

VIA ELECTRONIC SUBMISSION

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: 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.

Comments of the Financial Marketers Coalition

Dear Mr. Stawick:

The following comments are provided by the Financial Marketers Coalition (Coalition) in response to the Commodity Futures Trading Commission's (the "Commission") Proposed Order issued on August 28, 2012 concerning 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 (Proposed Order). This Proposed Order was issued in response to a Petition filed by certain Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs) and the Electric Reliability Council of Texas (ERCOT) (collectively ISOs/RTOs), which requests that all ISO/RTO Market Participants be exempt from the Commission's jurisdiction under Section 4(C)(6) of the Commodities and Exchange Act (CEA).¹ The Coalition supports the exemption requested by the RTOs/ISOs and appreciates the opportunity to submit comments regarding the Proposed Order.

¹ See 7 U.S.C. 6(C)(6).

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A primary goal of the Coalition in providing these comments is to assure that wholesale electricity markets remain pro-competitive, fair and that unwarranted barriers to market entry are avoided. The Coalition is an industry trade group made up of independent power marketing companies that trade electricity at wholesale in all of the organized ISO/RTO markets and the Electric Reliability Council of Texas (ERCOT). The Coalition is an active participant in many ISOs/RTOs and ERCOT stakeholder proceedings as well as in proceedings before the Federal Energy Regulatory Commission (FERC). The Coalition also closely monitors Commission rulemakings and proposed orders as well as related legislative proposals.

I. EXECUTIVE SUMMARY

Based on the text of the Proposed Order, the Coalition believes the Commission has attempted to exempt all of Petitioners' Market Participants from the full scope of its CEA jurisdiction, a result fully supported by the Coalition. However, as discussed below, some text in the Proposed Order suggests the Commission may be attempting to draw a distinction between certain groups of Market Participants based on a possible misunderstanding of how the RTO/ISO markets operate. Thus the Coalition respectfully requests that the Commission clarify that all Market Participants currently transacting in the RTO/ISO Markets are exempt from the Commission's jurisdiction under the Proposed Order. More specifically, Financial Marketers request that the Commission provide the following clarifications. First, consistent with the ISO/RTO Petition, the Commission should clarify that all Virtual Transactions² are exempt under the Proposed Order. Commission regulation of Virtual Transactions is neither needed nor

² A Virtual Transaction is a purchase or sale of energy in the day-ahead market that is settled against real-time energy prices. Virtual Transactions currently include such products as Financial Transmission Rights (FTRs), Up-To Congestion Transactions (UTCs), and Incremental bids (INCs) and Decremental offers (DECs).

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warranted because these transactions are extensively regulated by ISOs/RTOs, Market Monitors and FERC and are inextricably linked to the physical capabilities and operations of the wholesale electricity markets and the grid. Second, the Commission should clarify that a Market Participant does not have to own physical assets, such as transmission lines or generating facilities, in order to be exempt from its jurisdiction under the Proposed Order. Third, the Commission should clarify that the intent of the Proposed Order is that all Market Participants that satisfy the financial requirements under FERC Order No. 741 fall within the definition of “appropriate persons” and thus are also exempt from Commission jurisdiction. The Coalition strongly believes that these clarifications are essential to maintaining a well-functioning and competitive ISO/RTO system. A dual regulatory structure would be inefficient, operationally unworkable and inconsistent with the Commission’s goals.

II. THE COMMISSION SHOULD CLARIFY THAT THE PROPOSED ORDER EXEMPTS MARKET PARTICIPANTS THAT ENGAGE IN VIRTUAL TRANSACTIONS BUT DO NOT OWN TRANSMISSION OR GENERATION ASSETS

Financial Marketers respectfully request that the Commission clarify that all Virtual Transactions, including Financial Transmission Rights, Up-To Congestion Transactions, and Incremental bids and Decremental offers are included in the proposed exemption from the Commission’s jurisdiction. Financial Marketers believe this was the Commission’s intent but some of the language in the Proposed Order could be interpreted in a manner that would create an artificial distinction between some investor-owned utilities operating in the ISO/RTO markets and all other Market Participants. For example, when describing the exempt transactions, the Commission states that such transactions are “primarily entered into by commercial participants

that are in the business of generating, transmitting and distributing electricity.”³ However, not all participants in the ISO/RTO markets generate, transmit or distribute physical electricity. In fact, many traditional utilities no longer own generation or wholesale transmission facilities. Similarly, many non-traditional utilities, including many engaging in Virtual Transactions, have never owned these facilities. In fact, FERC has spent many years encouraging or requiring unbundling and promoting market entry by non-traditional Market Participants in order to enhance competition. Since there is no fundamental difference between Market Participants that own these physical assets and all others we believe and trust that the Commission should clarify that it was not intending to make any jurisdictional distinction based on asset ownership. This would certainly be in line with the regulatory approach taken by FERC and the RTOs/ISOs over the last decade.

III. COMMENTS

Because some of the language used in the Proposed Order suggests that asset ownership is necessary to be granted the requested exemption, we ask that the Commission clarify that no such distinction was intended and specifically that all Virtual Transactions are exempt under the Proposed Order. This request is necessary and appropriate for several key reasons.

A. The Current Regulatory Scheme Imposes Significant Oversight On Virtual Transactions

Commission jurisdiction over Virtual Transactions is unneeded and unwarranted because all of these transactions are already extensively regulated by FERC, the ISOs/RTOs and Market Monitors. Virtual Transactions, like all others, are offered and entered into pursuant to a detailed ISO/RTO Tariff that has been approved by FERC, or in the case of ERCOT by the Public Utilities Commission of Texas (PUCT). Further, all Virtual Transactions are currently subject to

³ Proposed Order at 52, 144.

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a long-standing and comprehensive regulatory framework for the offer and sale of electricity. Any changes to Virtual Transactions in the RTO/ISO markets, such as implementing a new rule expanding or limiting trading, must be vetted through a rigorous RTO/ISO stakeholder process and then approved by FERC.

All Market Participants that engage in Virtual Transactions must abide by stringent credit, financial, oversight and other regulatory requirements enforced by the ISOs/RTOs, Market Monitors and FERC on a real-time basis. ISOs/RTOs and their Market Monitors review this trading, along with all other trades, on an hourly basis (if not more frequently). Similarly, FERC issues orders on ISO/RTO issues on a daily basis and has its own Office of Energy Market Regulation that actively monitors all ISO/RTO markets and a separate Division of Market Oversight within its Office of Enforcement that looks at discrete trades and transactions. Thus there is no regulatory gap, Virtual Transactions, along with all other transactions on the ISO/RTO system, are regularly monitored and the lawfulness of the specific trades actively assessed.

Virtual Transactions are also subject to some of the most stringent credit and collateral requirements in the ISO/RTO system. Unlike more traditional utilities, which often trade based on unsecured credit, Virtual Market Participants must post cash or cash equivalent collateral equal to the full value of their bids and offers. As noted in the Proposed Order, FERC Order No. 741 imposes both minimum participation requirements in order for a Market Participant to transact in the market and credit requirements based on each Market Participant's level of trading activity.⁴ For example, under PJM's Tariff, Attachment Q, Section D II, a Market Participant must provide financial security based on their peak market activity, which is the greatest amount

⁴ *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 75 FR 65942 (Oct. 21, 2010), FERC Stats. & Regs. ¶ 31,317 (2010) (Order No. 741).

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invoiced for the Participant's transaction activity for all PJM markets and services, in any rolling one, two, or three week period, ending within a respective semi-annual period.⁵ Attachment Q, Subsection VIII of PJM's tariff also requires a Market Participant to post financial security equal to 1.33 times their Incremental bids and Decremental offers based on the nodal reference price at each location. These nodal reference prices are calculated based on the 97th percentile price differential between hourly day-ahead and real-time prices experienced over the corresponding two-month reference period in the prior calendar year. In addition to a real-time trade screen to ensure that Market Participants have sufficient collateral posted to transact, a virtual Market Participant's peak market activity is re-evaluated semi-annually to ensure that the credit requirement is current and adequate. All Market Participants are also obligated to immediately notify the ISO/RTO of any material change to their financial condition.

All of the RTOs/ISOs also require Market Participants, consistent with FERC Order No. 741, to have a risk policy and risk assessment program in effect and annually certify that it is being complied with. The risk framework must be documented in a risk policy that addresses market, credit and liquidity risk. Each Market Participant must also maintain an organizational structure with clearly defined roles and responsibilities that segregate trading and risk management functions. In addition, each Market Participant must have rules in place that require each trader to have adequate training relative to his or her trading authority and ensure that risk limits are in place to control risk exposure.

In addition to the requirements laid out by FERC and Petitioners, each ISO/RTO also has a Market Monitoring Unit responsible to FERC (or the PUCT for ERCOT), which closely monitors all transactions and market activity. Each Market Monitoring Unit has full access to the ISO/RTO systems, market and trading data, which is used to evaluate the performance of the

⁵ See generally Attachment Q of PJM's tariff.

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markets and to identify conduct by Market Participants or the ISO/RTO that could compromise market outcomes or identify efforts to manipulate the market.⁶ In addition to this real time monitoring, each Market Monitoring Unit produces an annual report assessing the competitive performance of the overall ISO/RTO markets and other reports through out the year focused on specific market issues. Some RTOs/ISOs have both an Independent Market Monitoring Unit as well as an internal department of Market Monitoring to provide additional protections.⁷

Therefore, it is abundantly clear that Market Participants that engage in Virtual Transactions, like all other Market Participants, must meet stringent market entry requirements and continuing credit requirements, comply with significant regulatory disclosure requirements and have policies and procedures in place to minimize any potential risk to the market. Thus, any additional regulation or oversight by the Commission over Virtual Transactions is neither needed nor warranted because they are subject to even more restrictions and protections than physical transactions under the current regulatory rules.

B. As Required By the Proposed Order, Virtual Transactions Are Inextricably Linked To The Physical System

The Commission should clarify that all Virtual Transactions are exempt under the Proposed Order because Virtual Transactions are inextricably linked to the physical system. While Financial Marketers believe this to be the Commission's intent, certain language in the Proposed Order could be inconsistent. For example, the Proposed Order states "financial transactions that are not tied to the allocation of the physical capabilities of an electric transmission grid would not be suitable for exemption because such activity would not be

⁶ See e.g. *Southwest Power Pool, Inc.*, 106 FERC ¶61,110 at P 134, order on reh'g, 109 FERC ¶61,010 (2004). See generally Attachment M of PJM's Tariff, PJM Market Monitoring plan.

⁷ See e.g. Appendix A to Section III of the ISO New England Tariff.

inextricably linked to the physical delivery of the grid.”⁸ This statement appears to be based on a misunderstanding of how the ISO/RTO markets operate because it suggests that Virtual Transactions are not tied to the physical capabilities of an electric transmission grid.

All Virtual Transactions are tied to the physical capability of the grid. In fact, financial bids and offers for electricity are submitted in the same manner, cleared in the same manner and settled at the same time as physical bids and offers. In at least two of the ISOs, PJM and CAISO, Virtual Transactions are included in the same modeling run as the physical bids and offers in order to determine the most efficient dispatch and operation for that particular day. More specifically, PJM has three modeling runs prior to determining dispatch for each day and both financial and physical bids and offers are modeled in the first and second modeling runs. This modeling results in both price and operational efficiency because it allows the system operator to determine which units to dispatch based on the best price and projected demands considering all offers and bids including virtuals. All other ISOs/RTOs use a comparable process that considers all physical and financial transaction in determining the most efficient price and generation mix.

Further, all Virtual Transactions are cleared based on the capabilities and needs of the physical system. FTRs, for example, are available only to the extent allowed by the physical limits of the grid. As FERC has noted in previous comments to the Commission, all FTRs must be simultaneously feasible on the grid, unlike financial derivatives which are only limited by the willingness of Market Participants to take an opposite position.⁹ The same is true of Up-To Congestion Transactions and Incremental bids and Decremental offers. Virtual Transactions cannot be entered into unless the selected node and the grid are capable of supporting the

⁸ Proposed Order at 52,143.

⁹ FERC’s Comment Letter dated February 22, 2011 submitted in response to the Commission’s request for comments on various proposed swamp-related definitions (Comment File RIN 3235-AK65).

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transaction. If the physical node is not available, the transaction is rejected. Thus the aggregate cleared volume of Virtual Transactions for any period is limited by the physical capability of the electricity system operated by the RTOs/ISOs and is based on the projected physical power needs of the system for the specific hour, day, month or year. As FERC has noted, “virtual transactions may also increase options and flexibility for managing physical production and delivery....”¹⁰ Because all Virtual Transactions are inextricably tied to the physical system they should fall within the Commission’s exemption. Certainly, there is no rationale basis for treating Virtual Transactions differently from other ISO/RTO transactions.

C. Virtual Transactions Fully Meet the Test Required by the Commission For Coming Within The Exemption

All Virtual Transactions meet the requirements the Commission set out in the Proposed Order for an exemption. All Virtual Transactions: a) take place on markets that are monitored “by either an independent market monitor, a market administrator (the RTO/ISO or ERCOT) or both, and government regulator (FERC or PUCT)”¹¹; and b) are inextricably tied to Petitioners’ physical delivery of electricity.¹¹ As noted, Virtual Transactions are fully regulated by the RTOs/ISOs (or ERCOT) and FERC (or the PUCT) and are also monitored by a Market Monitoring Unit on the same basis as any physical asset or physical transaction. All Virtual Transactions are linked to the physical delivery of electricity because they are indistinguishable parts of the same trading markets. There is no factual basis for distinguishing between physical and financial transactions; both are essential elements of a single market. Thus the Commission should exercise its authority under the CEA, Section 4(c)(6), “to exempt from its regulatory oversight, among other things, agreements, contracts, or transactions traded pursuant to an RTO

¹⁰ *Independent Sys. Operator of New England*, 109 FERC ¶61,383 at P 34 (2004).

¹¹ Proposed Order at 52, 144.

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or ISO tariff that has been approved or permitted to take effect by FERC or a State regulatory authority.”¹²

D. The Coalition Requests Clarification That Exempt Entities Do Not Have To Own Physical Assets

While the requirements set out by the Commission in the Proposed Order do not require ownership of physical assets, the Commission states several times that the exemption applies primarily to those in “the business of generating, transmitting and distributing electricity.” There is a stark difference between companies in “the business of generating, transmitting and distributing energy” and the requirement that “transactions be inextricably linked to physical system.” As noted above, all Virtual Transactions are limited to the physical capacity of the grid and thus they are part of the physical system. However, such transactions do not require a Market Participant to own a physical asset. A requirement to own a physical asset would contradict how all Market Participants have been regulated for over a decade. While the Coalition believes that it was not the intent of the Commission to require a Market Participant to own a physical asset, such a clarification is extremely important to maintain competition in the markets and avoid creating an unduly discriminatory policy.

E. Subjecting One Group Of Market Participants To Greater Regulatory Requirements Than All Others Would Violate The Federal Power Act

Exempting one group of Market Participants and not others would create an artificial distinction between different classes of Market Participants in direct conflict with the requirements of the Federal Power Act.¹³ The Federal Power Act states that “[n]o public utility shall, with respect to any transmission or sale subject to the jurisdiction of the [FERC], (1) make or grant any undue preference or advantage to any person or subject any person to any undue

¹² See 7 U.S.C. 6(c)(6).

¹³ 16 U.S.C. § 824d(b) (2006).

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prejudice or disadvantage...”¹⁴ A Final Order that would require one group of Market Participants to abide by a set of onerous regulations while exempting all others from those requirements would certainly be unduly discriminatory and preferential. Under the status quo all Market Participants are treated in the same manner from both an operational and regulatory perspective because, as demonstrated above, there is no difference in participating or transacting that would warrant any other approach. FERC and the courts have stated on multiple occasions that “undue discrimination is in essence an unjustified difference in treatment of similarly situated customers.”¹⁵ A burdensome dual regulatory structure imposed on one set of similarly situated Market Participants would undermine their ability to transact in the market and unduly prefer those that did not face this second regulatory structure. In addition, because of the way the ISOs/RTOs implement their regulations and model their systems, there is no justification for treating one set of Market Participants differently from another.

Finally, excluding one set of Market Participants from the Proposed Order would cause many Market Participants to exit the market because they simply could not operate based on the requirements of a dual regulatory structure. Such an outcome would decrease competition, harm, liquidity in the markets and allow the continued exercise of market power. It is indisputable that Virtual Transactions assist in converging prices between the Day-Ahead and Real-Time market and could increase operational efficiency. Thus, the result of not exempting one set of Market

¹⁴ *Id.*

¹⁵ *Transwestern Pipeline Co.*, 36 FERC ¶ 61,175 at 61,433 (1986); *see e.g. Western Grid Development, LLC*, 133 FERC ¶ 61,029 at 61,118 (2010); *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶61,076 at P 369 (2007).

Participants from the Commission’s jurisdiction would be unjust and unreasonable rates for consumers in violation of the Federal Power Act.¹⁶

F. Exempting Certain Market Participants But Not Others Would Make The ISO/RTO Markets Far Less Competitive

Failure to include all Market Participants within the definition of “appropriate persons” would cause many non-traditional Market Participants to exit the RTO/ISO markets because they simply could not meet the net worth requirements under the Commodities and Exchange Act or the burden of compliance with two rigorous regulatory schemes. Further, they could not effectively compete against Market Participants subject to only one regulatory scheme. If non-traditional Market Participants exit the market, competition will be greatly reduced and ratepayers will be harmed. Non-traditional Market Participants ensure that the ISO/RTO markets are more competitive, more liquid and are more robust. They also act to reduce the market power. Further, Virtual Transactions foster price convergence between the Day-Ahead and Real-Time energy markets. Thus, if a distinction is made in the Commission’s exemption that acts to drive non-traditional Market Participants out of the ISO/RTO markets or to so burden the virtual sector that their trading is greatly reduced, the result will be less competition and higher electricity prices.

FERC has frequently noted the importance of Virtual Transactions to a well functioning electricity market. For example, in a recent FERC Order accepting tariff revisions to the CAISO Market re-design, the FERC stated that:

[C]onvergence bidding expands the number of competitors and the number of bids into the day- ahead market. By expanding the number of offers in the day-ahead market, convergence bidding helps prevent the exercise of market power. Without convergence bidding, participants with market power may be able to price discriminate between the

¹⁶ 16 U.S.C. § 824d(a).

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day-ahead and real-time markets, resulting in a forward price that is systematically different than the expected real-time price.¹⁷

In another order, this time addressing revisions to ISO New England’s tariff, the FERC stated that virtual bidding “provides generators and load-serving entities with the flexibility to manage their financially binding day-ahead commitments at the hourly level.”¹⁸ Further, Dr. David Patton, the Market Monitor for New York ISO, ERCOT, ISO-New England and Midwest ISO, has also written extensively about the benefits of Virtual Transactions.¹⁹ In his 2010 assessment of the New England market, Dr. Patton stated, “[v]irtual trading plays an important role in overall market efficiency by improving price convergence between day-ahead and real-time markets, thereby promoting efficient commitment and scheduling of resources in the day-ahead market.”²⁰

IV. THE FINAL ORDER SHOULD CLARIFY THAT ALL RTO/ISO MARKET PARTICIPANTS MEET THE “APPROPRIATE PERSONS” DEFINITION

A. The Commission Should Clarify That Entities That Post Cash Collateral In Lieu of Meeting The Net Worth Requirements Fall Within The “Appropriate Persons” Definition

The Commission should clarify that all Market Participants that post financial security in lieu of meeting the baseline net worth requirements of FERC Order No. 741 come within the definition of “appropriate persons.” A significant number of participants in the RTO/ISO markets post additional collateral in lieu of satisfying the baseline capitalization requirements. For example, over 200 Market Participants in the New York ISO market, over half of this

¹⁷ *California Indep. Sys. Operator*, 133 FERC ¶ 61,039 at P 12-13 (2010).

¹⁸ *Independent Sys. Operator of New England*, 109 FERC ¶61,383 at P 34 (2004).

¹⁹ *See e.g.* 2011 State of the Market Report for the Midwest ISO Electricity Markets (June 2012).

²⁰ 2010 Assessment of the Electricity Markets in New England at 14 (June 2011).

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market, satisfied the minimum participation criteria by posting additional collateral rather than meeting the minimum capitalization requirements. This alternative compliance is not limited to one sector, it is used by generators, load serving entities and financial marketers. Further, the option of posting extra collateral fully protects the market because it is in addition to the collateral that must be posted to support any bids and offers submitted and cannot be used to support any additional trading. Thus, not only does the posting of additional cash or cash equivalent collateral form a fully adequate alternative to the minimum net worth requirements, but it assures that competition and market liquidity are preserved. When FERC approved FERC Order No. 741 it was based on a risk benefit analysis of allowing an alternative to the baseline net worth requirements. FERC determined that protecting competition in the markets by preserving the extra collateral option was critical, thus it allowed RTOs and ISOs to use this alternative.²¹

When considering this clarification, the Commission should recognize all of the regulatory requirements currently imposed by the RTOs/ISOs, FERC and the PUCT significantly limit the degree of risk posed in the wholesale electricity markets. Thus, requiring Market Participants to meet the stringent net worth requirement imposed by the Commission, while not taking into consideration the numerous regulatory protections already in place for those that cannot satisfy them, would be devastating to the ISO/RTO markets and to competition.

The requested clarification is well within the Commission's authority. Section 4(C)(3)(K) defines "appropriate persons," to include "[s]uch other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of

²¹ Order No. 741 at 63-65.

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appropriate regulatory protections.”²² Because Market Participants that post cash collateral must meet the FERC Order No. 741 credit, risk and entry requirements the Commission should deem them “appropriate in light of their financial and other qualifications.” As noted above, the minimum participation requirements as well as the continuing and closely monitored credit requirements ensure that such Market Participants pose very little risk to the market. In addition in light of the fact that these Market participants also comply with all of the other market rules imposed by FERC and the RTOs/ISOs and their Independent Market Monitoring units, the Commission should also determine that they are “appropriate persons” because of the “applicability of appropriate regulatory protections.” Thus, including Market Participants that post cash collateral in lieu of the minimum net worth requirements within the definition of “appropriate persons” under Section 4(C)(3)(K) of the CEA is consistent with the plain language of the statute.

B. The Definition of “Appropriate Persons” Should Be Interpreted To Include All Market Participants That Meet the Order No. 741 Credit Requirements

The Commission should clarify that it interprets the “appropriate persons” definition to include all Market Participants that meet the Order No. 741 requirements. The term “appropriate persons,” is defined as “A [business entity] with a net worth exceeding \$1,000,000 or total assets exceeding \$5,000,000, or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement....”²³ It is unclear how the Commission will quantify the obligations of a business entity or what will be acceptable as a “keepwell, support or other agreement.” For example, will

²² See CEA Section 4(c)(3)(K).

²³ See CEA Section 4(c)(3)(F).

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a parental guaranty be acceptable as is currently in most of the RTOs and ISOs? Would audited financials be required as is currently the case in most RTOs and ISOs?

In its analysis of this issue, the Commission should take into consideration the fact that some of the FERC Order No. 741 requirements are more stringent than those in the Commodities and Exchange Act. For example, the net worth requirements of FERC Order No. 741 are more stringent than the “appropriate persons” definition because total assets must exceed \$10,000,000 not \$5,000,000. In addition, under the Commission’s rules, a Market Participant may meet the net worth requirements by providing unaudited financials while RTOs/ISOs require audited financial statements. Importantly, both sets of rules and regulations serve the important policy goal of protecting the markets. Dual regulatory structures would not further that policy goal or provide additional protections; it would simply make the ISO/RTO market less competitive and far less efficient.

V. IT IS NOT WORKABLE FOR THE CFTC AND FERC TO JOINTLY REGULATE ONE CLASS OF MARKET PARTICIPANTS

Dual regulation would be redundant and unworkable because the Commission’s rules were not formulated with these specialized markets in mind. FERC has regulated Virtual Transactions and RTOs/ISOs since their inception, has a high level of expertise in how the RTO/ISO markets operate and is responsible for ensuring reliable electric service. FERC’s efforts in promoting competition and the formation of organized electricity markets dates back to 1996 when it issued Order No. 888 to encourage the formation of ISOs, which would operate all of the transmission facilities in a geographic area.²⁴ ISOs were aimed at encouraging

²⁴ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996),

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competition by facilitating development of regional power markets, and enhancing trading opportunities for a region's buyers and sellers. Several years later, FERC's Order No. 2000 encouraged the formation of RTOs, which perform the same transmission and market functions as ISOs but extend these benefits to a larger geographic area.²⁵ The Energy Policy Act of 2005 gave FERC's enforcement division significant new penalty authority and the authority to approve and enforce standards for maintaining the reliability of the bulk power system. FERC has regulated every aspect of these markets since the beginning of these markets and has a complete understanding of how the various tariff provisions, reliability rules and statutory obligations are interwoven to translate into efficient and well-functioning markets.

Dual regulation would be extremely harmful from an operational and policy perspective. Dual regulation would subject the organized electricity markets and transactions that are carried out in accordance with FERC-approved tariffs to an entirely different regulatory model, one that does not have as its basis the requirement that rates for wholesale power must be just and reasonable and nondiscriminatory. Assume for a moment that both the CFTC and FERC both regulated Virtual Transactions, and an RTO/ISO wanted to change its tariff to increase the number of INCs and DECs a Market Participant could engage in during a given period, or to change the credit requirements for such transactions, or to change what ISO/RTO costs could be

FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

²⁵ *Regional Transmission Organizations*, Order No. 2000, 65 FR 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 FR 12088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

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included in the rate. The RTO/ISO has already vetted the proposed change with its technical staff, ensured its technical and operational feasibility, determined it is based on cost causation principles and reached consensus among its stakeholders. The CFTC and FERC then both review the revised tariff for approval and reach different conclusions for entirely different reasons, what do the markets do at that point? This would create a bottleneck that would affect the entire electricity market. It would also cause significant hardships on both Market Participants and Petitioners alike -- at a minimum the ISO/RTO would have to vet the issue again through the stakeholder process, reach agreement and make two additional filings to ensure that the revised proposal is in compliance with both agencies' determination, assuming they could be reconciled. Such an outcome would be unworkable. It would also be inconsistent with section 720 of the Dodd-Frank Act, which requires that the public interest in regulating these markets be met "in a manner so as to ensure effective and efficient regulation." Therefore, dual regulation is operationally difficult, extremely inefficient, burdensome on the markets and their participants and violates both the Federal Power Act and the intent of the Dodd-Frank Act.

VI. CONCLUSION

The Coalition respectfully requests that the Commission exempt all ISO/RTO Market Participants from its jurisdiction. More specifically, for the reasons discussed herein, the Coalition requests that the Commission clarify that: (a) all Virtual Transactions are exempt under the Proposed Order and (b) there is no requirement to own physical assets in order to be exempt from the Commission's jurisdiction. Further, the Commission should clarify that all Market Participants that satisfy the minimum financial requirements under FERC Order No. 741 come within the definition of "appropriate persons," including Market Participants that post cash collateral in lieu of meeting the net worth requirements. These clarifications avoid a confusing dual regulatory structure, preserve competition and liquidity in the wholesale electricity markets

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and comport with the non-discriminatory tents of the Federal Power Act and the goal of the Dodd-Frank Act to avoid redundant regulation.

Sincerely,

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