



June 22, 2015

Via Electronic Submission

Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order From Southwest Power Pool, Inc. From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in Section 4(c)(6) of the Act

Dear Secretary Kirkpatrick:

By Notice of Proposed Order published in the Federal Register on May 21, 2015, the Commodity Futures Trading Commission (“CFTC” or “the Commission”) requested comments on a Proposed Order issued in response to an application from Southwest Power Pool, Inc. to exempt certain Transmission Congestion Rights, Energy Transactions, and Operating Reserve Transactions from the provisions of the Commodity Exchange Act and Commission regulations (“Proposed Order”).¹ In its application (“SPP Application”),² Southwest Power Pool, Inc. (“SPP”) sought the same exemptive relief the Commission had granted other Regional Transmission Organizations (“RTO”) in its April 2, 2013 Final Order (“RTO Order”).³

By this letter, GDF SUEZ Energy North America, Inc. (“GSENA”) respectfully provides comment on the Proposed Order.

In the RTO Order, the CFTC found that it is in the public interest under the Commodity Exchange Act (“CEA”)⁴ to exempt the RTO-enabled transactions “from all provisions of the CEA, except” for a limited number of specifically enumerated CEA provisions (and

¹ *Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order From Southwest Power Pool, Inc. From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in Section 4(c)(6) of the Act*, 80 Fed. Reg. 29490 (May 21, 2015).

² *In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Southwest Power Pool, Inc.*, Oct. 17, 2013, as amended Aug. 1, 2014.

³ *Final Order in Response to 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 Pursuant to the Authority Provided in the Act*, 78 Fed. Reg. 19880 (Apr. 2, 2013).

⁴ 7 U.S.C. § 1, *et seq.*

implementing Commission regulations) that represent the Commission's own anti-fraud and anti-manipulation authority.⁵

In the SPP Application, SPP seeks the same relief that the other RTOs received via the RTO Order. The Proposed Order largely tracks the RTO Order, and appears to give SPP essentially the same relief as the RTO Order granted to the other RTOs. In general, GSENA fully supports granting SPP the exemptions it seeks in the SPP Application, and agrees that the exemptions sought are in the public interest.

However, the Proposed Order departs from the RTO Order because the Proposed Order includes in its preamble a paragraph that suggests that the Commission intends the continued applicability of the private right of action in Section 22 of the CEA as to SPP—and perhaps also as to the RTOs subject to the RTO Order.⁶ This statement appears in the preamble notwithstanding the Commission's recognition in the immediately-preceding paragraph that “[n]either the proposed nor the final RTO[] Order discussed, referred to, or mentioned CEA section 22” when excepting “certain CEA provisions pertaining to fraud and manipulation . . . from the exemption.”⁷ The “intent” statement also is inconsistent with the ordering language of the Proposed Order, which likewise nowhere mentions Section 22 of the CEA as being part of the enumerated “except[ions]” to the otherwise categorical exemption from the CEA.⁸ GSENA is concerned that were the language regarding Section 22 to be included in a final version of the Proposed Order, the exemption granted to SPP could be argued to be limited (in a manner that is contrary to the plain meaning of the exemptive order), and could result in an order that is significantly different from the RTO Order because Section 22 is never mentioned anywhere in the RTO Order.

Moreover, to the extent this paragraph about the Commission's “intent” or “belief” could even be construed to be an “interpretation” of the RTO Order, such paragraph is incorrect and would not be entitled to any deference for a number of reasons, including because under existing precedent, the position would be plainly erroneous and inconsistent with the RTO Order itself, as the unambiguous meaning of the RTO Order is that RTOs are exempted from Section 22 of the CEA.⁹ In fact, the federal district court in the Southern District of Texas has already correctly held, in granting GSENA's motion to dismiss a private action under Section 22 aimed at conduct covered by the RTO Order, that the RTO Order's broad exemption bars a private right of action because the Commission did not include Section 22 in the specific enumeration of CEA provisions excepted from the exemption.¹⁰ The plaintiffs in that case have now relied upon the Commission's preamble paragraph on appeal from the district court's ruling, arguing that it purportedly supports reversal of the district court's ruling, but they are incorrect. Regardless, at

⁵ RTO Order at 19911-12.

⁶ Proposed Order at 29493 (paragraph beginning “By enacting CEA section 22, . . .”).

⁷ *Id.*

⁸ *Id.* at 29515-18.

⁹ See, e.g., *Auer v. Robbins*, 519 U.S. 452, 463 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

¹⁰ See *Aspire Commodities, LP v. GDF Suez Energy N. Am., Inc.*, No. CIV.A. H-14-1111, 2015 WL 500482, at *5-6 (S.D. Tex. Feb. 3, 2015).

minimum, the Commission would have no authority to apply any such position about the availability of the Section 22 private right of action *retroactively*.

Further, it is well-settled that the Commission is bound by the plain language of its orders.¹¹ There is nothing more plain than an order granting an exemption “from all provisions of the CEA” and then specifically listing (by express reference to statutory provisions) those elements of the CEA that are “except[ed]” from the exemption.¹² The Commission cannot retroactively alter the exemption in the RTO Order by simply reciting its belief or intent, as indicated in the preamble to the Proposed Order. Nor would reinserting Section 22 as an applicable provision be consistent with good public policy and the intent of Dodd-Frank in Section 4c.¹³

GSENA appreciates the opportunity to submit comments to the Commission regarding the Proposed Order. GSENA agrees with the Commission’s conclusion that granting the exemptions requested by the SPP Application is in the public interest. However, GSENA respectfully urges the Commission to approve the SPP Application and issue a final version of the Proposed Order that does not include the Proposed Order’s preamble language discussing Section 22 of the CEA. This change will benefit market participants in the RTOs, including SPP, by promoting certainty and clarity.

Respectfully submitted,



Rob Minter
Senior Vice President
Government and Regulatory Affairs
GDF SUEZ Energy North America, Inc.
1990 Post Oak Blvd.
Suite 1900
Houston, Texas 77056
713-636-1969
Rob.minter@gdfsuezna.com

¹¹ See, e.g., *United States ex rel. Accardi vs. Shaughnessy*, 347 U.S. 260 at 261 (1954) (finding that federal agencies are bound by their promulgated regulations and orders).

¹² Exempted “from all provisions of the CEA, except, in each case, the Commission’s general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.” RTO Order at 19912.

¹³ GSENA is a member of the Electric Power Supply Association (“EPSA”), and as such strongly echoes the comments filed by EPSA, together with the Edison Electric Institute, and other physical commodity market participants (collectively the “Joint Trade Association”), regarding the Proposed Order. The Joint Trade Association’s comments noted (among other things) that allowing a private right of action to survive in a final order on the SPP Application would cause confusion and uncertainty, and be detrimental to the orderly regulation of electricity markets – not just SPP, but potentially the RTOs and ISOs covered by the RTO Order.

Christopher Kirkpatrick, Secretary

June 22, 2015

Page 4

cc: Chairman Massad

Commissioner Bowen

Commissioner Giancarlo

Commissioner Wetjen