Omaha Public Power District

June 14, 2016

Jon Hansen, Vice President - Energy Production and Marketing
Omaha Public Power District
444 South 16th Street Mall
Omaha, NE 68102-2247

Bureau of Consumer Financial Protection
Office of Management and Budget
Attn: OMB Desk Officer
Executive Office Building, Room 10235
Washington, DC 20503

Regarding: Commodity Futures Trading Commission Notice - Final Orders; Proposed Amendments: Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions

I. Background

The CFTC has issued a proposed amendment to the Joint ISO/RTO exemption orders to preserve private rights of action under Section 22 of the CEA based on transaction in ISO/RTO markets. ISO/RTO markets effectively support grid reliability in accordance with principles of economic efficiency. This outcome is facilitated by the effective and efficient structure and regulation of the host of market products that support organized electricity markets. This benefit would be undermined by the introduction of private rights of action in the ISO/RTO 4(c) exemption orders. As described in greater detail below, the cost and negative impacts associated with this proposal are far greater than any potential benefits.

In 2012, six of the seven ISOs/RTOs filed Commodity Exchange Act Section 4(c) exemption requests with the CFTC. The scope of the requests included several ISO/RTO market products (e.g. Day – Ahead energy; Financial transmission rights; Virtual transactions; Capacity markets; Certain Ancillary services; among others), and it covered the ISO/RTO and the ISO/RTO market participants that transacted in the relevant products. The scope of the 4(c) requests did not include CFTC anti-fraud and anti-manipulation authority. The CFTC granted the requests in 2013.

In 2013, SPP filed a 4(c) exemption request that mirrored the requests of the other six US ISOs/RTOs. In 2015, CFTC issued a draft order that introduced the issue of preserving private rights of action in the ISO/RTO exemption orders. Although not in the body of the draft order, the CFTC raised the issue in the preamble with respect to not only the SPP order, but also in terms of the existing ISO/RTO orders, noting that it never intended to exclude private rights of action from transactions in ISO/RTO markets – said another, way, it never meant to include private rights of action within the scope of the ISO/RTO exemption orders. The SPP order is still pending at CFTC, subject to a no action letter, pending the resolution of this issue.

In response to the SPP draft order, all the ISOs/RTOs and numerous other entities filed comments opposing the preservation of private rights of action in the ISO/RTO orders. Since then, there has been much discussion regarding the problems associated with preserving private rights of action, but the CFTC has elected to re-open the six ISO/RTO orders for notice and comment with respect to this issue, presenting it as being necessary "to clarify" the orders – despite the fact that the prior orders excluding private rights of action were approved unanimously by the prior Commission. For the reasons described in more detail below, the CFTC's proposal lacks merit, and, in fact, may be counterproductive to its goals, as well as to the goals of Congress when they enacted the Dodd-Frank Act in 2010.

II. The Scope of the ISO/RTO 4(c) Exemption Orders are Consistent with Congressional Intent Under Dodd Frank

A primary concern with the CFTC's private rights of action proposal is that it is contrary to the intent of Congress under Dodd Frank. Under Dodd Frank, Congress struck a balance between FERC and CFTC oversight to facilitate the preservation of each agency's jurisdiction, while also recognizing the potential for overlap between their respective jurisdictions with respect to particular types of financial products. The intent of Congress in this regard is evidenced by the inclusion in Dodd Frank of a jurisdictional savings clause, a 4(c) exemption section focused specifically on transactions in organized electricity markets governed by FERC and relevant state regulatory agencies and requirement for FERC and the CFTC to execute a memorandum of understanding to manage potential areas of jurisdictional overlap.

The scope of the six effective ISO/RTO orders achieved the balance intended by Congress by exempting the relevant transactions in organized markets from all but CFTC behavioral oversight. This balance recognizes that FERC (and PUCT) pervasively regulate the organized electricity markets they oversee from both a structural and behavioral perspective (including the establishment of independent market monitors that monitor market behavior, outcomes and design). However, the preservation of CFTC behavioral oversight for the relevant products also recognizes the potential interplay between electricity market activity and external financial markets, which are within the expertise and purview of CFTC. In this manner, the scope of the ISO/RTO exemptions met the public interest standard required for a 4(c) exemption by maximizing the scope of oversight, but also limiting the oversight to the two agencies with the experience and knowledge required for effective and efficient market regulation. In addition, the exemption orders appropriately allocated the respective agencies' scope of responsibilities in accordance with their expertise. Collectively, this paradigm not only met the intent of Congress in Dodd Frank, but also met the public interest standard in the most effective and efficient manner.

Against the effective platform created by the ISO/RTO exemptions, the introduction of private rights of action can only have a detrimental effect. First and foremost, it contravenes the intent of Congress. Additionally, as described in more detail in subsequent sections of this outline, allowing private rights of action to proceed for activity in organized electricity markets would create potential regulatory disruption, and possibly divestiture, both of which would undermine the effective regulatory paradigms that have facilitated the economic benefits produced by organized electricity markets, which inure to the benefit of consumers.

The fact that the existing scope of the ISO/RTO exemption orders is consistent with Congressional intent is supported by the bipartisan support for legislation within the CFTC Reauthorization bill that was included in manager's amendment and passed Senate Agriculture Committee (the bill is pending full Senate action). In response to the CFTC's actions on this matter, the draft legislation expressly prohibits the preservation of private rights of action in the ISO / RTO 4(c) exemptions issued pursuant to Section 4(c)(6) of the Commodity Exchange Act.

III. The Scope of the ISO/RTO 4(c) Exemption Orders Meets the Public Interest Standard for Approving 4(c) Exemptions

The ISO/RTO 4(c) Exemption Orders were sought, structured and issued to preserve the well balanced comprehensive and effective regulatory structure in place for ISO/RTO markets, which was consistent with the intent of the Dodd-Frank Act – to preserve the balance of regulatory authority between CFTC and FERC. The existing comprehensive regulatory paradigm was, in fact, the basis for the ISO/RTO 4(c) exemption orders meeting the public interest standard/protections under Section 4(c) of the CEA. There is no need to preserve PROA in the ISO/RTO exemption orders to protect entities rights. In fact, doing so would undermine the protections the current regulatory paradigm provides.
ISO/RTO markets represent a carefully balanced paradigm designed to meet the Federal Power Act (FPA) Section 205 just and reasonable rate standard. These markets are comprised of synergistic market products (including, but not limited to, energy and ancillary services) that facilitate economically efficient prices and effective / efficient grid operations. At a minimum the preservation of private rights of action in ISO/RTO 4(c) exemption orders could undermine the effectiveness and efficiency of the ISO/RTO markets by disrupting the well thought out and well developed market structures and synergies.

FERC and the PUCT employ comprehensive frameworks, which have been developed over approximately two decades, to regulate the structural and behavioral aspects of organized electricity markets. Combined with the preservation of CFTC behavioral oversight for relevant matters, the existing ISO/RTO exemptions were granted because, collectively, the regulatory protections meet the public interest (these same protections apply to the pending

SPP 4(c) exemption request). The comprehensive control and oversight of electricity markets obviates the need for additional protections, and, accordingly, there is no reason to apply private rights of action under Section 22 of the CEA to transactions in organized electricity markets. They would provide no incremental benefit, and can only undermine the effective balance achieved by the ISO/RTO 4(c) exemptions.

Given the essential nature of the underlying commodity - electricity - and the comprehensive structural, behavioral and regulatory protections in place for the ISO/RTO markets, there is no basis for compromising the appropriate balance struck by CFTC in the existing ISO/RTO 4(c) exemption orders, which exempt ISO/RTO products from all but CFTC behavioral enforcement jurisdiction.

IV. Preserving Private Rights of Action in ISO/RTO Exemption Orders Will Undermine the Effective and Efficient Regulation of Organized Electricity Markets

The preservation of private rights of action in the ISO/RTO 4(c) Exemption Orders will potentially create significant regulatory disruption and/or regulatory divestiture issues with respect to ISO/RTO markets, and will also potentially expose ISOs/RTOs to significant litigation burden and risk, with any resulting cost impacts being passed on to consumers. Under the CEA, CFTC has exclusive jurisdiction over certain types of products, including swaps. If private rights of action are preserved in the ISO/RTO 4(c) exemption orders, as a preliminary matter a court may decide if an ISO/RTO market product is a swap (or other relevant product under the CEA). If a court decides this question in the affirmative, it raises the question of whether CFTC has exclusive jurisdiction over such products under the CEA. Regardless of the savings clause in Dodd Frank (preserving CFTC and FERC respective jurisdiction), there is the risk that a court could find that CFTC has exclusive jurisdiction, thereby effectively divesting FERC of jurisdiction over the relevant product(s).

The potential regulatory disruption/divestiture impact of such a result could range from removal of the relevant product from ISO/RTO markets, restructuring of the ISO/RTO product, or, alternatively, retention of the product somehow, but under CFTC regulation. Any of these outcomes would be harmful to ISO/RTO markets, potentially creating disjointed, ineffective and inefficient regulation thereof, which could undermine the cost benefits that the ISO/RTO markets have produced for consumers in the respective regions of the country over the past two decades.

The 2013 exemption orders effectively resolved the CEA jurisdictional issue by NOT deciding whether ISO/RTO market products, such as FTRs and virtual transactions, are "swaps" under the CEA. As noted above, a federal district court hearing a private action would likely be required to resolve jurisdictional issues that the 2013 exemption orders avoided, because it would have to determine an ISO/RTO product was a jurisdictional product under the CEA. This finding could potentially be understood to give CFTC exclusive jurisdiction over products that are now regulated by FERC. If a district court were to rule that FTRs or virtual transactions, for example, are "swaps", it could plausibly be argued that the CFTC would then have "exclusive" jurisdiction over those products under the CEA - financial transmission rights, virtual transactions, capacity markets, possibly day ahead energy schedules and prices, and certain ancillary services are all at risk of being found to be within the exclusive jurisdiction of the CFTC. Such a finding could be used to block FERC regulation or enforcement activity, both of which would undermine the effective and comprehensive ISO/RTO market framework regulated by FERC.

Plaintiffs in a private right of action under the CEA could collaterally attack in district court ISO/RTO market rules that have been approved by FERC as "filed rates."[1] Accordingly, private rights of action could also effectively result in judicial regulation of ISO/RTO markets, because the courts would be interpreting ISO/RTO market rules. As discussed, these markets have been developed over approximately two decades with input from the ISOs/RTOs, a multitude of interested parties and FERC (and PUCT). The markets are an extremely complex combination of engineering, economics and regulatory policy. Effective regulation and oversight of this arcane paradigm requires expertise and historical knowledge. Courts are not well equipped to act as the initial forum to interpret matters arising in organized electricity markets. This is especially true where such matters are brought by self-interested commercial entities that present the rules based on self-interest, and not necessarily in a manner that reflects the issue objectively in light of all relevant considerations. Of course, under the current FERC construct such matters may reach the courts, but only after being properly vetted via all relevant and appropriate regulatory channels. This approach ensures effective review and regulatory action, and it mitigates the potential for frivolous claims to undermine ISO/RTO markets and the assignment of unwarranted costs to ISOs/RTOs, market participants or consumers.

Court decisions resulting from private rights of action could also create indirect impacts to ISO/RTO markets, thereby causing inefficient market outcomes, if they result in chilling effects on otherwise appropriate market behavior. This result is certainly possible if a court misinterprets ISO/RTO rules and penalizes one market participant for appropriate behavior. This could result in other market participants engaging in inefficient behavior to mitigate their exposure to similar private rights of action brought on the basis of such precedent (as discussed above, this could also result in inefficient/ineffective changes to market rules to mitigate the impact of the inappropriate court ruling).

Furthermore, if an ISO/RTO is successfully sued under a private right of action, those costs would be passed on to demand, because ISOs/RTOs are non-profit and all expenses are ultimately paid by electricity consumers. Any such costs would not be warranted, because the ISO/RTO markets are already subject to significant protections via the structural, behavioral and regulatory oversight/enforcement protections by both CFTC and FERC.

[1] Plaintiffs have already attempted to challenge ISO/RTO rules using the CEA's private right of action. The Aspire case involved a collateral attack on ERCOT market rules approved by the PUC of Texas. The federal district court and the Fifth Circuit rejected the claims based on the 2013 exemption orders, which they found do not allow private rights of action. Private lawsuits challenging market rules would create legal uncertainty, by negating the longstanding judicial doctrine that, outside the enforcement context, an ISO/RTO tariff can be interpreted only by FERC (or a US Court of Appeals, on appeal from FERC).

The potential benefit of a private right of action, if any, would be greatly outweighed by the potential harm.

V. Conclusion

Congress recognized the unique nature of electricity products regulated by FERC in the Dodd Frank Act, and designed that Act to ensure that any potential jurisdictional overlap between CFTC and FERC was effectively managed, respecting each agency's jurisdiction, but also applying that jurisdiction relative to need and expertise. This well thought out approach led to the approval of the existing ISO/RTO exemption orders, which preserve FERC's overall jurisdiction for ISO/RTO markets, subject only to complementary CFTC behavioral oversight jurisdiction.

CFTC engaged with the ISOs/RTOs and FERC (PUCT for ERCOT) in the development of the ISO/RTO proposals to ensure they met the public interest standard that is required for the issuance of a 4(c) exemption order. Ultimately, CFTC found that ISO/RTO proposals met the public interest standard, because, essentially, those markets are comprehensively and effectively regulated and, as such, mitigate financial risks to consumers. This was the basis for granting the effective ISO/RTO orders.

The preservation of private rights of action under Section 22 of the CEA will undermine the jurisdictional balance that Congress established and CFTC effectuated via the existing ISO/RTO orders. It will cause potentially significant regulatory disruption and / or divestiture issues that could result in significant negative impacts to ISO/RTO markets. This could also affect the scope and effectiveness of both FERC and CFTC regulatory authority.

Consistent with the foregoing discussion, the CFTC should not adopt the proposal to preserve PROA in ISO/RTO 4(c) exemptions (*i.e.* exclude Section 22 from the scope of the ISO/RTO 4(c) exemption orders), and it should then issue SPP's final exemption order consistent with the scope of the exemptions provided to all other ISO/RTOs. This will ensure ISO/RTO markets will be able to continue to serve the electricity needs of consumers in the most effective and efficient manner possible.

The positions reflected in these comments is vastly supported by a consensus of electric industry participants. In fact, entities that typically differ on issues, including the ISOs/RTOs, ISO/RTO market participants and the major industry trade groups (*e.g.* NRECA, APPA, EEI and EPSA) all oppose the preservation of private rights of action in ISO/RTO exemption orders. CFTC should give due consideration to the substantive arguments that counsel against the preservation of private rights of action and the weight of industry opposition and reject the proposal at issue.

Signed