



September 24, 2012

**Via Electronic Submission**

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Center  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

**Re: Comments on Ownership and Control Reports, In Particular Forms 40/40S  
(RIN 3038-AD31, 77 Fed. Reg. 44968, July 26, 2012)**

Dear Mr. Stawick:

The National Rural Electric Cooperative Association (“NRECA”), the Large Public Power Council (“LPPC”) and the Electric Power Supply Association (“EPSA”)(hereafter “Joint Electric Associations”)<sup>1</sup> respectfully submit these comments in response to the Notice of Proposed Rulemaking (the “Proposal”) on Ownership and Control Reports to be used to implement the Large Trader Reporting rules for Physical Commodity Swaps (the “LTR Rules”).<sup>2</sup> The Joint Electric Associations’ comments herein will focus solely on the “New Form 40” (which also constitutes a Form 40S), and the aspects of the Proposal that relate to the New Form 40.

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

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<sup>1</sup> The comments contained in this filing represent the recommendations of the Joint Electric Associations, but not necessarily the views of any particular member of any one or more of the Joint Electric Associations on any issue. The Joint Electric Associations are authorized to note the involvement of ACES Power Marketing in preparing these comments, and to indicate their full support of these comments and recommendations.

<sup>2</sup> Part 20 of the Commission’s regulations, published in the Federal Register on July 22, 2011, 76 Fed. Reg. 43851, is titled “Large Trader Reporting for Physical Commodity Swaps.”

LPPC is an organization representing 24 of the largest government-owned electric utilities in the nation. LPPC members own and operate over 86,000 megawatts of generation capacity and nearly 35,000 circuit miles of high voltage transmission lines, representing nearly 90% of the transmission investment owned by non-Federal government-owned electric utilities in the United States.

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

The Joint Electric Associations' members are participants in the markets for nonfinancial (or "physical") energy and energy-related commodities, and the members rely on energy commodity swaps, futures, forwards and options primarily to hedge or mitigate commercial risks. They are not financial entities. Neither are the vast majority of the Joint Electric Associations' members "reporting entities" under the Commission's LTR Rules, which require regular reporting of "reportable positions" in certain physical commodities and commodity derivatives by clearing organizations, clearing members, and Commission-registered "swap dealers" whether or not such swap dealers are clearing members.

The Joint Electric Associations' members face significant seasonality in their electric operations in certain geographic regions as a result of weather and other factors outside their control affecting the supply of and demand for nonfinancial energy commodities. As a consequence of commercial risk management activities, certain of the Joint Electric Association members may from time to time own or control "reportable positions" primarily to hedge or mitigate the commercial risks of their electric operations.

Such members may be recipients of a "special call" from the Commodity Futures Trading Commission (the "Commission") for information about "positions" held in swaps and/or swaptions linked or priced at a differential to either the price of one of the 46 physical commodity futures contracts enumerated by the Commission ("Covered Futures Contracts") or the price of the nonfinancial commodity at the delivery location of one of the Covered Futures Contracts.

In response to such periodic special calls, the Joint Electric Associations' members are required to submit information to the Commission on the New Form 40. As such, the Joint Electric Associations' members have a direct and significant interest in the New Form 40, in the clarity of both the Form and the instructions to the Form, and in the process by which the Commission implements its "special call" authority in respect of swaps and swaptions referencing certain Covered Futures Contracts for nonfinancial energy commodities.

## **I. Summary of the Joint Electric Associations' Comments**

The Joint Electric Associations respectfully request that the Commission revise the New Form 40 and the General Instructions thereto to make the Form understandable to a commercial end user of nonfinancial commodity swaps or swaptions that is not otherwise generally familiar with the Commission's rules and regulations, and to allow a "check the box" response for entities that predominantly use nonfinancial commodity derivatives to hedge or mitigate commercial risks.

The Joint Electric Associations also respectfully request the Commission not to require all New Forms 40 to be filed electronically, but to continue to accept paper, facsimile or email submissions.

Finally, the Joint Electric Associations respectfully request that the Commission eliminate any ongoing filing requirements, or any requirement that a recipient of its periodic "special call" for information periodically update the information filed with the Commission on New Form 40. The Commission's "special call" authority to request information periodically from market participants is not intended to create an ongoing and open-ended regulatory obligation for market participants who are not otherwise subject to the Commission's jurisdiction.

## **II. The General Instructions To New Form 40 Presumes A Level Of Familiarity With The Commission's Jurisdiction And The Commission's LTR Rules That Is Not Consistent With The Experience Of Members Of The Joint Electric Associations in the Electric And Natural Gas Industries**

The New Form 40 retains from the old Form 40 (applicable to futures and exchange traded options) a number of characteristics that may be confusing to a commercial end user of nonfinancial commodities and commodity derivatives without significant experience in the futures industry. The Commission revised Form 40 to serve as the vehicle through which swap market participants (including commercial end users) subject to 17 C.F.R. 20.5(b) would submit their Form 40S information to the Commission. But most of the words used in the form were not revised to reflect the different market structure whereby swap counterparties transact directly with registered "swap dealers" (that are "reporting entities" under the LTR Rules), rather than through financial intermediaries or market professionals as is the case in the futures industry. As a result, commercial market participants receiving the New Form 40, if they have never seen old Form 40, have no context within which to understand the new Form or their responsibilities to the Commission.

The typical member of one of the Joint Electric Associations is a commercial end user of nonfinancial energy commodities and non-cleared energy commodity swaps. The member may execute such swap transactions with one or more financial institutions that are "swap dealers," and such "swap dealers" may or may not be clearing members. The typical Joint

Electric Association member does not “trade,” does not “deal,” does not “invest” and does not “speculate” in nonfinancial energy commodity derivatives or other financial market products.

Consequently, if such a Joint Electric Association receives a Commission “special call,” the recipient is confused by being addressed as a “reporting trader” and told that the recipient owns or controls a “reportable position.” The plain English understanding of those terms is that the Commission believes the recipient is a “trader” of either commodities or commodity derivatives, and that the recipient should be aware of a regulatory reporting obligation in respect of a “reportable position” that the recipient owns or controls. And that is just the beginning of the confusing language in the New Form 40 to a commercial end user of energy commodity swaps. Such a commercial market participant may not transact in futures or exchange-traded options, may not enter into cleared or exchange-traded “swaps,” and is not a “reporting entity” for purposes of the Commission’s LTR Rules. The terms “reporting entity” and “reporting trader” are not descriptive or distinguishable without experience with the Commission’s regulatory jurisdiction and a careful review of all the relevant rules. The Joint Electric Associations respectfully request that the General Instructions be revised to explain why certain commercial market participants may receive a “special call” to file a Form 40 (or more specifically, a Form 40S).

The General Instructions begin with a statement about “owning or controlling a reportable position,” without saying in what or why the position is reportable or for what purpose. The term “reportable position” is not defined in the General Instructions to the New Form 40 or in the “Acknowledgment of Definitions.” The Joint Electric Associations respectfully request that the General Instructions be revised to explain the source of the Commission’s information, what the “reportable position” is and that the Instructions clarify that the reporting obligation arises only upon receipt of the Commission’s “special call.”

**III. In The “Acknowledgement Of Definitions,” The Definitions Have Embedded Complex And Undefined Regulatory Terms And Concepts. If The Recipient Of A Special Call Assumes That The Words Bear Plain English Meanings Unless Defined In The Form 40, The Recipient Is Not Instructed In Sufficient Detail To Be Able To Accurately Report The Information Sought By The Commission**

The Form contains an “Acknowledgement of Definitions” which provides definitions of selected terms used in the Form, but omits to define terms embedded within the provided definitions that have significant ramifications for the accuracy of the information the recipient is expected to provide. Most notably, the New Form 40’s definition of “derivatives” provides no indication that the word “swap” bears enormous significance in the Commission’s new regulatory regime under the Dodd-Frank Act. The defined term “derivative” then appears throughout the New Form 40 creating inaccurate and potentially misleading requests for information, based on an erroneous assumption that an end user’s swap transactions are conducted in the same manner as the futures transactions, if any, in which the recipient engages. The Joint Electric Associations respectfully request that the Commission revise New Form 40 to

more clearly distinguish the reporting requirements in respect of Form 40 and Form 40S. Otherwise, the recipient may not have enough instruction to be able to accurately report to the Commission.

Moreover, the definitions do not include such other significant terms as “swap dealer” and “major swap participant,” although the recipient is asked to represent in response to questions 15 and 16 if it meets one or both of those definitions. And the definitions do not include such other significant terms as “hedging or mitigating commercial risks” and “hedging a physical position,” both of which have significant meanings under the Dodd-Frank Act rules, and which definitions are critical for appropriately responding to questions later in the New Form 40. The Joint Electric Associations respectfully request that these terms be defined, as well as a defined term “commercial end user” and/or “commercial market participant” and “financial entity,” if that becomes relevant to the disclosure about swaps used to hedge or mitigate commercial risk.

The Joint Electric Associations respectfully request that a “check the box” option for commercial end users of nonfinancial commodity derivatives (including swaps) be included at the beginning of the New Form 40. If a recipient checks that box, the New Form 40 should direct that the recipient is excused from filling out the remainder of the New Form 40. This type of “regulatory reporting lite” for commercial end users will substantially reduce the regulatory reporting on New Form 40 for commercial end users who hold “reportable positions” to hedge or mitigate commercial risks arising from their operations.

In the body of the New Form 40, other terminology that remains from the old Form 40 has taken on new meaning as a result of the Commission’s extensive rulemakings to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). The Joint Electric Associations respectfully request that the New Form 40 be revised to define those terms so that entities receiving the Commission’s special calls will understand the information being sought. Otherwise, the recipients may be unable to respond accurately to the form without substantial legal or regulatory assistance. Or the recipient may inadvertently provide incorrect information to the Commission by applying a “plain English” meaning to the regulatory terms used without definition in the form or the instructions.

The Joint Electric Associations will point out a few examples of each these issues in the New Form 40 and the instructions, but encourage the Commission to review the New Form 40 carefully with a wide audience of commercial end users of nonfinancial commodities and nonfinancial commodity swaps in different categories to be sure that it is written in plain English.

For example, in question 18, the question asks the recipient to identify commodities the reporting trader “trades.” If the appropriate answer is that the recipient of New Form 40 doesn’t trade at all or that the recipient predominantly uses commodities as inputs for its business, or acts as a producer, generator, processor, or merchant or merchandiser of the commodity, that choice

is not available. The Joint Electric Associations respectfully request that, at the beginning of the “Nature of Business” Section there be a clear “check the box” for an entity that solely or predominantly acts as a commercial user of nonfinancial commodities or nonfinancial commodity derivatives. Similarly, Question 19 asks about the business purpose for which the recipient uses derivatives markets, and the “predominant business purpose.” And yet again, there is not a choice of “to hedge or mitigate commercial risks associated or arising from the recipient’s operations.” Nor is there an explanation of the variety of new meanings for the concept of “hedging” under the Commission’s new regulatory regime for swaps.

The Joint Electric Associations respectfully request that the Form be revised such that, if there is no “check the box” at the front that allows a recipient to skip the rest of the Form, that clear choices be added to Supplemental List III drawn from the Commission’s new regulations for swaps.

The Joint Electric Associations respectively request that New Form 40 not be sent out until all of the rulemaking implementing the new Dodd-Frank Act jurisdiction over “swaps” has been finalized. The information to be solicited has simply not yet been finalized. For example, in at least one place, the New Form 40 references a “25% Ownership Indicator,” although it seeks information on subsidiaries in which the “reporting trader” has a 10% or greater ownership interest. Elsewhere, there are other aggregation and disaggregation levels that are measured or relevant under the Commission’s evolving reporting rules. The Proposal notes that New Form 40 solicits more detailed information from the recipients of a “special call.” The Instructions and the Form should clearly identify, for each reported item, the regulatory provision for which information is being sought.

#### **IV. The Commission Should Not Require Electronic Filing Of New Form 40**

The New Forms 40 will be sent via “special call” to commercial market participants in the energy industry with little or no experience with the Commission or with financial markets or commodity trading. As the Commission acknowledges, the recipient may include as many as 25% of the entities that hold “reportable positions,” including small entities like electric cooperatives, natural gas distribution utilities, small producers and small government utilities. These recipients should not be required to access the Commission’s website and utilize a “web-portal” filing system. The Commission’s assumption that all such entities are familiar with other CFTC filing requirements or financial market filing mechanics is not consistent with the experience of the Electric Trade Associations’ members. The Joint Electric Associations respectfully request that recipients of a “special call” be allowed to fill out the New Form 40 and deliver it to the Commission on paper, by fax or by email. In particular, those recipients that “check the box” as solely or predominantly executing nonfinancial commodity transactions or swaps to hedge or mitigate commercial risk should be allowed to use such typical commercial reporting channels.

**V. Recipients Of The Commission's "Special Call" For New Form 40 Should Have No Continuing Obligations To Report Changes In New Form 40 Information To The Commission**

The Proposal anticipate that an entity that files a New Form 40 will have an ongoing regulatory obligation to periodically update information to the Commission or to a swap data repository. Such an ongoing regulatory obligation is inappropriate for entities that are not "reporting entities" under the LTR Rules, and that the Commission has even noted in the Proposal are only a small percentage of market participants. In particular, commercial market participants that may receive only one periodic "special call" from the Commission should not as a result be thereafter subject to a new and ongoing regulatory obligation. The Joint Electric Associations respectfully request that the Commission delete such requirement.

**VI. The Commission Should Establish Procedures To Limit The Use Of Its "Special Call" Authority To Require Information From "Small Entities"**

The Commission acknowledges that recipients of its "special calls" will include "small entities." See the Proposal at 43991. In particular, due to the seasonal nature of the Joint Electric Association members' need for nonfinancial energy commodities, it is likely that the Commission will routinely request New Forms 40 from NRECA members that may execute swaps referencing or linked to the NYMEX Henry Hub Natural Gas Contract.

The Joint Electric Associations respectfully rrequest that the Commission establish procedures to limit the application of its "special call" authority to "small entities." Otherwise, the Joint Electric Associations respectfully request that the Commission's cost/benefit analysis be revised to include a full SBREFA analysis of the New Form 40 filing/data collection requirements. Such analysis should estimate the amount of time and cost involved for a "small entity," with no futures or exchange-traded option positions and no cleared or exchange-traded swaps, but that utilizes energy commodity swaps solely to hedge or mitigate commercial risks, to comply. The cost to comply would include the cost of legal assistance to understand the New Form 40 and the information being solicited by the Commission (including terms used in the form without definition, but with important regulatory implications) and any regulations applicable to the information being collected. And the SBREFA analysis should explain the regulatory purpose of collecting such information from small entities, and the alternatives considered to reduce the burden on such entities.

**VII. Conclusion**

The Commission should minimize regulatory confusion and regulatory burdens that will be created by the New Form 40 for commercial end users that purchase or sell nonfinancial energy commodities in the ordinary course of operations, and transact in energy commodity swaps, options and, in some but not all cases, commodity futures and commodity options

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contracts transacted on exchanges regulated by the Commission, primarily or predominantly to hedge or mitigate commercial risks arising from such entities' operations.

The Joint Electric Associations appreciate the Commission's consideration of our comments on New Form 40 and the process by which the Commission plans to solicit information via its "special call" authority from commercial end users. Please contact us at the numbers listed below if you have any questions regarding these comments.



## **SIGNATURE PAGE – OWNERSHIP AND CONTROL REPORTS**

Respectfully submitted,

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