

behaviors those individuals exhibited; and

(ix). A description of the implementation and effectiveness of the mitigation measures of the Incidental Harassment Authorization.

(b). When shutdown is required for mitigation purposes, the following information will also be recorded:

(i). The basis for decisions resulting in shutdown of active acoustic transmissions;

(ii). Information needed to estimate the number of marine mammals potentially taken by harassment;

(iii). Information on the frequency of occurrence, distribution, and activities of marine mammals in the demonstration area;

(iv). Information on the behaviors and movements of marine mammals during and without operation of active acoustic sources; and

(v). Any adverse effects the shutdown had on the demonstration.

(c). Submit a final report to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East West Highway, Silver Spring, Maryland, 20910, within 30 days after receiving comments from NMFS on the draft report. If NMFS decides that the draft report needs no comments, the draft report shall be considered the final report.

(d). In the unanticipated event that the specified activity clearly cause the take of a marine mammal in a manner prohibited by this Authorization, such as an injury (Level A harassment), serious injury, or mortality (e.g., ship-strike, gear interaction, and/or entanglement), ONR shall immediately cease operations and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301-427-8401 and/or by email to [Michael.Payne@noaa.gov](mailto:Michael.Payne@noaa.gov) and [Michelle.Magliocca@noaa.gov](mailto:Michelle.Magliocca@noaa.gov). The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) The name and type of vessel involved;

(iii) The vessel's speed during and leading up to the incident;

(iv) Description of the incident;

(v) Status of all sound source use in the 24 hours preceding the incident;

(vi) Water depth;

(vii) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(viii) Description of marine mammal observations in the 24 hours preceding the incident;

(ix) Species identification or description of the animal(s) involved;

(x) The fate of the animal(s); and  
(xi) Photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with ONR to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. ONR may not resume their activities until notified by NMFS via letter, email, or telephone.

(e). In the event that ONR discovers an injured or dead marine mammal, and the lead protected species observer determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), ONR shall immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301-427-8401, and/or by email to [Michael.Payne@noaa.gov](mailto:Michael.Payne@noaa.gov) and [Michelle.Magliocca@noaa.gov](mailto:Michelle.Magliocca@noaa.gov). The report shall include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with ONR to determine whether modifications in the activities are appropriate.

(f). In the event that ONR discovers an injured or dead marine mammal, and the lead protected species observer determines that the injury or death is not associated with or related to the activities authorized in Condition 2 of this Authorization (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), ONR shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301-427-8401, and/or by email to [Michael.Payne@noaa.gov](mailto:Michael.Payne@noaa.gov) and [Michelle.Magliocca@noaa.gov](mailto:Michelle.Magliocca@noaa.gov) within 24 hours of the discovery. ONR shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

9. The Holder of this Authorization is required to comply with the Terms and Conditions of the Incidental Take Statement (ITS) corresponding to NMFS' Endangered Species Act Biological Opinion issued to both the Office of Naval Research and NMFS' Office of Protected Resources.

10. A copy of this Authorization must be in the possession of all contractors and protected species observers

operating under the authority of this Incidental Harassment Authorization.

11. *Penalties and Permit Sanctions*  
Any person who violates any provision of this Incidental Harassment Authorization is subject to civil and criminal penalties, permit sanctions, and forfeiture as authorized under the MMPA.

Dated: March 28, 2013.

**Helen M. Golde,**

*Acting Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2013-07606 Filed 4-1-13; 8:45 am]

**BILLING CODE 3510-22-P**

## COMMODITY FUTURES TRADING COMMISSION

RIN 3038-AE01

### Order Exempting, Pursuant to Authority of the Commodity Exchange Act, Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final order.

**SUMMARY:** The Commodity Futures Trading Commission ("CFTC" or "Commission") is exempting certain transactions between entities described in section 201(f) of the Federal Power Act ("FPA"), and/or other electric utility cooperatives, from the provisions of the Commodity Exchange Act ("CEA" or "Act") and the Commission's regulations, subject to certain anti-fraud, anti-manipulation, and record inspection conditions. Authority for this exemption is found in section 4(c) of the CEA.

**DATES:** *Effective date:* April 2, 2013.

**FOR FURTHER INFORMATION CONTACT:** David Van Wagner, Chief Counsel, (202) 418-5481, [dvanwagner@cftc.gov](mailto:dvanwagner@cftc.gov), or Graham McCall, Attorney-Advisor, (202) 418-6150, [gmccall@cftc.gov](mailto:gmccall@cftc.gov), Division of Market Oversight; or David Aron, Counsel, (202) 418-6621, [daron@cftc.gov](mailto:daron@cftc.gov), Office of General Counsel; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

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## I. Background

### A. Petition for Relief

On June 8, 2012, the Commission received a petition (“Petition”) from a group of trade associations and other organizations representing the interests of government and/or cooperatively-owned electric utilities<sup>1</sup> requesting relief from the requirements of the CEA<sup>2</sup> and Commission’s regulations issued thereunder,<sup>3</sup> pursuant to its exemptive authority under CEA section 4(c),<sup>4</sup> for certain “Electric Operations-Related Transactions” entered into between certain “NFP Electric Entities.”

Section 4(c) of the CEA provides the Commission with broad authority to exempt certain transactions and market participants from the requirements of the Act in order to “provide[e] certainty

and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.”<sup>5</sup> Importantly, the legislative history notes that the Commission need not determine whether the product for which an exemption is sought is within the Commission’s jurisdiction prior to issuing 4(c) relief.<sup>6</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)<sup>7</sup> added section 4(c)(6) to the CEA, which builds upon the Commission’s existing 4(c) exemptive authority by providing that the Commission “shall, in accordance with sections 4(c)(1) and 4(c)(2), exempt from the requirements of th[e] Act an agreement, contract, or transaction that is entered into \* \* \* between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)),” but only “[i]f the Commission determines that the exemption would be consistent with the public interest and the purposes of th[e] Act.”<sup>8</sup>

Petitioners represented that section 201(f) of the Federal Power Act (“FPA”), administered by the Federal Energy Regulatory Commission (“FERC”), provides broad-based relief from most provisions of Part II of the FPA<sup>9</sup> for

<sup>5</sup> House Conf. Report No. 102–978, 1992 U.S.C.C.A.N. 3179, 3213 (“4(c) Conf. Report”).

<sup>6</sup> The 4(c) Conference Report provides in relevant part that

[t]he Conferees do not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument, or transaction for which an exemption is sought is subject to the [CEA]. Rather, this provision provides flexibility for the Commission to provide legal certainty to novel instruments where the determination as to jurisdiction is not straightforward. Rather than making a finding as to whether a product is or is not a futures contract, the Commission in appropriate cases may proceed directly to issuing an exemption.

*Id.* at 3214–15.

<sup>7</sup> Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm>.

<sup>8</sup> 7 U.S.C. 6(c)(6)(C) (as added by section 722(f) of the Dodd-Frank Act).

<sup>9</sup> Per the Petition, Part II of the FPA governs the transmission of electric energy in interstate commerce, the sale at wholesale of electric energy in interstate commerce, and the facilities used for such transmission or sale. *See* Petition at 15 (citing FPA section 201(b)); Petition Exhibit 1, at 1 (providing the full text of 16 U.S.C. 824 *et seq.*). Petitioners represented that section 201(f) does not, however, provide an exemption from FPA parts I or III. Part I of the FPA deals with the establishment and functioning of FERC and the regulation of hydroelectric resources. *See* Petition at 15 n.31 (citing 16 U.S.C. 792 *et seq.*). Part III of the FPA deals with recordkeeping and reporting requirements and FERC’s procedural rules concerning complaints, investigations, and hearings. *See id.* (citing 16 U.S.C. 825 *et seq.*). Additionally, section 201(f) does not provide an

certain government and cooperatively-owned electric utility companies.<sup>10</sup> According to Petitioners, Congress recognized that the same rampant abuses which existed with investor-owned public utilities and that the Public Utility Act of 1935 and Rural Electrification Act of 1936 (“REA”) were enacted to combat simply did not exist with government and consumer-owned electric utilities.<sup>11</sup> Rather, Petitioners maintain that Congress understood these utilities to exist as self-regulating, not-for-profit entities with a shared public service mission of providing reliable, low-cost electric energy service through the management and operational oversight of elected or appointed government officials or

exemption from FERC’s refund authority, 16 U.S.C. 824e, reliability standards, 16 U.S.C. 824o(b)(1), or jurisdiction over transmission facilities and services, 16 U.S.C. 824(i)–(j). *See* Petition at 16–17.

<sup>10</sup> FPA section 201(f) provides in relevant part that

[n]o provision in [Part II of the FPA] 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.

Petition at 16 (quoting 16 U.S.C. 824(f)).

<sup>11</sup> *See* Petition at 17–18. Petitioners explained that the FPA was enacted originally “to remedy rampant abuses in the investor-owned electric utility industry.” *See Salt River Project Agric. Improvement and Power District v. Fed. Power Comm’n*, 391 F.2d 470, 475 (D.C. Cir. 1968). Petitioners maintained that of all the major abuses considered by Congress as the impetus for enacting the FPA, “virtually none could be associated with the [electric] cooperative structure where ownership and control is vested in the consumer-owners.” *Id.* at 475. Per the Petition, while FPA section 201(f), as originally enacted, exempted only government entities, the Federal Power Commission (“FPC”), FERC’s predecessor at the time, determined that Congress had intended also to exempt electric cooperatives financed under the REA from the FPC’s jurisdiction over “public utilities.” *See Dairyland Power Coop. et al. v. Fed. Power Comm’n*, 37 F.P.C. 12, 27 (1967). Finally, Petitioners explained that Congress codified the FPC’s interpretation as part of the Energy Policy Act of 2005 (“EPA 2005”), as articulated in *Dairyland* and affirmed in *Salt River*, 391 F.2d 470, and further expanded the scope of FPA section 201(f) by also exempting electric cooperatives that sell less than 4,000,000 megawatt hours of electricity per month, regardless of financing under the REA. *See* Public Law 109–58, 1291, 119 Stat. 594, 985 (2005). Counsel for Petitioners represented that while Congress did not exempt electric cooperatives that sell in excess of 4,000,000 megawatt hours of electricity per month due to EPA 2005 attempting to focus on issues with large electricity providers that had caused the 2003 blackouts in the northeast United States, FERC nonetheless often has allowed non-FPA 201(f) cooperatives additional regulatory flexibility, subject to “self-regulation” by the cooperatives’ member/owner boards.

<sup>1</sup> The Petition was submitted by the National Rural Electric Cooperative Association, the American Public Power Association, the Large Public Power Council, the Transmission Access Policy Study Group and the Bonneville Power Administration (collectively, “Petitioners”), and is available on the Commission’s Web site at <http://www.cftc.gov/stellent/groups/public/rulesandproducts/documents/ifdocs/nrecaetalltr060812.pdf>.

<sup>2</sup> 7 U.S.C. 1 *et seq.*

<sup>3</sup> The Commission’s regulations are set forth in title 17 of the Code of Federal Regulations (“CFR”).

<sup>4</sup> 7 U.S.C. 6(c).

cooperative member/consumers, and thus excluded them from the same degree of federal oversight as investor-owned public utilities by promulgating FPA section 201(f).<sup>12</sup>

While CEA section 4(c)(6) prompted the Petitioners to request relief for FPA section 201(f) entities, Petitioners also sought to include in their definition of NFP Electric Entities, in accordance with CEA sections 4(c)(1) and 4(c)(2), any Federally-recognized Indian tribe and the very small number of electric cooperatives that are not described by FPA section 201(f). Petitioners argued that FERC has precedent for treating Federally-recognized Indian tribes as FPA 201(f) government entities.<sup>13</sup> Additionally, Petitioners argued that regardless of whether an electric cooperative is recognized under FPA section 201(f) by virtue of receiving funding from the Rural Utilities Service (“RUS”)<sup>14</sup> or selling less than 4 million megawatt hours of electricity per year, all cooperatively-owned electric utilities share certain distinguishing features—a common not-for-profit public service mission and self-regulating governance model—that form the underlying rationale for the FPA section 201(f) exemption.<sup>15</sup>

<sup>12</sup> See Petition at 17–18, 22 (FPA section 201(f) entities are “effectively self-regulating” (quoting *Salt River*, 371 F.2d at 473)).

<sup>13</sup> See *id.* at 20 (citing *City of Paris, KY vs. Fed. Power Comm’n*, 399 F.2d 983 (D.C. Cir. 1968); *Sovereign Power Inc.*, 84 FERC ¶ 61,014 (1998); *Confederated Tribes of the Warm Springs Reservation of Or., a Federally Recognized Indian Tribe, and Warm Springs Power Enterprises, a Chartered Enter. of the Confederated Tribes of the Warm Springs Reservation of Or.*, 93 FERC ¶ 61,182 at 61,599 (2000) (concluding that “the Tribes are an instrumentality of the ‘United States, a State or any political subdivision of a state’” and that Warm Springs Power Enterprises, a Chartered Enterprise of the Tribes, was entitled to Tribes’ Section 201(f) exemption)).

<sup>14</sup> Per the Petition, the REA established the RUS as the federal agency to administer financing to rural utilities. See 7 U.S.C. 901 *et seq.*

<sup>15</sup> Per the Petition, to be treated as a “cooperative” under Federal tax law, regardless of FPA section 201(f) status, an electric cooperative must operate on a cooperative basis. See 26 U.S.C. 501(c)(12), 1381(a)(2)(C). Petitioners explained that the United States Tax Court, in the seminal case of *Puget Sound Plywood, Inc. v. Comm’r of Internal Revenue*, held that operating on a cooperative basis means operating according to the cooperative principles of (i) democratic member control, (ii) operation at cost, and (iii) subordination of capital. See 44 T.C. 305 (1965); see also Internal Revenue Manual § 4.76.20.4 (2006). Additionally, for any electric cooperative to be exempt from Federal income taxation pursuant to IRC 501(c)(12), it must collect annually “85 percent or more of [its] income \* \* \* from members for the sole purpose of meeting losses and expenses.” 26 U.S.C. 501(c)(12)(A). Accordingly, Petitioners argued that an electric cooperative, regardless of FPA section 201(f) status, lacks incentive or motivation to manipulate prices, disrupt market integrity, engage in fraudulent or abusive sales practices, or misuse customer assets because it: (i) Is a consumer

Petitioners limited the relief requested to certain Electric Operations-Related Transactions that meet defined criteria. The Petition described seven specific categories of transactions that traditionally occur between NFP Electric Entities and provided examples of each: Electric energy delivered, generation capacity, transmission services, fuel delivered, cross-commodity transactions, other goods and services, and environmental rights, allowances or attributes.<sup>16</sup> Under the Petitioners’ proposed definition, Electric Operations-Related Transactions would not reference any “commodity” in the financial asset class or “Other Commodity” asset class that is based upon or derived from a metal, agricultural product or fuel of any grade not used for electric energy generation.<sup>17</sup> In general, Petitioners represented that all transactions described by the seven categories fit within their proposed definition of Electric Operations-Related Transactions and were “intrinsically related” to the needs of NFP Electric Entities “to hedge or mitigate commercial risks” which arise from the entities’ public service obligations.<sup>18</sup> Notably, however, Petitioners requested categorical relief for “any other electric operations-related agreement, contract or transaction to which the NFP Electric Entity is a party,” even if such transaction was not described by one of the Petition’s categories, but could be developed as a new category in the future.<sup>19</sup>

### B. Summary of Proposed Order

The Commission published for comment in the **Federal Register** a “Proposal To Exempt Certain Transactions Involving Not-for-Profit Electric Utilities; Request for Comment” (“Proposed Order”).<sup>20</sup> The Proposed Order identified (i) the entities eligible to rely on the exemption for purposes of entering into an exempt transaction (“Exempt Entities”);<sup>21</sup> (ii) the agreement, contract, or transaction for which the exemption could be relied upon (“Exempt Non-Financial Energy

cooperative; (ii) is controlled by its members; (iii) must operate at cost and “not operate either for profit or below cost;” (iv) may not benefit its individual members financially; and (v) if exempt from Federal income taxation, must collect at least 85 percent of its income from members.

<sup>16</sup> See generally Petition at 6–12, and Exhibit 2.

<sup>17</sup> See *id.* at 13.

<sup>18</sup> See *id.* at 12.

<sup>19</sup> See *id.* at 5, 13.

<sup>20</sup> 77 FR 50998 (August 23, 2012).

<sup>21</sup> Exempt Entities are defined in Section IV.A of the Proposed Order. See *id.* at 51012.

Transactions”);<sup>22</sup> and (iii) the provisions of the CEA and Commission regulations that would continue to apply to Exempt Entities entering into Exempt Non-Financial Energy Transactions with one another.<sup>23</sup>

The Commission proposed a definition of Exempt Entities intended to capture the same scope of entities for which relief was requested by Petitioners. Generally, these entities included (i) electric facilities owned by government entities described in FPA section 201(f), (ii) electric facilities owned by Federally-recognized Indian tribes, (iii) any cooperatively-owned electric utility treated as a cooperative under Federal tax laws, and (iv) any other not-for-profit entity wholly-owned by one or more of the foregoing.<sup>24</sup> The Proposed Order provided the caveat that no Exempt Entity could qualify as a “financial entity” as such term is defined in CEA section 2(h)(7)(C).<sup>25</sup>

The Commission’s proposed definition of Exempt Non-Financial Energy Transaction was narrower in scope than the transaction definition proposed by Petitioners. Namely, the Commission declined to propose categorical relief for any transaction not described by one of the seven categories included in the Petition because the broader transaction definition is too vague for the Commission to conduct a considered and robust public interest and CEA purposes analysis under CEA section 4(c).<sup>26</sup> Additionally, due to overlap between certain transaction categories for which both Petitioners requested relief and the Commission’s joint final rule and interpretation with the Securities Exchange Commission (“SEC”) determined not to be swaps,<sup>27</sup> the Commission believed it was unnecessary to provide additional relief pursuant to CEA section 4(c) for those

<sup>22</sup> Exempt Non-Financial Energy Transactions are defined in Section IV.B of the Proposed Order. See *id.* at 51012–13.

<sup>23</sup> The conditions the Commission proposed to impose on the Proposed Order are described in Section IV.C thereof. See *id.* at 51013.

<sup>24</sup> See *id.* at 51012.

<sup>25</sup> See *id.*

<sup>26</sup> *Id.* at 51006, n.63. The Commission also declined to propose Petitioners’ secondary requests for i) an additional exempted transaction category for “trade options” and/or ii) delegated authority to Commission staff to review and approve new categories of exempted transactions, for the reasons set forth in the Petition. See *id.* Also, because the Commission has promulgated a trade option exemption in Commission regulation 32.3, there was no need to promulgate a separate trade option exemption for Petitioners, who, like all other persons whose transactions satisfy the terms of the trade option exemption, can rely thereon.

<sup>27</sup> 77 FR 48208 (August 13, 2012) (“Products Release”).

overlapping transaction categories.<sup>28</sup> Otherwise, the Commission proposed a definition for Exempt Non-Financial Energy Transactions that was intended to capture a similar scope of transactions as described in the Petition, limited in the Proposed Order to Electric Energy Delivered, Generation Capacity, Transmission Services, Fuel Delivered, Cross-Commodity Pricing, and Other Goods and Services.<sup>29</sup>

Pursuant to CEA section 4(c)(1), the Commission also proposed conditioning its relief. First, the Commission proposed to reserve its general anti-fraud, anti-manipulation, and enforcement authority.<sup>30</sup> Second, the Commission proposed to reserve its general authority to inspect books and records of Exempt Non-Financial Energy Transactions already kept in the normal course of business.<sup>31</sup> The overarching goal of these proposed conditions would be to allow the Commission to gain greater visibility with respect to Exempt Non-Financial Energy Transactions to ensure Exempt Entities' compliance with the terms of the order, provide a means to ensure that the relief provided in the order remains appropriate and in the public interest given the potential that Exempt Non-Financial Energy Transactions may continue to evolve and their usage otherwise change, and to maintain the ability to initiate enforcement proceedings against Exempt Entities' found to be engaged in manipulative, fraudulent, or otherwise abusive trading schemes when executing Exempt Non-Financial Energy Transactions with other Exempt Entities.<sup>32</sup>

Given the scope of the relief contemplated by the Proposed Order as just described, the Commission was able to make the public interest determinations required under CEA sections 4(c)(1) and 4(c)(2). In the Proposed Order, the Commission determined that (i) Exempt Non-

Financial Energy Transactions were innovative products necessary to meet the unique production, distribution, and usage needs of Exempt Entities that were constantly changing due to factors beyond their control;<sup>33</sup> (ii) CEA section 4(a) should not apply to Exempt Non-Financial Energy Transactions, which were bespoke in nature and conducted in a closed loop between Exempt Entities, therefore making them unsuitable for exchange trading and less likely to affect price discovery in Commission-regulated markets;<sup>34</sup> (iii) relief for Exempt Non-Financial Energy Transactions between Exempt Entities was not inconsistent with the public interest because the transactions were used to "manage" commercial risks arising from electric operations and facilities, and therefore were not speculative in nature;<sup>35</sup> (iv) Exempt Entities were self-regulating, not-for-profit public utilities with no outside investors or shareholders to profit from transactions, and as such, were less vulnerable to fraudulent or manipulative trading activity in accordance with the purposes of the CEA;<sup>36</sup> (v) Exempt Entities were "appropriate persons" for purposes of 4(c) relief either by virtue of having been identified explicitly by Congress in CEA section 4(c)(6)(C) as being eligible for a 4(c) exemption, by being a government-sponsored entity, and/or otherwise being appropriate due to sufficient financial soundness and operational capabilities;<sup>37</sup> and (vi) because of the foregoing, nothing would prevent the Commission or any contract market from discharging its respective regulatory or self-regulatory duties under the CEA.<sup>38</sup>

In addition to requesting comment on the scope of the relief and the Commission's 4(c) determinations, the Commission posed specific questions<sup>39</sup> related to different aspects of the Proposed Order and provided a 30-day comment period to respond.

## II. Comments Received and Commission Response

In response to the Proposed Order's Request for Comments, the Commission received two responses, both of which were generally supportive. The Electric Power Supply Association and the Edison Electric Institute, writing together ("Joint Associations"), voiced

general support for the Proposed Order and the Commission's determinations that the exemption would be in the public interest, and did not request any clarification or propose any changes.<sup>40</sup> The Petitioners also submitted a comment letter which, while approving overall of the Proposed Order and the Commission's "appropriate[ ] implementation[ ] of Congressional intent," requested that any final relief be clarified "in certain minor respects to align more closely with the Congressional intent," and that responded directly to the Commission's specific questions.<sup>41</sup>

Upon careful consideration of the comments received, the Commission has determined to finalize the Proposed Order, with certain revisions to the "Final Order,"<sup>42</sup> the majority of which are in response to comments discussed below and subject to the following interpretive guidance used to clarify the Commission's intent. Unless noted below, the Commission is finalizing the Proposed Order without change because it continues to believe that the scope of the Proposed Order is consistent with the public interest and purposes of the Act.<sup>43</sup>

### A. Clarification With Respect to the Definition of "Exempt Entity"

Generally, Petitioners agreed with the scope of entities included in the definition of Exempt Entity. In response to a question posed by the Commission,<sup>44</sup> Petitioners commented that the scope of the Exempt Entities definition should not be limited further to include only those electric cooperatives with tax-exempt status under Federal tax law because "[t]here is no operational or governance difference between electric cooperatives

<sup>40</sup> Letter from the Electric Power Supply Association and the Edison Electric Institute, at 1–2 (September 24, 2012) ("Joint Associations' Letter") ("The Joint Associations support the Commission's Proposed 201(f) Exemption and agree that the Proposed 201(f) Exemption is in the public interest.").

<sup>41</sup> Letter from the National Rural Electric Cooperative Association, the American Public Power Association, the Large Public Power Council, the Transmission Access Policy Study Group and the Bonneville Power Administration, at 1–2 (September 24, 2012) ("Petitioners' Letter"). As discussed below, the Petitioners did not respond directly to the Commission's "Request for Public Comment on Costs and Benefits" of the Proposed Order.

<sup>42</sup> See *infra* Section V.

<sup>43</sup> See Proposed Order at 51006–09.

<sup>44</sup> Specifically, the Commission asked whether it should "limit the scope of Exempt Entities to only those electric utilities described by FPA section 201(f)," and even if not, "should the Commission still limit the scope of electric cooperatives included as Exempt Entities to only those cooperatives with tax exempt status[?]" Proposed Order at 51013.

<sup>28</sup> See Proposed Order at 51008–09. Specifically, the Commission noted that certain "Fuel Delivered" transactions, as described in Exhibit B of the Petition, would be covered by the forward exclusion from the swap definition. *Id.* at 51008 (citing Products Release, 77 FR 48236).

Additionally, the Commission noted that agreements, contracts, and transaction involving the category of Environmental Rights, Allowances or Attributes, as specifically described by the Petition, would be covered by the forward exclusion from the swap definition. *Id.* (citing Products Release, 77 FR 48233–34).

<sup>29</sup> See *id.* at 51012–13. Generally, the description of each category mirrored the descriptions provided in the Petition.

<sup>30</sup> *Id.* at 51013 (reserving authority including, but not limited to, CEA sections 2(a)(1)(B), 4b, 4c(b), 4o, 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and Commission rules 32.4 and Part 180).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 51009.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.* at 51010.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.* at 51011.

<sup>37</sup> See *id.* at 51011–12.

<sup>38</sup> See *id.* at 51012.

<sup>39</sup> See *id.* at 51013–14.

that are tax exempt under IRC Section 501(c)(12) and those that are taxable under IRC Section 1381(a)(2)(C).<sup>45</sup> Similarly, in response to a different question,<sup>46</sup> Petitioners reiterated their support for including Federally-recognized Indian tribes within the scope of the relief for the same reasons that they provided in the Petition.<sup>47</sup>

The Proposed Order defined Exempt Entities to include not only those entities described in FPA section 201(f),<sup>48</sup> but federally-recognized Indian tribes and non-FPA section 201(f) electric cooperatives. The Commission accepted Petitioners' representations that FERC has traditionally treated federally-recognized Indian tribes as FPA section 201(f) entities due to the similarities they share with government entities.<sup>49</sup> The Commission also accepted Petitioners' representations that non-FPA section 201(f) electric cooperatives, so long as they are treated as cooperatives under Federal tax law but regardless of whether they have tax-exempt status, are owned and operated in the same not-for-profit, self-regulated manner as FPA section 201(f) cooperatives, and their source of financing or amount of monthly electricity sold does not affect their sharing with FPA section 201(f) electric cooperatives the same underlying public service mission of providing affordable, reliable electric energy service to customers.<sup>50</sup> Having received no comments challenging the Commission's determination based upon these representations, the Commission continues to believe that the scope of Exempt Entities included in the Proposed Order is consistent with the public interest and purposes of the Act, and thus is adopting the same general scope of Exempt Entities in the Final Order.<sup>51</sup>

Petitioners suggested a number of minor revisions to the language used in defining Exempt Entities in the Proposed Order in order "to clearly encompass the appropriate categories of electric entities discussed in the Petition and elsewhere in the Proposal."<sup>52</sup> For example, Petitioners suggested clarifying that Exempt Entities can own either a facility "or utility" that is subject to exemption under FPA section 201(f), and that such a facility or utility should be "wholly-owned" instead of partially-owned by entities that qualify under FPA section 201(f).<sup>53</sup> The Commission agrees that the proposed revisions would help align the Final Order with the Commission's intent as expressed in the adopting release of the Proposed Order, and has modified the definition of "Exempt Entity" accordingly.<sup>54</sup>

Petitioners also requested that the Commission remove the reference to "lowest cost possible" from clause (iii) in the Proposed Order's definition of electric "cooperatives" that qualify as Exempt Entities in order "to recognize that electric cooperatives have operational objectives in addition to low cost, e.g., electric service reliability and

determinative of its inclusion in the relief provided herein as long as it continues to meet the criteria for cooperatives as noted herein. Furthermore, the Commission does not believe that being notified of an electric cooperative's change in FPA 201(f) status would further any regulatory purposes under the Act, and therefore is not imposing any new reporting condition. The Commission is cognizant that any incentive provided by the Final Order for electric cooperatives to sell additional electricity and still be covered by the relief could be negated by the consequence of becoming fully regulated by FERC. The Commission stresses, however, that to the extent an electric cooperative no longer meets the criteria for cooperatives provided in the definition of an Exempt Entity, such electric cooperative may no longer rely on the relief provided in the Final Order.

<sup>52</sup> *Id.* at 3.

<sup>53</sup> *Id.*

<sup>54</sup> The Commission understands that a "facility" refers to an asset used in relation to the generation, transmission and/or delivery of electricity, whereas a "utility" refers to the entity that owns and/or operates the facility. Additionally, to qualify under FPA section 201(f) and, by extension, CEA section 4(c)(6)(C), an electric facility or utility cannot be partially-owned by an entity not described by FPA section 201(f). Furthermore, the Commission has clarified in the Final Order that, consistent with FPA section 201(f), an aggregated entity such as a Joint Power Administration can own facilities or utilities covered by the relief, subject to the caveat that the aggregated entity must consist solely of entities otherwise described as Exempt Entities. While not explicitly requested, the Commission has deleted the requirement that Federally-recognized Indian tribes must be "otherwise subject to regulation as a 'public utility' under the FPA" to account for the possibility that Indian tribes recognized by the U.S. government may someday be recognized explicitly under FPA section 201(f), at which point it could be confusing as to whether they are covered by the Final Order due to status with FERC as a public utility.

environmental stewardship."<sup>55</sup> The Petitioners represented that these are additional public service objectives that all Exempt Entities share as part of their collective public service mission, in addition to providing affordable electric energy service.<sup>56</sup> Additionally, Petitioners originally maintained that providing electric energy service at the lowest cost possible may be an operational goal of a cooperative, and that Federal tax law requires cooperatives to operate "at cost," as opposed to the lowest cost possible.<sup>57</sup> The Commission agrees that this is a worthwhile clarification and, accordingly, has revised the language in clause (iii) of the Proposed Order describing electric cooperatives included in the definition of Exempt Entity to make clear that such cooperatives must provide electric energy service to their member/owner customers "at cost," which the Commission intends to reflect the lowest cost possible in light of certain reliability and environmental standards and objectives, among others.

Lastly, Petitioners requested that the Commission delete the qualifier, "not-for-profit," from clause (iv) of the Exempt Entity definition describing entities that are wholly-owned by one or multiple other Exempt Entities.<sup>58</sup> The Petitioners noted that "[e]ach of these subsidiary or aggregated entities are FPA 201(f) entities because they are wholly-owned by other FPA 201(f) entities, without regard to tax status," and therefore "their activities do not benefit entities outside the 'closed loop' of entities" described in CEA section 4(c)(6)(C).<sup>59</sup> The Commission agrees that Petitioners' interpretation is consistent with FPA section 201(f) and CEA section 4(c)(6)(C). FPA section 201(f) provides that "any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing [entities described in FPA section 201(f)]" is exempted under the statute as well.<sup>60</sup> Under the Proposed Order, relief is provided for transactions entered into solely between Exempt Entities, meaning that all exempted transactions, whether they generate profit or not, are

<sup>55</sup> Petitioners' Letter at 4.

<sup>56</sup> *See id.*

<sup>57</sup> *See* Petition at 26 (defining "at cost" as "return[ing] excess operating revenues to [the cooperative's] member-patrons," which means the cooperative "must not operate either for profit or below cost" (citing *Puget Sound Plywood v. Comm'r*, 44 T.C. 305, 307-308 (1965)).

<sup>58</sup> Petitioner's Letter at 4.

<sup>59</sup> *Id.* (noting, as an example, that some Exempt Entities may have subsidiaries that provide their consumer-members with propane, on top of the subsidiary's primary electric service obligations).

<sup>60</sup> *See* FPA section 201(f), *supra* note 10.

<sup>45</sup> Petitioners' Letter at 9.

<sup>46</sup> Specifically, the Commission sought comment "on every aspect of the Proposed Order as it relates to Indian tribes." Proposed Order at 51013.

<sup>47</sup> Petitioners' Letter at 10-11.

<sup>48</sup> *See* Proposed Order at 51006-07.

<sup>49</sup> *See id.* at 51007.

<sup>50</sup> *See id.*

<sup>51</sup> With regard to the Commission asking whether an Exempt Entity should be required to notify the Commission of any change in status under FPA section 201(f), Proposed Order at 51013, the Commission notes that the question was only relevant to electric cooperatives that fall in-and-out of FPA section 201(f) status based upon the amount of electricity they sell or from whom they receive financing. The Petitioners stated that such a change in status "would have no effect on outstanding Exempt Non-Financial Energy Transactions entered into with Exempt Entities prior to the change in status." Petitioners' Letter at 9. Having further considered the issue, the Commission confirms its belief that, for the reasons stated in the adopting release to the Proposed Order, an electric cooperative's FPA 201(f) status should not be

for the benefit of facilitating the closed loop's public service mission. Because it has determined the qualifier to not be necessary, the Commission has struck the reference to "not-for-profit" status in clause iv) of the Exempt Entity definition.

*B. Clarification With Respect to the Definition of "Exempt Non-Financial Energy Transaction"*

Similar to their suggested revisions to the definition of Exempt Entity, Petitioners suggested a number of minor revisions to the definition of Exempt Non-Financial Energy Transaction in order to align the Final Order more closely with Congressional intent. First, Petitioners requested that the Commission substitute the words "public service obligations" for "contractual obligations" in Section IV.B of the proposed definition to account for the fact that "Exempt Entities' obligations to electric customers arise in some cases under Federal or state law, or under local municipal ordinances or city charters, under Tribal laws or, for electric cooperatives, under organizational charters or by-laws, rather than under individual customer contracts."<sup>61</sup> Next, for the same reasons applicable to the requested revision of the definition of Exempt Entity, Petitioners requested that the Commission delete the phrase, "at the lowest cost possible," when referring to the purpose of engaging in Exempt Non-Financial Energy Transactions.<sup>62</sup> Finally, Petitioners requested that the Commission delete the word "only" from the sentence immediately preceding enumerated transaction categories in Section IV.B of the proposed definition because it is industry practice to include these transactions as part of larger commercial agreements or arrangements that also encompass components not covered by the relief.<sup>63</sup> Petitioners requested that the Commission not impose upon Exempt Entities the new burden of having to compartmentalize their commercial relationships in such a way as to limit certain arrangements to only those six exempted transaction categories.<sup>64</sup>

The Commission agrees with these suggestions and has revised the

definition of Exempt Non-Financial Energy Transaction accordingly. The Commission notes, however, that by allowing Exempt Non-Financial Energy Transactions to be included as part of larger commercial agreements, it is not providing relief to any other type of transaction or component of the agreement that is not explicitly defined in the Final Order. That is, the inclusion of an Exempt Non-Financial Energy Transaction within a broader commercial agreement does not thereby provide relief to every transaction included within the entire agreement.

Petitioners also requested certain other clarifications with respect to the definition of Exempt Non-Financial Energy Transaction. First, the Commission is confirming that any "agricultural product or diesel fuel or [other] grade of crude oil that is used as fuel for electric generation may be the underlying commodity upon which an 'Exempt Non-Financial Energy Transaction' is based."<sup>65</sup> Next, the Commission is clarifying that there is no requirement that Exempt Non-Financial Energy Transactions "involve only fixed amounts of goods or services, or fixed time frames or only fixed measures."<sup>66</sup> Rather, the Commission confirms that the price, duration, quantity and any other aspect of these transactions may be variable, adjusted or adjustable during the term of an agreement, contract or transaction, as is customary for Exempt Non-Financial Energy Transactions.<sup>67</sup> The definition in the Final Order has been revised to reflect these two points.

Next, the Petitioners' requested certain changes to the proposed definition of Exempt Non-Financial Energy Transactions regarding what ultimate purpose the transactions must serve. First, Petitioners requested that the Commission substitute the words "related to" for "to facilitate" in Section IV.B of the proposed definition because in some cases, such as with an agreement to share a generation asset in order to more cost-effectively comply with environmental standards, the transaction may "limit rather than facilitate electric generation, transmission or distribution operations."<sup>68</sup> Second, Petitioners requested that the Commission not

include the proposed requirement that Exempt Non-Financial Energy Transactions must be "intended for making or taking physical delivery of the commodity upon which the agreement, contract or transaction is based."<sup>69</sup> Petitioners reiterated their original request that in issuing any 4(c) relief, the Commission not determine the regulatory status of any transaction or whether any transaction involves a "commodity," including a "nonfinancial commodity," as those terms are defined in the CEA.<sup>70</sup> Specifically, Petitioners provided examples of certain transactions that fall within the defined "Other Goods and Services" transaction category in the Proposed Order, but that "do not always involve an identifiable, tangible commodity intended for 'delivery,'" or where it would be objectively impractical for counterparties, who under an agreement jointly own and operate transmission facilities, to objectively monitor "intent" because there is not a "single, comprehensive operating agreement that embodies the relationship."<sup>71</sup>

The Commission has determined to revise the purpose language to address Petitioners' concerns with the "intent to physically deliver" requirement. The amended definition no longer directly modifies an Exempt Entity's public service obligation as "facilitating" generation, transmission and/or delivery of electric energy service, and no longer includes the "intent to physically deliver" language. Rather, the amended definition provides that an Exempt Non-Financial Energy Transaction "would not have been entered into, but for an Exempt Entities' need to manage supply and/or price risks arising from its existing or anticipated public service obligations to physically generate, transmit, and/or deliver electric energy service to customers."<sup>72</sup>

The effect of the Commission's revisions to the definition should make it clear that Exempt Non-Financial Energy Transactions do not necessarily result in an immediate net increase in generation, transmission, and/or delivery of electric energy for each Exempt Entity involved. The Commission interprets the Final Order definition, as amended, in the larger context of an Exempt Entity's public service obligations, which can include certain reliability, conservation, and environmental considerations related to their operations and facilities. Thus,

<sup>69</sup> *Id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See supra* Section IV.B.

<sup>61</sup> Petitioners' Letter at 4.

<sup>62</sup> *Id.* at 5.

<sup>63</sup> *Id.* at 7 (citing fuel delivery contracts and environmental commodity and other nonfinancial commodity transactions as examples of larger agreements, and noting that some such agreements may include governance or employee sharing provisions that have nothing to do with operational goods and services).

<sup>64</sup> *Id.*

<sup>65</sup> *See* Petitioners' Letter at 6–7.

<sup>66</sup> *See id.* at 7.

<sup>67</sup> The Commission notes that the definition of Exempt Non-Financial Energy Transaction is being revised in the Final Order to allow for price-hedging transactions, and that contrary to what was stated in the Proposed Order, some agreements may be variable price instead of fixed price. *See infra* Section II.E.1 and note 114 and accompanying text.

<sup>68</sup> *Id.* at 5.

under the examples posed in Petitioners' Letter, the need to enter into a demand-side management agreement or generation facility-sharing arrangement would still arise from the Exempt Entity's public service obligations, even if one Exempt Entity is required under the terms of the agreement to scale back its generation output to comply with demand-side management programming criteria, or the agreement itself does not directly result in physical generation, transmission, or delivery of electric energy service, but instead enables the fulfillment of physical obligations going forward.

These revisions are based on the Commission's recognition that not all Exempt Non-Financial Energy Transactions necessarily result in making or taking physical delivery of the "commodity" upon which the transaction is based, although many will.<sup>73</sup> As described in the Final Order, all categories of Exempt Non-Financial Energy Transactions represent agreements entered into by Exempt Entities in order to manage price<sup>74</sup> and/or supply risk resulting from the public service role they play in *physical* electricity markets. The Commission stresses that the revised definition still does not allow for Exempt Non-Financial Energy Transactions to be purely financial arrangements lacking any essential relationship to a physical generation, transmission, and/or delivery obligation of electric energy service to customers.<sup>75</sup> The proposed 4(c) public interest determination was premised on Exempt Non-Financial Energy Transactions not being speculative transactions.<sup>76</sup> Without

requiring more than the "closed loop" limitation as advocated for by Petitioners, the Commission believes that the Exempt Non-Financial Energy Transaction definition could be interpreted to cover purely financial transactions capable of being used for speculative purposes, which would not be in the public interest for the Commission to exempt.<sup>77</sup> Thus, the Commission has revised the Final Order definition to include the "but for" language.

Lastly, while not requested by commenters, the Commission has further revised the Exempt Non-Financial Energy Transaction definition. The descriptions of "Fuel Delivered" and "Cross-Commodity Pricing" transactions have been modified by replacing the operative verb "include" with "consist of." While the category description is not necessarily closed, the Commission notes that the change is intended to reflect that there are certain characteristics that must be present for these types of transactions. The "consist of" language is consistent with the other four Exempt Non-Financial Energy Transaction category descriptions. Additionally, the Commission has added the qualification that Exempt Non-Financial Energy Transactions are not entered into on or subject to the rules of a registered entity, submitted for clearing to a derivatives clearing organization ("DCO"), and/or reported to a swap data repository ("SDR"). This modification is based on Petitioners' representation that Exempt Non-Financial Energy Transactions are not standardized instruments suitable for exchange trading, clearing, or reporting.<sup>78</sup> If persons otherwise able to

claim the relief in the Final Order choose to (i) enter into an agreement, contract or transaction on or subject to the rules of a registered entity, (ii) submit an agreement, contract or transaction for clearing to a DCO or (iii) report an agreement, contract or transaction to an SDR, such an agreement, contract or transaction will be not be an Exempt Non-Financial Energy Transaction and will be outside the scope of the Final Order. In such circumstances, such persons, agreements, contracts or transactions will be subject to the applicable regulatory regime.

### *C. Clarification With Respect to the Commission's Right To Revisit the Terms of the Relief*

Regarding the condition that the Commission reserves the right to revisit any of the terms and conditions of the exemptive relief,<sup>79</sup> the Petitioners requested that the Commission clarify that any such reconsideration would be subject to notice and comment under the Administrative Procedure Act ("APA").<sup>80</sup> The Commission clarifies that exemptive orders issued pursuant to section 4(c) of the CEA are subject to "notice and opportunity for hearing."<sup>81</sup>

### *D. Request That Relief Not Be Conditioned Upon a Reservation of Jurisdiction Under the Commission's Authority Over Options Transactions*

Petitioners requested that the Commission remove references in the Proposed Order to CEA section 4c(b) and Commission regulation 32.4 as non-exclusive provisions being reserved for purposes of conditioning the relief on the Commission's general anti-fraud, anti-manipulation, and enforcement authority.<sup>82</sup> Petitioners noted that the two "provisions are not part of the general anti-fraud, anti-market manipulation and enforcement authority, but instead articulate the Commission's jurisdiction over option transactions."<sup>83</sup> Specifically, Petitioners expressed concern that the references were an attempt by the Commission "to

trading contracts would contain the same customized economic terms of any particular [Exempt Non-Financial Energy Transactions]". The Commission notes that Petitioners' original proposed transaction definition stated that the exempted transactions "shall not include agreements, contracts or transactions executed, traded, or cleared on a registered entity \* \* \*." See Petition at 5.

<sup>79</sup> Proposed Order at 51013.

<sup>80</sup> *Id.* at 7–8 (citing the APA, 5 U.S.C. 500 *et seq.*)

<sup>81</sup> CEA section 4(c)(1); 7 U.S.C. 6(c)(1) (providing that the Commission may exempt certain transactions "after notice and opportunity for hearing").

<sup>82</sup> Petitioners' Letter at 8.

<sup>83</sup> *Id.*

<sup>73</sup> With respect to Petitioners' comment that they specifically requested the Commission to not make any determination as to whether any Exempt Non-Financial Energy Transaction involves a "commodity," the Commission notes that Petitioners originally proposed that "Electric Operations-Related Transactions" be defined as "involving a 'commodity' (as such term is defined in the CEA) \* \* \* ." See Petition at 4.

<sup>74</sup> See *supra* Section II.E.1 (discussing the Commission's determination to clarify that an Exempt Non-Financial Energy Transaction can be used to manage the price risk of a commodity underlying the transaction).

<sup>75</sup> To emphasize the requirement that Exempt Non-Financial Energy Transactions be tied to obligations in physical electricity markets, the Commission has qualified the language in the Final Order definition to state that Exempt Entities' "public service obligations" are "to *physically* generate, transmit, and/or deliver electric energy service to customers." See *supra* Section IV.B (emphasis added).

<sup>76</sup> See Proposed Order at 51010. The Commission explained that the scope of the proposed definition required that the transaction would "contemplate 'delivery' of the underlying good or service," but that settlement of the transaction could occur in some circumstances through a financial book-out

transaction so long as the transaction was not intended for speculative purposes. *Id.* at 51008, n.83 and accompanying text. Without the physical delivery requirement, the Commission notes that price management transactions under the Final Order can be financially settled, so long as the underlying physical commodity is being procured through a corresponding physical delivery agreement.

<sup>77</sup> In response to the Commission asking whether the Proposed Order's definitions would foreclose the possibility of exempt speculative trading, the Petitioners responded that "Exempt Entities do not execute Exempt Non-Financial Energy Transactions for speculative purposes, but only to hedge or mitigate commercial risks arising from electric operations." Petitioners' Letter at 10. While the Commission appreciates that Petitioners represent their intent never will be to use the transactions to speculate, the Commission also believes it is in the public interest to foreclose the possibility of such exempt speculative trading activity through additional limiting language in the definition of Exempt Non-Financial Energy Transactions.

<sup>78</sup> See, e.g., Petition at 6–7 (noting that "Electric Energy Delivered" contracts are not fungible and cannot be described in electronically reportable formats); Petition at 31 (explaining that "it is highly unlikely that any [ ] standardized derivatives

reserve the right to decide later that it has jurisdiction over [a “Generation Capacity” transaction between “Exempt Entities”] as an option.”<sup>84</sup>

The Commission has declined to remove the reference to CEA section 4c(b) and Commission regulation 32.4 from the Conditions of the Final Order. As is standard practice with past exemptive orders issued pursuant to CEA section 4(c), the Commission reserves its general anti-fraud and anti-manipulation authority, as well as the ability to revisit the terms and conditions of the relief at any time and determine that certain transactions are jurisdictional in order to execute the Commission’s duties and advance the public interests and purposes of the CEA. The Commission also believes it prudent to reserve certain scienter-based prohibitions in the Act and Commission regulations (without finding it necessary in this particular context to preserve other enforcement authority), and has modified the language in the Final Order to make the scope of this reservation clear. While Petitioners are correct that the provisions in question do not articulate the Commission’s general anti-fraud, anti-manipulation and enforcement authority directly, the provisions exemplify a possible statutory basis for bringing an enforcement action, were a need to arise for the Commission to do so, and notes that the inclusion of these provisions is not intended to bring any transactions under CFTC jurisdiction for purposes other than enforcement.

The Commission also has determined to add new CEA sections 4s(h)(1)(A) and 4s(h)(4)(A)<sup>85</sup> and Commission regulations 32.410(a) and (b)<sup>86</sup> to the non-exclusive list of provisions that could provide a possible statutory basis for an enforcement action, as it has done in a similar proposed exemption for certain regional transmission organizations (“RTO”) and independent system operators (“ISO”).<sup>87</sup> The

<sup>84</sup> See *id.*

<sup>85</sup> 7 U.S.C. 6s(h)(1)(A), 6s(h)(4)(A) (as added by the Dodd-Frank Act section 731). CEA section 4s(h)(1)(A) requires a swap dealer (“SD”) or major swap participant (“MSP”) to comply with all Commission rules and regulations related to fraud, manipulation, and other abusive practices involving swaps, while CEA section 4s(h)(4)(A) makes it unlawful for any SD or MSP acting as an advisor to employ any deceptive device or scheme to defraud a Special Entity.

<sup>86</sup> These regulations prohibit an SD or MSP from perpetrating fraud, manipulation, or other abusive trading practices on “Special Entities,” as such term is defined in Commission regulation 23.401(c), and provide an affirmative defense against charges of perpetrating such abusive schemes. See 77 FR 9822–23 (Feb. 17, 2012).

<sup>87</sup> See 77 FR 52138, 52166 (August 28, 2012) (“Proposed RTO/ISO Order”). The Proposed RTO/

inclusion of CEA sections 4c(b), 4s(h)(1)(A) and 4s(h)(4)(A), and Commission regulation 32.4, as examples of reserved authority in no way indicates the Commission’s belief that a certain Exempt Non-Financial Energy Transaction is or could be a commodity option or other type of swap; to the contrary, consistent with the Commission’s interpretation of the authority contained in section 4(c), the Commission has taken no position in issuing the Final Order as to the product category or jurisdictional or non-jurisdictional nature of any of the exempted transactions.

Finally, the Commission is adding CEA section 4(d) to the non-exclusive list of reserved enforcement authority. The Commission believes it is important to highlight that, as with all exemptions issued pursuant to CEA section 4(c), the exemption “shall not affect the authority of the Commission under any other provision of [the CEA] to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of [the CEA] or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.”<sup>88</sup>

#### *E. Other Clarification and Comments*

The Commission is providing further clarification with respect to the appropriate uses of Exempt Non-Financial Energy Transactions and responding to other comments made by the Petitioners.

#### **1. Clarification With Respect to the Ability of Exempt Entities To Use Exempt Non-Financial Energy Transactions To Manage Price Risks**

The Commission requested comment on whether Exempt Non-Financial Energy Transactions, as defined in the Proposed Order, could be used to hedge price risk in an underlying commodity, and if so, whether the Commission explicitly should exclude such price-hedging transactions.<sup>89</sup> Petitioners

ISO Order exempted certain electric energy transactions that occur pursuant to a RTO/ISO tariff approved by the Federal Energy Regulatory Commission, subject to the Commission’s general anti-fraud, anti-manipulation, and enforcement authority. Similar to the FPA section 201(f) Petitioners, the RTO/ISO petitioners requested relief pursuant to the Commission’s new authority in CEA section 4(c)(6).

<sup>88</sup> See 7 U.S.C. 6(d).

<sup>89</sup> Proposed Order at 51014. In making its public interest determination in the Proposed Order, the Commission represented that it understood Exempt Entities to use Exempt Non-Financial Energy Transactions mainly to manage supply risk, and not price risk, of an underlying commodity. See *id.* at 51010. Therefore, the Commission declined to

responded that they use Exempt Non-Financial Energy Transactions to “‘hedg[e] or mitigat[e] commercial risks’ arising from electric operations,” and that commercial risks include “both price and availability risks of the nonfinancial commodities required as fuel for generation or the goods or services that the entity sells or anticipates selling.”<sup>90</sup> If the Commission explicitly were to exclude price hedging transactions from the scope of relief, Petitioners argued they would be required to rely on the more limited end-user exception to clearing for such transactions,<sup>91</sup> which Congress could not have intended because it added additional relief specifically for FPA section 201(f) entities in section 4(c)(6) of the CEA.<sup>92</sup>

The Commission is persuaded that Congress intended for the Commission to consider providing relief for transactions managing price risk entered into between FPA section 201(f) entities that goes beyond the relief available through the end-user exception for price hedging transactions, if in the public interest. Therefore, the Commission has made explicit in the Final Order definition that the scope of relief covers transactions entered into not only to manage supply risk arising from an Exempt Entity’s public service obligation to physically generate, transmit, and/or deliver electric energy service, but also any price risk associated with an underlying commodity used to facilitate the public service obligation. The Commission believes that the overall effect of the revisions to the definition of Exempt Non-Financial Energy Transaction

adopt Petitioners’ proposed definition incorporating the phrase, “‘to hedge or mitigate commercial risks’ (as such phrase is used in CEA Section 2(h)(7)(A)(ii)),” because the Commission generally did not interpret this phrase to refer to the full scope of transactions described in the Petition and incorporated into the Proposed Order through enumerated categories of Exempt Non-Financial Energy Transactions. *Id.* at 51007–08, n.81.

<sup>90</sup> See Petitioners’ Letter at 12.

<sup>91</sup> CEA section 2(h)(7)(A), 7 U.S.C. 2(h)(7)(A) (providing relief from the clearing and trade execution mandate for swap transactions entered into where at least one counterparty is not a financial entity and uses the swap to hedge or mitigate commercial risk). As Petitioners note, while the end-user exception would provide some relief for Exempt Non-Financial Energy Transactions, the transactions “nonetheless [would be] subject to other regulatory requirements.” Petitioners’ Letter at 12.

<sup>92</sup> See *id.* Petitioners argue that by providing both the “general end-user exception” and the “specific 4(c)(6) public interest waiver,” “Congress clearly intended that the Commission waive its jurisdiction over [transactions entered into between FPA section 201(f) entities], not merely that such entities would have the end-user exception.” *Id.*



previously discussed<sup>93</sup> also helps to clarify that the Final Order clearly covers price-risk management transactions directly related to an Exempt Entity's public service obligation. The Commission notes, however, that because these transactions cannot be used for speculative purposes,<sup>94</sup> any Exempt Non-Financial Energy Transaction used to manage the price risk of an underlying commodity must always be associated with an obligation to make or take physical delivery of that underlying commodity.<sup>95</sup>

## 2. Request That Relief Be Retroactive to the Date of Enactment of the Dodd-Frank Act

The Commission sought comment on whether it should grant Petitioners' original request for the effective date of any 4(c) relief issued to be retroactive to the date of enactment of the Dodd-Frank Act.<sup>96</sup> Petitioners reiterated their rationale from the Petition that certain transactions covered by the proposed definition of Exempt Non-Financial Energy Transactions "might otherwise require analysis as to whether they are 'historical swaps,' and might otherwise require reporting by one or the other of the Exempt Entities, both of which are non-SDs/MSPs under the Dodd-Frank

Act."<sup>97</sup> In order to prevent Exempt Entities from passing along the costs of such historical swap analysis and reporting to electric energy consumers, the Commission has provided that the relief in the Final Order applies retroactively to the date of enactment of the Dodd-Frank Act.<sup>98</sup> The Commission is persuaded that the representations made by Petitioners with respect to the public service obligations of government and cooperatively-owned not-for-profit electric utility companies and the transactions entered into to satisfy such obligations apply equally to the period between the enactment of the Dodd-Frank Act and the issuance of the Final Order contained herein, and thus the same public interest determinations support retroactive 4(c) relief.

## 3. Request That Relief Be Categorical

In response to the Commission's specific request for comments on the topic,<sup>99</sup> Petitioners reiterated their support for the Commission issuing categorical relief that would apply to all Electric Operation-Related Transactions, regardless of whether a transaction was described by one of the six defined categories.<sup>100</sup> Petitioners interpreted the "public interest waiver" codified in CEA section 4(c)(6) as a mandate to the Commission to exempt all transactions that occur between the "closed loop" of FPA section 201(f) entities, and that "[n]othing in the statute require[d] the Commission to analyze or categorize [such] transactions \* \* \*."<sup>101</sup> The Commission rejects this interpretation of Congressional intent.

As acknowledged by Petitioners elsewhere in their comment letter, Congress intended for all transactions occurring within the closed-loop of FPA section 201(f) entities to be "eligible for" an exemption,<sup>102</sup> rather than automatically exempt without further Commission consideration or action. First, the plain language of CEA section 4(c)(6) added by the Dodd-Frank Act is unambiguous: Categorical relief is not mandatory and any relief provided requires an analysis of, and possible limitation to, the transactions being exempted. The provision begins with an explicit "if" clause pre-conditioning any

relief upon the Commission "determin[ing] that the exemption would be consistent with the public interest and purposes of [the] Act."<sup>103</sup> If this determination can be made, the provision then instructs the Commission to issue relief "in accordance with" CEA sections 4(c)(1) and 4(c)(2), implying that additional analysis and limitations may be necessary and/or appropriate in the judgment of the Commission.<sup>104</sup> Second, the Commission notes that the Dodd-Frank Act also amended CEA section 2(a)(1)(A) to codify the Commission's exclusive jurisdiction with respect to swap transactions.<sup>105</sup> Had Congress intended for any transaction entered into between FPA section 201(f) entities to be exempt from this exclusive jurisdiction, it could have explicitly carved out these entities and any transactions occurring between them as categorically exempt.<sup>106</sup> Instead, the Commission believes that Congress explicitly recognized transactions between entities described in FPA section 201(f) as *eligible for* a mandatory exemption, subject to those pre-conditions which the Commission deems appropriate.

Accordingly, as stated in the Proposed Order, the Commission does not believe it can determine conclusively that it would be in the public interest to exempt any transaction entered into between Exempt Entities. Even if a transaction were to meet the requirements of the Exempt Non-Financial Energy Transactions definition, but not be described by one of the six enumerated transaction categories, the Commission would lack the necessary information about the specific nature of the transaction in order to make the requisite public interest determination.

<sup>103</sup> CEA section 4(c)(6), 7 U.S.C. 6(c)(6).

<sup>104</sup> *Id.*

<sup>105</sup> See 7 U.S.C. 2(a)(1)(A), as amended by the Dodd-Frank Act section 722(a). The provision already codified the Commission's exclusive jurisdiction with respect to commodity futures and options transactions.

<sup>106</sup> The Commission notes that such a carve-out would not be without precedent. See, e.g., CEA section 2(c)(1), 7 U.S.C. 2(c)(1) (providing that, subject to certain exceptions, the CEA does not govern or apply to an agreement, contract, or transaction in foreign currency, government securities, security warrants, security rights, resales of installment loan contracts, repurchase transaction in an excluded commodity, or mortgages or mortgage purchase commitments); CEA section 2(a)(1)(C)(i), 7 U.S.C. 2(a)(1)(C)(i) (providing that the CEA shall not apply to, and the Commission shall not have jurisdiction with respect to, designating a contract market for any transaction in which a party to such transaction acquires a put, call, or other option on one or more securities).

<sup>93</sup> See *supra* Section II.B.

<sup>94</sup> As previously noted, the Commission's public interest determination was premised on an Exempt Entity's inability to use Exempt Non-Financial Energy Transactions as purely financial transactions for speculative purposes only. See *supra* Section II.B.

<sup>95</sup> The Commission also confirms its determination, as expressed in the Proposed Order, that Exempt Non-Financial Energy Transactions entered into solely between Exempt Entities do not materially impair price discovery in Commission-regulated markets. See *supra* Section III.C. In response to the Commission asking whether there could be any circumstances where it should revisit this determination and require reporting of swap transactions to a swap data repository for price transparency purposes, Petitioners responded by reiterating their argument that because Exempt Non-Financial Energy Transactions are bespoke and occur within a "closed loop" of Exempt Entities, they do not affect price discovery in Commission-regulated markets. Petitioners' Letter at 9–10. Petitioners also argued that were FERC to require regulatory reporting of electric energy transactions entered into by FPA section 201(f) entities, the nature of the reporting and regulatory purposes behind requiring such reporting would be very different from those behind price transparency reporting of swaps as required by the CEA and Commission regulations. See *id.* At this time, the Commission agrees that any incremental regulatory benefit that might be gained from requiring regulatory reporting of Exempt Non-Financial Energy Transactions entered into between Exempt Entities is not necessary for purposes of making the required public interest determinations in issuing the Final Order, regardless of whether FERC requires reporting for FPA 201(f) entities in the future.

<sup>96</sup> Proposed Order at 51013.

<sup>97</sup> Petitioners' Letter at 11.

<sup>98</sup> CEA section 4(c)(1) provides that the Commission may exempt any agreement, contract, or transaction "either retroactively or prospectively, or both \* \* \*." 7 U.S.C. 6(c)(1).

<sup>99</sup> Proposed Order at 51013.

<sup>100</sup> *Id.* at 11–12.

<sup>101</sup> *Id.* Petitioners specifically noted their disagreement with the Commission's interpretation of CEA section 4(c)(6) "as requiring an analysis of, or a limitation on, the transactions or class of transactions to be exempted \* \* \*." *Id.* at 2, n.5.

<sup>102</sup> See *id.* at 5.

### III. CEA Section 4(c) Determinations

The Commission is issuing the Final Order pursuant its authority in CEA sections 4(c)(1) and 4(c)(6).<sup>107</sup> As required under both sections, the Commission must make certain determinations prior to issuing exemptive relief.<sup>108</sup> Generally, the Commission confirms the determinations it made in the Proposed Order because it believes that such determinations continue to support adopting the Final Order.<sup>109</sup> Where substantive changes have been made to the scope of the Final Order, the Commission is addressing such changes with additional discussion. In some instances, the Commission is expanding upon its proposed determinations to further support adoption of final exemptive relief for Exempt Non-Financial Energy Transactions entered into between Exempt Entities.

#### A. Applicability of CEA Section 4(a)

Due to the bespoke nature of Exempt Non-Financial Energy Transactions, the Commission does not believe that the exchange-trading requirement of CEA section 4(a) should apply. Generally, the exchange-trading requirement is meant to facilitate the price discovery and price transparency processes. Because (i) exchange-traded contracts are less effective at adequately performing as risk management substitutes for Exempt Non-Financial Energy Transactions; and (ii) Exempt Non-Financial Energy Transactions are executed within a closed-loop of Exempt Entities, and thus are not market facing, Exempt Non-Financial Energy Transactions do not materially impair price discovery in Commission-regulated markets and can continue to be executed bilaterally. For that reason, the Commission is limiting the Final Order to Exempt Non-Financial Energy Transactions entered into between Exempt Entities.

<sup>107</sup> To the extent that the Final Order applies to entities not explicitly described in FPA section 201(f), the Commission is using its general exemptive authority found in CEA section 4(c)(1).

<sup>108</sup> These determinations include that (i) CEA section 4(a)—the exchange trading requirement—should not apply; (ii) the exemption is consistent with the public interest and purposes of the CEA; (iii) the exemption is available only for “appropriate persons,” as such term is defined in CEA section 4(c)(3); and (iv) the exemption will not have a materially adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA. See 7 U.S.C. 6(c)(2).

<sup>109</sup> See generally Proposed Order at 51009–12 (proposing the Commission’s CEA section 4(c) determinations).

#### B. Public Interest and Purposes of the CEA

The Commission continues to believe that the scope of the Final Order is consistent with the public interest supported by the CEA.<sup>110</sup> As previously noted, Exempt Non-Financial Energy Transactions are bespoke and not suitable for trading as standardized products on a board of trade. Furthermore, the Final Order applies only to Exempt Non-Financial Energy Transactions entered into between Exempt Entities, which are transacting within a closed loop, and therefore do not materially impair price discovery in Commission-regulated markets.<sup>111</sup> Therefore, exempting these types of transactions from the Commission’s jurisdiction will not materially impair price discovery of electricity-related commodities in Commission-regulated markets.<sup>112</sup>

As discussed previously in response to Petitioners’ comments, the Commission has clarified in the Final Order that Exempt Non-Financial Energy Transactions can be used to hedge prices of underlying commodities, so long as the transaction meets the other definitional criteria and falls into one of the delineated transaction categories.<sup>113</sup> The Commission believes that exempting price hedging transactions is still in the public interest because of Exempt Entities’ unique public service mission and not-for-profit operational structure. Like all public utilities, Exempt Entities have a need to manage the risk associated with fluctuations in both the supply and price of a commodity underlying a transaction.<sup>114</sup> While

<sup>110</sup> These public interests include “providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.” CEA section 3(a), 7 U.S.C. 5(a).

<sup>111</sup> Given that Petitioners represented that exchange-traded instruments are, by their nature, primarily standardized, and therefore in many or most cases may be less effective for purposes of hedging the risks that Exempt Non-Financial Energy Transactions are specifically tailored to offset (e.g., due to the contract sizes not matching the risk being hedged, inconvenient delivery points, and/or unavailability of a contract overlying the specific commodity, the risk of which a market participant seeks to hedge), the Commission likewise presently considers any price link between Exempt Non-Financial Energy Transactions and transactions executed on exchange-traded derivative markets too attenuated to materially impair price discovery of exchange-traded derivatives.

<sup>112</sup> The Joint Associations agreed with this determination in the Proposed Order. See Joint Associations’ Letter at 3.

<sup>113</sup> See *supra* Section II.E.1.

<sup>114</sup> In the Proposed Order, the Commission noted that Exempt Non-Financial Energy Transactions generally are variable-priced transactions, as opposed to fixed-price, and therefore are entered

managing supply risk goes to the reliability aspect of Exempt Entities’ public service mission, hedging price risk goes to providing electric energy service that is low-cost as well. Therefore, it is in the public interest to allow Exempt Entities to continue engaging in price hedging transactions with one another, such that they can continue to provide both reliable and affordable electric energy service to customers.<sup>115</sup>

The Commission also believes that the Final Order is consistent with the purposes of the CEA.<sup>116</sup> As recognized by Congress in passing FPA section 201(f),<sup>117</sup> the not-for-profit structure and governance model—elected or appointed government officials or citizens, or cooperative members or consumers—of all Exempt Entities reduce the incentives and other conditions that traditionally lead to fraudulent or manipulative trading activity, and thus should mitigate the need for prescriptive federal oversight.<sup>118</sup> As previously noted, the Commission has clarified in the Final Order that some Exempt Entities may have a corporate for-profit form, but must nonetheless be wholly owned by other not-for-profit Exempt Entities. The Commission takes notice of the petitioner’s representation that a for-profit subsidiary of an Exempt Entity, when engaged in Exempt Non-Financial Energy Transactions with other Exempt Entities, is less likely to engage in abusive trading practices than other entities, particularly in light of the non-profit, public service nature of the parent Exempt Entity (or Exempt Entities).<sup>119</sup>

into for the purposes of hedging supply risk resulting from unpredictable fluctuations in demand for electric energy. See Proposed Order at 51010. The Commission understands this to still be true, but also understands that in limited circumstances, fixed-price arrangements exist such that Exempt Entities can hedge price risk.

<sup>115</sup> The Final Order, however, still does not exempt transactions that are speculative. Unlike price and supply risk management, speculative swap activity is not necessary to allow Exempt Entities to carry out their public service mission.

<sup>116</sup> In order to foster the public interests, it is the purpose of the CEA “to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to [the CEA] and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sale practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.” CEA section 3(b), 7 U.S.C. 5(b).

<sup>117</sup> See *supra* note 11 and accompanying text.

<sup>118</sup> The Joint Associations agreed with this determination in the Proposed Order. See Joint Associations’ Letter at 2.

<sup>119</sup> The Commission notes that the Final Order retains the Commission’s general anti-fraud and

### C. Appropriate Persons

The Commission believes that Exempt Entities, as defined in the Final Order, are all “appropriate persons” for purposes of satisfying the CEA section 4(c)(2) requirement.<sup>120</sup> As a starting point, the Commission believes that there is a presumption that entities explicitly described in FPA section 201(f) are appropriate persons because of Congress’ mandate to the Commission to exempt, in accordance with CEA sections 4(c)(1) and 4(c)(2) (which precludes the Commission from granting a CEA section 4(c) exemption to persons other than appropriate persons), transactions entered into between such entities if it is in the public interest and consistent with the purposes of the Act.<sup>121</sup> That is, the Commission infers that Congress would not have added CEA section 4(c)(6)(C), which explicitly identifies FPA section 201(f) entities as eligible for an exemption, unless it had presumed such entities were appropriate beneficiaries of an exemption for purposes of the CEA section 4(c)(2) requirement, and subjected CEA section 4(c)(6) to CEA section 4(c)(2) simply so that the Commission would verify that presumption. For the reasons discussed throughout this release, the Commission believes that FPA section 201(f) entities are appropriate persons.<sup>122</sup>

anti-manipulation authority, and certain scienter-based prohibitions, in addition to all public utilities, regardless of FPA section 201(f) status, being subject to FERC’s market manipulation authority. See FPA section 222v, 16 U.S.C. 824v.

<sup>120</sup> CEA section 4(c)(2)(B)(i) requires that the Commission exercise its 4(c) exemptive authority with respect to transactions entered into solely between “appropriate persons.” See 7 U.S.C. 6(c)(2)(B)(i). CEA section 4(c)(3) provides various criteria an entity can meet for purposes of qualifying as an appropriate person. 7 U.S.C. 6(c)(3). The Joint Associations supported the Commission’s proposed determination and underlying rationale that all Exempt Entities were appropriate persons. See Joint Associations’ Letter at 2.

<sup>121</sup> CEA section 4(c)(6)(C), 7 U.S.C. 6(c)(6)(C). Under CEA section 4(c)(3)(K), the Commission can determine other persons not explicitly enumerated in section 4(c)(3) “to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.” 7 U.S.C. 6(c)(3)(K). The Commission believes that Congress’ explicit recognition of FPA section 201(f) entities as being eligible for exemptive relief under CEA section 4(c)(6) constitutes an “other qualification” in support of such entities being appropriate persons, regardless of whether they otherwise would qualify under one of the enumerated appropriate person categories in CEA sections 4(c)(3)(A)–(J).

<sup>122</sup> The Commission notes that many FPA section 201(f) entities would qualify as appropriate persons under other CEA section 4(c)(3) criteria. See, e.g., CEA section 4(c)(3)(F) (providing that a business entity with a net worth exceeding \$1,000,000 or total assets exceeding \$5,000,000 is an appropriate person); CEA section 4(c)(3)(H) (providing that a government entity or political subdivision thereof,

The Commission believes that Exempt Entities not explicitly described in FPA section 201(f) are also appropriate persons.<sup>123</sup> First, the Commission interprets Federally-recognized Indian tribes as appropriate persons under CEA section 4(c)(3)(H) because they are analogous to governmental entities.

Next, some non-FPA section 201(f) electric cooperatives may qualify as appropriate persons under the CEA section 4(c)(3)(F) criteria by having a net worth exceeding \$1,000,000 or total assets exceeding \$5,000,000. For any non-FPA section 201(f) cooperative that does not otherwise qualify as an appropriate person under the specific provisions of section 4(c)(3), the Commission believes that such entities are at least as financially sophisticated and operationally capable as FPA section 201(f) cooperatives. Such cooperatives would not qualify as FPA section 201(f) entities because they sell in excess of 4,000,000 megawatt hours of electricity per month, and/or receive financing from lenders other than the RUS. In either case, such cooperatives likely would have greater assets due to the increased sales, which could qualify them for better financing terms than those offered by the RUS. Additionally, the Commission notes that such cooperatives are not exempt from FERC’s jurisdiction, and thus subject to more regulatory oversight than FPA section 201(f) electric cooperatives. The Commission interprets such FERC oversight of non-FPA section 201(f) electric cooperatives as the type of “appropriate regulatory protections” within the meaning of CEA section 4(c)(3)(K) that Congress had in mind when promulgating new exemptive authority for FPA 201(f) entities in CEA section 4(c)(6)(C).<sup>124</sup> Therefore, under the Commission’s discretionary

or any instrumentality, agency, or department of a government entity or political subdivision thereof, is an appropriate person).

<sup>123</sup> The Commission notes that such entities are being exempted pursuant to the Commission’s general exemptive authority in CEA section 4(c)(1).

<sup>124</sup> Compared to 201(f) cooperatives, non-201(f) electric cooperatives are still treated as “public utilities” for purposes of Part II of the FPA, and thus must receive FERC authorization under FPA section 203 to sell, merge or consolidate their electric facilities, or to purchase, acquire, or take any security of any other public utility. See Petition at 16 (citing 18 CFR Parts 2 and 33, Transactions Subject to FPA Section 203). Additionally, such cooperatives must seek approval under FPA sections 205 and 206 when altering rates and charges to be collected in transmitting or selling electric energy service in interstate commerce. See *id.* (citing *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 78 FERC ¶ 61,315 at 62,270 (2005)).

authority in CEA section 4(c)(3)(K) to determine non-enumerated entities as appropriate persons based upon financial or other qualifications, or the applicability of other appropriate regulatory protections, the Commission believes that such non-FPA section 201(f) cooperatives are appropriate persons.<sup>125</sup>

### D. Ability to Discharge Regulatory or Self-Regulatory Duties

As stated previously, Exempt Non-Financial Energy Transactions are bespoke and executed within the closed-loop of Exempt Entities, meaning they do not materially affect trading or pricing of transactions involving the same underlying commodity in Commission-regulated markets. Additionally, the Commission has retained its anti-fraud and anti-manipulation authority, as well as certain scienter-based prohibitions. Accordingly, the Commission does not believe that the exemptive relief provided in the Final Order will have a materially adverse effect on the ability of the Commission or any contract market to discharge their regulatory or self-regulatory duties under the CEA. As noted above, the Commission is limiting the Final Order to Exempt Non-Financial Energy Transactions entered into other than on or subject to the rules of a registered entity, submitted for clearing to a DCO, and/or reported to a SDR.

## IV. Related Matters

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires that Federal agencies consider whether proposed rules will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.<sup>126</sup> The relief provided in the Final Order may be available to some small entities, because they may fall within standards established by the Small Business Administration (“SBA”) defining entities with electric energy output of less than 4,000,000 megawatt hours per year as a “small entity.”<sup>127</sup>

<sup>125</sup> To the extent that an electric cooperative would not otherwise qualify as an appropriate person, regardless of whether it qualifies as an FPA section 201(f) entity, the Commission notes that its determination that such cooperatives are appropriate persons applies only in the context of the Final Order, and should not be interpreted to mean that all electric cooperatives are appropriate for purposes of any existing or future exemptions issued by the Commission pursuant to CEA section 4(c).

<sup>126</sup> 5 U.S.C. 601 *et seq.*

<sup>127</sup> U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North*

In response to the Proposed Order, the Commission received several comments from the Petitioners relevant to the RFA. The Petitioners requested that the Commission conduct future analyses of the impact on small entities the Petitioners represent if the Commission ever were to revisit the terms and conditions of the relief, and that the Commission provide relief retroactively to the enactment of the Dodd-Frank Act in the Final Order. In response to the request that the Commission conduct a future Small Business Regulatory Enforcement Fairness Act (“SBREFA”) analysis,<sup>128</sup> the Commission notes that it does not conduct RFA analyses based upon requests; rather, all Commission rulemaking are subject to the legal requirements of the RFA, which provides that a RFA analysis shall not apply if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.<sup>129</sup> In response to the request that the Commission conduct a full RFA analysis if it were to decide not to grant the relief provided herein retroactively to the enactment of the Dodd-Frank Act,<sup>130</sup> the Commission has addressed this comment by providing retroactive relief in the Final Order.<sup>131</sup> To the extent that these comments are preemptive in nature or have been addressed in the Final Order, the Commission is of the view that the Final Order would not have a significant economic impact on a substantial number of small entities, including any Exempt Entities that may qualify as a small entity.

With regards to the Petitioners’ general conclusion that the organizations that they represent fall within the definition of “small entity,”<sup>132</sup> the Commission notes that it has considered carefully the potential effect of this Final Order on small entities and has determined that it will not have a significant economic impact on any Exempt Entity, including any entities that may be small. Rather, the Final Order relieves the economic impact that the Exempt Entities, including any small entities that may

opt to take advantage of the Final Order, by exempting certain of their transactions from the application of substantive regulatory compliance requirements of the CEA and Commission regulations thereunder. Significantly, the Final Order prevents new requirements for swaps, such as clearing, trade execution and regulatory reporting, from affecting transactions that Exempt Entities traditionally have engaged in to serve their unique public service mission of providing reliable, affordable electric energy service to customers. Absent such relief and to the extent Exempt Non-Financial Energy Transactions would qualify as swaps, small entities covered by the Final Order could be subject to compliance with all aspects of the CEA and its implementing regulations. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the Final Order will not have a significant economic impact on a substantial number of small entities.

#### B. Paperwork Reduction Act

Under the Paperwork Reduction Act (“PRA”), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (“OMB”). The Commission determined that the Proposed Order did not contain any new information collection requirements, and did not receive any comments regarding this determination. As the Commission has left the conditions that were contained in the Proposed Order unchanged, the Final Order therefore also does not contain any new information collection requirements that would require approval of OMB under the PRA.<sup>133</sup> While the Commission reserves its authority to inspect books and records kept in the normal course of business that relate to Exempt Non-Financial Energy Transactions between Exempt Entities pursuant to the Commission’s regulatory inspection authorities, the Commission is not imposing a recordkeeping burden with respect to the books and records of Exempt Non-Financial Energy Transactions that already are kept in the normal course of business. Moreover, any inspection of books and records typically only will occur in the event that circumstances warrant the need to gain greater visibility with respect to Exempt Non-Financial Energy Transactions as they relate to Exempt Entities’ overall market

positions and to ensure compliance with the terms of this Final Order. Accordingly, each inquiry would be specific to the facts triggering the inquiry, and thus will not involve “answers to identical questions posed to \* \* \* ten or more persons,” as the term “collection of information” is defined in the PRA in pertinent part.<sup>134</sup>

#### C. Consideration of Costs and Benefits

Prior to the passage of the Dodd-Frank Act, swap market activity was largely unregulated. In the wake of the financial crisis of 2008, Congress adopted the Dodd-Frank Act, in part, to address conditions with respect to swap market activities. Among other things, the Dodd-Frank Act amends the CEA to expand its scope beyond regulation of “contract[s] of sale of a commodity for future delivery”<sup>135</sup> (commonly referred to as futures) and options,<sup>136</sup> by establishing a comprehensive regulatory framework for swaps as well.<sup>137</sup> In amending the CEA, however, the Dodd-Frank Act preserved the Commission’s authority under CEA section 4(c)(1) to exempt any transaction or class of transactions, including swaps, from select provisions of the CEA.<sup>138</sup> It also added new subparagraph 4(c)(6)(C) to the CEA specifically directing the Commission, in accordance with 4(c)(1) and 4(c)(2), to exempt agreements, contracts, or transactions entered into between FPA 201(f) entities if doing so “is consistent with the public interest

<sup>134</sup> 44 U.S.C. 3502(3)(a)(1). See also 44 U.S.C. 3518(c)(1)(B)(i) and (ii) (excluding collections of information related to administrative investigations against specific individuals or entities, and any subsequent civil actions).

<sup>135</sup> CEA section 4(a). See also CEA sections 1a(19) (“the term ‘future delivery’ does not include any sale of a cash commodity for deferred shipment or delivery”); 1a(47)(B)(ii) (excluding from the swap definition “any sale of a nonfinancial commodity \* \* \* for deferred shipment or delivery, so long as the transaction is intended to be physically settled”).

<sup>136</sup> CEA section 1a(36).

<sup>137</sup> Public Law 111–203, 124 Stat. 1376 (2010). More specifically, Title VII of the Dodd-Frank Act amended the CEA to establish a comprehensive new regulatory framework for swaps, a term defined by the statute. See Section 4(c)(1) of the CEA. The legislative framework seeks to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers (“SDs”) and major swap participants (“MSPs”); (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission’s rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight. Futures, options, and swaps are referred to collectively herein as “derivatives.”

<sup>138</sup> Section 4(c)(1) of the CEA.

*American Industry Classification System Codes*, footnote 1 (effective March 26, 2012), available at [http://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

<sup>128</sup> Petitioners’ Letter at 8. The SBREFA amended the RFA.

<sup>129</sup> See 5 U.S.C. 605.

<sup>130</sup> Petitioners’ Letter at 11.

<sup>131</sup> See *supra* Section II.E.2.

<sup>132</sup> Petitioners highlighted that the majority of the entities their respective organizations represent fall within the definition of “small entity” under the SBREFA, which incorporates by reference the SBA definition. Petitioners’ Letter at 2.

<sup>133</sup> 44 U.S.C. 3501 *et seq.*

and the purposes of” the CEA.<sup>139</sup> The Commission, through this Final Order, is exercising its exemptive authority under CEA section 4(c)(1) and 4(c)(6) with respect to “Exempt Non-Financial Energy Transactions”<sup>140</sup> entered into solely between “Exempt Entities,”<sup>141</sup> subject to certain conditions.<sup>142</sup> These conditions are, among others, that the relief provided in the Final Order is subject to (i) the Commission’s general anti-fraud and anti-manipulation authority, and scienter-based prohibitions under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9 and 13, and Commission rules 32.4, 23.410(a) and (b), and Part 180; and, ii) the Commission’s reserved authority to inspect the books and records related to Exempt Non-Financial Energy

<sup>139</sup> CEA sections 4(c)(2) and 4(c)(3) further articulate the conditions precedent to granting an exemption under CEA section 4(c)(1), including that the exempted agreements, contracts, or transactions be entered into between “appropriate persons,” as that term is defined in CEA section 4(c)(3).

<sup>140</sup> Section V.B., *infra*. “Exempt Non-Financial Energy Transactions” consist of “any agreement, contract, or transaction based upon a ‘commodity,’ as such term is defined and interpreted by the CEA and regulations thereunder, that would not have been entered into, but for an Exempt Entity’s need to manage supply and/or price risks arising from its existing or anticipated public service obligations to physically generate, transmit, and/or deliver electric energy service to customers. The term ‘Exempt Non-Financial Energy Transaction’ excludes agreements, contracts, and transactions based upon, derived from, or referencing any interest rate, credit, equity or currency asset class, or any grade of a metal, or any agricultural product, or any grade of crude oil or gasoline that is not used as fuel for electric energy generation. The term ‘Exempt Non-Financial Energy Transaction’ also excludes agreements, contracts, or transactions entered into on or subject to the rules of a registered entity, submitted for clearing to a derivatives clearing organization, and/or reported to a swap data repository. Exempt Non-Financial Energy Transactions are limited to the following categories, which may exist as stand-alone agreements or as components of larger agreements that combine the following categories of transactions: [electric energy delivered, generation capacity, transmission services, fuel delivered, cross-commodity pricing, and other goods and services].”

<sup>141</sup> Section IV.A., *infra*. An Exempt Entity is: (i) Any electric facility or utility that is wholly owned by a government entity, as described in Federal Power Act (“FPA”) section 201(f), 16 U.S.C. 824(f); (ii) any electric facility or utility that is wholly owned by an Indian tribe recognized by the U.S. government pursuant to section 104 of the Act of November 2, 1994, 25 U.S.C. 479a–1; (iii) any electric facility or utility that is wholly owned by a cooperative, regardless of such cooperative’s status pursuant to FPA section 201(f), so long as the cooperative is treated as such under Internal Revenue Code section 501(c)(12) or 1381(a)(2)(C), 26 U.S.C. 501(c)(12), 1381(a)(2)(C), and exists for the primary purpose of providing electric energy service to its member/owner customers at cost; or (iv) any other entity that is wholly owned, directly or indirectly, by any one or more of the foregoing. A “financial entity” as defined in CEA section 2(h)(7)(C) is not an Exempt Entity.

<sup>142</sup> Section V.C., *infra*.

Transactions kept by Exempt Entities in the normal course of business pursuant to the Commission’s regulatory inspection authorities.

#### 1. The Statutory Mandate To Consider the Costs and Benefits of the Commission’s Action: Section 15(a) of the CEA

Section 15(a) of the CEA<sup>143</sup> requires the Commission to “consider the costs and benefits” of its actions before promulgating a regulation under the CEA or issuing certain orders. 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 considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

The Commission considers the costs and benefits of the Final Order to the public and market participants, including Exempt Entities, against the backdrop of the CEA regulatory regime for derivatives, as amended by the Dodd-Frank Act, and absent the relief provided by the Final Order.<sup>144</sup> Under the post-Dodd-Frank Act regulatory regime, Exempt Entities that, as represented in the Petition, are “nonfinancial end-users of [Exempt Non-Financial Energy Transactions entered into] only to hedge or mitigate commercial risks,”<sup>145</sup> are subject to the Commission’s general anti-fraud and anti-manipulation authority, as well as certain scienter-based prohibitions under the CEA.<sup>146</sup> Absent the Final

<sup>143</sup> 7 U.S.C. 19(a).

<sup>144</sup> As discussed earlier, to exempt transactions under CEA section 4(c), the Commission need not first determine—and is not determining—whether the transactions subject to the exemption fall within the CEA. However, to capture potential costs and benefits, this consideration assumes that the transactions may now or in the future be jurisdictional.

<sup>145</sup> Petition at 33.

<sup>146</sup> See, e.g., CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 6(c), 6(d), 6(e), 6c, 6d, 8, 9 and 13, and Commission rules 32.4, 23.410(a) and (b), and Part 180. CEA section 2(h)(7) (the “end-user exception”), excepts a swap from the swap clearing requirement of CEA section 2(h)(1)(A) (it “shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing \* \* \* if the swap is required to be cleared”) and the trade execution requirement of CEA section 2(h)(8) (transactions subject to the clearing requirement of CEA section 2(h)(1) must be executed on either a designated contract market (“DCM”) or a swap execution facility (“SEF”). The end-user exception applies if

Order, to the extent that Exempt Non-Financial Energy Transactions are futures transactions within the meaning of the CEA, they would be subject to the statute’s exchange-trading requirement and a comprehensive regulatory scheme.<sup>147</sup> Similarly, absent the Final Order, to the extent that Exempt Non-Financial Energy Transactions are swaps as defined in the CEA, the Exempt Entity counterparties to these transactions would be subject to requirements for swap data reporting<sup>148</sup> and recordkeeping;<sup>149</sup> in addition, unless both Exempt Entity counterparties to a swap transaction are eligible contract participants (“ECPs”),<sup>150</sup> CEA section 2(e) would prohibit them from executing the swap other than on or subject to the rules of a registered DCM.<sup>151</sup>

one counterparty is “not a financial entity; \* \* \* is using swaps to hedge or mitigate commercial risk; and \* \* \* notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps.”

<sup>147</sup> CEA section 4(a). The same is true for options on futures. See 17 CFR 33.3(a). The discussion of cost-benefit implications of this Final Order with respect to futures contracts applies equally to options on futures.

<sup>148</sup> The CEA as amended by the Dodd-Frank Act contemplates two types of reporting to SDR. First, is real-time reporting: For every swap executed, certain transaction information, including price and volume, is to be reported to an SDR” “as soon as technologically practicable.” CEA section 2(a)(13)(A) & (C); see also Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182 (Jan. 9, 2012) (adopting 17 CFR part 43 regulations to implement real-time reporting). For swaps executed off of a DCM or SEF and for which neither counterparty is an SD or MSP—as the Commission expects Exempt Non-Financial Energy Transactions engaged in between Exempt Entities would be—the real-time reporting obligation for the transaction falls to one of the counterparties, as agreed between themselves. 17 CFR 43.3(a)(3) Second, for each swap, additional information beyond that required in real-time reports must be reported to an SDR in a “timely manner as may be prescribed by the Commission.” CEA section 2(a)(13)(G); see also Swap Data Recordkeeping and Reporting Requirements 77 FR 2136 (Jan. 13, 2012) (adopting 17 CFR part 45); Swap Data Recordkeeping and Reporting Requirements: Pre-enactment and Transition Swaps 77 F.R. 35200 (June 12, 2012) (adopting 17 CFR part 46).

<sup>149</sup> Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012) (adopting 17 CFR part 45); Swap Data Recordkeeping and Reporting Requirements: Pre-enactment and Transition Swaps 77 F.R. 35200 (June 12, 2012) (adopting 17 CFR part 46).

<sup>150</sup> See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” 77 FR 30596 (May 23, 2012).

<sup>151</sup> 7 U.S.C. 2(e). Additionally, absent the Final Order, in the event that executing Exempt Non-financial Energy Transactions required an Exempt Entity to register as an SD or MSP, additional regulatory requirements would apply. See, e.g., Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and

The Commission remains cognizant of the regulatory landscape as it existed before the enactment of Dodd-Frank. As such, the Commission notes that any Exempt Non-Financial Energy Transactions engaged in between Exempt Entities that are swaps (excluding options) under the statutory definition and Commission rules were not regulated prior to Dodd-Frank. Thus, measured against a pre-Dodd-Frank Act reference point, Exempt Entities engaging in such swaps could experience costs attributable to the conditions placed upon the Final Order. For example, Exempt Entities were not subject to the Commission's routine regulatory inspection authorities with respect to records of Exempt Non-Financial Energy Transactions transacted bilaterally away from a trading facility prior to the enactment and effectiveness of the Dodd-Frank Act. The same was not true to the extent Exempt Non-Financial Energy Transactions are futures contracts, as such contracts have always been regulated by the Commission and Dodd-Frank did not fundamentally alter the futures regulatory scheme.

The Proposed Order expressly requested public comment on the Commission's cost-benefit considerations, including with respect to reasonable alternatives; the magnitude of specific costs and benefits (including data or other information to estimate a dollar valuation); and any impact on the public interest factors specified in CEA section 15(a).<sup>152</sup> Neither of the two comments received specifically addressed the Proposed Order's consideration of costs and benefits or otherwise provided data or other information to enable the Commission to better quantify the expected costs and benefits attributable to the Final Order. While, as a general matter, the Commission endeavors to quantify estimated costs and benefits where reasonably feasible, it considers the costs and benefits of this Final Order in qualitative terms only given that commenters did not provide data or information necessary for quantification.<sup>153</sup>

Major Swap Participants, 77 FR 55904 (Sept. 11, 2012); Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012); Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734 (Feb. 17, 2012).

<sup>152</sup> 77 FR 50988, 51019 (Aug. 23, 2012).

<sup>153</sup> In the Proposed Order, the Commission noted that it could not quantify the costs and benefits of

the discussion that follows, the Commission considers the costs and benefits of the Final Order to the public and market participants, generally, and to Exempt Entities, specifically. As discussed above, the Commission has refined the Final Order to clarify several issues identified in the Petitioners' comment letter.<sup>154</sup> To the extent these refinements reflect a substantive choice among alternatives with potential cost-benefit significance, they are included in the discussion of alternatives, below. Finally, the Commission considers the Final Order's costs and benefits relative to the public interest factors enumerated in CEA section 15(a).

## 2. Costs

### To Exempt Entities

The Final Order provides Exempt Entities with relief from regulatory requirements of the CEA for the narrow category of Exempt Non-Financial Energy Transactions engaged in between them. As with any exemption, this order is permissive, meaning that potentially eligible entities are not required to avail themselves of the relief it offers. Accordingly, the Commission presumes that an entity would rely on the Final Order only if the anticipated benefits warrant the costs. Here, the Final Order provides for the continued application of the Commission's general anti-fraud and anti-manipulation authority, and certain scienter-based prohibitions, under the CEA and its implementing regulations, and additionally reserves the Commission's inspection authority for books and records that the Exempt Entities currently prepare and retain.<sup>155</sup> Accordingly, and to the extent Exempt Non-Financial Energy Transactions are

the relief provided therein because it did not have such information available to it; accordingly, the Commission requested commenters provide specific figures for its consideration. See Proposed Order at 51019. Because the core requirements of the Dodd-Frank Act are currently being implemented, the Commission's ability to quantify the costs and benefits of the Final Order is unchanged from when it published the Proposed Order.

<sup>154</sup> More specifically, as discussed above in section II, these refinements include several modifications to clarify: The definition of "Exempt Entity," the definition of "Exempt Non-Financial Energy Transaction," the Commission's right to revisit the terms of relief, the ability to manage price risk, retroactivity, and the categorical nature of relief.

<sup>155</sup> For example, Exempt Entities that receive financing from the RUS are required to keep records of all master agreements and term contracts for the procurement of goods and services. See 18 CFR 125.3 (Schedule of records and periods of retention); RUS Bulletin 180-2. Under the books and records inspection authority contained in the Proposed Order, the Commission could request any of these procurement agreements that document an Exempt Non-Financial Energy Transaction for the purchase or sale of "electric energy delivered," as such term is defined in the Proposed Order.

jurisdictional agreements, contracts or transactions, the incorporation of these conditions within the Final Order generates no incremental costs beyond those that currently exist under the CEA, a point that no commenter disputed.

### To Market Participants and the Public

The Commission has considered whether an exemption from the CEA for Exempt Non-Financial Energy Transactions engaged in between Exempt Entities will expose market participants and the public to the risks that the CEA guards against—a potential cost. For a variety of reasons, the Commission believes that it does not. These reasons—which were identified in the Proposed Order and not disputed by commenters—include the following:

- Exempt Non-Financial Energy Transactions are ill-suited for exchange trading, as evidenced by their bespoke nature to manage Exempt Entities' operational risks, and thus do not serve a material price discovery function.<sup>156</sup>
- The incentive structure for Exempt Entities—as generally limited to not-for-profit governmental, tribal, and IRC section 501(c)(12) or section 1381(a)(2)(c) electric cooperative entities<sup>157</sup>—is different than that of investor-owned entities and, according to Petitioners, mitigates incentives for fraud, manipulation, or other abusive practices against which Commission oversight and trading facility rules guard.<sup>158</sup>
- Exempt Non-Financial Energy Transactions are executed bilaterally

<sup>156</sup> In the Proposed Order, the Commission noted its belief that the commercial risks that Exempt Non-Financial Energy Transactions face generally are not related to fluctuations in the price of a commodity, but are rather related to ensuring Exempt Entities' ability to meet production, transmission, and/or distribution obligations. Proposed Order at 51010. As previously discussed, however, the Commission has determined in the Final Order that Exempt Non-Financial Energy Transactions can also be used to hedge price risk of an underlying commodity, but only if "arising from its existing or anticipated public service obligations to physically generate, transmit, and/or deliver electric energy service to customers." See *supra* Section II.E.1; section B of the Final Order. The additional cost/benefit implications of this clarification are discussed in context of the Commission's Consideration of Alternatives, *infra* Section IV.C.4.

<sup>157</sup> As discussed in section II.A, above, to avoid confusion, the Commission has struck the explicit "non-profit" modifier from the fourth clause of the definition of Exempt Entity in the Final Order. As explained, FPA section 201(f) utilities may include for-profit subsidiaries that are wholly-owned by other not-for-profit FPA section 201(f) utilities. Subsequent short-hand references in this Consideration of Costs and Benefits to "not-for-profit electric utility entities" or "not-for-profit Exempt Entities" are intended to include all subsidiary entities captured by Final Order, including those for-profit subsidiaries.

<sup>158</sup> See Proposed Order, 77 FR 51011.

within a closed-loop of non-financial, not-for-profit electric utility entities, are not market facing, and therefore have little, if any, ability to materially impact liquidity, fairness or financial security of derivative products trading on regulated exchanges.<sup>159</sup>

Besides carefully defining the boundaries for Exempt Non-Financial Energy Transactions between Exempt Entities, the Final Order incorporates conditions designed to protect the markets subject to the Commission's jurisdiction. Specifically, the Commission retains its general anti-fraud and anti-manipulation authority, and certain scienter-based prohibitions, contained in the CEA and its implementing regulations. Additionally, the Commission retains authority to inspect books and records kept in the normal course of business, pursuant to its regulatory inspection authorities, in the event that circumstances warrant greater visibility with respect to Exempt Non-Financial Energy Transactions as they relate to Exempt Entities' overall market positions and compliance with this Final Order. This retained authority to inspect books and records also provides a tool for the Commission to monitor any evolution and/or change in the usage of Exempt Non-Financial Energy Transactions to ensure that they conform to the expectations described in this order and that the relief provided herein remains appropriate and in the public interest. Accordingly, for the narrow subset of electric industry transactions covered by this Final Order, the Commission believes that the risk potential, at most, is remote and the prescribed conditions appropriate to contain it. The Final Order, therefore, should not give rise to any costs attributable to increased risk.

Next, the Commission considered the potential that price discovery in jurisdictional, non-exempt markets could be diminished because Exempt Entities, acting under the relief provided in this Final Order, eschewed such markets in favor of performing production and price risk management via Exempt Non-Financial Energy Transactions with one another. The Commission deems the risk of this occurring to be insignificant. While an underlying commodity may be similar or identical to that which underlies a standardized product available for trading in a non-exempt, jurisdictional market, the bespoke nature of Exempt Non-Financial Energy Transactions is such that it is unlikely that non-exempt market transactions would be an effective substitute for Exempt Entities

going forward. As such, and in addition to the Commission's anticipation that the number of Exempt Entity transactions will be small relative to the total number of transactions in related non-exempt markets, any distortive impact on price discovery in Commission-regulated markets would be immaterial.

Similarly, the Commission considered whether the Final Order would have any impact on the efficiency, competitiveness,<sup>160</sup> and financial integrity of markets regulated under the CEA. Since Exempt Non-Financial Energy Transactions are executed bilaterally between non-financial entities primarily in order to satisfy existing or expected operations-related public service obligations, and since they are bespoke transactions, the Commission expects the exemptive relief provided herein to have little, if any, negative effect on market efficiency, competitiveness, or financial integrity of markets regulated by the CFTC.

The Commission does not view the various refinements that it incorporated in the Final Order in response to comments as altering the continuing logic or validity of these reasons; rather, as explained above,<sup>161</sup> these refinements are mostly technical in nature and clarify the Commission's intended scope and operation of the relief as necessitated by certain practical issues highlighted by commenters. Substantive changes are addressed below in the "Consideration of Alternatives."<sup>162</sup>

### 3. Benefits

#### To Exempt Entities

Relative to no exemption, the Final Order will benefit Exempt Entities by lessening the likelihood that compliance with the CEA and Commission regulations would diminish their ability and/or incentives to continue to engage in Exempt Non-Financial Energy Transactions that, as described in the Petition, the Proposed Order, and above,

<sup>160</sup> More specifically with respect to competition, absent the exemptive relief provided herein, it is unclear whether Exempt Entities otherwise would qualify as ECPs, and thus be able to continue transacting Exempt Non-Financial Energy Transactions bilaterally with one another at all. Because many of the transactions exempted under the Final Order relate to longstanding and exclusive agreements between Exempt Entities, the limited relief provided in the exemption is not likely, in and of itself, to cause Exempt Entities to change the nature or frequency of conducting Exempt Non-Financial Energy Transaction with one another; rather, they will continue to carry out their public service obligations under standard industry practices, as was intended by Congress in adding CEA section 4(c)(6)(c).

<sup>161</sup> See *supra* Section II.

<sup>162</sup> See *supra* Section IV.C.4.

are an operational tool relied upon by Exempt Entities to effectively execute their public service mission. The exemption will benefit Exempt Entities by providing assurances that these Exempt Non-Financial Energy Transactions upon which they rely are not subject to the CEA and Commission regulations.<sup>163</sup>

To the extent Exempt Non-Financial Energy Transactions are swaps, as a threshold matter, absent Commission action, CEA section 2(e) would prohibit Exempt Entities from executing them away from a registered DCM unless both Exempt Entity counterparties qualify as ECPs. The relevant criteria for determining ECP status varies for Exempt Entities that are governmental entities (or political subdivisions of governmental entities) and those that are not. For the former, governmental Exempt Entities must meet certain line of business requirements,<sup>164</sup> or "own \* \* \* and invest \* \* \* on a discretionary basis \$50,000,000 or more in investments."<sup>165</sup> For the latter, non-governmental Exempt Entities either must have: (a) Assets exceeding \$10,000,000; (b) a guarantee for obligations; or, (c) greater than \$1,000,000 net worth and "enter \* \* \* 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."<sup>166</sup> While some of the larger Exempt Entities in particular may meet the definitional requirements to be ECPs, the Petition does not provide information evidencing that all Exempt Entities for all types of Exempt

<sup>163</sup> The refinements that the Commission has made in the Final Order to clarify its terms and application reinforce these benefits. As discussed below with respect to benefits to market participants and the public, Exempt Entities' members and other customers should be the indirect beneficiaries of these avoided costs. The Commission is aware, however, that the Final Order stops short of providing the categorical relief requested by Petitioners, and thus does not give Exempt Entities exact certitude that any electric energy transactions not specifically covered under the terms of this Order entered into between Exempt Entities will not be subject to the requirements of the CEA.

<sup>164</sup> That is, have "a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity [or] incur \* \* \* risks, in addition to price risk, related to the commodity." CEA section 1a(17)(A)(i) & (2) (as referenced in CEA section 1a(18)(A)(vii)(aa)). CEA section 1a(18)(A)(vii) specifies alternative criteria to qualify for governmental-entity ECP status that do not appear relevant given that Exempt Entities are not SDs, MSPs, or financial entities.

<sup>165</sup> CEA section 1a(18)(A)(vii)(bb).

<sup>166</sup> CEA section 1a(18)(A)(v).

<sup>159</sup> See Proposed Order, 77 FR 51010.

Non-Financial Energy Transaction clearly would.<sup>167</sup>

If Exempt Entities are not ECPs, and given that Petitioners have represented that Exempt Non-Financial Energy Transactions are bespoke and therefore unsuitable for exchange trading, absent Commission action, non-ECP Exempt Entities would be unable to engage bilaterally in any Exempt Non-Financial Energy Transactions that are swaps. Relative to a circumstance that would preclude non-ECP Exempt Entities from continuing to engage in Exempt Non-Financial Energy Transactions that are swaps, the Final Order allows for the continued use of transactions that are closely related to Exempt Entities' public service mission to provide affordable, reliable electricity—a benefit. The Final Order also saves Exempt Entities the time and expense necessary to determine if they are ECPs. While under the Final Order, ECP status becomes largely irrelevant, without it, Exempt Entities may have to concern themselves with ECP status determinations as a threshold for engaging in certain transactions.

Even assuming, *arguendo*, that all Exempt Entities are ECPs, absent this Final Order, Exempt Non-Financial Energy Transactions engaged in by Exempt Entities in the normal course of carrying out their public service obligations would count towards the *de minimis* swap dealing threshold, and thus impact whether an Exempt Entity would need to register with the Commission as an SD or MSP.<sup>168</sup> The Final Order eliminates this possibility and any attendant compliance costs it might entail.<sup>169</sup>

Lastly, to the extent that Exempt Non-Financial Energy Transactions are swaps, the Final Order also avoids potential costs that Exempt Entities might incur to comply with swap data reporting and recordkeeping

<sup>167</sup> Furthermore, a comment letter submitted by two of the Petitioners in connection with the Commission rulemaking on the Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant," states that some not-for-profit consumer-owned electric utilities "may not meet the financial tests listed in the definition of ECP due to the relatively small size of their physical assets." Letter from NRECA, APPA and LPPC dated February 22, 2011, RIN 3235-AK65, at 12.

<sup>168</sup> 77 FR 30596, 30744–45 (May 23, 2012).

<sup>169</sup> Further, to the extent the potential for triggering a registration requirement might otherwise deter Exempt Entities from engaging in Exempt Non-Financial Energy Transactions with one another, the Final Order benefits Exempt Entities by maintaining the current number of available counterparties for such transactions and exempting Exempt Entities from otherwise applicable reporting and recordkeeping requirements applicable to non-SDs/MSPs.

requirements as articulated in Commission regulations.<sup>170</sup>

Even for Exempt Non-Financial Energy Transactions that are not swaps, if Exempt Entities perceived some potential that they could be swaps (now or as they evolve in the future), Exempt Entities would likely need to expend resources to monitor contemplated transactions and make status determinations as to them. Moreover, the bespoke nature of these transactions could complicate the ability to generalize conclusions across transactions, potentially resulting in a need for more frequent, individualized assessments that could multiply determination costs. While the Commission lacks a basis to meaningfully project any such benefit in dollar terms, qualitatively it expects that the benefit would include the avoided costs of training staff to differentiate between swap and non-swap transactions and, in some cases at least, to obtain an expert legal opinion to support a determination. Additionally, uncertainty about whether a certain transaction would or would not be deemed a swap could prompt an Exempt Entity to forego a beneficial transaction or to substitute a transaction that served the operational needs less effectively. The Commission considers avoiding a result that would diminish the use of operationally-efficient Exempt Non-Financial Energy Transactions to be an important benefit.

To Market Participants and the Public

For reasons similar to those discussed in the Commission's analysis of the Proposed Order under CEA sections 4(c)(1) and 4(c)(6), the Commission asserts that this Final Order will benefit the public, generally.<sup>171</sup>

<sup>170</sup> See Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182, 1232–40 (Jan. 9, 2012) (adopting 17 CFR part 43 regulations to implement real-time reporting). Swap Data Recordkeeping and Reporting Requirements 77 FR 2136, 2176–93 (Jan. 13, 2012) (adopting 17 CFR part 45); Swap Data Recordkeeping and Reporting Requirements: Pre-enactment and Transition Swaps 77 FR 35200, 35217–25 (June 12, 2012) (adopting 17 CFR part 46).

Swap Data Recordkeeping and Reporting Requirements 77 FR 2136 (Jan. 13, 2012) (adopting 17 CFR part 45); Swap Data Recordkeeping and Reporting Requirements: Pre-enactment and Transition Swaps 77 FR 35200 (June 12, 2012) (adopting 17 CFR part 46); see also *supra* Section II.E.3 (clarifying that exemptive relief is granted retroactively to the date of Dodd-Frank Act enactment to avoid costs associated with the reporting requirements for historical swaps).

<sup>171</sup> In that the impacted transactions are undertaken exclusively in a closed-loop environment from which financial participants are absent, the Commission does not foresee that derivative market participants beyond Exempt Entities will realize either a cost (as earlier discussed) or benefit impact.

First, in that the Exempt Entities share the same public-service mission of providing affordable, reliable electricity to their customers, those aspects of the Final Order that benefit Exempt Entities directly should benefit their customers indirectly as well. For example, the Final Order would enable non-ECP Exempt Entities to engage in Exempt Non-Financial Energy Transactions, to the extent they are swaps, that would be barred to them under CEA section 2(e), or facilitate the likelihood that they would continue to engage in Exempt Non-Financial Energy Transactions that they might choose to forego for regulatory uncertainty or cost reasons absent the exemption. In these circumstances, Exempt Entity customers likely would be the ultimate beneficiaries (via supply reliability and affordability) of the operational risk-management and efficiencies that Exempt Non-Financial Energy Transactions afford. Similarly, to the extent that the Final Order enables Exempt Entities to avoid compliance and/or monitoring costs they would otherwise incur, the non-profit structure, conformance with requisite Internal Revenue Code guidelines, and public service mission that Exempt Entities share means that the cost savings should be passed through to members and other customers in the form of lower electricity prices.

Second, the public also benefits by the promotion of economic and financial innovation that this Final Order facilitates.<sup>172</sup> The unique environment in which these electric utilities must operate to reliably serve their customer load in the face of constantly fluctuating demand—compounded by the fact that many of these Exempt Entities do not enjoy the same economies of scale as investor-owned utilities—places a premium on innovative solutions to operational issues. Exempt Non-Financial Energy Transactions represent one such innovation. The Commission intends for the Final Order, as contemplated by Congress,<sup>173</sup> to provide Exempt Entities with regulatory certainty important to their ability to continue to develop and deploy innovative solutions through bespoke, closed-loop agreements, contracts, and transactions.

Accordingly, the Final Order provides an overall benefit to the public.

#### 4. Consideration of Alternatives

The chief alternatives to this Final Order are for the Commission to (i)

<sup>172</sup> See Proposed Order, 77 FR 51009–10.

<sup>173</sup> See House Conf. Report No. 102–978, 1992 U.S.C.A.N. 3179, 3213 ("4(c) Conf. Report").



decline to exercise its exemptive authority; (ii) adopt the Proposed Order without certain substantive changes made to the Final Order; or (iii) exercise its exemptive authority more broadly and without conditions as requested in the Petition or reiterated in the Petitioners' comment letter.

With respect to the first alternative—decline to exempt—the costs and benefit consideration is the mirror-image of that discussed above. A decision not to provide an exemption in this circumstance would preserve the current post-Dodd-Frank regulatory environment.

Relative to the second alternative—adopting the exemption as proposed—the Commission has made two substantive changes to the definition of Exempt Non-Financial Energy Transaction based upon Petitioners' comments. These are: i) Striking the requirement that Exempt Non-Financial Energy Transactions be “intended for making or taking physical delivery of the commodity upon which the agreement, contract, or transaction is based” (the “physical delivery requirement”); and ii) consistent with the first change, explicitly clarifying that Exempt Non-Financial Energy Transactions can be used to “manage supply and/or price risk.” As explained above, the Commission premised these changes on the Petitioners' representation that, absent such changes, certain benefits sought through the exemption would be lost, namely regulatory certainty of knowing that price management transactions falling within one of the six defined transaction categories would be afforded greater regulatory relief than otherwise would be provided through the end-user exception.<sup>174</sup>

Eliminating the physical delivery requirement and clarifying that Exempt Non-Financial Energy Transactions may be used to manage price risk (as well as supply risk) arguably blurs the definitional distinction that the Proposed Order otherwise would have expressly provided between Exempt Non-Financial Energy Transactions and jurisdictional futures contracts.

However, even without the physical-delivery requirement and with the price-risk management clarification, the Commission does not expect the Final Order to undermine the exchange trading requirement for, or the Commission's oversight of, futures.<sup>175</sup> Indeed, the Commission intends the

protection of the public interest affected through Commission oversight of such activity to be fully preserved. As clearly stated throughout the Final Order, a foundational basis for granting this exemptive relief is the Commission's understanding, based on Petitioners' representations, that Exempt Non-Financial Energy Transaction are undertaken solely to manage supply and/or price risks arising from Exempt Entities' public service obligation to supply electric energy to customers and are bespoke to meet the needs of particular Exempt Entities, and thus not suited to DCM trading (or DCO clearing).<sup>176</sup> The Commission expects this to continue to remain the case.<sup>177</sup> Accordingly, the Commission views the revised terms of the Final Order as preserving similar protections as the Proposed Order, while affording enhanced direct benefits for Exempt Entities.

The Commission also has revised the Final Order from what was proposed to accommodate Petitioners' request that final exemptive relief apply retroactively to the enactment of the Dodd-Frank Act. As a consequence, Exempt Entities will be saved any costs associated with determining whether certain Exempt Non-Financial Energy Transactions entered into prior to the effective date of the Final Order were historical swaps or not, and reporting those historical transactions to an SDR.<sup>178</sup> Given the Commission's understanding of the nature and volume of Exempt Non-Financial Energy Transactions between Exempt Entities, it believes that any diminution in benefit attributable to historical swap reporting will be *de minimis*, if any.

Relative to the third alternative of exercising its exemptive authority more broadly and in a manner that would provide categorical relief from all of the requirements of the CEA as requested by Petitioners in their original Petition, the

<sup>176</sup> For the same reasons as represented by Petitioners, a foundational basis for exempting Exempt Non-Financial Energy Transactions that may be swaps is that they are not suited to SEF trading.

<sup>177</sup> The Final Order's reservation of authority to revisit terms and conditions serves as adequate protection that, over time, transactions subject to the exemption retain their foundational characteristics, including that they be (i) undertaken solely to manage supply and/or price risks arising from Exempt Entities' public service obligation to supply electric energy to customers and (ii) bespoke and are not otherwise suitable for exchange trading as futures. In the hypothetical event that, over time, this proves untrue, the Commission anticipates it would use its reserved authority to revisit the terms and conditions of this Final Order's exemptive relief to realign it with the Commission's understanding and expectations in this regard.

<sup>178</sup> See *supra* Section II.E.3.

Commission purposefully has defined the categories of exempt transactions more narrowly, and preserved certain aspects of CEA jurisdiction with respect to them. As reiterated in their comment letter,<sup>179</sup> Petitioners sought categorical relief for all Electric Operation-Related Transactions, regardless of whether the transactions fell within a specifically-defined category. The more open-ended categorical relief sought by Petitioners theoretically would lessen the burden on Exempt Entities to determine whether a transaction engaged in between them is or is not exempted compared to the more refined and limited definition of Exempt Non-Financial Energy Transactions that the Commission proposed. As stated previously in this release, however, while transactions may be relief-eligible under 4(c)(6), the Commission must “determine that the exemption would be consistent with the public interest and purposes of [the] Act.”<sup>180</sup> Commenters have not provided sufficient information for the Commission to make such a determination, or meaningfully quantify the costs and benefits that categorical relief, as distinguished from the relief provided in the Final Order, would confer on market participants and the public. Given the inability to foresee how these transactions may develop, the Commission considers it prudent and in the public interest to ring-fence the definition within stated parameters to restrict the potential for the transactions to evolve in a manner incompatible with the public interest and purposes of the CEA.

Finally, the exemption reserves the Commission's general anti-fraud and anti-manipulation authority, and certain scienter-based prohibitions, as well as the Commission's authority to review books and records already kept in the ordinary course of business in the event that circumstances warrant the need to gain greater visibility with respect to Exempt Non-Financial Energy Transactions as they relate to Exempt Entities' overall market positions, and to ensure compliance with the terms of this Final Order.<sup>181</sup> Petitioners'

<sup>179</sup> Petitioners' Letter at 11–12; see also Petition at 4–5.

<sup>180</sup> CEA section 4(c)(6), 7 U.S.C. 6(c)(6).

<sup>181</sup> As explained in the Proposed Order, the Commission believes that this reservation of authority serves important beneficial ends to ensure the integrity of commodity and commodity derivatives markets within its jurisdiction. To the extent Exempt Entities incur some cost to remain compliant with the CEA's anti-fraud and anti-manipulation regime, and the specified scienter-based prohibitions, the Commission considers such costs warranted by the importance of maintaining commodity market integrity. The Commission also

<sup>174</sup> See Petitioners' Letter at 5–6, 12.

<sup>175</sup> See CEA sections 2(h)(1) and 2(h)(8), 7 U.S.C. 2(h)(1), 2(h)(8). The same is true for swap clearing and DCM or SEF trade execution mandates.

comment letter did not challenge the Proposed Order's imposition of these conditions on cost-benefit grounds, generally, though it did request that the Commission's reserved authority not explicitly include CEA section 4c(b) and regulation 32.4, as those provisions could be interpreted as a Commission determination that certain Exempt Non-Financial Energy Transactions constituted commodity options.<sup>182</sup> Reserving CEA section 4c(b) and regulation 32.4 should not be so interpreted. Furthermore, such reservations impose no additional costs on Exempt Entities, as currently they are subject to the Commission's authority under these provisions to the extent their transactions are options.

#### 5. Consideration of CEA Section 15(a) Factors

##### a. Protection of Market Participants and the Public

As explained above, the Commission does not foresee that the Final Order will negatively affect the protection of market participants and the public. More specifically, Exempt Non-Financial Energy Transactions, as transacted bilaterally and in a closed loop between Exempt Entities in the highly specialized and unique electric-industry circumstances, do not appear to generate risks of the nature addressed by the CEA. The Commission has delineated the definitional boundaries for Exempt Entities and Exempt Non-Financial Energy Transactions in a manner that appropriately ring-fences against the possibility that they could generate such risks, either now or as they may evolve in the future. Moreover, the exemption incorporates conditions<sup>183</sup> to counter residual risk

believes that authority to inspect books and records kept in the ordinary course of business, pursuant to its regulatory inspection authority, as they relate to Exempt Non-Financial Energy Transactions is important to assure visibility into activity in such transactions on an as-needed basis. Further, as a general matter, the Commission expects to exert its regulatory inspection authority with respect to Exempt Non-Financial Energy Transactions infrequently; and, such authority would involve only records that Exempt Entities keep in the ordinary course of business, and only be exercised in the event that circumstances warrant the need to gain greater visibility with respect to Exempt Non-Financial Energy Transactions as they relate to Exempt Entities' overall market positions, and to ensure compliance with the terms of this Final Order. The Commission believes that any costs occasioned by this condition are de minimis.

<sup>182</sup> See *supra* Section II.D.

<sup>183</sup> These conditions include the reservation of the Commission's anti-fraud and anti-manipulation authority, and certain scienter-based prohibitions, as well as its authority to inspect books and records already kept in the normal course of business. Further, the Commission reserves the right to revisit the terms and conditions of the Final Order's relief

that conceivably, though unexpectedly, might survive notwithstanding the Final Order's definitional crafting.

##### b. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission foresees little, if any, negative impact from the Final Order on the efficiency, competitiveness, and financial integrity of markets regulated under the CEA. This is because, to the extent any are jurisdictional, Exempt Non-Financial Energy Transactions entered into between Exempt Entities constitute only a narrow market segment limited to bespoke transactions, executed bilaterally between non-financial entities primarily in order to satisfy existing or expected operations-related public service obligations. Moreover, the Commission anticipates the Final Order will help to maintain the competitive landscape and efficiency of the market segment for Exempt Non-Financial Energy Transactions entered into between Exempt Entities. As previously discussed, the Final Order maintains the number of counterparties that Exempt Entities will be able to face—namely, other Exempt Entities with which they already conduct Exempt Non-Financial Energy Transactions—by exempting Exempt Non-Financial Energy Transactions between Exempt Entities from CEA section 2(e), and eliminates the possibility that entering into Exempt Non-Financial Energy Transactions will subject Exempt Entities to the full array of compliance costs arising from the Commission's ongoing oversight regime.<sup>184</sup> In addition, the Commission expects that the Final Order will contribute to operational efficiency in the market segment where Exempt Entities conduct Exempt Non-Financial Energy Transactions with one another by eliminating costs necessary to determine their regulatory status or the status of Exempt Non-Financial Energy Transactions.

Further, as an exercise of the Commission's CEA section 4(c) authority to provide legal certainty for novel instruments as Congress intended, the Final Order affords Exempt Entities transactional flexibility that the Commission understands to be valuable to their ability to efficiently deploy their limited resources.

and alter or revoke them as appropriate. See Section V.C.

<sup>184</sup> Exempt Entities may still incur minimal episodic compliance costs with respect to Exempt Non-Financial Energy Transactions if the Commission has a need to exercise its reserved authority.

##### c. Price Discovery

The Commission does not believe that the Final Order will materially impair price discovery in non-exempt, jurisdictional markets. The Commission recognizes that a desire to avoid regulation in theory could incentivize Exempt Entities to participate in Exempt Non-Financial Energy Transactions to a greater extent than they otherwise might choose to do, vis-à-vis related non-exempt markets. This is unlikely, however, due to the requirement that Exempt Non-Financial Energy Transactions be entered into only to manage supply and/or price risk arising from their public service obligations to physically supply electric energy service to customers, and only with other Exempt Entities. The relatively small size of trading in this market segment also renders it unlikely that the Final Order will materially impair price discovery in jurisdictional markets even were the Final Order to incentivize Exempt Entities to execute some of their customer-serving transactions pursuant to the Final Order instead of on a registered entity. Thus, against the backdrop of Congress' mandate to consider exempting transactions between FPA 201(f) entities, the Commission believes that the Final Order would not materially distort price discovery in non-exempt, jurisdictional markets.

##### d. Sound Risk Management Practices

The Final Order will promote the ability of Exempt Entities to manage the operational risks posed by unique electricity market characteristics, including the non-storable nature of electricity and demand that can and frequently does fluctuate dramatically within a short time-span. As discussed above, the Commission understands that Exempt Non-Financial Energy Transactions are an important tool facilitating the ability of Exempt Entities to efficiently manage operational risk in fulfillment of their public service mission to provide affordable, reliable electricity.

##### e. Other Public Interest Considerations

In exercising its exemptive authority under CEA sections 4(c)(1) and 4(c)(6) in the Final Order, the Commission is acting to promote the broader public interest in facilitating the generation, transmission, and delivery of affordable, reliable electric energy service as Congress contemplated.

## V. Final Order

Based on the Petitioners' representations, and for the reasons set forth above, the Commission hereby

exempts, pursuant to Commodity Exchange Act (“CEA”) sections 4(c)(1) and 4(c)(6), from all requirements of the CEA and Commission regulations issued thereunder, except those specified below, all Exempt Non-Financial Energy Transactions (as defined below) entered into solely between Exempt Entities (as defined below), retroactive to the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and subject to certain conditions (as detailed below):

A. *Exempt Entity* means (i) any electric facility or utility that is wholly owned by a government entity, as described in Federal Power Act (“FPA”) section 201(f), 16 U.S.C. 824(f); (ii) any electric facility or utility that is wholly owned by an Indian tribe recognized by the U.S. government pursuant to section 104 of the Act of November 2, 1994, 25 U.S.C. 479a–1; (iii) any electric facility or utility that is wholly owned by a cooperative, regardless of such cooperative’s status pursuant to FPA section 201(f), so long as the cooperative is treated as such under Internal Revenue Code section 501(c)(12) or 1381(a)(2)(C), 26 U.S.C. 501(c)(12), 1381(a)(2)(C), and exists for the primary purpose of providing electric energy service to its member/owner customers at cost; or (iv) any other entity that is wholly owned, directly or indirectly, by any one or more of the foregoing. The term “Exempt Entity” does not include any “financial entity,” as defined in CEA section 2(h)(7)(C).

B. *Exempt Non-Financial Energy Transaction* means any agreement, contract, or transaction based upon a “commodity,” as such term is defined in CEA section 1a(9) and Commission regulation 1.3(e), that would not have been entered into, but for an Exempt Entity’s need to manage supply and/or price risks arising from its existing or anticipated public service obligations to physically generate, transmit, and/or deliver electric energy service to customers. The term “Exempt Non-Financial Energy Transaction” excludes agreements, contracts, and transactions based upon, derived from, or referencing any interest rate, credit, equity or currency asset class, or any grade of a metal, or any agricultural product, or any grade of crude oil or gasoline that is not used as fuel for electric energy generation. The term “Exempt Non-Financial Energy Transaction” also excludes agreements, contracts, or transactions entered into on or subject to the rules of a registered entity, submitted for clearing to a derivatives clearing organization, and/or reported to a swap data repository. Exempt Non-Financial Energy

Transactions are limited to the following categories, which may exist as stand-alone agreements or as components of larger agreements that combine the following categories of transactions:

1. *Electric Energy Delivered* transactions consist of arrangements in which a provider Exempt Entity agrees to deliver electric energy to a recipient Exempt Entity within a geographic service territory, load, or electric system over a period of time. Such transactions include “full requirements” contracts, under which one Exempt Entity becomes obligated to provide, and the recipient Exempt Entity becomes obligated to take, all of the electric energy the recipient needs to provide reliable electric service to its fluctuating electric load over a specified delivery period at one or multiple delivery points or locations, net of any electric energy the recipient is able to produce through generation assets that it owns.

2. *Generation Capacity* transactions consist of agreements in which a recipient Exempt Entity purchases from a provider Exempt Entity the right to call upon the provider Exempt Entity’s electric energy generation assets to supply electric energy within a geographic area, regardless of whether such right is ever exercised for the purposes of the recipient Exempt Entity meeting its location-specific reliability obligations. Such transactions also may specify certain conditions that must exist prior to exercising the right to use an Exempt Entity’s generation assets, or establish an agreement between Exempt Entities to share pooled electric generation assets in order to satisfy regionally-imposed demand side management program requirements.

3. *Transmission Services* transactions consist of arrangements in which a provider Exempt Entity owning transmission lines sells to a recipient Exempt Entity the right to deliver the recipient Exempt Entity’s electric energy from one designated point on the transmission lines to another, at a price per wattage and over a period of time, in order for the recipient Exempt Entity to provide electric energy to its customers. Such transactions may include ancillary services related to transmission such as congestion management and system losses.

4. *Fuel Delivered* transactions consist of arrangements used to buy, sell, transport, deliver, or store fuel used in the generation of electric energy by an Exempt Entity. Additionally, Fuel Delivered transactions may include an agreement to manage the operational basis or exchange (*i.e.*, location or time of delivery) risk of an Exempt Entity

that arises from its location-specific, seasonal or otherwise variable operational need for fuel to be delivered.

5. *Cross-Commodity Pricing* transactions consist of arrangements such as heat rate transactions and tolling agreements in which the price of electric energy delivered is based upon the price of the fuel source used to generate the electric energy. Cross-Commodity transactions also include fuel delivered agreements in which the price paid for fuel used to generate electric energy is based upon the amount of electric energy produced.

6. *Other Goods and Services* transactions consist of arrangements in which the Exempt Entities enter into an agreement to share the costs and economic benefits related to construction, operation, and maintenance of facilities for the purposes of generation, transmission, and delivery of electric energy to customers. In a full requirements contract between Exempt Entities that share ownership of generation assets, the provider Exempt Entity may determine how generation to meet the recipient Exempt Entity’s full requirements will be allocated among the provider’s independent generation assets, the jointly-owned generation assets, and the recipient’s independent generation assets. Other Goods and Services transactions also may include agreements between Exempt Entities to operate each other’s facilities, share equipment and employees, and interface on each other’s behalf with third parties such as suppliers, regulators and reliability authorities, and customers, regardless of whether such agreements are triggered as contingencies in emergency situations only or are applicable during the normal course of operations of an Exempt Entity.

C. *Conditions*. The relief provided herein is subject to the Commission’s general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9 and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and Part 180. Additionally, the Commission reserves its authority to inspect books and records kept in the normal course of business that relate to Exempt Non-Financial Energy Transactions between Exempt Entities pursuant to the Commission’s regulatory inspection authorities. The relief provided herein does not affect the jurisdiction of FERC or any other

government agency over the entities and transactions described herein.

Furthermore, the Commission reserves the right to revisit any of the terms and conditions of the relief provided herein and alter or revoke such terms and conditions as necessary in order for the Commission to execute its duties and advance the public interests and purposes under the CEA, including a determination that certain entities and transactions described herein should be subject to the Commission's full jurisdiction.

Issued in Washington, DC, on March 28, 2013, by the Commission.

**Christopher J. Kirkpatrick,**

*Deputy Secretary of the Commission.*

**Appendices to Order Exempting, Pursuant to Authority in Section 4(c) of the Commodity Exchange Act, Certain Transactions Between Entities Described in Section 201(f) of the Federal Power Act, and Other Electric Cooperatives—Commission Voting Summary and Statement of the Chairman**

**Appendix 1—Commission Voting Summary**

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2—Statement of Chairman Gary Gensler**

I support the final order regarding certain electricity and electricity-related energy transactions between rural electric cooperatives and/or federal, state, municipal, and tribal power authorities (as defined in section 201F of the Federal Power Act).

Congress authorized that these transactions be exempt from certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which is consistent with previous exemptions Congress has granted from the Federal Power Act. For decades, these entities have been generally recognized as performing a public service mission to provide their customers or cooperative members with reliable, affordable electric energy service. They have been largely exempt from regulation by the Federal Energy Regulatory Commission because of their government entity status or their not-for-profit cooperative status.

This final order responds to a petition filed by a group of these cooperatives and authorities and has benefitted from public input.

The scope of the final order is carefully tailored to physically backed electricity and electricity-related energy transactions that are necessary for the generation, transmission and delivery of electric energy services to customers.

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**BILLING CODE 6351-01-P**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

[Docket ID DoD-2013-OS-0069]

**Proposed Collection; Comment Request**

**AGENCY:** Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

**ACTION:** Notice.

In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995*, the Office of the Under Secretary of Defense for Personnel and Readiness announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by June 3, 2013.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350-3100.

**Instructions:** All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information. Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at <http://www.regulations.gov> for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Manpower Data Center, ATTN: Daniel McCarthy, 400 Gigling Road, Seaside, CA 93955, or call the DBIDS Office at 831-583-2400 x4744.

*Title; Associated Form; and OMB Number:* Application for Department of Defense Access Card—Defense Biometric Identification System (DBIDS) Enrollment; OMB Control Number 0704-0455.

*Needs and Uses:* This information collection requirement is needed to obtain the necessary data to verify eligibility for a Department of Defense physical access card for personnel who are not entitled to a Common Access Card or other approved DoD identification card. The information is used to establish eligibility for the physical access to a DoD installation or facility, detect fraudulent identification cards, provide physical access and population demographic reports, provide law enforcement data, and in some cases provide anti-terrorism screening.

*Affected Public:* Individuals or Households.

*Annual Burden Hours:* 195,929.

*Number of Respondents:* 1,621,487.

*Responses per Respondent:* 1.

*Average Burden per Response:* 7.25 Minutes.

*Frequency:* On Occasion.

**SUPPLEMENTARY INFORMATION:**

**Summary of Information Collection**

Respondents are individuals who require physical access to DoD installations. Basic identifying information is collected from the individuals including several biometrics. Additional information may also be collected (such as contact information, vehicle information, organization affiliation, etc.) but is not required for that person to be registered and gain access to the controlled installation.

Dated: March 27, 2013.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

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**BILLING CODE 5001-06-P**