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June 15, 2016

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: **Notice of Proposed Amendment to and Request for Comment on the 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**
Comments of Xcel Energy Services Inc.

Dear Mr. Kirkpatrick:

Thank you for the opportunity to comment on the Commodity Futures Trading Commission's (Commission's) proposal to clarify that participants in Independent System Operator (ISO) and Regional Transmission Organization (RTO) markets are subject to private rights of action under the Commodity Exchange Act (CEA).[1] As discussed further below, allowing private rights of action is unnecessary, may result in duplicative and potentially conflicting enforcement regimes, and may chill or hinder development of renewable energy resources needed to meet environmental policy goals. Xcel Energy Services Inc. (XES), on behalf of its affiliated operating companies, urges the Commission to ***not*** adopt this proposal. The Commission should instead clarify that RTOs and ISOs and participants in their markets are exempt from the private right of action provisions of the CEA.

XES supports the written comments being filed in this proceeding by the Edison Electric Institute (EEI), the Southwest Power Pool, Inc. (SPP), and the Midcontinent Independent System Operator, Inc.'s (MISO's) Transmission Owners, among others. XES's individual comments are intended to augment and emphasize certain aspects of the comments filed by EEI and these other stakeholders.

The Xcel Energy System

Xcel Energy Inc. (Xcel Energy) is a public utility holding company and a Minnesota corporation. The Xcel Energy Operating Companies are Northern States Power Company, a Minnesota corporation (NSPM); Northern States Power Company, a Wisconsin corporation (NSPW); Public

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[1] *Proposed Order and Request for Comment on the 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*, 81 Fed. Reg. 30245 (May 16, 2016) ("Proposed Order").

Service Company of Colorado (PSCo); and Southwestern Public Service Company (SPS).[2] The NSP Companies participate in the regional electric markets administered by the MISO RTO, and SPS participates in regional electric markets administered by the SPP RTO. PSCo does not operate in an RTO market at this time, but is an advocate for development of more regional energy markets in the Western Interconnection in the western United States. XES is the service company for the Xcel Energy holding company system and, *inter alia*, represents the Xcel Energy Operating Companies in federal regulatory matters.

Private Rights of Action Unnecessary

The Federal Energy Regulatory Commission (FERC) has jurisdiction over RTOs and ISOs and engages in comprehensive regulatory oversight of both RTO and ISO markets as well as the behavior of participants in those markets. FERC rules prohibit market participants from engaging in manipulative behavior.[3] FERC has aggressively enforced its anti-market manipulation rules. For example:

- On September 29, 2009, FERC approved a settlement imposing a $30 million fine Energy Transfer Partners for market manipulation and requiring Energy Transfer Partners to create a $25 million fund to reimburse third parties harmed by its behavior.[4]
- On March 22, 2013, FERC approved a settlement of more than $3 million, including a payment of more than $2.8 million in disgorgement to be remitted to ISO New England for distribution to load.[5]
- On March 9, 2012, FERC approved a settlement with Constellation Energy Commodities Group for alleged market manipulation, imposing a fine of $135 million and disgorgement of $110 million.[6]

In addition to these settlements listed above, FERC has initiated enforcement actions against several other participants in RTO/ISO markets for alleged market manipulation. In fact, since 2007 FERC has assessed civil penalties in excess of $644 million and has ordered disgorgements in excess of $302 million.[7] Further, FERC requires that RTOs and ISOs have independent market monitors that track behavior of market participants and report suspicious behavior to FERC. These market monitoring units must be independent from RTO and ISO management, must periodically review markets, and must report potential market abuses and market design flaws to FERC.[8] Transactions conducted in RTO/ISO markets are thus already subject to comprehensive oversight by FERC which, with the aid of independent market monitors, identifies anti-competitive behavior.

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[2] NSPM and NSPW are jointly referred to as the "NSP Companies" or "NSP."

[3] 18 C.F.R. §(1)(c).

[4] *Energy Transfer Partners. LP et al., Order Approving Uncontested Settlement,* 128 FERC 61,269 (September 21, 2009).

[5] *Rumford Paper Company, Order Approving Stipulation and Consent Agreement,* 142 FERC ¶ 61, 218 (March 22, 2013).

[6] Constellation Energy Commodities Group Inc., *Order Approving Stipulation and Consent Agreement,* 138 FERC ¶61, 168 (March 9, 2012).

[7] http://ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp

[8] 18 CFR §35.34(k)(6); *Wholesale Competition in Regions with Organized Electric Markets,* Federal Energy Regulatory Commission, 125 FERC ¶ 61,071 (October 17, 2008); *Policy Statement on Market Monitoring Units,* Federal Energy Regulatory Commission, Docket PL05-1-000 (May 27, 2005).

Further, FERC has a proven track record of pursuing enforcement actions against entities alleged to have engaged in market manipulative behavior and ensuring that third parties who have been harmed by anti-competitive behavior achieve redress through disgorgement.

Allowing Private Rights of Action Would Harm Wholesale Markets

RTO and ISO markets are complex. The markets are designed to deliver energy to customers reliably and cost-effectively, taking advantage of large pools of available generation to deliver production cost savings to customers. FERC, with the assistance of independent market monitors, has intimate knowledge of the workings of RTO and ISO markets and is well-positioned to evaluate and regulate market behavior in a consistent and uniform way. Courts are not.

By statute, FERC is responsible under the Federal Power Act (FPA) for ensuring that RTO and ISO markets serve the public interest by delivering reliable and cost-effective energy to customers. Private litigants are not necessarily driven by the same motives, and their involvement in energy markets through litigation will only detract from the ability of markets to deliver energy reliably and cost-effectively to customers.

The threat of private rights of action may also chill otherwise appropriate market behavior due to the risks of increased litigation costs and unfavorable or inconsistent outcomes rendered by courts that do not have the same knowledge of complex wholesale RTO and ISO market workings as FERC. The potential for such litigation could lead to a contraction of the wholesale energy markets, or the liquidity of those markets, as market participants exit RTO markets in response to perceived risks of litigation.[9] Allowing private rights of action could thus negatively impact the ability of RTOs and ISOs to deliver energy reliably and cost-effectively to consumers.

Allowing private rights of action could also impede the ability of the United States to achieve its long term climate and carbon emission reduction goals. Xcel Energy is the largest retail wind generation provider in the United States, with almost 6,557 MW of wind generation and 459 MW of solar interconnected to the transmission systems of the Xcel Energy Operating Companies as of the end of 2015. We have an additional 1,217 MW of wind or solar generation to be interconnected in 2016 and have filed plans to add 4,200 MW of wind and solar through 2030. In 2015, almost 18 percent of the energy requirements of retail and wholesale customers of the Xcel Energy Operating Companies were provided from wind and solar. RTOs and ISOs serve a critically important role in integrating renewable generation.

RTOs and ISOs serve a critically important role in integrating renewable generation resources into the electric grid due to their broad geographic scope and ability to dispatch a vast array of resources to instantaneously meet consumer demand while operationally managing the variability and uncertainty of renewable resources such as wind and solar. Simply put, the vast and rapid expansion of wind and solar renewable generation in the U.S. over the last decade would not have been operationally possible without RTO/ISO administration of day ahead and real time regional energy markets.

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[9] *See* http://tabbforum.com/opinions/pursued-by-a-bear-implications-of-banks-leaving-the-traded-energy-markets?print_preview=true&single=true ("The past year has seen an unprecedented exodus of global investment banks from the traded energy markets…..Of the 10 largest commodities trading firms in 2013, eight were banks and six of those have exited or are looking to exit the market.")

One of the ways federal agencies can most effectively encourage increased development of renewable generation, especially in the Western U.S., is to encourage development of RTO/ISO or other regional market mechanisms. Indeed, the ability of energy markets to effectively integrate wind is a key factor driving the development of RTOs or other regional market mechanisms in the western United States.[10] A Commission order allowing private rights of action would do just the opposite: it would create new risks that discourage utilities and other potential market participants from joining RTOs/ISOs or other regional markets, or encourage utilities to leave RTOs/ISOs. Imposing new risks on participants in RTOs and ISOs in the form of private rights of action will result in negative impacts in terms of expanding and enhancing the very markets that support increasing the amount of renewables on the electric grid.

Conclusion

XES appreciates the Commission's thoughtful consideration of this issue. As discussed above, private rights of action are not needed in the RTO and ISO context because FERC, with the aid of independent market monitors, has the ability and the resources to identify and remedy anti-competitive behavior on the part of participants in these markets. Further, subjecting RTO and ISO participants to private rights of action will only have a chilling effect on markets, potentially negatively impacting the country's ability to achieve its climate goals. We strongly encourage the Commission to not adopt the proposes order, and to instead clarify that RTOs and ISOs are not subject to the private rights of action provisions of the CEA.

Sincerely,

Thomas A. Imbler

Thomas A. Imbler
Vice President, Commercial Operations
Xcel Energy Services Inc.

[10] http://www.npr.org/2016/06/06/475731503/whos-in-charge-getting-western-states-to-agree-on-sharing-renewable-energy. *See also Operating Reserve Reductions From a Proposed Energy Imbalance Market With Wind and Solar Generation in the Western Interconnection,* King, J.; Kirby, B.; Milligan, M.; Beuning, S., NREL Report No. TP-5500-54660, May 2012, http://www.nrel.gov/docs/fy12osti/54660.pdf.