

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

In 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

**Comments of
PJM Interconnection, L.L.C.,
Electric Reliability Council Of Texas, Inc., and
California Independent System Operator Corporation**

PJM Interconnection, L.L.C. (“**PJM**”), the Electric Reliability Council of Texas, Inc. (“**ERCOT**”), and the California Independent System Operator Corporation (“**CAISO**”) (“hereinafter, collectively, the **ISO-RTO Commenters**”) respectfully submit these comments in response to the Commodity Futures Trading Commission’s (the “**Commission**” or “**CFTC**”) May 21, 2015 proposed order that would exempt specified transactions in the markets operated by the Southwest Power Pool, Inc. (“**SPP**”), SPP members, and SPP from all, but the anti-fraud and anti-manipulation provisions of the Commodity Exchange Act, as amended (“**CEA**”).¹ The ISO-RTO Commenters submit these comments to address the Commission’s statement in the preamble to the Proposed SPP Order concerning its intent to preserve private rights of actions under Section 22 of the CEA in connection with the final exemption order that the CFTC issued more than two years ago in response to a request from other independent system operators 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 19, 2015) (“**Proposed SPP Order**”).

regional transmission organizations (“**ISOs-RTOs**”), including the ISO-RTO Commenters.² Although the proposed exemption involves another RTO, the Commission’s insertion into the preamble of a statement regarding Section 22 of the CEA can be construed as a retroactive attempt to modify the ISO-RTO Final Order and, therefore, raises fundamental fairness and regulatory policy issues that potentially impact the ISO-RTO Final Order. Because this potential modification of the ISO-RTO Final Order was undertaken without due process of law, the ISO-RTO Commenters have a significant interest in the outcome of this matter as it relates to the preamble language concerning private causes of action.

Under both the Proposed SPP Order and the ISO-RTO Final Order, and consistent with its long-standing practice, the CFTC preserved its own anti-fraud and anti-manipulation authority under the CEA and related regulations. The text of the Proposed SPP Order and the ISO-RTO Final Order does not preserve a private right of action under CEA Section 22. Nevertheless and notwithstanding the plain language of the ISO-RTO Final Order, the CFTC stated in the preamble to the Proposed SPP Order that “[i]t would be highly unusual for the [CFTC] to reserve to itself the power to pursue claims for fraud and manipulation...while at the same time denying private rights of action and damages remedies for the same violations...Thus, the [CFTC] did not intend to create such a limitation, and believes the [ISO-RTO Final Order and the Proposed SPP Order do not] prevent private claims for fraud or manipulation under the [CEA].”³

² 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 FR 19880, April 2, 2013 (“**ISO-RTO Final Order**”).

³ Proposed SPP Order at 24943.

I. Summary of Comments

The ISO-RTO Commenters, like other interested parties, are concerned about the Commission including, for the first time, a statement of its intent to preserve private rights of action under CEA Section 22 with respect to the ISO-RTO Final Order in the preamble of a proposal to grant a different exemption to which the ISO-RTO Commenters and the other ISOs-RTOs are not parties. Contrary to the express requirements of Section 4(c)(1), the Commission did not provide the ISO-RTO Commenters, other ISOs-RTOs, their members, and other interested parties, including the Federal Energy Regulatory Commission (“**FERC**”) and the Public Utility Commission of Texas (“**PUCT**”), with prior notice of, and an opportunity for hearing on, its statement of intent.⁴

Exempting ISOs-RTOs, ISO-RTO transactions, and their market participants from private rights of action under the CEA promotes the public interest by, among other things: (1) avoiding “conflicting or duplicative” regulation by the FERC and the CFTC — an outcome that Congress expressly sought to avoid when it called for the CFTC and the FERC to exercise their respective authorities in a manner “as to ensure effective and efficient regulation in the public interest;” and (2) and providing regulators and market participants with certainty about the regulatory treatment of ISO-RTO transactions.⁵ The ISO-RTO Commenters are concerned that

⁴ Moreover, because the Commission and Congress historically have not preserved private rights of action in Section 4(c) and statutory exemptions, the ISOs-RTOs, their members and other interested parties had no notice that the Commission might attempt to preserve retroactively such actions in the ISO-RTO Final Order.

⁵ Section 720(a)(1)(A) of the Dodd-Frank Wall Street reform and Customer Protection Act (“**Dodd-Frank Act**”); 15 U.S.C. § 8308(a)(1) (Directing the CFTC and FERC to “negotiate a memorandum of understanding to establish procedure: (A) for applying their respective authorities in a manner so as to ensure effective and efficient regulation in the public interest; (B) resolving conflicts concerning overlapping jurisdiction between the 2 agencies; and (C) avoiding, to the extent possible, conflicting or duplicative regulation.”).

the Commission's statement of intent will have a number of unintended and adverse consequences, including the potential for inconsistent rulings among the nation's hundreds of federal district court judges, the CFTC, and the FERC concerning the scope of the CEA and the Federal Power Act ("FPA").⁶ This potential for "conflicting or duplicative regulation" likely will frustrate the CFTC's and the FERC's ability to carry out their respective regulatory responsibilities in a manner that provides regulatory certainty to market participants and effectively protects the public interest.⁷

If the Commission does not revise the preamble language to conform it to the express terms of the ISO-RTO Final Order, the actual ordering language in the Proposed SPP Order and other previous Section 4(c) exemptions, it should, at a minimum, state that it will not address in this rulemaking the scope of private rights of actions under the CEA concerning alleged manipulative and fraudulent schemes arising in wholesale electricity markets. Instead, the CFTC should confer with FERC and the PUCT to resolve these questions in a manner that will promote effective and efficient regulation in the public interest and that will avoid conflicting or duplicative regulation.

⁶ Federal Power Act, 16 U.S.C. § 791a *et seq.*

⁷ The ISO-RTO Commenters recognize that, in areas where the CFTC has not granted a Section 4(c) exemption, private rights of action can proceed concurrently with CFTC actions in matters involving transactions and markets exclusively regulated by the CFTC and that some potential for inconsistent rulings exists in that context. However, inconsistent rulings that implicate the jurisdictions of the FERC and the CFTC are more problematic because Congress in the Dodd-Frank Act directed the agencies to "apply [] their respective authorities" in a manner that ensures "efficient and effective regulation" and avoids "conflicting or duplicative regulation." *See* Section 720 of the Dodd Frank Act; 15 U.S.C. § 8308(a)(1)(A). Attempting to enshrine private causes of action in an exemption order involving FERC-regulated ISO-RTO markets would exacerbate the very duplicative (if not multiplicative) regulation that Congress expressly directed the agencies to avoid and would conflict with Congress' express intent.

II. The Commission Did Not Provide Advance Notice and an Opportunity for Hearing About Its Intent to Preserve Private Rights of Action in the ISO-RTO Final Order

The express language of the Proposed SPP Order and the ISO-RTO Final Order does not preserve CEA Section 22. Instead, consistent with the Commission's long-standing practice, the Proposed SPP Order and the ISO-RTO Final Order preserve only 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 section, including, but not limited to, Rule 23.410(a) and (b), 32.4, and Part 180. Indeed, when the Commission issued its proposed order before issuing the ISO-RTO Final Order, it did not include Section 22 in the text of the proposed order or discuss private rights of action in the preamble of that proposed order. As a result, the ISO-RTO Commenters, other ISOs-RTOs, and their market participants have never had notice of, or an opportunity for hearing on, the Commission's stated intent to preserve a private right of action in the ISO-RTO Final Order.

The Commission's statement raises fundamental issues that were never explored in the ISO-RTO exemption process, such as the potential for inconsistent rulings between the FERC, the CFTC, and the nation's 670+ district court judges as to whether a particular ISO-RTO product is regulated under the CEA or the FPA. When Congress passed the Dodd-Frank Act, it expressly sought to avoid conflicting and duplicative regulation by directing the Commission and FERC to reach a memorandum of understanding ("MOU") establishing procedures for, among other things, applying their respective authorities to promote effective and efficient regulation.⁸ It also directed the CFTC to grant exemptions from the requirements of the CEA transactions

⁸ See Section 720 of the Dodd-Frank Act; 15 U.S.C. § 8308.

made pursuant to a FERC-approved tariff or a protocol permitted to take effect by the PUCT if, as the CFTC found in the Final ISO-RTO Order, such an exemption is in the public interest.⁹ Congress recognized the problems created by duplicative proceedings that could create inconsistent results and conflicting regulatory treatment of ISO-RTO transactions. Despite Congress's directives, the issues raised by the Commission's statement of intent were not addressed in the ISO-RTO Final Order exemption proceeding; let alone coordinated with FERC or the PUCT.

III. The Commission Has Not Preserved Private Rights of Action in Prior Exemption Orders

Section 4(c) of the CEA, with certain limited exceptions, provides the CFTC with broad authority to grant public interest exemptions. Notably, neither Section 4(c) nor Section 22 limit the CFTC's ability to grant exemptions from private rights of action. Therefore, the CFTC is authorized to grant a public interest exemption from private rights of actions related to ISO-RTO transactions.¹⁰

Contrary to the Commission's statement in the preamble that it would be "highly unusual" for the Commission to preserve its own manipulation and fraud enforcement authority while excluding a private right of action for the same violations, it would, in fact, be highly unusual for the Commission to preserve private causes of action in an exemption order. The Commission's long-standing precedent and consistent practice, with two exceptions superseded

⁹ 7 U.S.C. § 6(c).

¹⁰ See 7 U.S.C. § 6(c)(1)(A).

by Congress, has been to issue exemption orders that do not preserve private claims.¹¹ For example, in issuing an exemptive order for the effective date of certain provisions of the CEA that were amended by the Dodd-Frank Act, the Commission expressly stated that: “[t]o the extent that the Final Order provides [4(c)] exemptive relief [for certain provisions of the CEA], such exemptive relief would, in effect, *preclude a person from succeeding in a private right of action under CEA section 22(a)* for violation of such provisions.”¹² During the public meeting before issuing the proposed exemption order, Commissioner Jill Sommers asked the Commission’s General Counsel whether the “proposed relief . . . provides protection from [a] private right[] of action claim based on [a] failure to comply with the CEA.” The General Counsel responded that the exemption order provides that protection.¹³

In granting Section 4(c) exemptions for other electricity and energy product transactions, and persons entering into or providing advice about such transactions, the CFTC did not preserve

¹¹ On December 13, 2000, the Commission issued two rules that preserved Section 22 in connection with Section 4(c) exemption orders. *See A New Regulatory Framework for Clearing Organizations*, 65 Fed. Reg. 78020 (Dec. 13, 2000) (Section 39.5 Enforceability); *see also Exemption of Transactions on a Derivatives Transaction Facility*, 65 Fed. Reg. 77962, 77986 (Dec. 13, 2000) (Section 37.8 Enforceability). Eight days later, in the Commodity Futures Modernization Act, Congress amended the CEA to grant statutory exemptive relief for certain types of transactions and did not preserve private rights of action. *See* former CEA Sections 2(d), (g) and (h). As a result, the CFTC was forced to withdraw its regulations. *See A New Regulatory Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations; Rules Relating to Intermediaries of Commodity Interest Transactions; A New Regulatory Framework for Clearing Organizations; Exemption for Bilateral Transactions*, 65 Fed. Reg. 82278 (Dec. 28, 2000).

¹² *See Effective Date for Swap Regulation*, 76 Fed. Reg. 42508, 42517 (Jul. 19, 2011).

¹³ *See* Commodity Futures Trading Commission, Open Meeting to Consider Effective Dates of Provisions in the Dodd-Frank Act (pp. 58-59) (June 14, 2011) (transcript available at www.cftc.gov). The Commission issued this order, which provided exemptive relief for the effective dates of certain Dodd-Frank Act amendments to the CEA, pursuant to Section 4(c) of the CEA; the same authority it used to issue the ISO-RTO Final Order.

private rights of action under Section 22 of the CEA.¹⁴ In fact, the CFTC did not even mention private rights of action in the preambles to those orders. Similarly, when the CFTC granted a Section 4(c) exemption for bilateral swap agreements, it preserved the sections of the CEA prohibiting market manipulation and fraud, but did not preserve a private right of action under Section 22.¹⁵ If the Commission desired to change its long-standing position on this issue, particularly as applied to the Final ISO-RTO Order, it should have, at the very least, provided interested parties with advance notice and an opportunity for hearing. Prior notice and hearing are particularly necessary given the sweeping impact of the Commission's statement of intent on the coordinated, effective, and efficient administration of the CEA and the FPA in accordance with Congress' directive in the Dodd-Frank Act, and under the Texas Public Utility Regulatory Act.¹⁶

IV. Exempting ISO-RTO Transactions from Private Rights of Action Under the CEA is Consistent with the Public Interest and Avoids the Unintended Adverse Consequences of Conflicting Judicial Determinations

If the CFTC suggests that parties can bring private claims under the CEA related to ISO-RTO transactions, it will enable plaintiffs to collaterally attack rules approved by FERC or permitted to take effect by the PUCT by claiming that transactions made pursuant to, and in compliance with, those rules are unlawful. Moreover, courts will be forced to determine how to characterize the contracts on which private claims are based. Individual district court judges around the nation may reach different or inconsistent conclusions about the scope of the CEA

¹⁴ See *Order Exempting, Pursuant to Authority of the Commodity Exchange Act, Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives*, 78 Fed. Reg. 19670 (Apr. 2, 2013); see also *Exemption for Certain Contracts Involving Energy Products*, 58 Fed. Reg. 21286 (Apr. 20, 1993).

¹⁵ See *Exemption for Certain Swap Agreements*, 58 Fed. Reg. 5587, 5594 (Jan. 22, 1993).

¹⁶ Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001-66.016 (West 2007 & Supp. 2014) (“PURA”).

versus the FPA or PURA in cases involving the same transactions in a single ISO-RTO market.

To the extent that a court rules that an ISO-RTO transaction is a futures, swap or option contract, it will be unclear which agency has the authority to regulate that transaction and market participants.¹⁷

In addition, permitting private claims will adversely affect the ability of the CFTC and the FERC to determine via the MOU how to exercise their respective authorities over ISO-RTO transactions and market participants. Congress' directive regarding avoiding conflicting and duplicative regulation should be heeded in this instance and the preamble language should be set aside for further review and coordination between the two agencies and with industry stakeholders.

More specifically, the inclusion of such language in the preamble of the Proposed SPP Order has referenced the ISO-RTO Final Order, but has not provided due process and an opportunity to be heard by each of the affected ISOs-RTOs and their market participants. Because the Commission has not provided interested parties with an opportunity to comment on why preserving a private right of action in the ISO-RTO Final Order is consistent with the Congressionally-declared public interest in effective and efficient regulation of markets within the FERC's or the PUCT's jurisdiction, the ISO-RTO Commenters request that the CFTC not include the preamble language concerning private claims with respect to the ISO-RTO Final

¹⁷ Importantly, the SPP Proposed Order and the ISO-RTO Final Order preserve the CFTC's authority to seek restitution for any person who is injured by violations of the CEA's manipulation and fraud provisions. Therefore, persons harmed by such violations are not left without recourse even if no private right of action is available to them with respect to ISO-RTO products.

Order.¹⁸ Notice and an opportunity for hearing are particularly important because the CFTC granted the exemption in the ISO-RTO Final Order based in large part on FERC's and the PUCT's pervasive regulation of ISOs-RTOs, their products, and their members.¹⁹

V. If the Commission Does Not Conform Its Statement About Private Claims to the Express Terms of the Draft Order, It Should Acknowledge That It Must First Confer With Its Fellow Regulatory and Enforcement Agencies on the Subject

If the Commission does not revise the preamble language to conform it to: (1) the express terms of the ISO-RTO Final Order; (2) the actual ordering language in the Proposed SPP Order; and (3) other previous Section 4(c) exemptions, it should, at a minimum, state that it will not address here the scope of private rights of action under the CEA as regards to alleged manipulative and fraudulent schemes arising in organized wholesale electricity markets. It should further acknowledge that Congress recognized the extensive role played by the FERC and the PUCT in regulating and ensuring enforcement in such markets and the attendant possibility of "conflicting and duplicative regulation" between agencies in this area.²⁰ Finally, the Commission should state in the final SPP exemption order that, for these reasons, questions as to the scope of private rights of action under the CEA (*e.g.*, questions involving the potential to disrupt and confuse existing agency enforcement paradigms) must first be considered through collaborative dialogue between the CFTC, the FERC and the PUCT.

Taking this approach would be consistent with Congress' intent, which envisioned, in the case of CFTC and FERC jurisdiction, the inter-agency memorandum of understanding as the place to address precisely these types of questions. It would also offer a more holistic and

¹⁸ See Section 720 of the Dodd-Frank Act.

¹⁹ See ISO-RTO Final Order at 19894.

²⁰ See Section 720 of the Dodd-Frank Act and Section 4(c)(6) of the CEA.

uniform approach to dealing with the matter, rather than publishing a final order affecting just one electricity market operator that includes unilaterally added preamble text raising a host of questions and consequences that, with respect to other ISOs-RTOs, have not been fully considered.

VI. Conclusion

The ISO-RTO Commenters appreciate the Commission's consideration of their comments on the Proposed SPP Order. For the foregoing reasons, the ISO-RTO Commenters respectfully request that the Commission remove its proposed statement about private claims in the preamble language or conform it to the text of the Proposed SPP Order. Alternatively, the Commission should defer any action on its statement of intent until after it has conferred with its fellow regulatory and enforcement agencies (FERC and the PUCT).

Respectfully submitted,

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