

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

June 14, 2016

Christopher Kirkpatrick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street NW  
Washington, DC 20581

**Re: 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**

Comments of the Staff of the Federal Energy Regulatory Commission

Dear Mr. Kirkpatrick:

On May 16, 2016, the Commodity Futures Trading Commission issued a Notice of Proposed Amendment and request for comment on an order issued on March 28, 2013, exempting certain electric energy transactions from specified provisions of the Commodity Exchange Act and CFTC regulations (RTO-ISO Order). In the Notice of Proposed Amendment, the CFTC proposes to clarify that the order does not exempt the entities covered by the order from the private right of action in Section 22 of the CEA.

As discussed in our prior comment letters, the Federal Energy Regulatory Commission regulates the transmission and sale for resale of electricity in interstate commerce by public utilities pursuant to the Federal Power Act and ensures that the rates charged are just and reasonable. As part of this mission, FERC has authorized the creation of public utilities known as independent system operators (ISOs) and regional transmission organizations (RTOs), which serve as the regional grid operators throughout much of the United States. FERC pervasively regulates these entities to ensure both that rates remain just and reasonable and that the transmission system in their region is operated in an efficient and reliable manner.

In addition to operating markets for physical products like the sale and transmission of electric energy, these grid operators oversee markets for certain financial products that are closely tied to the physical operation of the grid, such as those identified in the RTO-ISO Order. All of these products, as well as the relevant market rules and pricing mechanisms, are authorized and overseen by FERC. These authorizations are implemented in lengthy tariffs that FERC reviews and approves. FERC staff monitors these markets to ensure that they are functioning efficiently and appropriately. FERC also requires each grid operator to have an independent market monitor for its markets, who reviews all market activities in real-time and also may propose improvements to market design and market rules for FERC's consideration.

We have previously submitted comments on other proposed Dodd-Frank implementing rules in which we raised concerns about the potential for duplicative or inconsistent regulation of participants and transactions in the FERC-jurisdictional markets. In this vein, we have urged the CFTC to interpret the CEA as not applying to any contract or instrument traded in these markets pursuant to a FERC tariff. FERC staff continues to see that approach as the most natural and appropriate application of the CEA and the FPA.

Nonetheless, we offer the following comments on the Notice of Proposed Amendment. First, for the reasons discussed below, FERC staff opposes the introduction to FERC-jurisdictional markets of a private right of action under the CEA.

As the Notice of Proposed Amendment recognizes, Congress acted in Dodd-Frank to expand the CFTC's jurisdiction while indicating that it intended to balance the CFTC's new authority with FERC's jurisdiction and regulatory mandate. The statute included a savings clause in section 2(a)(1) of the CEA that reserved authority to FERC and state regulatory authorities. Congress also granted the CFTC the ability under section 4(c)(6) of the CEA to issue exemptions for certain contracts, agreements, or transactions. In addition, Congress required the CFTC to work with FERC to, among other things, establish procedures for "resolving conflicts concerning overlapping jurisdiction" between the two agencies and avoid "to the extent possible, conflicting or duplicative regulation."<sup>1</sup>

Revising the RTO-ISO Order to allow private rights of action for transactions in these markets could upset this Congressionally-mandated balance. As part of the Energy Policy Act of 2005, Congress expressly prohibited energy market manipulation and provided FERC with robust enforcement authority, including the ability to impose significant civil penalties.<sup>2</sup>

---

<sup>1</sup> 15 U.S.C. § 8308.

<sup>2</sup> See 16 U.S.C. § 824v; 18 C.F.R. § 1c.2 (2016).

That same statutory provision, though, explicitly prohibits private rights of action in market manipulation cases. This statutory decision made by Congress in favor of public enforcement by a specialized agency, rather than private enforcement through a generalist court, is consistent with the nature of these markets. As discussed above, these markets are both complex and highly regulated. Because the markets only involve wholesale transactions, market participants are typically highly sophisticated entities such as generators and utilities. Consumers, by contrast, do not purchase or sell the financial products in these markets. Thus, introducing a private right of action to these markets via the CEA appears inconsistent with Congressional intent and would conflict with the design of the FPA.

In addition, the FPA already provides significant provisions to ensure protection for consumers. Under section 206 of the FPA, FERC may determine, either on its own motion or as a result of a complaint, that an existing rate or market feature is unjust and unreasonable and, as such, FERC must establish a just and reasonable rate prospectively. This authority extends to the products at issue in the RTO-ISO Order. Once FERC finds an existing rate to be unjust and unreasonable, it has authority to order refunds. Notably, though, the relief granted is generally prospective. Allowing private rights of action through the courts could frustrate the careful line Congress drew when establishing complaint proceedings under the FPA designed to balance the need for market certainty with the goal of consumer protection.

Allowing private rights of action under the CEA for transactions in FERC-regulated RTO and ISO markets is also at variance with Congress' directive that the CFTC and FERC establish cooperative procedures for avoiding conflicts where the agencies' jurisdiction may overlap. As required by Congress, the CFTC and FERC have set forth such procedures in a memorandum of understanding. Establishing a private right of action under the CEA risks the potential of jurisdictional conflicts between the CFTC and FERC being disputed by private actors in court proceedings, rather than through the inter-agency cooperation that Congress intended. This outcome could increase both regulatory uncertainty and litigation risk and make the markets less efficient.

Second, while FERC staff opposes the proposal to provide for a private right of action in these markets, we appreciate the CFTC's recognition in its Notice of Proposed Amendment of FERC's continuing jurisdiction over the covered transactions in the RTO-ISO Order. The CFTC states that given the savings clause of Section 2(a)(1)(I)(i) of the CEA that Congress enacted in Dodd-Frank, "nothing in the CEA could limit or otherwise affect FERC's or PUCT's authority over the Covered Transactions, regardless of any judicial finding regarding the nature of the Covered Transactions." FERC staff strongly agrees with that statement, which appropriately recognizes FERC's longstanding regulation and oversight of these aspects of its jurisdictional markets.

If the CFTC ultimately amends the RTO-ISO Order to provide a private right of action under the CEA in these markets, FERC staff requests that the CFTC reiterate in its final order that the CFTC does not have exclusive jurisdiction over transactions covered by the RTO-ISO Order. Such an explicit statement from the CFTC would provide greater certainty for participants in these FERC-jurisdictional markets and would limit the potential for jurisdictional conflict in any future litigation based on a private right of action.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Max Minzner', with a long horizontal flourish extending to the right.

Max Minzner  
General Counsel