market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Section 4(i) of the CEA authorize the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [47] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.[48] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these Orders, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Orders

a. Order Relating to the Mid-C Financial Peak Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Mid-C Financial Peak contract, traded on the IntercontinentalExchange, Inc., satisfies the statutory material price reference and material liquidity criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the Mid-C Financial Peak contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity [49] with respect to the Mid-C Financial Peak contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities.

Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.[50]

b. Order Relating to the Mid-C Financial Off-Peak Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Mid-C Financial Off-Peak contract, traded on the IntercontinentalExchange, Inc., satisfies the statutory material price reference and material liquidity criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the Mid-C Financial Off-Peak contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity [51] with respect to the Mid-C Financial Off-Peak contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities.

Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.[52]

Issued in Washington, DC, on June 25, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–16212 Filed 7–1–10; 8:45 am]

BILLING CODE 6351–01–P

[47] 5 U.S.C. 601 *et seq.*

[48] 66 FR 42256, 42268 (Aug. 10, 2001).

[49] 7 U.S.C. 1a(29).

[50] Because ICE already lists for trading a contract (*i.e.,* the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

[51] 7 U.S.C. 1a(29).

[52] Because ICE already lists for trading a contract (*i.e.,* the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

COMMODITY FUTURES TRADING COMMISSION

Orders Finding That the Mid-C Financial Peak Daily Contract and Mid-C Financial Off-Peak Daily Contract, Offered for Trading on the IntercontinentalExchange, Inc., Do Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final orders.

SUMMARY: On October 6, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Mid-C [2] Financial Peak Daily ("MPD") contract and Mid-C Financial Off-Peak Daily ("MXO") contract,[3] which are listed for trading on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), perform a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue orders finding that the MPD and MXO contracts do not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective Date:* June 25, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading

[1] 74 FR 51261 (October 6, 2009).

[2] The acronym "Mid-C" stands for Mid-Columbia.

[3] The **Federal Register** notice also requested comment on the Mid-C Financial Peak ("MDC") contract and Mid-C Financial Off-Peak ("OMC") contract; these contracts will be addressed in a separate **Federal Register** release.

Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [4] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[5] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[6] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[7] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[8]

II. Notice of Intent To Undertake SPDC Determination

On October 6, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the MPD and MXO contracts [9] perform a significant price discovery function and requested comment from interested parties.[10] Comments were received from the Federal Energy Regulatory Commission ("FERC"), Financial Institutions Energy Group ("FIEG"), Working Group of Commercial Energy Firms ("WGCEF"), Edison Electric Institute ("EEI"), ICE, Western Power Trading Forum ("WPTF") and Public Utility Commission of Texas ("PUCT").[11] The comment letters from FERC [12] and PUCT did not directly address the issue of whether or not the subject contracts are SPDCs. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the MPD and MXO contracts and generally expressed the opinion that the contracts are not SPDCs because they does not meet the material price reference or material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

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[4] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

[5] 7 U.S.C. 1a(29).

[6] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[7] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). *See also* 73 FR 75888, 75894 (Dec. 12, 2008).

[8] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[9] As noted above, the **Federal Register** notice also requested comment on the Mid-C Financial Peak ("MDC") contract and Mid-C Financial Off-Peak ("OMC") contract. The MDC and OMC contracts will be addressed in a separate **Federal Register** release.

[10] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[11] FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." EEI is the "association of shareholder-owned electric companies, international affiliates and industry associates worldwide." ICE is an ECM, as noted above. WPTF describes itself as a "broad-based membership organization dedicated to encouraging competition in the Western power markets * * * WTPF strives to reduce the long-run cost of electricity to consumers throughout the region while maintaining the current high level of system reliability." PUCT is the independent organization that oversees the Electric Reliability Council of Texas ("ERCOT") to "ensure nondiscriminatory access to the transmission and distribution systems, to ensure the reliability and adequacy of the regional electrical network, and to perform other essential market functions." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09–011.html.*

[12] FERC expressed the opinion that a determination by the Commission that either of the subject contracts performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Federal Power Act (FPA) over the transmission or sale for resale of electric energy in interstate commerce or with its other regulatory responsibilities under the FPA" and further that "FERC staff will monitor proposed SPDC determinations and advise the CFTC of any potential conflicts with FERC's exclusive jurisdiction over RTOs, [(regional transmission organizations)], ISOs [(independent system operators)] or other jurisdictional entities."

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[13] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[14] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

The Commission's findings and conclusions with respect to the MPD and MXO contracts are discussed separately below:

a. The Mid-C Financial Peak Daily (MPD) Contract and the SPDC Indicia

The MPD contract is cash settled based on the peak, day-ahead price index for the specified day, as published by ICE in its "ICE Day Ahead Power Price Report," which is available on the ECM's Web site. The daily peak-hour electricity price index is a volume-weighted average of qualifying, day-ahead, peak-hour power transactions at the Mid-Columbia hub that are traded on the ICE platform from 6 a.m. to 11 a.m. CST on the publication date. The ICE transactions on which the price index is based specify the physical delivery of power. The size of the MPD contract is 400 megawatt hours ("MWh"), and the MPD contract is listed for 38 consecutive days.

As the Columbia River flows through Washington State, it encounters two federal and nine privately-owned hydroelectric dams generating a total of close to 20,000 MW of power in the Northwest.[15] With another three dams in British Columbia, Canada, and many more on its various tributaries, the Columbia River is the largest power-producing river in North America. A major goal of the participants in the Mid-C electricity market is to maximize the Columbia River's potential, along with protecting and enhancing the non-power uses of the river. The reliability of the electricity grid in the Northwest is coordinated by the Northwest PowerPool ("NWPP"), which is a voluntary organization comprised of major generating utilities serving the Northwestern United States, as well as British Columbia and Alberta, Canada.

One stretch of the Columbia River between the Grand Coulee Dam and Priests Rapids Dam is governed by the Mid-Columbia Hourly Coordination Agreement ("MCHCA"). The MCHCA covers seven dams[16] and nearly 13,000 MW of generation. Specifically, the agreement defines how the Chelan, Douglas and Grant PUDs coordinate operations with the Bonneville Power Administration to maximize power generation while reducing fluctuations in the river's flow. A number of other utilities that buy power from the PUDs have also signed onto the agreement. This agreement was signed into effect in 1972 and renewed for 20 years in 1997.[17]

In general, electricity is bought and sold in an auction setting on an hourly basis at various points along the electrical grid. The price of electricity at a particular point on the grid is called the locational marginal price ("LMP"), which includes the costs of producing the electricity, as well as congestion and line losses. Thus, an LMP reflects generation costs as well as the actual cost of supplying and delivering electricity to a specific point on the grid.

Electricity is traded in a day-ahead market as well as a real-time market. Typically, the bulk of energy transactions occur in the day-ahead market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because day-

[13] In its October 6, 2009, **Federal Register** release, the Commission identified material price reference and material liquidity as the possible criteria for SPDC determination of the MPD and MXO contracts. Arbitrage and price linkage were not identified as possible criteria. As a result, arbitrage and price linkage will not be discussed further in this document and the associated Orders.

[14] 17 CFR 36, Appendix A.

[15] *http://www.wpuda.org/publications/connections/hydro/River%20Riders.pdf.*

[16] The federal dams are Grand Coulee and Chief Joseph. The remaining dams are Wells (operated by the Douglas PUD), Rocky Reach and Rock Island (operated by the Chelan PUD), and Wanapum and Priest Rapids (operated by the Grant PUD). The term "PUD" stands for publically-owned utility, which provides essential services within a specified area.

[17] *http://www.wpuda.org/publications/connections/hydro/River%20Riders.pdf.*

ahead quotes for power are based on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. In this regard, on the day the electricity is transmitted and used, auction participants typically realize that they bought or sold too much power or too little power. A real-time auction is operated to alleviate this problem by servicing as a balancing mechanism. Specifically, electricity traders use the real-time market to sell excess electricity and buy additional power to meet demand. Only a relatively small amount of electricity is traded in the real-time market compared with the day-ahead market.

1. Material Price Reference Criterion

The Commission's October 6, 2009, **Federal Register** notice identified material price reference and material liquidity as the potential basis for a SPDC determination with respect to the MPD contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "West Power of Day" package with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. This package includes price data for the MPD contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study") found that in general, market participants view ICE as a price discovery market for certain electricity contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the MPD contract, while not mentioned by name in the ECM Study, might warrant further review.

The Commission explains in its Guidance to the Part 36 rules that in evaluating a contract under the material price reference criterion, it will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[18] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The Mid-C power market is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the Mid-C power market when conducting cash deals. However, ICE's Mid-C Financial Peak ("MDC") contract, which is a monthly contract, is used more widely as a source of pricing information for electricity than the daily, peak-hour contract (*i.e.,* the MPD contract). Specifically, the MDC contract prices power at the Mid-C trading point based on the simple average of the daily peak-hour prices over the entire month, as reported by ICE. Moreover, the MDC contract is listed for up to 86 calendar months. Thus, market participants can use the MDC contract to lock-in electricity prices far into the future. In contrast, the MPD contract is listed for a much shorter length of time—up to 38 days in the future. With such a limited timeframe, the forward pricing capability of the MPD contract is much more constrained than that of the MDC contract. Traders use monthly power contracts like the MDC contract to price electricity commitments in the future, where such commitments are based on long range forecasts of power supply and demand. As actual generation and usage nears, market participants have a better understanding of actual power supply and needs. As a result, traders can modify previously-established hedges with the daily power contracts, like the MPD contract.

The Commission explained in its Guidance that a contract meeting the material price reference criterion would routinely be consulted by industry participants in pricing cash market transactions. Although the Mid-C is a major trading center for electricity and, as noted, ICE sells price information for the MPD contract, the MPD contract is not consulted in this manner and does not satisfy the material price reference criterion. Thus, the MPD contract does not satisfy the direct price reference test for existence of material price reference. Furthermore, the Commission notes that publication of the MPD contract's prices is not indirect evidence of material price reference. The MPD contract's prices are published with those of numerous other contracts, including ICE's monthly electricity contracts, which are of more interest to market participants. In these circumstances, the Commission has concluded that traders likely do not specifically purchase ICE data packages for the MPD contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

i. **Federal Register** Comments:

WGCEF, WPTF, EEI and ICE stated that no other contract directly references or settles to the MPD contract's price. Moreover, the commenters argued that the underlying cash price series against which the MPD contract is settled (in this case, the peak Mid-C electricity price on a particular day, which is derived from cash market transactions) is the authentic reference price and not the ICE contract itself. Commission staff believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while the Mid-C is a major power market, traders do not consider the daily peak-hour Mid-C price to be as important as the electricity price associated with the monthly contract.

In addition, WGCEF stated that the publication of price data for the MPD contract price is weak justification for material price reference. This commenter argued that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the MPD contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the MPD prices as part of a broad package is not conclusive evidence that market participants are buying the ICE

[18] 17 CFR 36, Appendix A.

data sets because they find the MPD prices have substantial value to them. As noted above, the Commission notes that publication of the MPD contract's prices is not indirect evidence of routine dissemination. The MPD contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of daily power contracts relative to monthly contracts, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the MPD contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, EEI criticized that the ECM Study did not specifically identify the MPD contract as a contract that is referred to by market participants on a frequent and recurring basis. In response, the Commission notes that it cited the ECM Study's general finding that some ICE electricity contracts appear to be regarded as price discovery markets merely as indication that an investigation of certain ICE contracts may be warranted. The ECM Study was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the ICE MPD contract does not meet the material price reference criterion because cash market transactions are not priced either explicitly or implicitly on a frequent and recurring basis at a differential to the MPD contract's price (direct evidence). Moreover, while the MPD contract's price data is sold to market participants, those individuals likely do not purchase the ICE data packages specifically for the MPD contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Material Liquidity Criterion

As noted above, in its October 6, 2009, **Federal Register** notice, the Commission identified material price reference and material liquidity as potential criteria for SPDC determination of the MPD contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that changes to the subject contract's prices potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the MPD contract was 1,294 in the second quarter of 2009, resulting in a daily average of 20.2 trades. During the same period, the MPD contract had a total trading volume of 18,862 contracts and an average daily trading volume of 294.7 contracts. Moreover, open interest as of June 30, 2009, was 826 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[19]

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 19,574 contracts (or 301 contracts on a daily basis). In terms of number of transactions, 1,108 trades occurred in the fourth quarter of 2009 (17 trades per day). As of December 31, 2009, open interest in the MPD contract was 550 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

The number of trades per day remained relatively low between the second and fourth quarters of 2009 and averaged only slightly more than the reporting level of five trades per day. Moreover, trading activity in the MPD contract, as characterized by total quarterly volume, indicates that the MPD contract experiences trading activity that is similar to that of minor futures markets.[20] Thus, the MPD contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.[21]

i. **Federal Register** Comments

ICE and WGCEF stated that the MPD contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, FEIG and EEI argued that the MPD contract cannot have a material effect on other contracts, such as those listed for trading by the New York Mercantile Exchange ("NYMEX"), a DCM. The commenters pointed out that it is not possible for the MPD contract to affect a DCM contract because price linkage and the potential for arbitrage do not exist. The DCM contracts do not cash settle to the MPD contract's price. Instead, the DCM contracts and the MPD contract are both cash settled based on physical transactions, which neither the ECM or the DCM contracts can influence.

WGCEF and ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the relatively low number of trades per day in the MPD contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another." [22]

ICE opined that the Commission "seems to have adopted a five trade per day test for material liquidity." To the contrary, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs" [23] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, the contract will not be found to be a

[19] 74 FR 51261 (October 6, 2009).

[20] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[21] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC],* * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." [17 CFR 36, Appendix A]. For the reasons discussed above, the Commission has found that the MPD contract does not meet the material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since the Commission believes it is not useful as the sole basis for a SPDC determination.

[22] Guidance, *supra*.

[23] 73 FR 75892 (December 12, 2008).

SPDC merely because it met the reporting threshold.

ICE proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all months" as well as in strips of contract months. ICE suggested that a more appropriate method of determining liquidity is to examine the activity in a single traded month of a given contract." [24] It is the Commission's opinion that liquidity, as it pertains to the MPD contract, is typically a function of trading activity in particular lead days and, given sufficient liquidity in such days, the ICE MPD contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the MPD contract does not meet the material price reference criterion, according to the Commission's Guidance, it would be unnecessary to evaluate whether the MPD contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission finds that the MPD contract does not meet the material liquidity criterion.

3. Overall Conclusion Regarding the MPD Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE MPD contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the MPD contract does not meet the material price reference or material liquidity criteria at this time. Accordingly, the Commission is issuing the attached Order declaring that the MPD contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its MPD contract.[25] Accordingly, with respect to its MPD contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements for ECMs.

b. The Mid-C Financial Off-Peak Daily (MXO) Contract and the SPDC Indicia

The MXO contract is cash settled based on the off-peak, day-ahead price index for the specified day, as published by ICE in its "ICE Day Ahead Power Price Report," which is available on the ECM's website. The daily, off-peak hour electricity price index is a volume-weighted average of qualifying, day-ahead, off-peak hour power transactions at the Mid-Columbia hub that are traded on the ICE platform from 6 a.m. to 11a.m. CST on the publication date. The ICE transactions on which the price index is based specify the physical delivery of power. The size of the MXO contract is 25 MWh, and the MXO contract is listed for 70 consecutive days.

As the Columbia River flows through Washington State, it encounters two federal and nine privately-owned hydroelectric dams generating close to 20,000 MW of power for the Northwest.[26] With another three dams in British Columbia, Canada, and many more on its various tributaries, the Columbia River is the largest power-producing river in North America. A major goal of the participants in the Mid-C electricity market is to maximize the Columbia River's potential, along with protecting and enhancing the non-power uses of the river. The reliability of the electricity grid in the Northwest is coordinated by the NWPP.

One stretch of the Columbia River between the Grand Coulee Dam and Priests Rapids Dam is governed by the MCHCA. The MCHCA covers seven dams [27] and nearly 13,000 MW of generation. Specifically, the agreement defines how the Chelan, Douglas and Grant PUDs coordinate operations with the Bonneville Power Administration to maximize power generation while reducing fluctuations in the river's flow. A number of other utilities that buy power from the PUDs have also signed onto the agreement. This agreement was signed into effect on 1972 and renewed for 20 years in 1997.[28]

In general, electricity is bought and sold in an auction setting on an hourly basis at various point along the electrical grid. The price of electricity at a particular point on the grid is called the LMP, which includes the cost of producing the electricity, as well as congestion and line losses. Thus, and LMP reflects generation costs as well as the actual cost of supplying and delivering electricity to a specific point on the grid.

Electricity is traded in a day-ahead market as well as a real-time market. Typically, the bulk of the energy transactions occur in the day-ahead market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because day-ahead price quotes are based on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. On the day electricity is generated and used, auction participants usually realize that they bought or sold either too much or too little power. A real-time auction is operated in the Mid-C market to alleviate this problem. In this regard, electricity traders use the real-time market to sell excess electricity and buy additional power to meet demand. Only a relatively small amount of electricity is traded in the real-time market compared with the day-ahead market.

1. Material Price Reference Criterion

The Commission's October 6, 2009, **Federal Register** notice identified material price reference and material liquidity as the potential basis for a SPDC determination with respect to the MXO contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily

[24] In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 6, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 28 percent (fourth quarter of 2009) of all transactions in the MPD contract. Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

[25] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[26] *http://www.wpuda.org/publications/connections/hydro/River%20Riders.pdf.*

[27] The federal dams are Grand Coulee and Chief Joseph. The remaining dams are Wells (operated by the Douglas PUD), Rocky Reach and Rock Island (operated by the Chelan PUD), and Wanapum and Priest Rapids (operated the Grant PUD).

[28] *http://www.wpuda.org/publications/connections/hydro/River%20Riders.pdf.*

only or historical. For example, ICE offers the "West Power of Day" package with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. This package includes price data for the MXO contract.

The Commission also noted that its October 2007 ECM Study found that, in general, market participants view ICE as a price discovery market for certain electricity contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the MXO contract, while not mentioned by name in the ECM Study, might warrant further analysis.

The Commission has explained in Guidance that it will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract is being used as a material price reference and therefore, serving a significant price discovery function.[29] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The Mid-C power market is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the Mid-C power market when conducting cash deals. However, ICE's Mid-C Financial Off-Peak ("OMC") contract, which is a monthly contract, is used more widely as a source of pricing information for electricity in that market than the daily off-peak hour contract (*i.e.,* the MXO contract). In this regard, OMC contract prices power at the Mid-C trading point based on the simple average of the daily off-peak hour prices over the entire month, as reported by ICE. Moreover, the OMC contract is listed for up to 86 calendar months. Market participants can use the OMC contract to lock-in off-peak electricity prices far into the future. In contrast, the MXO contract is listed for a much shorter length of time—up to 70 days in the future. With such a limited timeframe, the forward pricing capability of the MXO contract is constrained relative to that of the OMC contract. Traders likely use monthly power contracts like the OMC contract to price electricity commitments in the future. Such commitments are based on long range forecasts of power supply and demand. As the time of generation and consumption nears, market participants have a better understanding of actual power supply and needs. As a result, traders can modify previously-established hedges with the daily power contracts, like the MXO contract.

The Commission explained in its Guidance that a contract meeting the material price reference criterion would routinely be consulted by industry participants in pricing cash market transactions. Although the Mid-C is a major trading center for electricity and, as noted, ICE sells price information for the MXO contract, the Commission found upon further evaluation that the MXO contract is not routinely consulted by industry participants in pricing cash market transactions. Furthermore, the Commission notes that publication of the MXO contract's prices is not indirect evidence of material price reference. The MXO contract's prices are published with those of numerous other contracts, including ICE's OMC contract, which are of more interest to market participants. Thus, the Commission has concluded that traders likely do not specifically purchase ICE data packages for the MXO contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

i. **Federal Register** Comments

WGCEF, WPTF, EEI and ICE stated that no other contract directly references or settles to the MXO contract's price. Moreover, the commenters argued that the underlying cash price series against which the MXO contract is settled (in this case, the off-peak Mid-C electricity price on a particular day, which is derived from cash market transactions) is the authentic reference price and not the ICE contract itself. Commission staff believes that this interpretation of price reference is too limiting and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while the Mid-C is a major power market, traders do not consider the daily off-peak hour Mid-C price to be as important as the electricity price associated with the average monthly off-peak price.

In addition, WGCEF stated that the publication of price data for the MXO contract price reference is weak justification for material price reference. This commenter argued that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the MXO contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the MXO prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the MXO prices have substantial value to them. As mentioned above, the Commission notes that publication of the MXO contract's prices is not indirect evidence of routine dissemination. The MXO contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of daily power contracts relative to monthly power contracts, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the MXO contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, EEI observed that the ECM Study did not specifically identify the MXO contract as a contract that is referred to by market participants on a frequent and recurring basis. In response, the Commission notes that it cited the ECM Study's general finding that some ICE electricity contracts appear to be regarded as price discovery markets merely as indication that an investigation of certain ICE contracts may be warranted. The ECM Study was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

[29] 17 CFR 36, Appendix A.

ii. Conclusion Regarding Material Price Reference:

Based on the above, the Commission finds that the ICE MXO contract does not meet the material price reference criterion because cash market transactions are not priced either explicitly or implicitly on a frequent and recurring basis at a differential to the MXO contract's price (direct evidence). Moreover, while the MXO contract's price data is sold to market participants, those individuals likely do not specifically purchase the ICE data packages for the MXO contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Material Liquidity Criterion

As noted above, in its October 6, 2009, **Federal Register** notice, the Commission identified material price reference and material liquidity as potential criteria for SPDC determination of the MXO contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that changes to the subject contract's prices potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the MXO contract was 437 in the second quarter of 2009, resulting in a daily average of 6.8 trades. During the same period, the MXO contract had a total trading volume of 61,688 contracts and an average daily trading volume of 963.9 contracts. Moreover, open interest as of June 30, 2009, was 826 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[30]

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 19,216 contracts (or 296 contracts on a daily basis). In terms of number of transactions, 123 trades occurred in the fourth quarter of 2009 (1.9 trades per day). As of December 31, 2009, open interest in the MXO contract was 2,528 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

The number of trades per day fell below minimum reporting level of five trades per day in the fourth quarters of 2009. Moreover, trading activity in the MXO contract, as characterized by total quarterly volume, indicates that the MXO contract experiences trading activity that is similar to that of minor futures markets.[31] Thus, the MXO contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.[32]

i. **Federal Register** Comments

ICE and WGCEF stated that the MXO contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, FEIG and EEI argued that the MXO contract cannot have a material effect on other contracts, such as those listed for trading by NYMEX. The commenters pointed out that it is not possible for the MXO contract to affect a DCM contract because price linkage and the potential for arbitrage do not exist. The DCM contracts do not cash settle to the MXO contract's price. Moreover, the DCM contracts and the MXO contract are both cash settled based on physical transactions, which the contracts cannot influence.

WGCEF and ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the relatively low number of trades per day in the MXO contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another." [33]

ICE opined that the Commission "seems to have adopted a five trade per day test for material liquidity." To the contrary, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[34] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, the contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all months" as well as in strips of contract months. ICE suggested that a more appropriate method of determining liquidity is to examine the activity in a single traded month of a given contract.[35] It is the Commission's opinion that liquidity, as it pertains to the MXO contract, is typically a function of trading activity in particular lead days and, given sufficient liquidity

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[30] 74 FR 51261 (October 6, 2009).

[31] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[32] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission observed that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the MXO contract does not meet the material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since the Commission believes it is not useful as the sole basis for a SPDC determination.

[33] Guidance, *supra.*

[34] 73 FR 75892 (December 12, 2008).

[35] In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 6, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 61 percent of all transactions in the MXO contract (fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

in such days, the ICE MXO contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the MXO contract does not meet the material price reference criterion, according to the Commission's Guidance, it would be unnecessary to evaluate whether the MXO contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission finds that the MXO contract does not meet the material liquidity criterion.

3. Overall Conclusion Regarding the MXO Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE MXO contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the MXO contract does not meet the material price reference or material liquidity criteria at this time. Accordingly, the Commission is issuing the attached Order declaring that the MXO contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its MXO contract.[36] Accordingly, with respect to its MXO contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements for ECMs.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") [37] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA[38] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Section 4(i) of the CEA authorizes the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

The Commission has concluded that the MPD and MXO contracts, which are the subject of the attached Orders, are not SPDCs; accordingly, the Commission's Orders impose no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [39] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.[40] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these Orders, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Orders

a. Order Relating to the Mid-C Financial Peak Daily Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Mid-C Financial Peak Daily contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price preference or material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [41] with respect to the Mid-C Financial Peak Daily contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the Mid-C Financial Peak Daily contract with the issuance of this Order.

This Order is based on the representations made to the

[36] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[37] 44 U.S.C. 3507(d).

[38] 7 U.S.C. 19(a).

[39] 5 U.S.C. 601 *et seq.*

[40] 66 FR 42256, 42268 (Aug. 10, 2001).

[41] 7 U.S.C. 1a(29).

Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and March 24, 2010, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the Mid-C Financial Peak Daily contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

b. Order Relating to the Mid-C Financial Off-Peak Daily Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Mid-C Financial Off-Peak Daily contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference or material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [42] with respect to the Mid-C Financial Off-Peak Daily contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the Mid-C Financial Off-Peak Daily contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., July 27, 2009, and March 24, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the Mid-C Financial Off-Peak Daily contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

Issued in Washington, DC on June 25, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[42] 7 U.S.C. 1a(29).

[FR Doc. 2010–16206 Filed 7–1–10; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the Fuel Oil-180 Singapore Swap Contract Traded on the IntercontinentalExchange, Inc., Does Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Order.

SUMMARY: On October 20, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Fuel Oil-180 Singapore Swap ("SZS") contract traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the SZS contract does not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective Date:* June 25, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov*.

[1] 74 FR 53728 (October 20, 2009).

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as an SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.