

# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

www.dps.ny.gov

## PUBLIC SERVICE COMMISSION

GARRY A. BROWN

*Chairman*

PATRICIA L. ACAMPORA

MAUREEN F. HARRIS

JAMES L. LAROCCA

GREGG C. SAYRE

*Commissioners*



PETER MCGOWAN

*General Counsel*

JACLYN A. BRILLING

*Secretary*

September 27, 2012

### VIA ELECTRONIC SUBMISSION

David A. Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

RE: *Proposed Order and Request for Comment on a Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions*  
Docket ID CFTC-2012-0113

Dear Commission,

The New York Public Service Commission (“NYPSC”) submits these comments to the Commodity Futures Trading Commission (“CFTC” or the “Commission”) in response to the Proposed Exemption under Section 4(c) of the Commodity Exchange Act (“CEA” or the “Act”) within the matter referenced above.<sup>1</sup> NYPSC supports the position of the New York Independent System Operator, Inc. (“NYISO”), detailed within its comments, which requests that the Commission exercise its authority under Section 4(c)(3)(K), and, pursuant to the public interest, further expand the Proposed Order exemption to include all market participants in Petitioners’<sup>2</sup> markets who satisfy both the minimum participation criteria and the credit requirements.

<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 Commission or the Public Utility Commission of Texas from Certain Provisions of the Commodity Exchange Act*, 77 Fed. Reg. 52, 138 (Aug. 28, 2012) (hereinafter “Proposed Order”).

<sup>2</sup> “Petitioners” within these comments refers to the entities named below that submitted a consolidated petition, *In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent Service Operator Corporation; the Electric Reliability Council of Texas, Inc.; ISO New England, Inc.; Midwest Independent Transmission System Operator, Inc.; New York Independent System Operator, Inc.; PJM Interconnection, L.L.C.* (Feb. 7, 2012, as amended June 11, 2012).

Petitioners initially requested that the Commission exempt specified transactions from the provisions of the CEA. In response, CFTC presented the Proposed Order, which would exempt from the provisions of the CEA and Commission regulations certain contracts, agreements, and transactions for the purchase or sale of the limited electricity-related products that are specifically described within the Proposed Order.<sup>3</sup> However, to be eligible for the proposed exemption, the transactions would have to be entered into by “appropriate persons” as defined in Section 4(c)(3)(A) through (J) of the CEA or by “eligible contract participants,” as defined in Section 1a(18) of the CEA and Commission regulation 1.3(m).

Section 4(c)(3)(F) of the CEA defines “appropriate persons” to include business entities with a net worth exceeding \$1,000,000 or total assets exceeding \$5,000,000. Market participants in the NYISO market participate in that market by satisfying “minimum participation criteria”. The “minimum participation criteria” may be met by either of two ways: (1) maintaining a net worth of at least \$1,000,000 or total assets of at least \$10,000,000; or (2) by holding additional financial security of \$200,000 or \$500,000. The participants that meet the “minimum participation criteria” by maintaining net worth or total assets greater than specified in the NYISO rules are meeting capitalization requirements greater than those required by the Proposed Order. However, the market participants who satisfy the “minimum participation criteria” through meeting the NYISO security requirements<sup>4</sup> provide equivalent security, but are unable to qualify as “appropriate persons” under the Proposed Order.

In addition, the NYISO requires audited financial statements to demonstrate the participants’ financial well-being in satisfaction of the baseline capitalization requirements. NYISO market participants must also have written risk management policies and procedures to address potential risks that could adversely affect the market participant’s ability to pay ISO/RTO invoices when due. Above and beyond these “minimum participation criteria”, the NYISO imposes stringent product-specific credit requirements which are product-, volume- and market participant-specific, as determined by tariff-defined formulae. These product specific credit requirements are conservative estimates of the maximum exposure of each individual market participant.

These NYISO requirements, together with the FERC regulated NYISO “minimum participation criteria” ensure that participants in the NYISO market pose very little risk from their participation in NYISO-administered transactions. The intended benefits of applying the “appropriate person” standard to the NYISO markets is therefore already realized through the rules maintained by the NYISO and subject to regulatory oversight by Federal Energy Regulatory Commission (“FERC”).

---

<sup>3</sup> With the exception of Sections 2(a)(1)(B), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9 and 13 of the CEA and any implementing regulations promulgated thereunder including, but not limited to Commission regulations 23.410(a) and (b), 32.4 and part 180.

<sup>4</sup> Within the NYISO, over 200 market participants elected to satisfy minimum participation criteria by meeting security requirements; this represents over half of all NYISO market participants. The NYPSC does not have data demonstrating whether this is correct for other ISO/RTOs.

Participants who fall outside the exemption as currently proposed, will likely be subject to duplicative regulation between FERC and CFTC. Failure to include all NYISO market participants within the definition of “appropriate persons” could result in a number of market participants unable to meet CFTC trading criteria and/or unable to satisfy FERC and CFTC regulations, and may, as a result, withdraw from the NYISO markets. The loss of participants would concentrate the market and reduce competition.

The Commission has the authority to expand the proposed exception and include all NYISO market participants. Pursuant to CEA Section 4(c)(3)(K), the CFTC has statutory discretion to include under “appropriate persons” “[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.” Therefore, the Commission may include within its Proposed Exemption all market participants in Petitioners’ markets who have satisfied both the minimum participation criteria and the credit requirements. This clarification to the definition of “appropriate persons” would satisfy the intent of the Commission in maintaining financially secure electric markets, while preventing duplicative and overlapping regulation, which would only result in a loss of market participants and less competition within the market potentially decreasing the market’s liquidity and constraining its efficiency.

To conclude, the NYPSC supports the NYISO’s request to clarify the definition of “appropriate persons” in order to include all participants of ISO/RTO markets in the exemption detailed in the Proposed Order.

Respectfully submitted,



Peter McGowan  
General Counsel  
Public Service Commission  
of the State of New York  
3 Empire State Plaza  
Albany, NY 12223-1305  
518-474-1585