



September 24, 2012

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

**Re: Proposal To Exempt Certain Transactions involving Not-for-Profit  
Electric Utilities, 77 Fed. Reg. 50998 (August 23, 2012)**

Dear Mr. Stawick:

The Petitioners<sup>1</sup> respectfully submit these comments to the Commodity Futures Trading Commission (the "Commission") on the **Proposal To Exempt Certain Transactions involving Not-for-Profit Electric Utilities, 77 Fed. Reg. 50998 (August 23, 2012)**(the "Proposal").

The Petitioners appreciate the Commission's Proposal to provide relief from the requirements of the Commodity Exchange Act (the "CEA") and to provide regulatory certainty for "Exempt Non-Financial Energy Transactions" entered into between and amongst "Exempt Entities." The Commission has appropriately implemented Congressional intent that it grant a public interest waiver of jurisdiction over these transactions, as the Commission was authorized and directed to do by Section 722(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").<sup>2</sup> In Section 722(f) of the Dodd-Frank Act,

---

<sup>1</sup> The National Rural Electric Cooperative Association, the American Public Power Association, the Large Public Power Council, the Transmission Access Policy Study Group and the Bonneville Power Administration. A copy of the Petition can be found at <http://sirt.cftc.gov/sirt/sirt.aspx?Topic=PendingFilingsandActionsAD&Key=23572>. The comments contained in this filing represent the comments and recommendations of the Petitioners, but not necessarily the views of any particular member of any one or more of the trade association Petitioners with respect to any issue. The Petitioners are grateful to the following organizations and associated entities who are active in the legislative and regulatory policy arena in support of the electric industry, and who have provided considerable assistance and support in developing these comments. The Petitioners are 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: ACES Power Marketing and The Energy Authority.

<sup>2</sup> The reference to "public interest waiver" comes from the Dodd-Frank Act, where the heading of Section 722(f) of the Dodd-Frank Act, which added new Section 4(c)(6) to the CEA, is "Public Interest Waiver."

Congress added new Section 4(c)(6) to the CEA, and directed the Commission to exempt from the requirements of the CEA “an agreement, contract or transaction that is entered into... (C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. § 824(f))” (“FPA 201(f)”), upon making certain “public interest” determinations and “in accordance with Sections 4(c)(1) and 4(c)(2).”

## **I. THE PETITIONERS**

The Petitioners are introduced in Section I of the Petition. The Petitioners represent the interests of electric generators and utilities in the United States that operate on a not-for-profit basis as government-owned or tribal utilities, as electric cooperatives or as aggregated entities comprised of such not-for-profit electric entities. The primary business of all these “not-for-profit electric entities” has been for well over 75 years, and still is today, to provide reliable electric energy to American consumers and businesses every hour of the day and every season of the year, keeping costs low and supply predictable, while practicing good environmental stewardship.

The vast majority of NRECA’s and APPA’s members meet the definition of “small entities” under the Small Business Regulatory Enforcement Fairness Act (“SBREFA”).<sup>3</sup> 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.<sup>4</sup>

## **II. SUMMARY OF COMMENTS**

The Petitioners seek clarification of the proposed order contained in the Proposal (the “Proposed Order”) in certain minor respects to align more closely with the Congressional intent expressed in Section 722(f) of the Dodd-Frank Act and new Section 4(c)(6) of the CEA, and provide answers to the Commission’s questions.<sup>5</sup>

---

<sup>3</sup> 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996).

<sup>4</sup> 13 C.F.R. §121.201, n.1.

<sup>5</sup> The Petitioners respectfully disagree with the Commission’s interpretation of Section 722(f) of the Dodd-Frank Act, adding new CEA Section 4(c)(6), as requiring an analysis of, or a limitation on, the transactions or class of transactions to be exempted under Section 4(c)(1). See Section V of the Petition. Nevertheless, for purposes of this comment letter, the Petitioners seek only certain clarifications of the transactions covered by the Proposed Order and do not object to the Commission’s decision not to exempt the transactions from all requirements of the CEA.

**III. THE PETITIONERS SUPPORT THE COMMISSION'S PROPOSAL TO GRANT A PUBLIC INTEREST WAIVER UNDER NEW CEA 4(c)(6), IN ACCORDANCE WITH CEA 4(c)(1) AND 4(c)(2), AS CONGRESS INTENDED IN SECTION 722(f) OF THE DODD-FRANK ACT**

The Petitioners commend the Commission for implementing Congressional intent by proposing to grant the public service waiver, thus providing regulatory certainty to this "closed loop" of not-for-profit electric entities. The Petitioners and their members seek the continuing and uninterrupted ability to work together to fulfill their public service obligations to provide electric service and, in doing so, to hedge or mitigate commercial risks arising from electric operations. The Petitioners also appreciate the Commission's prompt consideration of the Petition. Timely action will prevent disruption in the electric operations by which the not-for-profit entities provide electric service to their customers.

**IV. THE PETITIONERS RESPECTFULLY REQUEST MINOR CLARIFICATIONS OF THE PROPOSED DEFINITION OF "EXEMPT ENTITY" IN THE PROPOSED ORDER**

A. The definition of "Exempt Entity" in the Proposed Order would benefit from certain minor clarifications to clearly encompass the appropriate categories of electric entities discussed in the Petition and elsewhere in the Proposal. The Petitioners recommend using the following definition, marked to show changes from the defined term "Exempt Entity" proposed on page 51012 in Section IVA of the Proposed Order:

*"Exempt Entity shall mean (i) any ~~government-owned~~ electric facility or utility that is wholly-owned by one or more government entities, instrumentalities or departments described in ~~recognized under~~ Federal Power Act ("FPA") section 201(f), 16 U.S.C. 824(f); (ii) any electric facility or utility otherwise subject to regulation as a "public utility" under the FPA that is wholly-owned by an Indian tribe recognized by the U.S. government pursuant to section 104 of the Act of November 2, 1994, 25 U.S.C. 479a-1; (iii) any cooperatively-owned electric facility or utility, regardless of status pursuant to FPA section 201(f), so long as the utility entity is treated as a "cooperative" ~~organization~~ under Internal Revenue Code section 501(c)(12) or 1381(a)(2)(C), 26 U.S.C. 501(c)(12), 1381(a)(2)(C), and exists for the primary purpose of providing electric energy service to its member/owner customers at the lowest cost possible; or (iv) any ~~not-for-profit~~ entity that is wholly owned, directly or indirectly, by any one or more of the foregoing. The term "Exempt Entity" does not include any "financial entity," as defined in CEA section 2(h)(7)(C)."*

The modified definition aligns with both the intent of Congress as expressed in CEA Section 4(c)(6)(C), and with the Commission's own intent, as expressed on pages 51006 and 51007 of the Proposal, to focus on the entities described in FPA 201(f) that own such electric facilities in addition to the electric facilities themselves.

B. The Petitioners respectfully request that the Commission remove the reference to “at the lowest cost possible” in clause (iii) to recognize that electric cooperatives have operational objectives in addition to low cost, *e.g.*, electric service reliability and environmental stewardship. These are additional public service objectives that all of the Exempt Entities share as part of their collective public service mission.

C. The Petitioners respectfully request that the Commission delete the words “not-for-profit” in clause (iv) of the defined term “Exempt Entity.” Some of the entities that are wholly-owned by the Exempt Entities are not formed as non-profit or not-for-profit entities. However, because the subsidiary or aggregated entities are wholly-owned by Exempt Entities, their activities do not benefit entities outside the “closed loop” of entities entitled to rely on the public interest waiver. Each of these subsidiary or aggregated entities are FPA 201(f) entities because they are wholly-owned by other FPA 201(f) entities, without regard to tax status. For example, some Exempt Entities or groups of Exempt Entities have subsidiaries that provide their consumer-members with propane in addition to their primary electric service obligations. Other Exempt Entities may have a wholly-owned entity that builds or repairs electric poles and electric distribution lines. The Petitioners respectfully request that the Commission delete this additional requirement for aggregated or subsidiaries that are wholly-owned by Exempt Entities.

## **V. THE PETITIONERS RESPECTFULLY REQUEST MINOR CLARIFICATIONS OF THE PROPOSED DESCRIPTION OF “NON-FINANCIAL ENERGY TRANSACTIONS” IN THE PROPOSED ORDER**

In order to make the Proposed Order more easily understandable for the Exempt Entities, many of which have been involved in electric operations-related transactions for decades, but are not involved in financial or commodity market transactions for purposes of speculating, dealing or even “trading,”<sup>6</sup> we request the following clarifications:

A. The Petitioners respectfully request that the Commission substitute the words “public service obligations” for “contractual obligations” on page 51012 in Section IVB of the Proposed Order, as it references the Exempt Entities’ obligations to electric customers. The Exempt Entities’ obligations to electric customers arise in some cases under Federal or state law, or under local municipal ordinances or city charters, under Tribal laws or, for electric cooperatives, under organizational charters or by-laws, rather than under individual customer contracts. This clarification is in keeping with the Commission’s discussion of the Petitioners’ obligations to electric customers earlier in the Proposal which recognizes the public service nature of the electric service obligations.<sup>7</sup>

---

<sup>6</sup> As we have explained in the Petition and in other dockets, the Petitioners execute electric operations-related transactions solely “to hedge or mitigate commercial risks” that arise from their ongoing electric operations.

<sup>7</sup> See footnote 81 and accompanying text of the Proposal describing the public service concept.

B. The Petitioners respectfully request that the Commission substitute the words “related to” for “to facilitate” on page 51012 in Section IVB of the Proposed Order, as it describes the primary purpose of the exempt transactions. Although all such transactions are directly related to the Exempt Entities’ electric facilities and operations, the concept of “facilitating” operations may not always be accurate. For example, these transactions, which are related to managing, hedging and mitigating commercial risks arising from electric operations, may in some cases limit rather than facilitate electric generation, transmission or distribution operations as such. For example, an agreement between two Exempt Entities to cooperate in satisfying demand side management programming, or an agreement between two Exempt Entities to utilize a shared generation asset in such a way as to permit one of the two Exempt Entities’ to more cost-effectively comply with environmental restrictions.

C. The Petitioners respectfully request that the Commission delete the words “at the lowest cost possible” in Section IVB of the Proposed Order for the same reasons described in Section IVB above, to recognize that Exempt Entities have operational objectives in addition to low cost as part of their public service mission, *e.g.*, electric service reliability and environmental stewardship. In addition, many Exempt Entities are required to provide services “at cost” or based on other statutory, ordinance or order, regulatory or contractual allocation formulas or principles irrespective of whether the costs are “the lowest cost possible.” Incorporating this additional element into the definition of an exempt transaction will potentially exclude transactions between Exempt Entities that should otherwise be covered by the public interest waiver.

D. The Petitioners respectfully request that the Commission delete from the Proposed Order the additional requirement that each exempted transaction needs to be “intended for making or taking physical delivery of the commodity upon which the agreement, contract or transaction is based,” even if the transaction falls within one of the six categories described in the Proposed Order. The Commission has reviewed and limited the Proposed Order to categories of exempted transactions that it has determined are electric operations-related. The Petitioners agree that the public interest waiver will be limited to electric operations-related categories. The Proposed Order also expressly excludes transactions in other commodity asset classes and categories from eligibility for the public interest waiver, and the Petitioners agree with those limitations as well.

In the Petition, the Petitioners explicitly requested that the Commission *not* determine whether the transactions between NFP Electric Entities constitute “swaps,” or meet statutory exclusions or Commission exemptions or safe harbors from such defined terms. The Petitioners also requested the Commission *not* determine if the transactions involve a “commodity,” or meet requirements in other Commission rules, statutory interpretations and precedent related to commodities or “nonfinancial commodities.” The Petitioners explained that the vast majority of the NFP Electric Entities engage in electric operations-related transactions only “between NFP Electric Entities,” and that such transactions were intended by Congress not to require additional regulatory analysis, but were eligible for a “public interest waiver” of jurisdiction provided for in Section 722(f) of the Dodd-Frank Act.

The additional “intent” language creates unnecessary ambiguity in electric operations-related transactions between Exempt Entities that are included in the six categories, that involve no risk to the financial system, and that have virtually no affect on entities beyond the “closed loop” of Exempt Entities or on transactions or markets over which the Commission has jurisdiction. The Commission has not provided a rationale as to why the public interest waiver should not encompass all transactions in the identified categories – whether customary commercial agreements and arrangements, nonfinancial commodity forward transactions, commodity trade options, or swaps between and amongst Exempt Entities, and whether or not such transactions meet statutory definitions or exclusions or Commission safe harbors, statutory interpretations or exemptions.

The following are a few examples of transactions that fit squarely within one of the six categories in the Proposed Order, but may or may not meet this additional “intent” requirement:

1. Other goods and services transactions, such as the right of one Exempt Entity to operate another’s facilities, do not always involve an identifiable, tangible commodity intended for “delivery.”
2. The Los Angeles Department of Water and Power Resources and Bonneville Power Administration jointly own and operate one of the country’s largest transmission lines – the Pacific DC Intertie. Many of the arrangements by which LADWP and BPA, both Exempt Entities, operate this facility are not documented and involve a myriad of operating arrangements and allocations, not all of which involve physical delivery of a commodity from one to the other. The two Exempt Entities share personnel, they reconcile outstanding asset and financial accounts (goods, services, supplies, inventory, etc.) by custom and practice and, since there is not a single, comprehensive operating agreement that embodies the relationship, they have no way to objectively determine or monitor “intent.” This is just one example of the unique nature of the way in which Exempt Entities interact with each other to fulfill their shared public service mission.

In addition it is as yet unclear, under the Commission’s statutory interpretations implementing Section 721(a)(21) of the Dodd-Frank Act and interpreting Section 1a(47) of the CEA, what the regulatory status is of certain generation capacity transactions, transmission, transportation and storage services agreements and certain other arrangements that are commonplace between Exempt Entities, as well as in other parts of the electric industry.

The Petitioners are therefore seeking the regulatory certainty of a public interest waiver for electric operations-related transactions that fit within the categories enumerated in the Proposed Order, limited as to commodity asset class and category as described in the Proposed Order, and that occur between and amongst Exempt Entities. The Petitioners respectfully request that the Commission delete this additional “intent” requirement.

E. The Petitioners respectfully request that the Commission add the words “or any” before the word “agricultural,” and the words “or any grade of” before the word “crude oil” on page 51012 at the top of the third column of Section IVB of the Proposed Order. The

modification is intended to clarify that an agricultural product or diesel fuel or another grade of crude oil that is used as fuel for electric generation may be the underlying commodity upon which an “Exempt Non-Financial Energy Transaction” is based. The Petitioners seek clarification that transactions between Exempt Entities involving such an agricultural product or a grade of crude oil used as fuel for electric generation will be exempt pursuant to the public interest waiver.

F. The Petitioners respectfully request that the Commission delete the word “only” from the sentence immediately preceding the list of transaction categories in Section IVB of the Proposed Order. The Petitioners and other Exempt Entities enter into all manner of commercial arrangements and other transactions between and amongst them that would not subject to Commission jurisdiction either the transactions or the entities party to such transactions. The six identified categories of transactions may be part of a larger commercial agreement or arrangement. As the Petitioners discussed in the Petition, such categories of transactions will almost certainly be part of larger commercial transactions or arrangements including fuel delivery contracts, environmental commodity and other nonfinancial commodity transactions.

The Petitioners respectfully request that the Exempt Entities should not have to analyze and compartmentalize their relationships in such a way that only these six categories appear in a single transaction in order to preserve the public interest waiver. Alternatively, the sentence should be modified to provide that such categories may be “components of larger agreements that combine the following categories of transactions, but do not otherwise contain agreements, contracts or transactions that would subject such larger agreements to the Commission’s jurisdiction.” In other words, there may also be other components – like governance components or employee sharing components – that have nothing to do with operational goods and services that might otherwise subject the Exempt Entities or their Exempt Non-Financial Energy Transactions to Commission jurisdiction.

G. The Petitioners respectfully request clarification that there is no requirement that any of the categories involve only fixed amounts of goods or services, only fixed time frames or only fixed measures. In the Commission’s paraphrase of certain of Petitioners’ categories of transactions, there are numerous references to a “specified amount” of electric energy, a “specified amount” of capacity, a “set price per wattage” or a “certain time period.” In any particular transaction between or amongst Exempt Entities within a category, any of those transaction components may be variable, conditional, adjustable or adjusted during the term of the transaction. The Commission is requested to clarify in the final order that there is no requirement that any particular provision of an Exempt Non-Financial Energy Transactions be mandatory or fixed for the public interest waiver to apply.

## **VI. THE COMMISSION IS RESPECTFULLY REQUESTED TO CLARIFY ITS RIGHT TO REVISIT THE TERMS OF THE FINAL PUBLIC INTEREST WAIVER**

Petitioners respectfully request that the Commission clarify that its right to reconsider the terms and conditions of the relief provided in the public interest waiver will be subject to notice



of the events or circumstances requiring such a reconsideration, the Commission's analysis of regulatory alternatives considered, an opportunity for hearing and public comment, a cost/benefit analysis, and a reasonable transition period.<sup>8</sup>

The Exempt Entities are not-for-profit entities with joint and several long-term infrastructure development projects, and shared public service obligations within the "closed loop" of entities that benefit from this public interest waiver. These procedural safeguards are necessary to ensure that there is no undue disruption in the Petitioners' ongoing electric operations and infrastructure development activities arising from a Commission decision to reconsider the terms and conditions of the public interest waiver. In advance of any such reconsideration of the terms and conditions of the public interest waiver, the Petitioners also respectfully request that the Commission conduct a full SBREFA analysis. See also the responses to Questions 4 and 8 in Sections VIID and VIIH below.

## **VII. THE PETITIONERS REQUEST THAT THE COMMISSION NOT CONDITION THE PUBLIC INTEREST WAIVER BY RESERVING JURISDICTION UNDER ITS AUTHORITY OVER OPTIONS TRANSACTIONS**

In Section IVC of the Proposed Order, the Commission notes that the relief granted is "subject to the Commission's general anti-fraud, anti-market manipulation and enforcement authority." The sentence goes on to list a number of sections of the CEA and rules of the Commission as being part of such general Commission authority. However, the non-exclusive list of section references includes section 4c(b) of the CEA and Commission rule 32.4. Such provisions are not part of the general anti-fraud, anti-market manipulation and enforcement authority, but instead articulate the Commission's jurisdiction over option transactions. The Petitioners respectfully request that those section references, which may have been included in error, be deleted.

One of the areas of significant concern for the Petitioners in understanding the scope of the Commission's new authority under the Dodd-Frank Act to regulate "swaps" is the question of nonfinancial commodity transactions, including options. The Petitioners have provided the Commission with information explaining "generation capacity" transactions in particular, included as "category 2" of the Exempt Non-Financial Energy Transactions, that addresses the Commission's questions about whether these unique electric operations-related transactions may be viewed as having characteristics similar to options. If a transaction between Exempt Entities fits within category 2 as an Exempt Non-Financial Energy Transaction, the Commission should not reserve the right to decide later that it has jurisdiction over such transaction as an option. The Petitioners respectfully request that, in the final public interest waiver, the Commission not include a reference to those two provisions, which are not part of the Commission's general anti-fraud, anti-market manipulation and enforcement authority.

---

<sup>8</sup> Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*



## **VIII. THE PETITIONERS PROVIDE RESPONSES TO THE COMMISSION'S QUESTIONS**

A. In response to Question No. 1, the Commission should not further limit the scope of Exempt Entities entitled to the benefit of the Proposed Order. The Petitioners support the Commission's definition of Exempt Entities, with the minor clarifications requested in Section IV above. Moreover, the Commission should not limit the scope of electric cooperatives included as Exempt Entities to only those cooperatives with tax exempt status under the Internal Revenue Code. In Section 722(f) of the Dodd-Frank Act, Congress focused on the status of entities under the Federal Power Act, not on the Federal tax status of the entities. The Federal Power Act does not draw any distinction between taxable and tax exempt electric cooperatives. It is the self-regulating governance structure and the electric operations capabilities that distinguish electric cooperatives as Exempt Entities for purposes of engaging in Exempt Non-Financial Energy Transactions. There is no operational or governance difference between electric cooperatives that are tax exempt under IRC Section 501(c)(12) and those that are taxable under IRC Section 1381(a)(2)(C). The Proposed Order appropriately requires that electric cooperatives operate under cooperative principles and exist for the primary purpose of providing electric service to member/owner customers.

B. Congress provided the answer to Question No. 2 when it included in the Dodd-Frank Act both the general end-user exception to clearing in Section 723, and the specific 4(c)(6) public interest waiver provisions in Section 722. In Section 722 of the Dodd-Frank Act, Congress clearly intended that the Commission waive its jurisdiction over transactions between and amongst this "closed loop" of entities, not merely that such entities would have the end-user exception provided for in Section 723 of the Dodd-Frank Act.

C. In response to Question No. 3, there is no regulatory reason to require an Exempt Entity relying on the Order to notify the Commission of a change in its status under FPA section 201(f). The Exempt Entity might have to reevaluate its electric operations-related transactions to assess whether future transactions, even if with other Exempt Entities and even if within the six categories, would otherwise be subject to the Commission's jurisdiction. However, such a change in status would have no effect on outstanding Exempt Non-Financial Energy Transactions entered into with Exempt Entities prior to the change in status. Moreover, although the Petition discusses the small number of electric cooperatives that, from year to year, are "non-FPA 201(f) electric cooperatives," the Commission has determined that electric cooperatives are Exempt Entities regardless of their FPA 201(f) status, so long as they meet the other conditions in the definition. The other entities described in FPA 201(f), and therefore entitled to the benefit of the public interest waiver, are not likely to experience such a change in FPA 201(f) status.

D. In response to Question No. 4 and questions elsewhere in the Proposal including footnotes 100 and 112, the Petitioners agree with the Commission that Exempt Non-Financial Energy Transactions in the six categories identified in the Proposed Order between Exempt Entities play no price discovery purpose for transactions in Commission-regulated markets. The transactions are customized and the terms (including the price terms as well as the credit support terms) reflect the public service mission and not-for-profit governance structure that the Exempt

Entities share. In addition, as discussed in the Petition, such electric operations-related transactions within the “closed loop” of Exempt Entities also create no risk to the financial system, but instead serve only to hedge commercial risks arising from the Exempt Entities’ electric operations.

The Federal Energy Regulatory Commission’s (“FERC”) authority under Section 220 was granted to it by Congress to enable it to meet FERC’s regulatory objectives under the Federal Power Act. If FERC requires reporting by FPA 201(f) entities under Section 220 of the FPA, the reports of sales of electric energy and electric transmission at wholesale in interstate commerce would be required within wholly-different timeframes, in wholly-different levels of granularity, and in wholly-different categories of transactions than the Commission’s rules for reporting “swaps” under the CEA.<sup>9</sup>

As such, if FERC requires reporting of energy transactions to achieve its regulatory objectives, it does not follow that the Commission should similarly mandate reporting of any, much less all, of the six categories of Exempt Non-Financial Energy Transactions between Exempt Entities under the CEA. These categories of transactions may or may not be “swaps.” These transactions between Exempt Entities are not market-facing and therefore serve no price discovery function, and create no systemic risk to the financial markets. If FERC changes one or more of its rules, or if any other event or circumstance occurs as a result of which the Commission decides to consider revisiting or modifying the public interest waiver, the Commission should follow the administrative procedures described in Section VI above.

E. In response to Question No. 5, the Petitioners wish to point out that Exempt Entities do not execute Exempt Non-Financial Energy Transactions for speculative purposes, but only to hedge or mitigate commercial risks arising from electric operations.

F. In response to Question No. 6, the Petitioners agree with the Commission’s determination that electric utilities owned by federally-recognized Indian tribes “are no different

---

<sup>9</sup> On September 21, 2012, FERC issued Order No. 768, its Final Rule in *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, Docket No. RM101-2-000, 140 FERC ¶ 61,232. In that order, FERC exercised its authorities under Section 220 of the Federal Power Act to require 201(f) entities (which it calls “non-public utilities” in its Order) to file quarterly certain wholesale power sales transaction data with the Commission. In its Order, FERC exempted from these reporting requirements non-public utilities that make 4,000,000 MWh or less of annual wholesale sales (based on an average of the wholesale sales made in the preceding three years), finding that these utilities have a “*de minimis* market presence.” Order No. 768 at P 188. Moreover, non-public utilities with annual wholesale sales sufficient to trigger the reporting requirements do not have to report: “(1) sales by a non-public utility, such as a cooperative or joint action agency, to its members; and (2) sales by a non-public utility under a long-term, cost-based agreement required to be made to certain customers under Federal or state statute.” *Id.* at Paragraph 74. Non-public utility filers will be required to file beginning with the third quarter (Q3) of 2013, covering the period July through September 2013. For the period from January 1 through March 31, filings are due by April 30; for the period from April 1 through June 30, the due date is July 31; for the period July 1 through September 30, the due date is October 31; and for the period October 1 through December 31, the due date is January 31.

substantively than government-owned electric utilities...for purposes of benefiting from the relief provided in the Proposed Order,” and that consequently such tribal utilities should be included within the defined term “Exempt Entities” entitled to the benefit of the public interest waiver for their Exempt Non-Financial Energy Transactions with other Exempt Entities.

G. As a comment on Question No. 7, the Petitioners note that, in identifying the six categories of “Exempt Non-Financial Energy Transactions” for which the Exempt Entities can rely on the public interest waiver, the Commission has not determined whether any of such transactions are otherwise excluded by statute or exempted by rule, order or statutory interpretation from the Commission’s jurisdiction. The Proposed Order provides a “public interest waiver” of jurisdiction, as Congress intended, relieving the Exempt Entities from the need to analyze such categories of electric operations-related transactions which take place between and amongst them under the entire body of Commission precedent over futures, forwards, options and swaps. The Commission should not further limit the availability of the public interest waiver.

H. In response to Question No. 8 (and footnote 63), the Commission should grant the relief provided in the Proposed Order retroactively to the enactment of the Dodd-Frank Act. Transactions under the six categories identified as “Exempt Non-Financial Energy Transactions” might otherwise require analysis as to whether they are “historical swaps,” and might otherwise require reporting by one or the other of the Exempt Entities, both of which are non-Swap Dealers/Major Swap Participants under the Dodd-Frank Act. In many cases at least one of the Exempt Entities would be a “small entity” for SBREFA purposes. Determining whether such transactions are or are not “swaps” would be burdensome and unnecessary, and the associated costs would be passed through directly to the electric customers of such Exempt Entities, as a dollar-for-dollar regulatory increase in electric rates. Reporting such transactions would serve no price transparency purpose. If the Commission determines not to grant such relief retroactively, the Petitioners respectfully request a full SBREFA cost/benefit analysis of such regulatory decision.

In terms of the request that such exempt transactions between Exempt Entities not affect the regulatory status of any party, the Petitioners respectfully point out that these transactions have not been determined to be “swaps.” The Commission has waived jurisdiction over the transactions except for enforcement and anti-market manipulation purposes. Consistent with such waiver, it is simply not appropriate or reasonable that such transactions would have to be characterized as swaps or analyzed in terms of purpose, such that they could affect any entity’s regulatory obligations or status.

I. In response to Question No. 9, the Petitioners provided in the Petition the rationale as to why the Commission should waive its jurisdiction over all “Electric Operations-Related Transactions” between Exempt Entities as directed by Congress in Section 722 of the Dodd-Frank Act. Nothing in the statute requires the Commission to analyze or categorize the transactions between and among this “closed loop” of entities. All the transactions in the generic category requested by Petitioners are executed to hedge or mitigate commercial risks that arise from electric facilities and operations, by the terms of the definition provided by Petitioners. The

Commission should allow for such a generic category of exempted transactions, which along with the other six categories. All exempted transactions would continue to be further limited by the exclusion of transactions by commodity asset class and category, such that the public interest waiver would continue to only be available for transactions related to electric facilities and operations.

J. In Question 10, the Commission asks about whether Exempt Non-Financial Energy Transactions are used to hedge price risk in an underlying commodity. One aspect of “hedging or mitigating commercial risks” arising from electric operations is hedging price and availability risks of the nonfinancial commodities required as fuel for generation or the goods or services that the entity sells or anticipates selling.<sup>10</sup> The Commission should not exclude from the public service waiver a transaction between two Exempt Entities that accomplishes such a commercial risk hedging purpose.

As described in response to Question 2 above, Congress provided the end-user exception to clearing under Section 723 for a separate and distinct purpose than the public interest waiver provisions in Section 722 of the Dodd-Frank Act. It would be inappropriate for the Commission to decline to waive jurisdiction over certain Exempt Non-Financial Energy Transactions and require instead that such transactions be analyzed and, to the extent determined to be “swaps,” excepted from clearing and exchange trading under Section 2(h)(7) and 2(h)(8) of the CEA, but nonetheless subject to other regulatory requirements. Such a limitation would not be consistent with Congressional intent in providing for the public interest waiver in Section 722 of the Dodd-Frank Act. Congress intended the public service waiver provisions of Section 722(f) in general, and new CEA 4(c)(6)(C) in particular, to provide relief for a specific group of electric entities and for transactions between such entities.

## **IX. CONCLUSION**

The Petitioners appreciate the work of the Commission on this matter to date, and the efforts it has made to understand the distinctive governance structures, shared electric facilities and operations, and shared public service commitment of the Exempt Entities, which are unique even within the electric utility industry. The Petitioners continue to stand ready to help the Commission further understand our Exempt Entities, our operations, and our transactions and to explain the requests and comments made herein. Please contact any of the individuals below or Patricia Dondanville, Reed Smith LLP, 10 South Wacker Drive, 40<sup>th</sup> Floor, Chicago Illinois 60606, telephone (312) 207-3911, or e-mail, if you have questions regarding this comment letter or the Petition.

---

<sup>10</sup> See the definition provided for “hedging or mitigating commercial risks” in Section 39.6(c) of the Commission’s rules implementing the end-user exception to clearing.

**PROPOSED ORDER-  
NOT-FOR-PROFIT ELECTRIC UTILITIES**

Respectfully submitted,

**NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION**

*Russ Wasson*

---

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

**AMERICAN PUBLIC POWER ASSOCIATION**

---

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

**LARGE PUBLIC POWER COUNCIL**

---

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

**BONNEVILLE POWER ADMINISTRATION**

---

Virginia K. Schaeffer  
Attorney  
Bonneville Power Administration  
Office of the General Counsel – LC-7  
P.O. Box 3621  
Portland, Oregon 98208-3621  
Tel: (503)230-4030  
Email: [ykschaeffer@bpa.gov](mailto:ykschaeffer@bpa.gov)

**TRANSMISSION ACCESS POLICY  
STUDY GROUP**

---

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

cc: Honorable Gary Gensler, Chairman  
Honorable Mark Wetjen, Commissioner  
Honorable Jill E. Sommers, Commissioner  
Honorable Bart Chilton, Commissioner  
Honorable Scott O'Malia, Commissioner  
Office of the CFTC General Counsel

**PROPOSED ORDER-  
NOT-FOR-PROFIT ELECTRIC UTILITIES**

Respectfully submitted,

**NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION**

---

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

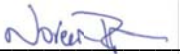
**AMERICAN PUBLIC POWER ASSOCIATION**

---

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

**LARGE PUBLIC POWER COUNCIL**

---

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

**BONNEVILLE POWER ADMINISTRATION**

---

Virginia K. Schaeffer  
Attorney  
Bonneville Power Administration  
Office of the General Counsel – LC-7  
P.O. Box 3621  
Portland, Oregon 98208-3621  
Tel: (503)230-4030  
Email: vkschaeffer@bpa.gov

**TRANSMISSION ACCESS POLICY  
STUDY GROUP**

---

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

cc: Honorable Gary Gensler, Chairman  
Honorable Mark Wetjen, Commissioner  
Honorable Jill E. Sommers, Commissioner  
Honorable Bart Chilton, Commissioner  
Honorable Scott O'Malia, Commissioner  
Office of the CFTC General Counsel

**PROPOSED ORDER-  
NOT-FOR-PROFIT ELECTRIC UTILITIES**

Respectfully submitted,

**NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION**

---

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

**AMERICAN PUBLIC POWER ASSOCIATION**

---

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

**LARGE PUBLIC POWER COUNCIL**

---

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

**BONNEVILLE POWER ADMINISTRATION**

---

Virginia K. Schaeffer  
Attorney  
Bonneville Power Administration  
Office of the General Counsel – LC-7  
P.O. Box 3621  
Portland, Oregon 98208-3621  
Tel: (503)230-4030  
Email: vkschaeffer@bpa.gov

**TRANSMISSION ACCESS POLICY  
STUDY GROUP**



---

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

cc: Honorable Gary Gensler, Chairman  
Honorable Mark Wetjen, Commissioner  
Honorable Jill E. Sommers, Commissioner  
Honorable Bart Chilton, Commissioner  
Honorable Scott O'Malia, Commissioner  
Office of the CFTC General Counsel



**PROPOSED ORDER-  
NOT-FOR-PROFIT ELECTRIC UTILITIES**

Respectfully submitted,


**NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION**

---

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

**AMERICAN PUBLIC POWER ASSOCIATION**

---

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

**LARGE PUBLIC POWER COUNCIL**

---

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

**BONNEVILLE POWER ADMINISTRATION**

---

Virginia K. Schaeffer  
Attorney  
Bonneville Power Administration  
Office of the General Counsel – LC-7  
P.O. Box 3621  
Portland, Oregon 98208-3621  
Tel: (503) 230-4030  
Email: vkschaeffer@bpa.gov

**TRANSMISSION ACCESS POLICY  
STUDY GROUP**

---

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

cc: Honorable Gary Gensler, Chairman  
Honorable Mark Wetjen, Commissioner  
Honorable Jill E. Sommers, Commissioner  
Honorable Bart Chilton, Commissioner  
Honorable Scott O'Malia, Commissioner  
Office of the CFTC General Counsel

**PROPOSED ORDER-  
NOT-FOR-PROFIT ELECTRIC UTILITIES**

Respectfully submitted,

**NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION**

---

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

**AMERICAN PUBLIC POWER ASSOCIATION**

---

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

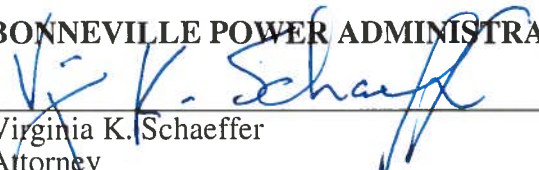
**LARGE PUBLIC POWER COUNCIL**

---

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

**BONNEVILLE POWER ADMINISTRATION**

---

  
Virginia K. Schaeffer  
Attorney  
Bonneville Power Administration  
Office of the General Counsel – LC-7  
P.O. Box 3621  
Portland, Oregon 98208-3621  
Tel: (503)230-4030  
Email: vkschaeffer@bpa.gov

**TRANSMISSION ACCESS POLICY  
STUDY GROUP**

---

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

cc: Honorable Gary Gensler, Chairman  
Honorable Mark Wetjen, Commissioner  
Honorable Jill E. Sommers, Commissioner  
Honorable Bart Chilton, Commissioner  
Honorable Scott O'Malia, Commissioner  
Office of the CFTC General Counsel