



June 15, 2016

**Filed via** <http://comments.cftc.gov>

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:

GDF SUEZ Energy North America, Inc. (“GSENA”) 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”).<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> *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).

<sup>2</sup> 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).

GSENA is part of the ENGIE S.A. family of companies. ENGIE S.A., a French *société anonyme*, is engaged internationally in a number of businesses, including production, transmission and distribution of electricity, power marketing, production, transportation and distribution of natural gas, and the transportation and distribution of LNG, as well as development of energy projects around the world. GSENA, through its subsidiaries and affiliates, owns and operates electric generation and cogeneration facilities, natural gas and LNG facilities, a retail energy provider, and participates in wholesale commodities markets to schedule and hedge energy flows related to these operations. As such, GSENA has a direct interest in the Proposal.

GSENA is a member of the Electric Power Supply Association (“EPSA”), the national trade association representing leading competitive power suppliers, including generators and marketers. GSENA supports the comments filed by EPSA regarding the Proposal, and reiterates EPSA’s position that the Proposal is not in the public interest and should not be adopted. In addition, GSENA would like to emphasize the following comments.

#### The Proposal Will Open the Door to Collateral Attacks on Established Regulatory Systems

RTO/ISO markets are carefully structured by regulators and stakeholders, with the aim of creating and fostering well-functioning competitive markets. Allowing private parties to sue market participants or even the RTO/ISOs themselves would represent a threat to these carefully constructed markets. One need look no further than the *Aspire Commodities* litigation<sup>3</sup>—in which GSENA was targeted as a defendant—for an example of how the Proposal, if adopted, could be used as a tool for such an attack. The *Aspire* suit was part of those plaintiffs’ broader attack on ERCOT’s market design and the PUCT’s considered judgment because it openly targeted the PUCT’s “small fish” rule—a rule designed to benefit consumers. The *Aspire* plaintiffs challenged the small fish rule through a petition with the PUCT<sup>4</sup>, but after the PUCT reaffirmed the rule<sup>5</sup>, the plaintiffs then filed their federal lawsuit against GSENA and expressly targeted the rule in that lawsuit. Of note, the district court dismissed the case based on the plain language of the existing RTO Order that exempts covered transactions from private actions under the CEA.<sup>6</sup> *Aspire* appealed to the US Court of Appeals for the Fifth Circuit, which upheld the district court and denied rehearing.<sup>7</sup>

By allowing such collateral attacks in the future, the Proposal, if adopted, would make it impossible for market participants – in this instance ERCOT participants - to rely on well-

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<sup>3</sup> *Aspire Commodities LP v. GDF SUEZ Energy North America, Inc.*, No. 4:14-cv-01111, Dkt. No. 10 (S.D. Tex. Filed April 22, 2014)

<sup>4</sup> PUCT Docket. No. 42424-1, Petition for Rulemaking to Eliminate Section §25.504(c) (Apr. 21, 2014).

<sup>5</sup> PUCT Docket No. 42424-11, Order Denying Petition for Rulemaking (June 20, 2014).

<sup>6</sup> *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

<sup>7</sup> *Aspire Commodities LP v. GDF SUEZ Energy North America Inc.*, ---Fed. App’x---, No. 15-20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

established rules and would change the way those markets work. This in turn could have a significant chilling effect on appropriate market behavior by participants, hindering the proper functioning of critical electricity markets and ultimately harming consumers.

#### There is No Market Oversight Gap to be Filled by Private Rights of Action

According to FERC's prior comments before the Commission in the Southwest Power Pool matter<sup>8</sup>, RTO/ISOs are "regulated to a greater extent than other commodity markets" and indeed "are regulated by FERC more extensively than other public utilities." ERCOT is similarly subject to extensive regulation by the PUCT. Further, RTO/ISOs are subject to oversight by independent market monitors and to the CFTC's authority over interstate commerce. In short, there are multiple layers of diligent, effective oversight of RTO/ISOs in place and no "gap" to be filled by private litigants. Moreover, these regulatory authorities have the ability to fully investigate behavior in their subject markets, and to order disgorgement of unjust profits and levy penalties on wrongdoers. Finally, aggrieved parties already have established avenues through which complaints or allegations of wrongdoing can be addressed. Market participants can file a complaint through Section 206 of the Federal Power Act, or raise their concerns to FERC via FERC's complaint "Hotline." Likewise, independent market monitors can, and do, act on complaints lodged by market participants, conducting their own investigations of alleged wrongdoing. There is no shortfall in regulatory oversight that a private plaintiff can fill, nor is there a lack of adequate remedies for market participants who have suffered harm as a consequence of another's manipulative behavior. "Deputizing" private litigants to pursue alleged wrongdoers via private suits will add an unnecessary additional layer of costly and conflicting oversight to markets that are already well-policed.

#### Additional Regulatory and Litigation Burdens will Disproportionately Impact End-Users

As stated above, "deputizing" private litigants to pursue alleged wrongdoers will add an unnecessary additional layer of costly and conflicting oversight. End-Users, including entities currently participating in physical markets through the operation of generating facilities, stand to face the highest regulatory burdens. Generators must comply with the operating rules of each ISO/RTO in which they generate and compliance with those rules both impact and are impacted by energy market conditions as well as the operating conditions of specific physical assets. Reliable operation of physical assets is the primary concern of End-Users, but End-Users also participate in financial markets in order to secure stable returns on investments.

Participation in both physical and financial markets can expose End-Users to potentially conflicting regulatory requirements even when participation in financial markets is limited to hedging physical assets. In order to avoid conflicting regulatory regimes or possible private

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<sup>8</sup> *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*, 80 Fed. Reg. 29490 (May 21, 2015) ("SPP Proposed Order").

litigation owing to the lawful compliance with rules governing physical assets, End-Users may avoid financial markets altogether or alter behavior in physical markets in such a way that does not provide adequate signals for investment in new generating capacity. This outcome would result in reduced investment in new efficient and environmentally beneficial generation capacity as well as potentially increase cost of energy to consumers over the long term. Those commodity market participants that operate only in the financial markets, such as traders, face no exposure to private litigation through the operation of generation facilities in compliance with tariffs and prudent operator practices.

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

Respectfully submitted,



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