement on page 80,194 of the Entity Definitions NOPR that it “preliminarily believes that whether an activity is commercial [for purposes of determining whether the activity represents ‘commercial risk’] should not be determined solely by the person’s organizational status as a for-profit entity, a non-profit organization or a governmental entity.” The Coalition respectfully requests that the Commission provide such clarification in Proposed Rule 1.3(ttt).

As the Coalition has discussed in its prior comment letters,<sup>17</sup> the NFP Electric End Users execute Energy Commodity Swaps solely to hedge or mitigate the risks that arise in the course of their public service activities. These public service activities are not “financial” in nature. In the binary way in which the Act uses the terms “financial” and “commercial,” the public service activities of the NFP Electric End Users are “commercial” in nature, as are the risks which arise from those activities, even though there is no profit-making to the activity that is being hedged.

The NFP Electric End Users intend to elect the “end-user exception” for all of the swaps they execute. Under the Proposed Rules, in order to elect the end-user exception, the NFP Electric End Users will be required to represent or certify to a registered entity or to their counterparties that swaps are being executed to “hedge or mitigate commercial risk.” Therefore, the NFP Electric End Users respectfully request that the Commission provide expressly in Proposed Rule 1.3(ttt) that whether or not a risk is “commercial” is to be determined by whether the activity that is being hedged is “commercial” as distinguished from “financial,” rather than by reference to the non-financial entity’s organizational status as a for-profit entity, a non-profit entity, a governmental entity or political subdivision of a governmental entity, or an instrumentality, agency or department of a governmental entity or political subdivision of a governmental entity.

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<sup>16</sup> The Coalition has reviewed the comments submitted in this docket by the Edison Electric Institute and the Electric Power Supply Association (the “EEI/EP SA Letter”), and we will concur by reference to Sections of that EEI/EP SA Letter herein as appropriate, rather than restating the comments.

<sup>17</sup> See the comment letter on the Definitions ANOPR, referenced in footnote 4.

C. THE COMMISSION SHOULD CLARIFY PROPOSED RULE 1.3(ppp) TO EXPRESSLY EXCLUDE FROM THE DEFINITION OF “SWAP DEALER” A MEMBER OF OR PARTICIPANT IN A RELATED NFP EEU GROUP ACTING ON BEHALF OF ANOTHER MEMBER OF OR PARTICIPANT IN THE SAME RELATED NFP EEU GROUP (OR ON BEHALF OF SUCH OTHER MEMBER OR PARTICIPANT’S RETAIL ENERGY CUSTOMER)

On page 80,183 of the Entity Definitions NOPR, the Commission requests comments on how the “swap dealer” definition should be applied to members of an affiliated group, and also asks whether there are specific circumstances in particular swap markets that should not be considered “swap dealing activities,” and consequently persons engaging in such activities should not be considered “swap dealers.” We recommend that the Commission clarify Proposed Definition 1.3(ppp)(2) to expressly exclude from the concept “as a part of [a, *sic*, *see the Act*] regular business” swaps executed by one member of or participant in a “Related NFP EEU Group” (described below) with, for the benefit of, or at the request of, another member of or participant in such Related NFP EEU Group.

As discussed in Section I, some electric cooperatives which provide electric service to their members/consumers, and some municipal or other governmental entities providing natural gas or electric utility services to their constituents, are also “members” (for cooperatives) or “participants” (for governmental entities) in larger NFP Energy End Users entities. For example, an electric “distribution cooperative” may also be a member of a “generation and transmission cooperative (a G&T cooperative).” Or, a municipal electric utility may also be a participant in a “joint action agency” or a “joint power authority.” NFP Electric End Users also act as members of joint project entities, established to build or operate large energy infrastructure projects, or as co-owners or operators of such infrastructure assets, without an intervening project entity. These groups of related NFP Energy End Users (“Related NFP EEU Groups”) are **not** analogous to corporate affiliates, families of affiliated funds or limited partnerships, or other affiliated groups of independent for-profit entities.

A Related NFP EEU Group is not “under common control,” in that its members or participants are independent. The larger, aggregated entity may have many members, none of which can exert “control” over the aggregated entity. For example, a G&T cooperative operates on the principle of “one member-one vote,” so that only a numeric majority of its members can, for any particular decision, control the G&T cooperative. In addition, the constituent entities of a Related NFP EEU Group are all not-for-profit, as is the aggregated entity that is owned or controlled collectively by the constituent entities. In a project-specific entity or co-ownership relationship, the members of a Related NFP EEU Group may have joint liability and rights, or shared but several liability and rights, in the project’s operating and financial performance. The Related NFP EEU Group conducts business on a collective service/shared mission basis, rather than at arms length.

Although the structures are in some respect analogous to the agricultural cooperatives that the Commission has dealt with in the past, the Related NFP EEU Groups differ in function from agricultural cooperatives. The Related NFP EEU Groups are generally “net



short/purchasing cooperative entities,” rather than “net long/selling cooperative entities.” Their common purpose is not to collectively access a market to sell their commodity, but to collectively access the Energy Commodity Swap markets to fulfill their shared public service commitment to deliver reliable, affordable electric energy to consumers (their members or constituents) in their service territories.

Under the government, membership and regulatory regimes that currently govern a Related NFP EEU Group’s activities (including state constitutions and statutes, the jurisdictional documents forming entities within the Related Groups, and other regulatory agencies with jurisdiction), entities within an identifiable Related NFP EEU Group are treated in many respects as “federated systems” of end users. Each Related NFP EEU Group acts collectively to build and operate electric generation and transmission assets, to purchase or sell natural gas and power, to collectively borrow money and manage their assets and to provide service to the consumers and businesses within their collective service territories. Project entities or co-owners or operators of energy infrastructure assets may collectively or individually make construction or operating decisions about the infrastructure assets and, as part of this regular business, may collectively or individually hedge the commercial risks using Energy Commodity Swaps. These Related NFP EEU Groups are all part of the NFP EEU system that has existed for 70+ years as a way of delivering energy to American consumers at just and reasonable rates. None of these Related NFP EEU Groups pose a systemic risk to the financial markets or the financial systems.

The transactions that take place among entities within a Related NFP EEU Group have little to no effect on the commodity or swap markets in which the NFP Energy End Users participate. The intra-Related NFP EEU Group swaps are not “market-facing” transactions. Nor do the payments or accounting arrangements between members of a Related NFP EEU Group have any bearing on market pricing or transparency of market pricing. Substantially all of these intra-Group transactions are cost-based, and there is no independent third party investor or shareholder to “profit” from market-pricing.

If one entity within a Related NFP EEU Group acts for or on behalf of another entity within the same Related NFP EEU Group, that act should have no regulatory ramifications for either party. For example, if a G&T cooperative executes a swap for the benefit of or for the account of one of its member distribution cooperatives (or one of the distribution cooperatives members), that G&T cooperative is not acting as a swap dealer. It is not holding itself out to the public as a dealer in an Energy Commodity Swap. It does not execute swaps for or on behalf of anyone other than its members, those within its Related NFP EEU Group. It is executing such Energy Commodity Swaps as part of its regular business of providing energy commodities to its members, not as part of a regular business of swap dealing.<sup>18</sup>

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<sup>18</sup> The NFP Energy End User Coalition and their members -- which are all public power utilities or electric cooperatives -- anticipate filing a CEA Section 4(c) exemption request for transactions *between* entities defined in Section 201(f) of the Federal Power Act (“FPA 201(f) entities”) pursuant to new CEA Section 4(c)(6)(C), as amended by Section 722(f) of the Act. --

D. THE COMMISSION SHOULD CLARIFY PROPOSED RULE 1.3(ppp) TO EXPRESSLY EXCLUDE FROM THE DEFINITION OF “SWAP DEALER” A NFP ELECTRIC END USER OR AN AFFILIATE (INCLUDING AN ENTITY PRINCIPALLY OWNED BY NFP ELECTRIC END USERS) ACTING FOR OR ON BEHALF OF ONE OR MORE OTHER NFP ELECTRIC END USERS, OR AN ENERGY INFRASTRUCTURE PROJECT OR ENTITY

In further response to the Commission’s question about particular industry exceptions, the NFP Electric End Users respectfully request the Commission to broadly provide in its rules an exclusion from the definition of “swap dealer” for any NFP Electric End User acting as operating or purchasing agent for other utilities in connection with an energy infrastructure project, partnership, joint venture or other enterprise, and an exclusion for any NFP Electric End User affiliate, including an entity principally owned by NFP Electric End Users, acting for or on behalf of NFP Electric End Users (as principal or as agent) in executing Energy Commodity Swaps.<sup>19</sup> In these activities the operating or purchasing agent, or the affiliate is not acting as “swap dealer.” It is not holding itself out to the public as a dealer in Energy Commodity Swaps. It does not execute swaps for or on behalf of anyone other than the energy infrastructure project or enterprise, or the members of its Related NFP EEU Group. It is executing such Energy Commodity Swaps as part of its regular business of providing energy commodities to the energy infrastructure project or enterprise, or to its NFP Electric End User members (and their retail energy customers), not as part of a regular swap dealing business.

E. THE COMMISSION SHOULD SIMPLIFY THE “DE MINIMUS” EXCEPTION FROM THE DEFINITION OF “SWAP DEALER”

We have reviewed Section V of the EEI/EPSC Letter filed in this docket, and we concur with the comments on this issue. The objective thresholds included in the Proposed Rules do not provide a meaningful measure of the magnitude of an entity’s swap dealing activity, and the alternative proposed by the EEI/EPSC Letter of a threshold measured in terms of a percentage of gross notional amount of the swap market, or a percentage of the gross notional amount of the swap market for a particular asset class, would be a more meaningful measure of whether an

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that is, for electric energy transactions *between* FPA 201(f) entities which are not participants in the same Related NFP EEU Group.

<sup>19</sup> On page 80,177 of the Entity Definitions NOPR, footnote 19 contains the Commission’s “interpretation” of certain language in the Act, that an agent acting on behalf of a principal is not “swap dealing” but providing agency or “intermediary” services. The NFP Electric End Users respectfully request that this interpretation be included in the rules, particularly as it relates not just to an agent acting for “customers,” but to an affiliate or agent acting for or for the benefit of a non-financial affiliate (and relying on the end-user exception). See our comment on this topic in Section IIG of our letter on the End-User Exception NOPR. A copy is attached for convenience of reference.

entity is engaged in the type of swap dealing activity that should subject it to regulation as a “swap dealer.”

**III. ALL COMMENT PERIODS SHOULD REMAIN OPEN UNTIL ALL THE BASIC RULES UNDER TITLE VII OF THE DODD-FRANK ACT HAVE BEEN PROMULGATED. THEREAFTER, ONCE THE RULES ARE FINALIZED, THE COMMISSION SHOULD PROVIDE EXTENDED TRANSITION PERIODS TAILORED TO THE NEEDS OF NON-FINANCIAL ENTITIES IN THE DIVERSE MARKETS FOR DIFFERENT CATEGORIES, CLASSES AND TYPES OF SWAPS USED AS COMMERCIAL RISK MANAGEMENT TOOLS**

The Coalition urges the Commission to hold open the comment periods on all initial rules being promulgated under the Act, to enable various industries such as the energy industry, and various types of market participants in the diverse markets for swaps, to consider the regulations and the corresponding definitions as a whole. The rules are complex and interconnected, and create a new market structure within which end users will need to conduct their commercial enterprises and hedge their commercial risks. The Coalition appreciates the Chairman’s recent statement that the Commission has established a “31st rulemaking team” (in addition to the 30 Task Forces originally established by the Commission to draft rules under the Act), whose sole task is to review the regulations under the CEA as a whole, in light of existing regulations and the changes to the CEA made by the Act.<sup>20</sup> We look forward to working with this new team to provide the perspective of the non-financial entity “end user” of non-cleared swaps -- a type of entity over which the Commission, prior to the Act, did not have jurisdiction in many respects. In reviewing the existing regulations, as well as in the current rule-makings, we encourage the Commission to assure its rules, as a whole, are clear, consistent and understandable to entities like the NFP Electric End Users.

In the case of the markets for Energy Commodity Swaps, the new market structure will also need to be integrated with the existing regulatory structures within which the energy companies currently conduct their commercial enterprises. Once the rules are finalized, the NFP Electric End Users will need substantial time to analyze their operations and install new systems, staffing and operating procedures and protocols to adapt to the new market structure, while continuing to seamlessly deliver reliable and affordable electricity to American consumers and businesses and comply with their existing regulatory and corporate recordkeeping and reporting requirements. We urge the Commission to allow time for comprehensive review of the new market structure prior to making the complex new rules effective, and transition times that are adequate for end users to adapt their commercial enterprises to the new market structure and regulatory protocols.

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<sup>20</sup> Testimony of Chairman Gary Gensler before the House Committee on Agriculture, February 10, 2011, available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-68.html>.

#### **IV. THE COMMISSION MUST CONSIDER THE OVERALL IMPACT OF ITS RULES PROMULGATED UNDER THE ACT ON SMALL ENTITIES**

The Coalition's members include many "small entities" as that term is defined in the Small Business Regulatory Flexibility Act. 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). 13 C.F.R. §121.201, n.1. Each of the complex and interrelated regulations currently being proposed by the Commission has both an individual, and a cumulative, affect on such small entities. Whether a particular proposed regulation is required by the Act, or is proposed pursuant to the Commission's "interpretation" of the Act (such as the Real-Time Data NOPR), or is proposed pursuant to "implicit" authority or "to provide guidance and clarity" for the Commission's jurisdiction under the Act (see the Second Interim Final Rule, 75 Fed. Reg. 78,892, issued December 17, 2010, at 75,893), the Commission rule-makings under the Act constitute an accumulation of interrelated regulatory burdens and costs on non-financial small entities like the NFP Electric End Users, who seek to transact in Energy Commodity Swaps only to hedge the commercial risks of their not-for-profit public service activities. The NFP Electric End Users reserve their rights as small entities to assess the full impact of the initial rule-makings being promulgated by the Commission under the Act, and to require a SBREFA analysis be conducted with respect to those regulations as a whole.

In each of its ongoing rule-makings, the Commission acknowledges that it has no experience under the new requirements of the Act in regulating the swap markets or market participants such as the NFP Electric End Users. Each Proposed Rule addresses a different piece of the Commission's overall rule-making challenge under the Act. The Commission's cost-benefit analysis in each release includes assumptions about the number of non-cleared "swaps," the number of "swap dealers" and "major swap participants," the number of "financial entities," the number of annual transactions, the number of end-user-to-end-user transactions, the number of calculations, valuations and disclosures, and what information the Commission needs about the non-cleared swap markets or each non-cleared swap transaction or each market participant. The NFP Electric End Users reserve the right to dispute all these assumptions, and request that the Commission fulfill its statutory requirements under SBREFA to provide economic data showing that the aggregate costs and cumulative regulatory burdens imposed on such small entities by the initial rule-makings to implement the Act are necessary, and that there are no alternatives to achieving the regulatory goals that would impose fewer burdens and less costs on the NFP Electric End Users and energy consumers.

#### **V. CONCLUSION**

The Coalition encourages the Commission to consider the perspective of non-financial entities using swaps to hedge commercial risk at every step of its regulatory rule-making process under the Act, and to ask whether its rules are clear to those who are not regular participants in the financial markets. We respectfully request that, as the Commission drafts its rules, it carefully consider the questions of and consequences to those who operate commercial enterprises and are drawn into this new regulatory environment only because of the Act's broad statutory language could be interpreted to redefine traditional commercial contracts as "commodities" or as "swaps." And we respectfully request that only the minimum, necessary

David Stawick, Secretary

February 22, 2011

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regulatory burdens and costs be applied to non-financial entities participating in the markets as “end users” hedging commercial risk. Each new direct or indirect cost or regulatory recordkeeping or reporting requirements will result, dollar for dollar, in higher costs to the NFP Electric End Users’ customers and owners -- approximately 87 million consumers of electric energy.

We stand ready to help the Commission understand our businesses, our industry and our markets, our transactions and documentation, and how our not-for-profit members use Energy Commodity Swaps to hedge the commercial risks inherent in their public service activities. Please contact any of the Coalition’s representatives for information or assistance.

David Stawick, Secretary  
February 22, 2011  
Signature Page

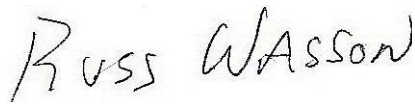
**FURTHER DEFINITION OF  
SWAP DEALER, MAJOR SWAP PARTICIPANT  
AND ELIGIBLE CONTRACT PARTICIPANT**

Respectfully yours,

**THE "NOT-FOR-PROFIT ELECTRIC END USER  
COALITION":**

**NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION**

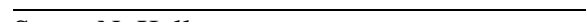
By:



Russell Wasson  
Director, Tax, Finance and Accounting  
Policy

**AMERICAN PUBLIC POWER ASSOCIATION**

By:

  
Susan N. Kelly  
Senior Vice President of Policy Analysis  
and General Counsel

**LARGE PUBLIC POWER COUNCIL**

By:

  
Noreen Roche-Carter  
Chair, Tax & Finance Task Force

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

David Stawick, Secretary  
February 22, 2011  
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SWAP DEALER, MAJOR SWAP PARTICIPANT  
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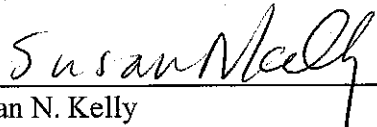
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February 22, 2011  
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**FURTHER DEFINITION OF  
SWAP DEALER, MAJOR SWAP PARTICIPANT  
AND ELIGIBLE CONTRACT PARTICIPANT**

Respectfully yours,

**THE "NOT-FOR-PROFIT ELECTRIC END USER  
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Honorable Jill E. Sommers, Commissioner  
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Honorable Scott O'Malia, Commissioner



**Copy of Comment Letter on End-User Exception NOPR**

See Attached.



**END-USER EXCEPTION TO  
MANDATORY CLEARING OF SWAPS  
RIN 3038-AD10**

February 22, 2011

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

**Re: Comments on Notice of Proposed Rulemaking on the End-User  
Exception to Mandatory Clearing of Swaps, under Title VII of the  
Dodd-Frank Wall Street Reform and Consumer Protection Act  
(the “Act”) (17 CFR Part 39)**

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Dear Mr. Stawick:

The trade associations comprising the “Not-For-Profit Electric End User Coalition” (the “Coalition”)<sup>1</sup> respectfully submit these comments to the Commodity Futures Trading Commission (the “Commission”) on the **Notice of Proposed Rulemaking on the End-User Exception to Mandatory Clearing of Swaps**, issued December 23, 2010 (the “End-User Exception NOPR”).<sup>2</sup>

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<sup>1</sup> The National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council (see Section I for a description of the members of each such trade association). The comments contained in this filing represent the comments and recommendations of the organizations comprising the “Coalition,” but not necessarily the views of any particular member with respect to any issue.

<sup>2</sup> 75 Fed. Reg. 80,747 (Dec. 23, 2010).

The Coalition's members are commercial enterprises, not swap dealers or major swap participants, and not financial entities. Our members engage in swaps only to mitigate or hedge commercial risks that arise in the course of their public service activities. Therefore, our comments focus on the aspects of the Proposed Rules under Part 39 that would require an "end user"<sup>3</sup> of non-cleared "swaps,"<sup>4</sup> of a type that the NFP Electric End Users define as "Energy Commodity Swaps,"<sup>5</sup> to register and comply with certain **reporting requirements as an entity**

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<sup>3</sup> This term is not defined in the Act, but is used to describe an entity that is not a "financial entity" (so we use the term "non-financial entity"), that utilizes swaps to hedge or mitigate commercial risk, and that notifies the Commission how it generally meets its financial obligations associated with entering into non-cleared swaps. CEA 2(h)(7)(A). Such a non-financial entity may except a "swap" to which it is a party from the clearing requirements of the Commodity Exchange Act, as amended by the Act (the "CEA") pursuant to what is called the "end-user exception." In some of the Proposed Rules published to date for comment, the Commission defines a category of swap party that is "non-SD/MSP counterparty," which encompasses both financial entities that are not swap dealers or major swap participants and non-financial entities. NFP Electric End Users are non-SD/MSP counterparties and non-financial entities, and the NFP Electric End Users anticipate utilizing the end-user exception in respect of all Energy Commodity Swaps to which they are parties. See Diagram #1. Therefore, the NFP Electric End Users will all register with the Commission for the proposed "end user only" sub-classification of "non-SD/MSP counterparties." See our recommendation for a CFTC-lite protocol for non-SD/MSP counterparty registration, recordkeeping and reporting requirements in our second General Theme on page four of this letter, and as more fully described in our comments to the Swap Data NOPRs for which web links are provided at footnote 11.

<sup>4</sup> We have footnoted this term, and direct the reader to the comment letter submitted by the Not-For-Profit Energy End User Coalition dated September 20, 2010, submitted in response to the Commission's August 2010 "Definitions ANOPR," and in particular to the comments on the definition of "swap" in that letter. A web link to such comment letter is available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26217&SearchText>. The comments herein are predicated on certain assumptions about how the Commission will define that term, and we reserve the right to change or expand our comments once the Commission's final rules in respect of that definition are issued. We use the term "non-cleared" in this comment letter, rather than "uncleared," so that our comments to the Commission on different rulemakings on identical concepts are consistent. The Act, and the CEA as amended by the Act, use the terms interchangeably. We respectfully request that the Commission confirm in its regulations, for the sake of clarity, that the terms are synonyms.

<sup>5</sup> We use the term "Energy Commodity Swaps" to mean (a) those non-cleared swaps referencing or derived on energy commodities in which the NFP Electric End Users transact in the ordinary course of their core public service activities, such as electric energy, natural gas, and other fuels for electric generation, including coal and fuel oil (but excluding crude oil, gasoline

in connection with executing swaps, in addition to reporting requirements the non-financial entity might have to report swap transaction data as a “reporting party” if it executes a swap with another non-SD/MSP counterparty. We are focused on preserving the value of the “end-user exception” by streamlining the regulatory reporting burdens and costs for non-financial entities like the NFP Electric End Users in light of three general Themes:

First, experienced risk managers and market participants in the United States electric power and natural gas industry believe that there are now, and will be after the Act becomes effective, more Energy Commodity Swaps executed which do not involve a swap dealer, major swap participant or other financial entity as a party than swaps executed in other categories, classes and types (or asset classes) of swaps.<sup>6</sup> We refer to these swaps as “end-user-to-end-user

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or refined petroleum products other than fuel oil -- these commodities are not germane to the NFP Electric End Users’ public service activities, and the markets for these commodities and related derivatives are distinguishable from the markets in which the NFP Electric End Users participate), (b) those non-cleared swaps referencing or derived on transmission, transportation, generation capacity or storage concepts or services related to the energy commodities described in (a), and (c) those non-cleared swaps referencing or derived on environmental or emissions regulations, or renewable energy or other environmental attributes, applicable to the NFP Electric End Users. All of these “Energy Commodity Swaps” reference or are derived on “nonfinancial commodities,” are intrinsically related to our members’ core public service activities, and many are subject to the continuing jurisdiction of regulators other than the Commission.

<sup>6</sup> In several places in the End-User Exception NOPR (and in other NOPRs issued to date), the Commission assumes that there are only a small number of swap transactions in which no swap dealer to major swap participant plays a role. See the End-User Exception NOPR at footnotes 9-13. See also footnote 18 in the Notice of Proposed Rule-making on Further Definition of Swap Dealer, Major Swap Participant and Eligible Contract Participant, 75 Fed. Reg. 80,174 at 80,180. The Commission’s assumption is based on the Commission’s reliance on two publicly-available, but financial-entity-dominated survey sources on over-the-counter derivatives markets: first, the survey by the International Swaps and Derivatives Association (“ISDA”) of its members, and second, the quarterly surveys by the Office of the Comptroller of the Currency (the “OCC”) of regulated financial institutions. These surveys may reflect comprehensive information about the scope of the global swaps markets **where at least one of the counterparties is a financial entity**. However, ISDA is a trade association comprised primarily of large financial institutions and other financial entities who transact regularly or act as dealers in the global derivatives markets. Only a few United States energy companies, other than major oil companies, are ISDA members. Moreover, in the Energy Commodity Swaps markets, many non-financial entities transact using the ISDA master agreement without being members of the ISDA trade association. In fact, ISDA facilitates this practice by providing physical energy annexes along with other annexes to the ISDA Master Agreement, so counterparties can engage in physical commodity and commodity derivatives transactions (that

swaps.”<sup>7</sup> There will be an even higher percentage of these end-user-to-end-user swaps if the Commission does not clarify its definition of “swap” to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day: including physical forwards, commercial options and transmission, transportation, capacity or other energy services transactions.<sup>8</sup> For NFP Electric End Users, it is critical that such end-user-to-end-user Energy Commodity Swaps take place with a minimum of new regulatory costs and burdens in order to preserve the value of the end-user exception.

Second, we recommend a “CFTC-lite” method of registration, recordkeeping and reporting for non-SD/MSP counterparties (including non-financial entities) that we believe will accomplish what the Act requires, and fulfill the Commission’s need for data to monitor the markets. We respectfully request that the Commission consider such an approach -- to recognize the differing burdens and costs being imposed by its new regulatory structure on non-SD/MSP counterparties like the NFP Electric End Users. As Congress and Chairman Gensler have recognized,<sup>9</sup> non-financial entities or “end users” are not financial entities, and do not represent the same degree of systemic risk as financial entities. This “CFTC-lite” method of regulation will also preserve access to the swap markets for end users hedging commercial risk. We refer you to Diagram #1, which outlines the CFTC-lite regulatory sub-classifications of the non-SD/MSP counterparty category of swap parties.

Third, to foster commercially efficient non-cleared swap markets consistent with the Commission’s fundamental mission, we recommend the Commission establish a regulatory

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by their terms settle financially) under the same ISDA master agreement. An ISDA survey of its members would not capture many end-user-to-end-user transactions. The OCC surveys reflect the derivatives activities of the financial institutions regulated by the OCC. Therefore, in the case of the OCC surveys, no end-user-to-end-user transactions would be reflected. **As a result, the Commission’s underlying assumption that there are relatively few “end-user-to-end-user swaps” is inaccurate, and it results in a fundamental misunderstanding by the Commission of the markets for Energy Commodity Swaps.** See Section ID beginning on page 8 below for a description of the unique aspects of the Energy Commodity Swaps markets.

<sup>7</sup> We use the term “end-user-to-end-user swaps,” but we also intend to include in this definition swaps that are executed by two non-financial entities, whether or not one or both of the non-financial entities elects the end-user exception.

<sup>8</sup> We reserve the right to submit revised or additional comments on this NOPR once the Commission issues its final rules on the definition of “swap” and other definitions, including “swap dealer” and “major swap participant.”

<sup>9</sup> Testimony of Chairman Gary Gensler before the House Committee on Agriculture, February 10, 2011, available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-68.html>.

reporting regime that minimizes reporting duplication, maximizes the best available source and timing for information capture, and streamlines reporting and public dissemination of swap transaction data to the public. Accordingly, we propose that the Commission clearly define and distinguish in its regulations among those reporting requirements that are appropriate and applicable: (i) to swap participant entities, (ii) to bilateral swap relationships (when a master agreement is executed), and (iii) to swap transactions (those “swap-by-swap” commercial decisions that are only made at the time a swap is executed).

In taking this approach, the Commission can structure its reporting requirements in the manner that does not require a significant change in the way bilateral market participants in the non-cleared swaps market interact today. It is inefficient and unproductive to burden bilateral counterparties engaged in the time-sensitive commercial negotiation of each swap transaction with repetitive and unnecessary representations and information exchanges. Also, there is no benefit or justification to require one counterparty (the “reporting party”) to meet swap-by-swap reporting requirements for entity data elements (for itself and the other counterparty), or for master agreement data elements that were already agreed for the express purpose of governing and representing all the counterparties’ subsequent swap transactions under a master agreement. Such an approach is cumbersome and will result in unnecessary time delays and transaction costs, greater potential for administrative recordkeeping and reporting errors, increased liabilities for reporting parties, and prolonged negotiations of the liability provisions and representations in master agreements.

We refer the Commission to Diagram #2, which gives our recommendation as to the notices, reports and data elements the Commission should require as periodic entity reports to be made directly to a registered entity such as a swap data repository (for use by the Commission), master agreement reports to be made to the swap data repository (as and when master agreements are executed between each pair of registered counterparty entities), and swap transaction data elements appropriate for reports by a reporting party at the time the swap is executed. Our recommendation is consistent with the recommendations we made in our pre-NOPR comment letter to the Commission’s End-User Exception Task Force,<sup>10</sup> and in our comment letters on the two recent Swap Data NOPRs.<sup>11</sup>

As the Commission (along with the Securities and Exchange Commission and the prudential regulators) embarks on the complex and interrelated rule-makings necessary to implement the Act, the Coalition respectfully requests that the regulators keep in mind at each

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<sup>10</sup> A web link to such comment letter, dated November 22, 2010, is [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission11\\_112210-email1.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission11_112210-email1.pdf).

<sup>11</sup> Web links to such comment letters, each filed February 7, 2011 are <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27623&SearchText> and <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27624&SearchText>.

step along the way how its Proposed Rules will impact the non-financial entities that are “end users” of commodities and swaps, and especially how the Proposed Rules will impact non-financial entities transacting among themselves, without a financial entity such a swap dealer or major swap participant to bear the burdens and costs of the types of reporting obligations to which such financial entities are accustomed. The NFP Electric End Users and other commercial energy companies are not financial entities, and they have not previously been regulated by the Commission. On the day after the effective date of the Act, each of these non-financial entities will still have a commercial enterprise to run, commercial risks to manage and, for the NFP Electric End Users, retail energy customers to serve.

The Act was intended by Congress to regulate the financial markets more effectively, to provide regulatory oversight to financial entities and to reduce risk to the financial system. It was also intended to bring more transparency to the swap markets. We fully support these policy objectives. However, the regulations must tell commercial enterprises which of their ongoing activities will now be regulated by the Commission and how to comply with the Commission’s new rules. The regulations should not impose unnecessary new regulatory costs and burdens on these non-financial commercial enterprises.

## **I. THE COALITION MEMBERS**

The coalition is comprised of three trade associations representing the interests of not-for-profit, consumer-owned electric utilities in the United States (collectively, the “NFP Electric End Users”).<sup>12</sup> The primary business of these NFP Electric End Users has been for well over 75 years, and still is today, to provide reliable electric energy to their retail consumer customers every hour of the day and every season of the year, keeping costs low and supply predictable, while practicing good environmental stewardship. The NFP Electric End Users are public service entities, owned by and accountable to the American consumers they serve.

### **A. NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION (“NRECA”)**

Formed in 1942, NRECA is the national service organization for more than 900 not-for-profit rural electric utilities and public power districts that provide electric energy to approximately 42 million consumers in 47 states or 12 percent of the nation’s population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all

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<sup>12</sup> The Coalition is grateful to the following organizations and associated entities who are active in the legislative and regulatory policy arena in support of the NFP Electric End Users, and who have provided considerable assistance and support in developing these comments. The Coalition is authorized to note the involvement of these organizations and associated entities to the CFTC, and to indicate their full support of these comments and recommendations: the Transmission Access Policy Study Group (an informal association of transmission dependent electric utilities located in more than 30 states), ACES Power Marketing and The Energy Authority.

electric energy sold in the United States. NRECA members generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. The vast majority of NRECA members are not-for-profit, consumer-owned cooperatives which distribute electricity to consumers. NRECA's members also include approximately 66 generation and transmission ("G&T") cooperatives, which generate and transmit power to 668 of the 846 distribution cooperatives. The G&T cooperatives are owned by the distribution cooperatives they serve. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost. All these cooperatives work together pursuant to their common public service mandate from their members, often without the type of contracts that exist between for-profit entities. Rather, many cooperatives deal with each other under take and pay "all requirements contracts" which set forth the terms of service/energy sales, but not necessarily the price for such service/energy sales. For example, as between a G&T cooperative and its distribution cooperative owner-members, the price is often determined based on a "cost of service" rate, with no market price component.

Electric cooperatives own approximately 43% of the distribution lines in the U.S., reaching some of the country's most sparsely populated areas, from Alaskan fishing villages to remote dairy farms in Vermont. In an electric cooperative, unlike most electric utilities, its owners -- called "members" of the cooperative -- are also customers, who are able to vote on policy decisions, directors and stand for election to the board of directors. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members.

The vast majority of NRECA's members meet the definition of "small entities" under the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. SBREFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that entities which provide electric services are "small entities" if their total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. 13 C.F.R. §121.201, n.1.

#### **B. AMERICAN PUBLIC POWER ASSOCIATION ("APPA")**

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and serve 45 million people. APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. These systems take various forms, including departments of a municipality; a utility board or a public utility district formed under state or local law; a joint action agency or joint power agency formed under state law to provide wholesale power supply and transmission service to distribution entity members; a state agency, authority or



instrumentality; or other type of political subdivision of a state. Like the members of NRECA, the vast majority of APPA's members are "small entities" under SBREFA.

Public power utilities perform a variety of electric utility functions. Some 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. All these systems work together pursuant to their common statutory and regulatory mandates. Some are "vertically integrated" electric utilities (engaging in generation, transmission, distribution and retail sales), while others are vertically integrated by contract with other "201(f) entities" (entities that are exempt from full Federal Power Act rate regulation under Section 201(f) of that statute), or by contract with third parties.

Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable, safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

#### C. LARGE PUBLIC POWER COUNCIL ("LPPC")

The Large Public Power Council is an organization representing 24 of the largest locally owned and operated public power systems in the nation. LPPC members own and operate over 75,000 megawatts of generation capacity and nearly 34,000 circuit miles of high voltage transmission lines. Collectively, LPPC members own nearly 90% of the transmission investment owned by non-federal public power entities in the U.S. Our member utilities supply power to some of the fastest growing urban and rural residential markets in the country. Members are located in 11 states and Puerto Rico -- and provide power to some of the largest cities in the country including Los Angeles, Seattle, Omaha, Phoenix, Sacramento, Jacksonville, San Antonio, Orlando and Austin.

Members of the LPPC are also members of APPA. LPPC members are larger in size than other APPA members due to the size and population density of the communities to which they provide power. LPPC members often require larger, more complex and more diverse types of resources to serve their communities as well, and therefore LPPC members own and operate more complex generation and transmission assets than many other APPA members. However, despite being larger in size and resources, LPPC members' public service mission remains the same -- to provide reliable, safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

#### D. THE COALITION'S MEMBERS ARE UNIQUE, AS ARE THE "MARKETS" IN WHICH THEY TRANSACT AND THE TRANSACTIONS IN WHICH THEY ENGAGE

The NFP Electric End Users represented by the Coalition include public power utilities and rural electric cooperatives. Some are quite large, but most of these NFP Electric End Users are very small, reflecting the communities they serve, the success of those communities in

providing reliable essential services for their citizens at the lowest reasonable rates and, in the case of rural electric cooperatives, the contribution to Americans' quality of life of the Rural Electrification Act of 1936.

Some NFP Electric End Users generate, transmit and sell electric energy to their fellow public power systems and cooperatives and to third parties at wholesale. Others purchase electric energy (from associated public power systems and cooperatives or from third parties), and distribute it to retail consumers. Still others perform all or a combination of these commercial functions. The coalition's members are unique among "end users" whose transactions are potentially subject to the Commission's regulation as "swaps" (even among those who are "end users" of energy and energy-related commodities and swaps) in that the NFP Electric End Users have no stockholders and are accountable to elected and/or appointed officials, and ultimately to the consumers of their services. Similarly, the electric cooperatives which are NFP Electric End Users are directly accountable to their consumer-members and boards. Any gains or losses on an NFP Electric End User's energy transactions result in higher or lower energy costs to American businesses and consumers. The NFP Electric End Users do not seek profit for shareholders or investors. Their public service mission is the singular purpose and reason for their existence. The interconnected Federal, state and local system of laws and financial regulation within which they operate is designed specifically to support this public service mission.

The market for power in North America is comprehensively regulated at the Federal, state and local level, with a focus on reliability of service and regulated rates payable by the retail customer. In addition, the electric industry in North America (including the NFP Electric End Users) is subject to extensive environmental regulations and, in many states, renewable energy standards. Unlike other markets for over-the-counter ("OTC") derivatives and/or "swaps" (as newly defined by the Act), these are not unregulated markets. They are comprehensively regulated, and any new regulatory structure must be carefully tailored so as not to conflict with existing regulatory structures.

Some of the NFP Electric End Users' energy transactions are conducted through, "on," or "in" the "markets" operated by various regional transmission organizations or independent system operators (collectively, "RTOs"). Each RTO operates its "market" in a defined geographic area of the United States, and all RTOs operate under a comprehensive regulatory structure established by the Federal Energy Regulatory Commission ("FERC"). The FERC-regulated markets are established by tariff in many instances, rather than by contract, and analogies between these FERC-created/FERC-regulated "markets," and the bilateral contract markets between independent and arm's length third parties, are inapt. Although, in some ways, the markets conducted by the various RTOs are similar in structure, no two RTO markets are exactly alike and their "products" or "transactions" are not fungible between RTOs. Each RTO also has in place credit risk mitigation policies and procedures to protect market participants from credit risk from other market participants, and to protect the RTO markets from disruption

due to market participant default. These RTO credit risk mitigation policies are established and maintained in accordance with the principles established by FERC.<sup>13</sup>

FERC's mandate from Congress under the Federal Power Act is to regulate in the "public interest" -- which is interpreted as the delivery of reliable electric energy to American consumers at "just and reasonable" rates. It is under this regulatory mandate that the RTOs (overseen by FERC) have established, and currently maintain and operate, the FERC-regulated markets. The RTO markets are intrinsically tied to the reliable physical transmission and ultimate delivery of electric energy in interstate commerce at just and reasonable rates.

Most of the Energy Commodity Swaps in which the NFP Electric End Users are engaged are currently conducted under exemptions or exclusions from the Commodity Exchange Act (the "CEA"), whether conducted in the bilateral OTC contract market (as most are, including RTO transactions) or on exempt commercial markets. The participants in these markets are "eligible contract participants" either by virtue of their size and financial characteristics, or by virtue of their use of underlying cash commodities relevant to their businesses (as "eligible commercial entities"). Other than a few large industrial companies, retail energy consumers generally do not participate in these markets directly. The physical and financial commodity transactions occur principal to principal, through agents and energy brokers, with a wide range of counterparties.

NFP Electric End Users engage in a substantial number of non-cleared, "end-user-to-end-user" Energy Commodity Swaps.<sup>14</sup> Counterparties for these Energy Commodity Swaps are typically the NFP Electric End Users' traditional commercial (physical energy commodity) counterparties, rather than financial entities (whether financial intermediaries or financial institutions) from whom the NFP Electric End Users secure financing. In the markets for Energy Commodity Swaps, an end user may be a buyer one day and a seller the next, as its seasonal commercial needs for one or more energy commodities fluctuate. And the end user may be a buyer of one type of energy commodity or derivative, and a seller of another type of energy commodity or derivative. In the markets for Energy Commodity Swaps, a single energy company may buy natural gas swaps and sell electric energy swaps for the same month. Or it may buy natural gas swaps for one month and sell natural gas swaps for the next month. Most energy companies' commercial risks are geography-specific and seasonal, and risk management decisions are made based on changing long-term weather forecasts, generation availability and/or load projections. Some energy companies hedge multiple commodity risks, such as an electric

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<sup>13</sup> Such policies were recently updated by FERC in its Final Rule on Credit Reforms in Organized Wholesale Electric Markets, 18 CFR Part 35, Docket No. RM10-13-000, Order No. 741 (issued October 21, 2010).

<sup>14</sup> See footnote 6. There will be an even higher percentage of these end-user-to-end-user swaps if the Commission does not clarify its definition of "swap" to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day. See footnote 8.

utility hedging the commercial risks of its input (natural gas as fuel) and output (electric generation/deliverable electric energy). Cross-commodity hedging is also commonplace. There is no “sell-side/buy-side” dichotomy in the non-cleared Energy Commodity Swap market, and there are often no financial intermediaries -- many non-financial entities play multiple commercial end user roles.<sup>15</sup>

The transactions contain customized, non-quantitative operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between commercial businesses. Although legal and administrative terms are standardized through the use of master agreements, the negotiated schedules to such master agreements and individual transaction confirmations are highly negotiated and differ based on the needs and preferences of each pair of counterparties. These are commercial transactions, when viewed through the traditional lens of “goods” and “services” used by American businesses. It is only when the transactions are viewed through the financial markets lens that these transactions are described using the financial market regulatory labels such as “exempt commodities,” “swap agreements,” “swaps” or “nonfinancial commodities” -- and analogized to “futures contracts” or “positions” created or engaged in by financial entities on a transaction-by-transaction basis for profit or speculation, and potentially subject to regulation traditionally applicable to such financial market transactions.

Credit risk management in the bilateral contract world of non-cleared Energy Commodity Swaps is grounded in broad-based, continuing and reciprocal commercial credit risk analysis and credit risk management between each set of counterparties, backstopped by credit support and collateralization principles. This type of credit risk management is not analogous to the transaction-by-transaction margining (without regard to counterparty identity) that takes place in today’s CFTC-regulated futures and options markets.

Today, the NFP Electric End Users have the commercial risk management choice to conduct some Energy Commodity Swap transactions on CFTC-regulated contract markets, or to clear some of these transactions through CFTC-regulated centralized clearing entities. Listed and cleared transactions are typically those delivered at “hubs,” in tradable increments and for tradable durations -- transactions or “products” that are “standardized” and “fungible” in financial market terms, and with sufficient contract trading liquidity to allow for financial markets to function. As the CFTC-regulated financial markets have evolved, some of the larger NFP Electric End Users have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments. But the vast majority of NFP Electric End Users’ commercial commodity transactions and Energy Commodity Swaps are still conducted “the old fashioned way:” under tariffs within the public power and cooperative systems or by contract with known and reliable physical commodity suppliers and customers, and not with CFTC-regulated financial intermediaries or on exchanges or with clearing entities. And the vast

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<sup>15</sup> Please let us know if the NFP Electric End Users can provide the Commission with further information on this unique aspect of the markets for Energy Commodity Swaps.

majority of NFP Electric End Users do not either post collateral to their counterparties or require that their counterparties post collateral to them.<sup>16</sup>

Due to the Act's wholesale deletion of applicable exemptions in the CEA, and the potentially sweeping nature of the Act's new definitions, these everyday business transactions of the NFP Electric End Users are at some risk of being redefined as "swaps." Although Congress has repeatedly indicated that its intention was NOT to reduce risk management options for end users or to impose new regulatory costs on end users hedging the risks of traditional commercial enterprises, Congress is relying on the regulators to implement understandable rules consistent with that intent. Congress did not intend for the regulators to read the expansive language of the Act without regard to legislative intent or to regulate and impose costs on end users as if they were financial entities or professional financial market participants.<sup>17</sup>

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<sup>16</sup> For examples of the diversity of credit support and collateral (or "margin") relationships which the NFP Electric End Users have in place with their Energy Commodity Swap counterparties, as well as the diversity of assets, load (customers served within the utility's geographic service territory), energy hedging and risk management policies, and swap usage within the coalition's membership, see the profiles attached to the NFP Electric End Users' comment letter to the Capital and Margin Task Force, dated December 14, 2010. Such comment letter can be found at the following link: [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dftsubmission/dftsubmission5\\_121410-0017.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dftsubmission/dftsubmission5_121410-0017.pdf). None of these profiles purport to be "typical" of large, medium or small NFP Electric End Users (by number of customers). No NFP Electric End User is typical, given their diverse commercial profiles. However, the Commission's regulations have to work for all NFP Electric End Users who share the identical public service mission.

<sup>17</sup> The Commission should not, in its rule-making under the Act, be distracted by those commentators who intone or invoke the names "AIG" or "Enron," without analysis. In fact, neither AIG nor Enron would be entitled to the end-user exception under the CEA as amended by the Act, and neither would be exempt from margin requirements applicable to cleared swaps by clearing entities. AIG, whose substantial positions in non-cleared credit default swaps allegedly endangered the financial system, would be registered and regulated as a "major swap participant" in credit default swaps. Enron, with its notorious "one-to-many" electronic interface offering to buy or sell swaps from energy to broadband, is the poster child for the Act's definition of "swap dealer," and would be registered and regulated as such. The NFP Electric End Users, and other non-financial entities hedging commercial risk with Energy Commodity Swaps and other types of non-cleared swaps, simply do not represent the types of systemic risk that the mere mention of those entities' names implies.

## II. GENERAL COMMENTS<sup>18</sup>

We begin our comments on this NOPR with our general Theme #1: in the markets for Energy Commodity Swaps, there are more “end-user-to-end-user swaps” than in other swap categories or asset classes. Many of the NFP Electric End Users execute a measurable percentage of Energy Commodity Swaps with their traditional physical energy commodity counterparties, in addition to executing such Energy Commodity Swaps with financial institutions or with ISDA members.<sup>19</sup>

In the futures and exchange-traded options markets currently regulated by the Commission (prior to the Act), the Commission required reports of information from regulated market professionals, such as dealers, brokers and other entities regulated by the Commission (colloquially called the “sell-side”), including information about their “customers” (the “buy-side”). In effect, the Commission required the market professionals to gather such information from their customers and report it to the Commission on a transaction-by-transaction basis, because the Commission did not have jurisdiction over the customers to require that information be reported directly to it. And there was always a “sell-side” market professional involved -- that is the way the regulated futures markets are currently structured. In addition, the Commission required the exchanges, the clearing entities and exempt commercial markets (also entities regulated by the Commission) to report information on a transaction-by-transaction basis.

In the market for Energy Commodity Swaps, there is no consistently applicable “sell-side/buy-side” market dichotomy. See Section ID. However, as part of its new jurisdiction over the swap markets, the Commission now has limited jurisdiction over both parties to a non-cleared swap, even if one or both of the parties is a non-financial entity, to the extent the Commission has the authority to monitor the use of the end-user exception. As a result of this new jurisdiction, by using an entity registration system, the Commission can require direct “entity reporting” from non-financial entities which execute swaps.

We respectfully note that many of the “entity” reporting requirements contemplated by the Act are not swap-specific, but are general in nature. The entity data should be reported directly to a registered entity such as a swap data repository, for use by the Commission. Moreover, as we recommended in our comments to the Data NOPRs, we respectfully request

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<sup>18</sup> The coalition has reviewed the comments submitted in this docket by the Edison Electric Institute and the Electric Power Supply Association (the “EEI/EPSA Letter”), and we will concur by reference to Sections of that EEI/EPSA Letter herein as appropriate, rather than restating the comments.

<sup>19</sup> See footnote 6. There will be an even higher percentage of these end-user-to-end-user swaps if the Commission does not clarify its definition of “swap” to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day. See footnote 8.

that the Commission differentiate between those data elements that can be collected at the time a swap master agreement is executed between two counterparties, rather than burdening the swap-by-swap negotiations and transaction mechanics between those same counterparties with confirming such prior contractual choices. See Diagram #2.

A. THE COMMISSION SHOULD STREAMLINE THE REGULATORY REQUIREMENTS FOR UTILIZING THE END-USER EXCEPTION

End-user-to-end-user Energy Commodity Swaps are not always executed electronically, nor are they always verified electronically, nor are the non-financial entity's recordkeeping and reporting systems similar to those that a financial entity might maintain.<sup>20</sup> If two non-financial entity counterparties execute an Energy Commodity Swap and both claim the end-user exception, one of the two will act as reporting party for the swap. The negotiation and execution of a swap should not require the counterparties to confirm or reconfirm entity data which has previously been submitted by each counterparty directly to a registered entity for use by the Commission. Nor should the parties have to confirm or reconfirm master agreement terms already in place between them and reported to a registered entity for use by the Commission. See our general Theme #3 and Diagram #2.<sup>21</sup>

1. *The Statute Does Not Require Swap-By-Swap Financial Obligation Notices.* Proposed Rule 39.6 requires 10 additional data elements to be reported for each swap in which one of the counterparties claims the end-user exception (12 for a swap where the "end user" counterparty is a public company). If both non-financial entity counterparties are public companies and both elect the end-user exception, that is 24 additional data elements per swap. This cumbersome requirement goes well beyond what the statute requires.
2. *The Commission Should Require Only What the Statute Requires in Terms of Financial Obligation Notices.* We have reviewed Section VA of the EEI/EPSC Letter and we concur with the comments made on this issue. CEA Section 2(h)(7)(A)(iii) requires notice to the CFTC of how a non-financial entity "generally meets its financial obligations associated with non-cleared swaps." For public companies, CEA Section 2(j) requires a public company's Board committee to approve a company's "decision to enter into swaps that are subject to such exemptions [intended to reference the end-user exception in CEA 2(h)]." These entity representations can be made by the non-financial

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<sup>20</sup> See our recommendations for a "CFTC-lite" protocol to registration, recordkeeping and reporting in general Theme #2 and our comments to the Swap Data NOPRs. Web links are provided at footnote 11.

<sup>21</sup> This recommendation is consistent with our recommendations in the comment letters on the Swap Data NOPRs.

entity directly to the swap data repository for use by the Commission, and should not be made and remade, confirmed and reconfirmed between counterparties in the midst of the time-sensitive negotiation of a swap used to hedge commercial risk. We recommend entity representations be made no more frequently than annually, unless there is a change to the information being reported. We provided suggestions on the form and substance of such regulatory Financial Obligation Notices in our pre-NOPR comment letter to the Commission's End-User Exception Task Force, and we refer the Commission to those comments.<sup>22</sup>

Proposed Rules 39.6(b)(5) and (6) would unnecessarily require new contractual representations and warranties between swap counterparties (requiring contract changes to all outstanding master agreements), would require entity data and master agreement data to be unnecessarily exchanged between the counterparties during time-sensitive commercial negotiations, and would require cumbersome swap-by-swap reporting (creating the potential for misunderstandings, potential liability for reporting inaccuracies and delays in reporting swap transaction data). We respectfully comment that all this exchange of data is unnecessary and burdensome, and the Commission should revise its Proposed Rules to streamline the process.<sup>23</sup>

B. THE COMMISSION SHOULD NOT ESTABLISH UNNECESSARY TRANSACTION HURDLES FOR NON-FINANCIAL ENTITIES HEDGING COMMERCIAL RISK

For non-financial entities who are not otherwise subject to the Commission's jurisdiction, the technological and administrative details and the incremental costs to engage in "the first" Energy Commodity Swap or "a few" Energy Commodity Swaps after the effective date of the Act should not be an intimidating set of regulatory hurdles. Whether a non-financial entity chooses to engage in one or one thousand Energy Commodity Swaps, the non-financial entity will be required to become familiar with the CEA, register with the Commission (or a swap data repository), enter into new master agreements or modify one or more of its existing master

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<sup>22</sup> See footnote 10 for a web link.

<sup>23</sup> On page 80,750, the NOPR asks whether it will be difficult or "prohibitively expensive" to report the information required by Proposed Rule 39.6. We respectfully suggest that those are not the right questions. Rather, we request the analysis to focus on whether the cumbersome swap-by-swap process is required by the statute, and whether there are not simpler and more effective ways to achieve the regulatory objectives without unnecessary costs. See Section IV below. The Commission asks, on page 80,752 whether the time needed to gather the required information will disrupt the transaction process for swaps to any material extent. The answer from the NFP Electric End Users is "yes." Our focus is on preserving the value of the end-user exception as it was intended by Congress -- as a cost-effective commercial risk management tool.



agreements, and comply with certain periodic notifications, and new recordkeeping and reporting requirements. In addition, if it is the “reporting party” for any swap, at the time the swap is executed, it will have to report swap transaction data and, thereafter for the life of that Energy Commodity Swap, the reporting party will have to report state data in respect of that Energy Commodity Swap.<sup>24</sup>

For NFP Electric End Users, enterprise staffing and administrative processes, and mission-critical information and operating systems, are focused on 24/7 reliable delivery of energy in accordance with public service commitments. The NFP Electric End Users’ swap execution processes are intended to make time-sensitive decisions on material terms of the swap transaction, while at the same time assuring that the swap transaction represents a prudent commercial risk decision in volatile commodity swap markets. Especially for non-financial entities that only occasionally engage in Energy Commodity Swaps, adding dozens of additional, unnecessary negotiation and confirmation items to the swap transaction checklist will be expensive, will delay execution of swaps to hedge commercial risk, and will make Energy Commodity Swaps a less effective commercial risk management tool.

C. THE COMMISSION SHOULD NOT MAKE IT MORE CUMBERSOME TO TRANSACT IN NON-CLEARED SWAPS WITH OTHER NON-FINANCIAL ENTITIES THAN WITH FINANCIAL ENTITIES<sup>25</sup>

As discussed in Section ID, the markets for Energy Commodity Swaps in which the NFP Electric End Users participate often do not involve financial market intermediaries. The Act (as implemented by the Commission’s rule-makings) should not make end-user-to-end-user swaps so cumbersome and so costly that non-financial entities are forced to deal with financial intermediaries (and pay the related costs) in order to comply with the new regulatory burdens.<sup>26</sup>

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<sup>24</sup> See Section IIC below.

<sup>25</sup> We have reviewed Section VC of the EEI/EPSC comment letter, and we concur with the comments on this issue. We provided to the Commission our recommendations on “reasonable time frames for reporting swap information” for end-user-to-end-user swaps, and the “alternatives to automated electronic reporting processes” for such swaps (referenced in the EEI/EPSC letter in Section VC) in our comments on the Swap Data NOPR, and refer the Commission to our views expressed therein. A web link to that comment letter can be found at footnote 11.

<sup>26</sup> See footnote 6.

D. THE COMMISSION SHOULD CLARIFY THE “CHECK THE BOX” SWAP-BY-SWAP REPRESENTATIONS AS THEY APPLY TO NON-CLEARED SWAPS

If the “Financial Obligation Notices” described in Proposed Rule 39.6 must be reported for each swap, the Commission should clarify the meaning of several of the Proposed Rules including:

1. The Commission is respectfully asked to confirm that, in representing which swaps are secured by collateral, the counterparty should check the box under Proposed Rule 39.6(b)(5)(ii) only if “all or any portion of the financial obligations associated with the reported swap **are secured** by collateral that **has been pledged** . . . to the swap counterparty” at the time the swap is entered into, and that the counterparty should “check the box” under Proposed Rule 39.6(b)(5)(i) only if the obligations associated with the reported swap **are to be secured in the future** by collateral that **is to be, or may in the future be, pledged** . . . to the swap counterparty pursuant to a master agreement or other credit support agreement applicable to the swap. In other words, Proposed Rule 39.6(b)(5)(i) is the appropriate box where the counterparties have in place collateralization arrangements subject to agreed unsecured credit thresholds.
2. If the swap counterparty relationship involves no credit support, no collateral (or collateralization) provisions, and no guaranties -- so none of Proposed Rules 39.6(b)(5)(i)-(iii) apply -- and a non-financial entity does not have **available** assets, lines of credit or other financial resources at the time the swap is executed, but nonetheless “intends to **generally** meet its financial obligations associated with non-cleared **swaps**” by managing its commercial risks prudently, offsetting its obligations under its non-cleared swaps against those commercial risks and, for an NFP Electric End User, passing through its costs and benefits of hedging to its retail energy customers during the time period(s) for which a swap hedges or mitigates commercial risk (pursuant to accepted and allowed energy rate-making processes), the Commission is requested to clarify whether such counterparty should check the box for Proposed Rule 39.6(b)(5)(iv) or for (v). In other words, when must the financial resources be “available” to a non-financial entity to check the box for (iv): at the time the swap is executed, or by the time the swap is expected to settle and hedge or mitigate the commercial risk?

E. SAFE HARBOR FROM MONETARY PENALTIES AND SANCTIONS

On page 80,750, the NOPR, the Commission asks whether the swap-by-swap reporting requirements are clear and what additional instructions should be adopted. If the information required by Proposed Rule 39.6 is required for each swap, the Rules should include safe harbors for reporting parties for administrative and inadvertent reporting errors or delays that have no

material effect on the relevant swap markets, and for any reporting party that relies in good faith on representations made to it by the non-reporting party.

F. BROAD DEFERENCE TO NON-FINANCIAL ENTITIES HEDGING COMMERCIAL RISK

We have reviewed Section VI of the EEI/EPSC Letter filed in this docket, and we concur with the comments on this issue. We are generally supportive of the Commission's definition of "hedging or mitigating commercial risk," and support utilizing the same definition in the end-user exception and elsewhere in the CEA. The Commission should give maximum deference to non-financial entities to determine, at the time a swap is entered into, the "economically appropriate" way to hedge commercial risks facing their enterprises. Risk management issues and practices vary considerably by commercial risk being hedged, by industry, by the size of a commercial enterprise's operations and administrative staff, by number of swaps of a particular class, category or type in which such non-financial entity engages, and by the risk appetite or hedging strategies of the commercial enterprise. The Commission should make it clear in its rules that the commercial risk management decision is made at the time the swap is entered into based on the facts and circumstances known by the non-financial entity at that time. The rules should be clear that the Commission will not second-guess that knowledge, the decision to enter into the swap or the terms of the swap, and should not review such commercial risk management decisions with "20/20 hindsight."

The Commission asks whether "single risk or aggregate risk hedging" or "single entity or consolidated group hedging" is appropriate, whether "industry-specific rules on hedging should apply, or apply only to certain swap categories," and whether "asset optimization" or "dynamic hedging" should be considered appropriate. We encourage the Commission not to be proscriptive about commercial risk management practices for non-financial entities, but to allow non-financial entities to establish and implement commercial risk management principles and procedures economically appropriate to their unique circumstances. Moreover, although evolving industry "best practices" may be aspirational goals, generalized "best practices" cannot be regulatory requirements for all non-financial entities.

The Commission also asks whether special considerations are warranted with respect to the use of non-cleared swaps by non-profit, governmental, or municipal entities engaged in electric power or energy activities. We respectfully request that the Commission clarify in its Proposed Rules that "commercial enterprise" is intended to include (i) a governmental entity (including the United States, a State or a foreign government) and a political subdivision of any such governmental entity, (ii) a multinational or supranational governmental entity, and (iii) an instrumentality, agency or department of any such governmental entity or political subdivision, and (iv) a not-for-profit or tax-exempt entity, including an electric cooperative.

G. AFFILIATE ISSUES

We have reviewed Section VD of the EEI/EPSC Letter, and concur in general with the comments on this issue. The Commission should not limit the ability of non-financial entities to

hedge commercial risks through “affiliated” entities. Moreover, the Commission should clarify in its rules that the defined term “affiliate” or “affiliated” includes the unique ways in which NFP Electric End Users maintain affiliate relationships.

The NFP Electric End Users respectfully request that the Commission clarify in its rules its interpretation of CEA Section 2(h)(7)(D)(i) to allow members of a “Related NFP EEU Group” to act for or on behalf of each other,<sup>27</sup> and to allow affiliated entities of NFP Electric End Users to hedge the NFP Electric End Users’ commercial risks. To understand the NFP Electric End Users’ affiliates, we refer the Commission to ACES Power Marketing, which is wholly-owned by electric cooperatives. ACES Power Marketing acts as agent for its NFP Electric End User member/owners in executing risk management transactions in the physical energy commodity, energy futures and Energy Commodity Swaps markets. We also refer the Commission to The Energy Authority, which is owned by public power entities and, as its regular business, it executes physical energy commodity, futures and Energy Commodity Swaps for and on behalf of NFP Electric End Users. Both ACES Power Marketing and The Energy Authority are “affiliates” of NFP Electric End Users (they are principally owned by NFP Electric End Users). The Commission’s rules should provide that affiliated entities such as ACES Power Marketing and The Energy Authority should be able to utilize the end-user exception for the NFP Electric End User on whose behalf the affiliated entity is acting. In the end-user exception rules, the word “affiliate” or “affiliated entity” shall mean any member of a Related NFP EEU Group or any entity principally owned by NFP Electric End Users.<sup>28</sup>

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<sup>27</sup> We use the term “Related NFP EEU Group” to describe the unique “federated systems” of NFP Electric End Users discussed in Section I. For example, some electric cooperatives which provide electric service to their members/consumers, and some municipal or other governmental entities providing electric utility services to their constituents, are also “members” (for cooperatives) or “participants” (for governmental entities) in larger NFP Energy End Users entities. For example, an electric “distribution cooperative” may also be a member of a “generation and transmission cooperative (a G&T cooperative).” Or, a municipal electric utility may also be a participant in a “joint action agency” or a “joint power authority.” NFP Electric End Users also act as members of joint project entities, established to build or operate large energy infrastructure projects, or as co-owners or operators of such infrastructure assets, without an intervening project entity. These groups of related NFP Energy End Users (“Related NFP EEU Groups”) are **not** analogous to corporate affiliates, families of affiliated investment funds or limited partnerships, or other affiliated groups of independent for-profit entities. What binds a Related NFP EEU Group together is a shared public service commitment to providing reliable and affordable electric service to consumers and businesses in their respective service territories.

<sup>28</sup> NRECA has reviewed the comment letter submitted by the National Rural Utilities Cooperative Finance Corporation (“CFC”) in this docket and concurs with the comments made by CFC in such letter. As NFP Electric End Users and member-owners of CFC, the rural electric

**III. ALL COMMENT PERIODS SHOULD REMAIN OPEN UNTIL ALL THE BASIC RULES UNDER TITLE VII OF THE DODD-FRANK ACT HAVE BEEN PROMULGATED. THEREAFTER, ONCE THE RULES ARE FINALIZED, THE COMMISSION SHOULD PROVIDE EXTENDED TRANSITION PERIODS TAILORED TO THE NEEDS OF NON-FINANCIAL ENTITIES IN THE DIVERSE MARKETS FOR DIFFERENT CATEGORIES, CLASSES AND TYPES OF SWAPS USED AS COMMERCIAL RISK MANAGEMENT TOOLS**

The coalition urges the Commission to hold open the comment periods on all initial rules being promulgated under the Act, to enable various industries such as the energy industry, and various types of market participants in the diverse markets for swaps, to consider the regulations and the corresponding definitions as a whole. The rules are complex and interconnected, and create a new market structure within which non-financial entities will need to conduct their commercial enterprises and hedge their commercial risks. The Coalition appreciates the Chairman's recent statement that the Commission has established a "31st rulemaking team" (in addition to the 30 task forces originally established by the Commission to draft rules under the Act), whose sole task is to review the regulations under the CEA as a whole, in light of the changes to the CEA made by the Act.<sup>29</sup> We look forward to working with this new team to provide the perspective of the non-financial entity "end user" of non-cleared swaps -- a type of entity over which the Commission, prior to the Act, did not have jurisdiction in many respects. In reviewing the existing regulations, as well as in the current rule-makings, we encourage the Commission to assure that its rules, taken as a whole, are clear, consistent and understandable to entities like the NFP Electric End Users.

In the case of the markets for Energy Commodity Swaps, the new market structure will need to be integrated with the existing regulatory structures within which the energy companies currently conduct their commercial enterprises. Once the rules are finalized, the NFP Electric End Users will need substantial time to analyze their operations and install new systems, staffing and operating procedures and protocols to adapt to the new market structure, while continuing to

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cooperatives rely on CFC for access to the non-governmental capital markets. All of the swaps that CFC uses to hedge its risks also serve to hedge the NFP Electric End Users' commercial risks by allowing CFC to provide NRECA members the long-term financing for energy infrastructure development projects. We respectfully request that the Commission clarify in its rules that, for purposes of the end-user exception, an "affiliate" of the NFP Electric End Users includes a non-profit, tax-exempt cooperative of which NFP Electric End Users are members, and which is not a depository institution. In order to provide regulatory certainty, the Commission must confirm in the rules that a cooperative entity such as CFC can elect the end-user exception for swaps used to hedge or mitigate commercial risk.

<sup>29</sup> Testimony of Chairman Gary Gensler before the House Committee on Agriculture, February 10, 2011, available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-68.html>.

seamlessly deliver reliable and affordable electricity to American consumers and businesses and comply with their existing regulatory and corporate recordkeeping and reporting requirements. We urge the Commission to allow time for comprehensive review of the new market structure prior to making the complex new rules effective, and transition times that are adequate for non-financial entities to adapt their commercial enterprises to the new market structure and regulatory protocols.<sup>30</sup>

#### **IV. THE COMMISSION MUST CONSIDER THE OVERALL IMPACT OF ITS RULES PROMULGATED UNDER THE ACT ON SMALL ENTITIES**

The Coalition's members include many "small entities" as that term is defined in the Small Business Regulatory Flexibility Act. 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). 13 C.F.R. §121.201, n.1. Each of the complex and interrelated regulations currently being proposed by the Commission has both an individual, and a cumulative, affect on such small entities. Whether a particular proposed regulation is required by the Act, or is proposed pursuant to the Commission's "interpretation" of the Act (such as the Real-Time Data NOPR), or is proposed pursuant to "implicit" authority or "to provide guidance and clarity" for the Commission's jurisdiction under the Act (see the Second Interim Final Rule, 75 Fed. Reg. 78,892, issued December 17, 2010, at 75,893), the Commission rule-makings under the Act constitute an accumulation of interrelated regulatory burdens and costs on non-financial small entities like the NFP Electric End Users, who seek to transact in Energy Commodity Swaps only to hedge the commercial risks of their not-for-profit public service activities. The NFP Electric End Users reserve their rights as small entities to assess the full impact of the initial rule-makings being promulgated by the Commission under the Act, and to require a SBREFA analysis be conducted with respect to those regulations as a whole.

In each of its ongoing rule-makings, the Commission acknowledges that it has no experience under the new requirements of the Act in regulating the swaps markets or non-financial entity market participants such as the NFP Electric End Users. Each Proposed Rule addresses a different piece of the Commission's overall rule-making challenge under the Act. The Commission's cost-benefit analysis in each NOPR includes assumptions about the number of non-cleared "swaps," the number of "swap dealers" and major swap participants," the number of "financial entities," the number of annual transactions, the number of end-user-to-end-user transactions, the number of calculations, valuations and disclosures, and what information the Commission needs about the non-cleared swaps markets or each non-cleared swap transaction or each market participant. The NFP Electric End Users reserve the right to dispute all these assumptions, and request that the Commission fulfill its statutory requirements under SBREFA

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<sup>30</sup> We have reviewed Section VII of the EEI/EPSC Letter filed in this docket, and we concur with the comments on this issue. We recommend that longer transition periods be allowed for those non-financial entities, like the NFP Electric End Users, that expect to elect the end-user exception for all of their swaps, and that have no independent resources from which to pay the cost of the new regulatory market structure.

to provide economic data showing that the aggregate costs and cumulative regulatory burdens imposed on such small entities by the initial rule-makings to implement the Act are necessary, and that there are no alternatives to achieving the regulatory goals that would impose fewer burdens and less costs on the NFP Electric End Users and energy consumers.

## **V. CONCLUSION**

The Coalition encourages the Commission to consider the perspective of non-financial entities using swaps to hedge commercial risk at every step of its regulatory rule-making process under the Act, and to ask whether its rules are clear to those who are not regular participants in the financial markets. We respectfully request that, as the Commission drafts its rules, it carefully consider the questions of and consequences to those who operate commercial enterprises and are drawn into this new regulatory environment only because of the Act's broad statutory language could be interpreted to redefine traditional commercial contracts as "commodities" or as "swaps." And we respectfully request that only the minimum, necessary regulatory burdens and costs be applied to non-financial entities participating in the markets as "end users" hedging commercial risk. Each new direct or indirect cost or regulatory recordkeeping or reporting requirements will result, dollar for dollar, in higher costs to the NFP Electric End Users' customers and owners -- approximately 87 million consumers of electric energy.

We stand ready to help the Commission understand our businesses, our industry and our markets, our transactions and documentation, and how our not-for-profit members use Energy Commodity Swaps to hedge the commercial risks inherent in their public service activities. Please contact any of the Coalition's representatives for information or assistance.

David Stawick, Secretary  
February 22, 2011  
Signature Page

**END-USER EXCEPTION TO  
MANDATORY CLEARING OF SWAPS**

Respectfully yours,

**THE "NOT-FOR-PROFIT ELECTRIC END USER  
COALITION":**

**NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION**

By: Russ Wasson  
Russell Wasson  
Director, Tax, Finance and Accounting  
Policy

**AMERICAN PUBLIC POWER ASSOCIATION**

By: \_\_\_\_\_  
Susan N. Kelly  
Senior Vice President of Policy Analysis  
and General Counsel

**LARGE PUBLIC POWER COUNCIL**

By: \_\_\_\_\_  
Noreen Roche-Carter  
Chair, Tax & Finance Task Force

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



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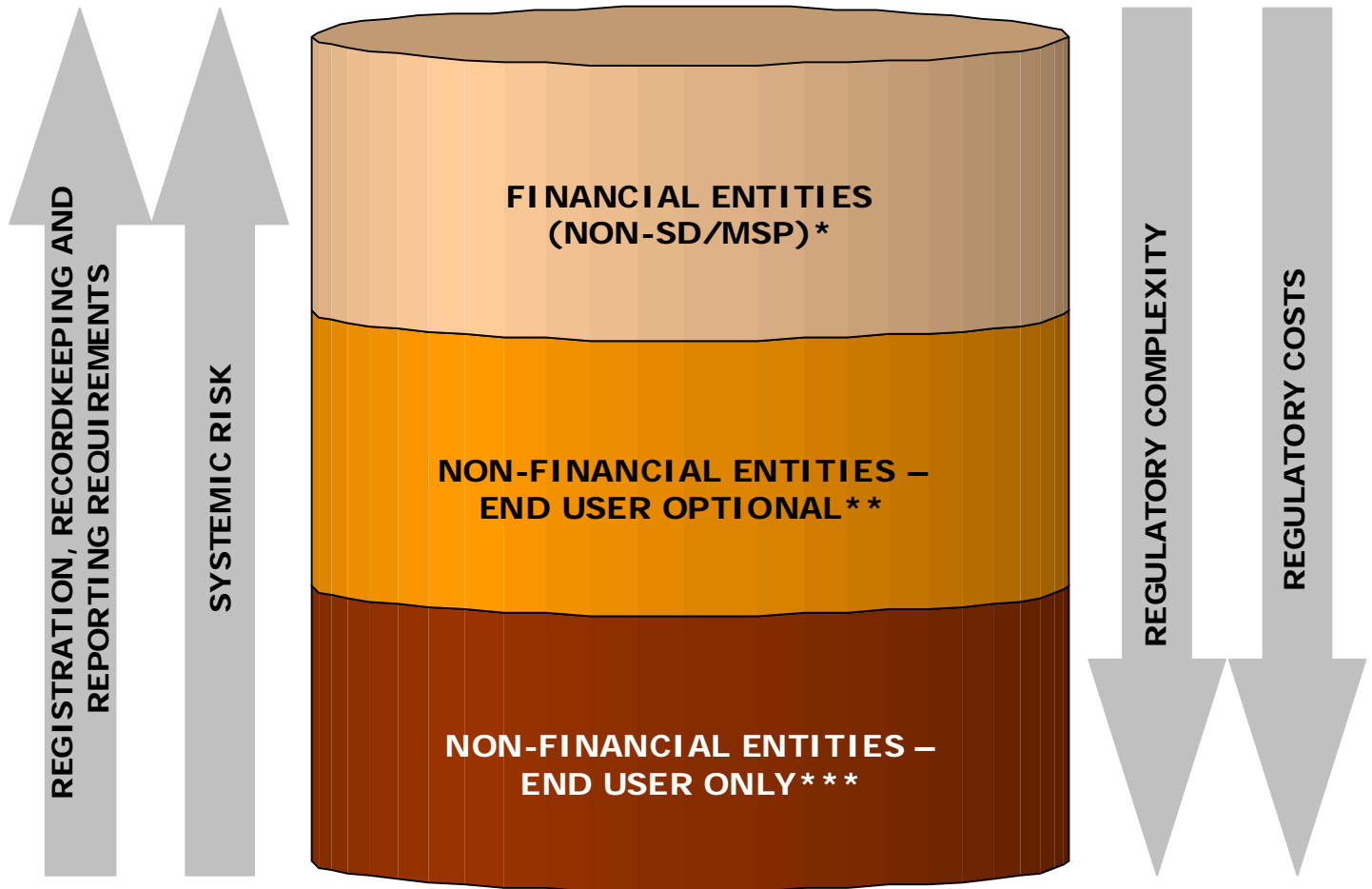
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**Diagram 1**

***Non-SD/MSP Counterparty Sub-Classifications***



\*Includes "financial entities" (other than swap dealers and major swap participants), as defined in CEA Section 2(h)(7)(C)(i), including commodity pools, private investment funds, employee benefit plans and persons engaged in activities that are in the business of banking or that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.

\*\*Includes entities which, because they are not financial entities, are entitled to use the end user exception for swaps used to hedge commercial risk. This category of "non-SD/MSP counterparties" chooses to make the end user exception decision on an asset class by asset class, or product-by-product, or swap-by-swap or other ongoing basis, as distinguished from the "Non-Financial Entities - End User Only" category below.

\*\*\*Includes entities which, because they are not financial entities, are entitled to use the end user exception for swaps used to hedge commercial risk. These entities choose a "CFTC-lite" form of registration under the Act. They use the end user exception for every swap to which the entity is a party. This classification would be used by commercial enterprises like the NFP Electric End Users -- who engage in swaps only to hedge commercial risks.

## Diagram 2

### *Data Submitted to SDR by Non-Financial Entities*

#### PERIODIC ENTITY REPORTING

(For all Non-Financial Entities who anticipate using the end user exception for some or all swaps):

- Entity identity and affiliate relationships (per Data NOPR on Unique Counterparty Identifier); eligible contract participant and special entity certifications
- How generally meets financial obligations associated with non-cleared swaps (CEA 2(h))
- If public company -- Approval by appropriate Board Committee of decision to enter into non-cleared swaps (CEA 2(j))
- If a Reporting Party – Report of “state” data for “swaps” for which appointed Reporting Party

#### MASTER AGREEMENT REPORTING

(When counterparties enter into a Master Agreement or amend an existing Master Agreement):

- Appointment of Reporting Party, Calculation Agent, Confirmation Party, etc.
- Negotiated choices as to credit risk mitigation, segregation of initial margin, etc.

#### SWAP TRANSACTION DATA REPORTING

(If Reporting Party, when Execute a “Swap”\*):

- Counterparties and applicable Master Agreement, if any
- End User Exception Election (One or Both)
- If Affiliate or Agent, identify Non-Financial Entity Affiliate or Principal
- Asset class and type of swap
- Underlying commodity or commodities
- Price reference point(s) or Index(es), delivery point(s), if any
- Tenor
- Notional Quantity
- Price
- Other Terms/Bespoke Terms

**SWAP DATA REPOSITORY**

\* Note that, if the Commission does not clarify the definitions of “swap” to exclude or exempt commercial energy transactions in which the NFP Electric End Users engage every day -- such as physical forwards, commercial options, transmission, transportation, capacity or other energy services transactions or emissions or renewable energy credits -- this protocol will be inadequate for reporting data in respect of most of those commercial transactions, and these data elements will be inadequate to provide the markets with useable or useful data in respect of most of those commercial transactions. We reserve the right to submit additional, revised comments, and to dispute the ability of the majority of our members to comply with the Proposed Rules if the Commission requires electronic reporting of data elements summarizing the terms of such commercial energy and energy-related transactions.