



15000 Commerce Parkway, Suite C
Mt. Laurel, NJ 08054

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Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Telefacsimile: (202) 418-5521
Email to secretary@cftc.gov and electronically to <http://comments.cftc.gov>

Re: “Notice of Proposed Order and Request for Comment on an Application for 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, published May 21, 2015 (the “Proposed SPP Exemption”)

Dear Mr. Kirkpatrick:

The International Energy Credit Association (“IECA”) provides these comments on the above-referenced Proposed SPP Exemption regarding the Southwest Power Pool’s (“SPP”) request for an exemption that is essentially identical to the exemption granted by the Commodity Futures Trading Commission (“CFTC” or “Commission”) to other Regional Transmission Operators (“RTOs”) and Independent System Operators (“ISOs”) in the Commission’s exemptive order issued on April 2, 2013¹ (the “2013 RTO-ISO Order”).

Congress granted the Commission the power to exempt certain transactions from its regulatory oversight under Section 4(c)(6) of the Commodity Exchange Act (“CEA”), which the CFTC exercised under the 2013 RTO-ISO Order referenced in the Proposed SPP Exemption. In the 2013 RTO-ISO Order, the Commission exempted the execution of Financial Transmission Rights, Energy Transactions, Forward Capacity Transactions, and Reserve or Regulation Transactions entered into in markets administered by the named RTOs and ISOs, as well as any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except the Commission’s general anti-fraud and anti-manipulation authority and scienter-based prohibitions under certain enumerated sections of the CEA and the Commission’s regulations thereunder.² The Commission now

¹ 78 Fed. Reg. 19880 (April 2, 2013).

² 78 Fed. Reg. at 19912.

proposes an essentially identical exemption for these energy transactions, and the market participants entering into these transactions, in markets administered by the SPP.

As noted by the Joint Trade Associations,³ in comments submitted to the Commission on June 19, 2015 regarding this Proposed SPP Exemption, the Commission's discussion in the Proposed SPP Exemption of the applicability of certain "private rights of action" under CEA Section 22 to the transactions and market participants exempted by the 2013 RTO-ISO Order has introduced uncertainty with respect to the exemption that has been relied on by MISO, ISO NE, PJM, NYISO and ERCOT markets and the market participants in those markets that have been operating in reliance on the exemption granted in the 2013 RTO-ISO Order for over two years since April 2, 2013. As the Joint Trade Associations' comments state:

"The inclusion of this language in the Preamble to the Proposed [SPP] Exemption, as it relates back to the 2013 RTO-ISO Order, is even more concerning as the issue was not raised by the Commission's 2012 Proposed Order on the RTO/ISO exemption application, or by any of the commenters in response to the request for comment on that 2012 Proposed Order. [footnote 13] As such, there was no notice or opportunity to for market participants to comment on the consequences of the inclusion of this commentary in the Preamble to the Proposed [SPP] Exemption."

The IECA is also concerned with the Commission's discussion of the applicability of the private rights of action under CEA Section 22, both in respect of the Proposed SPP Exemption and in respect of the 2013 RTO-ISO Order. In this regard, the IECA supports the above comments submitted by Joint Trade Associations.

In addition, the IECA notes that the Commission has said in its 2013 RTO-ISO Order that the CFTC has "exclusive jurisdiction" over transactions in RTO and ISO markets.⁴ In the Proposed SPP Exemption, the Commission says that Congress granted "private rights of action" under CEA §22 for fraud and manipulation in RTO and ISO markets, as "an alternative to Commission enforcement action."⁵ CEA §22 provides: "the rights of action authorized by [these sections] ... shall be the **exclusive remedies** under this chapter available to any person who sustains loss as a result of any alleged violation of this chapter."⁶

The Commission therefore seems to be saying that it has exclusive jurisdiction in RTO and ISO markets for fraud and manipulation, and if the CFTC does not exercise that jurisdiction, for example by granting an exemption for such transactions, private parties may still exercise such jurisdiction under a statute that provides such private parties an "**exclusive remedy.**"

We also note that the Federal Energy Regulatory Commission ("FERC") seems to believe that it can prosecute manipulation in RTO and ISO markets.⁷ FERC also has said there is a private right of action under the Federal Power Act for market manipulation in RTO and ISO

³ APPA, EEI, EPSA and NRECA

⁴ 78 Fed. Reg. at 19881 cols. 1-2.

⁵ 80 Fed. Reg. at 29493 col. 1.

⁶ 7 U.S.C. §25(a)(2) (emphasis supplied).

⁷ Examples are listed by FERC at <http://www.ferc.gov/enforcement/market-manipulation.asp> .

markets.⁸

Therefore, the IECA respectfully submits that the CFTC now has actual knowledge that it is “*sua sponte* considering such an authorization or exemption, which, in either case, may arguably fall within the overlapping jurisdiction of the other agency” within the meaning of section II.A.1 of the Jan. 2, 2014, CFTC-FERC Memorandum of Understanding that was required under Section 720(a) of the Dodd-Frank Act (“MOU”). Therefore, the IECA respectfully asks the Commission and its Staff to undertake the actions set forth in the MOU, and required pursuant to the Dodd-Frank Act, and advise the marketplace of the outcome.

Market participants in the markets administered by the SPP under the Proposed SPP Exemption, as well as market participants in the markets administered by the other RTOs and ISOs under the exemption granted under the 2013 RTO-ISO Order, need to understand FERC’s remaining enforcement jurisdiction in RTO and ISO markets, as well as whether there are private rights of action under the Federal Power Act or any other FERC-jurisdictional laws and regulations for manipulation in RTO and ISO markets.

Accordingly, the IECA supports the Commission’s granting the SPP’s exemption request as in the public interest. However, we respectfully request that the Commission grant that exemption without including the discussion of private rights of action under CEA Section 22.

Please direct correspondence concerning these comments to:

Zackary Starbird
First Vice President
International Energy Credit Association
30 S. Wacker Drive, Suite 900
Chicago, IL 60606
Phone: 312-594-7238
Email: zack.starbird@bp.com

Phillip G. Lookadoo, Esq.
Haynes and Boone, LLP
800 17th Street, NW
Suite 500
Washington, DC 20006
Phone: 202-654-4510
Email: phil.lookadoo@haynesboone.com

Yours truly,
INTERNATIONAL ENERGY CREDIT ASSOCIATION

/s/	/s/
Phillip G. Lookadoo, Esq. Haynes and Boone, LLP	Jeremy D. Weinstein Law Offices of Jeremy D. Weinstein

⁸ E.g., *Blumenthal v. ISO New England, Order Establishing Hearing Procedures*, 128 FERC ¶ 61,182 at para. 56: “Although section 222(b) of the FPA does not provide a private right of action, a person alleging energy market manipulation is not foreclosed from bringing such an allegation before the Commission pursuant to section 306 of the FPA which, as noted above, expressly permits a complaint to be brought to the Commission for any violation of the FPA.”