



May 2, 2017

Via Electronic Submission

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

RE: Agency Information Collection Activities: Notice of Intent to Renew Collection 3038-0103, Ownership and Control Reports, Forms 102/102S, 40/40S and 71 (Trader and Account Identification Reports)(the “Notice”)

Dear Mr. Kirkpatrick:

The National Rural Electric Cooperative Association (“NRECA”)¹ respectfully submits these comments in response to the notice² issued by the Commodity Futures Trading Commission (“CFTC” or “Commission”) that it intends to renew data collection activities for the Ownership and Control Reporting rules (the “OCR Rules”), including Forms 40/40S as initiated via “special call” by the Commission staff.

NRECA has been an active participant in the Commission’s numerous rulemakings implementing the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).³ In particular, NRECA filed comments (the “2012 Comments”) together with certain other electric industry trade associations (the “Joint Electric Associations”) in the rulemaking related to post-Dodd Frank Act amendments to the OCR Rules to include reporting of nonfinancial commodity swaps (the “OCR Rule Amendments for Swaps”).⁴

¹ NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to more than 42 million people in 47 states or 12 percent of electric customers. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. Because an electric cooperative’s electric service customers are also members of the cooperative, the cooperative operates on a not-for-profit basis and all the costs of the cooperative are directly borne by its consumer-members. . NRECA is authorized to note the involvement of the following organization to the Commission, and to indicate full support of these comments and recommendations: ACES. ACES provides commercial risk management and energy advisory and operations services for electric cooperatives and government-owned electric utilities in various RTO/ISO regions.

² 82 Fed. Reg. 12944 (March 8, 2017)(the “Notice”).

³ Pub. L. No. 111-203 (2010).

⁴ 78 Fed. Reg. 69,178 (November 18, 2013)(the “OCR Rule Amendments for Swaps”). The 2012 Comments can be found at the following link: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58829&SearchText=>.

In the 2012 Comments, the Joint Electric Associations recommended specific changes to the OCR Rules and to Forms 40/40S, as such Forms may be required to be filed by “commercial end-users,”⁵ in order to reduce regulatory burdens on such commercial end-users where the data collection activities were not anticipated to result in a particular regulatory benefit. As in the 2012 Comments, NRECA’s comments herein address only the regulatory burdens imposed on commercial end-users by the data collection activities for Forms 40/40S, and do not address the other data collection activities discussed in the Notice (related to Forms 102/102S and Form 71).

The OCR Rule Amendments for Swaps were finalized in late 2013, and had an effective date of February 18, 2014. Notwithstanding that was more than 3 years ago, the regulatory burdens for commercial end-users are only recently coming into focus. From the initial compliance date of August 15, 2014 until November 17, 2016 (the “No-Action Period”), the new requirements in the OCR Rule Amendments for Swaps requiring that Forms 40/40S be filed electronically, and thereafter that the information be updated on an ongoing basis, were the subject of conditional, time-limited no-action relief.⁶

During the No-Action Period, the Commission staff was developing, adapting questions and data response fields in its OCR Rule forms, testing its new OCR electronic interface and working to “operationalize” the OCR Rule Amendments for Swaps with registered swap dealers, market intermediaries and other financial market professionals, that is, with reporting parties required by the OCR Rules to file Forms 102/102S and Form 71 on an ongoing basis.⁷ Commercial end-users allowed financial market professionals to take the lead in OCR Rule technology discussions with the staff.⁸

⁵ The term “commercial end-user” is used herein to mean the category of entities that Congress identified as being “not responsible for the global financial markets crisis of 2008-2009,” and not intended to be burdened by new CFTC swap regulations promulgated under the Dodd-Frank Act.

⁶ The compliance date for the OCR Rule Amendments for Swaps was initially August 15, 2014. On July 23, 2014, the CFTC staff issued No-Action Letter 14-95, extending deadlines for certain Forms and certain groups of reporting parties. Thereafter, in subsequent No-Action Letters 15-03 (February 10, 2015), 15-52 (September 28, 2015) and 16-32 (April 8, 2016), the CFTC staff continued to extend deadlines. Despite requests from commercial end-users in the energy industry, the staff declined to extend the deadline past November 17, 2016 for Forms 40/40S filers.

⁷ These reporting parties are financial markets professionals, with principal business operations and technology staff focused on financial market transactions and reporting to financial regulators. Such reporting parties act as dealers, brokers, or traders of securities, futures contracts, financially-settled option contracts, or other financial instruments and investments. In working with these experienced market professionals, the CFTC staff developed hundreds of pages of technical guidance and instructions for how to answer questions and fill out myriad new data fields for different types of nonfinancial commodity swap markets, commodity interests and market participant entity structures.

⁸ Several energy industry representatives were told that Form 40/40S-specific questions, particularly from commercial end-users, would be considered and addressed at a later point in time in the technology discussion. Prior to and during the No-Action Period, NRECA’s members periodically responded to CFTC staff special calls to file Form 40 or Form 40S. There was a flurry of special calls for Forms 40S in the fall of 2012, and then again in the spring of 2014. If a commercial end-user received such a special call, the required Forms 40/40S were filled out on paper, and submitted by email. For Forms 40S, recipients were instructed to provide answers to pre-Dodd-Frank Act Form 40 questions “as if” the questions applied to bilateral OTC paired swaps, instead of futures contracts. Some

The OCR Rules, as amended by the OCR Rule Amendments for Swaps, require that Forms 40/40S be filed using the CFTC's new electronic interface portal or via FTP (an electronic filing format not regularly used in the electric industry). Once a commercial end-user receives a CFTC staff special call, the recipient must become familiar with the applicable CFTC rules, including the new Forms 40/40S instructions, questions and data fields available for response, establish a technology connection via the CFTC's new OCR portal, train its personnel on the CFTC's new electronic interface and modify its compliance policies and practices to take into account this new regulatory regime. After an initial filing, the special call recipient thereafter has a continuing and ongoing regulatory obligation to update the Form 40/40S data electronically when there is a change in any reported data.⁹

NRECA's members are not financial companies or financial market intermediaries or professionals, but instead are electric cooperatives ("commercial end-users"). NRECA's members enter into electric operations-related commodity swaps, or buy electric operations-related futures contracts, only to hedge or mitigate commercial risks that arise from ongoing electric operations.¹⁰

Each NRECA member's electric operations and therefore each NRECA member's commercial risks are location-specific and often seasonal in nature. An NRECA member's need for natural gas as a fuel for generation, and for hedging or mitigating associated commercial risks, is determined by the anticipated (forecasted) and real-time need for reliable, affordable and sustainable electricity delivered 24/7/365 to its members' homes and businesses. Other factors that determine an NRECA member's commercial risk hedging strategies include its electric generation assets and contract resources, natural gas pipeline capacity and storage in its geographic region, and the local and regional weather. When seasonal needs for natural gas are

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NRECA members asked the CFTC staff how to interpret certain "legacy Form 40" questions as applied to commercial enterprises using bilateral swaps to hedge commercial risks. For example, there are confusing concepts and overlap in questions about ownership or control of "positions" and "accounts" and ownership or control of parent/subsidiary entities, and questions about "control of trading" requiring individual names, when a commercial enterprise risk committee or governing board typically establishes and monitors/controls a commercial enterprise/reporting party's commercial risk hedging (or "trading") strategies. Staff responses were typically "just do the best you can."

⁹ These new regulatory reporting obligations have no value to the commercial end-user or its ongoing business operations. The regulatory benefit cited by the Commission to justify the broad scope of its new OCR data collection activities in general was the sweeping generalization that the regular collection of OCR information would significantly enhance the Commission's surveillance practices, including by improving the detection and deterrence of market manipulation and disruptive practices. *See* 78 Fed. Reg. at 69,179.

¹⁰ For example, many NRECA members purchase and sell natural gas which is used as a fuel for electric generation. Some NRECA members also buy natural gas futures contracts, or enter into natural gas swaps (including commodity trade options, which are interpreted as "swaps" by the Commission) to hedge or mitigate commercial risks, such as supply, location and price risks. NRECA members do not speculate, nor do they "trade," natural gas or other nonfinancial commodities or derivatives with the intent to incur commodity price risk, or to profit from the change in price of the commodity or the derivative instrument.

(or are forecast to be) at a peak, an NRECA member may have a “reportable position” in natural gas commodity interests.

In the 2012 Comments, the Joint Electric Associations explained that the Form 40/40S presumed a level of familiarity with the futures markets and financial market terminology that was not consistent with the experience of many electric industry entities that may, by contrast, enter into bilateral nonfinancial energy commodity swaps. The 2012 Comments asked that the new Forms 40/40S use “plain English” to explain the regulatory purpose and meaning behind each of the Form 40/40S questions. The 2012 Comments asked that the Forms have embedded cross-references to applicable sections of the OCR Rules to enable a first-time recipient of a special call to understand the questions, to allow accurate and efficient collection of the data required by the Commission to fulfill regulatory objectives in the new electronic format with binary, or limited choice or limited-text, data response fields.

In addition, the 2012 Comments asked for a simple, upfront Form 40/40S “check the box” for commercial end users of nonfinancial commodity derivatives to allow such a reporting party to quickly certify to the Commission that its nonfinancial commodity transactions were only entered into “to hedge or mitigate commercial risks of ongoing business operations,” and strictly for a “commercial,” and not a financial, “business purpose.” The 2012 Comments also requested that, for commercial end-users who did “check the box,” the Form 40/40S reporting obligation not be continuing in nature.¹¹ Finally, the Joint Electric Associations asked the Commission to establish procedures to limit the CFTC staff’s special call authority -- to exclude or exempt “small entities,” as that term is defined in the Regulatory Flexibility Act (the “RFA”), a category of market participants which includes most of NRECA’s members, as well as most government-owned utilities.¹²

¹¹ This would return the OCR Rule “special call” authority to its intended purpose -- to allow the Commission staff to periodically check a market participant’s commodity interest positions and business purpose, without bringing successive waves of commercial end-users into an ongoing (and burdensome) regulatory reporting regime. The Commission has not identified a specific regulatory benefit or purpose for such an ever-expanding group of commercial market participants required to provide ongoing reporting.

¹² In the adopting release for the OCR Rule Amendments for Swaps, the Commission acknowledged the Joint Electric Associations’ recommendations to reduce the regulatory burdens of the OCR Rules and Forms 40/40S for commercial end-users, including small entities. However, the Commission then adopted the proposed rule amendments without modifications based on generally-stated beliefs that the burdens of such data collection activities would not likely be significant for most reporting parties, that only a small subset of respondents would be likely to be “small entities” (see 78 Fed. Reg. 69197-69198) and that it would take approximately 3 hours to complete a Form 40/40S, with no time allotted to become familiar with the OCR Rules or the new electronic interface initially or to put in place an ongoing compliance program, when the Regulatory Flexibility Act specifically consider such burdens in analyzing the costs of data collection activities. The Commission also downplays the costs of the ongoing reporting obligation with general statements that the Commission believes the time required to provide such updating will be *de minimis*. While this may be true for financial companies with administrators and technical staff allocated to financial market reporting, the same is not true for commercial end-users, and in particular for NRECA’s members.

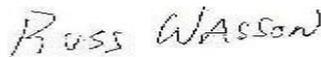
In the Commission’s Supporting Statement for New and Revised Information Collections in OMB Control Number 3038-0103 docket (the “Supporting Statement”), the Commission noted that, in 2012, it received approximately 3,123 completed Forms 40, from a total population estimated at approximately 10,000 reporting traders. Of these

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NRECA respectfully requests that the Commission consider the recommendations in the 2012 Comments as part of this proceeding. NRECA also urges the Commission to undertake a holistic evaluation of how its many different types of reporting rules (e.g., transaction, position and ownership and control reporting rules) impact commercial end-users of swaps and other derivatives. The Commission should evaluate whether the rules work together in a cohesive manner as they apply to commercial end-users, and do not impose unnecessary, overlapping and inconsistent regulatory requirements.¹³

NRECA appreciates the opportunity to submit comments in response to the Notice, and urges the Commission to provide the requested clarification to implementation of the OCR Rules and Forms 40/40S to reduce regulatory burdens on commercial end-users which are unnecessary and provide no foreseeable identifiable or quantified regulatory benefits.

Respectfully submitted,



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3,123 Forms 40, the Supporting Statement said approximately 2,500 were completed by institutions a portion of which could potentially be “small entities” under the RFA. See page 8 of the Supporting Statement. The Supporting Statement continues, “[n]ew Form 40 will not be required on a routine and ongoing basis.” In fact, the ongoing update obligation makes that unnecessary. The Supporting Statement said that “the Forms are not lengthy or complex.” In fact, energy industry commercial end-users have asked many interpretive questions of the CFTC staff over the past 3 years. And the Supporting Statement said that, if the Commission issues the same number of special calls, the annual industry cost will be \$527, 207 (three hours to complete each of 2508 “special calls” for paper filings, again without considering initial education, technology or administrative costs). Yet, if the universe of commercial end-users required to file, and then update, Form 40/40S increases annually by 2508 entities receiving special calls, the estimated burdens will increase geometrically. Each entity that is identified via special call as a “reporting party” will also need to keep abreast of corporate enterprise staffing changes, corporate reorganizations and policy changes, and other enterprise-wide information that would be necessary to update the Form 40/40S database on an ongoing basis. By comparison, the generalized regulatory benefit cited by the Commission in its cost/benefit, RFA and Paperwork Reduction analyses – “benefiting the Commission’s surveillance activities” and “to facilitate analysis of potentially disruptive or manipulative trading activity” – will remain aspirational and unquantified.

¹³ See also Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017) and Presidential Executive Order on Enforcing the Regulatory Reform Agenda (February 24, 2017), urging federal agencies to reduce and not increase the regulatory burden on commercial entities.