

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.*

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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 (“OFFP”) contract; these contracts will be addressed in a separate **Federal Register** release.

<sup>56</sup> 7 U.S.C. 1a(29).

<sup>57</sup> 7 U.S.C. 1a(29).

**FOR FURTHER INFORMATION CONTACT:**

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**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 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 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 6, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the SDP, SQP, SRP, DPN and UNP contracts<sup>10</sup> perform a significant price discovery function and requested comment from interested parties.<sup>11</sup> Comments were received from

<sup>5</sup> Public Law 110-246 at 13203; *Joint Explanatory Statement of the Committee of Conference*, H.R. Rep. No. 110-627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). See also 73 FR 75888, 75894 (Dec. 12, 2008).

<sup>6</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>7</sup> As noted above, 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 ("OPF") contract. The SPM and OPF contracts will be addressed in a separate **Federal Register** release.

<sup>8</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.

the Federal Energy Regulatory Commission ("FERC"), Electric Power Supply Association ("EPSA"), Financial Institutions Energy Group ("FIEG"), Working Group of Commercial Energy Firms ("WGCEF"), ICE, California Public Utilities Commission ("CPUC"), Edison Electric Institute ("EEI"), Western Power Trading Forum ("WPTF") and Public Utility Commission of Texas ("PUCT").<sup>12</sup> The comment letters from FERC<sup>13</sup> and PUCT did not directly address the issue of whether or not the subject contracts are SPDCs. CPUC stated that the subject contracts are SPDCs but did not provide reasons for how the contracts meet the criteria for

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> 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." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." ICE is an ECM, as noted above. CPUC is a "constitutionally established agency charged with the responsibility for regulating electric corporations within the State of California." EEI is the "association of shareholder-owned electric companies, international affiliates and industry associates worldwide." WPTF describes itself as a "broad-based membership organization dedicated to encouraging competition in the Western power markets \* \* \* WPTF strives to reduce the long-run cost of electricity to consumers throughout the region while maintaining the current high level of system reliability." PUCT is the independent organization that oversees the Electric Reliability Council of Texas ("ERCOT") to "ensure nondiscriminatory access to the transmission and distribution systems, to ensure the reliability and adequacy of the regional electrical network, and to perform other essential market functions." The comment letters are available on the Commission's Web site: <http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009-012.html>.

<sup>13</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, [(regional transmission organizations)], ISOs [(independent system operators)] or other jurisdictional entities."

<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).

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

SPDC determination. 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 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>14</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>15</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 SDP, SQP, SRP, DPN and UNP contracts are discussed separately below.

#### *a. The SP-15 Financial Day-Ahead LMP Peak Daily (SDP) Contract and the SPDC Indicia*

The SDP contract is cash settled based on the arithmetic average of peak-hour, day-ahead locational marginal prices (“LMPs”) <sup>16</sup> posted by the California ISO<sup>17</sup> (“CAISO”) for the SP-15 Existing

<sup>14</sup> In its October 6, 2009, **Federal Register** release, the Commission identified material price reference and material liquidity as the possible criteria for SPDC determination of the SDP, SQP, SRP, DPN and UNP 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>15</sup> 17 CFR Part 36, Appendix A.

<sup>16</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.

<sup>17</sup> The acronym “ISO” signifies “Independent System Operator” which is an entity that coordinates electricity generation and transmission,

Zone Generation (“EZ Gen”) Hun for all peak hours on the day prior to generation. The LMPs are derived from power trades that result in physical delivery. The size of the SDP contract is 400 megawatt hours (“MWh”), and the SDP contract is listed for 75 consecutive calendar 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 derived as a 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. Typically, the bulk of energy transactions occur in the day-ahead market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because power quotes are dependent on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. Consequently, 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. Only a relatively small amount of electricity is traded in the real-time market as compared to the day-ahead market.

Path 15 is an 84-mile portion of the north-south power transmission corridor in California, forming part of the Pacific AC Intertie and the California-Oregon Transmission Project.<sup>18</sup> Path 15, along with the Pacific

as well as grid reliability, throughout its service area.

<sup>18</sup> The Pacific Intertie comprises three alternating current (“AC”) lines and one direct current (“DC”) line. Together, these lines comprise the largest single electricity transmission program in the United States. The northern end of the DC line is at the Bonneville Power Administration's Celilo Converter Station, which is just south of The Dalles Dam about 90 miles east of Portland. The southern end is 846 miles away at the Sylmar Converter Station on the northern outskirts of Los Angeles. That station is operated by utilities including the Los Angeles Department of Water and Power (“LADWP”) and Southern California Edison. The AC lines follow generally the same path but terminate in Northern California. Only a few parties actually own the Intertie, but numerous entities

DC Intertie running far to the east, completes an important transmission interconnection between the hydroelectric plants to the north and the fossil fuel plants to the south. Path 15 currently consists of three lines at 500 kilovolts (“kV”) and four lines at 230 kV.<sup>19</sup> The 500 kV lines connect Los Banos to Gates (two lines) and Los Banos to Midway (one line); all four 230 kV lines have Gates at one end with the other ends terminating at Panoche #1, Panoche #2, Gregg, or McCall substations. “NP-15” refers to the northern half of Path 15; conversely, “SP-15” refers to the lower half of Path 15.

When the weather is hot in California and the Desert Southwest, it is comparatively cool in the Pacific Northwest. Conversely, when the weather is cold in the Pacific Northwest it is comparatively warm in California and the Desert Southwest. Consumers on the West Coast take advantage of seasonal weather differences to share large amounts of power between the Desert Southwest and the Pacific Northwest. In the spring and summer, when generators (mostly hydroelectric plants) generally have surplus power in the Northwest and temperatures climb in the Southwest, power is shipped south to help meet increasing power demand, particularly for air conditioning. Conversely in the winter, when generators in the Southwest generally have surplus power and temperatures drop in the Northwest, power is shipped north to meet increasing electricity demand, particularly for heating.

CAISO is charged with operating the high-voltage grid in California. Because CAISO’s service area is basically the entire State of California, it is responsible for serving millions of businesses and households, particularly in the Los Angeles and San Francisco areas. CAISO’s current mission is to ensure the efficient and reliable

have contracts to share its transmission capacity. The California-Oregon border is a dividing line for Intertie ownership and capacity sharing. Depending on seasonal conditions, the Intertie is capable of transmitting up to 7,900 MW— 4,800 MW of AC power (1,600 MW of this amount is in the California-Oregon Transmission Project, also known as the “Third AC Line”) and 3,100 MW of DC power. Over the past five years, the limit has ranged between about 6,300 MW and 7,900 MW. Most of the power transmitted on the Intertie is surplus to regional needs, but some firm power also is transmitted. See <http://www.nwccouncil.org/LIBRARY/2001/2001-11.pdf>.

<sup>19</sup> The third 500 kV line was installed between 2003 and 2004 in order to relieve constraints on the existing north-south transmission lines. This capacity constraint contributed to the California energy crisis in 2000 and 2001. See <http://www.wapa.gov/sn/ops/transmission/path15/factSheet.pdf>.

operation of the power grid, provide fair and open transmission access, promote environmental stewardship, facilitate effective markets, promote infrastructure development and support the timely and accurate dissemination of information. CAISO is responsible for operating the hourly auctions in which the power is traded, and CAISO publishes the LMP data on its Web site.

#### 1. Material Price Reference Criterion

The Commission’s October 6, 2009, **Federal Register** notice identified material price reference and material liquidity as the potential basis for a SPDC determination with respect to the SDP contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the “West Power of Day” package with access to all price data or just current prices plus a selected number of months (*i.e.*, 12, 24, 36 or 48 months) of historical data. This package includes price data for the SDP 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 SDP contract, while not mentioned by name in the ECM Study, warranted further review.

The Commission explains in its Guidance to the Part 36 rules that in evaluating a contract under the material price reference criterion, it will rely on one of two sources of evidence—direct 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.

SP-15 is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of electricity prices in the SP-15 power market when conducting cash deals. However, ICE’s SP-15 Financial Day-Ahead LMP Peak (“SPM”) 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 SDP contract). Specifically, the SPM contract prices power at the SP-15 trading point based on the simple average of the peak-hour prices over the contract month, as reported by CAISO. Market participants use the SPM contract to lock-in electricity prices far into the future. (The SPM contract is listed for 110 months into the future.) In contrast, the SDP contract is listed for a much shorter length of time (about 10 weeks); with such a limited timeframe, the forward pricing capability of the SDP contract is much more constrained than that of the SPM contract. Traders use monthly power contracts like the SPM 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 SDP contract.

Accordingly, although the SP-15 is a major trading center for electricity and, as noted, ICE sells price information for the SDP 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 SDP contract is not consulted in this manner and does not satisfy the material price reference criterion. Thus, the SDP contract does

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

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

#### i. Federal Register Comments

WGCEF, EPSA, WPTF, FIEG, EEI and ICE stated that no other contract directly references or settles to the SDP contract's price. Moreover, the commenters argued that the underlying cash price series against which the SDP contract is settled (in this case, the average day-ahead peak-hour SP-15 electricity prices on a particular day, which is derived from cash market transactions) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock-in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while SP-15 is a major power market, traders do not consider the daily average peak-hour SP-15 price to be as important as the peak electricity price associated with the monthly contract.

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

Lastly, EEI criticized that the ECM Study did not specifically identify the SDP 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 SDP 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 SDP contract's price (direct evidence). Moreover, while the SDP contract's price data is sold to market participants, those individuals likely do not purchase the ICE data packages specifically for the SDP 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 SDP contract was 6,159 in the second quarter of 2009, resulting in a daily average of 96.2 trades. During the same period, the SDP contract had a total trading volume of 23,365 contracts and an average daily trading volume of

365.1 contracts. Moreover, open interest as of June 30, 2009, was 3,387 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>21</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 40,840 contracts (or 628.3 contracts on a daily basis). In terms of number of transactions, 6,664 trades occurred in the fourth quarter of 2009 (102.5 trades per day). As of December 31, 2009, open interest in the SDP contract was 16,786 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 SDP contract, as characterized by total quarterly volume, indicates that the SDP contract experiences trading activity that is similar to that of thinly-traded futures markets.<sup>22</sup> Thus, the SDP contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.<sup>23</sup>

#### i. Federal Register Comments

ICE and WGCEF stated that the SDP contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, EPSA, FIEG and EEI argued

<sup>21</sup> 74 FR 51264 (October 6, 2009).

<sup>22</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>23</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 SDP 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.

that the SDP 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 SDP contract’s price. Instead, the DCM contracts and the SDP contract are both cash settled based on physical transactions, which neither the ECM nor the DCM contracts can influence.

WGCEF and ICE noted that the Commission’s Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the relatively low number of trades per day in the SDP 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>24</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>25</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>26</sup> It is the Commission’s

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

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

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE SDP 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 SDP 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 SDP 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 SDP contract.<sup>27</sup> Accordingly, with respect to its SDP 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.

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 29 percent of all transactions in the SDP contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between “on-exchange” versus “off-exchange” created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

<sup>27</sup> See 73 FR 75888, 75893 (Dec. 12, 2008).

#### b. The SP-15 Financial Day-Ahead LMP Off-Peak Daily (SQP) Contract and the SPDC Indicia

The SQP contract is cash settled based on the arithmetic average of off-peak hour, day-ahead LMPs posted by CAISO for the SP-15 EZ Gen Hun for all off-peak hours on the day prior to generation. The LMPs are derived from power trades that result in physical delivery. The size of the SQP contract is 25 MWh, and the SQP contract is listed for 75 consecutive calendar days.

As noted above, electricity generally 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. Typically, the bulk of energy transactions occur in the day-ahead market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because power quotes are dependent on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. Consequently, 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. Only a relatively small amount of electricity is traded in the real-time market as compared to the day-ahead market.

Path 15 is an 84-mile portion of the north-south power transmission corridor in California, forming part of the Pacific AC Intertie and the California-Oregon Transmission Project.<sup>28</sup> Path 15, along with the Pacific

<sup>28</sup> The Pacific Intertie comprises three AC lines and one DC line. Together, these lines comprise the largest single electricity transmission program in the United States. The northern end of the DC line is at the Bonneville Power Administration’s Celilo Converter Station, which is just south of The Dalles Dam about 90 miles east of Portland. The southern end is 846 miles away at the Sylmar Converter Station on the northern outskirts of Los Angeles. That station is operated by utilities including LADWP and Southern California Edison. The AC lines follow generally the same path but terminate in Northern California. Only a few parties actually

<sup>24</sup> Guidance, *supra*.

<sup>25</sup> 73 FR 75892 (December 12, 2008).

<sup>26</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 6, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only

DC Intertie running far to the east, completes an important transmission interconnection between the hydroelectric plants to the north and the fossil fuel plants to the south. Path 15 currently consists of three 500 kV lines and four 230 kV lines.<sup>29</sup> The 500 kV lines connect Los Banos to Gates (two lines) and Los Banos to Midway (one line); all four 230 kV lines have Gates at one end with the other ends terminating at Panoche #1, Panoche #2, Gregg, or McCall substations. As noted above, “NP-15” refers to the northern half of Path 15; conversely, “SP-15” refers to the lower half of Path 15.

When the weather is hot in California and the Desert Southwest, it is comparatively cool in the Pacific Northwest. Conversely, when the weather is cold in the Pacific Northwest it is comparatively warm in California and the Desert Southwest. Consumers on the West Coast take advantage of seasonal weather differences to share large amounts of power between the Desert Southwest and the Pacific Northwest. In the spring and summer, when generators (mostly hydroelectric plants) generally have surplus power in the Northwest and temperatures climb in the Southwest, power is shipped south to help meet increasing power demand, particularly for air conditioning. Conversely in the winter, when generators in the Southwest generally have surplus power and temperatures drop in the Northwest, power is shipped north to meet increasing electricity demand, particularly for heating.

CAISO is charged with operating the high-voltage grid in California. Because CAISO’s service area is basically the entire state, the ISO is responsible for serving millions of businesses and households, particularly in the Los Angeles and San Francisco areas. CAISO’s current mission is to ensure the efficient and reliable operation of the

power grid, provide fair and open transmission access, promote environmental stewardship, facilitate effective markets, promote infrastructure development and support the timely and accurate dissemination of information. This ISO also is responsible for operating the hourly auctions in which power is traded, and CAISO publishes LMP data on its Web site.

#### 1. Material Price Reference Criterion

The Commission’s October 6, 2009, **Federal Register** notice identified material price reference and material liquidity as the potential basis for a SPDC determination with respect to the SQP contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the “West Power of Day” package with access to all price data or just current prices plus a selected number of months (*i.e.*, 12, 24, 36 or 48 months) of historical data. This package includes price data for the SQP 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 SQP contract, while not mentioned by name in the ECM Study, warranted further review.

The Commission explains in its Guidance to the statutory criteria for SPDCs that in evaluating a contract under the material price reference criterion, it will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.<sup>30</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.

SP-15 is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the SP-15 power market when conducting cash deals. However, ICE’s SP-15 Financial Day-Ahead LMP Off-Peak (“OFP”) contract, which is a monthly contract, is used more widely as a source of pricing information for electricity than the daily, off-peak contract (*i.e.*, the SQP contract). Specifically, the OFP contract prices power at the SP-15 trading point based on the simple average of the off-peak hour prices over the contract month, as reported by CAISO. Market participants can use the OFP contract to lock-in electricity prices far into the future (about 10 weeks). In contrast, the SQP contract is listed for a much shorter length of time; with such a limited timeframe, the forward pricing capability of the SQP contract is much more constrained than that of the OFP contract. Traders use monthly power contracts like the OFP 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 SQP contract.

Accordingly, although the SP-15 is a major trading center for electricity and, as noted, ICE sells price information for the SQP 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 SQP contract is not consulted in this manner and does not satisfy the material price reference criterion. Thus, the SQP contract does not satisfy the direct price reference test for existence of material price reference.

own the Intertie, but numerous entities have contracts to share its transmission capacity. The California-Oregon border is a dividing line for Intertie ownership and capacity sharing. Depending on seasonal conditions, the Intertie is capable of transmitting up to 7,900 MW—4,800 MW of AC power (1,600 MW of this amount is in the California-Oregon Transmission Project, also known as the Third AC Line) and 3,100 MW of DC power. Over the past five years, the limit has ranged between about 6,300 MW and 7,900 MW. Most of the power transmitted on the Intertie is surplus to regional needs, but some firm power also is transmitted. See <http://www.nwccouncil.org/LIBRARY/2001/2001-11.pdf>.

<sup>29</sup> The third 500 kV line was installed between 2003 and 2004 in order to relieve constraints on the existing north-south transmission lines. This capacity constraint contributed to the California energy crisis in 2000 and 2001. See <http://www.wapa.gov/sn/ops/transmission/path15/factSheet.pdf>.

<sup>30</sup> 17 CFR Part 36, Appendix A.

Furthermore, the Commission notes that publication of the SQP contract's prices is not indirect evidence of material price reference. The SQP contract's prices are published with those of numerous other contracts, including ICE's monthly electricity contracts, which are of more interest to market participants. In these circumstances, the Commission has concluded that traders likely do not specifically purchase ICE data packages for the SQP contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

#### i. Federal Register Comments

WGCEF, EPSA, WPTF, FIEG, EEI and ICE stated that no other contract directly references or settles to the SQP contract's price. Moreover, the commenters argued that the underlying cash price series against which the SQP contract is settled (in this case, the average day-ahead off-peak SP-15 electricity prices on a particular day, which is derived from cash market transactions) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock-in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while SP-15 is a major power market, traders do not consider the daily average off-peak SP-15 price to be as important as the off-peak electricity price associated with the monthly contract.

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

Lastly, EEI criticized that the ECM Study did not specifically identify the SQP 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

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

#### 2. Material Liquidity Criterion

As noted above, in its October 6, 2009, **Federal Register** notice, the Commission identified the SQP contract as a potential SPDC based on the material price reference and material liquidity as potential criteria. 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 SQP contract was 2,086 in the second quarter of 2009, resulting in a daily average of 32.6 trades. During the same period, the SQP contract had a

total trading volume of 57,544 contracts and an average daily trading volume of 899.1 contracts. Moreover, open interest as of June 30, 2009, was 9,904 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>31</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 43,002 contracts (or 661.6 contracts on a daily basis). In terms of number of transactions, 1,939 trades occurred in the fourth quarter of 2009 (29.8 trades per day). As of December 31, 2009, open interest in the SQP contract was 6,424 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 SQP contract, as characterized by total quarterly volume, indicates that the SQP contract experiences trading activity that is similar to that of thinly-traded futures markets.<sup>32</sup> Thus, the SQP contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.<sup>33</sup>

#### i. Federal Register Comments

ICE and WGCEF stated that the SQP contract lacks a sufficient number of trades to meet the material liquidity

<sup>31</sup> 74 FR 51264 (October 6, 2009).

<sup>32</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>33</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 SQP 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.

criterion. These two commenters, along with WPTF, EPSA, FIEG and EEI argued that the SQP contract cannot have a material effect on other contracts, such as those listed for trading by NYMEX. The commenters pointed out that it is not possible for the SQP contract to affect a DCM contract because price linkage and the potential for arbitrage do not exist. Moreover, the DCM contracts do not cash settle to the SQP contract's price. Instead, the DCM contracts and the SQP contract are both cash settled based on physical transactions, which neither the ECM or the DCM contracts can influence.

WGCEF and ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the relatively low number of trades per day in the SQP 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>34</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>35</sup> rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, the contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE asserted 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>36</sup> It is the Commission's

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

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

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE SQP 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 SQP 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 SQP 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 SQP contract.<sup>37</sup> Accordingly, with respect to its SQP 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

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 60 percent of all transactions in the SQP contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

<sup>37</sup> See 73 FR 75888, 75893 (Dec. 12, 2008).

with the applicable reporting requirements for ECMs.

#### c. The SP-15 Financial Swap Real Time LMP-Peak Daily (SRP) Contract and the SPDC Indicia

The SRP contract is cash settled based on the arithmetic average of peak-hour, real-time LMPs posted by CAISO for the SP-15 EZ Gen Hun for all peak hours on the generation day. The LMPs are derived from power trades that result in physical delivery. The size of the SRP contract is 400 MWh, and the SRP contract is listed for 75 consecutive calendar days.

As noted above, 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 derived as a 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. Typically, the bulk of energy transactions occur in the day-ahead market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because power quotes are dependent on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. Consequently, 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. Only a relatively small amount of electricity is traded in the real-time market as compared to the day-ahead market.

Path 15 is an 84-mile portion of the north-south power transmission corridor in California, forming part of the Pacific AC Intertie and the California-Oregon Transmission Project.<sup>38</sup> Path 15, along with the Pacific

<sup>38</sup> The Pacific Intertie comprises three AC lines and one DC line. Together, these lines comprise the largest single electricity transmission program in the United States. The northern end of the DC line is at the Bonneville Power Administration's Celilo Converter Station, which is just south of The Dalles Dam about 90 miles east of Portland. The southern end is 846 miles away at the Sylmar Converter

<sup>34</sup> Guidance, *supra*.

<sup>35</sup> 73 FR 75892 (December 12, 2008).

<sup>36</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 6, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and

DC Intertie running far to the east, completes an important transmission interconnection between the hydroelectric plants to the north and the fossil fuel plants to the south. Path 15 currently consists of three 500 kV lines and four 230 kV lines.<sup>39</sup> The 500 kV lines connect Los Banos to Gates (two lines) and Los Banos to Midway (one line); all four 230 kV lines have Gates at one end with the other ends terminating at Panoche #1, Panoche #2, Gregg, or McCall substations. “NP–15” refers to the northern half of Path 15; conversely, “SP–15” refers to the lower half of Path 15.

When the weather is hot in California and the Desert Southwest, it is comparatively cool in the Pacific Northwest. Conversely, when the weather is cold in the Pacific Northwest it is comparatively warm in California and the Desert Southwest. Consumers on the West Coast take advantage of seasonal weather differences to share large amounts of power between the Desert Southwest and the Pacific Northwest. In the spring and summer, when generators (mostly hydroelectric plants) generally have surplus power in the Northwest and temperatures climb in the Southwest, power is shipped south to help meet increasing power demand, particularly for air conditioning. Conversely in the winter, when generators in the Southwest generally have surplus power and temperatures drop in the Northwest, power is shipped north to meet increasing electricity demand, particularly for heating.

CAISO is charged with operating of the high-voltage grid in California. Because CAISO’s service area is basically the entire State of California, it is responsible for serving millions of

businesses and households, particularly in the Los Angeles and San Francisco areas. CAISO’s current mission is to ensure the efficient and reliable operation of the power grid, provide fair and open transmission access, promote environmental stewardship, facilitate effective markets, promote infrastructure development and support the timely and accurate dissemination of information. CAISO also is responsible for operating the hourly auctions in which the power is traded, and CAISO publishes the LMP data on its Web site.

#### 1. Material Price Reference Criterion

The Commission’s October 6, 2009, **Federal Register** notice identified the SRP contract as a potential SPDC based on the material price reference and material liquidity statutory 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 “West Power of Day” package with access to all price data or just current prices plus a selected number of months (*i.e.*, 12, 24, 36 or 48 months) of historical data. This package includes price data for the SRP 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 SRP contract, while not mentioned by name in the ECM Study, warranted further review.

The Commission explains in its Guidance to statutory criteria that in evaluating a contract under the material price reference criterion, it will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.<sup>40</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.

SP–15 is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the SP–15 power market when conducting cash deals. However, ICE’s SP–15 Financial Day-Ahead LMP Peak (“SPM”) contract, which is a monthly contract, is used more widely as a source of pricing information for electricity than the real-time daily peak-hour contract (*i.e.*, the SRP contract). Specifically, the SPM contract prices power at the SP–15 trading point based on the simple average of the peak-hour day-ahead prices over the contract month, as reported by CAISO. Market participants use the SPM contract to lock-in electricity prices far into the future. (The SPM contract is listed for 110 calendar months.) In contrast, the SRP contract is listed for a much shorter length of time (about 10 weeks); with such a limited timeframe, the forward pricing capability of the SRP contract is much more constrained than that of the SPM contract. Traders use monthly power contracts like the SPM 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 SRP contract.

Accordingly, although the SP–15 is a major trading center for electricity and, as noted, ICE sells price information for the SRP 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 SRP contract is not consulted in this manner and does

Station on the northern outskirts of Los Angeles. That station is operated by utilities including LADWP and Southern California Edison. The AC lines follow generally the same path but terminate in Northern California. Only a few parties actually own the Intertie, but numerous entities have contracts to share its transmission capacity. The California-Oregon border is a dividing line for Intertie ownership and capacity sharing. Depending on seasonal conditions, the Intertie is capable of transmitting up to 7,900 MW—4,800 MW of AC power (1,600 MW of this amount is in the California-Oregon Transmission Project, also known as the Third AC Line) and 3,100 MW of DC power. Over the past five years, the limit has ranged between about 6,300 MW and 7,900 MW. Most of the power transmitted on the Intertie is surplus to regional needs, but some firm power also is transmitted. See <http://www.nwccouncil.org/LIBRARY/2001/2001-11.pdf>.

<sup>39</sup>The third 500 kV line was installed between 2003 and 2004 in order to relieve constraints on the existing north-south transmission lines. This capacity constraint contributed to the California energy crisis in 2000 and 2001. See <http://www.wapa.gov/sn/ops/transmission/path15/factSheet.pdf>.

<sup>40</sup> 17 CFR 36, Appendix A.

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

#### i. Federal Register Comments

WGCEF, EPSA, WPTF, FIEG, EEI and ICE stated that no other contract directly references or settles to the SRP contract's price. Moreover, the commenters argued that the underlying cash price series against which the SRP contract is settled (in this case, the average real-time peak SP-15 electricity prices on a particular day, which is derived from cash market transactions) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock-in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while SP-15 is a major power market, traders do not consider the average daily real-time peak-hour SP-15 price to be as important as the peak electricity price associated with the monthly day-ahead contract.

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

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 SRP contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, EEI argued that the ECM Study did not specifically identify the SRP 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 SRP 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 SRP contract's price (direct evidence). Moreover, while the SRP contract's price data is sold to market participants, those individuals likely do not purchase the ICE data packages specifically for the SRP contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

#### 2. Material Liquidity Criterion

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

The total number of transactions executed on ICE's electronic platform in the SRP contract was 826 in the second quarter of 2009, resulting in a daily average of 12.9 trades. During the same period, the SRP contract had a total trading volume of 1,014 contracts and an average daily trading volume of 15.8 contracts. Moreover, open interest as of June 30, 2009, was 143 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>41</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 691 contracts (or 10.6 contracts on a daily basis). In terms of number of transactions, 772 trades occurred in the fourth quarter of 2009 (11.9 trades per day). As of December 31, 2009, open interest in the SDP contract was 41 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 SDP contract, as characterized by total quarterly volume, indicates that the SDP contract experiences trading activity that is similar to that of thinly-traded futures markets.<sup>42</sup> Thus, the SRP contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.<sup>43</sup>

<sup>41</sup> 74 FR 51264 (October 6, 2009).

<sup>42</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>43</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 SRP 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

### i. Federal Register Comments

ICE and WGCEF stated that the SRP contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, EPSA, FIEG and EEI argued that the SRP 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 SDP contract's price. Instead, the DCM contracts and the SRP contract are both cash settled based on physical transactions, which neither the ECM or the DCM contracts can influence.

WGCEF and ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the relatively low number of trades per day in the SRP 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>44</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>45</sup> rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, the contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE argued 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

believes it is not useful as the sole basis for a SPDC determination.

<sup>44</sup> Guidance, *supra*.

<sup>45</sup> 73 FR 75892 (December 12, 2008).

given contract."<sup>46</sup> It is the Commission's opinion that liquidity, as it pertains to the SRP contract, is typically a function of trading activity in particular lead days and, given sufficient liquidity in such days, the ICE SRP contract itself would be considered liquid. In any event, because the Commission has found that the SRP contract does not meet the material price reference criterion, it is unnecessary to evaluate whether the SRP contract meets the material liquidity criterion since under the Commission's Guidance it cannot be used alone for SPDC determination.

### ii. Conclusion Regarding Material Liquidity

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

### 3. Overall Conclusion Regarding the SDP Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE SRP 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 SRP 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 SRP 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 SRP contract.<sup>47</sup> Accordingly, with respect to its SRP

<sup>46</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 6, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 51 percent of all transactions in the SRP contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

<sup>47</sup> See 73 FR 75888, 75893 (Dec. 12, 2008).

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.

### D. The NP-15 Financial Day-Ahead LMP Peak Daily (DPN) Contract and the SPDC Indicia

The DPN contract is cash settled based on the arithmetic average of peak-hour, day-ahead LMPs posted by CAISO for the NP-15 EZ Gen Hun for all peak hours on the day prior to generation. The LMPs are derived from power trades that result in physical delivery. The size of the DPN contract is 400 MWh, and the DPN contract is listed for 70 consecutive calendar days.

As noted above, 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 derived as a 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. Typically, the bulk of energy transactions occur in the day-ahead market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because power quotes are dependent on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. Consequently, 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. Only a relatively small amount of electricity is traded in the real-time market as compared to the day-ahead market.

Path 15 is an 84-mile portion of the north-south power transmission corridor in California, forming part of the Pacific AC Intertie and the California-Oregon Transmission Project.<sup>48</sup> Path 15, along with the Pacific

<sup>48</sup> The Pacific Intertie comprises three AC lines and one DC line. Together, these lines comprise the largest single electricity transmission program in

DC Intertie running far to the east, completes an important transmission interconnection between the hydroelectric plants to the north and the fossil fuel plants to the south. Path 15 currently consists of three 500 kV lines and four 230 kV lines.<sup>49</sup> The 500 kV lines connect Los Banos to Gates (two lines) and Los Banos to Midway (one line); all four 230 kV lines have Gates at one end with the other ends terminating at Panoche #1, Panoche #2, Gregg, or McCall substations. “NP-15” refers to the northern half of Path 15; conversely, “SP-15” refers to the lower half of Path 15.

When the weather is hot in California and the Desert Southwest, it is comparatively cool in the Pacific Northwest. Conversely, when the weather is cold in the Pacific Northwest it is comparatively warm in California and the Desert Southwest. Consumers on the West Coast take advantage of seasonal weather differences to share large amounts of power between the Desert Southwest and the Pacific Northwest. In the spring and summer, when generators (mostly hydroelectric plants) generally have surplus power in the Northwest and temperatures climb in the Southwest, power is shipped south to help meet increasing power demand, particularly for air conditioning. Conversely in the winter, when generators in the Southwest generally have surplus power and temperatures drop in the Northwest, power is shipped north to meet increasing electricity demand, particularly for heating.

the United States. The northern end of the DC line is at the Bonneville Power Administration's Celilo Converter Station, which is just south of The Dalles Dam about 90 miles east of Portland. The southern end is 846 miles away at the Sylmar Converter Station on the northern outskirts of Los Angeles. That station is operated by utilities including LADWP and Southern California Edison. The AC lines follow generally the same path but terminate in Northern California. Only a few parties actually own the Intertie, but numerous entities have contracts to share its transmission capacity. The California-Oregon border is a dividing line for Intertie ownership and capacity sharing. Depending on seasonal conditions, the Intertie is capable of transmitting up to 7,900 MW—4,800 MW of AC power (1,600 MW of this amount is in the California-Oregon Transmission Project, also known as the Third AC Line) and 3,100 MW of DC power. Over the past five years, the limit has ranged between about 6,300 MW and 7,900 MW. Most of the power transmitted on the Intertie is surplus to regional needs, but some firm power also is transmitted. See <http://www.nwccouncil.org/LIBRARY/2001/2001-11.pdf>.

<sup>49</sup>The third 500 kV line was installed between 2003 and 2004 in order to relieve constraints on the existing north-south transmission lines. This capacity constraint contributed to the California energy crisis in 2000 and 2001. See <http://www.wapa.gov/sn/ops/transmission/path15/factSheet.pdf>.

CAISO is charged with operating the high-voltage grid in California. Because CAISO's service area is basically the entire State of California, it is responsible for serving millions of businesses and households, particularly in the Los Angeles and San Francisco areas. CAISO's current mission is to ensure the efficient and reliable operation of the power grid, provide fair and open transmission access, promote environmental stewardship, facilitate effective markets, promote infrastructure development and support the timely and accurate dissemination of information. CAISO also is responsible for operating the hourly auctions in which the power is traded, and CAISO publishes the LMP data on its Web site.

#### 1. Material Price Reference Criterion

The Commission's October 6, 2009, **Federal Register** notice identified the DPN 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 “West Power of Day” package with access to all price data or just current prices plus a selected number of months (*i.e.*, 12, 24, 36 or 48 months) of historical data. This package includes price data for the DPN 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 DPN 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 or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.<sup>50</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.

NP-15 is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the NP-15 power market when conducting cash deals. However, ICE's NP-15 Financial Day-Ahead LMP Peak (“NPM”) 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 DPN contract). Specifically, the NPM contract prices power at the NP-15 trading point based on the simple average of the peak-hour prices over the contract month, as reported by CAISO. Market participants use the NPM contract to lock-in electricity prices far into the future. (The NPM contract is listed for up to 86 calendar months.) In contrast, the DPN contract is listed for a much shorter length of time (about 10 weeks); with such a limited timeframe, the forward pricing capability of the DPN contract is much more constrained than that of the NPM contract. Traders use monthly power contracts like the NPM 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 DPN contract.

Accordingly, although the NP-15 is a major trading center for electricity and, as noted, ICE sells price information for the DPN contract, the Commission has explained in its Guidance that a contract meeting the material price reference

<sup>50</sup> 17 CFR Part 36, Appendix A.

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

#### i. Federal Register Comments

WGCEF, EPSA, WPTF, FIEG, EEI and ICE stated that no other contract directly references or settles to the DPN contract's price. Moreover, the commenters argued that the underlying cash price series against which the DPN contract is settled (in this case, the average day-ahead peak SP-15 electricity prices on a particular day, which is derived from cash market transactions) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock-in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while NP-15 is a major power market, traders do not consider the daily average peak-hour NP-15 price to be as important as the peak electricity price associated with the monthly contract.

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

prices have substantial value to them. As noted above, the Commission indicated that publication of the DPN contract's prices is not indirect evidence of routine dissemination. The DPN 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 DPN contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, EEI argued that the ECM Study did not specifically identify the DPN 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 DPN 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 DPN contract's price (direct evidence). Moreover, while the DPN contract's price data is sold to market participants, those individuals likely do not purchase the ICE data packages specifically for the DPN contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

#### 2. Material Liquidity Criterion

As noted above, in its October 6, 2009, **Federal Register** notice, the Commission identified material price reference and material liquidity as potentially applicable criteria for SPDC determination of the DPN contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a

statistical analysis to measure the effect that changes to the subject contract's prices potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the DPN contract was 2,782 in the second quarter of 2009, resulting in a daily average of 43.5 trades. During the same period, the DPN contract had a total trading volume of 5,766 contracts and an average daily trading volume of 90.1 contracts. Moreover, open interest as of June 30, 2009, was 947 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>51</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 5,801 contracts (or 89.2 contracts on a daily basis). In terms of number of transactions, 2,160 trades occurred in the fourth quarter of 2009 (33.2 trades per day). As of December 31, 2009, open interest in the SDP contract was 573 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. However, trading activity in the DPN contract, as characterized by total quarterly volume, indicates that the DPN contract experiences trading activity that is similar to that of thinly-traded futures markets.<sup>52</sup> Thus, the DPN contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.<sup>53</sup>

<sup>51</sup> 74 FR 51264 (October 6, 2009).

<sup>52</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>53</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

### i. Federal Register Comments

ICE and WGCEF stated that the DPN contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, EPSA, FIEG and EEI argued that the DPN contract cannot have a material effect on other contracts, such as those listed for trading by NYMEX because price linkage and the potential for arbitrage do not exist. Moreover, the DCM contracts do not cash settle to the DPN contract's price. Instead, the DCM contracts and the DPN contract are both cash settled based on physical transactions, which neither the ECM or the DCM contracts can influence.

WGCEF and ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the relatively low number of trades per day in the DPN 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>54</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>55</sup> rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, the contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE argued 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>56</sup> It is the Commission's opinion that liquidity, as it pertains to the SDP contract, is typically a function of trading activity in particular lead days and, given sufficient liquidity in such days, the ICE DPN contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the DPN contract does not meet the material price reference criterion, according to the Commission's Guidance, it would be unnecessary to evaluate whether the DPN 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 DPN contract does not meet the material liquidity criterion.

### 3. Overall Conclusion Regarding the DPN Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE DPN 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 DPN 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 DPN 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 DPN contract.<sup>57</sup> Accordingly, with respect to its DPN 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.

### e. The NP-15 Financial Day-Ahead LMP Off-Peak Daily (UNP) Contract and the SPDC Indicia

The UNP contract is cash settled based on the arithmetic average of off-peak hour, day-ahead LMPs posted by CAISO for the NP-15 EZ Gen Hun for all off-peak hours on the day prior to generation. The LMPs are derived from power trades that result in physical delivery. The size of the UNP contract is 25 MWh, and the UNP contract is listed for 75 consecutive calendar days.

As noted above, electricity generally 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 derived as a 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. Typically, the bulk of energy transactions occur in the day-ahead market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because power quotes are dependent on the estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. Consequently, 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. Only a relatively small amount of electricity is traded in the real-time market as compared to the day-ahead market.

Path 15 is an 84-mile portion of the north-south power transmission corridor in California, forming part of the Pacific AC Intertie and the California-Oregon Transmission

<sup>56</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 6, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 34 percent of all transactions in the DPN contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

<sup>57</sup> See 73 FR 75888, 75893 (Dec. 12, 2008).

A. For the reasons discussed above, the Commission has found that the DPN 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>54</sup> Guidance, *supra*.

<sup>55</sup> 73 FR 75892 (December 12, 2008).

Project.<sup>58</sup> Path 15, along with the Pacific DC Intertie running far to the east, completes an important transmission interconnection between the hydroelectric plants to the north and the fossil fuel plants to the south. Path 15 currently consists of three 500 kV lines and four 230 kV lines.<sup>59</sup> The 500 kV lines connect Los Banos to Gates (two lines) and Los Banos to Midway (one line); all four 230 kV lines have Gates at one end with the other ends terminating at Panoche #1, Panoche #2, Gregg, or McCall substations. As noted above, “NP-15” refers to the northern half of Path 15; conversely, “SP-15” refers to the lower half of Path 15.

When the weather is hot in California and the Desert Southwest, it is comparatively cool in the Pacific Northwest. Conversely, when the weather is cold in the Pacific Northwest it is comparatively warm in California and the Desert Southwest. Consumers on the West Coast take advantage of seasonal weather differences to share large amounts of power between the Desert Southwest and the Pacific Northwest. In the spring and summer, when generators (mostly hydroelectric plants) generally have surplus power in the Northwest and temperatures climb in the Southwest, power is shipped south to help meet increasing power demand, particularly for air conditioning. Conversely in the winter, when generators in the Southwest generally have surplus power and temperatures drop in the Northwest,

<sup>58</sup>The Pacific Intertie comprises three AC lines and one DC line. Together, these lines comprise the largest single electricity transmission program in the United States. The northern end of the DC line is at the Bonneville Power Administration’s Celilo Converter Station, which is just south of The Dalles Dam about 90 miles east of Portland. The southern end is 846 miles away at the Sylmar Converter Station on the northern outskirts of Los Angeles. That station is operated by utilities including LADWP and Southern California Edison. The AC lines follow generally the same path but terminate in Northern California. Only a few parties actually own the Intertie, but numerous entities have contracts to share its transmission capacity. The California-Oregon border is a dividing line for Intertie ownership and capacity sharing. Depending on seasonal conditions, the Intertie is capable of transmitting up to 7,900 MW—4,800 MW of AC power (1,600 MW of this amount is in the California-Oregon Transmission Project, also known as the Third AC Line) and 3,100 MW of DC power. Over the past five years, the limit has ranged between about 6,300 MW and 7,900 MW. Most of the power transmitted on the Intertie is surplus to regional needs, but some firm power also is transmitted. See <http://www.nwccouncil.org/LIBRARY/2001/2001-11.pdf>.

<sup>59</sup>The third 500 kV line was installed between 2003 and 2004 in order to relieve constraints on the existing north-south transmission lines. This capacity constraint contributed to the California energy crisis in 2000 and 2001. See <http://www.wapa.gov/sn/ops/transmission/path15/factSheet.pdf>.

power is shipped north to meet increasing electricity demand, particularly for heating.

CAISO is charged with operating the high-voltage grid in California. Because CAISO’s service area is basically the entire State of California, it is responsible for serving millions of businesses and households, particularly in the Los Angeles and San Francisco areas. CAISO’s current mission is to ensure the efficient and reliable operation of the power grid, provide fair and open transmission access, promote environmental stewardship, facilitate effective markets, promote infrastructure development and support the timely and accurate dissemination of information. CAISO also is responsible for operating the hourly auctions in which the power is traded, and CAISO publishes the LMP data on its Web site.

#### 1. Material Price Reference Criterion

The Commission’s October 6, 2009, **Federal Register** notice identified the UNP 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 “West Power of Day” package with access to all price data or just current prices plus a selected number of months (*i.e.*, 12, 24, 36 or 48 months) of historical data. This package includes price data for the UNP 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 UNP contract, while not mentioned by name in the ECM Study, might warrant 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 or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.<sup>60</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.

NP-15 is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the NP-15 power market when conducting cash deals. However, ICE’s NP-15 Financial Day-Ahead LMP Off-Peak (“ONP”) 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 UNP contract). Specifically, the ONP contract prices power at the NP-15 trading point based on the simple average of the off-peak hour prices over the contract month, as reported by CAISO. Market participants can use the ONP contract to lock-in electricity prices far into the future. In contrast, the UNP contract is listed for a much shorter length of time; with such a limited timeframe, the forward pricing capability of the UNP contract is much more constrained than the ONP contract. Traders use monthly power contracts like the ONP contract to price electricity commitments in the future. The ONP contract is listed for up to 86 calendar months.) In contrast, the UNP contract is listed for a much shorter length of time (about 10 weeks). 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 UNP contract.

Accordingly, although the NP-15 is a major trading center for electricity and, as noted, ICE sells price information for the UNP contract, the Commission has

<sup>60</sup> 17 CFR Part 36, Appendix A.

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

#### i. Federal Register Comments

WGCEF, EPSA, WPTF, FIEG, EEI and ICE stated that no other contract directly references or settles to the UNP contract's price. Moreover, the commenters argued that the underlying cash price series against which the UNP contract is settled (in this case, the average day-ahead off-peak NP-15 electricity prices on a particular day, which is derived from cash market transactions) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock-in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, while NP-15 is a major power market, traders do not consider the daily average off-peak NP-15 price to be as important as the off-peak electricity price associated with the monthly contract.

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

market participants are buying the ICE data sets because they find the UNP prices have substantial value to them. As noted above, the Commission indicated that publication of the UNP contract's prices is not indirect evidence of routine dissemination. The UNP 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 UNP contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, EEI argued that the ECM Study did not specifically identify the UNP 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

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

#### 2. Material Liquidity Criterion

As noted above, in its October 6, 2009, **Federal Register** notice, the Commission identified material price reference and material liquidity as potentially applicable criteria for SPDC determination of the UNP contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the

Commission will then perform a statistical analysis to measure the effect that changes to the subject contract's prices potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the UNP contract was 1,925 in the second quarter of 2009, resulting in a daily average of 30.1 trades. During the same period, the UNP contract had a total trading volume of 36,936 contracts and an average daily trading volume of 577.1 contracts. Moreover, open interest as of June 30, 2009, was 4,152 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>61</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 19,859 contracts (or 305.5 contracts on a daily basis). In terms of number of transactions, 1,022 trades occurred in the fourth quarter of 2009 (15.7 trades per day). As of December 31, 2009, open interest in the UNP contract was 3,416 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 UNP contract, as characterized by total quarterly volume, indicates that the UNP contract experiences trading activity that is similar to that of thinly-traded futures markets.<sup>62</sup> Thus, the UNP contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.<sup>63</sup>

<sup>61</sup> 74 FR 51264 (October 6, 2009).

<sup>62</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>63</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

### i. Federal Register Comments

ICE and WGCEF stated that the UNP contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, EPSA, FIEG and EEI argued that the UNP contract cannot have a material effect on other contracts, such as those listed for trading by NYMEX, because price linkage and the potential for arbitrage do not exist. Moreover, the DCM contracts do not cash settle to the UNP contract's price. Instead, the DCM contracts and the UNP contract are both cash settled based on physical transactions, which neither the ECM or the DCM contracts can influence.

WGCEF and ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day and noted that the relatively low number of trades per day in the UNP 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>64</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>65</sup> rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, the contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE argued 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

guidepost indicating which contracts are functioning as [SPDCs].<sup>17</sup> 17 CFR 36, Appendix A. For the reasons discussed above, the Commission has found that the UNP 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>64</sup> Guidance, *supra*.

<sup>65</sup> 73 FR 75892 (December 12, 2008).

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>66</sup> It is the Commission's opinion that liquidity, as it pertains to the UNP contract, is typically a function of trading activity in particular lead days and, given sufficient liquidity in such days, the ICE UNP contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the UNP contract does not meet the material price reference criterion, according to the Commission's Guidance, it would be unnecessary to evaluate whether the UNP 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 UNP contract does not meet the material liquidity criterion.

### 3. Overall Conclusion Regarding the UNP Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE UNP 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 UNP 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 UNP contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time

<sup>66</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 6, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 45 percent of all transactions in the UNP contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

regard ICE as a registered entity in connection with its UNP contract.<sup>67</sup> Accordingly, with respect to its UNP 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>68</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>69</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

<sup>67</sup> See 73 FR 75888, 75893 (Dec. 12, 2008).

<sup>68</sup> 44 U.S.C. 3507(d).

<sup>69</sup> 7 U.S.C. 19(a).

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 SDP, SQP, SRP, DNP and UNP 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>70</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>71</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 SP-15 Financial 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 SP-15 Financial 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>72</sup> with respect to the SP-15 Financial 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 SP-15 Financial 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 SP-15 Financial 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.

### *b. Order Relating to the SP-15 Financial Day-Ahead LMP 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 SP-15 Financial Day-Ahead LMP 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>73</sup> with respect to the SP-15 Financial Day-Ahead LMP 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 SP-15 Financial Day-Ahead LMP 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 SP-15 Financial Day-Ahead LMP 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 SP-15 Financial Swap Real Time 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 SP-15 Financial Swap Real Time 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>74</sup> with respect to the SP-15 Financial Swap Real Time 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

<sup>70</sup> 5 U.S.C. 601 *et seq.*

<sup>71</sup> 66 FR 42256, 42268 (Aug. 10, 2001).

<sup>72</sup> 7 U.S.C. 1a(29).

<sup>73</sup> 7 U.S.C. 1a(29).

<sup>74</sup> 7 U.S.C. 1a(29).

prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the SP-15 Financial Swap Real Time 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 SP-15 Financial Swap Real Time 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.

*d. Order Relating to the NP-15 Financial 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 NP-15 Financial 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>75</sup> with respect to the NP-15 Financial 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 NP-15 Financial 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 NP-15 Financial 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.

*e. Order Relating to the NP-15 Financial Day-Ahead LMP 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 NP-15 Financial Day-Ahead LMP 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>76</sup> with respect to the NP-15 Financial Day-Ahead LMP 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 NP-15 Financial Day-Ahead LMP 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 NP-15 Financial Day-Ahead LMP Off-Peak Daily contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption

in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

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

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2010-17736 Filed 7-20-10; 8:45 am]

**BILLING CODE 6351-01-P**

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## **CORPORATION FOR NATIONAL AND COMMUNITY SERVICE**

### **Information Collection; Submission for OMB Review, Comment Request**

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (hereinafter the "Corporation"), has submitted a public information collection request (ICR) entitled Corporation Enrollment and Exit Forms to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995, Public Law 104-13, (44 U.S.C. chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Amy Borgstrom at (202) 606-6930. Individuals who use a telecommunications device for the deaf (TTY-TDD) may call (202) 606-3472 between 8:30 a.m. and 5 p.m. e.t., Monday through Friday.

**ADDRESSES:** Comments may be submitted, identified by the title of the information collection activity, to the Office of Information and Regulatory Affairs, Attn: Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service, by any of the following two methods within 30 days from the date of publication in this **Federal Register**:

- (1) *By fax to:* (202) 395-6974, Attention: Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service; and
- (2) *Electronically by e-mail to:* smar@omb.eop.gov.

**SUPPLEMENTARY INFORMATION:** The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including

<sup>75</sup> 7 U.S.C. 1a(29).

<sup>76</sup> 7 U.S.C. 1a(29).