

June 15, 2016

Christopher Kirkpatrick  
Secretary  
U.S. 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*

Dear Secretary Kirkpatrick:

On May 16, 2016, the Commodity Futures Trading Commission (“CFTC” or “the Commission”) published in the Federal Register a “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” (“Proposed Amendment”).<sup>1</sup> The Proposed Amendment, if approved, would revise the Commission’s existing RTO Exemption Order<sup>2</sup> to prospectively permit

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<sup>1</sup> *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*, 81 Fed. Reg. 30245 (May 16, 2016).

<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*

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third party actions under the Commodity Exchange Act (“CEA”). The Proposed Amendment is bad policy and inconsistent with Congressional intent.

By this letter, the Coalition of Physical Energy Companies (“COPE”) provides comments in opposition to the Proposed Amendment.

The members of COPE are physical energy companies in the business of producing, processing, and merchandizing energy commodities at retail and wholesale.<sup>3</sup> COPE members utilize futures and swaps, mainly in order to hedge the risks arising due to commodity price fluctuations and other potential changes affecting their physical businesses. Several COPE members regularly participate in RTO markets of the types considered in the Proposed Amendment and addressed herein. Such COPE members will be materially affected by the Proposed Amendment. COPE filed comments in the related Southwest Power Pool (“SPP”) matter<sup>4</sup> and stands by those comments with respect to the Proposed Amendment.

### **Background**

In the RTO Exemption Order, the CFTC acted pursuant to CEA Sections 4(c)(6)(A) and (B) to exempt RTO transactions authorized by the Federal Energy Regulatory Commission (“FERC”) and the Public Utility Commission of Texas (“PUC”) from virtually all aspects of the CEA.<sup>5</sup> The Commission explicitly included third party rights of action among those aspects of the CEA from which covered transactions would be excluded.<sup>6</sup> The Commission based the exemption on the finding that it was in the public interest and in furtherance of Congressional intent to avoid duplicative regulation, and that the affected markets and products were subject to extensive regulation and oversight by FERC and the PUC (including market monitoring and enforcement).<sup>7</sup> The RTO Exemption Order was a good public policy decision and was well received.<sup>8</sup>

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*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 Fed. Reg. 19880 (Apr. 2, 2013) (“RTO Exemption Order”).*

<sup>3</sup> The members are: Apache Corporation; 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.

<sup>4</sup> *See* Comments of The Coalition of Physical Energy Companies on 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, filed June 22, 2015.

<sup>5</sup> RTO Exemption Order at 19912.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> “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

SPP Proposed Order

Because the SPP RTO market was not as evolved as those of the RTO Exemption Order applicants at the time the application was filed, it was not included. Once the SPP RTO market was fully implemented, SPP filed an application to be treated in an identical fashion to the other RTOs.<sup>9</sup> On May 21, 2015 the Commission issued a proposed order including ordering paragraphs for the SPP RTO identical to those contained in the RTO Exemption Order (“SPP Proposed Order”).<sup>10</sup> However, buried in the preamble was ambiguous and contradictory language that sought to undo the scope of exemptions in the RTO Exemption Order and the plain, unambiguous regulatory text of the SPP Proposed Order by permitting third party rights of action.<sup>11</sup>

The Commission received thirteen comments on the SPP Proposed Order. Comments from RTO market regulators, substantial power industry market participants, trade associations, and RTOs uniformly opposed the Proposed Order’s attempt to rewrite history and backslide on the third party right of action issue.<sup>12</sup> Only a hedge fund with marginal ties to one RTO and its consultant provided contrary comments.<sup>13</sup> Notwithstanding the near-unanimity of power market participants and organizations, the Commission has not acted on the SPP Proposed Order.

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Texas (PUCT) . . . . These entities were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region. In addition, these markets administered by RTOs and ISOs are central to FERC and PUCT’s regulatory missions to oversee wholesale sales and transmission of electric energy.” Statement of Support by Chairman Gary Gensler on Final Order Related to Certain RTO and ISO Electricity Transactions (March 28, 2013).

<sup>9</sup> Southwest Power Pool, Inc.’s Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act, October 1, 2013 (“Exemption Application”). SPP Filed an amended Exemption Application on August 1, 2014.

<sup>10</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) (“SPP Proposed Order”).

<sup>11</sup> SPP Proposed Order at 29493.

<sup>12</sup> *See, e.g.*, Comments of Southwest Power Pool, Inc. on Notice of Proposed Order and Request for Comment on An Application for an Exemptive Order of 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, filed June 22, 2015 (“SPP Comments”); Comments of the Public Utility Commission of Texas on 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, filed June 22, 2015 (“PUCT Comments”); Comments of the Coalition of Physical Energy Companies on Notice of Proposed Order and Request for Comment on An Application for an Exemptive Order of 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, filed June 22, 2015.

<sup>13</sup> *See* Comments of Aspire Commodities LP on Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order From Southwest Power Pool, Inc. From Certain Provisions of

Instead of acting on the SPP Proposed Order, the Commission issued the Proposed Amendment. In doing so, it did not discuss the substance of the comments filed to the SPP Proposed Order, but it did recognize that the majority pointed out that the RTO Exemption Order did not provide for third party causes of action and that a SPP final order should similarly exclude them. The substance of the comments, which were not recognized by the Commission, provided significant public policy reasons to continue to exempt RTO markets from third party causes of action under the CEA.<sup>14</sup>

*Aspire vs GDF Suez*

The Proposed Amendment notes the existence of the *Aspire vs GDF Suez* litigation.<sup>15</sup> That proceeding was one in which a hedge fund attempted to bring an action in US District Court against an Electric Reliability Council of Texas (“ERCOT”) RTO market participant that was acting pursuant to explicit directives of the PUCT.<sup>16</sup> The claim underlying the litigation was that such PUCT-endorsed actions were in violation of the CEA.<sup>17</sup> Pursuant to the plain regulatory text of the RTO Exemption Order, the District Court dismissed the complaint.<sup>18</sup> The dismissal was affirmed by the Fifth Circuit.<sup>19</sup> This case was directly addressed by the PUCT in its comments regarding the SPP Proposed Order.<sup>20</sup> While noting the existence of the matter, the Proposed Amendment makes no mention of those comments.

*Energy and Environmental Markets Advisory Committee (“EEMAC”) February 25, 2016 Meeting*

Subsequent to the comment period for the SPP Proposed Order, the issue of third party causes of action in RTO markets was aired at the EEMAC meeting held February 25, 2016. A wide variety of power market participants such as the ISO/RTO Council, PJM Interconnection, ERCOT, the

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the Commodity Exchange Act Pursuant to the Authority Provided in Section 4(c)(6) of the Act, filed June 22, 2015. *See also* Comments of First Principles Economics, LLC on 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, filed June 22, 2015.

<sup>14</sup> *See, e.g.*, PUCT Comments at 3-7.

<sup>15</sup> Proposed Amendment at 30246.

<sup>16</sup> *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

<sup>17</sup> Beyond allegations, no basis for the claim was presented.

<sup>18</sup> Proposed Amendment at 30247.

<sup>19</sup> *Id.*

<sup>20</sup> PUCT Comments at 7.

PUCT, and ACES spoke with a single voice in opposition to third party causes of action in RTO markets.<sup>21</sup> The EEMAC meeting was not referenced in the Proposed Amendment.

### The Proposed Amendment

Without regard to the foregoing, the CFTC has issued the Proposed Amendment. All of the public policy reasons why third party causes of action under the CEA should not be permitted in RTOs (reasons that supported the original RTO Exemption Order, were presented in the SPP Proposed Order comments, and were expressed at the EEMAC meeting) continue to apply. In addition to reviewing the comments it receives in this matter, the Commission should consider those materials when considering the Proposed Amendment.

### **The Proposed Amendment Is Bad Policy and Should Not Be Adopted**

The Commission provides four reasons for issuing the Proposed Amendment. These reasons are faulty and fail to respect the pervasive and unique regulation by FERC and the PUCT that gave rise to the enactment of CEA Sections 4(c)(6)(A) and (B) by Congress and the public interest basis of the RTO Exemption Order. RTO markets and products are among the most highly regulated and closely scrutinized in the United States.

In RTO Markets: (1) FERC and the PUCT possess significant ongoing structural supervision and enforcement powers granted by Congress and the Texas Legislature, respectively; (2) all transactions are conducted subject to tariffs or protocols approved by regulators; (3) prices can be mitigated; (4) market monitors conduct constant 24/7 surveillance; and (5) FERC Enforcement, through its Division of Analytics and Surveillance (“DAS”) constantly monitors for violations. These tightly regulated markets are not subject to third party actions under the statutes of their primary regulators. The regulatory scheme for these markets is premised upon close supervision by FERC and the PUCT. With the RTO Exemption Order, the CFTC has joined these ranks as an additional regulator, but without the same statutory basis.

Unlike other commodity markets that are not similarly regulated, there is no role in RTO markets for third party causes of action. In unregulated OTC commodity markets such as metals or agricultural commodities, there is no FERC or PUCT. There are no tariffs, market monitors, price mitigation, or surveillance. In such markets, third party causes of action could be of value. In contrast, in RTO markets, third party causes of action can only subvert FERC and PUCT regulation.

The *Aspire* example is a case in point. The actions complained of by *Aspire* were explicitly approved by the PUCT in an order directed to GDF Suez.<sup>22</sup> *Aspire* attempted through the

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<sup>21</sup> See, e.g., RTO/ISO Statement of Behalf of RTO-ISO Commenters, filed February 24, 2016; PowerPoint Presentation of the PUCT, filed February 25, 2016, available at [http://www.cftc.gov/About/CFTCCommittees/EnergyEnvironmentalMarketsAdvisory/emac\\_meetings](http://www.cftc.gov/About/CFTCCommittees/EnergyEnvironmentalMarketsAdvisory/emac_meetings).

<sup>22</sup> See PUCT, Docket No. 41276, Order Approving Voluntary Mitigation Plan (Mar. 28, 2013).

regulatory process to cause the PUCT to prohibit certain behavior by GDF Suez.<sup>23</sup> After a comment process, the PUCT denied the request.<sup>24</sup> The reasons given by the PUCT were that the behavior was in furtherance of its market design.<sup>25</sup> Denied relief by the PUCT, Aspire brought an unsupported third party claim in US District court to place GDF Suez at risk and cause it to cease certain types of transactions or certain bidding practices in ERCOT actions. If it had been able to go forward, the clear message would be that regardless of PUCT and ERCOT approval, market participants that did not want to be exposed to such litigation risk should toe Aspire's line.

In offering the Proposed Amendment, we are seeing a responsible regulator act to provide a vehicle to subject other regulators to collateral attacks on their authority. When FERC acted to take an enforcement action related to futures markets, the CFTC submitted filings that made sure that the courts caused FERC to respect the CFTC's authority. Now the CFTC, without any valid basis or regulatory gap that needs to be filled, seems to be coming to the aid of parties such as Aspire to the detriment of regulators, end-users, and producers.

COPE is hopeful that the Commission will see its error and not go with forward the Proposed Amendment.

*The Four Points Presented in Support of the Proposed Amendment Are Without Merit*

**Basis 1:** The Proposed Amendment contends that “amending the RTO-ISO Order to explicitly preserve the private right of action...will not cause regulatory uncertainty or duplicative or inconsistent regulation.”<sup>26</sup> The assertion is in error.

As shown above, permitting a private right of action in parallel with FERC and PUCT oversight and enforcement in RTO markets provides an avenue for collateral attacks on such regulation.

- Private litigants are not acting in the public interest but, rather, are acting to further their own ends. Simply stated, FERC, the PUCT, and the Commission are motivated by the public interest, while private litigants are not. A private right of action can be a vehicle to bring an action to cause a market participant to cease behavior deemed proper by regulators or to attempt to obtain a settlement payment.
- FERC and the PUCT have spent countless hours and resources creating RTO markets that produce positive outcomes for consumers. In contrast, the venue for third party actions, district courts, are not electricity regulators. There is no reason to believe that the various district courts would have expertise in RTO markets and would understand their

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<sup>23</sup> Petition of Raiden Commodities, LP for Rulemaking to Remove § 25.504(c), the Exemption from the Market Power Definition for Entities Controlling Less Than 5% of the Generation Capacity in the ERCOT Region, PUCT Project No. 42424, Order Denying the Petition for Rulemaking (Jun. 20, 2014) (“PUCT Order Denying Petition for Rulemaking”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at pp. 8-10.

<sup>26</sup> Proposed Amendment at 30248.

complexities, particularly without the involvement of the RTOs or their regulators. Regardless, the Proposed Amendment would result in district courts becoming the arbiters of behavior in RTOs based upon the records produced by the parties to the private litigation. In the *Aspire* litigation, ERCOT, the PUCT, and the CFTC did not participate, nor should they have.

The necessary result of permitting third party causes of action is that RTO market participants will be compelled to take prophylactic actions to avoid exposure to such claims unless they are willing to assume the litigation risk and associated expense regardless of the views of power market regulators. Such an outcome will clearly cause not only regulatory uncertainty and duplicative/inconsistent regulation but also, as in the *Aspire* matter, frustration of the policy goals of the electricity market regulator.

**Basis 2:** The Proposed Amendment asserts that permitting a private right of action in RTO markets will protect the public by “deter[ring] bad actors, and maintain[ing] the credibility of markets subject to the Commission’s jurisdiction.”<sup>27</sup> The assertion is faulty.

The underlying premise of the Proposed Amendment is that FERC and the PUCT are failing to deter bad actors and are inadequate enforcement agencies. COPE is not aware of any evidence supporting this assertion. From COPE’s perspective, FERC is one of the most active, well-resourced, and vigilant enforcement agencies. In RTO markets, FERC’s and the PUCT’s oversight is enhanced by the existence of market monitors. RTO markets are transparent and are subject to continual regulatory surveillance. Bad actors are identified and dealt with.

Further, it is an overreach to contend, as the Proposed Amendment does, that the public views the credibility of RTO markets to be one premised upon the exercise of the Commission’s jurisdiction. With all due respect, the public views RTO markets to be subject to FERC and PUCT jurisdiction, with market credibility depending on the actions of those regulators. The Proposed Amendment can only serve to subvert RTO market credibility by permitting collateral attacks on FERC and the PUCT.

**Basis 3:** The Proposed Amendment asserts that CEA Section 22 was “established by Congress as an integral part of the CEA’s enforcement and remedial scheme”<sup>28</sup> while there is no private right of action under the Federal Power Act (“FPA”).<sup>29</sup> Accordingly, the CFTC is not persuaded that it should “strip injured parties of their remedy under the CEA.”<sup>30</sup>

This contention does not honor the entire context created by the framers of the CEA and results in an outcome inconsistent with the public interest. In addition to CEA Section 22, Congress also enacted CEA Sections 4(c)(6)(A) and (B). The purpose of those sections was to respect the primacy of FERC and the PUCT regulation over the markets those agencies were created to

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

regulate. As noted above, the effect of the Proposed Amendment is to subject such regulation to collateral attack. It is disingenuous for the CFTC to exempt RTO markets from the CEA, while at the same time, undermining them by exposing them to third party causes of action thereunder. The effect will be to not only render such markets subject to collateral attack but also to energize parties that are unable to bring a private right of action under the FPA to recharacterize their claim as being made under the CEA. As a result, FERC will be marginalized.

**Basis 4:** The Proposed Amendment contends that the Commission should adopt the Proposed Amendment to be consistent with its other CEA 4(c) exemptive orders.<sup>31</sup> Of course, the Proposed Amendment fails to note that the Commission already issued the RTO Exemption Order, which explicitly waived private rights of action finding the outcome to be in the public interest.<sup>32</sup> The inclusion of such a waiver was not viewed by the market as extraordinary. Instead, as noted above, this action was favorably received and did not cause any alarm by any market participant. Further, the Proposed Amendment fails to recognize the important roles the FERC and PUCT play and their explicit recognition by Congress.<sup>33</sup>

There is no valid policy rationale to require all 4(c) orders be the same. This is particularly true in cases where there are material factual differences (such as the existence of and the regulatory responsibilities of regulators such as FERC and the PUCT).

### **Commission Questions**

In addition to its general request for comments, the Commission has posed the three questions set forth below.

*1. To the extent there are concerns that explicitly amending the RTO-ISO Order to preserve private claims for fraud and manipulation under CEA section 22 would result in frivolous litigation, the Commission requests comment on the following issues regarding such litigation.*

*a. Please provide details as to the specifics of such litigation, including:*

*i. What type of entity might sue what other type of entity?*

*ii. What are the theories under which such litigation might be brought?*

*iii. How might the causes of action in such litigation derive from the enumerated fraud and manipulation provisions of the CEA that are excepted from the RTO-ISO Order?*

Answer: COPE declines to speculate on the nature of frivolous litigation that would be brought. However, COPE believes the *Aspire* case is illustrative of the type of litigation that could be brought subverting the regulation of the primary regulator of an RTO market

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<sup>31</sup> *Id.*

<sup>32</sup> RTO Exemption Order at 19,912.

<sup>33</sup> *See* RTO Exemption Order at 19894.



As the Commission well knows, Aspire unsuccessfully sought to change an ERCOT rule. After failing in the regulatory process, it brought an action against an ERCOT generator that not only was following the rule but also was provided with a company-specific order of the PUCT further authorizing its behavior. Aspire's clear goal was to halt the PUCT-endorsed behavior.

As the Proposed Amendment expressly noted regarding the *Aspire* matter,<sup>34</sup> it is unclear whether the Commission believes that litigation designed to undermine a legitimate regulator is frivolous. COPE does not believe it to be in the public interest.

*b. To the extent there is a concern about an increase in litigation regarding filed rates, how would such litigation survive a motion to dismiss based on the filed rate doctrine?*

Answer: COPE does not believe it is a fruitful exercise to speculate as to how any of the various US District Courts would rule on such a motion. COPE believes that the filed rate doctrine would not be familiar to such a court.

*2. In a letter submitted to the Commission's Energy and Environmental Markets Advisory Committee, PJM, ERCOT, and CAISO argued that "[a]llowing private actions will undermine the legal certainty provided by the exemptions and potentially could divest FERC and the PUCT of jurisdiction over certain ISO and RTO transactions." The letter then set forth a hypothetical scenario involving alleged market manipulation in the RTO-ISO markets, and noted that, "[b]ecause the CFTC's jurisdiction over swaps is 'exclusive,' if a number of federal circuits hold that [financial transmission rights] or other ISO and RTO transactions are swaps or futures contracts, no other federal or state agency could regulate ISOs and RTOs or their transactions."*

*The Commission requests comment on how, given the effect of the savings clause in CEA section 2(a)(1)(I)(i), discussed supra in note 51, FERC or PUCT would be divested of jurisdiction in the event of a judicial finding that one or more of the Covered Transactions is a swap. More broadly, the Commission requests comment on how, given that savings clause, preservation of the private right of action would result in regulatory uncertainty and/or inconsistent rulings.*

Answer: COPE believes the answer to this question is self-evident. If a court finds an RTO transaction is a swap and the CFTC has exclusive jurisdiction over swaps, then other agencies would not have jurisdiction. Such an outcome would be detrimental to FERC and PUCT authority over RTO markets.

*3. To the extent any commenters believe that preserving the private right of action in the RTO-ISO Order will have any other detrimental effect(s) on the RTO-ISO markets or market participants, the Commission requests that such commenters provide a specific and detailed basis for such a conclusion.*

Answer: COPE refers the Commission to its above comments. CFTC action to subvert the regulation of FERC and the PUCT is detrimental to RTO-ISO markets and market participants. It

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<sup>34</sup> Proposed Amendment at 30247.

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is not in the public interest. In addition it has not been sought by anyone except a self-interested hedge fund.

**Conclusion**

For the foregoing reasons, COPE respectfully requests that the Commission does not effectuate any amendments to the RTO Exemption Order and not authorize third party causes of action in SPP or the RTO markets subject to that order.

Respectfully Submitted,

/s/ David M. Perlman

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Coalition of Physical Energy Companies**

CC: COPE Members