

public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.

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

#### c. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”)<sup>46</sup> requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.<sup>47</sup> Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these Orders, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant

impact on a substantial number of small entities.

#### VI. Orders

##### a. Order Relating to the PJM WH Real Time Peak Contract

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

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the PJM WH Real Time Peak contract, traded on the IntercontinentalExchange, Inc., satisfies the material price preference and material liquidity criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the PJM WH Real Time Peak contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity<sup>48</sup> with respect to the PJM WH Real Time Peak contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities.

Further with respect to the PJM WH Real Time Peak contract, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.<sup>49</sup>

##### b. Order Relating to the PJM WH Real Time Off-Peak Contract

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

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the PJM WH Real Time Off-Peak contract, traded on the IntercontinentalExchange, Inc., satisfies the statutory material price reference and material liquidity criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the

IntercontinentalExchange, Inc., must comply with, with respect to the PJM WH Real Time Off-Peak contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity<sup>50</sup> with respect to the PJM WH Real Time Off-Peak contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities.

Further with respect to the PJM WH Real Time Off-Peak contract, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.<sup>51</sup>

Issued in Washington, DC, on July 9, 2010, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2010-17743 Filed 7-20-10; 8:45 am]

**BILLING CODE 6351-01-P**

#### COMMODITY FUTURES TRADING COMMISSION

#### Orders Finding That the PJM WH Real Time Peak Daily Contract, PJM WH Real Time Off-Peak Daily Contract and PJM WH Day Ahead LMP Peak Daily Contract Offered for Trading on the IntercontinentalExchange, Inc., Do Not Perform a Significant Price Discovery Function

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final orders.

**SUMMARY:** On October 26, 2009, the Commodity Futures Trading Commission (“CFTC” or “Commission”) published for comment in the **Federal Register**<sup>1</sup> a notice of its intent to undertake a determination whether the PJM<sup>2</sup> WH<sup>3</sup> Real Time Peak Daily

<sup>50</sup> 7 U.S.C. 1a(29).

<sup>51</sup> Because ICE already lists for trading a contract (i.e., the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

<sup>1</sup> 74 FR 54966 (October 26, 2009).

<sup>2</sup> The acronym “PJM” stands for Pennsylvania New Jersey Maryland Interconnection, LLC (“PJM Interconnection”), and signifies the regional electricity transmission organization (“RTO”) that coordinates the generation and distribution of electricity in all or parts of 13 states and the District of Columbia.

<sup>3</sup> The acronym “WH” signifies the PJM Interconnection’s Western Hub.

<sup>46</sup> 5 U.S.C. 601 *et seq.*

<sup>47</sup> 66 FR 42256, 42268 (Aug. 10, 2001).

(“PDP”) contract, PJM WH Real Time Off-Peak Daily (“ODP”) contract and PJM WH Day Ahead LMP Peak Daily (“PDA”) contract,<sup>4</sup> which are listed for trading on the IntercontinentalExchange, Inc. (“ICE”), an exempt commercial market (“ECM”) under sections 2(h)(3)–(5) of the Commodity Exchange Act (“CEA” or the “Act”), perform a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue orders finding that the PDP, ODP and PDA contracts do not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

**DATES: Effective Date:** July 9, 2010.

**FOR FURTHER INFORMATION CONTACT:**

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

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The CFTC Reauthorization Act of 2008 (“Reauthorization Act”)<sup>5</sup> significantly broadened the CFTC’s regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts (“SPDCs”) are traded—and treating ECMs in that category as registered entities under the CEA.<sup>6</sup> The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes

<sup>4</sup> The **Federal Register** notice also requested comment on the PJM WH Real Time Peak (“PJM”) contract and PJM WH Real Time Off-Peak (“OP”) contract; these contracts will be addressed in a separate **Federal Register** release.

<sup>5</sup> Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

<sup>6</sup> 7 U.S.C. 1a(29).

such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.<sup>7</sup> As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

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

<sup>7</sup> 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

<sup>8</sup> Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference*, H.R.

also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).<sup>9</sup>

## II. Notice of Intent To Undertake SPDC Determination

On October 26, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the PDP, ODP and PDA contracts<sup>10</sup> perform a significant price discovery function and requested comment from interested parties.<sup>11</sup> Comments were received from PJM Interconnection, Federal Energy Regulatory Commission (“FERC”), Electric Power Supply Association (“EPSA”), Financial Institutions Energy Group (“FIEG”), Edison Electric Institute (“EEI”), ICE and Public Utility Commission of Texas (“PUCT”).<sup>12</sup> The comment letters from PJM

Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). See also 73 FR 75888, 75894 (Dec. 12, 2008).

<sup>9</sup> For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

<sup>10</sup> As noted above, the **Federal Register** notice also requested comment on the PJM WH Real Time Peak (“PJM”) contract and PJM WH Real Time Off-Peak (“OP”) contract. The PJM and OPJ contracts will be addressed in a separate **Federal Register** release.

<sup>11</sup> The Commission’s Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

<sup>12</sup> PJM Interconnection, as noted above, is the RTO that coordinates the generation and distribution of electricity in all or parts of 13 states and the District of Columbia. FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. EPSA describes itself as the “national trade association representing competitive power suppliers, including generators and marketers.” FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, “including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors.” EEI is the “association of shareholder-owned electric companies, international affiliates and industry associates worldwide.” ICE is an ECM, as noted above. PUCT is the independent organization that oversees the Electric Reliability Council of Texas (“ERCOT”) to “ensure nondiscriminatory access to the transmission and distribution systems, to ensure the reliability and adequacy of the regional electrical network, and to perform other essential market functions.” The comment letters are available on the Commission’s Web site: <http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-032.html>.

Interconnection,<sup>13</sup> FERC<sup>14</sup> and PUCT did not directly address the issue of whether or not the subject contracts are SPDCs. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the subject contracts and generally expressed the opinion that the contracts are not SPDCs because they do not meet the material price reference or material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

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

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

- **Price Linkage**—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.

- **Arbitrage**—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.

- **Material price reference**—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by

<sup>13</sup> PJM Interconnection stated that it "takes no position as to whether the ICE [contracts] \* \* \* perform significant price discovery functions."

<sup>14</sup> FERC expressed the opinion that a determination by the Commission that any of the subject contracts performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Federal Power Act (FPA) over the transmission or sale for resale of electric energy in interstate commerce or with its other regulatory responsibilities under the FPA" and further that "FERC staff will monitor proposed SPDC determinations and advise the CFTC of any potential conflicts with FERC's exclusive jurisdiction over RTOs, ISOs [(independent system operators)] or other jurisdictional entities."

agreements, contracts or transactions being traded or executed on the electronic trading facility.

- **Material liquidity**—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.<sup>15</sup> Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.<sup>16</sup> For example, for contracts that are linked to other contracts or that may be arbitrated with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

### IV. Findings and Conclusions

The Commission's findings and conclusions with respect to the PDP,

<sup>15</sup> In its October 26, 2009, **Federal Register** release, the Commission identified material price reference and material liquidity as the possible criteria for SPDC determination of the PDP, ODP and PDA contracts. Arbitrage and price linkage were not identified as possible criteria. As a result, arbitrage and price linkage will not be discussed further in this document and the associated Orders.

<sup>16</sup> 17 CFR Part 36, Appendix A.

ODP and PDA contracts are discussed separately below.

#### a. The PJM WH Real Time Peak Daily (PDP) Contract and the SPDC Indicia

The PDP contract is cash settled based on the arithmetic average of peak-hour, real-time locational marginal prices ("LMPs")<sup>17</sup> published by PJM Interconnection for its Western Hub for all peak hours during the specified day of generation. The hourly LMPs are derived from power trades that result in physical delivery. The size of the PDP contract is 800 megawatt hours ("MWh"), and the PDP contract is listed for 38 consecutive days.

In general, electricity is bought and sold in an auction setting on an hourly basis at various points along the electrical grid. An LMP associated with a specific hour is calculated as the volume-weighted average price of all of the transactions where electricity is to be supplied and consumed during that hour.

Electricity is traded in a day-ahead market as well as a real-time market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because the offers and bids are dependent on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. In this regard, on the day the electricity is transmitted and used, auction participants typically realize that they bought or sold either too much power or too little power. A real-time auction is operated to alleviate this problem by serving as a balancing mechanism. Specifically, electricity traders use the real-time market to sell excess electricity and buy additional power to meet demand.

PJM Interconnection is an RTO that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. PJM Interconnection's transmission network is the largest centrally-dispatched grid in North America. PJM Interconnection dispatches about 163,500 MW of generating capacity over 56,350 miles of transmission lines and serves more than 51 million customers. The RTO's

<sup>17</sup> An LMP represents the additional cost associated with producing an incremental amount of electricity. LMPs account for generation costs, congestion along the transmission lines, and electricity loss.

members, totaling more than 500, include power generators, transmission owners, electricity distributors, power marketers and large consumers.

PJM Interconnection is responsible for operating a competitive wholesale electricity market as well as maintaining the reliability of the grid. The RTO acts as a neutral, independent party, and its activities are regulated by FERC. The company coordinates the continuous buying, selling and delivery of wholesale electricity through robust, open and competitive spot markets. In operating the markets, PJM Interconnection balances the needs of suppliers, wholesale customers and other market participants, and it continuously monitors market behavior.

Electricity is priced at individual points along the transmission network called nodes. An electric grid has many interconnections or buses. RTOs group certain buses together to form hubs, which do not necessarily follow along state lines or geographic boundaries. Power also is priced at the hub level and serves as a basis for trading electricity. PJM Interconnection has 11 hubs, including AEP GEN, AEP–Dayton, Chicago GEN, Chicago, Dominion, Eastern, Northern Illinois, New Jersey, Ohio, West INT and Western Hub.<sup>18</sup> The Western Hub is a basket of 109 buses that stretch all the way from Erie, PA, to Washington, DC.<sup>19</sup>

#### 1. Material Price Reference Criterion

The Commission's October 26, 2009, **Federal Register** notice identified the PDP contract as a potential SPDC based on the material price reference and material liquidity criteria. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "East Power of Day" package with access to all price data or just current prices plus a selected number of months (*i.e.*, 12, 24, 36 or 48 months) of historical data. This package includes price data for the PDP contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study") found that in general, market participants view ICE as a price discovery market for certain electricity contracts. The study did not specify which markets performed this

function; nevertheless, the Commission determined that the PDP contract, while not mentioned by name in the ECM Study, warranted further review.

The Commission explains in its Guidance to the statutory criteria that in evaluating a contract under the material price reference criterion, it will rely on one of two sources of evidence—direct and indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.<sup>20</sup> With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The PJM Western hub is a major pricing center for electricity in the eastern portion of the United States. Traders, including producers, keep abreast of the electricity prices at PJM Interconnection's Western Hub when conducting cash deals. Power prices in other neighboring markets, such as New York ISO's Zone A (Western New York), Zone G (Hudson Valley region) and Zone J (New York City) as well as Midwest ISO's Cinergy hub are typically based implicitly relative to the prices reported for PJM Interconnection's Western hub. However, ICE's PJM WH Real Time Peak ("PJM") contract, which is a monthly contract, is used more widely as a source of pricing information for electricity than the

daily, peak-hour contract (*i.e.*, the PDP contract). Specifically, the PJM contract prices power at the Western Hub based on the simple average of peak-hour prices over the contract month, as reported by PJM Interconnection. Market participants use the PJM contract to lock-in electricity prices far into the future. (The PJM contract is listed for 110 months into the future.) In contrast, the PDP contract is listed for a much shorter length of time (about five weeks); with such a limited timeframe, the forward pricing capability of the PDP contract is much more constrained than that of the PJM contract. Traders use monthly power contracts like the PJM contract to price electricity commitments in the future, where such commitments are based on long range forecasts of power supply and demand. As generation and usage nears, market participants have a better understanding of actual power supply and needs. As a result, traders can modify previously-established hedges with the daily power contracts, like the PDP contract.

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

#### i. Federal Register Comments

EPSA, FIEG, EEI and ICE stated that no other contract directly references or settles to the PDP contract's price. Moreover, the commenters argued that the underlying cash price series against which the PDP contract is settled<sup>21</sup> is

<sup>18</sup> <http://www.ferc.gov/market-oversight/mkt-electric/pjm.asp>.

<sup>19</sup> <http://www.ferc.gov/market-oversight/mkt-electric/pjm/2010/05-2010-elec-pjm-archive.pdf>.

<sup>20</sup> 17 CFR Part 36, Appendix A.

<sup>21</sup> In this case, the average of the real-time peak-hour Western hub electricity prices over the day of

the authentic reference price and not the ICE contract itself. Commission staff believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult [the derivatives contract] on a frequent and recurring basis" when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock-in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while Western Hub is a major power market, traders do not consider the daily average peak-hour Western Hub price to be as important as the peak electricity price associated with the monthly contract.

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

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

generation, which are derived from cash market transactions.

## ii. Conclusion Regarding Material Price Reference

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

## 2. Material Liquidity Criterion

To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that changes to the subject contract's prices potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the PDP contract was 48,072 in the second quarter of 2009, resulting in a daily average of 751.1 trades. During the same period, the PDP contract had a total trading volume of 68,586 contracts and an average daily trading volume of 1,071.7 contracts. Moreover, open interest as of June 30, 2009, was 1,856 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.<sup>22</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 64,233 contracts (or 988.2 contracts on a daily basis). In terms of number of transactions, 45,167 trades occurred in the fourth quarter of 2009 (694.9 trades per day). As of December 31, 2009, open interest in the PDP contract was 710

contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

The number of trades per day was substantial between the second and fourth quarters of 2009. However, trading activity in the PDP contract, as characterized by total quarterly volume, indicates that the PDP contract experiences trading activity that is similar to that of thinly-traded futures markets.<sup>23</sup> Thus, the PDP contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.<sup>24</sup>

## i. Federal Register Comments

ICE stated that the PDP contract lacks a sufficient number of trades to meet the material liquidity criterion. Along with EPSA and EEI, ICE argued that the PDP contract cannot have a material effect on other contracts, such as those listed for trading by the New York Mercantile Exchange ("NYMEX"), a DCM, because price linkage and the potential for arbitrage do not exist. Moreover, the DCM contracts do not cash settle to the PDP contract's price. Instead, the DCM contracts and the PDP contract are both cash settled based on physical transactions, which neither the ECM nor the DCM contracts can influence.

ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the PDP contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that

<sup>23</sup> Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

<sup>24</sup> In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], \* \* \* but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." 17 CFR 36, Appendix A. For the reasons discussed above, the Commission has found that the PDP contract does not meet the material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since the Commission believes it is not useful as the sole basis for a SPDC determination.

would define material liquidity may differ from one market or commodity to another.”<sup>25</sup>

ICE opined that the Commission “seems to have adopted a five trade per day test for material liquidity.” To the contrary, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to “independently be aware of ECM contracts that may develop into SPDCs”<sup>26</sup> rather than solely relying upon an ECM to identify potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, a contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission’s analysis (cited above) “include trades made in all months” as well as in strips of contract months. ICE suggested that a more appropriate method of determining liquidity is to examine the activity in a single traded month of a given contract.”<sup>27</sup> It is the Commission’s opinion that liquidity, as it pertains to the PDP contract, is typically a function of trading activity in particular lead days and, given sufficient liquidity in such days, the ICE PDP contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the PDP contract does not meet the material price reference criterion, according to the Commission’s Guidance, it would be unnecessary to evaluate whether the

<sup>25</sup> Guidance, *supra*.

<sup>26</sup> 73 FR 75892 (December 12, 2008).

<sup>27</sup> In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission’s October 26, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE’s electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 10 percent of all transactions in the PDP contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 26, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between “on-exchange” versus “off-exchange” created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

PDP contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

#### ii. Conclusion Regarding Material Liquidity

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

#### 3. Overall Conclusion Regarding the PDP Contract

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

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its PDP contract.<sup>28</sup> Accordingly, with respect to its PDP contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements for ECMs.

#### b. The PJM WH Real Time Off-Peak Daily (ODP) Contract and the SPDC Indicia

The ODP contract is cash settled based on the arithmetic average of off-peak hour, real-time LMPs published by PJM Interconnection for its Western Hub for all peak hours during the specified day of generation. The hourly LMPs are derived from power trades that result in physical delivery. The size of the ODP contract is 50 MWh, and the ODP contract is listed for 38 consecutive days.

In general, electricity is bought and sold in an auction setting on an hourly basis at various point along the electrical grid. An LMP associated with a specific hour is calculated as the volume-weighted average price of all of the transactions where electricity is to be supplied and consumed during that hour.

Electricity is traded in a day-ahead market as well as a real-time market. The day-ahead market establishes prices for electricity that is to be delivered

during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because the offers and bids are dependent on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. In this regard, on the day the electricity is transmitted and used, auction participants typically realize that they bought or sold either too much power or too little power. A real-time auction is operated to alleviate this problem by serving as a balancing mechanism. Specifically, electricity traders use the real-time market to sell excess electricity and buy additional power to meet demand.

PJM Interconnection is an RTO that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. PJM Interconnection’s transmission network is the largest centrally-dispatched grid in North America. PJM Interconnection dispatches about 163,500 MW of generating capacity over 56,350 miles of transmission lines and serves more than 51 million customers. The RTO’s members, totaling more than 500, include power generators, transmission owners, electricity distributors, power marketers and large consumers.

PJM Interconnection is responsible for operating a competitive wholesale electricity market as well as maintaining the reliability of the grid. The RTO acts as a neutral, independent party, and its activities are regulated by FERC. The company coordinates the continuous buying, selling and delivery of wholesale electricity through robust, open and competitive spot markets. In operating the markets, PJM Interconnection balances the needs of suppliers, wholesale customers and other market participants, and it continuously monitors market behavior.

Electricity is priced at individual points along the transmission network called nodes. An electric grid has many interconnections or buses. RTOs group certain buses together to form hubs, which do not necessarily follow along state lines or geographic boundaries. Power also is priced at the hub level and serves as a basis for trading electricity. PJM Interconnection has 11 hubs, including AEP GEN, AEP–Dayton, Chicago GEN, Chicago, Dominion, Eastern, Northern Illinois, New Jersey,

<sup>28</sup> See 73 FR 75888, 75893 (Dec. 12, 2008).

Ohio, West INT and Western Hub.<sup>29</sup> The Western Hub is a basket of 109 buses that stretch all the way from Erie, PA, to Washington, DC.<sup>30</sup>

#### 1. Material Price Reference Criterion

The Commission's October 26, 2009, **Federal Register** notice identified the ODP contract as a potential SPDC based on the material price reference and material liquidity criteria. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "East Power of Day" package with access to all price data or just current prices plus a selected number of months (*i.e.*, 12, 24, 36 or 48 months) of historical data. This package includes price data for the ODP contract.

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

The Commission explains in its Guidance to the statutory criteria that in evaluating a contract under the material price reference criterion, it will rely on one of two sources of evidence—direct and indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.<sup>31</sup> With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for

instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The PJM Western hub is a major pricing center for electricity in the eastern portion of the United States. Traders, including producers, keep abreast of the electricity prices at PJM Interconnection's Western Hub when conducting cash deals. Power prices in other neighboring markets, such as New York ISO's Zone A (Western New York), Zone G (Hudson Valley region) and Zone J (New York City) as well as Midwest ISO's Cinergy hub are typically based implicitly relative to the prices reported for PJM Interconnection's Western hub. However, ICE's PJM WH Real Time Off-Peak ("OPJ") contract, which is a monthly contract, is used more widely as a source of pricing information for electricity than the daily, off-peak hour contract (*i.e.*, the ODP contract). Specifically, the OPJ contract prices power at the Western Hub based on the simple average of off-peak hour prices over the contract month, as reported by PJM Interconnection. Market participants use the OPJ contract to lock-in electricity prices far into the future. (The OPJ contract is listed up to 86 months into the future.) In contrast, the ODP contract is listed for a much shorter length of time (about five weeks); with such a limited timeframe, the forward pricing capability of the ODP contract is much more constrained than that of the OPJ contract. Traders use monthly power contracts like the OPJ contract to price electricity commitments in the future, where such commitments are based on long range forecasts of power supply and demand. As generation and usage nears, market participants have a better understanding of actual power supply and needs. As a result, traders can modify previously-established hedges with the daily power contracts, like the ODP contract.

Accordingly, although the Western Hub is a major trading center for electricity and, as noted, ICE sells price information for the ODP contract, the Commission has explained in its Guidance that a contract meeting the material price reference criterion would routinely be consulted by industry

participants in pricing cash market transactions. The ODP contract is not consulted in this manner and does not satisfy the material price reference criterion. Thus, the ODP contract does not satisfy the direct price reference test for existence of material price reference. Furthermore, the Commission notes that publication of the ODP contract's prices is not indirect evidence of material price reference. The ODP contract's prices are published with those of numerous other contracts, including ICE's monthly electricity contracts (such as the OPJ contract), which are of more interest to market participants. In these circumstances, the Commission has concluded that traders likely do not specifically purchase ICE data packages for the ODP contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

#### i. **Federal Register** Comments

EPSA, FIEG, EEI and ICE stated that no other contract directly references or settles to the ODP contract's price. Moreover, the commenters argued that the underlying cash price series against which the ODP contract is settled<sup>32</sup> is the authentic reference price and not the ICE contract itself. Commission staff believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult [the derivatives contract] on a frequent and recurring basis" when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock-in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while Western Hub is a major power market, traders do not consider the daily average off-peak hour Western Hub price to be as important as the peak electricity price associated with the monthly contract.

In addition, EPSA stated that the publication of price data for the ODP contract price is a weak justification for material price reference because market participants generally do not purchase ICE data sets for one contract's prices, such as those for the ODP contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the ODP prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the ODP prices have substantial value. As noted

<sup>29</sup> <http://www.ferc.gov/market-overSight/mkt-electric/pjm.asp>.

<sup>30</sup> <http://www.ferc.gov/market-overSight/mkt-electric/pjm/2010/05-2010-elec-pjm-archive.pdf>.

<sup>31</sup> 17 CFR Part 36, Appendix A.

<sup>32</sup> In this case, the average of the real-time peak-hour Western hub electricity prices over the day of generation, which are derived from cash market transactions.

above, the Commission indicated that publication of the ODP contract's prices is not indirect evidence of routine dissemination. The ODP contract's prices are published with those of numerous other contracts, which are of more interest to market participants. The Commission has concluded that traders likely do not specifically purchase the ICE data packages for the ODP contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

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

## ii. Conclusion Regarding Material Price Reference

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

## 2. Material Liquidity Criterion

To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that changes to the subject contract's prices potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in

the ODP contract was 723 in the second quarter of 2009, resulting in a daily average of 11.3 trades. During the same period, the ODP contract had a total trading volume of 7,448 contracts and an average daily trading volume of 116.4 contracts. Moreover, open interest as of June 30, 2009, was 256 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.<sup>33</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 12,304 contracts (or 189.3 contracts on a daily basis). In terms of number of transactions, 737 trades occurred in the fourth quarter of 2009 (11.3 trades per day). As of December 31, 2009, open interest in the ODP contract was 488 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

The number of trades per day between the second and fourth quarters of 2009 was not substantial. In addition, trading activity in the ODP contract, as characterized by total quarterly volume, indicates that the ODP contract experiences trading activity that is similar to that of thinly traded futures markets.<sup>34</sup> Thus, the ODP contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.<sup>35</sup>

<sup>33</sup> 74 FR 54966 (October 26, 2009).

<sup>34</sup> Staff has advised the Commission that in its experience, a thinly traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

<sup>35</sup> In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], \* \* \* but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." 17 CFR 36, Appendix A. For the reasons discussed above, the Commission has found that the ODP contract does not meet the material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since the Commission believes it is not useful as the sole basis for a SPDC determination.

## i. Federal Register Comments

ICE stated that the ODP contract lacks a sufficient number of trades to meet the material liquidity criterion. Along with EPSA and EEI, ICE argued that the ODP contract cannot have a material effect on other contracts, such as those listed for trading by NYMEX, a DCM, because price linkage and the potential for arbitrage do not exist. Moreover, the DCM contracts do not cash settle to the ODP contract's price. Instead, the DCM contracts and the ODP contract are both cash settled based on physical transactions, which neither the ECM nor the DCM contracts can influence.

ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the relatively low number of trades per day in the ODP contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."<sup>36</sup>

ICE opined that the Commission "seems to have adopted a five trade per day test for material liquidity." To the contrary, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"<sup>37</sup> rather than solely relying upon an ECM to identify potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, a contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all months" as well as in strips of contract months. ICE suggested that a more appropriate method of determining liquidity is to examine the activity in a single traded month of a given contract.<sup>38</sup> It is the Commission's

<sup>36</sup> Guidance, *supra*.

<sup>37</sup> 73 FR 75892 (December 12, 2008).

<sup>38</sup> In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 26, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC

opinion that liquidity, as it pertains to the ODP contract, is typically a function of trading activity in particular lead days and, given sufficient liquidity in such days, the ICE ODP contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the ODP contract does not meet the material price reference criterion, according to the Commission's Guidance, it would be unnecessary to evaluate whether the ODP contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

#### ii. Conclusion Regarding Material Liquidity

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

#### 3. Overall Conclusion Regarding the ODP Contract

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

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its ODP contract.<sup>39</sup> Accordingly, with respect to its ODP contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply

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determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 34 percent of all transactions in the ODP contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 26, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

<sup>39</sup> See 73 FR 75888, 75893 (Dec. 12, 2008).

with the applicable reporting requirements for ECMs.

#### c. The PJM WH Day-Ahead LMP Peak Daily (PDA) Contract and the SPDC Indicia

The PDA contract is cash settled based on the arithmetic average of the peak-hour, day-ahead LMPs published by PJM Interconnection for its Western Hub for all peak hours during the day prior to power generation. The hourly LMPs are derived from power trades that result in physical delivery. The size of the PDA contract is 800 MWh, and the PDA contract is listed for 38 consecutive days.

In general, electricity is bought and sold in an auction setting on an hourly basis at various points along the electrical grid. An LMP associated with a specific hour is calculated as the volume-weighted average price of all of the transactions where electricity is to be supplied and consumed during that hour.

Electricity is traded in a day-ahead market as well as a real-time market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because the offers and bids are dependent on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. In this regard, on the day the electricity is transmitted and used, auction participants typically realize that they bought or sold either too much power or too little power. A real-time auction is operated to alleviate this problem by serving as a balancing mechanism. Specifically, electricity traders use the real-time market to sell excess electricity and buy additional power to meet demand.

PJM Interconnection is an RTO that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. PJM Interconnection's transmission network is the largest centrally-dispatched grid in North America. PJM Interconnection dispatches about 163,500 MW of generating capacity over 56,350 miles of transmission lines and serves more than 51 million customers. The RTO's members, totaling more than 500, include power generators, transmission owners, electricity distributors, power marketers and large consumers.

PJM Interconnection is responsible for operating a competitive wholesale electricity market as well as maintaining the reliability of the grid. The RTO acts as a neutral, independent party, and its activities are regulated by FERC. The company coordinates the continuous buying, selling and delivery of wholesale electricity through robust, open and competitive spot markets. In operating the markets, PJM Interconnection balances the needs of suppliers, wholesale customers and other market participants, and it continuously monitors market behavior.

Electricity is priced at individual points along the transmission network called nodes. An electric grid has many interconnections or buses. RTOs group certain buses together to form hubs, which do not necessarily follow along state lines or geographic boundaries. Power also is priced at the hub level and serves as a basis for trading electricity. PJM Interconnection has 11 hubs, including AEP GEN, AEP-Dayton, Chicago GEN, Chicago, Dominion, Eastern, Northern Illinois, New Jersey, Ohio, West INT and Western Hub.<sup>40</sup> The Western Hub is basket of 109 buses that stretch all the way from Erie, PA, to Washington, DC.<sup>41</sup>

#### 1. Material Price Reference Criterion

The Commission's October 26, 2009, **Federal Register** notice identified the PDA contract as a potential SPDC based on the material price reference and material liquidity criteria. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "East Power of Day" package with access to all price data or just current prices plus a selected number of months (i.e., 12, 24, 36 or 48 months) of historical data. This package includes price data for the PDA contract.

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

The Commission explains in its Guidance to the statutory criteria that in evaluating a contract under the material

<sup>40</sup> <http://www.ferc.gov/market-oversight/mkt-electric/pjm.asp>.

<sup>41</sup> <http://www.ferc.gov/market-oversight/mkt-electric/pjm/2010/05-2010-elec-pjm-archive.pdf>.

price reference criterion, it will rely on one of two sources of evidence—direct and indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.<sup>42</sup> With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The PJM Western hub is a major pricing center for electricity in the eastern portion of the United States. Traders, including producers, keep abreast of the electricity prices at PJM Interconnection's Western Hub when conducting cash deals. Power prices in other neighboring markets, such as New York ISO's Zone A (Western New York), Zone G (Hudson Valley region) and Zone J (New York City) as well as Midwest ISO's Cinergy hub are typically based implicitly relative to the prices reported for PJM Interconnection's Western hub. However, ICE's PJM WH Real Time Peak ("PJM") contract, which is a monthly contract, is used more widely as a source of pricing information for electricity than the daily, peak-hour day-ahead contract (i.e., the PDA contract). Specifically, the PJM contract prices power at the Western Hub based on the simple average of the real time, peak-hour prices over the contract month, as reported by PJM Interconnection.

Market participants use the PJM contract to lock-in electricity prices far into the future. (The PJM contract is listed up to 110 months into the future.) In contrast, the PDA contract is listed for a much shorter length of time (about five weeks); with such a limited timeframe, the forward pricing capability of the PDA contract is much more constrained than that of the PJM contract. Traders use monthly power contracts like the PJM contract to price electricity commitments in the future, where such commitments are based on long range forecasts of power supply and demand. As generation and usage nears, market participants have a better understanding of actual power supply and needs. As a result, traders can modify previously-established hedges with the daily power contracts.

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

#### i. Federal Register Comments

EPSA, FIEG, EEI and ICE stated that no other contract directly references or settles to the PDA contract's price. Moreover, the commenters argued that the underlying cash price series against which the PDA contract is settled<sup>43</sup> is the authentic reference price and not the ICE contract itself. Commission staff believes that this interpretation of price reference is too narrow and believes that

a cash-settled derivatives contract could meet the price reference criterion if market participants "consult [the derivatives contract] on a frequent and recurring basis" when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock-in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while Western Hub is a major power market, traders do not consider the daily average peak-hour, day-ahead Western Hub price to be as important as the peak, real-time electricity price associated with the monthly contract.

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

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

#### ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the ICE PDA contract does not meet the material price reference criterion because cash market transactions are not priced either explicitly or implicitly on a frequent

<sup>42</sup> 17 CFR Part 36, Appendix A.

<sup>43</sup> In this case, the average of the real-time peak-hour Western hub electricity prices over the day of generation, which are derived from cash market transactions.

and recurring basis at a differential to the PDA contract's price (direct evidence). Moreover, while the PDA contract's price data is sold to market participants, those individuals likely do not purchase the ICE data packages specifically for the PDA contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

## 2. Material Liquidity Criterion

To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that changes to the subject contract's prices potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the PDA contract was 1,063 in the second quarter of 2009, resulting in a daily average of 16.6 trades. During the same period, the PDA contract had a total trading volume of 1,435 contracts and an average daily trading volume of 22.4 contracts. Moreover, open interest as of June 30, 2009, was 75 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.<sup>44</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 1,960 contracts (or 30.2 contracts on a daily basis). In terms of number of transactions, 1,181 trades occurred in the fourth quarter of 2009 (19.2 trades per day). As of December 31, 2009, open interest in the PDA contract was 45 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

The number of trades per day between the second and fourth quarters of 2009 was not substantial. In addition, trading activity in the PDA contract, as

characterized by total quarterly volume, indicates that the PDA contract experiences trading activity that is similar to that of thinly-traded futures markets.<sup>45</sup> Thus, the PDA contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.<sup>46</sup>

### i. Federal Register Comments

ICE stated that the PDA contract lacks a sufficient number of trades to meet the material liquidity criterion. Along with EPSA and EEI, ICE argued that the PDA contract cannot have a material effect on other contracts, such as those listed for trading by NYMEX, a DCM, because price linkage and the potential for arbitrage do not exist. Moreover, the DCM contracts do not cash settle to the PDA contract's price. Instead, the DCM contracts and the PDA contract are both cash settled based on physical transactions, which neither the ECM nor the DCM contracts can influence.

ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the relatively low number of trades per day in the PDA contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."<sup>47</sup>

ICE opined that the Commission "seems to have adopted a five trade per day test for material liquidity." To the contrary, the Commission adopted a five trades-per-day threshold as a reporting

<sup>45</sup> Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

<sup>46</sup> In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], \* \* \* but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." 17 CFR Part 36, Appendix A. For the reasons discussed above, the Commission has found that the PDA contract does not meet the material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since the Commission believes it is not useful as the sole basis for a SPDC determination.

<sup>47</sup> Guidance, *supra*.

requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"<sup>48</sup> rather than solely relying upon an ECM to identify potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, a contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all months" as well as in strips of contract months. ICE suggested that a more appropriate method of determining liquidity is to examine the activity in a single traded month of a given contract.<sup>49</sup> It is the Commission's opinion that liquidity, as it pertains to the PDA contract, is typically a function of trading activity in particular lead days and, given sufficient liquidity in such days, the ICE PDA contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the PDA contract does not meet the material price reference criterion, according to the Commission's Guidance, it would be unnecessary to evaluate whether the PDA contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

### ii. Conclusion Regarding Material Liquidity

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

<sup>48</sup> 73 FR 75892 (December 12, 2008).

<sup>49</sup> In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 26, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about five percent of all transactions in the PDA contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 26, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

### 3. Overall Conclusion Regarding the PDA Contract

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

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its PDA contract.<sup>50</sup> Accordingly, with respect to its PDA contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements for ECMs.

## V. Related Matters

### a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (“PRA”)<sup>51</sup> imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

### b. Cost-Benefit Analysis

Section 15(a) of the CEA<sup>52</sup> requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission “consider” the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and

financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.

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

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

### c. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”)<sup>53</sup> requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36

rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.<sup>54</sup> Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these Orders, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

## VI. Orders

### a. Order Relating to the PJM WH Real Time Peak Daily Contract

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

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the PJM WH Real Time Peak Daily contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price preference or material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity<sup>55</sup> with respect to the PJM WH Real Time Peak Daily contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the PJM WH Real Time Peak Daily contract with the issuance of this Order.

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

<sup>50</sup> See 73 FR 75888, 75893 (Dec. 12, 2008).

<sup>51</sup> 44 U.S.C. 3507(d).

<sup>52</sup> 7 U.S.C. 19(a).

<sup>53</sup> 5 U.S.C. 601 *et seq.*

<sup>54</sup> 66 FR 42256, 42268 (Aug. 10, 2001).

<sup>55</sup> 7 U.S.C. 1a(29).

2(h)(3) and Commission Regulation 36.3.

*b. Order Relating to the PJM WH Real Time Off-Peak Daily Contract*

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

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the PJM WH Real Time Off-Peak Daily contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price preference or material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity<sup>56</sup> with respect to the PJM WH Real Time Off-Peak Daily contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the PJM WH Real Time Off-Peak Daily contract with the issuance of this Order.

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

*c. Order Relating to the PJM WH Day Ahead LMP Peak Daily Contract*

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

The Commission, pursuant to its authority under section 2(h)(7) of the

Act, hereby determines that the PJM WH Day Ahead LMP Peak Daily contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price preference or material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity<sup>57</sup> with respect to the PJM WH Day Ahead LMP Peak Daily contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the PJM WH Day Ahead LMP Peak Daily contract with the issuance of this Order.

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

Issued in Washington, DC, on July 9, 2010, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2010-17744 Filed 7-20-10; 8:45 am]

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## COMMODITY FUTURES TRADING COMMISSION

### Orders Finding That the SP-15 Financial Day-Ahead LMP Peak Daily Contract; SP-15 Financial Day-Ahead LMP Off-Peak Daily Contract; SP-15 Financial Swap Real Time LMP-Peak Daily Contract; NP-15 Financial Day-Ahead LMP Peak Daily Contract and NP-15 Financial Day-Ahead LMP Off-Peak Daily Contract; Offered for Trading on the IntercontinentalExchange, Inc., Do Not Perform a Significant Price Discovery Function

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final orders.

**SUMMARY:** On October 6, 2009, the Commodity Futures Trading Commission (“CFTC” or “Commission”) published for comment in the **Federal Register**<sup>1</sup> a notice of its intent to undertake a determination whether the SP-15<sup>2</sup> Financial Day-Ahead LMP Peak Daily (“SDP”) contract; SP-15 Financial Day-Ahead LMP Off-Peak Daily (“SQP”) contract; SP-15 Financial Swap Real Time LMP-Peak Daily (“SRP”) contract; NP-15<sup>3</sup> Financial Day-Ahead LMP Peak Daily (“DPN”) contract; and NP-15 Financial Day-Ahead LMP Off-Peak Daily (“UNP”) contract,<sup>4</sup> which are listed for trading on the IntercontinentalExchange, Inc. (“ICE”), an exempt commercial market (“ECM”) under sections 2(h)(3)–(5) of the Commodity Exchange Act (“CEA” or the “Act”), perform a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue orders finding that the SDP, SQP, SRP, DPN and UNP contracts do not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

**DATES:** Effective date: July 9, 2010.

<sup>1</sup> 74 FR 51264 (October 6, 2009).

<sup>2</sup> The acronym “SP” stands for “South Path.”

<sup>3</sup> The acronym “NP” stands for “North Path.”

<sup>4</sup> The **Federal Register** notice also requested comment on the SP-15 Financial Day-Ahead LMP Peak (“SPM”) contract and SP-15 Financial Day-Ahead LMP Off-Peak (“OFP”) contract; these contracts will be addressed in a separate **Federal Register** release.