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Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Comments of Aspire Commodities, LP ("Aspire") to the CFTC's *Notice of Proposed Amendment to and Request for Comment on the Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act*

Dear Secretary Kirkpatrick:

Aspire provides these comments in response to the Commission's Request pursuant to the *Notice of Proposed Amendment to and Request for Comment on the Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act* ("Proposed Amendment")[1], and in particular to support the continued availability of a private right of action to seek damages under the Commodity Exchange Act ("CEA") for market manipulation.

Aspire and its affiliated companies are active participants in physical and financial electricity markets across North America. Therefore, it has a significant interest in open, transparent, competitive, and financially sound physical and financial electricity markets. Aspire believes that the private right of action in Section 22 of the CEA is a fundamental component to effectuate and preserve facilitates those market features, is consistent with Congressional intent and the purpose of the CEA, and will not materially harm either market participants or the regulation or operation of physical RTO/ISO markets. By contrast, eliminating the private right of action will serve to decrease oversight and increase the likelihood of illegal market manipulation, which will in turn increase market risk, transaction costs, and consumer utility prices, all of which should be avoided.

[1] 81 Fed. Reg. 30245 (May 16, 2016).

Aspire's comments address and dispel the following arguments made by opponents to the private right of action's continued availability in response to market manipulation based on or involving RTO/ISO transactions::

1. That the CFTC's support of the private right of action is a policy change (it is not).
2. That CFTC/RTO regulation is sufficient (it is not).
3. That enforcement through the private right of action will create an inconsistent framework (it will not).

It is important to respond to the above assertions because the facts and the law do not support them. The preamble to the SPP Order, several CFTC Commissioners, and legislative history confirm that the availability of the private right of action to address market manipulation involving RTO/ISO transactions was always intended. Regulation by the CFTC and RTOs/ISOs, alone, is insufficient to keep the financial markets open, transparent, competitive and financially sound. And no credible argument has been made demonstrating how the private right of action, exercised through the same courts in which the CFTC brings its enforcement actions, would lead to inconsistent interpretation of the CEA or inconsistent policies.

The fundamental theme for the past 40 years of both the legislative and regulatory developments underlying the electricity sector has been the pursuit of efficiency. Moreover, the steps taken by legislators and regulators towards improving the efficiency of the sector has been both deliberate and consistent. The continued availability of the private right of action, in all contexts, furthers those goals. Eliminating the private right of action is contrary to them and contrary to the purpose of the CEA.

Opponents to the CFTC's proposed rulemaking focus on the costs of private rights of action and simply ignore the benefits from continuing the private right of action. The underlying logic of their argument erroneously assumes that the private right of action is unnecessary, which is not true.

Stated plainly, the private right of action is needed to prevent market participants from exploiting RTO/ISO rules, policies and procedures as a means to manipulate the financial markets in contravention of the CEA and the CFTC's implementing regulations. The RTOs/ISOs may have the expertise to police such activity, but in Aspire's experience, they choose not to do so and it is unrealistic to expect any contrary result. The CFTC has the obligation to regulate attempts to manipulate the financial markets, but it likely does not have the resources to do so or the needed granular knowledge of the specific manipulative strategies that are possible. The private right of action is an efficient tool to fill this regulatory gap and prevent market manipulation.

A. Affirming the private right of action is Not a Policy Change.

In addition to providing the CFTC with power to enforce the anti-manipulation provisions of the CEA, Congress also chose to authorize private rights of actions for damages by individuals injured by illegal manipulation. It did so because private damages actions are "critical to protecting the public and fundamental to maintaining the creditability of the futures markets." (H.R. Rep. No. 97-565, at 57 (1982).) In the words of the CFTC, "the private right of action was established by Congress as an integral part of the CEA's enforcement and remedial scheme." (CFTC Proposed Amendment to 2013 RTO/ISO Order, dated May 16, 2016, at 30248.)[2]

The Proposed Amendment does not change Congressional intent, nor could it. The Proposed Amendment, like the 2013 RTO/ISO Order before it, is intended only to exempt certain transactions and instruments in the physical electricity markets from certain regulatory requirements of the CEA to provide those instruments with legal certainty in order to foster greater financial innovation. "In granting [the above] exemptive authority to the [CFTC] . . . [Congress] recognize[d] the need to create legal certainty for a number of existing categories of instruments which trade . . . outside of the forum of a designated contract market." (H.R. Rep. No. 102-978, 102d Cong. 2d Sess. at 82-83.) "The [power to exempt certain contracts, agreements or transactions from the CEA] provides flexibility for the [CFTC] to provide legal certainty to novel instruments[.]" *Id.*

Exempting instruments in the physical market, which trade outside a contract market, from certain CEA requirements has nothing to do with exempting entities from private claims of illegal manipulation of contract markets subject to the CEA. The recent *LIBOR* decisions exhaustively analyze the nature of a private right of action under the CEA. They clearly establish that the means of the illegal manipulation do not themselves have to be illegal, subject to the CEA, or otherwise independently actionable for a valid and actionable manipulation claim to exist. That conclusion comports with well-settled, long-standing legal principles underlying not only CEA cases, but all forms of conspiracy, collusion, and fraud on the market claims in other contexts. Here, exempting transactions in the physical market that do not trade on contract markets from certain provisions of the CEA means either that those transactions are no longer subject to the CEA, or that they cannot be the direct object of a private right of action. But, as the *LIBOR* decisions show, a claim for illegal manipulation of a separate market can exist even if the conduct effectuating that illegal manipulation is *not* separately governed by or actionable under the CEA.

And, the CFTC confirmed in the SPP Order that when it issued the 2013 RTO/ISO Order it did not intend to eliminate the private right of action, which Congress saw as essential to the CEA, stating, "[n]either the proposed nor the final [2013] RTO-ISO Order discussed, referred to or mentioned CEA section 22 . . . [I]f the Commission intended to take such a differentiated approach to the private right of action . . . the RTO-ISO Order would have included a discussion

[2] Aspire uses the term 2013 RTO/ISO Order as the CFTC uses it in its proposed amendment to that 2013 RTO/ISO Order issued May 16, 2016.

or analysis of the reasons therefore. Thus, the Commission did not intend to create such a limitation, and believes that the RTO-ISO Order does not prevent private claims for fraud or manipulation under the [CEA]."[3]

That was in fact – and remains -- the only position possible for the CFTC. The CEA prohibits the CFTC from issuing any exemption that is contrary to the public interest and the purposes of the CEA:

> Section 4(c)(6) of the CEA, by its terms, was not intended to permit a blanket exemption for all transactions entered into pursuant to a FERC- or PUCT-approved Tariff. Moreover, section 4(c)(6) expressly prohibits the Commission from issuing an exemption for such transactions unless it affirmatively determines that exempting them would be consistent with the public interest and the purposes of the CEA.

2013 RTO/ISO Order at 19886. Eliminating the private right of action for illegal manipulation of contract markets hurts the public and is contrary to the purposes of the CEA. Eliminating that check on illegal manipulation will invariably lead to more manipulation and decreased integrity of contract markets, which is directly contrary to the purposes of the CEA. Eliminating the private right of action would thus be contrary to the CFTC's exemptive powers.

Finally, the CFTC cannot exempt the effects of transactions in the physical energy markets from the private right of action because the private right of action is not a "requirement" of the CEA. Section 4(c)(6) of Dodd-Frank authorizes the CFTC to grant exemptions from the CEA's "requirements." 7 U.S.C. § 6(c)(6). The private right of action is not a requirement of the CEA, it is a right provided to individuals harmed by illegal manipulation. Consequently, the CFTC did not have the power in the 2013 RTO/ISO Order to eliminate the private right of action.

The private right of action has always existed in the CEA through the intentional will of Congress and was not – and cannot be – eliminated through any RTO/ISO exemption, including the 2013 RTO/ISO exemption. Thus, proposing to preserve the private right of action in the Proposed Amendment is not a change of policy. Indeed, it is a clarification that the private right of action always existed and that any contrary view of a judicial body is erroneous.

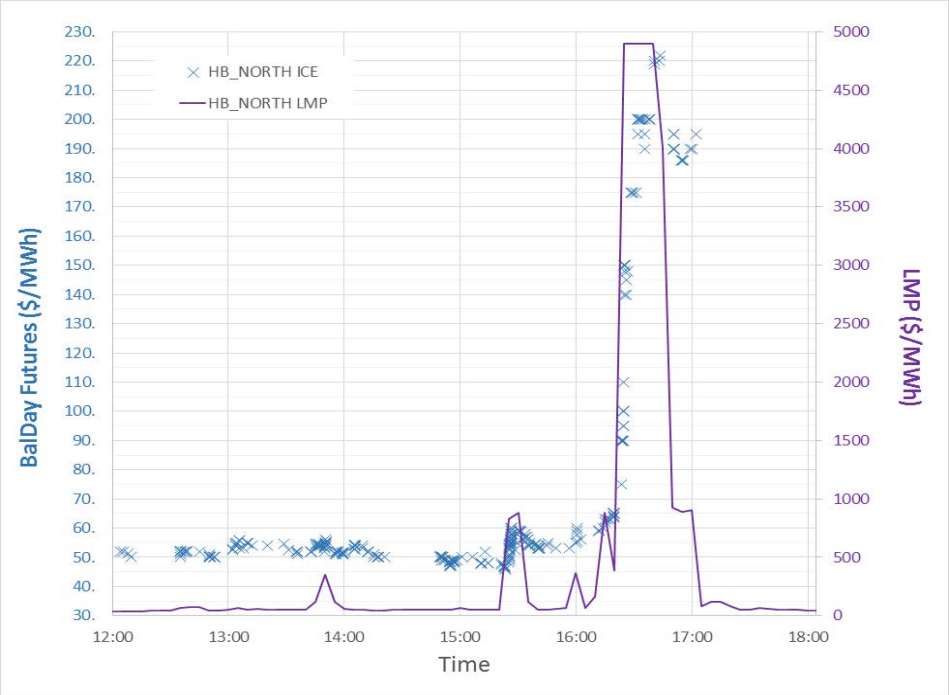
B. Regulation of Market Manipulation Cannot be Left Exclusively to RTOs/ISOs or the CFTC.

Establishment of the RTO/ISO markets resulted in robust trading of energy futures on separate financial markets like the InterContinental Exchange ("ICE"). The financial markets are used by participants in the physical market as the primary vehicle for hedging risk in the physical market. Thus, a generator in a particular RTO will sell energy in that RTO and

[3] http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister051815.pdf.

simultaneously trade derivatives on the financial markets that are directly connected to the RTO physical market in which it participates.

There is no question that activity in the physical market affects trading prices in the financial market. A generator can thus affect both physical market prices and the trading prices on financial markets by changing its behavior in the physical market. The chart below shows ERCOT prices correlated with ICE trading prices for September 3, 2015:



Similarly, policies in an RTO can affect derivative trading prices. In the videos, viewable at http://archive.adminmonitor.com/puct/real/PUCT_WS100813-1.rm, representatives of GDF Suez tell the PUCT that certain PUCT policies will not achieve their desired ends based on feedback from the trading prices on the derivative markets – a clear admission and acknowledgment of the tie between the two markets. Given that tie, transactions, activities and policies applicable to the RTO/ISO physical markets can undoubtedly be exploited for purposes of manipulating the tied financial markets, where RTO/ISO participants trade. That such a potential exists cannot be legitimately disputed.

The RTOs/ISOs mission is to deliver electricity reliably and efficiently. Their rules, products and processes are designed with that mission in mind. There is no reason to expect an RTO/ISO to implement rules or processes to protect the separate, financial contract markets under the CFTC's jurisdiction. Accordingly, their rules may not, and in most cases likely do not, ensure the transparency, openness and integrity of the contract markets. RTO/s/ISOs cannot be reasonably expected to institute or enforce such rules. And, in no sense are the RTO/ISO rules – designed to deliver energy reliably and efficiently – effective mechanisms for ensuring proper operation across separate markets, including the financial contract markets under the CFTC's jurisdiction.

Further, RTO/ISO market monitors are focused on whether market participants operate in accord with the applicable rules for the particular RTO/ISO. An RTO/ISO market monitor does not have—and does not seek— information regarding a market participant's activities on ICE or other derivative energy markets such as the Nodal Exchange. Lacking this information, monitors do not—and cannot be expected to—effectively monitor the entire range of activity a given market participant may engage in, including activity that may be tied to manipulation of the financial contract markets. It is unreasonable to believe that RTOs/ISOs can or will prevent illegal market manipulation on their own.

As a result, what has happened in actual practice is that electricity "market" performance and efficiency has been defined solely in terms of outcomes in the RTO/ISO operated markets. That is, market monitoring and evaluation has only taken place within the RTO/ISO markets and is measured only against the requirements of the accepted rules. The RTOs/ISOs are not competent at analyzing how transactions occurring in their markets may serve to manipulate correlated, but separate, financial markets.

While not hindered by a purpose and mission unrelated to the openness and transparency of commodities markets like the RTOs/ISOs, the CFTC cannot be expected to be all places at all times and understand all aspects of all markets. Manipulative schemes may go on for months, or even years, before they are uncovered by regulators. Additionally, whistleblower actions will not sufficiently protect the markets from manipulation and will not adequately compensate those injured by illegal manipulation. The CFTC must still dedicate scarce resources to evaluate and prosecuted accepted whistleblower claims. Further, because the CFTC pursues such actions on behalf of an absent separate party, any damage award may not correlate appropriately with the actual harm suffered. Allowing a person or entity injured by illegal market manipulation to spend its own resources in pursuit of its own compensatory damages is both more efficient and more effective.

In this situation – a highly complex and interdependent markets – the entities with the best information on how the market is working are the market participants themselves. Participants who are routinely engaged in operating, trading, investing, writing contracts, and related activities are far better placed to have the information, the knowledge and the understanding necessary to know if manipulation is taking place than is a market monitor or regulatory body. They are also better able to understand what questions need to be asked, what data needs to be gathered, what analysis needs to be performed, etc. in order to either prove or disprove that manipulation took place. For these reasons the CFTC has appropriately and accurately acknowledged that the private right of action is a necessary and effective tool to prevent illegal manipulation, especially through such complex markets as the RTO/ISO physical markets. Local regulation by the RTO/ISO is simply not rational and exclusive regulation by the CFTC is not practical.

C. The Private Right of Action Will Not Cause Jurisdictional Confusion or the Other Alleged Detrimental Effects to the RTOs/ISOs.

One consistent theme articulated by opponents to the private right of action is that its use will confuse the jurisdictions of FERC or CFTC. That criticism is misplaced. The jurisdictions of FERC and the CFTC are defined by statute. The private right of action allows individuals to recover damages for violation of the CEA. A person or entity exercising that right cannot exceed the boundaries of the CEA and has the same freedom to act, and the same limitations on his or her actions, as does the CFTC. By definition, the private right of action allows a private entity to act only where and to the same extent the CFTC could. Thus, there is simply no logical argument that allowing private actions will blur the boundaries of the CFTC's jurisdiction.

Another misplaced criticism of the private right of action is that actions brought by private litigants will create inconsistent legal standards. Actions brought pursuant to the private right of action will be heard in the same courts in which the CFTC would bring its enforcement actions. Therefore, private actions cannot promote inconsistency any more than currently exists under the CEA through CFTC enforcement actions. In fact, a private right of action will promote consistency since a greater universe of decisions will eliminate outlier decisions and create a more uniform and predictable system of common law interpreting the CEA's provisions.

Finally, allegations that having a private right of action would create a flood of manipulation lawsuits are unsupportable. A purported fear of out of control litigation is offered in response each time a private right of action is mentioned and it rarely, if ever, proves true. This context is no different. Courts effectively weed out non-meritorious lawsuits. And, if the suit is meritorious it should be filed because of the pro-market effects of such privates suits as explained above. Further, the significant expense of proving a market manipulation case is, itself, a significant deterrent to bringing unjustified claims.

D. Conclusion

Congress intentionally included the private right of action in the CEA as an additional mechanism to deter and catch illegal manipulation of commodities markets. The CFTC did not eliminate the private right of action in its 2013 RTO/ISO Order, nor could it. Suchan act would have violated the purposes of the CEA. The private right of action is necessary to detect exploitation of the complex rules in each RTO/ISO and their use to manipulate financial contact markets. And, the private right of action is consistent with market principles and will not adversely affect the proper functioning of the various RTO/ISO markets.

The purpose of the CEA is to prohibit market manipulation. "The mission of the Commodity Futures Trading Commission (CFTC) is to foster open, transparent, competitive, and financially sound markets, to avoid systemic risk, and to protect the market users and their funds, consumers, and the public from fraud, manipulation, and abusive practices related to derivatives and other products that are subject to the Commodity Exchange Act." The purpose of the private

right of action in the CEA to is to allow (1) market participants and (2) injured parties to recover for losses suffered as a result of illegal market manipulation. Eliminating the private right of action will decrease oversight of potential manipulators' conduct. Less oversight will lead to increased manipulation, which will decrease the integrity of commodities markets. That decreased integrity causes greater risk, which will be factored into the price of futures contracts. Higher-priced futures contracts will decrease liquidity in those markets and reduce opportunities for energy companies to hedge risks, which will ultimately manifest in higher electricity prices.

Electricity markets have very extensive and technical rules - because their primary focus is not to create a coherent financial market, but to reliability deliver electricity. That complexity increases the pathways in which manipulation can take place. Given the complexity of the RTO/ISO markets the potential for exploiting their rules to manipulate correlated financial markets is nearly boundless. . That reality requires the CFTC to continue the private right of action, as only private individuals with detailed, every day knowledge of the RTO/ISO markets and their effects on the financial markets can effectively detect and prevent manipulation.

The cost of increased market manipulation -- the inevitable consequence of eliminating the private right of action permitted by the CEA – ultimately will be borne by consumers, contrary to the public interest and contrary to the purposes of the CEA. The CFTC correctly seeks to preserve the private right of action for individuals injured by illegal market manipulation, regardless of whether that manipulation occurs in the copper market, the RTO/ISO market or on the financial contract markets through use of transactions in the RTO/ISO markets.

Respectfully,

Aspire Commodities, LP

/s/ Barry M. Hammond, Jr.

Barry M. Hammond, Jr.
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