



June 15, 2016

Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Notice of Proposed Amendment and Request for Comment, 81 Fed. Reg. 30245

Dear Secretary Kirkpatrick:

Kansas City Power & Light Company (“KCP&L”) and KCP&L Greater Missouri Operations Company (“GMO”) hereby submit comments in response to the Commodity Futures Trading Commission’s (“CFTC”) May 16, 2016, “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.” The proposal in the amendment would allow for Private Rights of Action (“PROAs”) under the Commodity Exchange Act (“CEA”) for alleged market manipulation in connection with certain Independent System Operators and Regional Transmission Organizations (“ISO/RTOs”) that are heavily regulated by the Federal Energy Regulatory Commission (“FERC”).

As explained below, KCP&L and GMO submit that the proposal is not in the public interest and will be harmful to the interests of the CFTC, FERC, would-be victims of manipulative behavior and electricity consumers.

I. BACKGROUND ON KCP&L AND GMO

KCP&L and GMO are both subsidiaries of Great Plains Energy Incorporated (“GPE”). GPE is a multistate electric utility holding company system providing electric service at retail and wholesale. KCP&L and GMO are transmission, generation, and distribution owning members of Southwest Power Pool, Inc. (“SPP”) and serve customers in Missouri and Kansas. KCP&L and GMO have ceded functional control of their transmission facilities to SPP. Further, KCP&L and GMO are transmission customers under the SPP Open Access Transmission Tariff and participate in the markets administered by SPP.

II. COMMENTS

The CFTC’s proposed amendment to the joint ISO/RTO exemption order¹ to preserve PROAs under Section 22 of the CEA based on transactions in ISO/RTO markets should not be adopted. ISO/RTO markets effectively support grid reliability in accordance with principles of economic efficiency and are heavily regulated by FERC. As Congress affirmed in Section 720(a)(1)(A) of the Dodd-Frank Act,² 15 U.S.C. § 8308(a)(1) (2012), the CFTC and FERC (as well as the Public Utility Commission of Texas, in the case of the Electric Reliability Council of Texas market) are supposed to work together to ensure that there is effective enforcement to

¹ 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 FR 19880, Apr. 2, 2013.

² Dodd-Frank Wall Street Reform and Consumer Protection Act.

protect market participants and the public at large from market manipulation schemes in the electricity markets administered by the ISO/ RTOs. The proposal is contrary to these purposes.

The regulation of the ISO/RTOs by FERC includes an anti-market manipulation rule, 18 C.F.R. §1c.2 (2015). It is virtually identical to the market manipulation rule adopted by the CFTC under the Dodd-Frank Act, 17 C.F.R. § 180.1. The CFTC rule also applies to ISO/RTO transactions. While overlap can be workable as a regulatory matter, adding PROAs as an additional enforcement mechanism in this context is not only ineffective but will be harmful. As described in greater detail below, the cost and negative impacts associated with this proposal are far greater than any potential benefit.

A. The Proposal Will Harm Both Agencies' Influence Over Development of the Law.

Both FERC's and CFTC's anti-manipulation rules are critical to the effective and efficient regulation of the ISO/RTO markets so that consumers will benefit from effective market operations. Both rules are also relatively new. The courts are only beginning to give them more meaning in actual cases brought by the enforcement programs of both agencies. PROAs will hinder the ability of both Commissions to influence the development in the courts of these laws. Though the courts will ultimately make those interpretations, whether in agency-brought court actions or PROAs, if FERC or CFTC are not parties as of right in the PROA cases, the agencies will not be able to influence the judge-made law that has an important impact on these markets—and which Congress clearly mandated that the agencies regulate. The judicial system benefits from agency expertise in such cases and, by extension, so does public interest.

B. The Proposal Will Harm Electricity Customers.

Although private rights of action are accepted in other contexts, frivolous suits bog down the judicial system and drain resources until they are dismissed. In this context, that cost is not worth the minimal benefits of PROAs. And customers of public utilities—entities that are likely to be subjected to such suit—will likely bear the brunt of those costs. This is the case because, unlike other types of entities the CFTC regulates, utilities such as KCP&L and GMO who participate in these markets are obligated to serve.³ Such utilities will have to pay these costs embedded in electricity rates. This regulatory compact still prevails across much of the U.S., even after electric market deregulation in some states.⁴ The ISO/RTOs themselves may also be sued and almost certainly will be dragged into PROAs as third parties for purposes of discovery. Those costs too will be borne by consumers because ISO/RTOs are non-profit organizations who must pass all costs on to their utility members and eventually to consumers. Unpredictability as to the amount of suits also will tend to make RTO decisions on staff resources difficult, and could lead to further inefficiencies. Thus, if the notion is that only “big companies” will be harmed, that is wrong.

Imposing enforcement costs on consumers is unnecessary because FERC already heavily regulates the ISO/RTOs and regularly brings market manipulation cases relating to the ISO/RTO

³ See, e.g., *Kan. Power & Light Co. v. The State Corp. Comm’n of the State of Kan.*, 237 Kan. 394, 395, 401 (1985) (upholding KCP&L’s right to build a line in order to fulfill its obligation to serve); *Harline v. Pub. Serv. Comm’n of Mo.*, 343 S.W.2d 177, 181 (1960) (noting that public utilities have a duty “to serve all persons in an area [they have] undertaken to serve” (citations omitted)); *Southwest Power Pool, Inc.*, 141 FERC ¶ 61,048 at P 488 (2012) (noting that SPP Market Participants “rely on the Integrated Marketplace to fulfill their retail obligations to serve”).

⁴ See, e.g., *Pub. Serv. Co. of Colo. et al.*, 148 FERC ¶ 61,213 at 371 (2014) (FERC generally referencing incumbent transmission providers’ obligations to provide service in their own service territory.).

context.⁵ Victims of manipulation have multiple methods by which they can bring the matter to FERC's attention, including calling FERC's Enforcement Hotline. FERC has not hesitated to act on these referrals. It is, in fact, FERC's top stated enforcement priority.⁶ There is no need to set loose on these markets a number of "private enforcement staffs." The proposal is a costly solution in search of a non-existent problem.

C. The Proposal Will Harm Victims.

While the notion of victim "self-help" may have superficial appeal, PROAs invoked by an active subset of victims of manipulation will likely interfere with the traditional disgorgement remedy employed by FERC to help **all** victims in cases of market manipulation. FERC regularly requires disgorgement in all manipulation cases.⁷ As distinguished from civil monetary penalties, disgorgement dollars are used to compensate victims.⁸ If FERC is acting in an

⁵ See, e.g., *Coaltrain Energy, L.P. et al.*, 155 FERC ¶ 61,204 at P 1 (2016); *Berkshire Hathaway Power Co., Power Plant Mgmt. Serv. LLC*, 154 FERC ¶ 61,259 at P 1 (2016); *ETRACOM LLC and Michael Rosenberg*, 153 FERC ¶ 61,314 at P 1 (2015); *City Power Marketing, LLC and K. Stephen Tsingas*, 152 FERC ¶ 61,012 at PP 5, 42 (2015); *Houlian Chen et al.*, 149 FERC ¶ 61,261 at PP 37, 74 (2014); *Direct Energy Servs., LLC*, 148 FERC ¶ 61,114 at P 15 (2014); *MISO Virtual and FTR Trading*, 146 FERC ¶ 61,072 at P 6 (2014); *Rumford Paper Co.*, 142 FERC ¶ 61,218 at PP 2, 5-9 (2013); *In re Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068 at PP 4, 69-82 (2013); *Lincoln Paper and Tissue*, 144 FERC ¶ 61,162 at PP 3, 9 (2013); *Competitive Energy Servs., LLC*, 144 FERC ¶ 61,163 at P 1 (2013); *Enerwise Global Technologies, Inc.*, 143 FERC ¶ 61,218 at P 6 (2013); *In re PJM Up-To Congestion Transactions*, 142 FERC ¶ 61,088 at P 16 (2013); *Richard Silkman*, 144 FERC ¶ 61,164 at P 3 (2013); *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056 at PP 1, 18 (2013); *Gila River Power, LLC*, 141 FERC ¶ 61,136 at PP 1, 13 (2012); *Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 at PP 1, 11 (2012); *In re Joseph Polidoro*, 138 FERC ¶ 61,018 at P 14 (2012); *In re Holyoke Gas and Elec. Dep't*, 137 FERC ¶ 61,159 at P 11 (2011); *North America Power Partners*, 133 FERC ¶ 61,089 at P 1 (2010).

⁶ See 2015 Report on Enforcement, FERC Docket No. AD07-13-009 at 2 (Nov. 19, 2015), available at <http://www.ferc.gov/legal/staff-reports/2015/11-19-15-enforcement.pdf> ("In FY2015, Enforcement had the same priorities as in previous years, continuing to focus on matters involving: Fraud and market manipulation ...").

⁷ *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 at P 216 (2010).

⁸ See, e.g., *Coaltrain Energy, L.P. et al.*, 155 FERC ¶ 61,204 at ordering clause (G) (2016) (ordering the market operator to "use the disgorgement funds and interest it receives pursuant to this Order from Respondents to provide reimbursement of MLSA payments, and any available interest, to those entities identified as a result of PJM's proposed methodology").

enforcement case, PROA private litigants would likely be seeking the same dollars FERC seeks in disgorgement and could interfere with the efficient achievement of the remedy.

If private litigants act and FERC is not yet acting, some third party will likely ask FERC to do so as well and the same problem arises. The availability of class actions under the CEA is not a counter to the problem because the classes likely would not be defined to include the universe of victims FERC can make whole through distribution of disgorgement dollars. There can only be one recovery of actual losses for a victim, so competing proceedings could interfere with achieving that objective. Moreover, FERC may need to intervene or be impleaded into a PROA. Likewise, a FERC action might invoke a PROA. Additionally, potentially competing analyses on how unjust gains would be calculated or definitions of victims in multiple cases could lead to inconsistent outcomes.

Moreover, cases under the CEA will likely be brought under contingency fee arrangements that will further divert redress dollars away from victims and into the pockets of the plaintiffs' bar.

This remedial problem is especially relevant to FERC cases because frequently these dollars are part of FERC-approved tariff rates. Indeed, in some cases, only FERC can fashion the remedy.⁹ Ultimately, the proposal will hurt, not help, victims of manipulation.

D. The CEA does not Bar the Creation of the Exemption

The statutory provision authorizing private rights of action does not bar creation of an exemption in these unique circumstances. The CFTC and FERC statutory market manipulation

⁹ See, e.g., *Houlian Chen, Powhatan Energy Fund, LLC, HEEP Fund, LLC, CU Fund, Inc.*, FERC Docket No. IN15-3-000, Comments of PJM Interconnection, L.L.C. at 3 (Apr. 1, 2015) (requesting FERC's "specific direction" on the method by which disgorgement amount would be allocated among victims).

rules are nearly identical, except FERC's rule excludes private rights of action. Notwithstanding this difference, Congress required the CFTC and FERC to act cooperatively in the implementation of their respective market manipulation rules.¹⁰ This provision requires the agencies to cooperate to "avoid[], to the extent possible, conflicting ... regulation." Because FERC directly oversees its markets, and there is no private right of action for manipulation under FERC's rules, adoption of CFTC rules permitting a private right of action would create a conflict. The "no conflict" language of the cooperation provision, together with Congress's delegation of rulemaking authority to implement the Act,¹¹ provide the CFTC with the flexibility to harmonize the roles of the agencies, as Congress required, by creating an exemption. In keeping with the Congressional intent embodied in the statute, the exemption can and should be narrowly tailored to apply only to activities in ISO/RTO markets. Accordingly, and for the reasons stated above, the CFTC should exercise its discretion here to allow the exemption.

III. CONCLUSION

The ISO/RTOs will work best with effective and efficient regulation of the host of market products that support such organized electricity markets. This benefit would be undermined by the introduction of PROAs in the ISO/RTO 4(c)(6) exemption order. Consistent with the foregoing discussion, KCP&L and GMO submit the CFTC should not adopt the proposal to preserve PROA in ISO/RTO 4(c) exemptions (i.e. exclude Section 22 from the scope of the

¹⁰ See § 720(a)(1)(A) of the Dodd-Frank Act, 15 U.S.C. § 8308(a)(1).

¹¹ See § 753(d) of the Dodd-Frank Act ("the amendments made by this section shall take effect on the date on which the final rule promulgated by the Commodity Futures Trading Commission pursuant to this Act takes effect.").

ISO/RTO 4(c) exemption orders). This will ensure ISO/RTO markets will be able to continue to serve the electricity needs of consumers in the most effective and efficient manner possible.

Respectfully submitted,

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