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Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Notice of Proposed Amendment to Final Order Exempting Specified RTO/ISO Transactions, 81 Fed. Reg. 30245 (May 16, 2016)

Dear Secretary Kirkpatrick:

Tenaska Energy, Inc. (“Tenaska”) respectfully submits these comments in response to the Commodity Futures Trading Commission’s (“CFTC or “the Commission”) 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” in the Federal Register (“Proposal”).¹ Through the Proposal, the CFTC seeks to permit third party actions in federal district court under a provision of the Commodity Exchange Act (“CEA”) that is among the sections of the CEA that the Commission has exempted from application to Independent System Operator/Regional Transmission Organization (“ISO/RTO”) transactions and products in the RTO Order issued in March 2013.² Tenaska respectfully submits the following comments opposing the Proposal because it is not in the public interest.

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 Proposal at 30245. See *Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act*, 78 Fed. Reg. 19880 (Apr. 2, 2013).

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The CFTC should defer to the Federal Energy Regulatory Commission (“FERC”) and the Public Utility Commission of Texas (“PUCT”) in their governance of the complex RTO markets, and avoid creating an opportunity for private litigants to collaterally attack these regulatory regimes.

A. About Tenaska

Tenaska is a privately held Delaware corporation headquartered in Omaha, Nebraska. It is an independent developer and owner of electric power production facilities located throughout the United States. Tenaska subsidiaries and affiliated companies participate in each of the organized RTO markets regulated by the FERC and by the PUCT. Tenaska has an interest in maintaining regulatory certainty in the complex and pervasively regulated RTO markets. Tenaska companies, in order to be allowed to participate in the RTO markets, are required by applicable FERC and PUCT regulations to act in accordance with the RTO Tariffs approved by the regulators, and to follow the instructions of the RTO market operator. Tenaska must have certainty that when a Tenaska company follows the instructions of an RTO market operator, or conducts itself in accordance with the RTO’s tariff, this activity will not expose Tenaska or its companies to potential court determinations that Tenaska had violated the CEA by taking those very actions which RTOs, FERC, or the PUCT required or authorized.

B. Regulatory conflicts and confusion arising from collateral attacks on RTO market rules and regulations

Allowing private rights of action creates the potential that a federal court ruling in a case brought by a private litigant could hold that conduct authorized or required by FERC, the PUCT or an RTO violates the CEA. This perverse outcome would undermine certainty, the ability of market participants to rely on the primacy of the electric market regulators’ authority, and create confusion concerning how companies within the organized electric markets should operate their facilities, or conduct their market participation. This uncertainty would not be conducive to maintaining reliable electric service in the organized markets. This would undermine efforts by the various regulators to provide an orderly market, and ultimately harm consumers.

Regulators carefully structure RTO/ISO markets to ensure reliable electric service to consumers at just and reasonable rates, but allowing private parties to sue could undermine those structures. Allowing third parties to launch a private cause of action under the CEA for conduct taken in accordance with RTO market rules enables widespread collateral attacks upon the carefully constructed rules set by the expert regulatory agencies who govern such markets. One court determination that, in a particular case, the RTO’s market rules could not be enforced, or did not

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serve to protect a participant who followed such rules, could deter other market participants from following the challenged RTO rules, and change the way the market works. This could result in market behavior at odds with the goals of RTOs, FERC and the PUCT of ensuring reliable electric service at just and reasonable rates. Because of the negative effect on the public interest such a result would have, the CFTC should continue to defer to the statutory regulatory regimes affecting electric power, shielding these regimes from the intrusion of private causes of action into these markets, and the disruptive effects that would occur.

Conclusion

For the foregoing reasons, Tenaska respectfully requests that the Commission withdraw its proposed amendment to the ISO/RTO Exemption Order, not rescind in any manner the exemption from third party causes of action set forth in that order, and conform its proposed Exemption Order in response the SPP, Inc. ("SPP) application for exemption likewise before issuing a final order on SPP's application.

Respectfully Submitted,

Tenaska Energy, Inc.

By,



Norma R. Iacovo

Associate General Counsel