

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: *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 FR 30,245, May 16, 2016*

Dear Mr. Kirkpatrick:

The Delaware Division of the Public Advocate (“DE DPA”),¹ the Indiana Office of Utility Consumer Counselor (“IN OUCC”),² the Maryland Office of Peoples’ Counsel (“MD OPC”),³ the Office of People’s Counsel for the District of Columbia (“DC OPC”),⁴ the New Jersey Division of Rate Counsel (“NJ RC”),⁵ the Pennsylvania Office of Consumer Advocate

¹ The DE DPA was established by 26 *Del. C.* §8716 to represent the interests of residential and small commercial customers before the Delaware Public Service Commission and other state and federal courts and agencies.

² The IN OUCC is an agency of the State of Indiana, duly authorized by state law to represent all Indiana ratepayers in state and federal proceedings regarding utility rates and issues. Indiana Code 8-1-1.1-9.1 specifically provides for the appointment of a deputy consumer counselor for federal affairs, who is specifically charged with the representation of Indiana ratepayers’ interests before federal agencies.

³ The MD OPC is an independent state agency that was established to represent the interests of residential consumers in utility cases. Maryland Public Utilities Code Annotated, Section 2-204 (2014). MD OPC may appear before any federal or State unit as necessary to protect the interests of residential and noncommercial users of gas, electricity or other regulated services. Maryland Public Utilities Code Annotated, Section 2-205(b).

⁴ The DC OPC is an independent agency of the District of Columbia government and is a member of PJM Interconnection, Inc. DC OPC is the statutory representative of District of Columbia consumers in public utility issues in proceedings before the Public Service Commission of the District of Columbia, state and federal courts and federal regulatory agencies, including the Federal Energy Regulatory Commission. See D.C. Code § 34-804 (d) (2010).

⁵ NJ RC is the administrative agency charged under New Jersey law with the general protection of the interests of utility ratepayers. N.J.S.A. 52:27E-50 *et seq.*

(“PA OCA”),⁶ and the Consumer Advocate Division of the Public Service Commission of West Virginia (“WV CAD”)⁷(“collectively, the “PJM Joint Consumer Advocates” or “PJM JCA”) respectfully submit these comments to the Commodity Futures Trading Commission (the “CFTC” or “Commission”) on the 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 published in the Federal Register on May 16, 2015 (“Proposed Amendment”).⁸ As described below, the Commission should take care to ensure that the regulatory jurisdiction of the Federal Energy Regulatory Commission (“FERC”) is not compromised as to those transactions the Commission has previously exempted from its oversight and regulations.

The PJM JCA are designated by the laws of our respective jurisdictions to represent the interests of utility consumers before state and federal regulatory commissions and the courts. The consumers we represent are in service territories that are part of PJM Interconnection, L.L.C. (“PJM”) Regional Transmission Organization (“RTO”) and, as a result, are served by suppliers that transact in RTO markets. Therefore, the electric bills paid by the consumers we represent are significantly impacted by the prices set by the markets run by the RTO.

Most consumer goods and services in our economy are offered by competing sellers, such that our nation’s consumers may benefit from being able to choose from a wide range of buying options based on price, quality and whatever other personal considerations may be of importance to them. For example, one can buy a car from a wide range of manufacturers from across the globe, one can buy medical services from any of a number of qualified service providers, and one can make financial investments in any of a number of different kinds of markets. But utility service is different. Electricity is an essential, largely non-substitutable, and highly standardized product that has long been provided by monopoly service providers. Consumers in certain portions of PJM have little ability either to refrain from buying through their local service provider or to directly influence market outcomes through their buying decisions. Tariff-based regulation – by state and federal regulators working in a system of cooperative federalism – is therefore a necessary substitute for the lack of real competition by monopoly service providers for consumer spending on utility services.

Some deregulation in the electricity industry has occurred, such as in the increasing sale of generation among utilities in the wholesale energy markets and even the ability of individual retail customers to choose among generation suppliers in portions of the PJM territory. Nevertheless, regulation in the electricity industry remains pervasive. The fact remains that

⁶ The PA OCA is an independent state office within the Pennsylvania Office of Attorney General. It is empowered by Pennsylvania statute to represent the interests of consumers before the Pennsylvania Public Utility Commission and equivalent federal regulatory agencies and before state and federal courts.

⁷ The WV CAD was established under West Virginia Code § 24-1-1(f)(2) to act as an advocate for the position of and in the interest of residential utility customers.

⁸ 81 FR 30245.

while some customers can choose among generators, individual consumers have little practical choice but to receive at least the distribution part of their electricity service through their particular local wires company, and if they are in a region served by an RTO or ISO, their electricity comes through that region's electricity market across transmission systems planned and operated by that organization. RTO and ISO markets also operate in part on a cost-socialized basis, meaning that certain costs are routinely "uplifted" or allocated by the RTO or ISO to appear on the bills of consumers with little or no additional regulatory review.

As the statutory representatives of electric consumers in each of our respective states, the PJM JCA are legislatively charged with representing consumer interests in utility regulatory proceedings that determine the rates, terms and conditions under which such consumers will receive service. Our offices exist because consumers rarely have the individual ability, expertise, or resources to represent themselves in utility regulatory proceedings. As such, we actively participate in utility regulatory proceedings both at our respective state public utility commissions and at FERC, and we also participate actively in the wide range of meetings each year at PJM to provide input into the development of its markets and the planning and operation of its transmission system.⁹

As representatives of the consumers who ultimately pay for and are supposed to be served by the electric utility industry, the PJM JCA appreciate the CFTC's cooperation with FERC in overseeing RTO and ISO markets. Given the essential nature of the service at issue and the fact that consumers have little practical choice but to receive electricity under terms set by the region's RTO or ISO, we would urge the CFTC to bear in mind the unique nature of the consumer relationship to the product and the importance that it be provided pursuant to a stable and predictable regime of tariff-based regulation. RTO and ISO markets are very complex, with many interrelated features that all must work together in order to produce economically efficient market outcomes which result in just and reasonable prices to consumers. Any approach that might result in piecemeal tinkering with parts of the electricity markets should be handled very cautiously. Tariff-based regulation of electricity suppliers like that provided by FERC can help assure that RTO and ISO products are properly understood as part of their overall markets and the particular challenges and implications of providing electric utility service.

In 2013, the Commission issued an Order exempting specific transactions of particular ISOs and RTOs from certain provisions of the Commodity Exchange Act ("CEA")¹⁰ and Commission regulations (the "RTO-ISO Order").¹¹ The RTO-ISO Order applies to transactions that fall within the definition of Financial Transmission Rights, Energy Transactions, Forward Capacity Transactions, or Reserve or Regulation Transactions (collectively, the "Covered

⁹ PJM has hundreds of stakeholder meetings each year, each of which may have dozens or even hundreds of participants. Input from this advisory structure is a key part of how RTOs and ISOs are supposed to operate. *Wholesale Competition in Regions with Organized Electric Markets*, Order 719, 125 FERC ¶ 61,071 at paras. 477 *et seq.* (2008).

¹⁰ 7 U.S.C. 1 *et seq.*

¹¹ *Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specific Transactions Authorized by a Tariff Protocol Approved by the Federal 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 FR 19880, April 2, 2013.

Transactions”) that are offered or sold pursuant to a tariff, rate schedule or protocol of an RTO or ISO. The Proposed Amendment would amend the RTO-ISO Order to clarify that the exemption granted in the RTO-ISO order does not apply to a private right of action brought pursuant to section 22 of the CEA.¹²

As discussed above, the consumers whose interests are represented by the PJM JCA buy electricity from suppliers that transact in the RTO markets. This is true for consumers in states that have restructured their retail electricity markets whether the consumer has switched to a competitive supplier or is served by the local utility. It is also true for consumers in states that have not restructured their electricity markets. The suppliers which serve consumers in an RTO use Covered Transactions to procure the electricity products needed to supply consumers and to hedge some of the risk associated with serving retail consumers. The rules regarding Covered Transactions in the ISO and RTO markets are largely developed in stakeholder processes. FERC then reviews the rules in conjunction with the other inter-related wholesale electricity markets in the ISO or RTO, using a “just and reasonable” standard for the prices that result from the markets.¹³ PJM also has an Independent Market Monitor (“IMM”) that reviews and comments on proposed changes to market rules. The IMM also functions as PJM’s “cop on the beat.” The IMM monitors the function of PJM’s markets and reports on whether they are producing just and reasonable prices. The IMM reviews market behavior in all RTO markets during all hours and reports anomalous and possibly anti-competitive behavior.

Such input from stakeholders, regulatory review by FERC in the context of PJM’s overall tariff, and input and oversight by the IMM are supposed to mean that rates which are ultimately passed through to consumers are just and reasonable. Such comprehensive contextual review of the function of the RTO and ISO markets, individually and collectively, as well as review of proposed rule changes by an IMM as well as FERC, is critical to maintain the integrity of markets and protect the economic interests of consumers.

In the Proposed Amendment, the Commission states that the “existence of a private right of action ... is not inconsistent with or detrimental to cooperation between the CFTC and FERC.”¹⁴ The Commission also stated that a court ruling in a civil proceeding brought by a private party that one of the Covered Transactions is a “swap” would not affect FERC’s authority over Covered Transactions.¹⁵ It is imperative to protecting the interests of consumers that are subject to the prices resulting from the ISO and RTO markets that the Commission and FERC are both able to exercise their respective regulatory authority over these markets. If the Commission adopts the Proposed Amendment to clarify that private rights of action regarding Covered Transactions in the ISO and RTO markets are permitted, the Commission should take care not to unintentionally undermine the current sharing of enforcement authority between FERC and the CFTC where transactions initiate in a market overseen by one regulator and cause harm in a market overseen by the other. If a finding that one of the Covered Transactions were a “swap” in a civil action by a private party were to result in FERC losing authority to regulate a

¹² 81 FR 30248.

¹³ Section 205 of the Federal Power Act, 16 U.S.C. § 824e (2012).

¹⁴ 81 FR 30248.

¹⁵ 81 FR 30248, fn. 51.

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significant portion of the wholesale electricity markets in ISOs and RTOs, it could remove not only FERC review of the market function but also the review of the IMM, which is performed under a FERC-approved tariff. It is essential that consumers not lose the protections of its “cop on the beat” as a result of this Commission’s actions.

While consumers are affected by RTO markets and are effectively captive to them, few individual consumers would be in a position to take advantage of private rights of action contemplated by the Proposed Amendment. It is important to the consumers we represent that the CFTC be careful not to inadvertently introduce unneeded uncertainties or otherwise increase costs passed along to consumers under the well-intentioned guise of providing them additional means to seek relief. We look forward to the CFTC’s review of these comments.

Respectfully submitted,

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