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June 15, 2016

Via Electronic Submission

Mr. Christopher Kirkpatrick
Secretary
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 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:

Pursuant to the Commodity Futures Trading Commission's ("Commission") notice of proposed amendment and request for comment published in the Federal Register on May 16, 2016 ("Proposed Amendment"),[1] the MISO Transmission Owners[2] respectfully submit

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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. 30,245 (May 16, 2016) ("Proposed Amendment").

[2] The MISO Transmission Owners consist of: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Dairyland Power Cooperative; Duke Energy Business Services, LLC for Duke Energy Indiana, Inc.; East Texas Electric Cooperative; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; (continued)

the following comments. The Commission's proposal to amend its 2013 order[3] explicitly to authorize private rights of actions for transactions occurring in energy markets regulated by the Federal Energy Regulatory Commission ("FERC")[4] will substantially undermine the certainty and stability that the Commission's 2013 Order was designed to promote. The MISO Transmission Owners urge the Commission to reconsider its proposal, acknowledging that the markets in question are already subject to considerable anti-fraud and anti-manipulation regulation and oversight.

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Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company d/b/a ITC*Transmission*; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power Inc.; South Mississippi Electric Power Association; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

[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. 19,880 (Apr. 2, 2013) ("2013 Order").

[4] The MISO Transmission Owners acknowledge that the 2013 Order also addressed exemptions for the Electric Reliability Council of Texas ("ERCOT") markets regulated by the Public Utility Commission of Texas ("PUCT"). By referring to "FERC-regulated" markets, the MISO Transmission Owners are not distinguishing between markets regulated by FERC and markets regulated by PUCT, and these comments should not be construed as suggesting any such distinction. The MISO Transmission Owners refer to markets regulated by FERC for the sake of convenience.

I. BACKGROUND AND INTRODUCTION

A. The MISO Transmission Owners

The MISO Transmission Owners are a diverse group of investor-owned, cooperative, and municipal electric utilities that own electric transmission assets that they have transferred to the functional control of the Midcontinent Independent System Operator, Inc. ("MISO"),[5] a FERC-authorized regional transmission organization ("RTO") that operates day-ahead and real-time electricity, ancillary services, and financial transmission rights ("FTR") markets. As transmission owners and members of MISO, some of the MISO Transmission Owners are active participants in the MISO-administered energy, ancillary services, and FTR markets.

Some MISO Transmission Owners are also load-serving entities that participate in the MISO-administered markets to serve their retail loads that they are obligated to serve under state laws. As such, these MISO Transmission Owners participate in and depend on the MISO markets not as financial players, but to serve their customers as required by state and federal laws.

Each MISO Transmission Owner is obligated to operate its transmission system in accordance with regulations and mandatory reliability standards adopted by FERC and the North American Electric Reliability Corporation ("NERC"), and are further obligated to comply with good utility practice and to operate their transmission facilities as directed by MISO under the MISO Transmission Owners Agreement ("Owners Agreement") and MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff ("MISO Tariff").

B. The Proposed Amendment

In its 2013 Order, the Commission exempted, subject to certain specified conditions and limitations:

> 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-

[5] MISO, formerly known as the Midwest Independent Transmission System Operator, Inc., was approved by FERC as the first-in-the-nation RTO in 2001. MISO operates the electric transmission system and energy markets in all or part of fifteen states stretching from the Canadian border to the Gulf of Mexico. MISO was one of the petitioners on the application for exemption that the Commission granted in the 2013 Order. *See* 2013 Order at 19,882.

> based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o*, 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.[6]

Importantly, the 2013 Order indicates that the specified markets and transactions are exempt *from all provisions* of the Commodity Exchange Act ("CEA") *except* for those enumerated, and section 22, which authorizes private rights of action, is *not* included in the enumerated list.

In its Proposed Amendment, the Commission proposes to modify its 2013 Order "to explicitly provide that the [2013 Order] does not exempt entities covered under the [2013 Order] from the private rights of action found in section 22 of the CEA with respect to the Excepted Provisions."[7]

II. GENERAL COMMENTS

The Commission should decline to adopt the proposed change to the 2013 Order and, instead, should explicitly confirm that the 2013 Order exempts from the private right of action provisions set forth in CEA section 22 FERC-regulated RTOs and independent system operators ("ISO"),[8] their markets, market participants transacting in such markets, and transactions occurring in such markets. Injecting CEA section 22 private rights of action into the tightly regulated, aggressively monitored, and highly technical energy markets would undermine the certainty and stability that the 2013 Order provided. In addition to further duplicating regulation and surveillance over these unique markets, allowing private rights of action would increase substantially the costs of administering and transacting in such markets with no concurrent benefit. The Commission should rethink its proposal, and decline to authorize private rights of actions in RTO markets.

A. Enabling Private Rights of Action Is Unnecessary to Deter Fraud and Abuse in FERC-Regulated Markets

As the Commission recognized in the 2013 Order,[9] the RTO markets are subject to a longstanding, comprehensive regulatory framework administered by FERC under the Federal

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6 2013 Order at 19,912 (emphasis added).

7 Proposed Amendment at 30,245.

8 For convenience, this letter refers collectively to RTOs and ISOs as "RTOs."

9 *E.g.*, 2013 Order at 19,894 ("[T]he Commission finds that . . . [t]he Covered Transactions have been, and are, subject to a long-standing, regulatory framework for the offer and sale of the Transactions established by FERC or PUCT . . . .").

Power Act ("FPA"). In this regard, FERC has considerable experience in overseeing wholesale energy markets, and frequently promulgates new regulations to address emerging market issues or to address challenges in the energy markets.[10] FERC also possesses substantial enforcement authority to police against fraud and manipulation in energy markets and to punish those who engage in such conduct, including, for example, the statutory authority to levy civil penalties of up to $1 million per day[11] and the ability to order disgorgement of illegal profits or order modifications to market rules to address fraud and manipulation that it discovers. If, as Chairman Massad noted in his statement accompanying the Proposed Amendment, the private right of action language in the CEA serves to augment the Commission's ability and resources to detect and prosecute instances of fraud and abuse in markets,[12] such concerns are mitigated in the context of RTO markets, where FERC already enjoys extensive regulatory and enforcement authority over such markets. Given FERC's key role in overseeing these markets, private rights of action simply are not necessary to complement the Commission's anti-fraud and anti-manipulation oversight of FERC-regulated markets.

In addition, RTO markets are subject to substantial overlapping policing to detect and deter fraud and abuse. Specifically, RTOs oversee the conduct of participants in their markets and establish market rules to ensure efficient, reliable, and effective competition in such markets. Moreover, per FERC requirements, each RTO market is also monitored by an independent Market Monitor whose primary functions include monitoring RTO markets to detect for abusive conduct or violations of market rules and to report such conduct to the RTO for mitigation or to

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10 For example, FERC issued its Order No. 741 in response to certain defaults that occurred in the energy markets of the PJM Interconnection, L.L.C. *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 2008-2013 FERC Stats. & Regs., Regs. Preambles ¶ 31,317, at PP 8-9 & n.8 (2010) (citing the events that gave rise to the issuance of Order No. 741), *order on reh'g*, Order No. 741-A, 2008-2013 FERC Stats. & Regs., Regs. Preambles ¶ 31,320, *reh'g denied*, Order No. 741-B, 135 FERC ¶ 61,242 (2011). The Commission relied heavily on FERC's adoption of Order No. 741 and the RTO's compliance with it in granting the exemptions in the 2013 Order; indeed, the exemptions were premised on each RTO's compliance with various Order No. 741 requirements. 2013 Order at 19,890 ("[T]he Commission believes that for each Requesting Party that is regulated by FERC, full compliance with FERC regulation 35.47, . . . is a necessary prerequisite to the effectiveness of the exemption in the Final Order with respect to that Requesting Party.").

11 16 U.S.C. § 825*o*.

12 Proposed Amendment at 30,253 (Appendix 2—Statement of Chairman Timothy Massad in Support of the Proposed Amendment to the RTO-ISO Order).

FERC for potential investigation and enforcement.[13] With the oversight and monitoring of the RTO and the independent Market Monitor, in addition to FERC's comprehensive regulation and the Commission's potential anti-fraud and anti-manipulation authority, there is no reason to add yet another layer of overlapping policing of RTO markets by myriad private parties and more than 100 federal district courts. This is particularly true given that private actions would be available broadly to "any person who sustains loss as a result of any *alleged* violation of" the CEA,[14] including entities that lack experience and expertise in the complex RTO-administered energy markets.

Given the longstanding, pervasive, and layered oversight and regulation of the RTO-administered energy markets, such markets are very different from other markets and exchanges that the Commission regulates under the CEA and for which Congress enacted CEA section 22. Extending CEA section 22 to RTO markets is unnecessary to carry out the Commission's anti-fraud and anti-manipulation responsibilities under the CEA, and the Commission should not adopt its proposal to do so.

B. The Proposed Amendment Would Increase Uncertainty and Destabilize FERC-Administered Markets

In addition to being wholly unnecessary to prevent fraud and abuse in the RTO energy markets, the Commission's proposal would result in severe negative consequences for RTOs, their markets, and parties who transact within them.

The *Aspire Commodities, L.P. v. GDF Suez Energy North America, Inc.*[15] litigation provides a compelling case against extending the private rights of action provisions of CEA section 22 to RTO-administered energy markets. In *Aspire*, the plaintiffs challenged conduct occurring in the ERCOT market, not for any alleged manipulative effect on ERCOT prices but for the tangential effect that such conduct allegedly had on prices on the Intercontinental Exchange ("ICE").[16] However, while the allegations involved impacts on ICE, the case clearly sought to challenge activity conducted under ERCOT rules that were developed to promote the efficient operation and administration of the ERCOT market.

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13 *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 2008-2013 FERC Stats. & Regs., Regs. Preambles ¶ 31,281, at P 354 (2008) (listing the core functions of Market Monitors), *as amended*, 126 FERC ¶ 61,261, *order on reh'g*, Order No. 719-A, 2008-2013 FERC Stats. & Regs., Regs. Preambles ¶ 31,292, *reh'g denied*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

14 7 U.S.C. § 25 (emphasis added).

15 No. 15-20125, 2016 U.S. App. LEXIS 3588 (5th Cir. Feb. 25, 2016) ("*Aspire*").

16 *Aspire* *4.

Indeed, as the PUCT stated in comments previously submitted to the Commission, the *Aspire* case called into question a rule that was deliberately adopted by ERCOT after careful consideration by ERCOT, its stakeholders, its independent Market Monitor, and the PUCT, and that served an important purpose in the ERCOT market.[17] Had the case been allowed to proceed, an important and robustly vetted rule that served a legitimate purpose in ERCOT could have been undermined by allegations involving a wholly different market. Legal and proper RTO market rules should not be subject to challenge in federal courts for their alleged effects on other markets, and RTO market rules that are approved by FERC as just and reasonable under the FPA should not be second-guessed by federal district court judges who, absent a private right of action under CEA section 22, would have no authority over such rules.[18] To allow otherwise would inject substantial uncertainty into the RTO markets and undermine the certainty and finality that transactions in those markets enjoy today.

The Commission issued its original grant of exemptive relief in the 2013 Order pursuant to section 4(c) of the CEA.[19] As the Commission explained in the 2013 Order, "Congress noted that the purpose of the provision is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner."[20] Allowing private rights of action does exactly the opposite by injecting uncertainty and instability into existing and emerging markets by allowing parties to challenge conduct that was legal under the RTO's existing, FERC-approved rules that a party alleges had a manipulative effect either in that RTO market or in another market. Allowing private parties to sue for conduct in RTO markets that is permissible under existing, FERC-accepted rules eviscerates the certainty provided by the FERC process, as it frustrates the ability of parties to rely on transactions that have been executed and settled in the

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17 *See* Public Utility Commission of Texas Comment Letter, 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, at 7-10 (June 22, 2015), www.puc.texas.gov/agency/about/commissioners/anderson/letters/PUCT_Comments_Regarding_SPP_Exemptive_Order.pdf.

18 Under the FPA, challenges to FERC-approved rates, terms, and conditions for service, including market rules adopted by RTOs, are subject to review in the federal appellate courts, not at the district court level. As discussed in more detail *infra* Section II.C, the FERC enforcement provision of the FPA expressly excludes private rights of action. Congress clearly did not intend to subject FERC-regulated services, such as transactions in the RTO markets, to private causes of action adjudicated in federal district courts.

19 2013 Order at 19,912.

20 2013 Order at 19,882 (citing H.R. Rep. No. 102-978, at 82-83 (1992)).

RTO markets. Given the broad language of CEA section 22, there is no guarantee that a private party would be limited only to challenging conduct that violated established RTO rules. Similarly, allowing private parties to sue for conduct in RTO markets that has allegedly manipulative effects on other markets also creates substantial uncertainty and compromises the certainty provided by the FERC process, because an entity engaging in entirely legal conduct in one venue could be subject to liability for impacts on secondary markets. Nothing in the CEA or the FPA suggests that Congress intended that the potential overlap of Commission and FERC jurisdiction should promote such uncertainty.

Additionally, as the CFTC noted in the 2013 Order, the transactions exempted in that order are "part of, and inextricably linked to, the organized wholesale electricity markets"[21] and thus are a necessary component of ensuring just and reasonable electricity rates for consumers. MISO Transmission Owners that are also retail load-serving entities rely on the MISO markets to fulfill their state-law-imposed obligations to serve their customers. Allowing challenges to RTO rules outside of the FERC arena could undermine the exempted transactions in ways that make them less effective at ensuring just and reasonable rates, which could undermine the ability of the load-serving MISO Transmission Owners to comply with state retail service obligations.

RTO market rules are developed through extensive discussion and interaction among RTO stakeholders, the RTO's independent Market Monitor, and the RTO itself, and any tariff rules that are ultimately adopted through this process are subject to FERC review under the FPA. In this manner, rules and protocols that govern transactions in RTO markets have been developed and appropriately vetted by a broad base of stakeholders to establish the RTO's operating practices. Parties transact in RTO markets with settled expectations based on these FERC-accepted rules. Historically, when events occur that were unforeseen by this robust process, the RTO and its stakeholders typically have instituted efforts to modify existing rules to address the issue. By enabling private rights of action to challenge conduct and rules in FERC-regulated RTO markets, the Commission's proposal would undermine this effective cooperation by allowing private parties to circumvent existing stakeholder and RTO processes, as well as FERC review, and proceed directly to federal court to allege violations of the CEA. Permitting a private action suit assumes that the courts know better than industry, the independent RTOs, their independent Market Monitors, and FERC how to create fair markets, which they do not. In fact, the Commission's proposal opens the door for well-intentioned, but ill-informed rules to be implemented in response to private suits that significantly interfere with well-developed and proven best utility practices based on proper evaluation of engineering and economic conditions.

Allowing private rights of action in FERC-regulated markets under CEA section 22 also presents real costs and consequences to RTOs and their members, with no corresponding benefit. First, MISO and FERC would not necessarily be parties to a private right of action against a market participant facing a lawsuit due to conduct that occurred in the MISO markets. A private

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[21] 2013 Order at 19,886.

right of action case could be decided in a way that modifies or repudiates a settled MISO market transaction or otherwise undermines a valid MISO rule without any involvement or opportunity to comment by MISO and/or FERC. In addition, RTOs like MISO are non-profit entities that are funded by their members and customers. Any costs incurred by MISO to participate in or defend against a private right of action, as well as any monetary judgment against MISO, would be borne by MISO's members, transmission owners, and, ultimately, customers. MISO's ratepayers would pay MISO's costs to defend against such allegations, and thus would be financially harmed even if MISO were ultimately successful in defending against such action. Furthermore, if MISO were found liable for a violation of the CEA by a district court judge, MISO ratepayers would pay the costs of any damages or penalty. Thus, it would not be MISO, but its ratepayers, who would be punished for actions over which they had no control or involvement.

Finally, it is noteworthy that in the 2013 Order the Commission declined to find whether RTO markets and/or the exempted transactions actually fall under the Commission's jurisdiction under the CEA.[22] Allowing private rights of action may force or encourage a federal judge to make a determination that the Commission itself has not made.

C. It Is Doubtful that Congress Intended for RTO Markets to Be Subject to Private Rights of Action

It is doubtful that Congress intended that FERC-regulated RTO markets and the transactions occurring in such markets should be subject to private rights of action. Accordingly, the Commission should not extend CEA section 22 to such markets and transactions absent explicit Congressional guidance to do so.

First, the RTO markets were created under and operate under rules adopted pursuant to the FPA. Unlike the CEA, the FPA's enforcement provision (specifically FPA section 222) expressly prohibits private rights of action under the FPA.[23] In enacting the FPA enforcement provisions, Congress saw a need to provide FERC with extensive oversight and enforcement authority over energy markets, but did not see a need to create parallel private rights. The FPA contains several safeguards, including FERC enforcement authority (including civil penalty authority) and FERC or private party complaints under FPA sections 206 and 306. Given these extensive protections, Congress determined that adding yet another avenue for policing conduct in FERC-regulated energy markets is unnecessary. Given the FPA's express prohibition against

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[22] *See, e.g.*, 2013 Order at 19,901 ("To the contrary, and consistent with the legislative history behind CEA section 4(c), the Commission takes no position as to the jurisdictional status of any Requesting Party or Covered Transaction in the Final Order.").

[23] 16 U.S.C. § 824v(b) ("Nothing in this section shall be construed to create a private right of action.").

private rights of action, it is clear that Congress did not intend FERC-regulated RTO-administered energy markets to be subject to lawsuits adjudicated in federal district courts.

Second, nothing in the legislative history of the Dodd-Frank Act or the CEA suggests that Congress intended that private rights of action should be applied to RTO markets. Indeed, the language in section 22 of the CEA predates the enactment of the Dodd-Frank Act and was not originally designed to apply to RTO markets that are already subject to extensive regulation and enforcement oversight by FERC. Given the comprehensive oversight and monitoring by FERC, RTO Market Monitors, and the RTO itself, RTO markets are different from other markets and exchanges that the Commission typically regulates and that the private right of action language was originally designed to address. Imposing CEA section 22 on markets that are already subject to extensive overlapping regulation and monitoring will do nothing to advance the Commission's statutory obligations, but will be tremendously burdensome to RTOs and their market participants. Given the lack of express legislative intent to apply CEA section 22 to such markets, the Commission should explicitly decline to do so.

III. RESPONSES TO SPECIFIC QUESTIONS SET FORTH IN THE PROPOSED AMENDMENT

In addition to the general comments offered above, the MISO Transmission Owners provide comments in response to the Commission's specific questions identified in the Proposed Amendment.

1. *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.*

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

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

Given the broad language of section 22 of the CEA, it is impossible to predict the universe of potential plaintiffs if the Commission were to apply section 22 to FERC-regulated RTO markets. CEA section 22 states that private actions are available to "*any person* who sustains loss as a result of any *alleged* violation of" the CEA.[24] Thus, if the Commission adopts its proposal, a person who is not even transacting in the RTO market could pursue action under CEA section 22 for alleged fraud or manipulation of the RTO's market or a secondary market. Indeed, experience from the *Aspire* case shows that entities transacting in one market can bring suits to challenge practices in RTO markets.

[24] 7 U.S.C. § 25 (emphasis added).

Potential defendants in such actions could include market participants, RTOs, or even transmission owners who are not market participants or whose actions in operating their transmission systems contributed to circumstances that caused a change in prices that a party could challenge as manipulative. For example, a transmission owner could institute a planned maintenance outage of a transmission facility that is coordinated through the RTO's outage process. Such actions are necessary from time to time to ensure effective maintenance and operation of the transmission system. However, outages can cause changes in power flows that affect congestion, which could have an impact on energy market prices or a party's FTR positions. Thus, a party that experiences an energy price increase or change in its FTR position due to the outage could initiate a private right of action against the transmission owner or the RTO, claiming that such conduct manipulated prices in the FTR markets or in a derivatives market that relies on RTO energy prices. As a result, an action that is consistent with the RTO's rules, good utility practice, and FERC and NERC reliability standards could be challenged in federal court for its effect on market prices in other markets. Even if the private right of action ultimately fails because the court finds that the defendant's conduct was proper, the defendant will still suffer financial harm in having to defend itself.

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

Again, it is impossible to predict under what theories a private litigant may proceed. CEA section 22 allows private rights of action for any loss stemming from an alleged CEA violation. The activity challenged in *Aspire* was conduct undertaken in ERCOT that allegedly affected a separate derivatives market. It is impossible to predict the universe of creative theories that the plaintiff's bar could conceive to proceed under CEA section 22.

iii. *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?*

Once again, *Aspire* provides a good example. Action in ERCOT that was not alleged to violate ERCOT rules was alleged to have affected prices in another market, calling into question valid rules developed to promote the efficient administration and operation of the ERCOT markets. The anti-fraud and anti-manipulation provisions of the CEA are broad and can be subject to interpretation, and all that is required to proceed with a claim under CEA section 22 is an allegation of "loss" stemming from an alleged CEA violation.

b. *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?*

There is no guarantee that a federal district judge (who may not be familiar with the filed rate doctrine because most FERC-related federal court litigation takes place at the appellate level) would grant a motion to dismiss on the grounds of the filed rate doctrine. Moreover, if a

party is alleging manipulation of a secondary market, a judge may not be willing to dismiss so easily because it would be the *conduct* in the RTO market, and perhaps not the market rule itself (which is the "filed rate"), that is being challenged. Courts may allow suits challenging conduct to proceed even if that conduct complied with the filed rate, because of the conduct's alleged fraudulent or manipulative effect either on the RTO market or a derivatives market.

2. *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.*

While the savings clause does appear to preserve FERC jurisdiction, the savings clause could be interpreted by a federal judge as conflicting with the "exclusive jurisdiction" language of the CEA. If a federal judge determines that one of the covered transactions is a "swap" (a determination that the Commission itself has declined to make), then the CEA's "exclusive jurisdiction" language would appear to vest the Commission with exclusive jurisdiction over such transactions. The fact that it is unclear and unpredictable how any one federal judge would reconcile the savings clause and exclusive jurisdiction language is yet another reason why the Commission should not subject RTO markets to private rights of action. Allowing private rights of action will only lead to increased uncertainty and instability for RTO markets and their participants.

3. *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.*

Please see the general comments *supra*, Section II.

IV. COMMUNICATIONS

The MISO Transmission Owners request that correspondence and communications with respect to these comments be provided to:

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V. CONCLUSION

For the reasons stated above, the MISO Transmission Owners urge the Commission to decline to adopt its Proposed Amendment and instead explicitly confirm that its 2013 Order exempted FERC-regulated RTOs and ISOs and their markets, market participants, and transactions, from the private right of action provisions set forth in section 22 of the CEA.

Respectfully submitted,

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