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Westar Energy
Taking energy to heart.

June 14, 2016

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

RE: Notice of Proposed Order and Request for Comment,
81 Fed. Reg. 30245, May 16, 2016 (the "Proposed Amendment")

I. Introduction

Westar Energy, Inc., (Westar) provides electric service at retail throughout Kansas to approximately 702,000 customers. Westar also provides wholesale service to 35 municipalities and cooperatives that in turn serve additional Kansas retail customers. Westar is a transmission owner in the Southwest Power Pool, Inc. (SPP) and has placed its transmission facilities under the SPP Open Access Transmission Tariff (OATT). Through its Generation and Marketing division, Westar Energy is an active participant in the wholesale electric market subject to Federal Energy Regulatory Commission (FERC) jurisdiction as well as oversight by the SPP Market Monitor. Westar is also a major transmission customer in SPP, purchasing transmission service for its retail load, point-to-point service for its energy marketing activities, and acting as an agent for certain wholesale customers in purchasing transmission service on their behalf.

II. 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. 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. Westar has participated in ensuing discussions within the industry regarding the problems associated with preserving private rights of action. Westar agrees with the various filings with the CFTC critical of the proposed amendment and will not go into great detail on such issues as they are properly set forth by other industry participants. However, Westar emphasizes the reasons described below as to why the CFTC's proposal lacks merit, and, in fact, may be counterproductive to its goals from the standpoint of Westar and its customers.

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 the organized electricity markets by FERC and various market monitors. 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 on the industry and its customers associated with this proposal are far greater than any potential benefits.

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

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 energy and ancillary services market products that facilitate economically efficient prices and, as importantly, effective / efficient grid operations. 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 unnecessarily disrupting the well thought out and well developed market structures and synergies.

FERC and related oversight entities 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 and pending ISO/RTO exemptions were granted because, collectively, the regulatory protections meet the public interest. The current protections provide comprehensive control and oversight of electricity markets 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 and Negatively Impact Rate-Paying Customers

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) which would be an upheaval of nearly 20 years of market protection and enforcement development.

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. 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. 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.

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. 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). 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, market monitors, and FERC. 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. 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.

Furthermore, if an ISO/RTO is successfully sued under a private right of action, those costs would be passed on to end-use customers, 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. The potential benefit of a private right of action, if any, would be greatly outweighed by the potential harm to Westar's customers, and all utility rate payers.

V. Conclusion

The current process and protections meet the public interest standard because RTO/ISO markets are comprehensively and effectively regulated which mitigates financial risks to consumers. This was the basis for granting the effective ISO/RTO orders and should be applied to the pending SPP matter.

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 and customers. 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.

Sincerely,

Jeff Martin