Department of the Army Research, Development, and Engineering Command.

NSN: 7510–00–272–9804—Envelope, Transparent.

NPA: Bestwork Industries for the Blind, Inc., Runnemede, NJ.

Contracting Activity: Federal Acquisition Service, GSA/FSS OFC SUP CTR—Paper Products, New York, NY.

Coverage: B—List for the Broad Government Requirement as aggregated by the General Services Administration.

Service

Service Type/Location: Janitorial, Customs and Border Protection, B.P. Sector Maintenance, 398 E. Aurora Drive, El Centro, CA.

NPA: ARC–Imperial Valley, El Centro, CA.

Contracting Activity: Bureau of Customs and Border Protection, Office of Procurement, Washington, DC.

Deletions

On 5/7/2010 (75 FR 25210–25211), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. The action may result in authorizing small entities to furnish the services to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services deleted from the Procurement List.

End of Certification

Accordingly, the following services are deleted from the Procurement List:

Services

Service/Location: Medical Transcription, Veterans Affairs Medical Center, 7305 N. Military Trail, West Palm Beach, FL.

NPA: Gulfstream Goodwill Industries, Inc., West Palm Beach, FL.

Contracting Activity: Department of Veterans Affairs, Nac, Hines, IL.

Service Type/Location: Janitorial/Custodial, Fort McPherson: U.S. Army Health Clinic, Buildings 100, 101, 105, 162, 163, 165, 170, 170A and 170B, Fort McPherson, GA.

NPA: WORKTEC, Jonesboro, GA.

Contracting Activity: Dept of the Army, XR W40M NATL REGION CONTRACT OFC, Washington, DC.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2010–16103 Filed 7–1–10; 8:45 am]

BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Orders Finding That the Mid-C Financial Peak Contract and Mid-C Financial Off-Peak Contract, Offered for Trading on the IntercontinentalExchange, Inc., Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final orders.

SUMMARY: On October 6, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Mid-C [2] Financial Peak ("MDC") contract and Mid-C Financial Off-Peak ("OMC") contract,[3] which are listed for trading on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), perform a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue orders finding that the MDC and OMC contracts perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

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

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

SUPPLEMENTARY INFORMATION:

I. Introduction

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

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

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

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

[3] The **Federal Register** notice also requested comment on the Mid-C Financial Peak Daily ("MPD") contract and Mid-C Financial Off-Peak Daily ("MXO") contract. Those contracts will be reviewed in a separate **Federal Register** release.

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

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

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

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

II. Notice of Intent To Undertake SPDC Determination

On October 6, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the MDC and OMC contracts[9] perform a significant price discovery function and requested comment from interested parties.[10] Comments were received from the Federal Energy Regulatory Commission ("FERC"), Financial Institutions Energy Group ("FIEG"), Working Group of Commercial Energy Firms ("WGCEF"), Edison Electric Institute ("EEI"), ICE, Western Power Trading Forum ("WPTF") and Public Utility Commission of Texas ("PUCT").[11] The comment letters from FERC[12] and PUCT did not directly address the issue of whether or not the subject contracts are SPDCs. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the MDC and OMC 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.[13] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the

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

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

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

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

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

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

[13] In its October 6, 2009, **Federal Register** release, the Commission identified material price reference and material liquidity as the possible criteria for SPDC determination of the MDC and OMC 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.

Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[14] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

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

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

The MDC contract is cash settled based on the arithmetic average of the peak, day-ahead power price indicies that are reported each day in the specified contract month. The daily price indicies are published by ICE in its "ICE Day Ahead Power Price Report," which is available on the ECM's website. The peak-hour electricity price index on a particular day is calculated as the volume-weighted average of qualifying, day-ahead, peak-hour power transactions at the Mid-Columbia hub that are traded on the ICE platform from 6 a.m. to 11 a.m. CST on the publication date. The ICE transactions on which the daily price index is based specify the physical delivery of power. The size of the MDC contract is 400 megawatt hours ("MWh"), and the MDC contract is listed for 86 months.

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

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

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

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

1. Material Price Reference Criterion

The Commission's October 6, 2009, **Federal Register** notice identified material price reference and material liquidity as the potential basis for a SPDC determination with respect to the MDC 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 MDC 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 MDC contract, while not mentioned by name in the ECM Study, might warrant further review.

The Commission explains in its Guidance to the Part 36 rules that in evaluating a contract under the material price reference criterion, it will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[18] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices

[14] 17 CFR Part 36, Appendix A.

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

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

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

[18] 17 CFR Part 36, Appendix A.

generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The Mid-C power market is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the Mid-C power market when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of power at the Mid-C hub when entering into cash market transaction for electricity, especially those trades providing for physical delivery in the future. Traders use the ICE MDC contract, as well as other ICE power contracts, to hedge cash market positions and transactions—activities which enhance the MDC contract's price discovery utility. The substantial volume of trading and open interest in the MDC contract appears to attest to its use for this purpose. While the MDC contract's settlement prices may not be the only factor influencing spot and forward transactions, electricity traders consider the ICE price to be a critical factor in conducting OTC transactions.[19] Accordingly, the MDC contract satisfies the direct price reference test.

The direct price reference finding also is supported by the uniqueness of the ICE electricity prices for the Mid-C market. Day-ahead and real-time electricity prices are reported by a number of sources, including third-party price providers (*e.g.,* Dow Jones & Company). ICE's Mid-C price indices are unique in that they are derived from transactions completed on ICE's electronic system. Moreover, ICE is the only entity that has access to such transaction data. Thus, it is not possible for any other firm to replicate ICE's indices.[20]

The fact that ICE's MDC monthly contract is used more widely as a source of pricing information rather than the daily contract (*i.e.,* the MPD contract)[21] bolsters the finding of direct price reference. In this regard, the MDC contract prices power at the Mid-C up to 86 calendar months in the future. Thus, market participants can use the MDC contract to lock-in electricity prices far into the future. Traders use monthly power contracts like the MDC contract to price future power electricity commitments, where such commitments are based on long range forecasts of power supply and demand. In contrast, the MPD contract is listed for a much shorter length of time—up to 38 days in the future. As generation and usage nears, market participants have a better understanding of actual power supply and needs. As a result, they can modify previously-established hedges with daily contracts, like the MPD contract.

The Commission notes that the Mid-C is a major trading point for electricity, and the MDC contract's prices are well regarded in the industry as indicative of the value of power at the Mid-C hub. Accordingly, Commission staff believes that it is reasonable to conclude that market participants purchase the data packages that include the MDC contract's prices in substantial part because the MDC contract prices have particular value to them. Moreover, such prices are consulted on a frequent and recurring basis by industry participants in pricing cash market transactions. In light of the above, the MDC contract meets the indirect price reference test.

i. **Federal Register** Comments

WGCEF, WPTF, EEI and ICE stated that no other contract directly references or settles to the MDC contract's price. Moreover, the commenters argued that the underlying cash price series against which the MDC contract is settled (in this case, the average of peak-hour Mid-C electricity prices over the contract month, which are derived from physical transactions) is the authentic reference price and not the ICE contract itself. Commission staff believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements.

As noted above, the Mid-C hub is a major trading center for electricity in the western United States. Traders, including producers, keep abreast of the prices of the MDC contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of electricity at the Mid-C hub when entering into cash market transaction for power, especially those trades that provide for physical delivery in the future. Traders use the ICE MDC contract to hedge cash market positions and transactions, which enhances the MDC contract's price discovery utility. While the MDC contract's settlement prices may not be the only factor influencing spot and forward transactions, natural gas traders consider the ICE price to be a crucial factor in conducting OTC transactions.

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

[19] In addition to referencing ICE prices, firms participating in the Mid-C power market may rely on other cash market quotes as well as industry publications and price indices that are published by third-party price reporting firms in entering into power transactions.

[20] In contrast, third-party price reporting firms typically compute their power index prices from transaction information that is voluntarily submitted by traders. It is possible that one trader could submit the same transaction data to multiple price reporting firms, whereby increasing the likelihood that price indices from different firms are similar in value. However, it is more plausible that the third-party price reporters' price indices would be similar but not exactly the same because different traders are polled.

[21] The MPD contract is cash settled based on the peak, day-ahead price index for the specified day, as published by ICE in its "ICE Day Ahead Power Price Report," which is available on the ECM's website. The daily peak-hour electricity price index is a volume-weighted average of qualifying, day-ahead, peak-hour power contracts at the Mid-Columbia hub that are traded on the ICE platform from 6 a.m. to 11 a.m. CST on the publication date.

concluded that traders likely purchase the ICE data packages specifically for the MDC contract's prices and consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, EEI observed that the ECM Study did not specifically identify the MDC contract as a contract that is referred to by market participants on a frequent and recurring basis. The Commission 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, and did not 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 MDC contract meets the material price reference criterion because cash market transactions are priced either explicitly or implicitly on a frequent and recurring basis at a differential to the MDC contract's price (direct evidence). Moreover, the MDC contract's price data are sold to market participants, and those individuals likely purchase the ICE data packages specifically for the MDC contract's prices and consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Material Liquidity Criterion

As noted above, in its October 6, 2009, **Federal Register** notice, the Commission identified material price reference and material liquidity as potential criteria for SPDC determination of the MDC 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.[22]

The total number of transactions executed on ICE's electronic platform in the MDC contract was 2,022 in the second quarter of 2009, resulting in a daily average of 31.6 trades. During the same period, the MDC contract had a total trading volume of 67,400 contracts and an average daily trading volume of 1,053.1 contracts. Moreover, open interest as of June 30, 2009, was 169,851 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.[23]

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 142,700 contracts (or 2,195 contracts on a daily basis). In terms of number of transactions, 2,975 trades occurred in the fourth quarter of 2009 (46 trades per day). As of December 31, 2009, open interest in the MDC contract was 221,608 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.

Trading activity in the MDC contract, as characterized by total quarterly volume, indicates that the MDC contract experiences trading activity that is significantly greater than that of minor futures markets.[24] Thus, it is reasonable to infer that the MDC contract could have a material effect on other ECM contracts or on DCM contracts.

To measure the potential effect of the MDC contract on another ECM contract staff performed a statistical analysis[25] using daily settlement prices between July 1, 2008, and December 31, 2009, for the ICE MDC and OMC contracts. The simulation suggests that, on average over the sample period, a one percent rise in the MDC contract's price elicited a 1.09 percent increase in ICE OMC contract's price.

i. **Federal Register** Comments

ICE and WGCEF stated that the MDC contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, FEIG and EEI argued that the MDC contract cannot have a material effect on other contracts, such as those listed for trading by the New York Mercantile Exchange ("NYMEX"), a DCM. The commenters pointed out that it is not possible for the MDC contract to affect a DCM contract because price linkage and the potential for arbitrage do not exist. The DCM contracts do not cash settle based on the MDC contract's price. Instead, the DCM contracts and the MDC contract are both cash settled based on physical transactions, which the ECM and DCM contracts cannot influence. The Commission's statistical analysis shows that changes in the ICE MDC contract's price significantly influences the prices of other ECM contracts (namely, the OMC contract).

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 MDC 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."[26]

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

[22] As noted above, the material liquidity criterion speaks to the effect that transactions in the potential SPDC may have on trading in "agreements, contracts and transactions listed for trading on or subject to the rules of a designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act."

[23] 74 FR 51261 (October 6, 2009).

[24] 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.

[25] Specifically, Commission staff econometrically estimated a cointegrated vector autoregression (CVAR) model using daily settlement prices. CVAR methods permit a dichotomization of the data relationships into long-run equilibrium components (called the cointegration space or cointegrating relationships) and a short-run component. A CVAR model was chosen over the more traditional vector autoregression model in levels because the statistical properties of the data (lack of stationarity and ergodicity) precluded the more traditional modeling treatment. Moreover, the statistical properties of the data necessitated the modeling of the contracts' prices as a CVAR model containing both first differences (to handle stationarity) and an error-correction term to capture long run equilibrium relationships. The prices were treated as a single reduced-form model in order to test hypothesis that power prices in the same market affect each other. The prices of ICE's MDC and OMC contracts are positively related to each other in a cointegrating relationship and display a high level of statistical strength. On average during the sample period, each percentage rise in MDC contract's price elicited a 1.09 percent rise in OMC contract's price.

[26] Guidance, *supra.*

requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs" [27] 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, 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." [28] It is the Commission's opinion that liquidity, as it pertains to the MDC contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE MDC contract itself would be considered liquid.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission finds that the MDC meets the material liquidity criterion. Specifically, there is sufficient trading activity in the MDC contract to have a material effect on "other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market * * * or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act."

3. Overall Conclusion Regarding the MDC Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the MDC contract performs a significant price discovery function under two of the four criteria established in section 2(h)(7) of the CEA. The Commission has concluded that the MDC contract meets both the material price reference and material liquidity criteria. Accordingly, the Commission is issuing the attached Order declaring that the MDC contract is a SPDC.

Issuance of this Order signals the immediate effectiveness of the Commission's authorities with respect to ICE as a registered entity in connection with its MDC contract,[29] and triggers the obligations, requirements—both procedural and substantive—and timetables prescribed in Commission rule 36.3(c)(4) for ECMs.

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

The OMC contract is cash settled based on the arithmetic average of the off-peak, day-ahead power price indices that are reported each day in the specified contract month. The daily price indices are published by ICE in its "ICE Day Ahead Power Price Report," which is available on the ECM's website. The off-peak hour electricity price index on a particular day is calculated as the volume-weighted average of qualifying, day-ahead, off-peak hour power transactions at the Mid-Columbia hub that are traded on the ICE platform from 6 a.m. to 11 a.m. CST on the publication date. The ICE transactions on which the price index is based specify the physical delivery of power. The size of the OMC contract is 25 MWh, and the OMC contract is listed for 86 months.

As the Columbia River flows through Washington State, it encounters two federal and nine privately-owned hydroelectric dams that generate close to 20,000 MW of power in the Northwest.[30] With another three dams in British Columbia, Canada, and many more on its various tributaries, the Columbia River is the largest power-producing river in North America. A major goal of the participants in the Mid-C electricity market is to maximize the Columbia River's potential, along with protecting and enhancing the non-power uses of the river. The reliability of the electricity grid in the Northwest is coordinated by the NWPP.

One stretch of the Columbia River between the Grand Coulee Dam and Priests Rapids Dam is governed by the MCHCA. The MCHCA includes seven dams [31] and nearly 13,000 MW of generation. Specifically, the agreement defines how the Chelan, Douglas and Grant PUDs coordinate their operations with the Bonneville Power Administration to maximize power generation while reducing fluctuations in the river's flow. A number of other utilities that buy power from the PUDs have also signed onto the agreement. The MCHCA agreement was signed into effect in 1972 and renewed in 1997 for 20 years.[32]

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

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

[27] 73 FR 75892 (December 12, 2008).

[28] 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 included 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. 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 54 percent of all transactions in the MDC contract. The 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.

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

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

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

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

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 OMC 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 OMC 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 OMC contract, while not mentioned by name in the ECM Study, might warrant further review.

The Commission explains in its Guidance to the Part 36 rules that in evaluating a contract under the material price reference criterion, it will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[33] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The Mid-C power market is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the Mid-C power market when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of power at the Mid-C hub when entering into cash market transaction for electricity, especially those trades providing for physical delivery in the future. Traders use the ICE OMC contract, as well as other ICE power contracts, to hedge cash market positions and transactions—activities which enhance the OMC contract's price discovery utility. The substantial volume of trading and open interest in the OMC contract appears to attest to its use for this purpose. While the OMC contract's settlement prices may not be the only factor influencing spot and forward transactions, power traders consider the ICE price to be a critical factor in conducting OTC transactions.[34] As a result, the OMC contract satisfies the direct price reference test.

Another reason that bolsters the direct price reference claim is related to the uniqueness of the ICE electricity prices for the Mid-C market. Day-ahead and real-time electricity prices are reported by a number of sources, including third-party price providers (*e.g.,* Dow Jones & Company). ICE's Mid-C price indices are unique in that they are derived from transactions completed on ICE's electronic system. Moreover, ICE is the only entity that has access to such transaction data. Thus, it is not possible for any other firm to replicate ICE's indices.[35]

The fact that ICE's OMC contract is used more widely as a source of pricing information rather than the daily contract (*i.e.,* the MXO contract)[36] reinforces the argument for direct price reference. In this regard, the OMC contract is a monthly contact that prices power at the Mid-C up to 86 calendar months in the future. Thus, market participants can use the OMC contract to lock-in electricity prices far into the future. In contrast, the MXO contract is listed for a much shorter length of time—up to 70 days in the future. Traders use monthly power contracts like the OMC contract to price future power electricity commitments, 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 generation capacity actual power needs. As a result, they can modify previously-established hedges with daily contracts, like the MXO contract.

The Commission notes that the Mid-C is a major trading point for electricity, and the OMC contract's prices are well regarded in the industry as indicative of the value of power at the Mid-C hub. Accordingly, Commission staff believes that it is reasonable to conclude that market participants purchase the data packages that include the OMC contract's prices in substantial part because the OMC contract prices have particular value to them. Moreover, such prices are consulted on a frequent and recurring basis by industry participants in pricing cash market transactions. In light of the above, the OMC contract meets the indirect price reference test.

i. **Federal Register** Comments

WGCEF, WPTF, EEI and ICE stated that no other contract directly references or settles to the OMC contract's price. Moreover, the commenters argued that the underlying cash price series against which the OMC contract is settled (in this case, the average of peak Mid-C electricity prices over the contract month, which are derived from cash market transactions) is the authentic reference price and not the ICE contract itself. Commission staff believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and

[33] 17 CFR Part 36, Appendix A.

[34] In addition to referencing ICE prices, firms participating in the Mid-C power market may rely on other cash market quotes as well as industry publications and price indices that are published by third-party price reporting firms in entering into power transactions.

[35] In contrast, third-party price reporting firms typically compute their power index prices from transaction information that is voluntarily submitted by traders. It is possible that one trader could submit the same transaction data to multiple price reporting firms, whereby increasing the likelihood that price indices from different firms are similar in value. However, it is more plausible that the third-party price reporters' price indices would be similar but not exactly the same because different traders are polled.

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

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, the Mid-C hub is a major trading center for electricity in the western United States. Traders, including producers, keep abreast of the prices of the OMC contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of electricity at the Mid-C hub when entering into cash market transaction for power, especially those trades that provide for physical delivery in the future. Traders use the ICE OMC contract to hedge cash market positions and transactions, which enhances the OMC contract's price discovery utility. While the OMC contract's settlement prices may not be the only factor influencing spot and forward transactions, power traders consider the ICE price to be a crucial factor in conducting OTC transactions.

In addition, WGCEF stated that the publication of price data for the OMC contract price is weak justification for material price reference. This commenter argued that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the OMC contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the OMC prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the OMC prices have substantial value to them. As noted above, the Commission notes that publication of the OMC contract's prices is indirect evidence of routine dissemination. The OMC contract's prices, while sold as a package, are of particular interest to market participants. Thus, the Commission has concluded that traders likely specifically purchase the ICE data packages for the OMC contract's prices and 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 OMC 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 OMC contract meets the material price reference criterion because cash market transactions are priced either explicitly or implicitly on a frequent and recurring basis at a differential to the OMC contract's price (direct evidence). Moreover, the OMC contract's price data are sold to market participants, and those individuals likely purchase the ICE data packages specifically for the OMC contract's prices and consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Material Liquidity Criterion

In its October 6, 2009, **Federal Register** notice, the Commission identified material price reference and material liquidity as potential criteria for SPDC determination of the OMC 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.[37]

The total number of transactions executed on ICE's electronic platform in the OMC contract was 443 in the second quarter of 2009, resulting in a daily average of 6.9 trades. During the same period, the OMC contract had a total trading volume of 185,950 contracts and an average daily trading volume of 2,905.5 contracts. Moreover, open interest as of June 30, 2009, was 1,105,361 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.[38]

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 213,862 contracts (or 3,290 contracts on a daily basis). In terms of number of transactions, 327 trades occurred in the fourth quarter of 2009 (5 trades per day). As of December 31, 2009, open interest in the OMC contract was 1,249,165 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 relatively low between the second and fourth quarters of 2009. However, trading activity in the OMC contract, as characterized by total quarterly volume, indicates that the MDC contract experiences trading activity that is greater than that of minor futures markets.[39] Thus, it is reasonable to infer that the OMC contract could have a material effect on other ECM contracts or on DCM contracts.

To measure the effect that the OMC contract potentially could have on another ECM contract, staff performed a statistical analysis[40] using daily settlement prices between July 1, 2008, and December 31, 2009, for the ICE OMC and MDC contracts. The simulation suggests that, on average over the sample period, a one percent

[37] As noted above, the material liquidity criterion speaks to the effect that transactions in the potential SPDC may have on trading in "agreements, contracts and transactions listed for trading on or subject to the rules of a designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act."

[38] 74 FR 51261 (October 6, 2009).

[39] 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.

[40] Specifically, Commission staff econometrically estimated a cointegrated vector autoregression (CVAR) model using daily settlement prices. CVAR methods permit a dichotomization of the data relationships into long-run equilibrium components (called the cointegration space or cointegrating relationships) and a short-run component. A CVAR model was chosen over the more traditional vector autoregression model in levels because the statistical properties of the data (lack of stationarity and ergodicity) precluded the more traditional modeling treatment. Moreover, the statistical properties of the data necessitated the modeling of contracts' prices as a CVAR model containing both first differences (to handle stationarity) and an error correction term to capture long run equilibrium relationships. The prices were treated as a single reduced-form model in order to test hypothesis that power prices in the same market affect each other. The prices of ICE's OMC and MDC contracts are positively related to each other in a cointegrating relationship and display a high level of statistical strength. On average during the sample period, each percentage rise in OMC contract's price elicited a 0.915 percent rise in MDC contract's price.

rise in the OMC contract's price elicited a 0.915 percent increase in ICE MDC contract's price.

i. **Federal Register** Comments

ICE and WGCEF stated that the OMC contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, FEIG and EEI argued that the OMC 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 OMC contract to affect a DCM contract because price linkage and the potential for arbitrage do not exist. The DCM contracts do not cash settle to the OMC contract's price. Instead, the DCM contracts and the OMC contract are both cash settled based on physical transactions, which the ECM and DCM contracts cannot influence. The Commission's statistical analysis shows that changes in the ICE OMC contract's price significantly influence the prices of other ECM contracts (namely, the MDC contract).

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 OMC contract did not meet this standard of liquidity. While a continuous stream of prices would indeed be an indication of liquidity for certain markets, 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." [41]

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" [42] 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 also 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.[43] It is the Commission's opinion that liquidity, as it pertains to the OMC contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE OMC contract itself would be considered liquid.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission finds that the OMC meets the material liquidity criterion. Specifically, there is sufficient trading activity in the OMC contract to have a material effect on "other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market * * * or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act" (that is, an ECM).

3. Overall Conclusion Regarding the OMC Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the OMC contract performs a significant price discovery function under two of the four criteria established in section 2(h)(7) of the CEA. The Commission has concluded that the OMC contract meets both the material price reference and material liquidity criteria. Accordingly, the Commission is issuing the attached Order declaring that the OMC contract is a SPDC.

Issuance of this Order signals the immediate effectiveness of the Commission's authorities with respect to ICE as a registered entity in connection with its OMC contract,[44] and triggers the obligations, requirements—both procedural and substantive—and timetables prescribed in Commission rule 36.3(c)(4) for ECMs.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") [45] 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 [46] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to

[41] Guidance, *supra*.

[42] 73 FR 75892 (December 12, 2008).

[43] 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 82 percent of all transactions in the OMC contract. Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

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

[45] 44 U.S.C. 3507(d).

[46] 7 U.S.C. 19(a).

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

c. Regulatory Flexibility Act

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

VI. Orders

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

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

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

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

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

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

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

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

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

David A. Stawick,

Secretary of the Commission.

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

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

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

AGENCY: Commodity Futures Trading Commission.

ACTION: Final orders.

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

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

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

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

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

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

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

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

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

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

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

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