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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

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:

I am pleased to share the comments of New England Power Pool ("NEPOOL") Participants Committee with the Commodity Futures Trading Commission (the "Commission") to the proposed exemption to exempt specified transactions for the purchase or sale of certain electricity-related products (the "Proposed Exemption") from the provisions of the Commodity Exchange Act and Commission regulations, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), in response to the consolidated petition (the "Petition") from several regional transmission organizations ("RTOs") and independent system operators ("ISOs") (the "Petitioners"). We appreciate the thoughtful consideration of the Commission in crafting the Proposed Exemption, and we believe that it will provide greater regulatory certainty to market participants that engage in contracts, agreements or transactions in markets administered by RTOs or ISOs, which are regulated by the Federal Energy Regulatory Commission ("FERC").

## Background on NEPOOL

NEPOOL is a voluntary association organized in 1971 pursuant to the Second Restated New England Power Pool Agreement, and it comprises more than 430 members. Those members include all of the electric utilities rendering or receiving services under the ISO New England Inc. ("ISO-NE") Transmission, Markets and Services Tariff, as well as independent power generators, marketers, load aggregators, brokers, consumer-owned utility systems, demand response providers, developers, end users and a merchant transmission provider. NEPOOL is the principal stakeholder organization for ISO-NE. Pursuant to governance provisions in the Second

Restated New England Power Pool Agreement that were reviewed and accepted by the FERC,<sup>1</sup> NEPOOL acts through the NEPOOL Participants Committee.

To the end of creating greater regulatory certainty in the ISO and RTO-administered markets, NEPOOL has three concerns with the Proposed Exemption that we respectfully urge the Commission to address in its final exemption.

#### Appropriate Person Definition

To be eligible for the Proposed Exemption, the contract, agreement or transaction would be required to be offered or entered into in a market administered by a Petitioner and the contract, agreement or transaction would be required to be entered into by a person who is an “appropriate person,” as defined in section 4(c)(3)(A) through (J) of the Commodity Exchange Act (the “CEA”) or an “eligible contract participant,” as defined in section 1a(18) of the CEA and Commission regulation 1.3(m). As a result of this definition, market participants that do not meet the financial thresholds to be an “appropriate person” or “eligible contract participant,” will not be eligible for the Proposed Exemption, notwithstanding their active participation in the generation, transmission or distribution of electricity and their satisfaction of minimum participation eligibility criteria mandated by the FERC in its Credit Reform Policy in FERC Order 741.<sup>2</sup>

To address this exclusion, we urge the Commission to expand the definition of “appropriate person” as permitted under section 4(c)(3)(K) of the CEA<sup>3</sup> to include RTO and ISO market participants that might not otherwise meet the financial requirements to be deemed an “appropriate person,” so long as they meet FERC-approved participation eligibility criteria. We believe that there are numerous market participants that should be permitted in light of their other qualifications, including their traditional participation in the wholesale markets for electricity and the minimal degree of risk that they pose to the ISO/RTO markets. While the ISOs’ participant eligibility requirements do not guarantee that all participants satisfy a minimum net worth and/or total assets requirement, those that do not meet such thresholds are required to post financial security to their counterparty.

The failure to extend the Proposed Exemption to market participants that may not meet the financial thresholds in the CEA creates a significant conflict with the minimum participation standards established by FERC for their market participants under Orders No. 741 and 741-A, “Credit Reforms in Organized Wholesale Electric Markets,” and the risk management requirements that the ISOs/RTOs apply to their market participants. Notably, FERC’s criteria are designed to ensure that most traditional market participants, including small load-serving

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<sup>1</sup> *ISO New England Inc. et al.*, 109 FERC ¶ 61,147 (2004).

<sup>2</sup> *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 133 FERC ¶ 61,060 (2010), *on reh’g*, Order No. 741-A, 134 FERC ¶ 61,126 (2011).

<sup>3</sup> Section 4(c)(3)(K) of the CEA includes in the definition of “appropriate person,” “Such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.”

entities, municipalities, cooperatives, and similar market participants may continue to participate in the wholesale electric markets. As noted by the Commission staff in response to FERC Order No. 741, reducing capitalization requirements for entities with small positions is necessary to ensure that traditional market participants, such as municipalities and cooperatives, continue to have access to the ISO/RTO markets. Therefore, we urge the Commission to expand the definition of “appropriate person” to ensure that market participants in the wholesale electricity markets who meet the FERC criteria for participation, as required under Order No. 741, would qualify as “appropriate persons” under the Proposed Exemption.

#### Treatment of Virtual Transactions

The Proposed Exemption would extend to four specific transactions: financial transmission rights (“FTR”), energy transactions, forward capacity transactions and reserve or regulation transactions.<sup>4</sup> Thus, transactions related to the wholesale electricity market would be eligible for the Proposed Exemption only to the extent that they qualify as an FTR, energy transaction, forward capacity transaction or reserve or regulation transaction. While the proposing release to the Proposed Exemption notes the reference in the Petition to include “virtual bids/transactions” in any exemption, the Proposed Exemption, perhaps inadvertently, does not appear to include such transactions.<sup>5</sup> We note that virtual bidding is an important risk management tool for market participants, as it allows them to participate in the physical markets, by buying and selling electricity without physically producing or consuming it.

We are concerned that the Proposed Exemption does not appear to the importance in the ISO and RTO markets of virtual transactions, as the proposing release states, “To be clear, however, 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 inextricably linked to the physical delivery of electricity.”<sup>6</sup> We are uncertain about the impact of this qualification as virtual transactions are in fact related to the physical delivery of electricity. Virtual bidding allows virtual traders to supply power to service areas where physical competition is constrained due to insufficient transmission and to increase market efficiency by making pricing less volatile as day-ahead prices converge with real-time prices. Therefore, we believe the Commission should explicitly include virtual transactions through the ISO and RTO markets in the final version of the Proposed Exemption.

#### Exemptive Relief Limited to Existing Products

As discussed above, the Commission determined that it would be inappropriate and therefore declined to extend the Proposed Exemption beyond the scope of the transactions that are specifically defined in the Proposed Exemption. The Commission believes that the authority to issue an exemption from the CEA, provided by section 4(c) of the CEA, may not be

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<sup>4</sup> 77 Fed. Reg. 52141.

<sup>5</sup> 77 Fed. Reg. 52163.

<sup>6</sup> 77 Fed. Reg. 52143.

“automatically or mechanically exercised.”<sup>7</sup> Instead, the Commission is required to affirmatively determine that the exemption would be consistent with the public interest and the purposes of the CEA. As a result, any transaction, contract or agreement that was not explicitly included in the Proposed Exemption would not be eligible for the exemption and might be subject to dual regulatory requirements by FERC and the CFTC. While we appreciate that the Commission noted in the Proposed Exemption that it stands ready to review promptly any additional applications for an exemption pursuant to section 4(c)(6) of the CEA for other precisely defined products, we respectfully submit that the Proposed Exemption, in its current form, is not broad enough to allow for innovation in the wholesale electricity market.

While we share the Commission’s concern that the Proposed Exemption should cover transactions that are in the public interest, we continue to believe that, as discussed in the Petition, the Proposed Exemption should cover the purchase and sale of a product or service that is directly related to, *and* a logical outgrowth of, any of a Petitioner’s core functions as an ISO/RTO and all related services. Otherwise, we and other Petitioners may be required to seek additional exemptions from the Commission for relatively minor modification to existing tariffs, and/or as existing products are changed or additional products are added to the markets, even though such modifications are designed to ensure reliability and cost-effective electricity services. This could dramatically increase the Commission’s workload, as ISO-NE made nearly 60 tariff change filings with the FERC in the past year, and that experience is not dissimilar to that of the other ISOs and RTOs. We do not believe this is an efficient use of Commission resources and will impair the ISOs and RTOs ability to effectively serve the wholesale electricity markets. Instead, we believe that the Commission should broaden the Proposed Exemption to include products or services that relate to *core* ISO and RTO market functions.

Alternatively we suggest that the Commission provide clarity with respect to what tariff changes would require Commission review and which ones are subsumed in existing relief. In this regard, we would suggest a presumptive exemption for tariff changes related to core ISO and RTO market functions that are filed with and accepted by the FERC. We agree that the development of new FTRs and other substantially different products would require the ISOs and RTOs to seek an additional exemption from the Commission, but we do not believe that the ISOs and RTOs should be required to do so if they modify or adapt existing products to address the needs of wholesale electricity market participants.

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<sup>7</sup> 77 Fed. Reg. 52163.

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We appreciate the opportunity to provide our comments to the Commission on the Proposed Exemption and we continue to welcome the opportunity to discuss any questions the Commission may have with respect to our comments. If you should have any questions or need any additional information, please contact Kenneth M. Raisler of Sullivan & Cromwell LLP, at (212) 558-4675.

Sincerely,

*Kenneth M. Raisler / S.M.M.*