



Ms. Stacy Yochum, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

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 Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act

Dear Ms. Yochum:

The American Public Power Association (“APPA”) hereby submits its comments on the Proposed Order referenced above (the “RTO Proposed Order”). The RTO Proposed Order was published in Vol. 77, No. 167 of the *Federal Register* on August 28, 2012. APPA supports the Commission’s granting of the exemptive relief sought by the subject Regional Transmission Organizations and Independent System Operators (together, “RTOs”) pursuant to Section 4(c)(6) of the Commodity Exchange Act (“CEA”),¹ and Section 712(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”).²

APPA is joining in comments with other electric industry associations being filed today on the RTO Proposed Order (“Association Comments”). It files these separate comments to make certain additional points on behalf of its public power system members.

APPA’S INTERESTS

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power utilities provide over 15 percent of all kilowatt-hour sales to ultimate customers, and do business in every state except Hawaii. Public power utilities own almost 10 percent of the nation’s electric generating capacity, but purchase nearly 70 percent of the power used to serve their ultimate consumers. All APPA utility members are load-serving entities, with the primary goal of providing retail electric customers in the communities they serve with reliable electricity at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns

¹ 7 U.S.C. § 6(c)(6).

² Pub. L. No. 111-203, 124 Stat. 1376 (2010).

the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities. Collectively, public power systems serve over 46 million Americans.

Approximately 950 public power systems are located in regions of the country that are served by RTOs. RTOs are considered “public utilities” and are therefore regulated by the Federal Energy Regulatory Commission (“FERC”) under the Federal Power Act (“FPA”).³ The RTOs file rate schedules and tariffs setting out their rates, terms and conditions of service for approval by FERC. The cost of their transmission and other services is passed through directly to the retail electric customers of APPA’s member public power systems. Because of the interconnected nature of regional transmission facilities, APPA members in regions that RTOs serve are effectively required to take service from these RTOs and hence to conduct business with them. APPA therefore has a vital interest in the regulatory regimes governing RTO services and operations.

APPROPRIATE PERSONS

At pages 52145-52146 of the RTO Proposed Order, the Commission discusses the subject of “appropriate persons.” It proposes to “limit the Proposed Exemption to entities that meet one of the appropriate persons categories in CEA Section 4(c)(3)(A) through (J), or, pursuant to CEA section 4(c)(3)(K), that otherwise qualify as an eligible contract participant (‘ECP’), as that term has been defined.” *Id.* at 52145. The Commission goes on to observe that “municipal utilities . . . appear to qualify as ‘appropriate persons’ pursuant to CEA section 4(c)(3)(H).” As noted in footnote 99, that subsection defines as appropriate persons “[a]ny governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or . . . any instrumentality, agency, or department of any of the foregoing.” The Commission notes that this definition covers “the municipalities and other government owned market participants.” *Id.* The Commission seeks comment on whether “the entities defined in CEA section 4(c)(3)(A) through (J) are appropriate persons for the purpose of the Proposed Exemption.” *Id.* at 52146.

APPA agrees that the definition in section 4(c)(3)(H) covers public power systems, as they are all units of state or local governments, or agencies or instrumentalities of the foregoing. Moreover, it covers electric utilities that are units or instrumentalities of tribal governments, as they, like other public power systems, are governmental entities, and section 4(c)(3)(H) specifically includes “[a]ny governmental entity.”

It is most important that APPA members be considered appropriate persons for purposes of the proposed exemption, as *APPA members taking service from RTOs generally have no choice as to whether to do so*. If their electric transmission/distribution systems are geographically “embedded” in the footprint of an RTO, they must take transmission and other services from the RTO to provide electric service to their customers, to fulfill their own retail electric service obligations. The interconnected nature of regional electric grids effectively requires APPA members in RTO regions to deal with RTOs as a practical matter, even if they wished to do

³ 16 U.S.C. §§ 824, *et seq.*

otherwise. APPA therefore requests the Commission to affirm in any final order in this proceeding that public power systems are appropriate persons within the meaning of the CEA.

APPA notes that the Association Comments being filed today discuss the applicability of the “appropriate persons” definition to rural electric cooperatives. Electric cooperatives located in RTO regions are in the same position as APPA members. These cooperatives also effectively have no choice but to obtain transmission and other services from their RTOs to fulfill their service obligations to their own retail electric customer-owners. It is less clear, however, whether all electric cooperatives in RTO regions meet the definition of “appropriate persons,” or the definition of “ECP,” for the reasons discussed in the Association comments. APPA accordingly requests the Commission to take all necessary action to ensure that all electric cooperatives that are customers of RTOs are considered to be appropriate persons, so that they can continue to conduct business under any exemption granted to the requesting RTOs.

As the RTOs themselves note in the portion of their exemption request quoted in the Commission’s RTO Proposed Order (at page 52145), these cooperatives are “authorized to own, lease and operate electric generation, transmission and distribution facilities,” and their participation “may be necessary to make electricity available within the entire grid for a region.” It was not Congress’s intent when it passed the DFA to endanger the ability of electric cooperatives to continue to provide retail electric service to their customer-owners. The Commission should not take action, intentionally or not, that would lead to such a result.

CENTRAL COUNTERPARTY

At page 52153 of the RTO Proposed Order, the Commission discusses FERC’s Order No. 741,⁴ and in particular, Section 35.47(d) of the FERC’s regulations regarding RTO credit requirements. The Commission notes that while “there appears to be strong support for the proposition that the central counterparty structure [footnote omitted] would give rise to enforceable rights of setoff of the central counterparty, the Commission believes it would be in the public interest to have further clarity regarding whether a Petitioner’s chosen approach to comply with FERC regulation 35.47(d) grants sufficient certainty regarding the ability to enforce setoff rights.” The Commission therefore “proposes that, as a prerequisite to the granting of the 4(c)(6) request, each Petitioner must submit a well-reasoned legal memorandum from, or a legal opinion of, outside counsel that, in the Commission’s sole discretion, provides the Commission with adequate assurance that the approach selected by the Petitioner will in fact provide the Petitioner with set-off rights in a bankruptcy proceeding.” The Commission proposes that if this condition is fulfilled, “compliance with FERC regulation 35.47(d) appears to be congruent with, and to accomplish sufficiently, Core Principle D’s regulatory objectives in the context of Petitioners’ activities with respect to the Transactions.” However, the Commission “seeks comment with respect to this preliminary conclusion.”

⁴ *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, FERC Stats. & Regs. ¶ 31,317 (2010), *order on reh’g*, Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 (2011), *reh’g denied*, Order No. 741-B, 135 FERC ¶ 61,242 (2011).

APPA takes no position regarding the Commission's proposed condition. Rather, it defers to the petition and comments filed in this proceeding by the RTOs themselves as to whether this condition is reasonable under the circumstances.

APPA notes, however, that the central counterparty constructs either already adopted or under development by various RTOs in response to FERC Order No. 741 have been framed to address a matter of paramount concern to public power systems dealing with RTOs: their continued ability to use tax-exempt financing to finance their operations in compliance with the Internal Revenue Code ("IRC"). The great majority of public power systems finance generation, transmission and distribution facilities with tax-exempt bonds that are subject to the "private activity" prohibition contained in IRC Section 141.⁵ Therefore, public power systems in the various RTOs have been working cooperatively with their RTOs to ensure that the RTOs' central counterparty constructs do not unintentionally trigger potential issues with the IRC's private use restrictions.

APPA does not read the Proposed Exemptive Order as being in any way inconsistent with those efforts. APPA highlights the significance of the private activity issue, however, because the CFTC recently took an action in the course of implementing the DFA that, however unintentionally, has erected an unanticipated and substantial obstacle to public power systems' continued ability to conduct business with certain of their industry counterparties.⁶ In considering any potential revisions to the Proposed Exemptive Order in this proceeding, APPA respectfully urges the CFTC to avoid any action that could have an analogous adverse impact on public power systems, undermining their ability to continue to conduct business with their RTOs while preserving the tax-exempt status of their financing.

⁵ 26 U.S.C. § 141.

⁶ See, the Petition for Rulemaking to Amend CFTC Regulation 1.3(ggg)(4) filed by APPA and a number of other public power entities with the Commission on July 12, 2012, seeking Commission action regarding the \$25 million annual *de minimis* threshold on swap "dealing" business conducted with "special entities." This *de minimis* provision is contained in the Commission's "swap dealer definition" Final Rule published in the *Federal Register* on May 23, 2012. This Petition is currently pending before the Commission.

