June 15, 2016

Via Electronic Submission

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

Re: Comments of the Edison Electric Institute on the Notice of 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

Dear Mr. Kirkpatrick:

I. INTRODUCTION

The Edison Electric Institute ("EEI"), respectfully submits these comments in opposition to the Commodity Futures Trading Commission's ("CFTC" or "Commission") 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 ("Proposed Order").[1] In the Proposed Order, the CFTC is proposing to amend the order exempting specific electric energy transactions from certain provisions of the Commodity Exchange Act ("CEA")[2] and CFTC regulations issued to the Midcontinent Independent Transmission System Operator, Inc.; ISO New England, Inc.; PJM Interconnection, L.L.C. ; California Independent System Operator Corporation; New York

[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").

[2] 7 U.S.C. § 1 *et seq.*

Independent System Operator, Inc.; and the Electric Reliability Council of Texas, Inc. ("ERCOT") ("collectively RTOs/ISOs") in April 2013 ("2013 RTO-ISO Order")[3] to explicitly include private rights of action under section 22 of the CEA.

EEI is the association of U.S. shareholder-owned electric companies. EEI's members comprise approximately 70 percent of the U.S. electric power industry, provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly employ more than 500,000 workers. With more than $100 billion in annual capital expenditures, the electric power industry is responsible for one million jobs related to the delivery of power.

EEI members are physical commodity market participants and rely on commodity derivative contracts primarily to hedge or mitigate commercial risks arising from ongoing electric operations. EEI members own and operate the generation, transmission and distributions facilities that serve residential, commercial and industrial consumers in all areas of the United States including the RTO/ISO markets that are subject to the 2013 RTO-ISO Order. EEI members that participate in RTO/ISO markets are registered members of the RTO/ISO and have physical assets within the geographic footprint covered by that RTO/ISO. As physical commodity market participants, EEI members routinely engage in transactions on and through the delivery stage and account reconciliation mechanisms of the markets administered by the RTOs/ISOs under Federal Energy Regulatory Commission ("FERC") or Public Utility Commission of Texas ("PUCT"), in the case of ERCOT, approved tariff provisions. As such, the EEI members are active participants within the markets operated by the RTOs and rely on the RTO/ISO Tariff Transactions to perform their commercial operational activity in the markets.

As active participants in the markets operated by the RTOs/ISOs, EEI, on behalf of its members, strongly urges the CFTC not to amend the 2013 RTO-ISO Order to allow for private rights of action. As discussed in the comments below, in passing the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[4] Congress recognized that the possibility of conflicting and duplicative between FERC, which has regulated the electric industry, since 1935 and the CFTC. To address these issues a number of provisions were included in the Dodd-Frank Act recognizing FERC's authority and enabling the CFTC to exempt transactions that are entered into pursuant to a tariff or rate schedule approved or permitted to take effect by FERC or by the applicable State authority. In recognition of this jurisdictional overlap and in recognition of the extensive FERC regulation of the RTO/ISO markets, the CFTC issued the carefully constructed and detailed 2013 RTO/ISO Order. The Proposed Order, if finalized, is not in the public interest as, allowing private rights of action in the RTO/IOS markets would:

- be contrary to Congressional intent and result in duplicative or conflicting regulations
- create significant regulatory uncertainty

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[3] *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*, 78 Fed. Reg. 19880 (April 2, 2013) ("2013 RTO-ISO Order").

[4] Pub. L. No. 111-203 (2010).

- raise the possibility that FERC/PUCT loses jurisdiction over these tariffed transactions in these integrated market
- allow collateral attacks on FERC/PUCT orders
- increase costs for EEI members
- increase cost to end use consumers

The Proposed Order would not increase the efficiency or integrity of these markets and is not necessary to help the CFTC monitor the RTO/ISO markets. As such, the Proposed Order is not in the public interest and should not be adopted.

II. BACKGROUND

Electric utilities, as well as the wholesale markets for electricity and natural gas transactions, are subject to comprehensive regulation at the federal and state level by the FERC and state public service commissions. FERC and the state commissions have both separate and concurrent jurisdiction over electric markets. Regulation of electric utilities by states began in 1907 and by FERC in 1935 with the passage of the Federal Power Act ("FPA")[5]. Over time, the electric industry has evolved from one comprised of vertically integrated utilities to one in which RTOs and ISOs operate bulk electric power systems in over two-thirds of the United States. RTOs and ISOs are independent, membership-based, non-profit organizations that are required to meet FERC requirements, and in the case of ERCOT, PUCT criteria, and that operate under FERC or PUCT-approved tariffs with the goal of ensuring reliability and optimizing supply and demand bids for wholesale electric power.[6]

The FPA confers to FERC the authority to establish, review, and enforce rates and charges for the transmission and sale of electric energy, as well as for the interconnection of all facilities used to generate, transport, and sell electric energy in interstate commerce.[7] FERC also has the concurrent responsibility to oversee electric grid reliability and has the exclusive authority to review and approve the rates, charges, and rules of all public utilities – including ISOs/RTOs – that operate the transmission system and facilitate the wholesale sale of electricity. Under this authority, the ISOs/RTOs are required by FERC to file and maintain schedules of their rates, terms and conditions that apply to market participants using these specialized markets– such rates, terms, and conditions are required to be just and reasonable, and not unduly preferential to any person, and not unreasonably discriminatory between classes of service.[8]

The Dodd-Frank Act enacted in 2010 repealed prior regulatory exemptions for over the counter ("OTC") derivatives based on energy and energy-related commodity transactions which

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[5] 16 USC 791 et seq.

[6] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC ¶ 61,051 (July 21, 2011) (codified at 18 C.F.R. Part 35).

[7] 42 U.S.C. § 7172(a)(1)(B).

[8] 6 U.S.C. § 824d(a)-(b).

subjected EEI members to CFTC regulation.[9] CEA Section 2(a)(1)(A), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), provided that, with limited exceptions, the CFTC has exclusive jurisdiction "with respect to . . . option[s], . . . swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts)." Thus, the Dodd-Frank Act added another layer of regulatory oversight and, for the first time, electric utilities were subject to CFTC regulation in addition to regulations by FERC and state commissions. In recognition of this fact, the Dodd-Frank Act contained a number of provisions addressing this overlap in jurisdiction between FERC and the CFTC:

- Section 722 of the of the Dodd-Frank Act added section 2(a) (1) (I)(I) to the CEA, also known as the "savings clause" which provides that nothing in the CEA "shall limit or affect any statutory authority of the [FERC] or a State regulatory authority . . . with respect to an agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved by [FERC or a state regulator]."

- Section 722 of the Dodd-Frank Act also added section 4(c)(6) to the CEA, allowing the CFTC to grant a public interest exemption. The section provides that, if the Commission determines that the exemption would be consistent with the public interest and the purposes of the CEA, the CFTC can exempt from the requirements of the CEA an agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved or permitted to take effect by FERC or by the applicable State authority.

- Section 720 of the Dodd-Frank specifically recognizes the possibility of conflict between the jurisdictions of the two agencies and requires FERC and the CFTC to enter into a Memorandum of Understanding ("MOU") to establish procedures for "(A) applying their respective authorities in a manner so as to ensure effective and efficient regulation in the public interest; (B) resolving conflicts concerning overlapping jurisdiction between the 2 agencies; and (C) avoiding, to the extent possible, conflicting or duplicative regulation" as well as for sharing information to assist in potential manipulation, fraud or market power abuse investigations. On January 2, 2014, FERC and the CFTC entered into a Memorandum of Understanding outlining a procedure for addressing overlapping jurisdiction and information sharing.[10]

On February 7, 2012, the RTOs/ISOs filed a joint Petition with the Commission requesting that the Commission exercise its authority under section 4(c)(6) of the CEA and section 722(f) of the Dodd-Frank Act to exempt certain contracts, agreements and transactions for the purchase or sale of specified electric energy products, that are offered pursuant to a tariff approved by the FERC which regulates the RTOs/ISOs, except ERCOT, or protocols approved by the PUCT which regulates ERCOT. On April 2, 2013, the Commission issued the 2013 RTO-ISO Order. The plain language of the 2013 RTO-ISO Order exempted Financial Transmission Rights, Energy Transactions, Forward Capacity Transactions and Reserve or Regulation Transactions as defined

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[9] *See* CEA §§ 2(h)(1) and 2(g) (pre-amendment).

[10] http://www.ferc.gov/legal/mou.asp

in the 2013 RTO-ISO Order (hereafter "Covered Transactions") from the CEA subject to the enumerated conditions and specified CEA sections.[11] The 2013 RTO-ISO Order specifically "Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission's general antifraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180."[12] Then-Chairman Gensler described the scope of the final order, which did not expressly address private rights of action, as "carefully tailored . . . [and] conditioned on . . . each of [the Covered Transactions] being inextricably linked to the physical delivery of electric energy."[13]

On May 21, 2015, the Commission issued a Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order, similar to the one granted to the other RTOs/ISOs, from the Southwest Power Pool ("SPP").[14] In the Preamble in the Proposed Exemption, the Commission raised for the first time the issue of a private right of action under CEA section 22 as it related to both the Proposed Exemption for SPP and the 2013 RTO-ISO Order. The Commission commented that "[i]t would be highly unusual for the [CFTC] to reserve to itself the power to pursue claims for fraud and manipulation…while at the same time denying private rights of action and damages remedies for the same violations…Thus, the [CFTC] did not intend to create such a limitation, and believes the [ISO-RTO Final Order and the Proposed SPP Order do not] prevent private claims for fraud or manipulation under the [CEA]."[15] EEI along with other trade associations filed comments strongly opposing the interpretation and inclusion of CEA § 22 private right of action. The comments indicated that at a minimum the Commission should not retroactively make any changes to the 2013 RTO-ISO Order without notice and an opportunity for comment.[16]

On May 16, 2016, Commission issued the Proposed Order proposing to specifically apply CEA section 22 right of action to the 2013 RTO-ISO Order. The Commission noted that it was issuing the Proposed Order in response to an order issued by the United States District Court for

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[11] 2013 RTO-ISO Order at 19912.

[12] *Id*. EEI notes that CEA section 4c(b) and Commission regulation 32.4 are not part of the general anti-fraud, anti-manipulation and enforcement authority under the CEA. Instead, those sections articulate the Commission's jurisdiction over option transactions.

[13] 2013 RTO-ISO Order at 19915.

[14] *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) (hereafter "Proposed Exemption").

[15] Proposed Exemption at 29493.

[16] Comments of the Joint Trade Association on the 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 (June 22, 2015)_(*available at* https://www.epsa.org/forms/uploadFiles/318990000004F.filename.SPP_Exemption_CFTC.pdf.

the Southern District of Texas and affirmed by the United States Court of Appeals for the Fifth Circuit finding that the 2013 RTO-ISO Order did not allow for private rights of action.[17]

III. COMMENTS

In the Proposed Order, the CFTC provides three primary reasons in support of its proposal to amend the 2013 RTO – ISO Order to allow for private rights of actions under the CEA. These are that the proposal: (1) will not cause regulatory uncertainty or duplicative or inconsistent regulation; (2) private rights of action are necessary to deter bad behavior and protect the integrity of the markets; and (3) private rights of action are integral to the CFTC's enforcement authority. Due to the unique nature of the electricity markets and the pervasive regulation provided by FERC and the PUCT, EEI disagrees that private rights of action should be authorized in RTO/ISO markets and responds to each of these arguments below.

A. Amending the 2013 RTO-ISO Order to Allow Private Rights of Action is Inconsistent With Congressional Intent and Will Cause Regulatory Uncertainty and Inconsistent and Duplicative Regulation

Since 2013, the RTOs/ISOs and the market participants in those markets have been operating in reliance on the 2013 RTO-ISO Exemption Order with the unambiguous understanding that the energy transactions specifically identified in the 2013 RTO-ISO Order were exempt from all provisions of the CEA except for the specifically enumerated reserved sections. This understanding was supported by the extensive and detailed discussions in the 2013 RTO-ISO Order, as well as the 2013 RTO – ISO Proposed Order[18] which included detailed discussion on the savings clause, the 4(c) provision requirements in the CEA and specificity as to the scope, applicability, conditions, and definitions applicable to the exception.

In granting the public interest exception, the CFTC specifically found as required by CEA section 4(c), through detailed explanation, that (1) the exemption would be consistent with the public interest and the purposes of the CEA; (2) the transaction will be entered into solely between ''appropriate persons;'' and (3) the exemption would not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA. Consistent with previous orders, the 2013 RTO-ISO Order did not contain any reference to or discussion on CEA section 22 or private rights of action. In issuing an exemptive order for the effective date of certain provisions of the CEA that were amended by the Dodd-Frank Act, the Commission expressly stated that: "[t]o the extent that the Final Order provides [4(c)] exemptive relief [from certain provisions of the CEA], such exemptive relief

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[17] *See Aspire Commodities, L.P.* v. *GDF Suez Energy N. Am., Inc.,* No. H–14–1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015). *Aspire Commodities, L.P.* v. *GDF Suez Energy N. Am., Inc.,* No. 15–20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

[18] *Proposed Order and Request for Comment on 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 Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act*, 77 Fed. Reg. 52138 (Aug. 28, 2012).

would, in effect, *preclude a person from succeeding in a private right of action under CEA section 22(a)* for violation of such provisions."[19]

Inclusion of section 22 private rights of actions calls into question the very purpose and effectiveness of the 2013 RTO-ISO Order and creates inconsistency regarding the treatment of transactions and activities within ISO/RTO markets. In its analysis and in the adopting release for the 2013 RTO-ISO Order, the Commission intentionally stated that it was not required to make a determination as to whether the Covered Transactions are or are not "swaps.[20] CEA section 22 private right of action as amended by section 749 of the Dodd-Frank Act only applies to claims based upon losses incurred in connection with swaps, futures and options transactions. Thus, the seminal issue that necessarily will be addressed in any private right of action under CEA section 22 is whether the transaction is or is not a swap, futures or option contract. Thus, the proposal to now include CEA section 22 as an enumerated provision undercuts the regulatory certainty that the 2013 ISO-RTO Order intended to give the market participants in these markets by specifically not addressing whether the Covered Transactions are swaps or other CFTC-jurisdictional transactions. A judicial decision that an exempted transaction is a swap, futures contract, or option has a number of potential consequences for EEI members and the certainty provided by 2013 RTO-ISO Order. The two most important ones are the possibility that FERC/PUCT could be divested of jurisdiction over these regulated markets and the direct conflict with the FPA.

First, a ruling by a court that a Covered Transaction is a swap or futures contract may call into question the effect of the savings clause in CEA section 2(a)(1)(I).[21] Classification of a Covered Transactions as a swap, future or option by a district court raises the question of whether FERC can retain jurisdiction over those transaction(s) under the FPA. As such, the impact of such rulings by district courts creates uncertainty about the FERC's and the PUCT's ability to prosecute manipulation schemes fi these transactions are found to be futures, swap or option contracts. It is also unclear if the CFTC could allow FERC to retain jurisdiction over these transactions once

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[19] *See Effective Date for Swap Regulation,* 76 Fed. Reg. 42508, 42517 (Jul. 19, 2011). The CFTC has specifically provided for private right in only two cases and these two exemptions were superseded within eight days by Congress with statutory exemptions that did not permit private rights of action in connection with exempt transactions. *See A New Regulatory Framework for Clearing Organizations*, 65 Fed. Reg. 78020 (Dec.13, 2000) (Section 39.5 Enforceability); *see also Exemption of Transactions on a Derivatives Transaction Facility*, 65 Fed. Reg. 77962, 77986 (Dec. 13, 2000) (Section 37.8 Enforceability). Eight days later, in the Commodity Futures Modernization Act, Congress amended the CEA to grant statutory exemptive relief for certain types of transactions and did not preserve private rights of action. *See* former CEA Sections 2(d), (g) and (h). As a result, the CFTC was forced to withdraw its regulations. *See A New Regulatory Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations; Rules Relating to Intermediaries of Commodity Interest Transactions; A New Regulatory Framework for Clearing Organizations; Exemption for Bilateral Transactions*, 65 Fed. Reg. 82278 (Dec. 28, 2000).

[20] *See* e.g. adopting release for the 2013 RTO-ISO Order at 19901.

[21] Proposed Order at 30248. FN 51 of the Proposed Order states that even if one of the Covered Transactions are found to be swaps it would not affect the FERC or PUCT's authority because of the saving clause in section 2(a)(1)(I)(i) of the CEA. The saving clause, while helpful and reflective of Congressional intent to preserve FERC's authority, is subject to interpretation in its application and different courts could have different interpretations. For example, the savings clause could be interpreted to maintain the status quo at the time the Dodd-Frank Act was passed. If a Covered Transaction is subsequently defined as a swap then the status quo is changed. The issue would be out of the CFTC and FERC's control. Even if the savings clause pre-empts the CFTC's exclusive jurisdiction over swaps, there would be duplicative regulation over the markets which Congress sought to avoid.

classified as a swap, future or option. The CFTC addresses this clear risk simply by saying that allowing private rights of action will not cause regulatory certainty or duplicative or inconsistent regulation without elaboration or justification. The CFTC goes on to simply say that conflicting judicial interpretation would not affect the jurisdiction of FERC or any relevant state regulatory authority. As justification for these cursory statements, the CFTC relies on a footnote describing but not opining on the effectiveness of the savings clause..

The RTO/ISO markets are carefully structured, inter-related markets subject to comprehensive FERC and PUCT regulation and oversight for both their reliability and market purposes. Having just one Covered Transactions classified as a swap, future or option and removed from FERC or PUCT jurisdiction would have enormous impacts on market operations and the reliability of the electric system. In contrast to the CFTC's statement that the Proposed Order, was being issued to provide clarity and consistency between all the RTOs and ISOs, including SPP,[22] the proposal decreases the clarity and consistency available to market participants, especially those that participate and own physical facilities in more than one RTO/ISO. Specifically, electricity is a physical commodity that flows between markets and RTOs and ISOs have FERC- or PUCT- approved market rules that address these seams issues. EEI members invest billions of dollars in capital infrastructure in and across these markets based on the rules in the FERC approved tariffs and PUCT-approved protocols. They also make market decisions to procure energy and hedge risk based on the rules in the FERC approved tariffs and PUCT approved protocols. Thus, these members bear the risk of having a Covered Transaction in one RTO/ISO being classified as a swap and a similar Covered Transaction in another RTO/ISO not being classified as a swap. Despite the CFTC's cursory statements, the potential for inconsistent and duplicative regulation that would be costly and inefficient is real for market participants and will, without doubt, increase the cost of operation and potentially adversely impact the delicate and harmonious balance between markets, reliability, and seams that has been struck, resulting in unnecessary adverse impacts to members and their end users. These impacts include greater uncertainty regarding the ability to leverage market structures to enhance reliability and higher costs for end user retail consumers that use electricity in every facet of their lives.

Second, allowing private rights of action creates a clear and unnecessary conflict between the FPA and the CEA. FPA section 222, prohibiting market manipulation, specifically does not provide for a private right of action.[23] As such, there is a direct conflict with the FPA if the Commission extends private rights of action to the RTO/ISO markets through the CEA. In response to this direct regulatory conflict, the CFTC simply states that judicial risk exists whether the entity alleging the violation is the CFTC or a third party.[24] EEI disagrees. Under its market manipulation authority, the CFTC has the authority to conduct an investigation and assess penalties if a violation is substantiated without classifying the Covered Transactions as swaps,

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[22] Proposed Order at 30248.

[23] 16 U.S.C § 824v (2006); 18 C.F.R § 1c.2 (2009). Section (b) specifically states that "nothing in this section shall be construed to create a private right of action." It should be noted that while private parties are not able to bring private rights of action under the market manipulation provisions of the FPA, FERC has allowed parties to bring concerns to the Commission's attention under § 306 of the FPA which allows a private complaint to be brought to the Commission for any alleged violated of the FPA. *See Richard Blumenthal, Attorney General for the State of Connecticut vs. ISO New England et al;* 128 FERC ¶ 61,182 at P 56 (2009).

[24] Proposed Order at 30248.

futures or options. The same is not true for a third party litigant in district court.

Congress sought to avoid this type of conflict and inconsistent regulation by including section 720 which requires the two agencies to enter into a MOU to address jurisdictional issues and section 722 which provides a savings clause as well as the ability to grant a public interest exception. These provisions collectively highlight a clear Congressional intent that FERC and the CFTC work to resolve conflicts regarding overlapping jurisdiction and to avoid conflicting or duplicative regulation. In contrast to this direction provided to FERC and the CFTC to resolve issues through MOUs, sections 712[25] and 718[26] of the Dodd-Frank Act specifically provides for a judicial resolution of disputes between the CFTC and the SEC. Contrary to this direction to CFTC and the SEC, nothing in Title VII indicates that Congress sought to unwind the authority conferred to FERC through the FPA, nor did it specifically sanction the resolution of jurisdictional questions between the CFTC and FERC in the U.S. federal district courts. Through this proposal, the CFTC goes against clear Congressional intent, and creates substantial regulatory uncertainty by creating overlapping jurisdiction and conflicting regulation.

B. Amending the 2013 RTO-ISO Order to Allow Private Rights of Action Is Not in the Public Interest

The Proposed Order states that the "private right of action is necessary to protect the American public, deter bad actors and maintain the credibility of the markets subject to the Commission's jurisdiction."[27] Allowing for private rights of action in RTO/ISO markets in contravention of the FPA will not accomplish any of these goals. Unlike other OTC commodity markets, such as metals or agricultural commodities, the energy markets were already subject to extensive regulation prior to the enactment of Dodd-Frank. The CFTC's anti manipulation and penalty authority simply adds another layer to existing enforcement capabilities. The substantial penalties that the CFTC, FERC and the PUCT can levy - $1,000,000/day/per violation – rival any penalties that can be levied by civil courts.

The FPA requires FERC to ensure that "all rates and charges … for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission… shall be just and reasonable."[28] Just and reasonable rates are defined as rates that are neither "'less than

[25] Section 712 provides for the "review of regulatory authority" such that "if either Commission referred to in this section determines that a final rule, regulation, or order of the other Commission conflicts … then the complaining Commission may obtain review of the final rule, regulation, or order in the United States Court of Appeals for the District of Columbia Circuit by filing in the court, not later than 60 days after the date of publication of the final rule, regulation, or order, a written petition requesting that the rule, regulation, or order be set aside…[such proceeding[shall be expedited by the United States Court of Appeals for the District of Columbia Circuit."

[26] Section 718 states that in that as to "determining status of novel derivative products," judicial resolution over product status may be reached by either the CFTC or the SEC filing a "petition the United States Court of Appeals for the District of Columbia Circuit for review of a final order of the other Commission…with respect to a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities) that it believes affects its statutory jurisdiction within 60 days after the date of entry of such order, a written petition requesting a review of the order. Any such proceeding shall be expedited by the Court of Appeals."

[27] *Id.*

[28] 16 U.S.C. § 824d(a).

compensatory' nor 'excessive.'"[29] Just and reasonable rates strike a "fair balance between the financial interests of the regulated company and 'the relevant public interests, both existing and foreseeable.'"[30] The FPA's emphasis on just and reasonable rates underscores that the Commission's "primary task" is to "guard the consumer from exploitation by non-competitive electric power companies."[31] In furtherance of its authority, FERC has issued orders establishing market oversight and 24/7 market monitoring. FERC Order No. 2000 required each RTO and ISO to establish and maintain a market monitoring function.[32] Additionally, FERC Order No. 719 requires the RTO/ISO Market Monitoring Units to identify ineffective market rules, recommend proposed rule changes and OATT modifications, review and report on the performance of the markets to the respective RTO or ISO as well as to FERC, and notify FERC when instances of a market participant's behavior may require further investigation.[33] ERCOT has similar market monitoring provisions under rules promulgated by the Texas Legislature.[34] In the 2013 RTO-ISO Order, the CFTC specifically referred to this long-standing regulatory framework and the extensive FERC and PUCT oversight in finding that the exemption was in the public interest.[35]

Due to the manner in which they are regulated there is no need in RTO/ISO markets for private right of action, unlike other commodity markets that are not similarly regulated. In unregulated OTC commodity markets such as metals or agricultural commodities, there is no direct regulator such as the FERC or PUCT. Such unregulated OTC markets do not have: tariffs or protocols, market monitors; price mitigation or surveillance. In such markets, private right of action may be of value. In contrast, in RTO/ISO markets, extensive surveillance, regulations, independence, and active monitoring diminish the potential value that private right of action can bring and ultimately could undermine FERC and PUCT regulation though collateral attacks on their rules and regulations. Thus, rather than providing additional oversight through private rights of action, under the Proposed Order, the potential exists to upset the current, effective layered surveillance framework currently in place in RTO/ISO markets. This could create an environment for bad actors to use private causes of actions to their advantage by judicially changing, revising, or clarifying market rules, behaviors, and/or protocols. Such modifications outside of the expertise, review, and jurisdiction of FERC, public service commissions, market monitors, and the input of other market stakeholders would allow bad actors to advantage themselves through private rights of actions, which could force the current regulators and market operators to develop

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[29] *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984).

[30] *Id*

[31] *NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *cert. granted* 425 U.S. 662 (1976); *see also Electrical District No. 1 v. FERC*, 774 F.2d 490, 492-493 (D.C. Cir. 1985) (stating that customer protection is the FERC's primary purpose under the FPA); *Lockyer*, 383 F.3d at 1017.

[32] *Regional Transmission Organizations*, 89 FERC ¶ 61,285 (Dec. 20, 1999), 65 Fed. Reg. 809 (Jan. 6, 2000) ("Order No. 2000"). The RTOs/ISOs meet these requirements by establishing a distinct and independent market monitoring program that serves a role similar to that of a market regulation function required for a DCM. Under Order No. 2000, Petitioners' market monitoring programs are required to have access to all market data and maintain the resources necessary to carry out their market monitoring functions.

[33] *Wholesale Competition in Regions with Organized Electric Markets*, 125 FERC ¶ 61,071 (Oct. 17, 2008). ("Order No. 719").

[34] *See* chapter 25 Texas Administrative Code, Title 16, Part II

[35] 2013 RTO-ISO Order at 19894.

and approve tariff, business practice, and other changes outside of the normal, established, and vetted processes, creating market uncertainty and reducing oversight and enforcement. Rather than deter bad actors, the end result of allowing private right of actions could be to create an environment for those seeking to use the uncertainty in regulation and jurisdiction to their monetary advantage. Thus, unlike other commodity markets that are not similarly regulated, there is no need in RTO/ISO markets for private rights of action and such private rights of actions have the potential to create more adverse -rather than beneficial – consequences relative to such markets.

For example, through the Proposed Order, the CFTC is providing a vehicle to subject FERC and PUCT regulations to collateral attacks on their authority when a market participant is unhappy with the regulator's decision. In the Proposed Order, the CFTC has assumed that there is a benefit to participants in the RTO/ISO markets to having hundreds of additional, non-government, private plaintiff "cops on the beat" in federal courts across the country seeking monetary damages in these specialized regional electric markets. At the same time, the Commission has substantially underestimated the additional legal and regulatory costs that will ultimately be borne by electric customers in each RTO/ISO as well as to the impacts upon each RTO/ISO, its tariff or protocol, its market rules, its software, and the established processes for market-related changes. Such changes are not only regulatory, but also operational and can take months – sometimes years – to implement where complex model or algorithm modifications are required. The CFTC has provided no reason to believe that the various district courts would have the expertise to parse through the complexities of the RTO/ISO markets and come to an equitable and just result that punishes bad actors and respects the needs of the electricity markets.

Private litigants are not acting in the public interest but, rather, are acting to further their own ends.[36] Unlike private parties, the CFTC, FERC and the PUCT have a common goal in maintaining the integrity of the markets, seeking to punish bad actors for impact on consumers or markets rather than personal financial gain. Thus, FERC, the PUCT, and the CFTC are motivated by the public interest, while private litigants are not and as such, allowing private rights of actions in RTO/ISO markets is not in the public interest.

C. The Commission has the Tools Necessary to Monitor the RTO/ISO Markets Without Amending the 2013 RTO-ISO Order to Allow Private Rights of Action

In the 2013 RTO-ISO Order, the CFTC expressly retained its general antifraud and anti-manipulation authority. Thus, both the CFTC and FERC have authority to investigate and levy fines for violations of the market manipulations sections under substantially similar provisions under the CEA and the FPA. FERC and the CFTC also take an expansive view of their enforcement authority[37] which helps ensure that both agencies will be monitoring these markets.

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[36] As the Commission noted in the preamble to the Proposed Amendment, "private counsel may pursue litigation based upon private, *rather than* public, concerns." 81 Fed. Reg. at 30252.

[37] *See* Reply Brief of Intervenor Comm. Fut. Trading Comm'n, Hunter v. F.E.R.C., 711 F.3d 155 (D.C. Cir. 2013), 2012 WL 2394422 (C.A.D.C.), *5 (". . . the CFTC's exclusive authority encompasses all matters related to the trading of futures contracts on designated contract markets, whether manipulative or not, and as a result, other regulatory agencies are statutorily prohibited from exercising authority in that jurisdictional space."); Brief for the Petitioner,

Thus, the CFTC's market manipulation and information gathering ability is augmented by the oversight of the markets by FERC and the PUCT which is not the case for other commodities subject to CFTC oversight. The CFTC tools that Congress deemed insufficient in the futures markets[38] are augmented in the RTO/ISO markets so that private rights of action are not needed. The CFTC referenced this coordination and ability to get information from FERC and the PUCT in finding in the 2013 RTO-ISO Order that the exemption would not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA:

> In addition, the Commission noted that, as a condition to the exemption, the Commission would be able to obtain data from FERC and PUCT with respect to activity on the Requesting Parties' markets that may impact trading on Commission regulated markets. Finally, the Commission noted that if the transactions described in the Proposed Order could ever be used in combination with trading activity or in a position in a DCM contract to conduct market abuse, both the Commission and DCMs have sufficient independent authority over DCM market participants to monitor for such activity…..The Commission retains the authority to question and obtain additional information in a timely manner regarding the underlying prices to which FTRs and other electric energy contracts, which are subject to the Commission's jurisdiction, settle.[39]

Nothing has changed since the issuance of the 2013 RTO-ISO Order to change this assessment. In fact, the ability to share information has been enhanced. Since the issuance of the 2013 RTO-ISO Order, the CFTC and FERC have entered into an information sharing MOU which further augments and solidifies the CFTC's ability to obtain information in further of their market surveillance and enforcement responsibilities. The CFTC, therefore, has the tools necessary to monitor the RTO/ISO markets without allowing private rights of action.

IV. CONCLUSION

EEI appreciates the CFTC issuing the Proposed Order for comment and strongly urges the CFTC not to amend the 2013 RTO-ISO Order to allow for private rights of action. Amending the RTO/ISO Order to allow for private rights of action will not enhance the CFTC's enforcement authority, but it will increase regulatory uncertainty, increase costs for market participants, including EEI members, and increase cost for end use customers. As such the Proposed Order is not in the public interest.

For the foregoing reasons, the CFTC should not amend the 2013 RTO-ISO Order to allow private rights of action.

F.E.R.C. v. Electric Power Supply Assoc., 136 S.Ct. 760 (2016), 2015 WL 4237680 (U.S.), *19 ("The FPA requires FERC to ensure that any 'rule, regulation, practice, or contract affecting [a wholesale] rate' is 'just and reasonable' and not 'unduly discriminatory or preferential.'").

[38] Proposed Order at 30248.

[39] 2013 RRO-ISO Order at 19903

Respectfully Submitted,

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Richard F. McMahon, Jr.
Vice President
Lopa Parikh
Senior Director, Federal Regulatory Affairs
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Email: lparikh@eei.org

cc: Honorable Timothy Massad, Chairman
Honorable Sharon Bowen, Commissioner
Honorable Christopher Giancarlo, Commissioner
Jonathan Marcus, General Counsel
Robert Wasserman, Chief Counsel, Division of Clearing & Risk
Alicia Lewis, Special Counsel, Division of Clearing & Risk
Andree Goldsmith, Special Counsel, Division of Clearing & Risk
David P. Van Wagner, Chief Counsel, Division of Market Oversight
Riva Spear Adriance, Senior Special Counsel, Division of Mark Oversight