

June 15, 2016

Via Electronic Submission

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

Re: Comments of the Large Public Power Council on Notice of Proposed Amendment to Final Order Exempting Specified Transactions in Regional Transmission Organizations and Independent System Operators, 81 Fed. Reg 30,245 (published May 16, 2016).

Dear Mr. Kirkpatrick:

The Large Public Power Council ("LPPC") respectfully submits these comments in response to the Notice of Proposal¹ issued by the Commodities Future Trading Commission ("CFTC" or "the Commission") to amend its April 2, 2013 Order² exempting specified electric energy-related transactions from certain provisions of the Commodities Exchange Act ("CEA"). The CFTC's proposal would amend its 2013 RTO/ISO Order exempting specified transactions ("Covered Transactions") of Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") from certain provisions of the Commodity Exchange Act ("CEA") in order to permit private causes of action for market manipulation under CEA Section 22.

LPPC urges the Commission to not adopt the proposed amendment. The wholesale electric regulatory framework onto which the Commission would graft private rights of action for manipulative behavior is tightly regulated by the Federal Energy Regulatory Commission ("FERC"), and overseen by a combination of the RTOs/ISOs, RTO-ISO designated Market Monitoring Units ("MMUs"), state public utility commissions and the CFTC. FERC's enforcement precedent is evolving, as is the CFTC's, and LPPC believes it would be unwise to introduce into this setting the further uncertainty with respect to governing standards and precedent that would accompany development of a body of law resulting from private rights of action. Though LPPC understands that the CEA contemplates that

¹ *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) ("Proposed Order").

² *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 (Apr. 2, 2013) ("2013 RTO/ISO Order").

such actions may be authorized by the CFTC, it urges the CFTC to exercise its discretion to find that such actions are not in the public interest.

IDENTITY OF LPPC

LPPC is an association of the 26 largest state-owned and municipal utilities in the nation, comprising the larger, asset-owning members of the public power community. LPPC's members are located throughout the nation, both within and outside ISO/RTO boundaries, and together they serve approximately 30 million customers. Though LPPC members are generally exempt from FERC regulation pursuant to section 201(f) of the Federal Power Act (“FPA”),³ they are nonetheless subject to FERC’s anti-market manipulation oversight under FPA section 222.⁴ LPPC members are also members of the American Public Power Association, and support the comments filed in this proceeding contemporaneously by that organization jointly with the National Rural Electric Cooperative Association.

COMMENTS

1. **Oversight of Market Behavior in ISO/RTO Wholesale Sales Markets is Comprehensive, Complicated and Evolving.**

Regulation and oversight of the wholesale energy markets administered by the ISOs/RTOs is comprehensive and complex. As the Commission recognizes, the Covered Transactions are already subject to comprehensive regulation by FERC or, in Texas, the Public Utilities Commission of Texas (“PUCT”). Under the Federal Power Act (“FPA”) (relevant to ISO/RTO operations outside Texas), the terms under which these transactions take place are governed by ISO/RTO tariffs which are subject to FERC approval and change under FPA sections 205 and 206.⁵ FERC further administers FPA section 222, pursuant to which manipulative behavior in connection with the purchase and sale of electricity and transmission service subject to FERC’s jurisdiction is prohibited. FERC’s market oversight is supplemented by its reliance on Market Monitoring Units, charged with responsibility for reviewing day-to-day market behavior and structure, with the aim of rooting out market dysfunction.⁶

Layered onto FERC’s ISO/RTO market oversight framework is the CFTC’s anti-manipulation authority. While the Commission’s 2013 RTO/ISO Order exempted from regulatory oversight Covered Transactions,⁷ the Order omitted from that exemption the Commission’s “anti-fraud, and anti-manipulation authority, and scienter-based prohibitions.”⁸ Accordingly, alongside FERC, and to the extent of its jurisdiction, the CFTC maintains market oversight authority of its own.

³ 16 U.S.C. § 824(f)

⁴ 16 U.S.C. § 824v.

⁵ All tariffs must be found by FERC to be just and reasonable prior to approval by FERC under FPA section 205, 16 U.S.C. § 824d, and they may be changed upon a finding that they have become unjust and unreasonable under FPA section 206, 16 U.S.C. § 824e.

⁶ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, pp. 31,146-157 (2000).

⁷ Covered Transactions are defined to include (1) Financial Transmission Rights; (2) Energy Transactions; (3) Forward Capacity Transactions; and (4) Reserve or Regulation Transactions.

⁸⁸ 2013 RTO/ISO Order at 19912.

FERC's oversight of manipulative behavior in ISO and RTO markets has been fast-evolving and controversial. The agency has come under fire in recent years for what some believe to be a failure to provide clear guidance as to what constitutes manipulative conduct. Whether or not the criticism is fair, key RTO/ISO manipulation cases are currently in court, with the targets of FERC's investigations arguing that the agency has not provided adequate notice of prohibited behavior, and that behavior permitted under FERC tariffs cannot be unlawful.⁹ These contentions go to the core of FERC's approach to manipulative behavior, and whether or not the agency's decisions are ultimately upheld, it seems fair to say that its precedent is unsettled.

Complicating matters further, the CFTC's authority over swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"),¹⁰ is new, and lines of authority between FERC and the CFTC are unsettled. The CFTC's policies with respect to swaps are still developing. Indeed, as of the 2013 ISO/RTO Order, the Commission had not as yet issued any formal determination regarding whether the Covered Transactions were swaps.

To add to this picture, the lines between CFTC and FERC jurisdiction have been blurred by conflicting determinations of the United States Court of Appeals for the District of Columbia¹¹ and the United States District Court for the Eastern District of California,¹² in cross-market manipulation cases involving transactions in both physical and financial energy commodity markets. In *Hunter*, the D.C. Circuit declared that the CFTC has exclusive jurisdiction to police manipulation of futures markets, even though the scheme involved the use of physical sales of natural gas as a lever. By contrast, in *Barclays*, the district court held that FERC had jurisdiction over manipulative conduct by virtue of its authority over physical sales that were entered into in order to benefit swap positions.

2. Private Rights of Action in this Highly Regulated Yet Unsettled Environment Would be Unwise.

In view of the substantial existing enforcement regime, and current uncertainty over precedent and jurisdiction, LPPC believes it would be unwise to unleash private rights of action for manipulative conduct, at least at this time. Opening the courthouse doors to private litigants in this environment seems particularly unwise while FERC and the CFTC struggle to settle their substantive approach to the definition of market manipulation, and continue to wrestle with jurisdictional boundaries.

In its 2013 ISO/RTO Order, the CFTC itself made the case for refraining from exercising its regulatory authority over ISO/RTO markets, in view of the existing comprehensive regulatory regime. As the Commission opined:

Consistent with the proposed determinations set forth in the Proposed Order, the Commission finds that: (a) the Covered Transactions have been, and are, subject to a long-standing, regulatory framework for the offer and sale of the Transactions established

⁹ See *FERC v. Barclays Bank PLC, et al.*, 105 F.Supp.3d. 1121, 1144 (E.C. Cal. 2015) ("*Barclays*"); Memorandum in Support of Powhatan Energy Fund's Motion to Dismiss the Complaint, filed Oct. 19, 2015 in *FERC v. Powhatan Energy Fund LLC, et al.*, Civ. Action No. 3:15-CV-00452-MHL (E.D. Va.).

¹⁰ See 7 U.S.C. § 2(a)(1)(A).

¹¹ See *Hunter v. FERC*, 711 F.3d 155, 158-160 (D.C. Cir. 2013) ("*Hunter*").

¹² See *FERC v. Barclays Bank PLC, et al.*, 105 F.Supp.3d. 1121, 1144 (E.C. Cal. 2015).

by FERC or PUCT; and (b) the Covered Transactions administered by the RTOs, ISOs, or ERCOT are part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC and PUCT regulation and oversight.¹³

The Commission went on to comment further that

...the Covered Transactions that take place on the Requesting Parties' markets are overseen by an MMU, required by FERC for each Requesting Party under its jurisdiction and by PUCT in the case of ERCOT, to identify manipulation of electric energy on the Requesting Parties' markets.¹⁴

While the 2013 ISO/RTO Order reserved the Commission's authority to prosecute claims of manipulation, its recognition of an already crowded and complex regulatory field makes the case for refraining from further complicating matters by effectively introducing a new set of regulators in the form of U.S. District Courts.

Anticipating this concern over "regulatory uncertainty or inconsistent or duplicative regulation," the Proposed Order says that

...the Covered Entities will be subject [in private actions] to the same substantive CEA provisions, including judicial interpretations of those provisions, regardless of whether the plaintiff who brings an action alleging a violation of one of those provisions is the Commission or a private party....¹⁵

But this response ignores the obviously substantial discretion given to decision-makers to define the scope of prohibited manipulation. As has been acknowledged in various quarters, the statutory prohibition requires definition that gives it meaning. Indeed, it is hardly possible to know what the term "manipulation" means without a body of precedent. For that reason, restricting the development of governing precedent to knowledgeable regulators is essential. Without that restriction, the potential proliferation of competing theories of market manipulation is likely to create a series of conflicting signals, sewing substantial and costly confusion in the marketplace.

Closely related to this, LPPC cannot agree with the Proposed Order's tentative conclusion that there is no reason to be concerned about "conflicting judicial interpretations regarding the nature of the Covered Transactions" as they bear on the respective agencies' jurisdiction.¹⁶ To the contrary, such interpretations will determine whether causes of action may be entertained by the courts,¹⁷ and which body of precedent (under the FPA or the CEA) will govern the behavior. These matters are only now evolving, and a proliferation of potentially conflicting judicial interpretations is a prescription for confusion.

¹³ 2013 ISO/RTO Order, 78 Fed. Reg. 19894 (footnote omitted).

¹⁴ *Id.* (footnote omitted).

¹⁵ Proposed Order, 81 Fed. Reg. 30248.

¹⁶ *Id.*

¹⁷ As the Commission notes, the FPA does not provide for private rights of action. *Id.*

Finally, LPPC cannot agree with the CFTC's tentative conclusion that private rights of action will serve the public interest simply by enhancing the deterrent effect of enforcement. Far more effective than having "more cops on the beat" would be an emphasis on clear and consistent rules administered by knowledgeable agencies sensitive not only to the need for vigorous enforcement, but the needs of the marketplace. At their best, expert agencies are capable of balancing fair, dispassionate enforcement with the ability to promote the public interest through nuanced regulation and a cooperative relationship with regulated entities. Consistency in the application of regulatory principles is a hallmark of good regulatory policy, and regulatory agencies are appropriately expected to exercise prosecutorial discretion in order to advance priorities consistent with the public interest.

The downside of proliferating private rights of action in a highly regulated setting has been catalogued this way:

First, private rights of action can lead to inefficiently high levels of enforcement, causing waste of judicial resources and leading to excessive deterrence of socially beneficial activity. Second, private enforcement actions can directly interfere with public enforcement efforts, distorting government enforcement priorities and disrupting the cooperative relationship between regulators and regulated entities that is often necessary to achieve compliance with statutory objectives. Third, private enforcement actions raise concerns about the democratic accountability of law enforcers, since private plaintiffs are not subjected to the same electoral checks that constrain executive officials.¹⁸

LPPC asks the Commission to take these concerns to heart.

CONCLUSION

For the reasons set forth above, LPPC respectfully asks the Commission to reject the proposed amendment to the 2013 RTO/ISO order and to continue to exempt the Covered Transactions from private rights of action under CEA Section 22.

Respectfully submitted,

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Council*

¹⁸ Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 114-117 (2005).