SUTHERLAND ASBILL & BRENNAN LLP
700 Sixth Street, NW, Suite 700
Washington, DC 20001-3980

TEL 202.383.0100
FAX 202.637.3593

June 15, 2016

VIA ELECTRONIC SUBMISSION

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

Re: Notice of Proposed Order and Request for Comment Regarding the Proposed Amendment to the CFTC's 2013 RTO-ISO Order

Dear Mr. Kirkpatrick:

I. INTRODUCTION.

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Sutherland Asbill & Brennan LLP submits this letter in response to the Commodity Futures Trading Commission's ("**CFTC**" or "**Commission**") Notice of Proposed Order and Request for Comment (the "**Proposed Amendment**")[1] regarding a proposed amendment to the Commission's 2013 order that exempts specified electric energy transactions from certain provisions of the Commodity Exchange Act (the "**CEA**") and Commission regulations (the "**RTO-ISO Order**").[2] The Working Group recommends that the Commission expressly exempt from private rights of action under CEA Section 22 entities covered by the RTO-ISO Order. The exemption would promote effective regulation of the electricity markets overseen by regional

[1] *See* Notice of Proposed Order and Request for Comment, *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), *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-11385a.pdf.

[2] *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. 19,880 (Apr. 2, 2013).

transmission organizations (each, an "**RTO**") or independent system operators (each, an "**ISO**"), providing the Commission with appropriate grounds for such an exemption.

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. Among the members of the Working Group are some of the largest users of energy derivatives in the United States and globally. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

II. COMMENTS OF THE WORKING GROUP.

The Working Group appreciates the Commission's request for comment regarding the Proposed Amendment and believes the comments will better inform the Commission in determining whether to introduce private rights of action into ISO-RTO markets where none has previously existed. The Commission should appreciate that its decision on whether to introduce private rights of actions into the ISO-RTO markets is more than (a) balancing the interests of potential litigants and market participants or (b) supplementing the enforcement resources of the Commission. Rather, such decision could require the CFTC to knowingly alter the very foundations of a regulatory paradigm that governs a very unique market.

In this light, the Commission should maintain the existing regulatory paradigm of the ISO-RTO markets and refrain from introducing private rights of action into these markets. Accordingly, the Working Group recommends that the Commission not adopt or otherwise implement the Proposed Amendment and instead expressly exempt the ISO-RTO markets from private rights of action under CEA Section 22. As the Working Group discusses below, a number of pragmatic and policy considerations support this recommendation.

A. The Regulatory Paradigm of the ISO-RTO Markets Reflects Congressional Intent to Place Regulatory Oversight of Such Markets with Regulators and not Private Litigants.

As the Commission is aware, the Federal Power Act ("**FPA**") and other statutes and regulations under which ISO-RTO markets developed do not contain a private right of action. This omission reflects an important public policy determination by Congress to place the monitoring and policing functions for such markets solely in the hands of regulators.

The plenary oversight by regulators of the ISO-RTO markets is rational given the complexity of the energy and ancillary services markets. The complexity is a function of the round-the-clock, 365-day-a-year operation of the electricity generation and transmission systems, a massive engineering undertaking, together with an integrated, competitive marketplace. Most energy markets involve both day-ahead and real-time co-optimization of energy, ancillary services, and financial transmission rights governed by tariffs written by public utilities and

approved by the Federal Energy Regulatory Commission ("**FERC**"). The combination of engineering and market expertise necessary to oversee and regulate such integrated markets is best achieved by regulators. This regulatory structure assures American citizens have access to reliable electricity, arguably, a fundamental element of modern existence.

ISO-RTO markets are regulated quite differently from markets that the CFTC has traditionally regulated. Importantly, the regulatory architecture of the ISO-RTO markets contains unique measures to balance the interests of market participants. The unique regulatory architecture of the ISO-RTO markets does not require, and might undermined by, private rights of actions under the CEA.

Under the FPA, the interests of all market participants are weighed during the deliberative process that results in the tariffs under which each RTO or ISO must operate. Each tariff is designed, in part, to have a set of standards that are "just and reasonable" for the market. Recognition of this previous deliberative process is a policy driver behind the "filed rate doctrine" to which Commissioner Giancarlo refers in his dissent to the Proposed Amendment.[3] Thus, in a meaningful way, the tariffs already account for the interests of market participants in a way that renders private rights of action unnecessary.

The regulatory architecture for the ISO-RTO markets also addresses certain reliability concerns that are different from the markets the CEA historically governs. For example, many of the ISO-RTO markets have certain rules that limit the bidding or offering for electricity or generation. These rules are designed to assure that electricity suppliers will make a return on their capital investments. Thus, the regulatory architecture and the trading rules reflect a nuanced appreciation of how the electricity markets influence investment decisions, which are necessary components for assuring that enough electricity supply exists to meet consumers' current and future needs. Before introducing private rights of actions into the regulatory architecture of the ISO-RTO markets, the Commission ought to fully assess the impact of private rights of actions on the policies underlying the trading rules of such markets.

The electricity markets also contain unique remedies that support the regulatory architecture. FERC has the authority to direct profit disgorgement or resettle markets to benefit ratepayers or other market participants when abusive trading behavior occurs because the FPA specifically allows for resettlement of past market outcomes where trading involves a violation of the rate on file with FERC. Even a successful private litigation will not – and cannot – adequately protect ratepayers from the harm of abusive trading activity. The requirement that public utilities have a rate on file, and the ability of FERC to order resettlements if there is a violation of the rate on file, is entirely unique and warrants disparate treatment of markets that FERC primarily regulates.

The power markets differ from other commodity markets, among other ways, in that the infrastructure needed to operate such markets is vast and complex, and the markets are heavily

[3] Proposed Amendment at 30,255.

reliant on a knowledgeable central operator and regulator. The concentration of oversight with only regulators promotes decision-making that takes into account the efficient operation of the physical systems and the market viewed as a whole.[4] That is, the decisions of regulators weigh not only the interests of individual market participants or segments of the market, but also effects to the entire system, including the prices retail ratepayers pay. Nothing precludes individual market participants from reporting suspected market misconduct to ISOs/RTOs or state and federal regulators, who have the infrastructure to appropriately regulate such markets. Given that the electric system and its related markets are fundamental to the U.S. economy, the concentration of regulatory authority ensures that the interests of a few are kept from materially disrupting the interests of all.

The reservation of monitoring and policing functions to FERC, the Public Utility Commission of Texas ("**PUCT**"), and, through FERC-approved tariffs, the ISOs and RTOs enables them to shape the enforcement policies and procedures appropriate to the ISO-RTO markets. These regulatory bodies are most familiar with the trading in their markets and the consequences of such trading and the various oversight and enforcement policies. Their enforcement policies and decisions also inform which parties enter the markets and how they behave. If market participants were to perceive enforcement policies as overreaching and overly burdensome, such policies might cause market participants to reduce otherwise legitimate trading.

The Working Group notes that FERC, the CFTC, the PUCT, and the ISOs and RTOs each have multiple oversight tools to address activity by a single firm. Unlike private litigants, they are not forced to rely solely on litigation to address suspicious or uncertain trading activity. Litigation is costly and imposes upon the market indirect, but still material, costs. Ultimately, ISOs and RTOs may be involved in any litigation, and its members, and, thus, ultimately consumers, would bear unnecessary litigation costs.

Congress endorsed the benefits of concentrating market oversight when it did not include a private right of action under the FPA. Those benefits are in the public interest. If a private right of action were present under the FPA, participants in such markets would not have the benefit of entirely centralized regulation. It is difficult, if not impossible, to defend a plurality of individual, self-motivated interests as a superior regulatory design for the oversight of the critically important, complex infrastructure and the related markets for electricity in the U.S.

B. Congress's Intent to Place Regulatory Oversight of the ISO-RTO Markets with Regulators is Sufficient to Find a Necessary "Public Interest" to support an exemption under CEA Section 4(c)(6).

The Commission, in the Proposed Amendment, identifies the requirement of CEA Section 4(c)(6) that an exemption "be consistent with the public interest and the purposes of [the

[4] This holistic approach includes weighing optimal outcomes in one part of the market that may appear – at least when viewed in isolation – to cause inefficient or irrational outcomes in another portion of the co-optimized real-time markets.

CEA]." As discussed above, the Commission should recognize Congress' intent to have the public power markets regulated solely by regulators. The Commission also should recognize the public interest that underlies Congress' intent.

There is little, if any, public interest served by the adoption of private rights of action with respect to activity in the ISO-RTO markets. Arguments for allowing private rights of action based on a policy goal of balancing interests in a marketplace are inapposite in the specific case of the ISO-RTO markets. No statute or regulation has removed a legal right of redress for a private actor. Furthermore, such private actors are free to inform regulators of alleged harmful conduct (and often do). Moreover, the mere supplementing of agency enforcement resources is not a sufficient justification for granting private rights of action for ISO-RTO market activity, particularly when there are now at least three separate government entities that monitor and regulate conduct in such markets, one of which has a unique remedy to protect retail and end-users consumers from the impact of abuse.[5]

The Commission points to the legislative history of CEA Section 22 in which Congress found that private rights of action under the CEA are "critical to protecting the public and fundamental to maintaining the creditability of the futures market."[6] However, as discussed above the electricity markets are quite distinct from the futures markets. Yet, the Commission proffers no explanation on why the policy drivers for private rights of action in one market continue with equal force in a very different market.

Respecting the differences between the CEA and FPA and the markets each primarily applies to is exactly in the public interest. The Commission need not find a statutory conflict with the CEA to withhold private rights of action under CEA Section 22; it merely needs to find that doing so is in the public interest. The CEA and FPA may not be in conflict, as the Commission asserts.[7] The statutes are different, as the Commission finds.

There is no evidence that Congress, when formalizing a jurisdictional overlap between FERC and the CFTC under the Dodd-Frank Act, had any specific intent to thrust the CEA's private right of action into the ISO-RTO markets. Congress was silent on the subject. The Commission did not find any such intent of Congress in the Proposed Amendment. At best, Congress appears to have given the CFTC jurisdiction over products that might be characterized as swaps, but largely left it to the CFTC, FERC, and the PUCT to work together to delineate responsibilities for applicable markets.

---

5 The presence of multiple regulators distinguishes the ISO-RTO markets from other commodity derivatives markets. In the ISO-RTO markets, at least two federal regulators have enforcement power. The ISOs and RTOs themselves are not for-profit enterprises and strictly constrained by the authorizing tariffs. Thus, ISO-RTO markets are pervasively regulated.

6 Proposed Amendment at 30,248.

7 *Id.*

The Working Group submits that the Commission is in the best position to determine when prohibitions contained in the CEA should be applied to activity in a market that it does not primarily regulate. This is an integral part of the mission that Congress left to the Commission and FERC to delineate their boundaries. Congress said nothing about leaving these decisions in the hands of private litigants.

C. Additional Pragmatic and Policy Justifications Exist for the Commission to Exempt Affirmatively ISO-RTO Markets From Private Rights of Action.

The CFTC received new enforcement authority under the Dodd-Frank Act, which courts are beginning to review and further define. The private rights of actions under CEA Section 22 allow private litigants to further this judicial process of shaping the Commission's enforcement power. However, the Commission is typically not a party to the decision of a private party to litigate. Given the overlap between the Commission's and FERC's jurisdiction, the Commission should consider whether there might be value in retaining the decisional authority to advance cases that will define the enforcement of the CEA and CFTC regulations for activity in ISO-RTO markets rather than allowing cases brought by private litigants to do so.

If the Proposed Amendment were to be finalized, it is possible that at least four parties might simultaneously advance administrative and legal actions. That is, for any particular alleged misconduct, the CFTC, FERC, the ISO/RTO, and private litigants all might advance investigations or lawsuits simultaneously.[8] There is no obligation for such parties to coordinate, and it is possible that they might see benefits for themselves in taking action, even if detrimental to others. The Working Group submits that, while regulators have experience coordinating their enforcement efforts, there is no certainty that their coordination with one or more private litigants will be successful, setting aside all questions of fairness for the alleged perpetrator.[9]

---

[8] The Working Group notes that the Commission framed its request for comment in respect of frivolous litigation. However, potential congestion among regulators and plaintiffs still might exist where private litigation is not frivolous.

Moreover, the Commission identifies that one policy behind CEA Section 22 is the provision or supplement to Commission enforcement actions. Proposed Amendment at 30,247. Arguably, this policy would be satisfied by any FERC enforcement action.

[9] The Working Group notes that the *Total* litigation is a current day example of a private litigant acting simultaneously with a regulator. *C&C Trading vs. Total Gas & Power N. America*, USDC SDNY (Apr. 14, 2016).

III. CONCLUSION.

The Working Group appreciates this opportunity to provide comments regarding the Proposed Amendment and respectfully requests that the CFTC consider the comments set forth herein.

If you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ David T. McIndoe
David T. McIndoe
Alex S. Holtan
Counsel to The Commercial Energy Working Group