June 15, 2016

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

Re: Notice of Proposed Amendment to and Request for Comment on the ISO-RTO Final Order

Dear Mr. Kirkpatrick:

The U.S. members of the ISO/RTO Council ("**IRC**") respectfully submit these comments in response to the Notice of Proposed Amendment to and Request for Comment on the Final Order in Response to a Petition from Certain Independent System Operators ("**ISOs**") and Regional Transmission Organizations ("**RTOs**") 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, issued on May 16, 2016 ("**Proposed Amendment**").[1] For the reasons explained below, the IRC requests that the Commission not adopt the Proposed Amendment.[2]

The IRC's U.S. members are: California ISO (CAISO); Electric Reliability Council of Texas (ERCOT); ISO New England (IESO); Midwest ISO (MISO); New York ISO (NYISO); PJM Interconnection (PJM); and Southwest Power Pool (SPP). IRC members are committed to fostering innovation and working together to advance the development of the North American electric grid. The ultimate goal of IRC members is to ensure access to affordable, reliable and sustainable power through efficient administration of independent and transparent wholesale energy markets. The Proposed Amendment, if finalized, will have a substantial impact on the IRC's members, the markets they operate and their market participants. Consequently, the IRC has an important interest in the outcome of the Commission's proposal.

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[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).

[2] For the Commission's convenience, the IRC includes in an Appendix cross-references to the sections of its comment letter that address the topics raised by the questions asked by the Commission in section V of the preamble to the Proposed Amendment.

I. Background

In 2012, six of the IRC's members, on behalf of themselves and their members (collectively, "**Covered Entities**"), filed consolidated requests with the Commodity Futures Trading Commission ("**CFTC**" or the "**Commission**") for an exemption from all but the anti-manipulation and anti-fraud provisions of the Commodity Exchange Act, as amended ("**CEA**").[3] The goal of the requests was to confirm, consistent with Congress' intent, that it is in the public interest for the Federal Energy Regulatory Commission ("**FERC**") and the Public Utility Commission of Texas ("**PUCT**") to continue to regulate the Covered Entities and transactions in the nation's organized wholesale electricity markets ("**Covered Transactions**") irrespective of various amendments to the CEA made by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

On April 2, 2013, the Commission granted the Covered Entities' requests by issuing an order ("**ISO-RTO Order**") that exempted them and Covered Transactions from all provisions of the CEA and the Commission's regulations, except the Commission's general anti-fraud and anti-manipulation authority, and *scienter*-based prohibitions.[4] Then-Chairman Gensler described the scope of the final order, which did not except private rights of action from the scope of the exemption, as "carefully tailored . . . [and] conditioned on . . . each of [the Covered Transactions] being inextricably linked to the physical delivery of electric energy."[5]

Since the Commission issued the ISO-RTO Order, FERC and the PUCT have continued to regulate the Covered Entities and Covered Transactions effectively and efficiently in accordance with their respective statutory mandates. They also have continued to protect the integrity of the markets, as well as market participants and electricity ratepayers, by initiating enforcement actions against alleged wrongdoing. In addition, the ISO-RTO markets have continued to promote reliability by allocating electricity resources to match supply and demand and to produce "just and reasonable" rates for wholesale market participants (ultimately, to the

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[3] *See* In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent Service Operator Corporation; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by the Electric Reliability Council of Texas, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by ISO New England Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Midwest Independent Transmission System Operator, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by New York Independent System Operator, Inc.; and In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by PJM Interconnection, L.L.C. (Feb. 7, 2012, as amended June 11, 2012). The application for an exemption of another U.S. IRC member, SPP, is still pending. *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. 29400 (May 21, 2015).

[4] *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).

[5] *Id.* at 19915.

benefit of ratepayers). In sum, the ISO-RTO Order has served the public interest successfully, as Congress and the Commission intended.

Now, only three years after its then five members unanimously granted the ISO-RTO Order, the current Commission proposes to amend it to permit private claims pursuant to CEA section 22 based upon the CEA's anti-fraud and anti-manipulation provisions stating that it is merely "clarifying" the exemption as originally written.[6]

II. Summary of Comments

The IRC is concerned about the Proposed Amendment not just because it fears frivolous litigation or the burdens and costs that its U.S. members and their market participants will incur defending against private claims that will raise scores of complex issues. Rather, the IRC's principal concern is that the Proposed Amendment is contrary to Congress' intent that the Commission protect the public interest in efficient and effective regulation of Covered Entities and Covered Transactions for the benefit of ratepayers. Although the Commission makes a number of assertions about the likely future impact of the Proposed Amendment, *e.g.*, "conflicting judicial interpretations regarding the nature of Covered Transactions *would not* affect the jurisdiction of FERC or any relevant state regulatory authority," "amending the ISO-RTO Order . . . *will not* cause regulatory uncertainty or duplicative or inconsistent regulation," "any potential for conflict among regulators and others or for conflicting judicial interpretations *does not* depend on whether the plaintiff is a private litigant or the Commission," the IRC is concerned that the Commission's proposed action will have the opposite effect.

The Covered Entities believed when they applied for the ISO-RTO Order, and continue to believe, that neither they nor Covered Transactions are subject to the CFTC's jurisdiction under the CEA. Regardless of whether this is correct as a matter of law, one of the primary reasons for requesting the exemption ultimately provided by the ISO-RTO Order was to avoid litigating this and other related jurisdictional questions in the courts.

In 2010, Congress saw no need to change the status quo or to redefine the jurisdictional line pertaining to the Covered Transactions that it understood to be in place at that time. Instead, Congress instructed the agencies to share information at the jurisdictional interface and to cooperate where manipulative schemes might begin in one agency's market and end in the other's market. The ISO-RTO Order, which has been relied upon by market participants for over three years, carefully respects Congress' wishes. For example, the Commission's reservation of its enforcement rights in the ISO-RTO Order enables it, in cooperation with FERC and the PUCT, to identify and prosecute complex manipulation schemes that might have one leg involving a Covered Transaction (FERC or PUCT regulated) and another involving a transaction traded on a designated contract market or swap execution facility (CFTC regulated).

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[6] 81 Fed. Reg. 30245, and at 30247.

The Proposed Amendment now threatens to undo the "carefully tailored" solution to these complex jurisdictional issues provided by the ISO-RTO Order. Unlike CFTC enforcement actions, a private claim under CEA section 22 requires the plaintiff to demonstrate that it incurred losses on the purchase or sale of a swap or futures contract. Private litigation in which courts must determine whether the alleged manipulation of a Covered Transaction occurred in connection with a swap or futures contract may, notwithstanding the savings clause on which the Commission relies to support its proposal, have the unintended effect of depriving one agency or the other of anti-manipulation jurisdiction and, potentially, the plenary regulatory authority it exercises today.[7]

Permitting private claims is likely to have a number of additional unintended consequences that *do not* serve the public interest, and that create the same uncertainty that the ISO-RTO Order was designed to avoid.[8] These adverse consequences, which could disrupt the existing comprehensive federal and state regulatory regime that delivers just and reasonable electric energy rates to consumers, include:

- Authorizing private claims for alleged manipulation of Covered Transactions:
    - based upon the premise that private claims are necessary to supplement the CFTC's "insufficient" tools to maintain the integrity of "markets subject to the Commission's jurisdiction" without taking into consideration the fact that, in this instance, there are other federal and state regulators – FERC and the PUCT – with the tools, resources and experience necessary to maintain the integrity of the ISO and RTO markets;
    - despite the fact that Congress expressly precluded private claims under FERC's nearly identical anti-manipulation rule – claims which, if successful, could have the effect of interfering with FERC or PUCT enforcement actions for the same alleged misconduct; and
    - even though the Commission intends, in another proposed exemption, to preclude private rights action against Federal Reserve Banks, in part, because they are "insulated" under their legal framework from third-party claims.
- Resurrecting questions about potentially conflicting or overlapping jurisdiction that Congress specifically intended to avoid through public interest exemptions for Covered Entities and Covered Transactions, and hindering the ability of FERC, the PUCT and the CFTC to avoid and resolve such conflicts;
- Creating uncertainty about the legal status of the regulatory regimes that oversee the ISO-RTO markets – uncertainty which, paradoxically, may lead to *less* regulation,

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7 *See* note 27, *infra*.

8 *Id.* at 30248.

less protection of ratepayers and less innovation in ISO and RTO markets than exists today;

- Enabling private parties to supplant the FERC's and the PUCT's jurisdiction to determine appropriate market outcomes by, for example, permitting collateral attacks on Covered Transactions made pursuant to FERC- or PUCT-approved tariffs or protocols;

- Creating uncertainty about the application of the filed-rate doctrine to private claims under the CEA involving Covered Transactions; and

- Calling into question the ability of market participants and courts to rely upon the plain language of CFTC-granted public interest exemptions.

The purpose of requesting the ISO-RTO Order was to avoid these potential adverse consequences, including either the *best case* scenario in which court decisions raise (but do not resolve) questions about conflicting or overlapping agency jurisdiction, or the *worst case* scenario in which courts make binary decisions about which agencies have and do not have jurisdiction over Covered Transactions. Since the Commission issued the ISO-RTO Order, there have been no changes in the CEA, the Federal Power Act ("**FPA**"), the Texas Public Utility Regulatory Act ("**PURA**"), or the Congressionally-declared public interest in efficient and effective regulation of ISO and RTO markets that would warrant setting in motion waves of private litigation that likely will undermine Congressional intent and the legal certainty provided by the ISO-RTO Order. For these reasons, the Commission should not adopt the Proposed Amendment.

III. The Proposed Amendment is Unnecessary and Contrary to Congress' Intent to Ensure Efficient and Effective Regulation of ISO-RTO Markets

A. *The Proposed Amendment is Unnecessary*

The Commission reasons that allowing private claims for alleged manipulation or fraud in connection with Covered Transactions is necessary to deter misconduct and to maintain "the credibility of the markets *subject to the Commission's jurisdiction*."[9] As support for its proposal, the Commission cites Congress' determination that the Commission's enforcement tools are "insufficient" by themselves to "protect[] the public and . . . to maintain[] the credibility of the *futures market*."[10]

The IRC respectfully submits that the Commission's premise is mistaken because it does not take into account the fact that, unlike the futures markets where the CFTC is the exclusive federal regulator, the Covered Entities and Covered Transactions are comprehensively regulated

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[9] *Id.* at 30248 (emphasis added).

[10] *Id.* (emphasis added).

by federal and state regulators, FERC and the PUCT, with substantial enforcement tools, resources and experience. There is, therefore, no need to supplement the CFTC's resources to maintain the integrity of the ISO and RTO markets. FERC and the PUCT already perform that function, exactly as contemplated by Congress and the ISO-RTO Order.

B. *The Proposed Amendment Conflicts with the Prohibition on Private Rights of Action in the Federal Power Act and Texas Law*

The Proposed Amendment conflicts with Congress' express determination in the FPA that it was not in the public interest to allow private claims under FERC's anti-manipulation rule.[11] Private rights of action based upon Covered Transactions are similarly barred under Texas law.[12] Allowing courts to adjudicate claims arising under an ISO's or RTO's FERC-approved tariff or PUCT-approved protocol undermines FERC's and the PUCT's authority to oversee and regulate Covered Transactions, and the terms of the applicable tariff or protocol governing those transactions. This is why the FPA and Texas law explicitly preclude private rights of action.

The Commission asserts that "[t]he fact that Congress made different judgments with respect to a private right of action in the CEA and the FPA does not persuade the Commission to strip injured parties of their remedy under the CEA nor does it amount to a conflict between the two statutes."[13] However, the CFTC has reached a contrary conclusion in another proposed exemption that implicates a parallel regulatory regime. In a pending section 4(c) exemption applicable to Federal Reserve Banks, the Commission emphasized that it is "appropriate" to preclude private rights action against them, in part, because "under the Federal Reserve Bank Governing Documents, the Federal Reserve Banks *are currently insulated from third-party claims*."[14] As support for its determination to except Federal Reserve Banks from private claims, the Commission notes that they "were created and are operated in furtherance of the national interest."[15]

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[11] 16 U.S.C. § 824v(b). In certain circumstances, private claims can be pursued through an administrative proceeding at FERC under section 306 of the FPA.

[12] *Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 508–10 (5th Cir. 2005).

[13] 81 Fed. Reg. at 30248.

[14] *Notice of Proposed Order and Request for Comment on a Proposal to Exempt, Pursuant to the Authority in Section 4(c) of the Commodity Exchange Act, the Federal Reserve Banks from Sections 4d and 22 of the Commodity Exchange Act*, 81 Fed. Reg. 35337, 35342 (2016) (emphasis added). The Commission also concluded that the benefits of the proposed exemption "exceed the benefits of preserving the ability to bring any private claims under Section 22 of the CEA." *Id*.

[15] *Id.*

Like Federal Reserve Banks, ISOs and RTOs were created and operate in the public interest.[16] But here, in contrast to the deference it proposes to show to the regulatory regime applicable to Federal Reserve Banks, the CFTC is substituting its judgment for that of Congress and the State of Texas, and authorizing private claims under the CEA for the same alleged misconduct and involving the same transactions that cannot be pursued under the FPA or PURA.[17] There is no reason for the Commission to take a different position in the Proposed Amendment where Congress and the State of Texas intentionally "insulated" Covered Entities "from third-party claims." By permitting a private right of action notwithstanding the plain language of the FPA and unambiguous judicial precedent interpreting Texas law, the Commission is taking inconsistent approaches to exemptions that both involve parallel regulatory regimes, and introducing uncertainty in the law where there need be none.

C. *Congress Sought to Avoid Jurisdictional Disputes Among the CFTC, the FERC, and PUCT and to Ensure Effective and Efficient Regulation of the ISO-RTO Markets Through Public Interest Exemptions*

Congress specifically sought to avoid jurisdictional disputes over the regulation of Covered Transactions and Covered Entities by adding a provision to the CFTC's general exemptive authority in CEA section 4(c) that directs the Commission to grant exemptions for transactions made pursuant to a FERC-approved tariff or a protocol permitted to take effect by the PUCT if, as the CFTC found in the ISO-RTO Final Order, such an exemption was "consistent with the public interest and the purposes of [the CEA]."[18] Under this new statutory provision, when the Covered Entities requested the ISO-RTO Order, they were not required to, and did not, concede that the CFTC has jurisdiction over them or Covered Transactions. Instead, the Covered Entities explained in their application that Covered Transactions are "subject to a long-standing, regulatory framework" that provides comprehensive oversight by the FERC and PUCT that is designed to ensure the integrity of market transactions, minimize systemic risk, promote fair and liquid markets, and protect market participants and, ultimately, electric ratepayers.[19]

The Covered Entities also explained that the FERC's and the PUCT's jurisdiction and broad regulatory oversight are inextricably linked to their unique statutory duties and obligations

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[16] *See Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) at 3, *order on rehearing*, Order No. 2000-A, FERC Stats & Regs. ¶ 31,092 (2000) ("[I]ndependent regionally operated transmissions grids will enhance the benefits of competitive electricity markets. Competition in wholesale electricity markets is the best way to *protect the public interest* and ensure that electricity consumers pay the lowest price possible for reliable service.") (Emphasis added).

[17] 16 U.S.C. § 824v(b).

[18] 7 U.S.C. § 4(c)(6) (2014).

[19] 78 Fed. Reg. at 19894; Joint Petition Requesting an Exemptive Order Under Section 4(c) of the Commodity Exchange Act, In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent System Operator Corporation, et. al (Feb. 7, 2012), *revised* on June 11, 2012, *available at* http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/iso-rto4capplication.pdf.

to ensure just and reasonable rates and reliable operation of the electric system.[20] The Commission relied upon these unique aspects of the ISO-RTO markets and their system of regulatory oversight when it "carefully tailored" the ISO-RTO Order to avoid potentially disruptive jurisdictional disputes.[21] Such disputes, including those that likely will arise if the Commission adopts the Proposed Amendment, threaten not only the inefficiency that comes with overlapping and duplicative regulation, but also increased costs to consumers in the form of higher rates.[22]

Separately, Congress directed the CFTC and the FERC "to negotiate a memorandum of understanding 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."[23] The IRC respectfully submits that the Commission's predictions about the lack of impact that private claims will have on efficient regulation of the organized wholesale markets are likely to be incorrect. At a minimum, private claims would interfere with the ability of the FERC and the PUCT to determine how Covered Entities and Covered Transactions should be regulated so as to produce just and reasonable rates.

IV. Private Litigation Will Generate Unpredictable Results that Increase Regulatory Uncertainty

The Commission predicts in the preamble to the Proposed Amendment that "conflicting judicial interpretations regarding the nature of Covered Transactions *would not* affect the jurisdiction of FERC or any relevant state regulatory authority."[24] It is not in the public interest to test whether the Commission's prediction would prove to be correct by authorizing private litigation that is highly likely to result in such conflicting judicial interpretations. Congress directed the CFTC to issue the ISO-RTO Order to provide jurisdictional certainty to the agencies

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[20] In *Hughes v. Talen Energy Marketing*, the U.S. Supreme Court held that "the FPA allocates to FERC exclusive jurisdiction over 'rates and charges . . . received . . . for or in connection with' interstate wholesale sales." 136 S. Ct. 1288, 1297 (2016). Similarly, in *FERC v. EPSA*, the U.S. Supreme Court stated that FERC has the authority – and, indeed, the duty – to ensure that rules or practices 'affecting' wholesale rates are just and reasonable." *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 774 (2016). In Texas, PURA gives the PUCT broad authority to determine rules governing the ERCOT market, including the rules applicable to the Covered Transactions. Tex. Util. Code Ann. § 39.151(d) (2011).

[21] 78 Fed. Reg. at 19915.

[22] The CFTC has expressed similar concerns about inefficient regulation when aggressively defending its exclusive jurisdiction under the CEA. For example, in *Hunter v. FERC*, the CFTC asserted that allowing FERC to pursue manipulation claims against a trader who allegedly manipulated futures contracts "would result in the very overlapping, duplicative, and inconsistent regulation of on-exchange futures trading that Congress intended to preclude." Brief of Intervenor Comm. Fut. Trading Comm'n, *Hunter v. F.E.R.C.*, 711 F.3d 155 (D.C. Cir. 2013), 2012 WL 1437438 (C.A.D.C.), at *23.

[23] Section 720, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

[24] 81 Fed. Reg. at 30248.

and Covered Entities so that responsibility for resolving jurisdictional issues would not be left to the courts.

The IRC fears, with good reason, that allowing private claims alleging fraud or manipulation in connection with Covered Transactions very well could have a number of adverse effects on the jurisdictional clarity provided by the ISO-RTO Order about which agency is the appropriate regulator of a particular Covered Transaction. As even the Commission acknowledged in the preamble to the Proposed Amendment, "private counsel may pursue litigation based upon private, *rather than* public, concerns."[25]

To pursue a claim under CEA section 22, private parties, unlike the CFTC, must first prove that a violation of the CEA or the CFTC's rules occurred in connection with a futures or swap transaction. Depending upon the facts, a private party could allege that it incurred losses on: (1) Covered Transactions because the defendant manipulated the price of such transactions; or (2) futures or swap positions because the defendant manipulated the price of Covered Transactions against which the futures or swap positions settled. In the first scenario, which involves claims based exclusively upon Covered Transactions, a private party must prove that a Covered Transaction is a futures or swap contract – precisely the determination that CEA section 4(c) does not require and that the CFTC, consistent with its usual practice, declined to make when it issued the ISO-RTO Order. It is unclear whether a parallel FERC or PUCT enforcement action could proceed against the same defendant if the court's holding that a Covered Transaction is a swap or futures contract raises questions about whether the relevant transaction ever was subject to the FERC's or PUCT's jurisdiction.[26]

Private litigation over whether Covered Transactions are swaps or futures contracts necessarily will raise questions about a number of complex issues, including: the regulatory characterization of Covered Transactions; the scope of CEA section 22 private claims; the effect of the jurisdictional savings clause in CEA section 2(a)(1)(I) if a court concludes that a Covered Transaction is (or is not) a swap or futures contract; whether the filed rate doctrine precludes a private claim based upon conduct related to, or the price of, a Covered Transaction that is a swap or futures contract; the scope of the ISO-RTO Order; and the impact of the court's rulings on

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[25] *Id.* at 30252.

[26] The second scenario may raise questions about whether the FERC or the PUCT could pursue a parallel enforcement action against an alleged manipulative scheme if a court in a private case finds either that the Covered Transaction is a swap or futures contract or that the scheme involves futures contracts or swaps regulated by the CFTC. Even before Congress amended the CEA in 2010, the line between the respective enforcement jurisdictions of the CFTC and FERC was subject to dispute. *See*, *e.g.*, *Hunter v. F.E.R.C.*, 711 F.3d 155 (D.C. Cir. 2013). And, as noted below, because the savings clause only preserves pre-existing jurisdiction, it is unclear how courts will interpret it in private litigation and what impact those interpretations will have in enforcement litigation.

parallel FERC or PUCT enforcement actions.[27] The unpredictable impact of private litigation on the existing federal and state regulation of Covered Entities and Covered Transactions, and on ratepayers will outweigh any benefit of allowing private claims and, therefore, is not in the public interest.

V. Private Litigation Likely Will Subject Market Participants to Inconsistent Regulatory Standards

The IRC is concerned that allowing private rights of action under CEA section 22 will enable private litigants to attempt to challenge conduct and transactions that are specifically authorized by the FPA and PURA. In contrast to the Commission's statement that the Proposed Amendment "*will not* cause regulatory uncertainty or duplicative or inconsistent regulation," *Aspire* – a case which the Commission discusses in the Proposed Amendment – is a real-life example of the type of collateral attack on conduct expressly permitted by the PUCT that the Proposed Amendment will promote.[28] Indeed, *Aspire* shows how private claims will enable plaintiffs to collaterally attack rules and tariffs approved by FERC or permitted to take effect by the PUCT by claiming that Covered Transactions made in compliance with those rules are unlawful.

Absent the ISO-RTO Order in its current form, participants in the nation's organized electricity markets would have no assurance that conduct that is expressly permitted by the FERC or PUCT could not be challenged by private litigation under the CEA. The proposed Amendment would put market participants in the untenable situation of operating within the rules established by the ISO or RTO, but remaining vulnerable to a collateral attack by an opportunistic private litigant. It would be contrary to the public interest to permit collateral attacks on rules authorized by more experienced regulators with direct jurisdiction over the conduct involved. Furthermore, to the extent that private claims increase litigation costs incurred by, or give rise to judgments against, an ISO or RTO, those costs and any damages typically will be passed on to ISO and RTO members and, ultimately, to ratepayers; an outcome contrary to Congress' intent and the public interest.

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[27] The savings clause does not grant jurisdiction to the CFTC, the FERC or PUCT; it only preserves jurisdiction that already exists. Moreover, because the savings clause does not affect the pre-existing jurisdiction of any of the agencies, a ruling by a court that a Covered Transaction is a swap or futures contract may raise questions about whether the transaction remains within the jurisdiction of the FERC or the PUCT, and whether either agency can pursue enforcement actions for manipulation of such a transaction. Conversely, a ruling that a Covered Transaction is not a swap or a futures contract means that it is not within "any statutory authority of the Commission" or "subject to the Commission's [regulatory] jurisdiction," as those terms are used in the savings clause. *See also* 81 Fed. Reg. at 30246 and 30248.

[28] *See Aspire Commodities, L.P. v. GDF Suez Energy North America, Inc.*, 2016 WL 758689 (5th Cir. 2016) (plaintiffs brought private claims under the CEA alleging that offers by energy producers to sell electricity that were expressly permitted by the PUCT manipulated the price of Covered Transactions in the ERCOT market and caused plaintiffs to incur losses on futures contract positions that settled against those prices.).

VI. The Proposed Amendment Would Raise Questions about Application of the "Filed Rate" Doctrine to Private Claims Based Upon Covered Transactions with no Discernible Public Benefit

The filed rate doctrine "precludes interference with the rate setting authority of an administrative agency."[29] It is designed to prevent the type of interference with FERC and PUCT-approved rates, tariffs and protocols for Covered Transactions that allowing private claims will produce. The potential impact of the Proposed Amendment on the filed rate doctrine demonstrates in at least two respects why the Proposed Amendment is not in the public interest.

First, the Commission's intimation in the form of a question that private claims under the CEA may be barred by the filed rate doctrine, if correct, would undercut the rationale for the Proposed Amendment. If private claims are futile because they are barred by the filed rate doctrine, there is no public purpose or value in permitting such claims under CEA section 22. In any event, until this question is adjudicated and finally settled – a prospect that would take years and may lead to inconsistent results in different courts – market participants would face added legal uncertainty.

Second, to the extent that private claims are *not* barred by the filed rate doctrine, the Proposed Amendment would allow private parties to challenge the validity of the filed rates upon which electricity consumers rely; something that the courts historically have left only to the FERC and the PUCT. In the preamble to the Proposed Amendment, the Commission asks a question about how a filed rate defense applies if one or more courts hold that a Covered Transaction is a swap or a futures contract. This is not an abstract concern because courts have identified several exceptions to the filed rate doctrine and may do so in private cases alleging manipulation or fraud in connection with Covered Transactions.[30]

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[29] *Wah Chang v. Duke Energy Trading & Mktg.*, 507 F.3d 1222, 1225 (9th Cir. 2007); *California ex rel. Lockyer v. Dynegy, Inc*., 375 F.3d 831, 852 (9th Cir. 2004), *rehearing and rehearing en banc denied*, 387 F.3d 966 (9th Cir. 2004).

[30] For example, courts have observed that the filed rate doctrine: (1) does not categorically bar claims where a plaintiff challenges a defendant's *conduct* rather than its *rate*; (2) may not bar claims for fraud; (3) does not apply to an action brought by a competitor; and (4) does not apply to the price of futures contracts even where the price of underlying commodity is set by a government formula (*e.g.*, government minimum milk prices). *See SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 2015 U.S. Dist. LEXIS 146904 (D. Ariz., Oct. 27, 2015); *Gulf State Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471 (5th Cir. 1987); *City of Kirkwood v. Union Elec.* Co., 671 F.2d 1173, 1179 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170, 74 L. Ed. 2d 1013, 103 S. Ct. 814 (1983) (noting that the filed rate doctrine applies when persons directly subject to a rate challenge it but not when a competitor challenges a rate that the competitor does not pay); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 767 F. Supp. 2d 880, 895 (N.D. Ill. 2011) (explaining that the filed rate doctrine does not apply where a plaintiff challenges a defendant's market behavior, which affected market participants' expectations about what the rate would be in the future, rather than the rate itself because, in such a case, the plaintiff is not challenging an unreasonable rate but rather the fact that the plaintiff paid an unreasonable amount for futures contracts "based on inflated expectations for what the filed rate would be.").

Regardless of whether some or all private claims brought pursuant to CEA section 22 ultimately are barred by the filed rate doctrine, the Proposed Amendment creates legal uncertainty with no discernible public benefit.

VII. The Proposed Amendment is a Material Change that Creates Uncertainty About Other Public Interest Exemptions Granted by the Commission

The Proposed Amendment would substantively change, not just clarify, the scope of the exemption in the ISO-RTO Order. The ISO-RTO Order is unambiguous – it does not preserve CEA section 22 as continuing to apply to Covered Transactions or Covered Entities. In language nearly identical to similar previous regulatory and statutory exemptions, the ISO-RTO Order excepted *only* the Commission's authority to enforce compliance with the anti-manipulation, anti-fraud and *scienter*-based provisions of the CEA and the Commission's regulations from the scope of the exemption.[31] As Commissioner Giancarlo correctly noted in his dissent to the Proposed Amendment, "[i]t is not unusual for the Commission to reserve its anti-fraud or anti-manipulation authority without also reserving section 22; the Commission has done so in the past."[32]

A Commission order should not be amended, expanded or withdrawn absent a change in the law or the factual predicate of the order. No changes have occurred over the past three years that would justify amending the ISO-RTO Order.[33] The Commission does not explain in the Proposed Amendment why in 2013 it was in the public interest to except private claims from the scope of the exemption, but now is no longer in the public interest. Absent a compelling and persuasive explanation, the ISO-RTO Order should remain unchanged.[34]

By suggesting that private claims under CEA section 22 are implicitly permitted – contrary to the plain language of the ISO-RTO Order – the Commission's proposal undermines the legal certainty provided not only by the ISO-RTO Order, but also by other exemptions that

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[31] Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 21286 (Apr. 20, 1993); Exemption for Certain Swap Agreements, 58 Fed. Reg. 5587 (Jan. 22, 1993); 7 U.S.C. § 2(h) (2001).

[32] 81 Fed. Reg. at 30254, n.5. As several of the ISOs and RTOs have pointed out previously, in the 24 years since section 4(c) was added to the CEA, the Commission has expressly preserved a private right of action in broad public interest exemptions only two times. Those 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); *Exemption of Transactions on a Derivatives Transaction Facility*, 65 Fed. Reg. 77962, 77986 (Dec. 13, 2000) (Section 37.8 Enforceability); and *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).

[33] To the best of the IRC's knowledge, the Commission has never previously proposed to amend similarly worded section 4(c) exemptions to permit private claims.

[34] *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) ("Whatever the ground for the departure from prior norms . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.").

the CFTC has granted under CEA section 4(c).[35] As Commissioner Giancarlo observed, this introduces "a disturbing precedent regarding the legal certainty of [the Commission's] orders."[36]

Furthermore, because the Proposed Amendment materially changes the ISO-RTO Order, the Commission is obligated to fully consider the costs and benefits of the new proposal. The Commission's consideration of the costs and benefits associated with the Proposed Amendment is insufficient. The Commission should conduct a new cost-benefit analysis that fully takes into account the costs of private litigation and its potential impact on ratepayers and other regulators.

VIII. The Commission has Express and Unambiguous Authority to Grant an Exemption that Precludes Private Claims under CEA Section 22

Although the Commission in 2013 did not question its authority to issue the ISO-RTO Order as written, in the preamble to the Proposed Amendment it questions whether Section 4(c)(6) "provides the Commission with the authority to exempt the Covered Entities from the private right of action found in Section 22."[37] The answer to the Commission's question is unambiguously yes.

The plain language of Section 4(c)(6) requires the Commission to apply sections 4(c)(1) and 4(c)(2) in their entirety with no limitations. Consequently, when the Commission considered the ISOs' and RTOs' request for an exemption, it emphasized that is "*must act in accordance with sections 4(c)(1) and (2)* of the CEA, when issuing an exemption under section 4(c)(6)."[38] That is precisely what the Commission did when it granted the ISO-RTO Order "[p]ursuant to its authority under section 4(c)(6) . . . and in accordance with sections 4(c)(1) and (2) of the Act."[39]

CEA section 4(c)(1) expressly authorizes the Commission to grant exemptions from both the "requirements of subsection (a)" of section 4 and "any other provision" of the CEA.[40] And, in CEA section 4(c)(1)(A), where Congress limited the Commission's authority to grant an exemption from specified sections of CEA, it did not limit the Commission's authority to grant an exemption from section 22. It cannot be the case that subsection (c)(6) trumps subsection (c)(1)(A) or limits the scope of the exemption that the CFTC can grant under subsections (c)(1) and (c)(2). Otherwise, the Commission could pick and choose which portions of those subsections to act "in accordance with" when it issues an exemption.

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[35] In Commissioner Giancarlo's dissent, he correctly noted that because the Commission's proposal to change the scope of the ISO-RTO Order is not based on any change in facts or circumstances, but on a "legal fiction" that it intended to reserve section 22 all along, the Proposed Amendment "calls into question the legal certainty of all other section 4(c) orders in which the Commission failed to discuss or reserve the applicability of section 22 for violations of the Act or regulations reserved for itself." 81 Fed. Reg. at 30254.

[36] *Id.* at 30254.

[37] *Id.* at 30249.

[38] 78 Fed. Reg. at 19881.

[39] *Id.* at 19912 (emphasis added).

[40] CEA sections 4(c)(1)-(2) and (6).

IX. Conclusion

For the foregoing reasons, the Commission should not adopt the Proposed Amendment. Please contact Paul J. Pantano, Jr., Partner, Cadwalader Wickersham & Taft LLP, at 202-862-2410, if the Commission or Staff have any questions about the IRC's position on these important issues.

Respectfully submitted,

/s/ The IRC
The IRC

cc: Honorable Timothy G. Massad, Chairman
Honorable Sharon Y. Bowen, Commissioner
Honorable J. Christopher Giancarlo, Commissioner

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APPENDIX

Specific Questions Posed in the Proposed Order

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.

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

What type of entity might sue what other type of entity?

See Section IV, *supra*.

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

See Section IV and V, *supra*.

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?

See Section III, *supra*.

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?

See Section VI, *supra*.

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.

See Sections IV, V, and VI, *supra*.

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.

See Sections VII, *supra*.