

**DEPARTMENT OF COMMERCE****International Trade Administration**

[A-427-001]

**Revocation of Antidumping Duty Order on Sorbitol From France**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On July 1, 2009, the Department of Commerce (the Department) initiated the sunset review of the antidumping duty order on sorbitol from France. *See Initiation of Five-year ("Sunset") Review*, 74 FR 31412 (July 1, 2009). Pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act), the U.S. International Trade Commission (the Commission) determined that revocation of the existing antidumping duty order on sorbitol from France would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *Sorbitol From France; Determination*, 75 FR 39277 (July 8, 2010) (*ITC Final*). Therefore, pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(1)(iii), the Department is revoking the antidumping duty order on sorbitol from France.

**DATES:** *Effective Date:* August 5, 2009.

**FOR FURTHER INFORMATION CONTACT:** Steve Bezirgianian or Robert James, AD/CVD Operations Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482-1131 and (202) 482-0649, respectively.

**SUPPLEMENTARY INFORMATION:****Background**

On April 9, 1982, the Department published the antidumping duty order on sorbitol from France. *See Sorbitol From France; Antidumping Duty Order*, 47 FR 15391 (April 9, 1982). On June 29, 1984, the order was revoked, in part. *See Sorbitol From France; Revocation in Part of Antidumping Duty Order*, 49 FR 26773 (June 29, 1984). On July 1, 2009, the Department initiated its most recent sunset review of the antidumping duty order on sorbitol from France. *See Initiation of Five-year ("Sunset") Review*. On July 2, 2009, the Commission instituted its most-recent five-year review of the order. *See Sorbitol From France*, 74 FR 31762 (July 2, 2009).

As a result of the Department's sunset review, the Department determined that revocation of the antidumping duty

order would be likely to lead to the continuation or recurrence of dumping. *See Sorbitol from France: Final Results of Expedited Five-year (Sunset) Review of Antidumping Duty Order*, 74 FR 56793 (November 3, 2009). The Department notified the Commission of the magnitude of the margin likely to prevail were the antidumping duty order to be revoked.

On July 8, 2010, the Commission published its determination that, pursuant to section 751(c) of the Act, revocation of the antidumping duty order on sorbitol from France would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See ITC Final* and USITC Publication 4164 (June 2010), titled *Sorbitol from France* (Investigation No. 731-TA-44 (Third Review)).

**Scope of the Order**

The products covered by the order are shipments of crystalline sorbitol. Crystalline sorbitol is a polyol produced by the catalytic hydrogenation of sugars (glucose). It is used in the production of sugarless gum, candy, groceries, and pharmaceuticals. The above-described sorbitol is currently classifiable under item 2905.44.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description remains dispositive.

**Determination**

As a result of the determination by the Commission that revocation of the antidumping duty order is not likely to lead to the continuation or recurrence of material injury to an industry in the United States, the Department, pursuant to section 751(d) of the Act, is revoking the antidumping duty order on sorbitol from France. Pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(2)(i), the effective date of revocation is August 5, 2009 (*i.e.*, the fifth anniversary of the publication in the **Federal Register** of the notice of continuation of this order). The Department will notify U.S. Customs and Border Protection to terminate suspension of liquidation and collection of cash deposits on entries of the subject merchandise entered or withdrawn from warehouse on or after August 5, 2009. Entries of subject merchandise prior to the effective date of revocation will continue to be subject to suspension of liquidation and antidumping duty deposit requirements. The Department will complete any pending administrative reviews of this order.

This five-year sunset review and notice are in accordance with section 751(d)(2) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: July 15, 2010.

**Ronald K. Lorentzen**,  
*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010-17800 Filed 7-20-10; 8:45 am]

**BILLING CODE 3510-DS-P**

**COMMISSION OF FINE ARTS****Notice of Meeting**

The next meeting of the U.S. Commission of Fine Arts is scheduled for 15 July 2010, at 10 a.m. in the Commission offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street, NW., Washington, DC 20001-2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: <http://www.cfa.gov>. Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by e-mailing [staff@cfa.gov](mailto:staff@cfa.gov); or by calling 202-504-2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated: July 6, 2010 in Washington, DC.

**Thomas Luebke**,  
*AIA, Secretary.*

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**BILLING CODE 6330-01-M**

**COMMODITY FUTURES TRADING COMMISSION**

**Orders Finding That the SP-15 Financial Day-Ahead LMP Peak Contract and SP-15 Financial Day-Ahead LMP 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**<sup>1</sup> a notice of its intent to

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

undertake a determination whether the SP-15<sup>2</sup> Financial Day-Ahead LMP Peak (“SPM”) contract and SP-15 Financial Day-Ahead LMP Off-Peak (“OFP”) contract,<sup>3</sup> which are listed for trading on the IntercontinentalExchange, Inc. (“ICE”), an exempt commercial market (“ECM”) under sections 2(h)(3)–(5) of the Commodity Exchange Act (“CEA”) or the “Act”), perform a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue orders finding that the SPM and OFP 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”)<sup>4</sup> significantly broadened the CFTC’s regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts (“SPDCs”) are traded—and treating ECMs in that category as registered entities under the CEA.<sup>5</sup> The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria

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

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

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

entities.<sup>7</sup> The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).<sup>8</sup>

**II. Notice of Intent To Undertake SPDC Determination**

On October 6, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the SPM and OFP contracts<sup>9</sup> perform a significant price discovery function and requested comment from interested parties.<sup>10</sup> Comments were received from the Federal Energy Regulatory Commission (“FERC”), Electric Power Supply Association (“EPSA”), Financial Institutions Energy Group (“FIEG”), Working Group of Commercial Energy Firms (“WGCEF”), ICE, California Public Utilities Commission (“CPUC”), Edison Electric Institute (“EEI”), Western Power Trading Forum (“WPTF”) and Public Utility Commission of Texas (“PUCT”).<sup>11</sup> The comment letters from

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

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

<sup>9</sup> As noted above, the **Federal Register** notice also requested comment on the SP-15 Financial Day-Ahead LMP Peak Daily (“SDP”) contract; SP-15 Financial Day-Ahead LMP Off-Peak Daily (“SQP”) contract; SP-15 Financial Swap Real Time LMP-Peak Daily (“SRP”) contract; NP-15 Financial Day-Ahead LMP Peak Daily (“DPN”) contract and NP-15 Financial Day-Ahead LMP Off-Peak Daily (“UNP”) contract. These contracts will be addressed in a separate **Federal Register** release.

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

<sup>11</sup> FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. EPSA describes itself as the “national trade association representing competitive power suppliers, including generators and marketers.” FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, “including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors.” WGCEF describes itself as “a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy

Continued

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

<sup>3</sup> The **Federal Register** notice also requested comment on the SP-15 Financial Day-Ahead LMP Peak Daily (“SDP”) contract; SP-15 Financial Day-Ahead LMP Off-Peak Daily (“SQP”) contract; SP-15 Financial Swap Real Time LMP-Peak Daily (“SRP”) contract; NP-15 Financial Day-Ahead LMP Peak Daily (“DPN”) contract and NP-15 Financial Day-Ahead LMP Off-Peak Daily (“UNP”) contract; these contracts will be addressed in a separate **Federal Register** release.

<sup>4</sup> Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law No. 110–246, 122 Stat. 1624 (June 18, 2008).

<sup>5</sup> 7 U.S.C. 1a(29).

<sup>6</sup> 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

FERC<sup>12</sup> and PUCT did not directly address the issue of whether or not the subject contracts are SPDCs. CPUC stated that the subject contracts are SPDCs but did not provide reasons for how the contracts meet the criteria for SPDC determination. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the subject contracts and generally expressed the opinion that the contracts are not SPDCs because they do not meet the material price reference or material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

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

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

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

commodities to customers, including industrial, commercial and residential consumers” and whose membership consists of “energy producers, marketers and utilities.” ICE is an ECM, as noted above. CPUC is a “constitutionally established agency charged with the responsibility for regulating electric corporations within the State of California.” EEI is the “association of shareholder-owned electric companies, international affiliates and industry associates worldwide.” WPTF describes itself as a “broad-based membership organization dedicated to encouraging competition in the Western power markets \* \* \* 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 Web site: <http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-012.html>.

<sup>12</sup> 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.”

transfer or convert a position, cash or financially settle a position, or close out a position.

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

- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.

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

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.<sup>13</sup> Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.<sup>14</sup> For example, for contracts that are linked to other

contracts or that may be arbitrated with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

### IV. Findings and Conclusions

The Commission's findings and conclusions with respect to the SPM and OFP contracts are discussed separately below.

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

The SPM contract is cash settled based on the arithmetic average of peak-hour, day-ahead locational marginal prices (“LMPs”) <sup>15</sup> posted by the California ISO <sup>16</sup> (“CAISO”) for the SP-15 Existing Zone Generation (“EZ Gen”) hub for all peak hours during the contract month. The LMPs are derived from power trades that result in physical delivery. The size of the SPM contract is 400 megawatt hours (“MWh”), and the SPM contract is listed for up to 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 derived as a volume-weighted average price of all of the transactions where electricity is to be supplied and consumed during that hour.

Electricity is traded in a day-ahead market as well as a real-time market. Typically, the bulk of energy transactions occur in the day-ahead market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction

<sup>13</sup> In its October 6, 2009, **Federal Register** release, the Commission identified material price reference and material liquidity as the possible criteria for SPDC determination of the SPM and OFP contracts. Arbitrage and price linkage were not identified as possible criteria. As a result, arbitrage and price linkage will not be discussed further in this document and the associated Orders.

<sup>14</sup> 17 CFR 36, Appendix A.

<sup>15</sup> An LMP represents the additional cost associated with producing an incremental amount of electricity. LMPs account for generation costs, congestion along the transmission lines, and electricity loss.

<sup>16</sup> The acronym “ISO” signifies “Independent System Operator,” which is an entity that coordinates electricity generation and transmission, as well as grid reliability, throughout its service area.

quotes offered in advance. Because the power quotes 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. Only a relatively small amount of electricity is traded in the real-time market as compared to the day-ahead market.

Path 15 is an 84-mile portion of the north-south power transmission corridor in California, forming part of the Pacific AC Intertie and the California-Oregon Transmission Project.<sup>17</sup> Path 15, along with the Pacific DC Intertie running far to the east, completes an important transmission interconnection between the hydroelectric plants to the north and the fossil fuel plants to the south. Path 15 currently consists of three lines at 500 kilovolts (“kV”) and four lines at 230 kV.<sup>18</sup> The 500 kV lines connect Los Banos to Gates (two lines) and Los Banos to Midway (one line); all four 230 kV lines have Gates at one end with the other ends terminating at the Panoche #1, Panoche #2, Gregg, or McCall

substations. “NP-15” refers to the northern half of Path 15; conversely, “SP-15” refers to the lower half of Path 15.

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

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

#### 1. Material Price Reference Criterion

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

The Commission explains in its Guidance to the statutory criteria that in evaluating a contract under the material price reference criterion, it will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.<sup>19</sup> With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract’s price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The SP-15 power market is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the SP-15 power market when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of power at the SP-15 hub when entering into cash market transactions for electricity, especially those trades providing for physical delivery in the

<sup>17</sup> The Pacific Intertie comprises three alternating current (“AC”) lines and one direct current (“DC”) line. Together, these lines comprise the largest single electricity transmission program in the United States. The northern end of the DC line is at the Bonneville Power Administration’s Celilo Converter Station, which is just south of The Dalles Dam about 90 miles east of Portland. The southern end is 846 miles away at the Sylmar Converter Station on the northern outskirts of Los Angeles. That station is operated by utilities including the Los Angeles Department of Water and Power (“LADWP”) and Southern California Edison. The AC lines follow generally the same path but terminate in Northern California. Only a few parties actually own the Intertie, but numerous entities have contracts to share its transmission capacity. The California-California border is a dividing line for Intertie ownership and capacity sharing. Depending on seasonal conditions, the Intertie is capable of transmitting up to 7,900 MW—4,800 MW of AC power (1,600 MW of this amount is in the California-Oregon Transmission Project, also known as the “Third AC Line”) and 3,100 MW of DC power. Over the past five years, the limit has ranged between about 6,300 MW and 7,900 MW. Most of the power transmitted on the Intertie is surplus to regional needs, but some firm power also is transmitted. See <http://www.nwccouncil.org/LIBRARY/2001/2001-11.pdf>.

<sup>18</sup> The third 500 kV line was installed between 2003 and 2004 in order to relieve constraints on the existing north-south transmission lines. This capacity constraint contributed to the California energy crisis in 2000 and 2001. See <http://www.wapa.gov/sn/ops/transmission/path15/factSheet.pdf>.

<sup>19</sup> 17 CFR 36, Appendix A.

future. Traders use the ICE SPM contract, as well as other ICE power contracts, to hedge cash market positions and transactions—activities which enhance the SPM contract's price discovery utility. The substantial volume of trading and open interest in the SPM contract appears to attest to its use for this purpose. While the SPM 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.<sup>20</sup> As a result, the SPM contract satisfies the direct price reference test.

The fact that ICE's SPM monthly contract is used more widely as a source of pricing information rather than the daily contract (*i.e.*, the SDP contract)<sup>21</sup> bolsters the argument that it serves as a direct price reference. In this regard, the SPM contract prices power at the SP-15 hub up to almost five years into the future. Thus, market participants can use the SPM contract to lock-in electricity prices far into the future. Traders use monthly power contracts like the SPM contract to price future electric power commitments, where such commitments are based on long range forecasts of power supply and demand. In contrast, the SDP contract is listed for a much shorter length of time—up to 75 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 SDP contract.

The Commission notes that SP-15 is a major trading point for electricity, and the SPM contract's prices are well regarded in the industry as indicative of the value of power at the SP-15 hub. Accordingly, the Commission believes that it is reasonable to conclude that market participants purchase the data packages that include the SPM contract's prices in substantial part because the SPM 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 these circumstances, the SPM contract meets the indirect price reference test.

*i. Federal Register Comments:*

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

As noted above, the SP-15 hub is a major trading center for electricity in the western United States. Traders, including producers, keep abreast of the prices of the SPM contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of electricity at the SP-15 hub when entering into cash market transaction for power, especially those trades that provide for physical delivery in the future. Traders use the ICE SPM contract to hedge cash market positions and transactions, which enhances the SPM contract's price discovery utility. While the SPM 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 and EPSA stated that the publication of price data for the SPM contract price is weak justification for material price reference. Market participants generally do not purchase ICE data sets for one contract's prices, such as those for the SPM contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the SPM prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the SPM prices have substantial value to them. As noted above, the Commission notes that publication of the SPM contract's prices is indirect evidence of routine dissemination. The SPM 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 SPM contract's prices and consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, EEI argued that the ECM Study did not specifically identify the SPM 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 SPM 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 SPM contract's price (direct evidence). Moreover, the SPM contract's price data are sold to market participants, and those individuals likely purchase the ICE data packages specifically for the SPM 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 the SPM 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 total number of transactions executed on ICE's electronic platform in the SPM contract was 3,235 in the second quarter of 2009, resulting in a daily average of 50.5 trades. During the same period, the SPM contract had a

<sup>20</sup>In addition to referencing ICE prices, firms participating in the SP-15 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.

<sup>21</sup>The SDP contract is cash settled based on the arithmetic average of peak-hour, day-ahead LMPs posted by CAISO for the SP-15 EZ Gen hub for all peak hours on the day prior to generation. The LMPs are derived from power trades that result in physical delivery. The size of the SDP contract is 400 MWh, and the SDP contract is listed for 75 consecutive calendar days.

total trading volume of 143,717 contracts and an average daily trading volume of 2,245.6 contracts. Moreover, open interest as of June 30, 2009, was 460,583 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.<sup>22</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 311,819 contracts (or 4,797.2 contracts on a daily basis). In terms of number of transactions, 6,199 trades occurred in the fourth quarter of 2009 (95.4 trades per day). As of December 31, 2009, open interest in the SPM contract was 622,503 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

The number of trades per day was substantial between the second and fourth quarters of 2009. In addition, trading activity in the SPM contract, as characterized by total quarterly volume, indicates that the SPM contract experiences trading activity that is greater than that of thinly-traded futures markets.<sup>23</sup> Thus, it is reasonable to infer that the SPM contract could have a material effect on other ECM contracts or on DCM contracts.

To measure the effect that the SPM contract potentially could have on another ECM contract staff performed a statistical analysis<sup>24</sup> using daily

settlement prices (between July 1, 2008 and December 31, 2009) for the ICE SPM and OFP contracts. The simulation suggest that, on average over the sample period, a one percent rise in the SPM contract's price elicited a 0.7 percent increase in ICE OFP contract's price.

*i. Federal Register Comments:*

ICE and WGCEF stated that the SPM contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, EPSA, FIEG and EEI argued that the SPM 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 SPM 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 SPM contract's price. Instead, the DCM contracts and the SPM 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 SPM contract's price significantly influences the prices of other ECM contracts (namely, the OFP 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 SPM contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."<sup>25</sup>

ICE opined that the Commission "seems to have adopted a five trade per day test for material liquidity." To the contrary, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"<sup>26</sup> rather than solely relying upon an ECM on its own to identify any

hypothesis that power prices in the same market affect each other. The prices of ICE's SPM and OFP 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 SPM contract's price elicited a 0.7 percent rise in OFP contract's price.

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

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

such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, the contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE argued that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all months" as well as in strips of contract months. ICE suggested that a more appropriate method of determining liquidity is to examine the activity in a single traded month of a given contract.<sup>27</sup> It is the Commission's opinion that liquidity, as it pertains to the SPM contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE SPM contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the SPM 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 SPM satisfies the material liquidity criterion. Specifically, there is sufficient trading activity in the SPM 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."

<sup>27</sup> In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 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 66 percent of all transactions in the SPM contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

<sup>22</sup> 74 FR 51264 (October 6, 2009).

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

<sup>24</sup> 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

### 3. Overall Conclusion Regarding the SPM Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE SPM 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 SPM contract meets the material price reference and material liquidity criteria at this time. Accordingly, the Commission is issuing the attached Order declaring that the SPM 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 SPM contract,<sup>28</sup> and triggers the obligations, requirements—both procedural and substantive—and timetables prescribed in Commission rule 36.3(c)(4) for ECMs.

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

The OFP contract is cash settled based on the arithmetic average of off-peak hour, day-ahead LMPs posted by CAISO for the SP-15 EZ Gen hub for all peak hours during the contract month. The LMPs are derived from power trades that result in physical delivery. The size of the OFP contract is 25 MWh, and the SPM 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 derived as a volume-weighted average price of all of the transactions where electricity is to be supplied and consumed during that hour.

Electricity is traded in a day-ahead market as well as a real-time market. Typically, the bulk of energy transactions occur in the day-ahead market. The day-ahead market establishes prices for electricity that is to be delivered during the specified hour on the following day. Day-ahead prices are determined based on generation and energy transaction quotes offered in advance. Because power quotes are dependent on estimates of supply and demand, electricity needs usually are not perfectly satisfied in the day-ahead market. Consequently, on the day the electricity is transmitted and used, auction participants typically realize

that they bought or sold either too much power or too little power. A real-time auction is operated to alleviate this problem by serving as a balancing mechanism. Specifically, electricity traders use the real-time market to sell excess electricity and buy additional power to meet demand. Only a relatively small amount of electricity is traded in the real-time market as compared to the day-ahead market.

Path 15 is an 84-mile portion of the north-south power transmission corridor in California, forming part of the Pacific AC Intertie and the California-Oregon Transmission Project.<sup>29</sup> Path 15, along with the Pacific DC Intertie running far to the east, completes an important transmission interconnection between the hydroelectric plants to the north and the fossil fuel plants to the south. Path 15 currently consists of three lines at 500 kilovolts (“kV”) and four lines at 230 kV.<sup>30</sup> The 500 kV lines connect Los Banos to Gates (two lines) and Los Banos to Midway (one line); all four 230 kV lines have Gates at one end with the other ends terminating at the Panoche #1, Panoche #2, Gregg, or McCall substations. “NP-15” refers to the northern half of Path 15; conversely, “SP-15” refers to the lower half of Path 15.

When the weather is hot in California and the Desert Southwest, it is comparatively cool in the Pacific Northwest. Conversely, when the weather is cold in the Pacific Northwest

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

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

#### 1. Material Price Reference Criterion

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

<sup>29</sup> The Pacific Intertie comprises three alternating current AC lines and one direct current DC line. Together, these lines comprise the largest single electricity transmission program in the United States. The northern end of the DC line is at the Bonneville Power Administration's Celilo Converter Station, which is just south of The Dalles Dam about 90 miles east of Portland. The southern end is 846 miles away at the Sylmar Converter Station on the northern outskirts of Los Angeles. That station is operated by utilities including LADWP and Southern California Edison. The AC lines follow generally the same path but terminate in Northern California. Only a few parties actually own the Intertie, but numerous entities have contracts to share its transmission capacity. The California-Oregon border is a dividing line for Intertie ownership and capacity sharing. Depending on seasonal conditions, the Intertie is capable of transmitting up to 7,900 MW—4,800 MW of AC power (1,600 MW of this amount is in the California-Oregon Transmission Project, also known as the Third AC Line) and 3,100 MW of DC power. Over the past five years, the limit has ranged between about 6,300 MW and 7,900 MW. Most of the power transmitted on the Intertie is surplus to regional needs, but some firm power also is transmitted. See <http://www.nwccouncil.org/LIBRARY/2001/2001-11.pdf>.

<sup>30</sup> The third 500 kV line was installed between 2003 and 2004 in order to relieve constraints on the existing north-south transmission lines. This capacity constraint contributed to the California energy crisis in 2000 and 2001. See <http://www.wapa.gov/sn/ops/transmission/path15/factSheet.pdf>.

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

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

The SP-15 power market is a major pricing center for electricity on the West Coast. Traders, including producers, keep abreast of the electricity prices in the SP-15 power market when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of power at the SP-15 hub when entering into cash market transaction for electricity, especially those trades providing for physical delivery in the future. Traders use the OFP contract, as well as other ICE power contracts, to hedge cash market positions and transactions—activities which enhance the OFP contract's price discovery utility. The substantial volume of trading and open interest in the OFP contract appear to attest to its use for this purpose. While the OFP 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.<sup>32</sup> In these circumstances, the OFP contract satisfies the direct price reference test.

The fact that ICE's OFP monthly contract is used more widely as a source of pricing information rather than the daily contract (*i.e.*, the SQP contract)<sup>33</sup> is further evidence of direct price reference. In this regard, OFP contract prices power at the SP-15 hub up to six years into the future. Thus, market participants can use the OFP contract to lock-in electricity prices far into the future. Traders use monthly power contracts like the OFP contract to price future power electricity commitments, where such commitments are based on long range forecasts of power supply and demand. In contrast, the SQP 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 SQP contract.

The Commission notes that SP-15 is a major trading point for electricity, and the OFP contract's prices are well regarded in the industry as indicative of the value of power at the SP-15 hub. Accordingly, the Commission believes that it is reasonable to conclude that market participants purchase the data packages that include the OFP contract's prices in substantial part because the SPM 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 OFP contract satisfies the indirect price reference test.

*i. Federal Register Comments:*

WGCEF, EPSA, WPTF, FIEG, EEI and ICE stated that no other contract directly references or settles to the OFP contract's price. Moreover, the commenters argued that the underlying cash price series against which the SPM contract is settled (in this case, the average day-ahead peak-hour SP-15 electricity prices over the contract

month, which is derived from cash market transactions) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too narrow and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants “consult on a frequent and recurring basis” the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to “lock in” a fixed price for some future point in time to hedge against adverse price movements.

As noted above, the SP-15 hub is a major trading center for electricity in the western United States. Traders, including producers, keep abreast of the prices of the OFP contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of electricity at the SP-15 hub when entering into cash market transactions for power, especially those trades that provide for physical delivery in the future. Traders use the ICE OFP contract to hedge cash market positions and transactions, which enhances the OFP contract's price discovery utility. While the OFP 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 and EPSA stated that the publication of price data for the OFP contract price is weak justification for material price reference. Market participants generally do not purchase ICE data sets for one contract's prices, such as those for the OFP contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the OFP prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the OFP prices have substantial value to them. As noted above, the Commission notes that publication of the OFP contract's prices is indirect evidence of routine dissemination. The OFP contract's prices, while sold as a package, are of particular interest to market participants. Thus, the Commission has concluded that traders likely purchase the ICE data packages specifically for the OFP contract's prices and consult such prices on a frequent and recurring basis in pricing cash market transactions.

Lastly, EEI argued that the ECM Study did not specifically identify the OFP contract as a contract that is referred to by market participants on a frequent and recurring basis. The Commission notes

<sup>32</sup> In addition to referencing ICE prices, firms participating in the SP-15 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.

<sup>33</sup> The SDP contract is cash settled based on the arithmetic average of peak-hour, day-ahead LMPs posted by CAISO for the SP-15 EZ Gen hub for all peak hours on the day prior to generation. The LMPs are derived from power trades that result in physical delivery. The size of the SDP contract is 400 MWh, and the SDP contract is listed for 75 consecutive calendar days.

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

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 OFP 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 OFP contract's price (direct evidence). Moreover, the OFP contract's price data are sold to market participants, and those individuals likely purchase the ICE data packages specifically for the OFP 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 the OFP 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 total number of transactions executed on ICE's electronic platform in the OFP contract was 187 in the second quarter of 2009, resulting in a daily average of 2.9 trades. During the same period, the OFP contract had a total trading volume of 116,559 contracts and an average daily trading volume of 1,793.2 contracts. Moreover, open interest as of June 30, 2009, was 1,408,870 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a

transaction executed off its trading platform.<sup>34</sup>

In a subsequent filing dated March 24, 2010, ICE reported that total trading volume in the fourth quarter of 2009 was 406,418 contracts (or 6,252.6 contracts on a daily basis). In terms of number of transactions, 329 trades occurred in the fourth quarter of 2009 (5.1 trades per day). As of December 31, 2009, open interest in the OFP contract was 2,009,556 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 during the period between the second and fourth quarters of 2009 was not substantial. However, trading activity in the OFP contract, as characterized by total quarterly volume, indicates that the OFP contract experiences trading activity that is greater than that of thinly-traded futures markets.<sup>35</sup> Thus, it is reasonable to infer that the OFP contract could have a material effect on other ECM contracts or on DCM contracts.

To measure the effect that the SPM contract potentially could have on another ECM contract staff performed a statistical analysis<sup>36</sup> using daily settlement prices (between July 1, 2008 and December 31, 2009) for the ICE SPM and OFP contracts. The simulation suggest that, on average over the sample period, a one percent rise in the OFP

contract's price elicited a 1.4 percent increase in ICE SPM contract's price.

*i. Federal Register Comments:*

ICE and WGCEF stated that the OFP contract lacks a sufficient number of trades to meet the material liquidity criterion. These two commenters, along with WPTF, EPISA, FIEG and EEI argued that the OFP contract cannot have a material effect on other contracts, such as those listed for trading by the NYMEX. The commenters pointed out that it is not possible for the OFP 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 OFP contract's price. Instead, the DCM contracts and the OFP 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 OFP contract's price significantly influences the prices of other ECM contracts (namely, the SPM 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 OFP contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."<sup>37</sup>

ICE opined that the Commission "seems to have adopted a five trade per day test for material liquidity." To the contrary, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"<sup>38</sup> rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; however, the contract will not be found to be a SPDC merely because it met the reporting threshold.

ICE argued that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades

<sup>34</sup> 74 FR 51264 (October 6, 2009).

<sup>35</sup> Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

<sup>36</sup> 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 the hypothesis that power prices in the same market affect each other. The prices of ICE's SPM and OFP 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 OFP contract's price elicited a 1.4 percent rise in SPM contract's price.

<sup>37</sup> Guidance, supra.

<sup>38</sup> 73 FR 75892 (December 12, 2008).

made in all months” as well as in strips of contract months. ICE suggested that a more appropriate method of determining liquidity is to examine the activity in a single traded month of a given contract.<sup>39</sup> It is the Commission’s opinion that liquidity, as it pertains to the SPM contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE OFP contract itself would be considered liquid. ICE’s analysis of its own trade data confirms this to be the case for the OFP 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 OFP meets the material liquidity criterion. Specifically, there is sufficient trading activity in the OFP 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 OFP Contract**

After considering the entire record in this matter, including the comments received, the Commission has determined that the ICE OFP 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 OFP contract meets the material price reference and

<sup>39</sup>In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission’s October 6, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE’s electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 79 percent of all transactions in the OFP contract (as of the fourth quarter of 2009). Commission acknowledges that the open interest information it provided in its October 6, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between “on-exchange” versus “off-exchange” created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

material liquidity criteria at this time. Accordingly, the Commission is issuing the attached Order declaring that the OFP 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 OFP contract,<sup>40</sup> 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”) <sup>41</sup> imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

*b. Cost-Benefit Analysis*

Section 15(a) of the CEA <sup>42</sup> requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission “consider” the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.

When a futures contract begins to serve a significant price discovery

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

*c. Regulatory Flexibility Act*

The Regulatory Flexibility Act (“RFA”) <sup>43</sup> requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.<sup>44</sup> Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these Orders, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

**VI. Orders**

*a. Order Relating to the SP-15 Financial Day-Ahead LMP Peak 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

<sup>40</sup> See 73 FR 75888, 75893 (Dec. 12, 2008).

<sup>41</sup> 44 U.S.C. 3507(d).

<sup>42</sup> 7 U.S.C. 19(a).

<sup>43</sup> 5 U.S.C. 601 *et seq.*

<sup>44</sup> 66 FR 42256, 42268 (Aug. 10, 2001).

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<sup>45</sup> 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.<sup>46</sup>

*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<sup>47</sup> 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.<sup>48</sup>

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**<sup>1</sup> a notice of its intent to undertake a determination whether the PJM<sup>2</sup> WH<sup>3</sup> Real Time Peak (“PJM”) contract and PJM WH Real Time Off-Peak (“OPJ”) contract,<sup>4</sup> which are listed for trading on the IntercontinentalExchange, Inc. (“ICE”), an exempt commercial market (“ECM”) under sections 2(h)(3)–(5) of the

<sup>48</sup> Because ICE already lists for trading a contract (*i.e.*, the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

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

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

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

<sup>4</sup> 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.

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:**

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**SUPPLEMENTARY INFORMATION:**

### I. Introduction

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

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.<sup>7</sup> As relevant here, rule 36.3

<sup>5</sup> Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law No. 110-246, 122 Stat. 1624 (June 18, 2008).

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

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

<sup>45</sup> 7 U.S.C. 1a(29).

<sup>46</sup> Because ICE already lists for trading a contract (*i.e.*, the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

<sup>47</sup> 7 U.S.C. 1a(29).