

**Via Electronic Submission**

Stacy Yochum, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Center  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

**Re: Comments on the Proposed Order and Request for Comment on a Petition for 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 Electric Power Supply Association (“EPSA”), Edison Electric Institute (“EEI”), National Rural Electric Cooperative Association (“NRECA”), American Public Power Association (“APPA”), and the Large Public Power Council (“LPPC”) (collectively “the Joint Trade Associations”) respectfully submit these comments supporting the Commodity Futures Trading Commission’s (the “Commission”) Proposed Order and Request for Comment on a Petition for 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 (“FERC”) or the Public Utility Commission of Texas (“PUCT”) from Certain Provisions of the Commodity Exchange Act (“Proposed RTO/ISO Exemption”).<sup>1</sup> On August 28, 2012, the Commission published the Proposed RTO/ISO Exemption in the Federal Register. The Proposed RTO/ISO Exemption would exempt specific categories of transactions from certain provisions of the Commodity Exchange Act (“CEA”) as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) and the Commission’s rules.<sup>2</sup> The Commission finds that the specific categories of transactions established in the Proposed RTO/ISO Exemption meet the criteria set forth in section 4(c)(6) of

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<sup>1</sup> *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*, 77 Fed. Reg. 52138 (Aug. 28, 2012). The comments represent the views of the Joint Trade Associations, but not necessarily the views of any particular member with respect to any issue. Various members of the Joint Trade Associations actively participate in one or more of the markets administered by one or more of the Petitioners.

<sup>2</sup> Pub. L. No. 111-203 (2010).

the CEA and requests comments on the Commission's findings and the Proposed RTO/ISO Exemption.

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 95 percent of the ultimate customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members.

NRECA is the national service organization for more than nine hundred rural electric utilities and public power districts that provide electric energy to approximately forty-two million consumers in forty-seven states or thirteen percent of the nation's population. Kilowatt hour sales by rural electric cooperatives account for approximately eleven percent of all electric energy sold in the United States. Because an electric cooperative's electric service customers are also members of the cooperative, the cooperative operates on a not-for-profit basis and all the costs of the cooperative are directly borne by its consumer-members.

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate customers. APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some publicly-owned electric utilities generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

LPPC is an organization representing 26 of the largest government-owned electric utilities in the nation. LPPC members own and operate over 86,000 megawatts of generation capacity and nearly 35,000 circuit miles of high voltage transmission lines, representing nearly 90% of the transmission investment owned by non-Federal government-owned electric utilities in the United States.

The Joint Trade Association members are physical commodity market participants that routinely engage in transactions on and through the delivery and account reconciliation mechanisms of the markets that the Petitioners administer. As such, the Joint Trade Associations are active participants within Petitioners' markets. In that capacity, the Joint Trade Associations

support the Proposed RTO/ISO Exemption and request that the Commission grant it, based upon the existence of pervasive regulation of RTOs/ISOs by FERC and the PUCT, as appropriate.

### **I. Summary of the Joint Trade Associations' Comments on the Proposed RTO/ISO Exemption**

The Joint Trade Associations generally support the Commission's approval and adoption of the Proposed RTO/ISO Exemption. As stated above, the Joint Trade Associations' members routinely engage in transactions on and through the delivery and account reconciliation mechanisms of Petitioners' markets and many members are subject to the rules of one or more of these markets. Based on this relationship, the Joint Trade Associations support the Proposed RTO/ISO Exemption, as discussed more fully below.

The Commission issued the Proposed RTO/ISO Exemption in response to a petition from PJM Interconnection, Inc. ("PJM"), Midwest Independent Transmission System Operator, Inc. ("MISO"), ISO New England, Inc. ("ISO-NE"), New York Independent System Operator ("NYISO"), California Independent System Operator ("CAISO"), and the Electric Reliability Council of Texas ("ERCOT") (collectively, "Petitioners") requesting such exemptive relief under the public interest waiver provisions of section 4(c)(6) of the CEA from certain provisions of the CEA ("Petition"). The Joint Trade Associations appreciate and support the Commission's efforts to accommodate the Petitioners' request<sup>3</sup> and provide the following limited comments on some aspects of the Proposed RTO/ISO Exemption:

- The Joint Trade Associations request that the Commission grant the Proposed RTO/ISO Exemption, based upon the existence of pervasive regulation of Petitioners by FERC or the PUCT, as appropriate;
- The Joint Trade Associations request an expansion of the scope of the specified categories of transactions included in the Proposed RTO/ISO Exemption;

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<sup>3</sup> In providing these comments in support of Petitioners' request and in response to the Commission's request for comment on the Proposed RTO/ISO Exemption, the Joint Trade Associations are not commenting on the representations made by the Petitioners to the Commission. The Joint Trade Associations believe that all existing transactions they enter into on or through the markets administered by the Petitioners can reasonably be placed in one of the four enumerated categories in the Proposed RTO/ISO Exemption, or are otherwise excluded or exempted from the Commission's jurisdiction. If the Commission intended to exclude from the Proposed RTO/ISO Exemption any categories of transactions that are currently entered into on or through the Petitioners' markets, the Joint Trade Associations respectfully request that the Commission identify such categories of transactions and provide the public with notice and an opportunity to comment on such a determination.

- The Joint Trade Associations request clarification that analysis of Petitioners' markets under certain of the SEF Core Principles and the DCO Core Principles does not equate to a finding on Petitioners' status as a SEF or a DCO or the transactions executed on or through Petitioners' markets as swaps;
- The Joint Trade Associations provide comments on the Commission's findings regarding "appropriate persons" under the Proposed RTO/ISO Exemption and a determination by the Commission that certain additional categories of entities are "appropriate persons" as allowed by CEA §4(c)(3)(K); and
- The Joint Trade Associations request modification of certain conditions of the Proposed RTO/ISO Exemption relating to the requirements under FERC Order No. 741.

## **II. Overview of the Proposed RTO/ISO Exemption**

The Proposed RTO/ISO Exemption would exempt the purchase and sale of certain categories of electricity-related products including: "financial transmission rights," "energy transactions," "forward capacity transactions," and "reserve or regulation transactions," as specifically defined in the Proposed RTO/ISO Exemption from most provisions of the CEA, subject to certain conditions. Among the conditions precedent to the exemption, the Commission would require Petitioners to demonstrate compliance with FERC Regulation 35.47 and the credit practices under FERC Order No. 741.<sup>4</sup> The Commission would also require each of the Petitioners to secure an opinion or a memorandum of counsel to assure the Commission that the netting arrangements selected by such Petitioner satisfy the requirements of FERC Regulation 35.47.<sup>5</sup> Finally, the Commission also proposes to require each of the Petitioners to adopt information-sharing provisions that would prohibit such Petitioners from notifying any market participant (including such Petitioners' own members) if the Commission seeks information about the market participant from such Petitioners.<sup>6</sup>

In the preamble to the Proposed RTO/ISO Exemption, the Commission explained what categories of transactions it would consider exempted from certain provisions of the CEA. Additionally, the Commission specifically stated that the Proposed RTO/ISO Exemption would not apply to any transactions beyond the scope of those categories specifically described in the Proposed RTO/ISO Exemption because such a finding would be "inappropriate."<sup>7</sup>

## **III. Comments**

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<sup>4</sup> 77 Fed. Reg. 52164-65 (Aug. 28, 2012).

<sup>5</sup> 77 Fed. Reg. 52165 (Aug. 28, 2012).

<sup>6</sup> 77 Fed. Reg. 52165-66 (Aug. 28, 2012).

<sup>7</sup> 77 Fed. Reg. 52163 (Aug. 28, 2012).

**A. The Commission Should Grant the Proposed RTO/ISO Exemption Based on the Existence of Pervasive Regulation of the Petitioners by FERC and the PUCT.**

The Joint Trade Associations support the Proposed RTO/ISO Exemption on the basis that the Petitioners are already subject to pervasive regulation and oversight by FERC, in the case of the RTOs/ISOs and the PUCT in the case of ERCOT. Therefore, any additional regulation by the CFTC would be duplicative and would lead to increased costs passed on to consumers.

In addition to the currently existing regulation of the Petitioners by FERC and the PUCT, respectively, providing a solid basis upon which the Proposed RTO/ISO Exemption should be granted, the Joint Trade Associations note that Congress did not intend for Petitioners to be subject to such regulation under the Dodd-Frank Act. Congress recognized the impropriety of imposing duplicative regulation over entities such as Petitioners and instructed the Commission and FERC to “appl[y] their respective authorities in a manner so as to ensure effective and efficient regulation in the public interest” and to “[avoid], to the extent possible, conflicting or duplicative regulation.”<sup>8</sup> The Joint Trade Associations respectfully comment that failing to grant the Proposed RTO/ISO Exemption, with the modifications discussed below, would result in conflicting and duplicative regulation of Petitioners. Such duplicative regulation would, in turn, lead to increased compliance costs for Petitioners, which would then be passed on to consumers, resulting in increased prices for electric energy.

Since FERC and the PUCT currently engage in pervasive regulation and oversight of the Petitioners’ markets, the Proposed RTO/ISO Exemption is appropriate and necessary to ensure that duplicative regulation does not lead to increased prices for consumers. Therefore, the Joint Trade Associations support the Commission granting the Proposed RTO/ISO Exemption on the basis that Petitioners are already subject to regulation by FERC and the PUCT.

**B. The Proposed RTO/ISO Exemption is in the Public Interest**

In the Proposed RTO/ISO Exemption, the Commission provides an analysis of the Petitioners’ request for exemption by evaluating the transactions included in the request and the currently existing regulations and oversight of the Petitioners and the specific transactions by the FERC and PUCT, respectively. The Commission also evaluates the Petitioners against the Core Principles established for Derivatives Clearing Organizations (“DCOs”) and Swap Execution Facilities (“SEFs”). The Commission’s analysis reviews the currently existing rules under each individual Petitioners’ Open Access Transmission Tariff (“OATT”) as approved by FERC or the PUCT and the regulations and oversight of FERC or the PUCT to evaluate if the currently existing oversight satisfies the public interest finding required under CEA § 4(c)(6) for granting a public interest waiver of jurisdiction in the Proposed RTO/ISO Exemption. The Joint Trade Associations support the Commission’s finding that the Proposed RTO/ISO Exemption is in the public interest and, as such, supports the Proposed RTO/ISO Exemption.

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<sup>8</sup> Dodd-Frank Act, § 720(a)(1)(A), (C) (2010).

i. Application of Swap Execution Facilities Core Principles to Petitioners

The Commission specifically sought comment on what bases exist for a finding that the Petitioners satisfy the SEF Core Principles. All RTOs and ISOs are required under FERC Order No. 2000 to establish and maintain a market monitoring function.<sup>9</sup> Additionally, under FERC Order No. 719, Petitioners' Market Monitoring Units are required to identify ineffective market rules, recommend proposed rule changes and OATT modifications, review and report on the performance of the markets to the respective RTO or ISO as well as to FERC, and notify FERC when instances of a market participant's behavior may require further investigation.<sup>10</sup> The PUCT has regulations that impose similar requirements on ERCOT.<sup>11</sup> The Joint Trade Associations refer to the discussion of the existing regulatory requirements in the Petition. Based on the Orders and regulations discussed above, the Joint Trade Associations support the Commission's determination that the Petitioners satisfy the requirements under CEA § 4(c) and that rules and regulations under the Petitioners' OATTs in general satisfy the Core Principles and regulatory requirements that would apply to entities seeking designation as a SEF.

ii. Application of Designated Clearing Organization Core Principles to Petitioners

The Commission notes its determinations in the preamble language of the Proposed RTO/ISO Exemption that, while Petitioners are not DCOs, their practices are consistent with the spirit of the policies of DCOs and seek to achieve similar goals as DCOs. The Commission sought comment on this finding.<sup>12</sup>

The Joint Trade Associations support the Commission's determination that the Petitioners' practices, particularly regarding the credit-worthiness provisions and financial integrity rules, satisfy the spirit of the DCO Core Principles. Petitioners' rules related to credit risk, financial settlement and central counterparties exist to strengthen the financial integrity of Petitioners' markets and ensure timely and orderly account reconciliations between members of the particular Petitioner, and market participants and settlement of transactions in such Petitioner's markets. Additionally, each of the Petitioners has implemented increased risk management strategies in order to prevent and protect the markets it administers from disruption

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<sup>9</sup> Regional Transmission Organizations, 89 FERC ¶ 61,285 (Dec. 20, 1999), 65 Fed. Reg. 809 (Jan. 6, 2000) ("Order No. 2000"). Petitioners meet these requirements by establishing a distinct and independent market monitoring program that serves a role similar to that of a market regulation function required for a DCM. Under Order No. 2000, Petitioners' market monitoring programs are required to have access to all market data and maintain the resources necessary to carry out their market monitoring functions. Petitioners' Market Monitoring Units report directly to the board of directors of the respective RTO or ISO.

<sup>10</sup> Wholesale Competition in Regions with Organized Electric Markets, 125 FERC ¶ 61,071 (Oct. 17, 2008). ("Order No. 719").

<sup>11</sup> Texas Public Utility Regulatory Act ("PURA") §39.1515 and PUC Subst. R. §25.365.

<sup>12</sup> 77 Fed. Reg. 52149 (Aug. 28, 2012).

resulting from liquidation or bankruptcy of any market participant. All of these regulations and requirements serve to strengthen each of the Petitioners markets and increase consumer protection in the event a market participant in any such market defaults.

Therefore, the Joint Trade Associations support the Commission's determination that the Petitioners' practices and market rules are consistent with the spirit of the DCO Core Principles and support the Proposed RTO/ISO Exemption.

- iii. The Joint Trade Associations Respectfully Request that the Commission Confirm That Its SEF Core Principles Analysis Does Not Constitute a Finding that Petitioners are SEFs or That Transactions Executed on Petitioners' Markets are Swaps

The Commission evaluated the Petitioners' request in the context of the DCO and SEF Core Principles in order to determine whether and how the requested exemption would satisfy the public interest under § 4(c)(6) of the CEA. The Commission determined that the rules and regulations of the respective Petitioners, coupled with the regulation and oversight of the FERC and PUCT, help to ensure that the Proposed RTO/ISO Exemption satisfies the §4(c)(6) requirement that the exemption is in the public interest. The Joint Trade Associations agree that the current regulatory oversight satisfies the spirit of the SEF Core Principles. However, the Joint Trade Associations request clarification that an analysis of the Petitioners' rules and OATTs under the SEF Core Principles does not equate to a finding by the Commission that Petitioners are or are not SEFs or that the transactions that take place on and through any of the markets and facilities administered by Petitioners are or are not swaps.

- iv. Existing Regulatory Oversight by FERC and PUCT

The Commission requests comments on several aspects of the currently existing regulation and oversight of the Petitioners and the specific categories of transactions set forth in the Proposed RTO/ISO Exemption. The Commission seeks comments on how the currently existing oversight provided by FERC and PUCT prevent the categories of transactions from being susceptible to manipulation, satisfy market monitoring requirements, satisfy reporting and recordkeeping requirements, and can prevent and detect market manipulation.

As explained above, each of the Petitioners and the RTO and ISO markets that each administers meet specific FERC requirements and must operate under FERC approved tariffs. In order to be considered RTOs or ISOs, each Petitioner had to demonstrate compliance with a wide range of requirements, similar to the process necessary under the CEA for an exchange to be granted designation as a Contract Market. In addition to the general rules and orders establishing requirements for consideration as an RTO or ISO, FERC and the PUCT have also issued orders and rules that govern many specific tasks required for any particular RTO or ISO to properly function. Among other things, such Petitioners are required to implement rules ensuring the financial integrity of Petitioners' markets. For example, FERC has issued policy statements and orders outlining how an RTO or ISO (or a particular RTO or ISO) should adopt policies to

ensure the financial integrity of its market and the market participants that transact in each RTO or ISO market,<sup>13</sup> and the PUCT has issued similar policy statements and orders.<sup>14</sup>

The Joint Trade Associations respectfully request that the exempted transactions should not be subject to the Commission's Position Limits regulations. Imposition of position limits would be impractical as Reference Contracts do not exist within any of Petitioners' markets. In addition, the transactions are exempted from Commission jurisdiction, so the Commission should not impose additional regulatory burdens such as Position Limits rules on these transactions. The prices and rates for such transactions are subject to the just and reasonable requirement under the Federal Power Act ("FPA")<sup>15</sup> and, as such, such statutory and regulatory protection displaces any need for Position Limits rules within and one or more of the Petitioners' markets.

The Joint Trade Associations also note that in addition to the regulatory requirements imposed on them by FERC and the PUCT, each of the Petitioners is subject to many other statutory and regulatory requirements imposed by FERC and PUCT rules and regulations on wholesale markets and all participants in the markets, including but not limited to the Petitioners. This includes the requirement under the FPA that wholesale rates for the transmission and sale of electric energy are just and reasonable and not unduly discriminatory or preferential in terms of the rates' effect on customers and discriminatory or preferential to affiliated entities.<sup>16</sup> Similar to FERC's role as the regulator of the RTOs and ISOs, the PUCT also ensures ERCOT's compliance (and compliance of ERCOT market participants) with the PURA and with rules and final orders of the PUCT.

As stated above, the pervasive regulation by FERC and the PUCT of Petitioners' markets should be the basis upon which the exemption is granted. The Joint Trade Associations therefore support the Commission's determination to grant the Proposed RTO/ISO Exemption.

### **C. The Commission Should Expand the Categories of Transactions Covered by the Proposed RTO/ISO Exemption**

- i. The Categories of Transactions Covered by the Proposed RTO/ISO Exemption Create Regulatory Uncertainty for Several Transaction Categories Not Included and Should Be Expanded to Account all Transactions Executed Under an Approved RTO/ISO Tariff or Considered a Logical Outgrowth Of Petitioners Markets

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<sup>13</sup> *Policy Statement on Electric Creditworthiness*, 109 FERC ¶ 61,186 (2004); *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 75 Fed. Reg. 65942 (Oct. 21, 2010), *et seq.*

<sup>14</sup> PURA §39.151; PUCT Rule 25.361(b).

<sup>15</sup> 16 U.S.C. §§824d; FPA §§ 205. (2012).

<sup>16</sup> 16 U.S.C. §§ 824d, 824e; FPA §§ 205, 206 (2012).



The Commission specified the limited categories of transactions to which the Proposed RTO/ISO Exemption would apply. In their request for exemption, Petitioners requested that the Commission exempt the “classes of contracts, agreements or transactions for the purchase and sale of a product or service that is directly related to, and a logical outgrowth of, any of [Petitioners’] core functions as an ISO/RTO...” from the requirements under the CEA other than certain specified requirements.<sup>17</sup> The Proposed RTO/ISO Exemption does not include all of those transactions and any transactions that would be a logical outgrowth of the transactions specifically delineated in the Proposed RTO/ISO Exemption on the basis that it would be “inappropriate” for the Commission to extend the exemption beyond the scope of the limited transactions discussed in the Proposed RTO/ISO Exemption. The Commission expressed concern that any “unidentified” transactions may demonstrate novel characteristics that could pose additional risks to the market that have not yet been considered or accounted for.<sup>18</sup>

The Joint Trade Associations respectfully request that the Commission reverse this finding and include in the exemption all transactions that are directly related to and a logical outgrowth of, the core functions of an RTO or ISO and are executed under a FERC-approved tariff or tariff approved by the PUCT of any one of the Petitioners. This is the scope of the “public interest” determination the Commission is directed to make in § 4(c)(6) under the public interest waiver provisions in §722(f) of the Dodd-Frank Act. The Joint Trade Associations are concerned that not clearly extending the exemption to all such current and future tariffed transactions, as Congress intended, will lead to regulatory uncertainty, particularly for any products or transactions that FERC or the PUCT may authorize in the future, thus requiring Petitioners to constantly request further exemptive relief from the Commission.<sup>19</sup> The Petitioners’ request specifically indicates that the product or service must be directly related to, or a logical outgrowth of, the Petitioners’ core function. As such, the request itself addresses the Commission’s concern regarding unidentified transactions that would pose a risk to the market as the product or service must relate to a core function of the FERC or PUCT regulated markets that the Petitioners administer under a FERC-approved tariff, or, in the case of ERCOT, through final rules and orders approved by the PUCT. Thus, the request is limited by the nature of the markets and its regulations.

Additionally, limiting the exemption as indicated above as well as the possibility that the Commission could reconsider the Proposed RTO/ISO Exemption based on changes to existing FERC or PUCT products will negatively impact the development of future RTO/ISO products

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<sup>17</sup> Petitioners’ Request for Exemption at 9.

<sup>18</sup> 77 Fed. Reg. 52163 (Aug. 28, 2012).

<sup>19</sup> The existing supplemental filings by certain Petitioners, which the Commission did not address in the Proposed RTO/ISO Exemption, are examples of the regulatory confusion that the Commission’s proposed approach creates. Assuming the transactions described in such supplemental filings are not entitled to the Proposed RTO/ISO Exemption, then market participants that execute such transactions on or through the particular Petitioner’s market will have to treat those transactions as “swaps.” If so, not only the transactions, but also the RTOs/ISOs themselves may be subject to regulation by the Commission.

and cause uncertainty in the markets. The energy markets are evolving with new products and technology and the electric market operates on an hour-by-hour basis to accommodate electric demand. Regulatory certainty is needed to allow the markets to operate. The requirements imposed by the Commission could have a chilling effect on more efficient or innovative market structures which, in turn, will affect the efficient operation of the markets as new services and transactions will be needed to address changes in technology, operations, or other changes in the electric markets. FERC and the PUCT exercise extensive regulatory oversight over not just the markets operated by Petitioners, but also the transactions that are executed on or through the markets administered by each Petitioner. Any transactions executed on a market operated by one of the Petitioners under a FERC-approved tariff or, in the case of ERCOT, compliance with a PUCT rule or final order, should fall under the exemption from the delineated requirements of the CEA as Congress intended in § 722(f) of the Dodd-Frank Act. As such, the limitations imposed by the Commission in the Proposed RTO/ISO Exemption are not necessary to ensure that the markets have oversight.

Therefore, for the reasons stated above, the Joint Trade Associations request that: (1) the Commission expand the scope of the Proposed RTO/ISO Exemption to include all classes of contracts, agreements or transactions for the purchase and sale of a product or service that are directly related to, and a logical outgrowth of, any of the Petitioners' core functions as an ISO/RTO and transacted pursuant to a FERC-approved or, in the case of ERCOT, a PUCT final rule or order; and (2) that Petitioners not be required to refile with the Commission simply because a FERC or PUCT approved change was made to an exempted transaction.

- ii. The Commission Should Remove the Limitation on the Exemption that Covers the Commission's Jurisdiction Over Options and Option Transactions

In Section VIII.B.1. of the Proposed RTO/ISO Exemption, the Commission notes that the relief granted is "subject to the conditions and limitations specified herein...[including] the Commission's general anti-fraud, anti-manipulation and enforcement authority under the CEA, including, but not limited to, CEA sections ... 4c(b)... and... Commission regulation... 32.4..."<sup>20</sup> However, CEA section 4c(b) and Commission regulation 32.4 are not part of the general anti-fraud, anti-manipulation and enforcement authority under the CEA. Instead, those sections articulate the Commission's jurisdiction over option transaction. The Joint Trade Associations request that references to sections 4c(b) and 32.4, which may have been included in error, be deleted.

The Joint Trade Associations are concerned that inclusion of such provisions may cause certain transactions included in the Proposed RTO/ISO Exemptions to become subject to the Commission's regulations under the Dodd-Frank Act. For instance, the Joint Trade Associations are concerned that transactions such as "Capacity and Reserve Transactions," which could be

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<sup>20</sup> 77 Fed. Reg. 52166 (Aug. 28, 2012).

viewed in economic terms to have option-like characteristics, could later be subjected to Commission regulation as options. For this reason, the Joint Trade Associations request that the Commission delete the references to sections 4c(b) and Commission regulation 32.4 from the limitations on the Proposed RTO/ISO Exemption as these provisions are not part of the Commission's general anti-fraud, anti-market manipulation and enforcement authority.

**D. The Commission Should Expand the Entities Considered “Appropriate Persons” Under the Proposed RTO/ISO Exemption**

The Joint Trade Associations support the determination by the Commission that all entities described in § 4(c)(3)(A) through (J) and all eligible contract participants (“ECPs”) are “appropriate persons” for the purposes of utilizing the Proposed RTO/ISO Exemption. The Commission asks if it should expand the parties considered to be “appropriate persons” entitled to rely on the Proposed RTO/ISO Exemption to cover other categories of entities that actively participate in the generation, transmission or distribution of electricity.<sup>21</sup> The Joint Trade Associations respectfully request that the Commission expand the parties considered “appropriate persons” under the Proposed RTO/ISO Exemption to include entities that actively engage in transactions in the categories exempted under the Proposed RTO/ISO Exemption on markets overseen by one or more of the Petitioners and that have been found by FERC or the PUCT to properly participate in RTO/ISO markets but who may not otherwise meet the financial requirements to be considered “appropriate persons” under the Proposed RTO/ISO Exemption due to their smaller size and cooperative entity structure. In particular, the Joint Trade Associations respectfully request that the Commission determine that all electric cooperatives that, by their nature, actively participate in the generation, transmission or distribution of electricity, but may not fall within CEA §4(c)(3)(A) through (J) and may not be ECPs, are nonetheless “appropriate persons” entitled to rely on the exemption order.

Section 4(c)(3) of the CEA identifies ten defined categories of appropriate persons;<sup>22</sup> and then provides the Commission with regulatory flexibility to include as appropriate persons for any exemption: “[s]uch other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections” (emphasis added).<sup>23</sup> Under § 4(c)(3)(K) of the CEA, the Commission may consider the operations qualifications of the person (or class of persons) in relation to the exempted transactions, as well as the person's (or class of persons') ability to execute the exempted transactions without additional regulatory protection by the Commission. In recognition of the pervasive regulation by FERC and the PUCT, the Commission should find any person those regulators have permitted to be a participant in an RTO/ISO market to be an appropriate person.

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<sup>21</sup> 77 Fed. Reg. 52164 (Aug. 28, 2012).

<sup>22</sup> CEA §§ 4(c)(3)(A) through (J).

<sup>23</sup> CEA § 4(c)(3)(K), 7 U.S.C. § 6(c)(3)(k).

In recognition of such pervasive regulation and the operational qualifications of electric cooperatives, the Commission should, in particular, find that all electric cooperatives are “appropriate persons.”

The vast majority of NRECA’s members are small, not-for-profit electric utilities, formed and operated for the public service of providing affordable electric services to their consumer members. “[T]he cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and electric customers are essentially limited to members.”<sup>24</sup>

The electric facilities and operations of an electric cooperative are managed by employees with experience in such operations, with a focus on fulfilling their public service mission. All activities in respect of electric facilities and operations are conservatively managed to accomplish the not-for-profit public service mission. Management of such electric operations is a core competency of the staff of the not-for-profit entity and is monitored by the cooperative’s board, which is elected by and comprised of its members/customers. All revenues from operational (or “commercial”) risk management activities related to the electric facilities and operations are used to reduce the cost of electric service delivered to the electric consumer/members of the electric cooperative.

As a result, all electric cooperatives are actively participating in the generation and/or transmission and/or distribution of electricity. Some NRECA members are located in geographic regions where they are required by FERC to participate in the markets administered by one or more of the Petitioners, and to purchase and sell electric energy, transmission services, capacity, and related goods and services on or through such RTO and ISO markets. Although many energy transactions occur directly between and among electric cooperatives,<sup>25</sup> cooperatives also participate in the various ISO and RTO markets to ensure that electricity, transmission and capacity will be available to fulfill their public service obligations to their consumer/members. In essence, the grid within a region is expanded and its reliability enhanced with the participation of cooperatives in the ISO and RTO markets. Indeed, as asserted by the Petitioners, as a consequence of electric cooperatives’ active participation and knowledge of the wholesale electricity markets administered by the Petitioners, electric cooperatives are “appropriate persons,”<sup>26</sup> regardless of whether they satisfy the financial requirements established in the CEA § 4(c)(3)(A) through (J). The Joint Trade Associations agree with this assertion.

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<sup>24</sup> *Salt River Project Agricultural Improvement and Power District v. Federal Power Commission*, 391 F. 2d 470 at 473 (D.C. Cir. 1968).

<sup>25</sup> *Proposal To Exempt Certain Transactions Involving Not-for-Profit Electric Utilities; Request for Comment*, 77 Fed. Reg. 50998 (Aug. 23, 2012).

<sup>26</sup> Petition at 27.

Therefore, the Joint Trade Associations respectfully request that the Commission determine that electric cooperatives and persons that FERC or the PUCT have permitted to be a participant in an RTO/ISO market are “appropriate persons” under § 4(c)(3)(K) of the CEA in light of their qualifications and the applicability of appropriate regulatory protection, and without regard to the financial requirement in other clauses of §4(c)(3)(A) through (J). In particular, the Joint Trade Associations respectfully request that the Commission determine that all electric cooperatives are “appropriate persons.”

In the alternative, in respect of electric cooperatives only, the Joint Trade Associations respectfully request that the Commission determine that electric cooperatives are ECPs. In the Entity Definitions Release,<sup>27</sup> the Commission notes that commenters have raised interpretive and other issues related to the ECP definition. In February 2011, in the comments filed on the Entity Definitions proposed rules, the NFP Electric Coalition requested the Commission determine that all electric cooperatives are ECPs for purposes of excluding electric operations-related transactions which would include the transaction categories exempted under the Proposed RTO/ISO Exemption.<sup>28</sup> The Entity Definitions release said that the Commission intends to consider whether any additional categories should be added to the definition of ECP.<sup>29</sup> The Joint Trade Associations respectfully request that the Commission make such a determination under § 1(a)(18)(c) of the CEA for all electric cooperatives.

Accordingly, the Joint Trade Associations request that the Commission expand the definition of “appropriate persons” to include all persons that FERC or the PUCT have permitted to be a participant in an RTO/ISO market as discussed above or, in the alternative, find that all electric cooperatives are either “appropriate persons” and/or ECPs. The Joint Trade Associations support the Proposed RTO/ISO Exemption with such modification as discussed above.

#### **E. The Commission Should Eliminate or Modify the Conditions Precedent to the Proposed RTO/ISO Exemption**

The Commission requests comment regarding the conditions required before the Proposed RTO/ISO Exemption would take effect for any of the individual Petitioners. Specifically, the Commission seeks comment on the requirement that each RTO or ISO fully implement the requirements established in FERC Order No. 741.<sup>30</sup>

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<sup>27</sup> *Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,”* 77 Fed. Reg. 30596 (May 23, 2012) at fn. 596.

<sup>28</sup> See <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27917&SearchText=rural>

<sup>29</sup> *Id.* at. 30656.

<sup>30</sup> 77 Fed. Reg. 52172 (Aug. 28, 2012).

The Commission proposes that each Petitioner must demonstrate that it is fully compliant with the requirements set forth in FERC Order No. 741 prior to the Commission issuing a final order granting the Proposed RTO/ISO Exemption.<sup>31</sup> This requirement of full compliance with FERC Order No. 741 would also apply to ERCOT, which is not currently under FERC jurisdiction but is under the jurisdiction and oversight of the PUCT.

The Joint Trade Associations support the Commission's reliance on the principles of FERC Order No. 741 as the basis of a finding that Petitioners' have appropriate risk management, credit worthiness, and financial integrity policies to protect participants in the markets which each Petitioner administers. However, the Joint Trade Associations are concerned that this condition precedent will unnecessarily delay the Commission granting the Proposed RTO/ISO Exemption for the benefit of any one or all of the Petitioners. The Joint Trade Associations request that the Commission reconsider its decision to treat the Petitioners' exemption requests collectively and ask that the Commission consider each Petitioner, with each Petitioner's own FERC tariff, or in the case of ERCOT, compliance with PUCT rules and final orders, and each Petitioner's own governance structure, separately.

According to the Proposed RTO/ISO Exemption, the Commission will not grant the single, combined exemption until each Petitioner demonstrates that it is fully compliant with the requirements established in Order No. 741. Given that each individual RTO and ISO must file separately to demonstrate that the rules under its particular tariff satisfies those requirements, and given that each RTO and ISO has a different membership and governance structure and consequently, a different approach to modifying the rules under their respective tariffs, the Joint Trade Associations are concerned that each RTO or ISO will not be considered "fully compliant" with Order No. 741 at the same time. In fact, each Petitioner is currently at a different step in the process.

Additionally, the Commission states that while ERCOT is not subject to regulation by FERC, and thus is not required to comply with Order No. 741, the Commission believes that "holding ERCOT to these standards may well be appropriate."<sup>32</sup> As explained in the Petition, ERCOT has established rules to protect market participants similar to the requirements established by FERC in Order No. 741<sup>33</sup> and, should be evaluated under the regulations imposed by the PUCT, not the same requirements necessary for the other RTOs and ISOs that fall under FERC jurisdiction.

The Joint Trade Associations request that the Commission grant the Proposed RTO/ISO Exemption on a case-by-case basis as each respective RTO or ISO is deemed by FERC to be fully compliant with Order No. 741, or in the case of ERCOT, deemed compliant by the PUCT.

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<sup>31</sup> 77 Fed. Reg 52172 (Aug. 28, 2012).

<sup>32</sup> 77 Fed. Reg. 52165 (Aug. 28, 2012).

<sup>33</sup> Petition at 22. PURA § 39.157.

The Joint Trade Associations are also concerned that such a long delayed and piecemeal approach to granting a single exemption will lead to regulatory uncertainty for each RTO and ISO and its members and the participants in each respective RTO/ISO region beginning as soon as the Commission acts on the Proposed RTO/ISO Exemption and the exemption becomes “effective.” The Petitioners administer ongoing markets, which cannot reasonably stop while the conditions of the Proposed RTO/ISO Exemption are fulfilled. Additionally, the Joint Trade Associations are concerned that waiting for all Petitioners to be considered fully compliant will also lead to extended uncertainty for each of the Petitioners and its market participants. The Commission should leave FERC and the PUCT to implement their regulatory responsibilities and the Commission should acknowledge FERC establishment of the Order No. 741 process, and the similar process at the PUCT, and the ongoing implementation as a basis for granting the Proposed RTO/ISO Exemption.

Finally, the Joint Trade Associations request that the Commission clarify what will constitute a finding that an RTO or ISO is fully compliant with Order No. 741. The Joint Trade Associations suggest that the Commission consider a final order from FERC finding each respective RTO or ISO in compliance with Order No. 741, or, with respect to ERCOT, a comparable final order by the PUCT, to be a sufficient demonstration without requiring duplicative review or approval from the Commission.

The Joint Trade Associations note that electric cooperatives and public power systems have been working closely with individual Petitioners to assure that the Petitioners’ central counterparty constructs<sup>34</sup> do not unintentionally cause serious issues with respect to these entities’ unique and important tax restrictions. The Joint Trade Associations respectfully request that the Commission avoid any such unintended consequences and allow each of the Petitioners flexibility in establishing its central counterparty constructs.

Based upon the concerns raised above, the Joint Trade Associations do not support the requirement that all Petitioners must demonstrate that they are fully compliant with the requirements set forth in FERC Order No. 741 as a condition to the Commission issuing a final order granting the Proposed RTO/ISO Exemption. Ongoing efforts to comply with the requirements should be sufficient to allow the Petitioners to rely on the public interest waiver while continuing to maintain the markets they are required by FERC and the PUCT to administer without disruption. Moreover, the Commission should rely on FERC’s determination of full compliance with its Order, and should allow the Petitioners flexibility in adopting the central counterparty construct within the FERC Order No. 741 process.

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<sup>34</sup> 18 CFR § 35.47(d) requires RTOs and ISOs to establish a single counterparty to all market participant transactions.

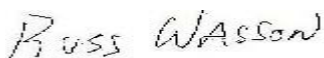
#### IV. Conclusion

The Joint Trade Associations appreciate the Commission's consideration of our comments on the Proposed RTO/ISO Exemption. For the reasons stated herein, we respectfully request that the Commission adopt the Proposed RTO/ISO Exemption.

We are happy to discuss any comments further. Please feel free to contact the undersigned below if you have any questions regarding these comments.

Respectfully submitted,

#### NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION



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Russell Wasson  
Director, Tax Finance and Accounting Policy  
4301 Wilson Blvd., EP11-253  
Arlington, VA 22203  
Tel: (703) 907-5802  
E-mail: [russell.wasson@nreca.coop](mailto:russell.wasson@nreca.coop)

#### ELECTRIC POWER SUPPLY ASSOCIATION



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Melissa M. Mitchell  
Director of Regulatory Affairs and Counsel  
1401 New York Avenue, NW  
Suite 1230  
Washington, DC 20005  
Tel: (202) 628-8200  
E-mail: [mmitchell@epsa.org](mailto:mmitchell@epsa.org)

#### EDISON ELECTRIC INSTITUTE



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Richard F. McMahon, Jr.  
Vice President  
Edison Electric Institute  
701 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Phone: (202) 508-5571  
Email: [rmcmahon@eei.org](mailto:rmcmahon@eei.org)

#### AMERICAN PUBLIC POWER ASSOCIATION



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Susan N. Kelly  
Senior Vice President of Policy Analysis and General  
Counsel  
1875 Connecticut Avenue, N.W.  
Suite 1200  
Washington, D.C. 20009-5715  
Tel: (202) 467-2933  
E-mail: [skelly@publicpower.org](mailto:skelly@publicpower.org)

#### LARGE PUBLIC POWER COUNCIL



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Noreen Roche-Carter  
Chair, Tax and Finance Task Force  
c/o Sacramento Municipal Utility District  
6201 S Street



Stacy Yochum, Secretary

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September 27, 2012

Sacramento, CA 95817-1899

Tel: (916) 732-6509

E-mail: [nrohec@smud.org](mailto:nrohec@smud.org)