

September 27, 2012

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

VIA ELECTRONIC FILING

RE: Proposed Order and Request for Comment on 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 Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act

Dear Mr. Stawick:

The PJM Industrial Customer Coalition ("PJMICC"), NEPOOL Industrial Customer Coalition ("NICC"), and Coalition of Midwest Transmission Customers ("CMTC") (jointly, "Industrial Coalitions") join in submitting these limited Comments on the Notice of Proposed Order and Request for Comment ("Proposed Order") issued by the Commodity Futures Trading Commission ("CFTC" or "Commission") on August 21, 2012. For the reasons discussed below, the Industrial Coalitions generally support the exemption described in the Proposed Order. To serve the public interest and recognize the unique nature of markets administered by independent system operators ("ISOs") and regional transmission organizations ("RTOs"), the Industrial Coalitions also submit that the definition of "appropriate persons" eligible for the CFTC exemption should be clarified to include traditionally active market participants otherwise eligible to participate in ISO and RTO markets under the Federal Energy Regulatory Commission's ("FERC") eligibility criteria set forth in Order No. 741.

Background

On February 7, 2012, certain RTOs and ISOs filed a consolidated petition requesting that the Commission exempt specified physical transactions from applicable provisions of the Commodity Exchange Act ("Act").¹ Petitioners requested that the Commission exercise its authority under the Act to exempt four types of transactions from CFTC jurisdiction: certain Financial Transmission Rights; Energy Transactions; Forward Capacity Transactions; and Reserve or Regulation Transactions.² These transactions are characterized as "inextricably linked" to the physical delivery of electricity. In the Industrial Coalitions' view, the link to the physical delivery of electricity is critical in order for the exemption to apply. To the extent that a transaction is not "inextricably linked" to physical delivery of electricity, the same factors militating for an exemption do not necessarily exist.

The Commission proposes to grant the Petitioners' requested exemption, subject to certain limitations and conditions.³ The Proposed Order limits the exempted transactions to those offered or sold pursuant to an ISO or RTO tariff, as approved by FERC.⁴ Moreover, the Proposed Order does not exempt Petitioners from those provisions of the Act prohibiting fraud or manipulation in ISO or RTO-operated markets, and the Commission would retain its authority to pursue such conduct.⁵ The Industrial Coalitions support both of these conditions. Of particular note, however, the Proposed Order limits the exemption to only transactions between "appropriate persons" as defined in the Act. For the reasons discussed below, Industrial Coalitions submit this limitation is too restrictive and may exclude market participants that serve the public interest and provide value to customers.

Description of Industrial Coalitions

PJMICC is an *ad hoc* association consisting exclusively of large commercial and industrial end-users of electricity. PJMICC members operate electricity-consumer manufacturing and institutional facilities in all states in the PJM footprint, except the District of Columbia. PJMICC member companies consume approximately 10 billion kilowatt-hours of electricity annually.

NICC is an *ad hoc* association of industrial customers with manufacturing facilities located in New England. NICC members consume large quantities of electricity, and electricity comprises a substantial part of many NICC members' manufacturing costs.

¹ Petitioners include Midwest Independent Transmission System Operator, Inc. ("MISO"); ISO New England, Inc. ("ISO-NE"); PJM Interconnection, L.L.C. ("PJM"); California Independent System Operator; New York Independent System Operator; and the Electric Reliability Council of Texas, Inc. (collectively, "Petitioners").

² Proposed Order and Request for Comment on a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specific Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas, 77 Fed. Reg. 52,138, 52,141 (proposed Aug. 28, 2012) ("Proposed Order").

³ *See id.* at 52,142.

⁴ *See id.*

⁵ *See id.* at 52,146.

CMTC is an *ad hoc* association of large industrial end-users of electricity. All CMTC members operate one or more manufacturing facilities in the Midwest and purchase electric delivery service or bundled electric service from at least one of the transmission owners encompassed by MISO. CMTC members consume more than 12 billion kilowatt-hours of energy annually.

Comments of the Industrial Coalitions

Industrial Coalitions generally support the Proposed Order. The Commission's continued jurisdiction over fraud and manipulation in the ISO and RTO markets provides crucial ongoing market oversight necessary for market transparency and consumer protection. In order to promote robust market participation, however, Industrial Coalitions encourage the Commission to expand the definition of "appropriate persons" in the Proposed Order to include those entities that satisfy FERC-approved market eligibility criteria, which provides the necessary protections to ensure accountability and appropriate risk management safeguards.

A. Continued Commission Oversight of Fraud/Manipulation Protects Consumers

The Act prohibits fraud or manipulation of the market price of any swap, contract for the interstate sale of a commodity, or contract for future delivery.⁶ The Commission is charged under the Act with deterring such activity in order to protect market participants and the financial integrity of the markets themselves. The Proposed Order expressly preserves the Commission's authority to pursue fraudulent or manipulative conduct in ISO- and RTO-operated markets.⁷ The Industrial Coalitions support the Commission's retained authority, and agree that the Commission's continued oversight in these vital areas protects the markets, market participants, and the customers they serve.

As the Commission notes in the Proposed Order, FERC regulations require Petitioners to engage in market monitoring to detect fraud and manipulation.⁸ From the perspective of the Industrial Coalitions, however, the Commission's additional oversight is crucial to detecting and deterring market manipulation that ultimately harms electricity customers. The Industrial Coalitions support the Commission's ongoing oversight with respect to potential fraud and manipulation, which provides an additional layer of consumer protection and transparency in ISO and RTO markets.

B. "Appropriate Person" Definition

In order to be eligible to rely on the exemption described in the Proposed Order, parties engaging in exempt transactions must be "appropriate persons" as defined in the Act. "Appropriate person," for purposes of the Proposed Order, includes entities defined in Section 4(c)(3)(A)-(J) of the Act, and entities qualifying under the Act's definition of "eligible contract participant."⁹

⁶ See *id.* at 52,146.

⁷ See *id.*

⁸ See *id.* at 52,144.

⁹ See *id.* at 52,146.

This definition excludes retail customers.¹⁰

As the Proposed Order acknowledges, the Act's definition of "appropriate person" is not coextensive with the eligibility requirements for all ISO- and RTO-operated markets, and the exemption may therefore exclude some otherwise qualified market participants.¹¹ As a result, traditionally active ISO and RTO market participants, such as certain smaller curtailment service providers ("CSPs") offering demand response services and load-serving entities ("LSEs") affiliated with industrial customers, may be ineligible for the exemption despite meeting minimum eligibility requirements required by Order No. 741.¹² Any question that a market participant does not qualify for the exemption risks that market participant not being permitted to transact in the ISO- and RTO-administered markets.

Accordingly, Industrial Coalitions urge the Commission to expand the definition of "appropriate person" to include ISO and RTO market participants that may not qualify under the Proposed Order's definition, but who "active[ly] participat[e] in the generation, transmission or distribution of electricity"¹³ and have met FERC-approved minimum eligibility criteria under FERC Order No. 741. Given the distinctive characteristics of ISO and RTO markets, and the added value that participants including smaller CSPs and appropriately collateralized LSEs serving affiliated load contribute to these markets, expanding the "appropriate person" definition for purposes of the exemption facilitates increased market participation and avoids duplicative oversight standards.

ISO and RTO markets present unique obstacles to market participation not exhibited in other Commission-regulated commodity markets. By virtue of the unique nature of energy markets, Petitioners' markets present greater barriers to entry than other more traditional commodity markets. In addition, these markets exhibit a high concentration of ownership, resulting in the potential for exercise of market power.¹⁴ The market eligibility criteria required by Order No. 741 address these obstacles by encouraging ISOs and RTOs to implement standards designed to encourage smaller entities to participate, while still safeguarding other market participants from risks associated with a potential default. For example, CSPs created by trade organizations may be able to provide demand response services to their members at a lower cost structure than those CSPs that may otherwise meet the "appropriate person" definition, facilitating additional demand response.¹⁵ With the protection of appropriate collateralization as required by FERC directives,

¹⁰ See *id.* at 52,141 ("appropriate persons" . . . does not include retail customers").

¹¹ See *id.* at 52,163.

¹² See *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 133 FERC ¶ 61,060, *order on reh'g*, Order No. 741-A, 134 FERC ¶ 61,126 (2011) ("Order 741"). Order 741 directed ISOs and RTOs to develop minimum eligibility criteria for participation in the wholesale energy markets. As the Commission notes in the Proposed Order, there is some variation among the approved ISO and RTO criteria; however, all market participants are required to meet a baseline capitalization requirement totaling \$1 million net worth or \$10 million total assets. See Proposed Order at 52,145.

¹³ *Id.* at 52,146.

¹⁴ See State of the Market Report for PJM at 4, PJM Interconnection, L.L.C. (Aug. 16, 2012), *available at* <http://www.pjm.com/~media/documents/reports/state-of-market/2012/2012q2-som-pjm.ashx>.

¹⁵ As demand response providers, CSPs facilitate greater competition in ISO and RTO markets and provide cost-effective dispatching of resources. See *Demand Response Competition in Organized Markets*, Order No. 745, 134 FERC ¶ 61, 187 at P 59 (2011) (emphasizing that removal of barriers to demand response participation facilitates greater market competition); *order on reh'g*, Order No. 745-A, 137 FERC ¶ 61,215 at P 2 (2011). Utilizing the

LSEs affiliated with large industrial and institutional customers can also participate in the markets in a manner that reduces the ultimate cost of energy for the affiliated retail customer by facilitating direct access to wholesale bilateral contracts, direct participation in RTO day-ahead and real-time markets, and direct access to congestion hedging mechanisms not otherwise available to these sophisticated electricity consumers. Moreover, such a structure enables customers to participate directly in economic- and reliability-driven demand response programs through their affiliated entity, which maximizes the value of customers' demand response capability.

Continued market participation by these entities, and other traditional market participants that would otherwise be excluded from the "appropriate person" definition, benefits consumers and allows for more robust wholesale electricity markets. If these types of existing market participation structures are not afforded the proposed exemption, it is reasonable to expect that ISOs and RTOs may seek to limit these entities' ability to participate in their markets out of concern about RTOs or ISOs needing to be registered with CFTC as a derivative clearing organization. Particularly when the FERC has established rigorous minimum participation requirements under Order 741 such that such market participants are required to be appropriately collateralized relative to their market activity, such an outcome would fail to serve the public interest and reduce large customers' ability to compete.

Adopting FERC-approved Order No. 741 eligibility criteria further avoids concerns regarding inconsistency in agency oversight. The purpose of Petitioners' exemption request was to avoid duplicative rules regarding the transactions subject to the proposed exemption. If the Proposed Exemption excludes traditionally active market participants, the objective of consistency will not be achieved.

Finally, should circumstances warrant modification of an ISO or RTO's minimum eligibility criteria, FERC may amend its regulations through notice and comment rulemaking to protect market participants and electricity customers.

minimum eligibility criteria mandated by Order No. 741 as the basis for the definition of "appropriate person" would further clarify that CSPs that do not neatly fit within the "generation, transmission or distribution" demarcations, but nonetheless provide important market services, are eligible to rely on the exemption. To the extent confusion exists as to whether demand response providers generally would qualify as "appropriate persons" for purposes of the exemption, adopting FERC-approved Order No. 741 eligibility criteria would clarify their inclusion.


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Conclusion

The Industrial Coalitions applaud the Commission's continued pursuit of fraud and manipulation in ISO and RTO markets, and respectfully request that the Commission expand the definition of "appropriate person" to include those entities meeting minimum eligibility criteria required by FERC Order 741.

Very truly yours,

McNEES WALLACE & NURICK LLC

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