



June 15, 2016

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

**Filed via <http://comments.cftc.gov>**

**Re: Notice of Proposed Amendment to Final Order Exempting Specified RTO/ISO Transactions, 81 Fed. Reg. 30245 (May 16, 2016)**

Dear Secretary Kirkpatrick:

Exelon Generation Company (“Exelon Generation”) respectfully submits these comments in response to the Commodity Futures Trading Commission’s (“CFTC or “the Commission”) 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” in the Federal Register (“Proposal”).<sup>1</sup> Through the Proposal, the Commission seeks to permit third party actions in federal district court under a provision of the Commodity Exchange Act (“CEA”) that is among the sections of the CEA that the Commission has exempted from application to Independent System Operator/Regional Transmission Organization (“ISO/RTO”) transactions and products in the RTO Order issued in March 2013.<sup>2</sup> Exelon respectfully submits the following comments opposing the Proposal because it is not in the public interest.

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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> Proposal at 30245. See *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*

Exelon Generation is one of the largest competitive power generators in the U.S., with more than 30,000 megawatts (“MW”) of owned generation capacity, located primarily in ISO/RTO markets subject to the Commission proposal. Exelon has one of the nation’s cleanest and lowest-cost power generation fleets including nuclear, fossil, hydroelectric, solar, landfill gas, and wind generation assets. Exelon owns and/or operates 24 of the 100 nuclear reactors in the United States and is the nation’s largest owner and operator of nuclear generation. Exelon also owns and operates 1,640 MW of hydroelectric generation, 410 MW of solar, and 1,420 MW of wind, making Exelon one of the nation’s leading renewable generators. Exelon Generation markets wholesale energy and capacity products to municipal, cooperative, and investor-owned utilities, retail suppliers, power marketers, and other commodity merchants. Constellation NewEnergy, Inc. (“CNE”), a subsidiary of Exelon Generation, provides electricity and/or energy-related services more than 150,000 business customers and two and a half million residential customers in the US. Exelon Generation is a quintessential end user of commodities and accesses centrally traded and cleared derivatives markets for the purpose of hedging and managing risk associated with these business activities.

The ISO/RTOs represent the core physical marketplaces within which Exelon Generation conducts wholesale transactions. The Commission should defer to the Federal Energy Regulatory Commission (“FERC”) and the Public Utility Commission of Texas (“PUCT”) with respect to matters involving these markets.

#### Regulatory conflicts and confusion

RTO/ISO markets are carefully structured and operate under FERC-approved tariffs, but allowing private parties to sue could undermine those structures. Notably, the Federal Power Act that governs FERC-jurisdictional markets specifically does not allow private rights of action for ISO/RTO activity. Therefore, the transactions under FERC-approved tariffs that Congress directed the Commission to exempt under CEA §4(c)(6) are in part premised upon Congress’ express prohibition of private rights of action for fraudulent or manipulative actions related to FERC-jurisdictional energy transactions. The CFTC proposal, however, would open the door for a collateral attack on a FERC tariff where neither FERC nor the ISO / RTO is party to a case.

While the proposal makes the blanket claim that “the existence of a private right of action also is not inconsistent with or detrimental to cooperation between the CFTC and FERC,” there is no analysis or other discussion to support this blanket claim.<sup>3</sup> To the contrary, the two agencies have developed a coordinated way to ensure that transactions in electricity markets are overseen and manipulation is prevented. Exelon Generation and all of its customers rely on that oversight to ensure that markets are operated fairly. This proposal, however, will upset that coordination by inserting private parties and myriad litigation venues into the discussions about how the two agencies should oversee these markets. For example, if a federal court in a private lawsuit

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*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).

<sup>3</sup> 81 FR 30245 at 30248

determines that a particular RTO/ISO transaction is a swap, that could preclude the CFTC's ability to rely on FERC oversight because the defendant could argue that FERC has no jurisdiction to bring the enforcement action.<sup>4</sup> This perverse outcome would undermine certainty and the ability of market participants to rely on the integrity of the markets. This would also exacerbate the regulatory confusion over competing jurisdictional claims by FERC and the CFTC, undermine efforts by the various regulators to provide an orderly market, and ultimately harm consumers.

The Proposal, if implemented, will put an unnecessary strain on resources that must be used by regulators to preserve jurisdictional certainty. The Commission suggests in the Proposal that in order to protect its interests it will continue to intervene in what will likely be numerous private lawsuits.<sup>5</sup> Regardless of whether the Commission has sufficient resources to do this, the Commission also must consider the impact to FERC and its resources, as FERC also will need to intervene in lawsuits throughout the country to protect its jurisdiction.

The Proposal inserts a new risk into well-regulated and well-functioning markets, with no countervailing benefit.

According to FERC's prior comments in the SPP matter, RTO/ISOs are "regulated to a greater extent than other commodity markets" and indeed "are regulated by FERC more extensively than other public utilities." ERCOT is similarly subject to extensive regulation by the PUCT. Further, RTO/ISOs are subject to oversight by independent market monitors and to the CFTC's authority over interstate commerce. Allowing private suits would add an unnecessary and costly additional layer of conflicting regulatory oversight, with no corresponding public benefit. There are undeniable and identifiable risks associated with inserting a private right of action into FERC jurisdictional markets that have been operating successfully for years without a private right of action. These risks significantly outweigh any stated benefit of the Commission proposal.

Market uncertainty and increased costs.

If the CFTC amends the RTO/ISO order to allow private rights of action—from potentially thousands of allegedly aggrieved parties—that would add tremendous uncertainty, which will increase the costs of operating, and operating in, the markets. These costs will be both direct and indirect. Direct costs include the increased costs that will result from entities having to manage

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<sup>4</sup> The CFTC Proposal seems to rely wholly on the savings clause under 2(a)(1) of the CEA to cast away any jurisdictional or regulatory uncertainty concerns, but the savings clause does not grant jurisdiction to the FERC; it only preserves jurisdiction that already exists. In other words the savings clause does not preserve with any certainty FERC's jurisdiction over any transaction a court finds in private litigation is a swap or futures contract.

<sup>5</sup> 81 FR 30245 at 30248

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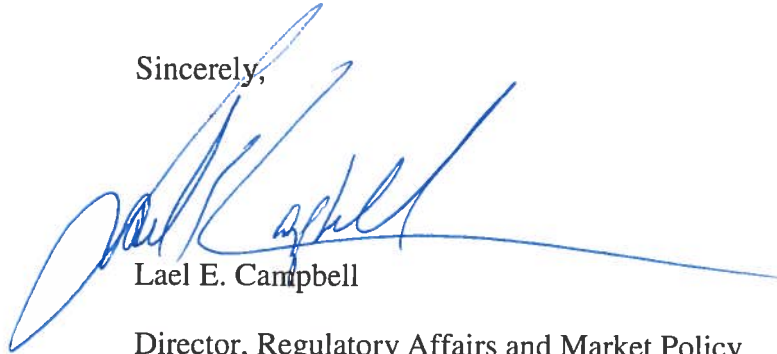
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the significant exposure to private-party litigation. Indirect costs will result from the increased risk and decreased liquidity in RTO/ISO products used to hedge and manage risk as market participants limit or forgo activity. Ultimately these costs will be passed on to end use customers resulting in unnecessarily higher energy costs for consumers. There is no benefit from the Commission proposal that will be derived by these consumers that justifies these costs.

Conclusion

For the foregoing reasons, Exelon Generation respectfully requests that the Commission withdraw its proposed amendment to the ISO/RTO Exemption Order, not rescind in any manner the exemption from third party causes of action set forth in that order, and conform its proposed SPP order likewise before issuing a final order on SPP's application.

Sincerely,



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