Aspire Commodities LP

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Dear Mr. Kirkpatrick:

Aspire Commodities ("Aspire") respectfully submits these comments in response to the Commodity Futures Trading Commission's ("CFTC") Proposed Order and Request for Comment on an Application for an Exemptive Order from the Southwest Power Pool ("Proposed Exemption").

Aspire and its affiliated companies are active participants in physical and financial electricity markets across North America. As such we have a significant professional interest in the structure, operation and oversight of the energy markets. While we are supportive of the Proposed Exemption, we are particularly heartened by the CFTC's explicit language clarifying that its 2013 RTO-ISO Final Order ("2013 Final Order") "does not prevent private claims for fraud or manipulation under the Act." Aspire is additionally heartened that FERC has no objections to the CFTC's clarification.

The multiple comments against the CFTC's clarification regarding private CEA rights of actions (often by those who can benefit from market manipulation or who seek to protect the power of a bureaucracy) are off base and sometimes contradict the very interests the commenters should be advocating.

For example, Commissioner Anderson writes: "[i]n short the goals of private causes of action brought [under the CEA] and the goals of market rules developed by state regulators and RTOs do not coincide." That is a remarkable statement. The goal of the CEA and any private actions brought pursuant to it is to prevent manipulation, advance market transparency and efficiency and allow injured parties to be compensated from illegal manipulation. One would think those would also be the goals of state regulators and RTOs/ISOs.

Additionally, Commissioner Anderson laments that private litigants may base CEA manipulation claims on conduct state regulators, like the PUCT, have found to be lawful. But, Commissioner Anderson fails to recognize that CEA lawsuits often actually *support* the principles underlying the regulators' rules and can be effective at preventing detrimental -- and illegal -- exploitation of those rules. Enron's schemes, for example, attempted to operate within the regulators' rules. From the book *24 Days*: "Spence Gerber, who'd worked with [convicted Enron employee Timothy Belden] at Portland General Electric, said that the mantra of Enron's western trading desk was, 'Tell me the rules. As long as they were operating in the rules, they felt they were okay. That was how they rationalized what they did. It was okay if it hadn't been prohibited.'" Similarly, from "Ensuring Reliability and a Fair Energy Marketplace," Energy Innovation Series and Sixth Annual Schultz Lecture University of Colorado, October 22, 2013:

> In March 2012, Andrew Fastow, the former Enron chief financial officer who went to prison for securities fraud spoke to business school students at the

> University of Colorado-Boulder. Fastow acknowledged that he "used the rules to subvert the rules." The key problem, Fastow told the students, was that when rules are complex it creates "a business opportunity." Fastow acknowledged that "[t]here are people who look at the rules and find ways to structure around them. The more complex the rules, the more opportunity." Fastow explained that was what Enron was doing, with the approval of the board of directors, attorneys, and accountants. Fastow said, "[t]he question I should have asked is not what is the rule, but what is the principle?"

Private rights of action alleging illegal manipulation under the CEA based on illegal exploitation of regulators' rules are thus often good for both the public and for regulators who care about the integrity of their rules. The PUCT's "Small Fish Rule" provides a good example of this principle. Commissioner Anderson spends a good deal of space promoting the virtue of ERCOT's Small Fish Rule, which allows "Small Fish" – those entities that control less than 5% of ERCOT's generation – to withhold energy with impunity. Aspire, frankly, does not see the value of that rule as a matter of ERCOT operation or administration. However, that such a rule can be exploited to manipulate energy prices and energy markets cannot be disputed, as Aspire has demonstrated in its lawsuit against GDF Suez and as multiple industry publications have noted. Commissioner Anderson stated that ERCOT's Independent Market Monitor addressed this issue in its most recent State of the Market Report. But, Commissioner Anderson did not reveal that the Independent Market Monitor found that GDF Suez's economic withholding, despite being a "Small Fish," cost ERCOT ratepayers hundreds of millions of dollars. A private lawsuit, directed at preventing such exploitation of PUCT's rules to GDF Suez's benefit and the ratepayers' detriment, supports – not hinders – the PUCT's mission and its purported goals. Commissioner Anderson's contrary statements are bizarre at best.

The arguments advanced by Bracewell & Giuliani, GDF Suez (represented by Bracewell in the lawsuit against Aspire) and Commissioner Anderson regarding the purported "retroactive" effect of the CFTC's clarification are irrelevant to the current Proposed Exemption and are nothing more than an inappropriate attempt to litigate the Aspire/GDF dispute in this context. And, there is no such retroactive effect by the CFTC interpreting its prior 2013 Final Order. Regulatory agencies interpret their own orders all the time, through bulletins, letters, and subsequent orders, just as the CFTC has done here.

The above entities also incorrectly state that the CFTC's clarification regarding CEA private rights of action is inconsistent with its 2013 Final Order. As the CFTC noted, "[n]either the proposed nor the [2013 Final Order] discussed, referred to or mentioned" the private right of action allowed by the CEA. Had the CFTC intended to effectuate such a dramatic change in the application of the CEA, it would have said so, and it didn't. The CFTC's May 21 interpretation of the 2013 Final Order cannot conflict with unambiguous language not in the 2013 Final Order.

The 2013 Final Order's exemption from the CEA for specific contracts, agreements or transactions is also not inconsistent the CFTC's interpretation of the 2013 Final Order to allow private rights of action for market manipulation since the legality or illegality of the underlying conduct is irrelevant to a claim for market manipulation. A plaintiff bringing an action under the CEA must show the defendant manipulated a relevant market and that the plaintiff suffered

damage from that manipulation. The necessary object of such a claim is the manipulation, not the legality or illegality of the underlying conduct by which the illegal manipulation was achieved. Claims for illegal manipulation are routinely based on *legal* underlying transactions.

Further, Congress intended to give the CFTC power to exempt particular agreements and transactions from the CEA, not to insulate manipulators from CEA liability. The purpose in providing the CFTC with exemptive authority was to provide legal certainty regarding enforceability of completed transactions in order to foster greater financial innovation. "In granting . . . exemptive authority to the [CFTC] . . . [Congress] recognize[d] the need to create legal certainty for a number of existing categories of instruments which trade . . . outside of the forum of a designated contract market." H.R. Rep. No. 102-978, 102d Cong. 2d Sess. at 82-83. "The [power to exempt certain contracts, agreements or transactions from the CEA] provides flexibility for the [CFTC] to provide legal certainty to novel instruments[.]" *Id.* Hence, Congress intended for the CFTC to apply its new exemptive powers to products and instruments -- completed transactions -- so that parties to exempted transactions could enter them freely without fear of future challenge under the CEA. But Congress' intent to provide stability for completed transactions, instruments and products traded in RTOs/ISOs like ERCOT has no bearing on the use of such transactions, instruments and products as a means to manipulate market prices.

Finally, the position advocated by Bracewell, GDF Suez, and Commissioner Anderson is directly contrary to the purpose of the CEA and the public interest the PUCT purports to represent. Allowing private rights of action under the CEA, by contrast, is consistent with the CEA and public interest.

The purpose of the CEA is to prohibit market manipulation. The purpose of the private right of action in the CEA to is to allow (1) market participants and (2) injured parties to recover for losses suffered as a result of illegal market manipulation. Courts, including the United States Supreme Court, have routinely recognized that private rights of action can be as effective at modifying conduct as regulation. *Medtronic v. Lohr*, 518 U.S. 470, 510-11 (1996) (O'Connor, J. joined by Rehnquist, C. J., and Scalia and Thomas, JJ, concurring); *Cipollone v. Liggett Group*, 505 U.S. 504, 522-23 (1992); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 358, 397 (1993); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987); *Larsen v. Gen. Motors Corp.,* 391 F.2d 495 (8th Cir. 1968). Bracewell, GDF Suez, and Commissioner Anderson seek to prevent that vital check on manipulating conduct, thus increasing the likelihood of illegal manipulation. Their position, if accepted, would also prevent parties injured by illegal manipulation from ever receiving compensation for losses, contrary to the private right of action Congress provided in the CEA.

Furthermore, if Bracewell's, GDF Suez's, and Commissioner Anderson's position is accepted and manipulators are provided immunity from private CEA lawsuits, the public will be harmed. Most simply, manipulation of the ERCOT's Real-Time LMP through exploitation of the PUCT's Small Fish Rule, as a matter of pure math, will cause utility rates to rise because such exploitation raises average price of electricity in ERCOT, thereby injuring innocent consumers, who cannot challenge GDF Suez's conduct because of the Filed Rate doctrine. More indirectly, increased manipulation (or even the perception of increased manipulation) resulting from eliminating private rights of action will decrease the integrity of derivative markets. That decreased integrity causes greater risk, which will be factored into the price of futures contracts.

Higher-priced futures contracts will decrease liquidity in those markets and reduce opportunities for energy companies to hedge their Real-Time risks, which will ultimately manifest in higher Real-Time prices and higher electricity prices.

In short, the cost of increased market manipulation -- the inevitable consequence of eliminating the private right of action permitted by the CEA -- will be borne by consumers, contrary to the public interest.

The CFTC's clarification regarding CEA private rights of action in its Proposed Exemption are consistent with (1) the content of the 2013 Final Order; (2) the purpose of the CEA; and (3) the public interest. The comments against the CFTC's clarification are contrary to each of (1) - (3), are nakedly the result of specific entities and persons pursuing their self-interest, and they should be rejected.

Sincerely,

Adam Sinn

President