Act, hereby determines that the SP–15 Financial Day-Ahead LMP Peak contract, traded on the IntercontinentalExchange, Inc., satisfies the material price preference and material liquidity criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the SP–15 Financial Day-Ahead LMP 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 [45] with respect to the SP–15 Financial Day-Ahead LMP Peak contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities.

Further with respect to the SP–15 Financial Day-Ahead LMP Peak contract, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.[46]

b. Order Relating to the SP–15 Financial Day-Ahead LMP 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 SP–15 Financial Day-Ahead LMP 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 SP–15 Financial Day-Ahead LMP 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 [47] with respect to the SP–15 Financial Day-Ahead LMP Off-Peak contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities.

Further with respect to the SP–15 Financial Day-Ahead LMP Off-Peak contract, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.[48]

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

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–17747 Filed 7–20–10; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Orders Finding That the PJM WH Real Time Peak Contract and PJM WH Real Time 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 26, 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 PJM [2] WH [3] Real Time Peak ("PJM") contract and PJM WH Real Time Off-Peak ("OPJ") contract,[4] 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 PJM and OPJ 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:* July 9, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. *Telephone:* (202) 418–5515. *E-mail:* gprice@cftc.gov; 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") [5] 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.[6] 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.[7] As relevant here, rule 36.3

[45] 7 U.S.C. 1a(29).

[46] 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).

[47] 7 U.S.C. 1a(29).

[48] 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 54966 (October 26, 2009).

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

[3] The acronym "WH" signifies the PJM's Western Hub.

[4] The **Federal Register** notice also requested comment on the PJM WH Real Time Peak Daily ("PDP") contract, PJM WH Day Ahead LMP Peak Daily ("PDA") contract and PJM WH Real Time Off-Peak Daily ("ODP") contract. Those contracts will be addressed in a separate **Federal Register** release.

[5] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law No. 110–246, 122 Stat. 1624 (June 18, 2008).

[6] 7 U.S.C. 1a(29).

[7] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

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.[8] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[9]

II. Notice of Intent To Undertake SPDC Determination

On October 26, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the PJM and OPJ contracts [10] perform a significant price discovery function and requested comment from interested parties.[11] Comments were received from PJM Interconnection, Federal Energy Regulatory Commission ("FERC"), Electric Power Supply Association ("EPSA"), Financial Institutions Energy Group ("FIEG"), Edison Electric Institute ("EEI"), ICE and Public Utility Commission of Texas ("PUCT").[12] The comment letters from PJM Interconnection,[13] FERC[14] and PUCT did not directly address the issue of whether or not the subject contracts are SPDCs. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the subject contracts and generally expressed the opinion that the contracts are not SPDCs because they do not meet the material price reference or material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

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

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

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by 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

[8] 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).

[9] 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.

[10] As noted above, the **Federal Register** notice also requested comment on the PJM WH Real Time Peak Daily ("PDP") contract, PJM WH Day Ahead LMP Peak Daily ("PDA") contract and PJM WH Real Time Off-Peak Daily ("ODP") contract. Those contracts will be addressed in a separate **Federal Register** release.

[11] 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.

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

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

[14] 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."

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.[15] 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.[16] 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 PJM and OPJ contracts are discussed separately below.

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

The PJM contract is cash settled based on the arithmetic average of peak-hour, real-time locational marginal prices ("LMPs") [17] published by PJM Interconnection for its Western Hub for all peak hours during the contract month. The hourly LMPs are derived from power trades that result in physical delivery. The size of the PJM contract is 800 megawatt hours ("MWh"), and the PJM contract is listed for 110 calendar months.

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

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

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

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

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

1. Material Price Reference Criterion

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

[15] In its October 26, 2009, **Federal Register** release, the Commission identified material price reference and material liquidity as the possible criteria for SPDC determination of the PJM and OPJ 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.

[16] 17 CFR 36, Appendix A.

[17] 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.

[18] *http://www.ferc.gov/market-oversight/mkt-electric/pjm.asp.*

[19] *http://www.ferc.gov/market-oversight/mkt-electric/pjm/2010/05-2010-elec-pjm-archive.pdf.*

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

The PJM Western hub is a major pricing center for electricity in the eastern portion of the United States. Traders, including producers, keep abreast of the electricity prices at PJM's Western Hub when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of power at the Western Hub when entering into cash market transaction for electricity, especially those trades providing for physical delivery in the future. Furthermore, power prices in other neighboring markets, such as New York ISO's Zone A (Western New York), Zone G (Hudson Valley region) and Zone J (New York City) as well as Midwest ISO's Cinergy hub are typically based implicitly relative to the prices reported for PJM Interconnection's Western hub. Traders use the ICE PJM contract, as well as other ICE power contracts, to hedge cash market positions and transactions—activities which enhance the PJM contract's price discovery utility. The substantial volume of trading and open interest in the PJM contract appears to attest to its use for this purpose. While the PJM 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.[21] In these circumstances, the PJM contract satisfies the direct price reference test.

The fact that ICE's PJM monthly contract is used more widely as a source of pricing information than the daily contract (*i.e.,* the "PDP" contract)[22] bolsters the argument that it serves as a direct price reference. In this regard, PJM contract prices power at the Western hub up to almost ten years into the future. Thus, market participants can use the PJM contract to lock in electricity prices far into the future. Traders use monthly power contracts like the PJM contract to price future power electricity commitments, where such commitments are based on long-range forecasts of power supply and demand. In contrast, the PDP 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 PDP contract.

The Commission notes that the Western hub is a major trading point for electricity, and that the PJM contract's prices are well regarded in the industry as indicative of the value of power at the Western hub. Accordingly, the Commission believes that it is reasonable to conclude that market participants purchase the data packages that include the PJM contract's prices in substantial part because the PJM contract's 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 PJM contract also meets the indirect price reference test.

The New York Mercantile Exchange ("NYMEX") lists a futures contract on its ClearPort platform— the PJM Western Hub Peak Calendar-Month Real-Time LMP Swap futures contract —that is comparable to the ICE PJM contract. However, unlike the ICE contract, none of the trades in the NYMEX version are executed in NYMEX's centralized marketplace; instead, all of the transactions originate as bilateral swaps that are submitted to NYMEX for clearing. The daily settlement prices of NYMEX's monthly, peak-hour Western hub contract are influenced, in part, by the daily settlement prices of the ICE PJM contract. NYMEX determines the daily settlement prices for its power contracts through a survey of cash market voice brokers. Voice brokers, in turn, refer to the ICE PJM price, among other information, as an important indicator as to where the market is trading. In this manner, the ICE PJM price influences the settlement price for the NYMEX monthly, peak-hour Western hub power contract. This conclusion is supported by an analysis of the daily settlement prices for the PJM contract and the NYMEX equivalent which indicates that 81 percent of the daily settlement prices[23] for the NYMEX version of the contract are within one standard deviation of the PJM contract's price settlement prices.

i. ***Federal Register*** *Comments:*

EPSA, FIEG, EEI and ICE stated that no other contract directly references or settles to the PJM contract's price. Moreover, the commenters argued that the underlying cash price series against which the PJM contract is settled[24] is the authentic reference price and not the ICE contract itself. Commission staff believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult [the derivatives contract] on a frequent and recurring basis" when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements.

As noted above, PJM's Western hub is a major trading center for electricity in the eastern United States. Traders, including producers, keep abreast of the prices of the PJM contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of electricity at the Western hub when entering into cash market transaction for power, especially those trades that provide for physical delivery in the future. Traders use the ICE PJM

[20] 17 CFR 36, Appendix A.

[21] In addition to referencing ICE prices, firms participating in PJM's Western hub 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.

[22] The PDP contract is cash settled based on the arithmetic average of peak-hour, real-time LMPs posted by PJM for the Western hub for all peak hours on the day of generation. The LMPs are derived from power trades that result in physical delivery. The size of the SDP contract is 800 MWh, and the PDP contract is listed for 38 consecutive calendar days.

[23] The price data covered the period December 2008 through December 2009.

[24] In this case, the average of the real-time peak-hour Western hub electricity prices over the contract month, which are derived from cash market transactions.

contract to hedge cash market positions and transactions, which enhances the PJM contract's price discovery utility. While the PJM 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, EPSA stated that the publication of price data for the PJM contract price is a weak justification for material price reference because market participants generally do not purchase ICE data sets for one contract's prices, such as those for the PJM contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the PJM prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the PJM prices have substantial value. As noted above, the Commission recognizes that publication of the PJM contract's prices is indirect evidence of routine dissemination. Thus, the Commission has concluded that traders likely purchase the ICE data packages specifically for the PJM contract's prices and consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, ICE and EEI criticized the ECM Study since it did not specifically identify the PJM 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 PJM 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 PJM contract's price (direct evidence). Moreover, the PJM contract's price data are sold to market participants, and those individuals likely purchase the ICE data packages specifically for the PJM 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 26, 2009, **Federal Register** notice, the Commission identified the PJM contract as a potential SPDC based on the material price reference and material liquidity 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 Commission's Guidance to the statutory criteria (Appendix A to Part 36) notes that "[t]raditionally, objective measures of trading such as volume or open interest have been used as measures of liquidity." In this regard, the total number of transactions executed on ICE's electronic platform in the PJM contract was 7,990 in the second quarter of 2009, resulting in a daily average of 124.8 trades. During the same period, the PJM contract had a total trading volume of 268,489 contracts and an average daily trading volume of 4,195.1 contracts. Moreover, open interest as of June 30, 2009, was 318,788 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.[25]

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 371,885 contracts (or 5,721.3 contracts on a daily basis). In terms of number of transactions, 9,913 trades occurred in the fourth quarter of 2009 (152.5 trades per day). As of December 31, 2009, open interest in the PJM contract was 344,754 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 during the period between the second and fourth quarters of 2009. In addition, trading activity in the PJM contract, as characterized by total quarterly volume, indicates that the PJM contract experiences trading activity that is greater than that of thinly-traded futures markets.[26] Thus, it is reasonable to infer that the PJM contract could have a material effect on other ECM contracts or on DCM contracts.

To measure the effect that the PJM contract potentially could have on another ECM contract staff performed a statistical analysis[27] using daily settlement prices (between July 1, 2008 and December 31, 2009) for the ICE PJM and OPJ contracts. The simulation suggest that, on average over the sample period, a one percent rise in the PJM contract's price elicited a 2.15 percent increase in ICE OPJ contract's price.

*i. **Federal Register** Comments:*

ICE stated that the PJM contract lacks a sufficient number of trades to meet the material liquidity criterion. Along with EPSA and EEI, ICE argued that the PJM contract cannot have a material effect on DCM contracts or other ECM contracts because these other contracts do not cash settle to the PJM contract's price. Instead, the DCM contracts and the PJM contract are both cash settled based on physical transactions, which neither the ECM or the DCM contracts can influence. The Commission's statistical analysis shows that changes in the ICE PJM contract's price significantly influences the prices of other ECM contracts (namely, the OPJ contract). In this regard, a one-percent rise in the PJM contract's price leads to a 2.15 percent rise in OPJ contract's price.

[25] 74 FR 54966 (October 26, 2009).

[26] 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.

[27] 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 PJM and OPJ 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 PJM contract's price elicited a 2.15 percent rise in OPJ contract's price.

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 PJM 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." [28]

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" [29] 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." [30] It is the Commission's opinion that liquidity, as it pertains to the PJM contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE PJM contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the PJM contract, and thus, the Commission believes that it applied the statistical data cited above in an appropriate manner for gauging material liquidity.

ii. Conclusion Regarding Material Liquidity:

For the reasons discussed above, the Commission finds that the PJM contract meets the material liquidity criterion. Specifically, there is sufficient trading activity in the PJM 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 PJM Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE PJM contract performs a significant price discovery function under two of the four criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the PJM contract meets the material price reference and material liquidity criteria at this time. Accordingly, the Commission is issuing the attached Order declaring that the PJM 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 PJM contract,[31] and triggers the obligations, requirements—both procedural and substantive—and timetables prescribed in Commission rule 36.3(c)(4) for ECMs.

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

The OPJ contract is cash settled based on the arithmetic average of off-peak hour, real-time LMPs published by PJM Interconnection for its Western Hub for all off-peak hours during the contract month. The hourly LMPs are derived from power trades that result in physical delivery. The size of the OPJ contract is 50 MWh, and the OPJ contract is listed for up to 86 calendar months.

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

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

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

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

Electricity is priced at individual points along the transmission network

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[28] Guidance, *supra.*

[29] 73 FR 75892 (December 12, 2008).

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

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

called nodes. An electric grid has many interconnections or buses. RTOs group certain buses together to form hubs for pricing and trading purposes, and these hubs do not necessarily follow along state lines or geographic boundaries. Power also is priced at the hub level and serves as a basis for trading electricity. PJM Interconnnection has 11 hubs, including AEP GEN, AEP–Dayton, Chicago GEN, Chicago, Dominion, Eastern, Northern Illinois, New Jersey, Ohio, West INT and Western Hub.[32] The Western Hub is a basket of 109 buses that stretch all the way from Erie, PA, to Washington, DC.[33]

1. Material Price Reference Criterion

The Commission's October 26, 2009, **Federal Register** notice identified the OJP contract as a potential SPDC based on the material price reference and material liquidity criteria. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "East Power of Day"package with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. This package includes price data for the OPJ 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 OPJ 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.[34] 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.

PJM's Western hub is a major pricing center for electricity in the eastern portion of the United States. Traders, including producers, keep abreast of the electricity prices at PJM's Western hub when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of power at the Western hub when entering into cash market transactions for electricity, especially those trades providing for physical delivery in the future. Furthermore, power prices in other neighboring markets, such as New York ISO's Zone A (Western New York), Zone G (Hudson Valley region) and Zone J (New York City) as well as Midwest ISO's Cinergy hub, are typically based implicitly relative to the prices reported for PJM Interconnection's Western hub. Traders use the ICE OPJ contract, as well as other ICE power contracts, to hedge cash market positions and transactions—activities which enhance the OPJ contract's price discovery utility. The substantial volume of trading and open interest in the OPJ contract appears to attest to its use for this purpose. While the OPJ 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.[35] As a result, the OPJ contract satisfies the direct price reference test.

The fact that ICE's OPJ monthly contract is used widely as a source of pricing information is further evidence of direct price reference. In this regard, OPJ contract prices power at the Western hub about seven years into the future. Thus, market participants can use the OPJ contract to lock-in electricity prices far into the future. Traders use monthly power contracts like the OPJ contract to price future power electricity commitments, where such commitments are based on long-range forecasts of power supply and demand.

The Commission notes that the Western hub is a major trading point for electricity, and the OPJ contract's prices are well regarded in the industry as indicative of the value of off-peak power at the Western hub. Accordingly, the Commission believes that it is reasonable to conclude that market participants purchase the data packages that include the OPJ contract's prices in substantial part because the OPJ contract's 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 OPJ contract meets the indirect price reference test.

NYMEX lists a futures contract that is comparable to the ICE OPJ contract on its ClearPort platform called the PJM Western Hub Off-Peak Calendar-Month Real-Time LMP Swap futures contract. However, unlike the ICE contract, none of the trades in the NYMEX version are executed in NYMEX's centralized marketplace; instead, all of the transactions originate as bilateral swaps that are submitted to NYMEX for clearing. The daily settlement prices of NYMEX's monthly, off-peak hour Western hub contract are influenced, in part, by the daily settlement prices of the ICE OPJ contract. This is because NYMEX determines the daily settlement prices for its power contracts through a survey of cash market voice brokers. Voice brokers, in turn, refer to the ICE OPJ price, among other information, as an important indicator as to where the market is trading. Therefore, the ICE OPJ price influences the settlement price for the NYMEX monthly, off-peak hour Western hub power contract. This conclusion is supported by an analysis of the daily settlement prices for the OPJ contract and the NYMEX equivalent which demonstrates that 94 percent of the daily settlement prices[36] for the

[32] *http://www.ferc.gov/market-oversight/mkt-electric/pjm.asp.*

[33] *http://www.ferc.gov/market-oversight/mkt-electric/pjm/2010/05–2010-elec-pjm-archive.pdf.*

[34] 17 CFR 36, Appendix A.

[35] In addition to referencing ICE prices, firms participating in PJM's Western hub 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.

[36] The price data covered the period December 2008 through December 2009.

NYMEX version of the contract are within one standard deviation of the OPJ contract's price settlement prices.

i. ***Federal Register*** *Comments:*

EPSA, FIEG, EEI and ICE stated that no other contract directly references or settles to the OPJ contract's price. Moreover, the commenters argued that the underlying cash price series against which the OPJ contract is settled (in this case, the average of the real-time off-peak hour Western Hub electricity prices over the contract month, which are 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.

PJM's Western hub is a major trading center for electricity in the eastern United States. Traders, including producers, keep abreast of the prices of the OPJ contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of electricity at the Western hub when entering into cash market transaction for power, especially those trades that provide for physical delivery in the future. Traders use the ICE OPJ contract to hedge cash market positions and transactions, which enhances the OPJ contract's price discovery utility. While the OPJ 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, EPSA stated that the publication of price data for the OPJ contract price is weak justification for material price reference. Market participants generally do not purchase ICE data sets for one contract's prices. Instead, traders are interested in the settlement prices, so the fact that ICE sells the OPJ prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because the OPJ prices have substantial value to them. The Commission notes that publication of the OPJ contract's prices is indirect evidence of routine dissemination. Thus, the Commission has concluded that traders likely specifically purchase the ICE data packages for the OPJ contract's prices and consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, ICE and EEI criticized the Commission's reliance on the ECM Study since it did not specifically identify the OPJ contract as a contract that is referred to by market participants on a frequent and recurring basis. 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 OPJ 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 OPJ contract's price (direct evidence). Moreover, the OPJ contract's price data are sold to market participants, and those individuals likely purchase the ICE data packages specifically for the OPJ 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 26, 2009, **Federal Register** notice, the Commission identified the OJP contract as a potential SPDC based on the material price reference and material liquidity 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 Commission's Guidance (Appendix A to Part 36) notes that "[t]raditionally, objective measures of trading such as volume or open interest have been used as measures of liquidity." in this regard, the total number of transactions executed on ICE's electronic platform in the OPJ contract was 437 in the second quarter of 2009, resulting in a daily average of 6.8 trades. During the same period, the OPJ contract had a total trading volume of 325,799 contracts and an average daily trading volume of 5,090.6 contracts. Moreover, open interest as of June 30, 2009, was 2,976,492 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.[37]

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 622,984 contracts (or 9,584.4 contracts on a daily basis). In terms of number of transactions, 456 trades occurred in the fourth quarter of 2009 (7.0 trades per day). As of December 31, 2009, open interest in the OPJ contract was 3,293,899 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 during the period between the second and fourth quarters of 2009. In addition, trading activity in the OPJ contract, as characterized by total quarterly volume, indicates that the OPJ contract experiences trading activity that is greater than that of thinly-traded futures markets.[38] Thus, it is reasonable to infer that the OPJ contract could have a material effect on other ECM contracts or on DCM contracts.

To measure the effect that the PJM contract could have on another ECM contract staff performed a statistical analysis[39] using daily settlement prices

[37] 74 FR 54966 (October 26, 2009).

[38] 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.

[39] 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

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(between July 1, 2008 and December 31, 2009) for the ICE PJM and OPJ contracts. The simulation suggests that, on average over the sample period, a one percent rise in the OPJ contract's price elicited a 0.47 percent increase in ICE PJM contract's price.

i. ***Federal Register*** *Comments:*

ICE stated that the OPJ contract lacks a sufficient number of trades to meet the material liquidity criterion. Along with EPSA and EEI, ICE argued that the OPJ contract cannot have a material effect on DCM contracts or other ECM contracts because these other contracts do not cash settle to the OPJ contract's price. Instead, the DCM contracts and the OPJ contract are both cash settled based on physical transactions, which neither the ECM nor the DCM contracts can influence. On the contrary, the Commission's statistical analysis shows that changes in the ICE OPJ contract's price significantly influences the prices of other ECM contracts (namely, the PJM contract). In this regard, a one-percent rise in the OPJ contract's price leads to a 0.47 percent rise in PJM contract's price.

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 OPJ 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." [40]

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" [41] 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 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." [42] It is the Commission's opinion that liquidity, as it pertains to the OPJ contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE OPJ contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the OPJ contract, and thus, the Commission believes that it applied the statistical data cited above in an appropriate manner for gauging material liquidity.

ii. Conclusion Regarding Material Liquidity:

For the reasons discussed above, the Commission finds that the OPJ contract satisfies the material liquidity criterion. Specifically, there is sufficient trading activity in the OPJ 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 OPJ Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE OPJ contract performs a significant price discovery function under the two of the four criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the OPJ contract meets the material price reference and material liquidity criteria. Accordingly, the Commission is issuing the attached Order declaring that the PJM 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 OPJ contract,[43] 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") [44] 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 [45] 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

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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 PJM and OPJ 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 OPJ contract's price elicited a 0.47 percent rise in PJM contract's price.

[40] Guidance, *supra.*

[41] 73 FR 75892 (December 12, 2008).

[42] In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 26, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 72 percent of all transactions in the OPJ contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 26, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

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

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

[45] 7 U.S.C. 19(a).

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

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

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [46] 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.[47] 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.

[46] 5 U.S.C. 601 *et seq.*

[47] 66 FR 42256, 42268 (Aug. 10, 2001).

VI. Orders

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

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

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

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

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

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

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the PJM WH Real Time Off-Peak contract, traded on the IntercontinentalExchange, Inc., satisfies the statutory material price reference and material liquidity criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the PJM WH Real Time Off-Peak contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity [50] with respect to the PJM WH Real Time Off-Peak contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities.

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

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

David A. Stawick,

Secretary of the Commission.

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

BILLING CODE 6351–01–P

[48] 7 U.S.C. 1a(29).

[49] 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).

[50] 7 U.S.C. 1a(29).

[51] 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).

COMMODITY FUTURES TRADING COMMISSION

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

AGENCY: Commodity Futures Trading Commission.

ACTION: Final orders.

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

[1] 74 FR 54966 (October 26, 2009).

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

[3] The acronym "WH" signifies the PJM Interconnection's Western Hub.