END USER EXCEPTION TASK FORCE

November 22, 2010

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

Submitted electronically pursuant to the CFTC website protocol

Re: Pre-NOPR Comments to End User Exception Task Force (XI) under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Mr. Stawick:

The trade associations comprising the "Not-For-Profit Energy End User Coalition" (the "Coalition") respectfully submit these comments to the Commodity Futures Trading Commission (the "CFTC") Task Force XI (the "End User Exception Task Force") established as part of the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). Given the nature of our members' commercial enterprises, [1] our comments focus on those aspects of the End User Exception Task Force's rule-makings that will affect end users of energy and energy-related commodities and "swaps."[2]

[1] 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.

[2] We have footnoted this term, and direct the reader to our comments dated September 20, 2010, submitted in response to the "Definitions ANOPR," and in particular to our comments on the definition of "swap". A copy is attached for convenience of reference. Given the broad definition of "swap" and the fact that everyday commercial transactions of the NFP Energy End

We appreciate the opportunity to submit these comments in advance of the End User Exception Task Force's rule-makings. As the CFTC (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 thanks the CFTC for its consideration of the impact of these rule-makings on our enterprises, which are "end users" of commodities and swaps. We appreciate that the Act's purpose is to provide increased regulatory oversight of financial entities. However, it is equally important that end users have certainty with respect to the impact of the rules on their enterprises. The rule-makings should not impose on end users new regulatory costs and burdens which are unnecessary to achieve the Act's goals of increased market oversight, reduction of systemic risk, increased price transparency and financially-sound trading markets for swaps.

I. THE COALITION MEMBERS[3]

The Coalition is comprised of four trade associations representing the interests of not-for-profit, consumer-owned electric and gas utilities in the United States (collectively, the "NFP Energy End Users"). The primary enterprise of these NFP Energy End Users has been for well over 75 years, and still is today, to provide reliable natural gas and/or 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 environmental stewardship. The NFP Energy 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

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Users may arguably fall within that definition, the regulatory burdens imposed on end users of "swaps" are of significant concern to NFP Energy End Users.

[3] 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 Energy 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.

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. The RFA 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 considered "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. AMERICAN PUBLIC GAS ASSOCIATION ("APGA")

The APGA is the national association for publicly-owned natural gas distribution systems. There are approximately 1,000 public gas systems in 36 states and over 720 of these systems are APGA members. Publicly-owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities. The purpose of a public gas system is to provide reliable, safe and affordable natural gas service to the community it serves. Public gas systems depend on the physical commodity markets, as well as financial market transactions, to meet the needs of their consumers. Together, these markets play a central role in public gas utilities securing natural gas supplies at reasonable and stable prices. Specifically, many public gas utilities purchase firm gas supplies in the physical delivery market at prevailing market prices, and enter into OTC derivatives customized to meet their specific needs to hedge their customers' exposure to future market price fluctuations and stabilize rates. As with APPA-member systems, the APGA members work together pursuant to their common statutory and regulatory mandates, often without the types of contracts that exist between for-profit entities, but instead under tariff arrangements or all requirements contracts. Like the members of NRECA and APPA, the vast majority of APGA's members are considered "small entities" under SBREFA. APGA members are "small entities" because nearly all have fewer than 500 employees. 13 C.F.R. §121.201.

D. 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 environmental stewardship.

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

The NFP Energy End Users represented by the Coalition include public power utilities, public gas utilities and rural electric cooperatives. Some are quite large, but most of these NFP Energy 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 Energy End Users generate, transmit and sell electric energy to their fellow public power systems and cooperatives and to third parties at wholesale, while others purchase natural gas and/or 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 CFTC regulation as "swaps" (even among those who are "end users" of energy and energy-related commodities and swaps) in that the public power and gas entities which are NFP Energy 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 Energy End Users are directly accountable to their consumer-members and boards. Any gains or losses on an NFP Energy End User's energy transactions result in higher or lower energy costs to American businesses and consumers. The NFP Energy End Users do not seek profit for shareholders or investors. Their public service mission is the singular purpose and reason for their existence, and 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 markets for natural gas and power in North America are 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 natural gas and electric industries in North America (including the NFP Energy End Users) are 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 or overlap with existing regulatory structures.

Some of the NFP Energy End Users' energy transactions are conducted through, "on," or "in" the "markets" operated by various regional transmission organizations or independent system operators (collectively, "RTOs"). RTOs operate their "markets" in certain defined geographic areas of the United States 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.

FERC's mandate from Congress under both the Federal Power Act and the Natural Gas Act is to regulate in the "public interest" -- which is interpreted as the delivery of reliable electric energy and natural gas 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 markets are intrinsically tied to the reliable physical transmission and ultimate delivery of electric energy in interstate commerce at just and reasonable rates.

All the energy contracts, agreements and transactions in which the NFP Energy End Users are engaged are currently conducted either on CFTC-regulated exchanges or 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 involvement in the underlying cash commodity markets relevant to their businesses (as "eligible commercial entities"). Other than a few large industrial companies, retail energy consumers generally do not participate in these wholesale markets directly. The physical and financial commodity transactions occur principal to principal, through agents and energy brokers, with a wide range of counterparties. As distinguished from other markets regulated by the CFTC, a significant percentage of these energy transactions do not involve financial intermediaries.

The transactions contain customized, non-quantitative operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between commercial enterprises. Although some legal and administrative terms are standardized through the use of master agreements, the schedules to such master agreements and the individual transaction confirmations are highly negotiated and differ based on the needs and preferences of each pair of contract counterparties. These are commercial transactions when viewed through the traditional lens of "goods" and "services" used by American businesses. It is only when they are viewed through the financial markets lens (as the Act does) that these transactions are described using the financial market regulatory labels such as "exempt commodities," "swap agreements," "options," "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 professionals.

The NFP Energy End Users currently have the risk management choice to conduct some of these everyday 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 those delivered at "hubs," in tradable increments and for tradable duration -- "swaps" that are "standardized" and "fungible" in financial market terms, and with sufficient trading liquidity to allow financial markets to function. As the CFTC-regulated financial markets have evolved, some of the larger NFP Energy End Users have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments. But the vast majority of NFP Energy End Users' commercial commodity transactions are still conducted "the old fashioned way": under tariffs within the public power and cooperative systems or by contract with known and reliable suppliers and customers, and not with CFTC-regulated financial intermediaries or on exchanges or with clearing entities.

Due to the Act's wholesale deletion of applicable exemptions in the CEA, and the potentially sweeping nature of the new definitions in the Act, these everyday transactions of the NFP Energy 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 impose new 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 professional financial market participants.[4]

II. COMMENTS

A. *The CFTC Should Ensure that End Users are NOT Inadvertently Swept Up in the Definitions of " Swap Dealer" and "Major Swap Participant."*

This issue was addressed in the EEI comment letter dated September 20, 2010 in response to the Definitions ANOPR (the "EEI Definitions ANOPR Comment Letter"), and we endorsed EEI's comments in our NFP EEU Definitions ANOPR Comment Letter, filed the same day. A copy of the EEI Definitions ANOPR Comment Letter is attached hereto for your convenience, and you are referred to Section III thereof. In the NFP EEU Definitions ANOPR Comment Letter, you are referred to Sections II.B and II.C thereof.

[4] See 156 Cong. Rec. H5248 (the "Dodd-Lincoln letter").

B. *The CFTC Should Define "Commercial Risk" Broadly, and Interpret the Phrase Consistently Throughout the Commodity Exchange Act.*

Section 721(b) of the Act provides that the CFTC "may adopt a rule to define...the term 'commercial risk.'" Our proposal for the definition of the statutory term "commercial risk" was addressed in our NFP EEU Definitions ANOPR Comment Letter in the context of the definition of "major swap participant.". You are referred to Section II.C thereof. That definition should also be used in the context of rule-makings for the end user exception.

The definition should accommodate the many and varied risks of a commercial enterprise (as juxtaposed with the risks faced by a financial entity), and which may be hedged or mitigated using swaps. The term is used to cover similar concepts in both these contexts and in other places in the Act where the defined term is used. Moreover, it is a fundamental principle of statutory construction that when a statute uses the same words in different sections of the same statute, those words should be interpreted to have the same meaning.[5]

C. *The CFTC Should Confirm that Eligible Commercial Entities are Eligible Contract Participants for Swaps where the Commodities Underlying Such Swaps Are Those Commodities In Which the Eligible Commercial Entity Transacts in the Conduct of its Commercial Enterprise, and Concurrently the CFTC Should Confirm and Determine that all NFP Energy End Users are Eligible Contract Participants.*

This issue was addressed in our NFP EEU Definitions ANOPR Comment Letter. You are referred to Section II.D.1 thereof. This issue becomes of even more importance to the NFP Energy End Users if it determines whether they can fully utilize the end user exception. See Section II.D below.

D. *The CFTC Should Interpret New CEA Section 2(e) Consistently with New CEA Sections 2(h)(7) and 2(h)(8.)*

A non-financial entity eligible to use the "end user exception" to clearing in new Section 2(h)(7) of the CEA is also entitled to the correlated exception from transacting on exchange provided in new Section 2(h)(8). However, new CEA Section 2(e) could be read separately to require that some of these end user transactions take place only on a designated contract market, or make the off-exchange transactions unlawful -- if the end user does not meet the definition of Eligible Contract Participant (which is mentioned nowhere in Section 2(h)).

We believe that the lack of a cross-reference in Section 2(e) is a drafting error in the Act. It cannot have been Congress' intent to grant the end user exception and correlated exception from exchange trading, and yet "catch" certain NFP Energy End Users with new Section 2(e), and force them to transact only in the quantities and at delivery locations which may be listed on

[5] Powerex Corp. v. Reliant Energy Services, 551 U.S. 224 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

designated contract markets, in order to hedge their commercial risks. In such a case, CEA Section 2(e) would effectively deny the end user exception to a non-Eligible Contract Participant, since the end user would have to incur the transaction and financial intermediary costs, including margin, to transact on exchange, or forego hedging its commercial risks.

Confirmation of this interpretation in the CFTC's rulemakings is crucial for entities such as small NFP Energy End Users, that *should* qualify as Eligible Contract Participants for those commodities in which they transact their commercial enterprise, but may not meet the financial parameters otherwise set forth in the definition of Eligible Contract Participant --see Section II.C above. The NFP Energy End Users anticipate that they will utilize the end user exceptions from clearing and exchange-trading for most of the swaps where the underlying commodities are those in which they conduct commercial activities -- to allow them to hedge their commercial risks efficiently and cost-effectively, using the customized terms and credit support mechanisms found only in the non-cleared markets. Congress clearly intended the end user exception to be available to all non-financial entities hedging commercial risk.

For example, a small municipal electric utility may want to hedge its production/purchased power costs by fixing the price of forward power that it needs to serve its load in July and August 2012. Its load and weather forecasts for its service territory (compared with its owned and purchased power assets) indicate it will need 30-34 megawatts delivered to its service territory for each of those forward months. Or, suppose a small municipal gas utility wants to fix the price of natural gas it expects to need to serve its load in November 2012 through March 2013 (based on load, weather and its gas assets) by purchasing a fixed for floating price swap for 50,000 MMBtus (5 futures contract equivalents) per month. Or, perhaps an electric cooperative wants to sell into the market the excess generation from a 200 megawatt plant that it completed in 2010 (based on pre-recession load growth forecasts) and use the sale proceeds to reduce debt incurred to build such generation over the next 3 years, while retaining access to the forward power to serve its projected long term load growth after 2014. The cooperative in this scenario wants to fix the forward price at which it will sell 145, 120 and 75 MWs forward for the next 3 years to "lock in" the power sales price it will receive and then use to reduce its debt load. In each of these examples, the small NFP Energy End User would utilize the end user exception to engage in a non-cleared, off-exchange swap to protect its costs against potentially intolerable price changes. The swap would be customized to hedge as precisely as possible the unique commercial risk the NFP Energy End User needs to hedge. However the NFP Energy End User in each example may or may not meet the financial tests within the definition of Eligible Contract Participant.

The NFP Energy End Users transact in the energy and energy-related commodity and swaps market solely to protect their enterprise cost structure from potential price fluctuations, unlike commodity and swap traders who initiate positions and then offset those transactions seeking to profit from market price movements. Every NFP Energy End User seeking to hedge its commercial risk in this way needs to be able to assure itself and its counterparty that Section 2(e) will not make the swap unlawful. For this reason, the NFP Energy End Users request that the CFTC confirm that its interpretation that new Section 2(e) is intended to be applicable *except*

to transactions entered into in reliance on the end user exceptions in new Sections 2(h)(7) and 2(h)(8).

E. *For End Users, the Required Notification of "How It Generally Meets Financial Obligations for Non-Cleared Swaps" Should be a One-Time Representation About Risk Management Policies, with an Obligation to Update If Its Representation Requires Updating, Revision or Clarification for Any Reason.*

The CFTC's requirements for end user notifications under Section 2(h)(7)(A)(iii) of the CEA should be reasonable and streamlined. This section of the Act allows the CFTC to specify the ways in which an end user may satisfy the statutory requirement that the end user notify the CFTC of "how it *generally* meets its financial obligations for non-cleared swaps *(emphasis added)*." The statutory requirement does not provide any analysis or insight into the varied ways in which end users might use swaps to manage commercial risk and, in that context, "generally" meet their associated financial obligations. Nor does the statutory requirement take into account or relate the notification to any systemic risk to the financial markets that the end user's non-cleared swaps might represent (or, more to the point, do not represent). So the CFTC needs to take a common sense approach, minimizing filing requirements and keeping in mind the wide variety of ways in which end users hedge their idiosyncratic commercial risks.

End users engage in swaps to hedge or mitigate the commercial risks that arise naturally and inevitably in their commercial enterprises. Those commercial risks are identifiable (for each commercial enterprise), and each management team then chooses to either mitigate or manage such risks or to allow the commercial risks to remain "unhedged" – which is, in itself, a passive method of risk management.

For the NFP Energy End Users, the commercial risks they face in their public service enterprises arise from the "natural short" position in which they usually find themselves. The NFP Energy End Users are load serving entities for the essential services -- natural gas or power -- necessary to run American homes and businesses. The NFP Energy End Users have continuing and absolute public service obligations to serve energy loads within their service territories. Unless and until the price and supply of the required volumes are acquired, the NFP Energy End Users are "short" and exposed to market price, availability and other commercial risks associated with their public service obligations. Accordingly, the sole purpose of the NFP Energy End Users to transact in the forward commodity and swaps markets is to mitigate those commercial risks. The NFP Energy End Users are clearly identifiable in the marketplace for energy and energy-related swaps as "natural shorts" (load serving entities in geographic service territories), and as entities for which it is politically and practically untenable at the time of delivery to be actually "short" of the deliverable energy commodity. As the delivery month approaches, the NFP Energy End Users and other load serving entities in the marketplace become more and more dependent on their risk management and energy procurement abilities to fill any gaps in their energy supply portfolios.

For NFP Energy End Users, hedging is not just about managing price risk. It is about fulfilling their public service mission (see Section I.E. above). The NFP Energy End Users hedge their physical need for power or natural gas with either purchased, options to purchase or

owned supply resources (as the offsetting "long positions"), and hedge the price and other commercial risks associated with those energy supply needs using forward contracts, options, swaps, and in some cases futures and exchange-traded options.

The NFP Energy End Users engage in swaps ONLY to hedge commercial risks. They do not speculate[6] and have no separate shareholder or investor base that would "profit" from such speculation. The NFP Energy End Users' risk management policies and procedures typically prohibit speculation and prohibit engaging in swaps which are not of the class, category or type of swaps necessary to hedge their commercial risks. The NFP Energy End Users' governing bodies (such as elected or appointed utility boards or electric cooperative boards, city councils, etc.), the regulators and the cooperative members --all comprised of citizens for whom the NFP Energy End Users provide essential services -- monitor those risk management policies and procedures carefully. As described in Section I.E. above, if a "loss" occurs in connection with the NFP Energy End User's energy or energy-related swaps transactions, that loss will either indirectly or directly affect the energy costs of the American consumers served by that NFP Energy End User.

The NFP Energy End Users "meet their financial obligations for non-cleared swaps" in two ways. First and foremost, they maintain experience-tested risk management policies and procedures which prohibit speculation and which are appropriate to the extent and complexity of the NFP Energy End User's involvement in the types of non-cleared swaps used to mitigate the commercial risks in the enterprise. These policies do not permit the entity to engage in swaps of other categories, classes or types deemed inappropriate to manage the entity's commercial risks. In this regard, NFP Energy End Users are similar to other end users of commodity-based swaps. Their policies are <u>not</u> broad financial authorizations to transact in swaps and other financial products generally and for profit, at the discretion of the entity's traders. Rather, they are focused policies, tailored to each entity's specific hedging and commercial risk mitigation objectives.

The second way in which the NFP Energy End Users meet their financial obligations is that they have the measurable and identifiable commercial risks which can be managed or mitigated by use of swaps. But this concept is already inherent in the definition of "commercial risk" which underlies the end user exception. A further requirement for some other statement, representation or filing to the CFTC is superfluous. Only a market participant that "buys" or "sells" a swap position for the purpose of profit, rather than to hedge an existing commercial risk, increases systemic risk by entering into that non-cleared swap. An end user hedging commercial risk reduces risk, and "generally meets its financial obligations" in respect of that

[6] The term "speculate" as used herein means deliberately taking a position, and then offsetting it with another position, for the purpose of profiting from favorable movements in market prices. Speculation is a risk-increasing activity in which commodity traders commonly engage. An NFP Energy End User may enter into a swap transaction that settles favorably (i.e., "in the money"). But that favorably-settling swap transaction offsets a correlated unfavorable movement/settlement in the commercial risk being hedged.

non-cleared swap when that swap settles by offsetting against the commercial risk that was hedged.

Ultimately, an NFP Energy End User meets its financial obligations in respect of the non-cleared hedges when customers in its service territory pay for the energy the NFP Energy End User delivers to them. If the CFTC requires any notification beyond the general risk management statement described above, it should be a similarly general statement that the NFP Energy End User has the ability, subject in some cases to review by state rate regulators or to other governmental or end user membership approvals, to adjust the rates payable by its customers for the commodity that the NFP Energy End User delivers to those customers.

The Coalition urges the CFTC to include in its rulemaking a provision allowing the CFTC notification for end users required by new Section 2(h)(7)(A)(iii) of the CEA to be limited to a one-time representation, with additional notification required only if that representation needs to be updated, revised or clarified in the future. The end user's representation may include an identification of the class, category or type of swaps in which the entity's risk management policies allow it to engage, and should be a general statement about the entity's management having made a determination that the risk management policies and procedures in place are appropriate to the scope and complexity of the entity's use of non-cleared swaps to hedge commercial risks.

We urge the CFTC not to require specific language in the representation or certain risk metrics, and not to require periodic financial statement filings or financial metrics. The CFTC rules should be principles-based. As discussed in Section I.E. above, the scope and complexity of the NFP Energy End Users' risk management policies and procedures vary considerably, just as the size and complexity of the NFP Energy End Users' service territories, energy resources and operations vary.[7] It is not the absolute size or financial underpinnings of the entity, but the appropriateness of its risk management policies and procedures that provides an end user with the ability to safely manage its commercial risks and generally meet its financial obligations for non-cleared swaps.

This type of one time notification will meet the requirements of Section 2(h)(7)(A)(iii) without placing unnecessary regulatory burdens on NFP Energy End Users, allowing them to focus instead on smooth integration of the new CFTC regulatory structure into their already comprehensive and time-tested risk management procedures. Additionally, the NFP Energy End Users respectfully request that a SBREFA review be conducted, focused on any regulatory notice

[7] To give the Task Force some examples of the diversity of assets, load (customers served within the utility's geographic service territory), energy hedging and risk management policies, swap usage and collateral/margin experience within the NFP EEU membership, we have attached eight "profiles" of individual NFP Energy End Users. None of these profiles purport to be "typical" of large, medium or small NFP Energy End Users (by number of customers). No NFP Energy End User is typical, given their diverse commercial profiles. However, the CFTC's regulations have to work for all NFP Energy End Users who share the identical public service mission.

requirements to be imposed on end users that are "small entities," with full opportunity for input and public hearing.

F. *For compliance with the CEA and all regulations promulgated thereunder, transactions between members of a "Related NFP EEU Group" should be disregarded.*

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 (G&T cooperative)." Or, a municipal gas or electric utility may also be a participant in a "joint action agency" or a "joint power authority." 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, and 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. The Related NFP EEU Group therefore conducts business within the group 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 CFTC 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 access a market to sell their commodity, but to fulfill their shared public service commitment to deliver reliable, affordable natural gas and/or power to consumers 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. 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 between 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. 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. For this reason, transactions between members of a Related NFP EEU Group should be disregarded for CFTC record keeping and reporting purposes. Intra-Related NFP EEU Group transactions should not be subject to margining or any other aspect of CFTC jurisdiction. And 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. Only transactions with third parties outside of a Related NFP EEU Group should be considered as transactions potentially subject to the CFTC's jurisdiction. [8]

III. CONCLUSION

The Coalition strongly encourages the CFTC to consider the foregoing comments as the CFTC proceeds with its rule-makings. The NFP Energy End Users are quintessential "end users of energy and energy-related commodities and swaps." The Coalition respectfully requests that the CFTC issue rules and clarifications that will preserve the NFP Energy End Users' ability to hedge and mitigate commercial risks and that the CFTC not impose new and unnecessary regulatory burdens on end users.

[8]Certain members of the NFP Energy End User Coalition – the public power utilities and the 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. – that is, for electric energy transactions *between* FPA 201(f) entities which are not participants in the same Related NFP EEU Group.

Respectfully yours,

THE "NOT-FOR-PROFIT ENERGY END USER COALITION":

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By: _____

Name:
Title:

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