INTERIM FINAL RULE

November 15, 2010

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Email: peswapreport@cftc.gov and via CFTC website protocol

Re: Comments on Interim Final Rule on Data Recordkeeping and Reporting under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (17 CFR Part 44)

Dear Mr. Stawick:

The trade associations comprising the "Not-For-Profit Electric End User Coalition" (the "Coalition") respectfully submit these comments to the Commodity Futures Trading Commission (the "CFTC") on the Interim Final Rule on Data Recordkeeping and Reporting, issued October 14, 2010 under Title VII of the "Dodd-Frank Wall Street Reform and Consumer Protection Act."[1] Because the comments on the Interim Final Rule are also relevant to the CFTC's Task Force XVII (the "Data Recordkeeping and Reporting Task Force") established as part of the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), we are also submitting these comments to such Data Recordkeeping and Reporting Task Force.

[1] 75 Fed. Reg. 63,080 (Oct. 14, 2010).

Given the nature of our members' commercial enterprises, [2] our comments focus on the aspects of the Interim Final Rule that will affect the record-keeping obligations of "end users" of energy and energy-related commodities and "swaps."[3]

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 respectfully requests that the regulators keep in mind at each step along the way how these rule-makings will ultimately impact the commercial enterprises that are "end users" of commodities and swaps. These are not financial entities, and they have not previously been regulated by the CFTC.

On the day after the effective date of the Act, each of these end users will still have a business to run, commercial risks to manage and customers to serve. The Act was intended by Congress to regulate the financial markets more effectively, and to provide regulatory oversight to financial entities. The rule-makings must not leave commercial enterprises uncertain as to which of their ongoing activities will now be regulated by the CFTC or how to comply with the CFTC's new rules. Nor should the rule-makings impose on these enterprises unnecessary new regulatory costs and burdens.

I. THE COALITION MEMBERS

The Coalition is comprised of three trade associations representing the interests of not-for-profit, consumer-owned electric utilities in the United States (collectively, the "NFP Electric End Users"). [4] The primary business of these NFP Electric End Users has been for well over 75

[2] 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.

[3] We have footnoted this term, and direct the reader to the comments submitted by the Not-For-Profit Energy End User Coalition dated September 20, 2010, submitted in response to the "Definitions ANOPR," and in particular to the comments on the definition of "swap" in that letter. A copy is attached for convenience of reference. Given the broad definition of "swap" and the fact that everyday commercial transactions of the NFP Electric End Users may arguably fall within that definition, the regulatory burdens of data record-keeping and reporting with respect to "swaps" are of significant concern to NFP Electric End Users.

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

years, and still is today, to provide reliable electric energy to their retail consumer customers every hour of the day and every season of the year, keeping costs low and supply predictable, while practicing good environmental stewardship. The NFP Electric End Users are public service entities, owned by and accountable to the American consumers they serve.

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

Formed in 1942, NRECA is the national service organization for more than 900 not-for-profit rural electric utilities and public power districts that provide electric energy to approximately 42 million consumers in 47 states or 12 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. NRECA members generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. The vast majority of NRECA members are not-for-profit, consumer-owned cooperatives which distribute electricity to consumers. NRECA's members also include approximately 66 generation and transmission ("G&T") cooperatives, which generate and transmit power to 668 of the 846 distribution cooperatives. The G&T cooperatives are owned by the distribution cooperatives they serve. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost. All these cooperatives work together pursuant to their common public service mandate from their members, often without the type of contracts that exist between for-profit entities. Rather, many cooperatives deal with each other under take and pay "all requirements contracts" which set forth the terms of service/energy sales, but not necessarily the price for such service/energy sales. For example, as between a G&T cooperative and its distribution cooperative owner-members, the price is often determined based on a "cost of service" rate, with no market price component.

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

The vast majority of NRECA's members meet the definition of "small entities" under the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. SBREFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that entities which provide electric services are "small entities" if they dispose of 4 million MWh or less per year. 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. LARGE PUBLIC POWER COUNCIL ("LPPC")

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

Members of the LPPC are also members of APPA. LPPC members are larger in size than other APPA members due to the size and population density of the communities to which they provide power. LPPC members often require larger, more complex and more diverse types of resources to serve their communities as well, and therefore LPPC members own and operate more complex generation and transmission assets than many other APPA members. However, despite being larger in size and resources, LPPC members' public service mission remains the

same -- to provide reliable, safe electricity service, keeping costs low and predictable for its customers while practicing good environmental stewardship.

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

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

Some NFP Electric End Users generate, transmit and sell electric energy to their fellow public power systems and cooperatives and to third parties at wholesale, while others purchase electric energy (from associated public power systems and cooperatives or from third parties), and distribute it to retail consumers. Still others perform all or a combination of these commercial functions. The Coalition's members are unique among "end users" whose transactions are potentially subject to CFTC regulation as "swaps" (even among those who are "end users" of energy and energy-related commodities and swaps) in that the public power entities which are NFP Electric End Users have no stockholders and are accountable to elected and/or appointed officials, and ultimately to the consumers of their services. Similarly, the electric cooperatives which are NFP Electric End Users are directly accountable to their consumer-members and boards. Any gains or losses on an NFP Electric End User's energy transactions result in higher or lower energy costs to American businesses and consumers. The NFP Electric End Users do not seek profit for shareholders or investors. Their public service mission is the singular purpose and reason for their existence, 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 market for power in North America is comprehensively regulated at the Federal, state and local level, with a focus on reliability of service and regulated rates payable by the retail customer. In addition, the electric industry in North America (including the NFP Electric End Users) is subject to extensive environmental regulations and, in many states, renewable energy standards. Unlike other markets for over-the-counter ("OTC") derivatives and/or "swaps" (as newly defined by the Act), these are not unregulated markets. They are comprehensively regulated, and any new regulatory structure must be carefully tailored so as not to conflict with existing regulatory structures.

Some of the NFP Electric End Users' energy transactions are conducted through, "on," or "in" the "markets" operated by various regional transmission organizations or independent system operators (collectively, "RTOs"). 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 the Federal Power Act is to regulate in the "public interest" -- which is interpreted as the delivery of reliable electric energy to American consumers at "just and reasonable" rates. It is under this regulatory mandate that the RTOs (overseen by FERC) have established, and currently maintain and operate the FERC-regulated markets. The 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 Electric End Users are engaged are currently conducted under exemptions or exclusions from the Commodity Exchange Act (the "CEA"), whether conducted in the bilateral OTC contract market (as most are, including RTO transactions) or on exempt commercial markets. The participants in these markets are "eligible contract participants" either by virtue of their size and financial characteristics, or by virtue of their 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 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 businesses. Although some legal and administrative terms are standardized through the use of master agreements, the negotiated schedules and 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 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 Electric 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 – that are "standardized" and

"fungible" in financial market terms, and with sufficient contract trading liquidity to allow for financial markets to function. As the CFTC-regulated financial markets have evolved, some of the larger NFP Electric End Users have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments. But the vast majority of NFP Electric End Users' commercial commodity transactions 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 Act's new definitions, these everyday business transactions of the NFP Electric End Users are at some risk of being suddenly, unexpectedly, redefined as "swaps." Although Congress has repeatedly indicated that its intention was NOT to reduce risk management options for end users or impose new regulatory costs on end users hedging the risks of traditional commercial enterprises, Congress is relying on the regulators to implement that intent and to write clear rules. 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.[5]

II. COMMENTS

A. *The Interim Final Rule Creates Uncertainty as to What Records Need to be Maintained for Pre-Enactment Swaps.*

The NFP Electric End Users appreciate the CFTC's timely issuance of the Interim Final Rule. The Interim Final Rule removed uncertainty as to what, if any, "non-cleared swaps" the NFP Electric End Users would be required to report to the CFTC on or prior to November 15, 2010 (30 days after issuance of the Interim Final Rule) pursuant to new Section 4r of the CEA, as set forth in Section 729(a) of the Act.[6]

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

[6] Pending the CFTC's complex and interrelated rule-makings under the Act, it is currently impossible to tell which of the NFP Electric End Users' everyday commercial transactions will be determined to be covered by, and not excluded from, the definition of "swap." It is also impossible to determine which of the NFP EEU's counterparties will be required to register as "swap dealers" or "major swap participants." For transactions with non-swap dealer/non-major swap participant counterparties (transactions not involving these CFTC-defined entities or other "financial entities"), it is commercially impractical to negotiate a reporting obligation for an outstanding transaction without deciding who will pay for such reporting. There are presently no "swap data repositories" registered to accept information about any, or any particular, category of non-cleared swaps. And it is yet to be determined what data elements in respect of particular categories of swaps will need to be reported, whether quantitative or qualitative, and in what form. Consequently, before the Interim Final Rule

However, while removing uncertainty with respect to reporting requirements, the Interim Final Rule **creates uncertainty as to what business records end users are required to retain in respect of pre-enactment swaps**. The NFP Electric End Users do not have the data storage systems to maintain a complete backup of their commercial business transactions in order to comply with potential CFTC data recordkeeping and reporting requirements. Our computer systems are focused on reliability and current regulatory record-keeping and reporting requirements to which our businesses are subject from energy, finance and environmental regulators at the local, state and Federal levels.

We respectfully request prompt clarification of the Interim Final Rule, in particular as the Rule applies to any entity which anticipates being eligible for the "end user" exception to clearing and in particular as the Rule applies to the energy and energy-related "swaps" to which the NFP Electric End Users are party. We respectfully request that the CFTC clarify that only the swap transaction documentation (e.g., confirmations), and applicable master agreements to the extent that such master agreements contain or define commercial terms incorporated into swap transaction documentation, and any modifications of those documents (the "Swap Documentation"), need be retained for pre-enactment swaps. Finally, we request that the CFTC provide a "safe harbor" for those market participants who make a good faith effort to comply with the Interim Final Rule in the absence of further guidance from the CFTC.

1. *For End Users, "Value" and "Price" are Evaluated and Determined Only in Relation to the Commercial Risk Being Hedged.* Three phrases in Proposed Rule 44.02 imply that documentation outside the four corners of the Swap Documentation must be retained. The three ambiguous phrases are the requirement to retain: ". . .information relating to the swap transaction . . .," ". . . information necessary to . . . value the transaction" or ". . . information relevant to the price of the transaction." For end users who utilize "swaps" to hedge commercial risks, such documentation could be interpreted to include documents from all areas of the commercial business enterprise. For end users, "value" and "price" are not evaluated and determined in the abstract (as they might be for a financial entity engaging in market transactions solely to manage price risk of existing contracts), but are evaluated and determined in relation to the commercial risk or risks being hedged. The documentation required to be kept, if viewed in the most conservative records retention/compliance sense, would be voluminous.

   In some cases, this documentation may be viewed on, or downloaded from, third party systems subject to confidentiality agreements. In other cases, the information may be developed on proprietary systems or software, either of the

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deferred reporting requirements under the Act, end users were faced with an impossible task of determining what documentation about what pre-enactment transactions to report to what entity, in what manner or form, and at whose cost.

end user or of third parties. For example, an energy supply employee may view price curves or weather projections provided by third parties in valuing or pricing a swap for July 2011 power. In the course of "valuing" a swap for purposes of pre-transaction or post-transaction risk management, credit risk management or regulatory compliance, a utility employee may look at load projections in its service territory, regulatory reliability or resource adequacy data, or regional transmission data. Extensive information relevant to valuation or price of "swaps" may exist in other departments of a commercial business about the commercial risk being hedged, the fluctuations in that commercial risk, and the business enterprise's risk tolerance. An employee may look at 30 year weather records, current year or future budget information, regulatory or reliability compliance or reserve requirements, or generation performance statistics. Finally, in valuing or pricing any over-the-counter swap transaction, a key part of the analysis will be the operating and financial strength of the counterparty and other counterparties in the marketplace potentially willing to enter into the same transaction, and how that credit risk is evaluated relative to the end user's own operating and financial strength and relative to the nature of the particular transaction and the counterparty relationship as a whole. Such information is developed on an ongoing basis before, during final negotiations, at the time and after any particular transaction is entered into. From the standpoint of the end users, such credit support and credit risk management information has considerable bearing on the value (pre-transaction and post-transaction) of the swap in managing or mitigating commercial risk.

It would be impossible for an end user hedging commercial risk to retain all information relevant to the value or pricing of any particular swap transaction. For this reason, we request that the CFTC clarify that, for persons who anticipate being eligible for the "end user" exception to clearing under the Act, no information is required to be maintained outside of the Swap Documentation.

2. *Only Swap Documentation is Necessary for the CFTC to Effectively Regulate Swaps.* We strongly support the CFTC's goal of price transparency for the markets in energy and energy-related swaps, classes and types of energy and energy-related swaps. The Swap Documentation will identify all the relevant commercial terms of the swap transaction, including the price at which the swap transaction is agreed. The CFTC's regulatory mission to bring transparency to the swaps market is fulfilled if it requires record-keeping and facilitates publication of that price and the price at which other comparable and concurrent swap transactions are agreed. The CFTC is not authorized to bring transparency to how those prices were reached between counterparties, or how a transaction is valued or priced by one or another of the contract counterparties. Nor is the CFTC charged with analyzing on what basis an end user "values" its decision to enter into a swap. To require end users to maintain records (or to report) information other than the terms included in the Swap Documentation does not advance the

CFTC's goal of swap price transparency. And end users should not be required to maintain records that do not contain information reasonably likely to be necessary for the CFTC to fulfill its regulatory obligations.

3. *Alternatively, the CFTC Should Outline Categories of Documentation Which Need Not Be Retained, in Terms That are Relevant to an End User's Commercial Business.* If the CFTC declines to make the clarification requested above, we alternatively respectfully request that the CFTC outline categories of information which need not be retained by persons who anticipate being eligible for the "end user" exception to clearing under the Act. No information must be retained which is or might reasonably be expected to be subject to confidentiality agreements with third parties. No proprietary information must be retained. No information must be retained about the commercial risks the end user hedges or considers hedging with swaps. No information need be retained about the actual, historical or potential fluctuations in that commercial risk or the end user's risk tolerance. No information need be retained about the relative or actual credit risk or credit support of the end user itself, its counterparty or other potential counterparties. We request that the CFTC clarify this for the categories, classes and types of energy and energy-related swaps in which the NFP Electric End Users regularly transact -- and we would be happy to provide further information about those categories, classes and types of swaps. Finally, we request that the CFTC clarify this for the NFP Electric End Users, who utilize these energy and energy-related transactions in the ordinary course of their business solely to hedge commercial risk, and anticipate availing themselves of the end user exception to clearing in respect of 100% of their swap transactions.

B. *The CFTC Should Also Confirm That No Records are Required to Be Kept for Post-Enactment Swaps*.

The Interim Final Rule addresses what records should be retained in respect of **pre-enactment swaps** -- those entered into and remaining outstanding as of the date the Act was enacted (July 21, 2010). For that reason, the NFP Electric End Users have "taken a snapshot of," or "sent a records retention notice for," pre-enactment swaps. However, the following two questions are being asked by the NFP Electric End Users: "Does the Interim Final Rule require companies to retain similar information for transactions entered into daily in August 2010, September 2010, October 2010, and for all ongoing post-enactment periods until the CFTC issues its final rules with respect to data record-keeping and reporting?" Also, "If a company does not currently have business practices or technology that captures and retains information referenced in the Interim Final Rule (with respect to pre-enactment swaps), does the CFTC's rule require or suggest that a commercial business develop and install such systems which are not otherwise necessary or useful to its operations?" The Interim Final Rule does not address these issues.

The NFP Electric End Users continue to do their commercial business, day in, day out, as they have for decades. In the process, the NFP Electric End Users enter into transactions that

may or may not be "swaps," with parties that may or may not be swap dealers or major swap participants. Such swaps are mostly "non-cleared." Many of these transactions will no longer be outstanding when the CFTC issues its final record-keeping and reporting rules. The NFP Electric End Users have limited funds available for the types of non-operating information technology systems or data storage resources which would be necessary to keep this type of information for an indeterminate period of time. The NFP Electric End Users respectfully request the CFTC confirm that market participants have no ongoing CFTC record-keeping requirements in respect of post-enactment swaps, and that it is still considering whether any or all of the data elements referenced in the Interim Final Rule will be required to be retained or reported under its final rules.

C. *A "Safe Harbor" Provision is Appropriate Given the Regulatory Uncertainty.*

In light of the ambiguities in the Interim Final Rule, and the complex and interrelated nature of the ongoing CFTC rule-making proceedings, the NFP Electric End Users respectfully request that the CFTC provide a "safe harbor" for those market participants who make a good faith effort to comply with the Interim Final Rule.

III. CONCLUSION

The Coalition strongly encourages the CFTC to consider the perspectives of end users of "swaps" at every step of its regulatory rule-making process and to ask whether its rules are clear to those who are not financial entities and not regular participants in the financial markets. We respectfully request that, as the CFTC drafts its rules, it carefully consider the questions of and consequences to those who operate commercial businesses and are drawn into this new regulatory environment only because of the Act's broad statutory language which could be interpreted to redefine traditional commercial contracts as "swaps." Any new direct or indirect costs or regulatory record-keeping or reporting requirements will result, dollar for dollar, in higher costs to the NFP Electric End Users' customers and owners -- approximately 87 million American retail consumers of electric energy.

The NFP Electric End Users are relying on the CFTC to draft clear rules, to make clear how current interpretations, no action positions and precedent under the CEA should be read in light of the Act's new and different regulatory structure, and to conduct all necessary exemption proceedings prior to the effective date of the Act (and with appropriate regulatory transition periods thereafter). We stand ready to help the CFTC understand our businesses, our industry and our "markets." Please contact any of the Coalition's representatives for information or assistance.

Respectfully yours,

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

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

By: Russ Wasson

Russell Wasson
Director, Tax, Finance and Accounting Policy

AMERICAN PUBLIC POWER ASSOCIATION

By: Susan Nicely

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

LARGE PUBLIC POWER COUNCIL

By: Noreen R

Name: Noreen Roche-Carter
Title: Chair, Tax and Finance Task Force

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

Copy of Comment Letter Dated September 20, 2010

See Attached.

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September 20, 2010

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Email to secretary@cftc.gov, dfadefinitions@cftc.gov and otcdefinitions@cftc.gov with Definitions in Subject line;

Re: Proposed Definitions Contained in 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") in response to the Advanced Notice of Proposed Rulemaking entitled "Definitions contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act."[1] This rulemaking is part of the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). Given the nature of our members' commercial businesses, our comments focus primarily on the aspects of the definitions that will affect end users of energy and energy-related commodities. [2]

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[1] 75 Fed. Reg. 51,429 (Aug. 20, 2010).

[2] The comments contained in this filing represent the initial comments and recommendations of the organizations comprising the "Coalition," but not necessarily the views of any particular member with respect to any issue.

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 respectfully requests that the regulators keep in mind at each step along the way how these rule-makings will ultimately impact the commercial businesses that are "end users" of commodities and "swaps." These are not financial entities, and they have not previously been regulated by the CFTC. Under current law, if an end user chooses to buy or sell CFTC-regulated futures contracts or options or to utilize a CFTC-regulated clearing entity to manage its commercial risk, this represents one commercial choice among many. In many circumstances, small businesses in particular choose to manage their risks in less expensive ways. On the day after the effective date of the Act, each of these end users will still have a business to run, commercial risks to manage and customers to serve. The Act was intended by Congress to regulate the financial markets more effectively, and to provide regulatory oversight to financial entities. The rule-makings must not leave commercial businesses uncertain as to which of their ongoing activities will now be regulated by the CFTC. Nor should the rule-makings impose on these businesses unnecessary regulatory costs and burdens.

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 business 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 predictable, while practicing good 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")

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[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 their involvement 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 (the "SBREFA"). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). The RFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (SBA). The SBA's small business size regulations state that entities which provide electric services are "small entities" if they dispose of 4 million MWh or less per year. 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 the RFA.

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)[4], 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.

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.

[4] For more discussion of 201(f) entities, see the comment in Section IIA3 below.

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 entities, public gas entities 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 at wholesale, while others purchase natural gas and/or electric energy, 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 have no stockholders and are accountable to elected and/or appointed officials, and ultimately to the consumers of their services. Similarly, the electric cooperatives are directly accountable to their consumer-members and boards. The NFP Energy End Users' 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.

NFP Energy End Users have a different credit profile than your average "trader" or financial market participant. Due to their consumer-owned and public service nature, most do not have significant assets available to post as margin (due to statutory or government financing restrictions) or significant non-operating accounts, investments or lines of credit available to post "margin" for their long-term infrastructure transactions, especially in the volatile natural gas and power markets. In this way, the NFP Energy End Users are fundamentally different from other entities the CFTC regulates or is charged with regulating under its new jurisdiction.

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 with existing regulatory structures.

A substantial number of the NFP Energy End Users manage the commodity and other commercial risks associated with their business by entering into "contracts, agreements and transactions" in energy and energy-related "exempt commodities," including, without limitation, transactions in electric power, natural gas and, in the case of electric utilities, other fuels for

generation. Other commercial risks are managed using options on natural gas, power or other exempt commodities, or "swap agreements." Some of these transactions are conducted through, "on" or "in" the "markets" operated by regional transmission organization or independent system operator (collectively, "RTOs"). These markets operate in certain geographic areas of the United States under a comprehensive regulatory structure established by the Federal Energy Regulatory Commission ("FERC"). The FERC markets are established by tariff in many instances, rather than by contract, and analogies between this system and the bilateral contract markets between independent and arm's length third parties are inapt.

FERC's mandate from Congress under the Federal Power Act and the Natural Gas Act is to regulate in the "public interest" -- which is interpreted as delivering 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 these energy contracts, agreements and transactions are currently conducted under exemptions or exclusions from the Commodity Exchange Act (the "CEA"), whether conducted in the bilateral over-the-counter contract market (as most are) or on exempt commercial markets. The participants in these markets are "eligible contract participants" either by virtue of their size and financial strength, 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 do not participate in these markets directly. The physical and financial commodity transactions occur principal to principal, through agents and energy brokers, with a wide range of counterparties. As distinguished from other markets regulated by the CFTC, many of these energy transactions do not involve financial intermediaries. The transactions contain customized, non-standardized operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between commercial businesses. They are commercial transactions, when viewed through the traditional lens of "goods" and "services" used by American businesses. It is only when they are viewed (as the Act does) through the financial markets lens that they are characterized with the financial market regulatory labels such as "exempt commodities," "swap agreements," "options, "swaps" or "nonfinancial commodities" -- and analogized to "futures contracts" or "positions" created by financial entities 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 the transactions through CFTC-regulated centralized clearing entities. But NFP Energy End Users make that choice relatively rarely. The exchanges have only recently begun to list a significant number of these types of contracts; and central clearing entities have only recently begun to clear energy transactions, especially those which are not standardized or "fungible" in financial market terms. Compared to markets for other commodities, natural gas, power and related transactions are

often highly customized, and contain longer terms as necessary for these infrastructure businesses, as necessary to serve retail customers, and significant operating conditions or contingencies, reflecting the inherent physical and commercial nature of the business. 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 clearing entities.

Due to the wholesale deletion of applicable exemptions in the CEA, and the potentially sweeping nature of the new definitions, these everyday business transactions of the NFP Energy End Users may suddenly, unexpectedly, be redefined as "swaps." Physical forward commodity transactions, commercial option transactions, and option-like aspects of ordinary course "full requirements" natural gas and electric energy transactions could be captured within the new regulatory paradigm. Although Congress has repeatedly indicated that its intention was NOT to capture commercial transactions or to impose new costs on end users hedging risks of traditional commercial businesses, Congress is relying on the regulators to implement that intent and write clear rules. Congress did not intend for the regulators to read the expansive language of the Act without regard to legislative intent, nor to regulate and impose costs on end users as if they were professional financial market participants.[5]

The NFP Energy End Users are relying on the CFTC to draft clear rules, to make clear how current interpretations, no action positions and precedent under the CEA should be read in light of the Act's new and different regulatory structure, and to conduct all necessary exemption proceedings prior to the effective date of the Act (and with appropriate regulatory transition periods thereafter). We stand ready to help the CFTC understand our businesses, our industry and our "markets." If the CFTC ignores the effect of the Act on end users, NFP Energy End Users will face a wall of regulatory uncertainty on the day the Act is effective. Such a result would be a classic example of the unintended and harmful consequences of sweeping legislation and regulation drafted without careful attention to the potential adverse impacts for industries outside the traditional financial markets that Congress intended to stabilize.

II. COMMENTS

A. DEFINITION OF "SWAP"

The Coalition agrees with the comments and recommendations made regarding the definition of "swap" by the Edison Electric Institute in its comment letter to the CFTC dated September 20, 2010. In addition:

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

1. Definition of "nonfinancial commodity"

The Coalition respectfully requests that the CFTC define the term "nonfinancial commodity," which is not otherwise defined in the CEA. Moreover, the Coalition requests that the CFTC identify in its regulations (subject to public notice and industry comment) each of the cash "commodities," "nonfinancial commodities," and "swaps" now being transacted in the natural gas and electric energy industries in North America. The NFP Energy End Users are not financial market professionals. They manage ongoing commercial businesses and provide an essential service to American consumers and businesses. They transact in commercial goods and services every day, and they hedge commercial risks using the identifiable economic tools available to them in the marketplace. NFP Energy End Users do not "create" new transaction types or financially engineer "contracts" or take and trade "positions" to make a profit. They should not have to ask, transaction by transaction, for a CFTC determination as to whether a commonplace commercial transaction falls under the new CFTC jurisdiction. The NFP Energy End Users need regulatory certainty in order to continue conducting their business as usual on the day after the Act's effective date. The NFP Energy End Users should not have to engage in such transactions without being told, in advance, if the CFTC sees such a commercial transaction as a "commodity," or a "swap," or a "financial commodity" (as opposed to a nonfinancial commodity). The Coalition requests that the CFTC grant certainty to end users in the energy industry, by definitively stating in its rule-making which energy and energy-related products and services currently transacted in the marketplace are "commodities," which are "swaps," and which are "nonfinancial commodities."

The Coalition proposes that the definition of "nonfinancial commodities" should include all products and services related to the production, generation, transmission, transportation, storage, delivery or regulation of natural gas or electric energy delivered to North American consumers by commercial businesses in any part of that commodity chain, including all fuels used to produce electric energy, and all services, transactions, allowances, credits, licenses or intangibles defined by an energy or environmental regulator. These types of transactions are used to hedge, mitigate or manage the commercial risks inherent in physical (nonfinancial) delivery of energy commodities, including natural gas and electric energy. "Nonfinancial commodities" should also include all energy and energy-related products and services sold pursuant to "tariffs" approved by Federal, state or local energy regulators, a regulatory process focused on reliability and rate regulated service -- concepts in many ways inconsistent with the concepts that underlie financial market regulation. Finally, "nonfinancial commodities" should also include all contracts, agreements and transactions related to transmission, transportation and storage of energy and energy-related commodities.[6]

[6] We request that the CFTC clarify this point in the definition of "nonfinancial commodity," which appears in the exclusions to the definition of "swap." The ambiguity actually emanates from the CEA's definition of "commodity," where the word "services" appears. Services agreements in the energy industry, including transmission, transportation and

The NFP Energy End Users deserve clear guidance with respect to each type of energy transaction. Understanding which transactions fall under the new regulatory scheme will be critical to commercial decisions the NFP Energy End Users need to make now and continue to make on the day after the effective date. NFP Energy End Users cannot be expected to stop doing business, develop and submit a request to the CFTC for a rule-making or an exemption on each commercial transaction, and await the CFTC's decision. The energy industry deserves to know in advance, and as soon as possible, which transactions need to be cleared, which need to be transacted on exchanges or swap execution facilities, which need to be recorded for later reporting and in what form, which need to fit within regulatory compliance programs, and which need to be reported, when and to whom. Addressing these issues early in the CFTC regulatory rule-making process will allow NFP Energy End Users to understand the scope of changes that the Act will require to the way in which they conduct their businesses. It will also allow input from the other regulators who have authority over the NFP Energy End Users, their transactions and the energy markets they utilize.

2. Tariff Transactions -- Exemption Process

As part of the definition of "swap," the Coalition requests that the CFTC, in conjunction with FERC, the RTOs, the Texas Public Utilities Commission, the Electric Reliability Council of Texas ("ERCOT") and other government and quasi-government energy tariff regulators, articulate an industry-wide exemption process, filing procedures, timelines and other related matters for the "Tariff Transaction" exemption provided for in Section 722(f) of the Act (CEA section 4(c)(6)(A)(B)). Although this exemption is found in a different section of the Act from the definition of "swap," and it refers to the CEA Section 4(c) exemption process, it is unclear how the exemption process is intended to work for transactions which exist currently under tariffs and, in particular, under the RTO and ERCOT rules. There are hundreds, if not thousands, of such tariff transactions, and all electric utility industry participants, including NFP Energy End Users, doing business in the applicable geographic regions use them every day. It is burdensome and unreasonable to expect individual market participants who utilize RTO products and services to request individual 4(c) transaction exemptions, or even product-by-product exemptions from the CFTC. The CFTC should initiate a process similar to the process outlined in the Act for currently cleared "swaps." Good public policy requires a timely, orderly and comprehensive process for exempting already-regulated transactions from duplicative regulation.

Moreover, the industry-wide exemption process should take place well before the effective date of the Act, and should include input from the regulators who approved the tariffs, as well as industry-wide input and public hearings on any transactions for which the CFTC does NOT intend to grant an exemption. The public interest invoked in Section 722(f) of the Act echoes the "public interest" mission of FERC described in Section IE above -- the public interest in reliable natural gas and power, delivered to the American public at just and reasonable rates. The NFP Energy End Users will continue to need to engage in tariff transactions the day after the

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storage contracts, are commercial transactions which should in almost all circumstances be excluded from the CFTC's jurisdiction under the CEA's forward contract exclusion(s).

Act's effective date in order to deliver energy to their customers. They cannot be left to wonder if these products will be deemed "swaps" by the CFTC on that effective date or retroactively at some later date.[7] After the effective date, there should be a clear and expeditious process whereby such exemptions will be filed by the entity or regulator authorized to approve the tariff, and promptly acted upon by the CFTC, to enable the tariff energy markets to continue to function with a focus on the public interest in delivering reliable and affordable energy delivered to the American consumer.

3. FPA 201(f) Transactions -- Exemption Process

The Coalition requests that the CFTC grant a blanket exemption from all aspects of the Act for all transactions between entities exempted from FERC regulation under Section 201(f) of the Federal Power Act.[8] These transactions are between entities in the public power and cooperative community, with no possibility of or incentive for profit at the counterparty's expense. They facilitate the public power system's, or the electric cooperative system's, public service mission, and have been generally exempt from most aspects of FERC jurisdiction for decades on the express understanding and regulatory determination that they are critical to the delivery of power to the American consumer, and do not represent an opportunity to profit to the detriment of either the counterparty or the ultimate consumer. These transactions are clearly distinguishable from transactions between independent arm's length for-profit parties.

B. DEFINITION OF "SWAP DEALER"

The Coalition agrees with the comments and recommendations made regarding the definition of "swap dealer" by the Edison Electric Institute in its letter to the CFTC dated September 20, 2010.

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[7] To be clear, the NFP Energy End Users believe such transactions should NOT be considered "swaps," as this would introduce burdensome, costly, duplicative and potentially conflicting regulation.

[8] FPA Section 201(f) can be found at 16 U.S.C. § 824, and states as follows:

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt. No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

C. DEFINITION OF "MAJOR SWAP PARTICIPANT"

The Coalition agrees with the comments and recommendations made regarding the definition of "major swap participant" by the Edison Electric Institute in its letter to the CFTC dated September 20, 2010. We agree with EEI's request that the CFTC define the term "commercial risk" for purposes of the definition of "major swap participant" and for consistent use throughout the CEA, as amended by the Act. We recommend the following definition:

> (___) **Commercial Risk**. This term means any risk that a person or governmental entity incurs, or anticipates incurring, in connection with operating a commercial business as distinguished from a financial entity, including, but not limited to: commodity risk; market risk, credit risk; operating risk; transportation and storage risk; liquidity risk; financial statement risk; regulatory risk; and any other risk that can be hedged or mitigated with a swap. Hedging and mitigating commercial risk does not include any activity undertaken to assume the risk of changes in the value of a commodity.

D. DEFINITION OF "ELIGIBLE CONTRACT PARTICIPANT"

1. "Eligible Contract Participants" that are also "Eligible Commercial Entities"

Under the changes to the CEA effected by the Act, it is unlawful for any person who is not an eligible contract participant ("ECP") to enter into a swap, unless the swap is entered into on a designated contract market. The NFP Energy End Users are public power and public gas entities, or electric cooperatives, that operate electric energy or natural gas utility businesses. They currently engage in contracts, agreements and transactions in energy and energy related "exempt commodities," which may or may not be determined to be "swaps" under the Act's sweeping definition. The NFP Energy End Users engage in such transactions in the course of their everyday commercial businesses to fulfill their obligation to deliver energy to retail consumers and to hedge, mitigate or manage commercial risk. It would not be cost-effective to conduct all their hedging transactions on an exchange. But some of these NFP Energy End Users do not meet the financial hurdles established in the definition of ECP due to their status as electric cooperatives or public power or gas entities. See the third paragraph of Section IE above. Accordingly, it is important that the CFTC confirm that such commercial entities qualify as ECPs, so that they can continue to engage in transactions which may be "swaps" under the Act, without transacting on an exchange. The NFP Energy End Users and other commercial entities will also need to be able to confirm the CFTC's interpretation to their counterparties and prospective counterparties.

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

> (v) *A corporation, partnership, proprietorship, organization, trust or other entity*
>
> (I) That has total assets exceeding $10,000,000;
>
> (II) The obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I), in clause (i), (ii), (iii), (iv), or (vii), or in subparagraph (C); or
>
> (III) *That --*
>
> *(aa) Has a net worth exceeding $1,000,000; and*
>
> *(bb) Enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business;* (*Emphasis added*)

Under this definition, an electric cooperative can qualify as an ECP if it has $1,000,000 net worth and engages in transactions to manage commercial risk. But some of the smallest NFP Energy End Users may not meet the financial test due to their status as a consumer-member owned entity. But such a small electric cooperative would meet the definition of "eligible commercial entity" ("ECE") but for the requirement that an ECE must also be an ECP. See below. Accordingly, we request that the CFTC interpret the definition of ECP so as to include electric cooperatives that satisfy any one of the criteria in clauses (i), (ii) or (iii) of Section 1a(17)(A) of the CEA.

For governmental entities who engage in the delivery of natural gas and/or power, the relevant portion of the definition of "eligible contract participant" is found in clause (vii) of Section 1a(18) of the CEA, which reads as follows:

> (vii) (I) *a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;* (II) a multinational or supranational government entity; or (III) *an instrumentality, agency, or department of an entity described in subclause (I) or (II);*
>
> except that such term does not include an entity, instrumentality, agency, or department referred to in subclause (I) or (III) of this clause unless (aa) the entity, instrumentality, agency, or department is a person *described in clause (i), (ii), or (iii) of*

> *paragraph (17)(A)*[9]; (bb) the entity, instrumentality, agency, or department owns and invests on a discretionary basis $50,000,000 or more in investments; or (cc) the agreement, contract, or transaction is offered by, and entered into with, an entity that is listed in any of subclauses (I) through (VI) of section 2(c)(2)(B)(ii). *(Emphasis added)*

Under this definition, a public power or gas entity can qualify as an ECP if it qualifies as an ECE under Section 1a(17)(A)(i), (ii) or (iii).[10]

Each of the criteria in Section 1A(17)(A)(i), (ii) and (iii) is independent of the others, and a public power and/or gas entity can qualify as an ECE, and therefore an ECP, if it meets any one of them. We believe that a public power or gas entity that distributes electric energy or natural gas to the public at retail as its commercial business clearly meets the criteria found in Section 1a(17)(A)(i)-(iii) of the CEA in that it "has a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity," and/or it "incurs risks, in addition to price risks, related to the commodity."

Finally, in clause (C) of the definition of ECP, the CFTC is given the authority to determine that any other person may be an ECP "in light of the financial or other qualifications of the person."

We respectfully request the CFTC to confirm that a public power or gas entity that meets one or more of the criteria set forth in Section 1a(17)(A)(i)-(iii) automatically qualifies as an ECP, regardless of its size or the value of assets that it owns or invests on a discretionary basis. In addition, we respectfully request that the CFTC determine, as permitted by Section 1a(18(C) of the CEA, that an electric cooperative that enters into a transaction to hedge, mitigate or

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[9] See definition of "eligible commercial entity," below.

[10] The relevant section defining an "exempt commercial entity" reads as follows:

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

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

manage commercial risk associated with its business and meets one or more of the criteria set forth in Section 1a(17)(A)(i)-(iii) automatically qualifies as an ECP regardless of its net worth.

2. Related Comments Regarding Treatment of "Special Entities"

Although the CFTC has not, at this time, sought comments on the definition of "Special Entity," due to the interrelationship of this definition with the definition of "eligible contract participant," we submit these comments here and plan also to submit them to the CFTC's Task Force charged with Regulation of Swap Dealers and Major Swap Participants. The NFP Energy End Users must rely on the CFTC's staff to be mindful of the interrelationship of all of the regulations. We understand the complexity of the CFTC staff's challenge under the tight statutory timeframe for rule-makings. But the complexity of the provisions of the Act, and the lack of clarity as to how the various sections were meant to work both together and with the CEA as in effect prior to the Act, creates a challenge for NFP Energy End Users who are struggling to understand whether, how and why this new regulatory scheme will apply to their commercial businesses.

The term "special entity" is defined in the Act to include, among other entities, a State, State agency, city, county, municipality, or other political subdivision of a State. The Act imposes new duties on swap dealers and major swap participants in their dealings with special entities.

The Coalition believes that it is not necessarily an advantage to be treated as a special entity. To the extent that swap dealers or major swap participants face higher costs when dealing with special entities, they may choose not to deal with special entities for certain types of transactions, or they may increase the fees that they (directly or indirectly) charge special entities for engaging in swap transactions. We believe that an entity that is both an ECP and a special entity should be able to "opt out" of the protections afforded by whatever duties the CFTC may establish for swap dealers and major swap participants in their dealings with special entities. This approach is consistent with the traditional CEA use of the ECP definition, which identifies an ECP by financial strength and permits the ECP to act for itself in the exempt markets. It is also consistent with other provisions of the Act in which ECPs are allowed to engage in certain types of transactions that retail customers or smaller entities are not. This proposal would also be consistent with the ability that end users have to opt out of mandatory clearing for their swap transactions.

If the CFTC does not accept our recommendation that all ECPs should be able to opt out of being treated as a special entity, then at the very least an eligible commercial entity should not be treated as a special entity with respect to transactions in the commodities in respect of which the eligible commercial entity operates a commercial business. For example, a public gas or power entity that operates commercial businesses distributing natural gas and/or electric energy to retail consumers would potentially be both an eligible commercial entity (and so an ECP) and a special entity as those terms are defined under the CEA, as amended by the Act. In our view, the very fact that the public power entity is engaged in a commercial business activity involving the distribution of natural gas or electric energy means that it is not appropriate to treat the public

power entity as a special entity with respect to swap transactions intrinsically related to its commercial energy activities. Being treated as a special entity would most likely make it more difficult (and certainly more expensive) for the public power or natural gas entity to engage in the types of hedging transactions it needs in order to protect against the risks associated with its commercial activities.

III. CONCLUSION

The Coalition strongly encourages the CFTC and the SEC to consider the effect on end users of "swaps" at every step of the regulatory rulemaking process. We respectfully request that, as the CFTC drafts its rules, it carefully consider the consequences to those who operate commercial businesses and are drawn into this new regulatory environment only because of the broad statutory language which could be read to redefine traditional commercial contracts as "swaps." All of the NFP Energy End Users' natural gas, electric energy and energy-related transactions are intrinsically tied to the physical commodities they deliver to American businesses and consumers -- there is no speculation and, given the NFP Energy End Users' not-for-profit public service business, they have no incentive to speculate. NFP Energy End Users transact only to obtain and deliver energy to retail consumers and to manage commercial risks, so that the ultimate cost of reliable natural gas and electric energy to consumers is as low and predictable as possible, consistent with their environmental stewardship standards. Any new regulatory burdens, direct or indirect costs or requirements will result, dollar for dollar, in higher costs to the NFP Energy End Users' customers and owners -- approximately 87 million (electric) and 5 million (gas) American retail consumers of electric energy and natural gas.

The NFP Energy End Users do not pose a threat to the United States banking or financial system. It was not Congress' intent that the Act should impose regulatory burdens on commercial business by treating them like the financial market professionals who participate voluntarily in CFTC-regulated markets. Regulatory policy-making and rule-making must be tailored to achieve Congressional objectives without creating uncertainty as to who will be regulated and what transactions will be regulated once the effective date for the Act arrives. The rules should be tailored to fit the differing market structures, and to exclude, exempt or treat appropriately, the business entities that engage in commercial transactions which might be determined to fall within the Act's sweeping new definitions.

If the CFTC decides not to clarify whether its regulations under the Act extend to commercial transactions that electric cooperatives and public power and gas systems utilize in their everyday business, the NFP Energy End Users respectfully request that an analysis be performed (pursuant to rule-making and with an opportunity for public hearing) on the potential impact of such regulations on "small entities" under the Regulatory Fairness Act, as noted above, to determine whether less burdensome alternative forms of regulation can be developed for small entities.

Respectfully yours,

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

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Director, Tax, Finance and Accounting Policy

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By: _____
Susan N. Kelly
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AMERICAN PUBLIC GAS ASSOCIATION

By: _____
Dave Schryver
Executive Vice President

LARGE PUBLIC POWER COUNCIL

By: _____
Name: _____
Its: _____

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner

Respectfully yours,

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Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (File Number S7-12-10 or S7-16-10 (unclear in the Federal Register Notice) – filed by e-mail per Federal Register Notice