

June 22, 2015

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”) issued a Proposed Order to respond to an application from Southwest Power Pool, Inc. (“SPP”) 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”).<sup>1</sup> SPP is seeking exemptive relief from the Commission that is similar in scope to the relief granted by the Commission to other Regional Transmission Organizations (“RTOs”) in an order issued in response to a separate RTO petition in the spring of 2013 (“Existing Order”).<sup>2</sup>

The Coalition of Physical Energy Companies (“COPE”)<sup>3</sup> hereby offers its comments on the Proposed Order. The members of COPE are physical energy companies in the business of

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<sup>1</sup> 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).

<sup>2</sup> 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 (Apr. 2, 2013).

<sup>3</sup> The members of COPE are: Apache Corporation; EP Energy LLC; Iberdrola Renewables, LLC; Kinder Morgan, Inc.; MarkWest Energy Partners, L.P.; Shell Energy North America (US), L.P.; SouthStar Energy Services LLC; and Targa Resources.

producing, processing, and merchandizing energy commodities at retail and wholesale. Several COPE members actively participate in RTO markets.

In its comments filed with the Commission prior to the issuance of the Existing Order, COPE made clear that it supported the Commission's exemption of the specified RTO-enabled transactions from regulation under the Commodity Exchange Act ("CEA").<sup>4</sup> Subsequently, the Commission issued the Existing Order which exempts, subject to certain conditions and limitations, certain specified RTO-enabled transactions from all provisions of the CEA, except the Commission's general anti-fraud and anti-manipulation authority.<sup>5</sup>

The Proposed Order appears to COPE to propose the same relief to SPP as the Existing Order granted to the other RTOs, and therefore COPE supports the Proposed Order insofar as it would exempt SPP transactions from the CEA. COPE believes that the Commission was right to recognize in the Existing Order that RTO-enabled transactions are effectively and efficiently regulated under the electricity market regulation of the Federal Energy Regulatory Commission ("FERC") and the Public Utility Commission of Texas ("PUCT").

Both former Commission Chairman Gensler and current Chairman Massad have publicly expressed their support for the notion of leaving regulation of RTO-enabled transactions to the existing regulation of FERC, the PUCT and the applicable market monitors, as those entities have the applicable regulatory experience and expertise to continue overseeing those markets. In particular, former Chairman Gensler observed at the time of the Existing Order that "Congress authorized that these transactions be exempt from certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act as they are subject to extensive regulatory oversight by the Federal Energy Regulatory Commission (FERC) or, in one instance, the Public Utility Commission of Texas (PUCT)."<sup>6</sup>

In addition, Chairman Massad observed that "[w]e have also worked with FERC to exempt from our regulations several electric industry participants—that is, regional transmission organizations and independent system operators—because they are already subject to FERC regulation."<sup>7</sup>

COPE fully supports efforts by the Commission to implement the general view of electric energy market regulation as illustrated by the statements of Chairman Gensler and Chairman Massad above. However, as explained below, COPE believes that the Proposed Order does not fully

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<sup>4</sup> COPE Comments Regarding 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 (Filed Sept. 27, 2012).

<sup>5</sup> Existing Order at 19912.

<sup>6</sup> Statement of Support by Chairman Gary Gensler on Final Order Related to Certain RTO and ISO Electricity Transactions (Mar. 28, 2013)

<sup>7</sup> Remarks of Chairman Timothy Massad before the Natural Gas Roundtable (May 26, 2015).

adhere to the principles espoused by the Chairmen in the above statements, and further believes that the Proposed Order, if implemented, would alter the exemption already provided by the Commission in the Existing Order. For those reasons, COPE cannot support the Proposed Order as drafted and urges the Commission to revise the Proposed Order in order to follow (rather than revise) the Existing Order.

#### The Proposed Order Attempts to Change the Existing Order

The Proposed Order provides in the preamble<sup>8</sup> (and captures the concept in the ordering language)<sup>9</sup> that consistent with the Existing Order, SPP does not seek, and expressly excludes from the exemption sought, relief from the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions.

The Proposed Order also provides in the preamble that in the Commission's view, the Existing Order (and the proposal that preceded it) did not discuss or reference Section 22 of the CEA, which provides for private rights of action for damages against persons who violate the CEA, or persons who willfully aid, abet, counsel, induce, or procure the commission of a violation of the Act.<sup>10</sup> The Commission goes on in the preamble to the Proposed Order to state that "[i]t would be highly unusual for the Commission to reserve to itself the power to pursue claims for fraud and manipulation – a power that includes the option of seeking restitution for persons who have sustained losses from such violations or a disgorgement of gains received in connection with such violations – while at the same time denying private rights of action and damages remedies for the same violations."<sup>11</sup> The Commission concludes that it "did not intend to create such a limitation, and believes that the [Existing Order] does not prevent private claims for fraud or manipulation under the Act," and furthermore, that the Proposed Order would not preclude such private claims against SPP.<sup>12</sup> This would, in COPE's reading, undermine the stated purpose of the ordering paragraphs to limit the exemption provided to particular sections of the CEA (which do not include Section 22). Perhaps even more troubling, the effect of this language would be to retroactively revise the Existing Order.

#### The Commission Should Not Expand The CEA Provisions Applicable To Otherwise Exempted Transactions For SPP Or Other RTOs Beyond Those Covered In The Existing Order

As the Commission and its current and former chairmen have explicitly recognized, RTO-enabled transactions are well covered by a well-established and longstanding regulatory system that fully covers all aspects of RTO activities, including anti-manipulation enforcement. Such

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<sup>8</sup> Proposed Order at 29491 (emphasis supplied) (internal citation omitted).

<sup>9</sup> Proposed Order at 29516.

<sup>10</sup> SPP Order at 29493 (internal citations omitted).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

transactions are subject to stringent tariffs and rules, employ independent market monitors, and are subject to direct enforcement actions by other regulatory agencies.<sup>13</sup>

If the Commission were to permit private rights of action in the case of exempted RTO-enabled transactions, the regulatory architecture for RTOs that the Existing and Proposed Orders attempt to preserve will be undermined. Rather than oversight and enforcement being driven by the market integrity and consumer protection goals of existing regulators, private commercial parties would be permitted to bring claims based solely on their desire for monetary gain. Such a regulatory scenario would prevent commercial and regulatory certainty for the affected transactions, since a transaction could be compliant with regulations and requirements of an RTO market monitor, FERC and the CFTC, and yet still be subject to a third party private action for alleged manipulation. COPE believes that such private claims could be, in part, motivated by a litigant's desire to receive a settlement payment rather than protect consumers, and as such would be no substitute for the carefully considered judgment of experienced regulators.

The Proposed Order's language regarding the preservation of third party actions could, if finalized by the Commission, undermine the exemptions being granted and indeed the current regulatory oversight scheme for RTOs. The RTO-enabled and regulated markets are carefully structured by FERC, the PUCT and market monitors, and subjecting transactions that are permitted by these regulators and that remain subject to Commission anti-manipulation regulation to third party challenge in federal court would be allowing collateral attacks on those transactions in which the regulators who have found no issue with those transactions are not represented. To make an analogy, it would be akin to the Commission standing by while FERC and private third parties bring actions concerning the manipulation of products on Designated Contract Markets, where the Commission maintains and defends its exclusive jurisdiction.<sup>14</sup> To reverse course now and permit private rights of action on top of the normal RTO regulatory architecture risks undermining that architecture which the Commission has recognized and professes to trust.

#### The Commission Must Not Retroactively Change the Effect of its Prior Order

In the Proposed Order, the Commission says that it intended not to exempt the transactions from Section 22 and believes, regardless of the language of the Existing Order or the original proposal

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<sup>13</sup> See, e.g., Existing Order at 19884 (noting that the relevant market monitors monitor the subject transactions as directed by FERC and PUCT under the relevant statutes to ensure reliable and efficient markets"); Proposed Order at 29492 (noting that FERC has established a regulatory system over time that governs RTOs and ISOs to improve both the reliability of the physical operations of electric transmission systems as well as the competitiveness of electric energy markets); Remarks of Chairman Timothy Massad before the Natural Gas Roundtable (May 26, 2015), *supra* fn 8; Statement of Chairman Gary Gensler regarding Existing Order (April 2, 2013).

<sup>14</sup> See 7 U.S.C. § 2(a)(1)(A) (CFTC has exclusive jurisdiction over swaps or contracts of sale of a commodity for future delivery traded or executed on a designated contract market); *Hunter v. FERC*, 711 F.3d 155, 157 (2013) (noting exclusive jurisdiction of the CFTC over registered futures exchange transactions).

that led to it, that it did not do so.<sup>15</sup> COPE submits that a reading of the plain language of the Existing Order makes clear that private rights of action under Section 22 are not preserved, and had they been preserved in the proposal that the Commission issued prior to the issuance of the Existing Order, COPE and other market participants would have addressed the matter in their comments and strenuously opposed the lack of exemption from Section 22. COPE strongly objects to the view, insofar as the Commission expressed it in the Proposed Order, that a retroactive statement of agency intent is sufficient to change the meaning of the specific and unambiguous language and ordering paragraphs of the Existing Order which effectuate the order's stated purpose.

It is well settled that the Commission must follow the plain language of its orders.<sup>16</sup> In the Existing Order, the Commission plainly listed the exempted and preserved elements of the CEA with respect to the covered RTO-enabled transactions.<sup>17</sup> If the Commission were to change the scope of the exemption provided in the Existing Order, it would have to do so through the normal agency process of public notice and comment. The Commission should in no event attempt to retroactively change the scope of the Existing Order's exemptions of RTO transactions through a statement of intent in a proposal issued two years later.

#### Conclusion

COPE respectfully requests that the Commission grant the exemption requested by SPP and exempt transactions conducted in the relevant market from the provisions of the CEA, except for the provisions relating to the Commission's own anti-manipulation authority.

Respectfully Submitted,

/s/ David M. Perlman

David M. Perlman  
George D. Fatula

**Counsel to  
Coalition of Physical Energy Companies**

CC: COPE Members

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<sup>15</sup> See, e.g., Proposed Order at 29493.

<sup>16</sup> 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).

<sup>17</sup> See Proposed Order at 29516.