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Commissioner

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## *Public Utility Commission of Texas*

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June 15, 2016

By electronic submission

Chris Kirkpatrick  
Secretary of the Commission  
U.S. Commodities Future Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
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:

On behalf of and as authorized by the Public Utility Commission of Texas (PUC),<sup>1</sup> the undersigned appreciates the opportunity to comment on the 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 (the Proposed Amendment)<sup>2</sup> published by the Commodities Futures Trading Commission (Commission or CFTC) on May 16, 2016. In this proceeding, the Commission proposes to amend the April 2013 order exempting specified electric

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<sup>1</sup> Chairman Donna L. Nelson, Commissioner Kenneth W. Anderson, Jr., and Commissioner Brandy Marty Marquez.

<sup>2</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).



energy transactions in designated Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), including the Electric Reliability Council of Texas (ERCOT),<sup>3</sup> from certain provisions of the Commodity Exchange Act (CEA) (the RTO-ISO Order).<sup>4</sup> Specifically, the CFTC now seeks to remove from the RTO-ISO Order the previously granted exemption from section 22 of the CEA (Section 22), which provides an explicit, civil private right of action to litigants in federal court.<sup>5</sup>

The PUCT is deeply concerned that the Proposed Amendment will have an adverse effect on the ERCOT market and the PUCT's regulatory oversight of that market. The Proposed Amendment's allowance of Section 22 claims has the potential to disrupt severely the market rules that support the efficient and economical operation of the ERCOT market by creating uncertainty, impairing liquidity, and imposing unnecessary cost on retail consumers of electricity. By this letter, the PUCT provides comments addressing this concern.

## I. BACKGROUND

Acting under authority delegated under the Public Utility Regulatory Act (PURA), the PUCT is responsible for ensuring the reliability of the ERCOT system and protecting the public interest inherent in the production and delivery of electricity among generators and all other market participants in the electricity sector.<sup>6</sup> The PUCT oversees ERCOT, the independent system operator for the electric grid, and the unbundled and restructured energy-only market operated on that grid. The ERCOT region covers approximately 75% of the Texas land mass and 90% of the electricity consumed in the state. Importantly, the PUCT is responsible for detecting and taking enforcement action against market manipulation and other forms of market power abuse within the ERCOT region.<sup>7</sup> Unlike other RTOs, ERCOT's market rules are subject to the PUCT's exclusive jurisdiction rather than Federal Energy Regulatory Commission (FERC) oversight.

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<sup>3</sup> ERCOT is an ISO, but for the purposes of these comments, statements regarding to RTOs are equally applicable to ISOs and the terms are used interchangeably.

<sup>4</sup> 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) (RTO-ISO Order).

<sup>5</sup> 7 U.S.C. § 25.

<sup>6</sup> Public Utility Regulatory Act, TEX. UTIL. CODE ANN. § 39.151(d) (Vernon & Supp. 2012).

<sup>7</sup> PURA §§ 39.151 and 39.1515.

ERCOT's primary obligations are to operate reliably the electric grid within the ERCOT power region and to administer the sale and purchase of electricity in its deregulated wholesale electric market. Reliable operation of the electric grid not only involves the economical dispatch of electricity across the power region, but also requires that a sufficient supply of electricity is procured to serve load on a day-to-day basis. In its role facilitating the wholesale purchase and sale of electricity, ERCOT is responsible for implementing pricing mechanisms built into the market as well as final settlement of all financial transactions in the day-ahead and real-time markets. ERCOT is the central counterparty for all transactions settled in the wholesale market pursuant to its protocols and is deemed to be the sole buyer from each seller, and the sole seller to each buyer, of all energy, ancillary services, reliability unit commitments, emergency response service, and other products and services for which ERCOT may pay or charge market participants in the day-ahead and real-time energy markets. In this way, ERCOT is inextricably involved in the routine operation of the ERCOT wholesale market as a party to myriad transactions that have an effect on market prices.

## **II. DETRIMENTAL EFFECTS OF THE PROPOSED AMENDMENT ON ERCOT**

Since its issuance in 2013, the RTO-ISO Order has served ERCOT and the other RTOs well. The RTO-ISO Order provides certainty regarding the boundaries of regulatory authority over activities in the various electricity markets. Because the PUCT comprehensively regulates the ERCOT wholesale market, the RTO-ISO Order's exemptive relief protects ERCOT market participants against duplicative and potentially conflicting regulation by multiple government agencies. At the same time, the RTO-ISO Order preserves the CFTC's ability to enforce the anti-fraud and anti-manipulation provisions of the CEA against bad actors. The Proposed Amendment threatens the certainty of this regulatory scheme, leaving ERCOT's market structure vulnerable to inconsistent federal court decisions. Putting aside the uncertainty created by conflicting decisions, unlike power market regulators, federal district courts may not appreciate either the purpose of certain market rules or the deleterious effects on the power markets that can result.

### **A. Private Section 22 Claims under the CEA Would Compromise the PUCT's Oversight Authority Over ERCOT**

Allowing private parties to litigate causes of action under Section 22 of the CEA could have harmful effects on the oversight authority of the PUCT as well as the administration and operation of the ERCOT market. ERCOT is unique in that it is the sole energy-only market in the United States, meaning that the PUCT does not impose a system-wide mandatory minimum reserve capacity margin on load serving entities or require ERCOT to operate a centralized forward capacity market to support such a required minimum capacity reserve margin. These unique attributes of ERCOT require a regulator with intimate knowledge of the ERCOT market to develop a regulatory structure that encourages competition, ensures reliability, and protects consumers. Given the energy-only nature of ERCOT, it is particularly important for the PUCT to promote competitive market mechanisms that allow energy prices to ensure adequate generation participation.

Throughout the evolution of the ERCOT market, the PUCT has established and administered a comprehensive regulatory scheme covering the behavior of market participants, which include competitive retail electric providers, transmission and distribution service providers, and competitive electric generators. PUCT rules extensively address the components of ERCOT's wholesale market design,<sup>8</sup> pricing safeguards to protect the public,<sup>9</sup> standards for monitoring activities of wholesale market participants,<sup>10</sup> prohibited activities for market participants,<sup>11</sup> mechanisms to provide for resource adequacy,<sup>12</sup> and reliability during energy emergencies.<sup>13</sup> These rules have been implemented after careful consideration of stakeholder input to ensure that oversight rules appropriately balance the varying interests of the different types of ERCOT market participants, including consumers.

Furthermore, ERCOT has its own protocol development process to implement market rules providing for efficient, transparent, and fair electricity transactions.<sup>14</sup> The ERCOT protocols

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<sup>8</sup> 16 TAC § 25.501.

<sup>9</sup> 16 TAC § 25.502.

<sup>10</sup> 16 TAC § 25.503.

<sup>11</sup> 16 TAC § 25.503(g).

<sup>12</sup> 16 TAC § 25.505.

<sup>13</sup> 16 TAC § 25.507.

<sup>14</sup> The ERCOT market rules are available at [www.ercot.com/mktrules](http://www.ercot.com/mktrules).

address a broad set of issues related to the administration of the electricity market, ranging from reliability requirements for generation and transmission companies to the settlement of financial transactions between buyers and sellers. Like PUCT rules, stakeholders provide their perspective in the development of the ERCOT protocols to achieve a coherent and workable protocol framework.

Private causes of action brought under the CEA have the potential to compromise carefully structured energy markets established by regulators and RTOs because such private claims may collaterally attack the rules that constitute the structure of a market's regulatory scheme. If private litigants are able to raise Section 22 claims, then those claims may be premised on activities undertaken pursuant to market rules that allow or prohibit particular behavior within ERCOT or other RTOs, as applicable. Another problem with this type of claim is that it may allow a litigant to challenge a market rule in a federal forum where the regulator and/or RTO may not be a party to the lawsuit, and thus would have no voice to defend the market rule. Regulators and RTOs have invested considerable time, effort, and thought in the development of their respective market rules. However, the critical objectives of those market rules could be significantly compromised if a federal court were to declare certain activity undertaken in compliance with local rules problematic under the CEA based on an interpretation of federal law brought by a private litigant seeking damages. This harm could be compounded if the various federal courts were to reach conflicting or inconsistent determinations regarding market participant behavior under the CEA.

An equally troubling aspect of the CFTC's proposal to allow private claims under Section 22 is that a private litigant could sue an RTO directly for activities undertaken in that RTO. This is particularly problematic for ERCOT because ERCOT is a non-profit entity whose costs are funded by load serving entities. Accordingly, ERCOT funds devoted to defending private lawsuits brought under the CEA would be imposed on load serving entities that, in turn, would be passed to their customers, ultimately raising the cost of electric services for everyday consumers.<sup>15</sup>

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<sup>15</sup> For purposes of these comments, the terms customer and ratepayer are used interchangeably. However, technically, customers are those that are served by a competitive retail electric provider while ratepayers are the customers of public power entities such as electric cooperatives and municipal utilities. In spite of the distinction, both ratepayers and customers would ultimately be responsible for funding ERCOT's legal costs associated with defending CEA claims.

## **B. Theories of Liability and Potential CEA Defendants**

The scope of potential liability under Section 22 is incredibly broad. Any person may be found liable for a violation of the CEA for engaging in specified transactions described in Section 22 or a person may be liable if that person “willfully aids, abets, counsels, induces, or procures the commission of a violation of [the CEA]” through a specified transaction.<sup>16</sup> Potential violations include the manipulation of the price of a commodity underlying a regulated contract or swap.<sup>17</sup> Because ERCOT plays a central role in activities that affect pricing outcomes for electricity, a potential claim against ERCOT in a Section 22 lawsuit could come in any number of unknowable permutations. Conceivably, any plaintiff could raise a claim in which ERCOT activity resulted in price formation (no matter how routine that activity may be) because Section 22 broadly provides for potential liability as an aider or abettor.

By way of example, in January of this year, a private party brought a complaint at the PUCT against ERCOT alleging that ERCOT incorrectly calculated electricity prices in the real-time market because of inaccurate transmission line rating data provided by a transmission utility. The complainant asserted that the inaccurate data caused ERCOT to determine incorrectly congestion on the line, which led ERCOT to dispatch more expensive generation sources around the congestion to satisfy demand.<sup>18</sup> The complaint included a separate claim alleging that an ERCOT hardware failure led to incorrect calculation of locational marginal prices for electricity for a period during an operating day. It is not inconceivable that a plaintiff could bring these types of claims against ERCOT and the transmission and distribution utility directly in federal court if the Proposed Amendment were adopted, no matter how groundless their assertions.<sup>19</sup> Because Section 22 creates a broad opening for potential liability, the limits of theories of liability would only be defined by the creativity of the plaintiff’s attorney.

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<sup>16</sup> 7 U.S.C. § 25.

<sup>17</sup> 7 U.S.C. § 25(a)(1)(D)(ii).

<sup>18</sup> Complaint of Raiden Commodities, LP Against Electric Reliability Council of Texas, PUCT Docket No. 45542 (filed Jan. 25, 2016). Filings relating to this PUCT docket and other PUCT dockets are available at [puc.texas.gov/industry/filings/Default.aspx](http://puc.texas.gov/industry/filings/Default.aspx).

<sup>19</sup> The PUCT expresses no opinion on the merits of the complaint (which was subsequently withdrawn) in this letter, and expressly disclaims any assertion that the complaint or any similar complaint would be actionable in federal court as a Section 22 claim.

A particular risk in this hypothetical lawsuit would be any judicial determination involving ERCOT rules regarding economic dispatch of electricity. ERCOT implements specific protocols to flow electricity effectively and economically throughout the ERCOT system.<sup>20</sup> But in a federal court, there is no guarantee that a judge will appreciate the value of these protocols to the ERCOT market when rendering a decision; instead, the judge's primary focus will be on whether or not liability attaches under the CEA. Accordingly, the determinations of the lawsuit could affect ERCOT's ability to comply with its own protocols, depending on the nature of those determinations. Furthermore, because the complaint could involve a claim against a transmission utility for submitting incorrect transmission line information to the RTO, the utility would be forced to incur significant litigation expenses and liability exposure for which recovery would likely be sought from ratepayers. Currently, such utility behavior is subject to the exclusive enforcement authority of its regulators. Finally, ERCOT would likely be responsible for costs to defend the lawsuit as well as any judgment rendered against it. These costs would ultimately be passed on to everyday Texas electricity consumers in the form of higher rates.

The Proposed Amendment also calls into question market participant behavior in ERCOT because it may invite private parties to challenge intraday offer curve bid changes in the real-time market.<sup>21</sup> ERCOT, like many other RTO's,<sup>22</sup> allows suppliers to change their energy offers throughout the operating day.<sup>23</sup> This practice allows suppliers to respond to market conditions—such as changes in fuel costs—so that operating costs can be reflected in a new offer. Furthermore, intraday bidding permits off-line generation, such as quick-starting combustion turbines, to respond to increasing real-time prices thus maintaining both system reliability and minimizing price increases. Recognizing the value of real-time bid flexibility, the FERC has endeavored to coordinate the scheduling process of the natural gas pipeline and electric generation industries<sup>24</sup> and approved same day bidding in real-time operations.<sup>25</sup> This greater flexibility allows RTOs to

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<sup>20</sup> See ERCOT Nodal Protocol 6.1 *available at* [ercot.com/mktrules/nprotocols/current](http://ercot.com/mktrules/nprotocols/current).

<sup>21</sup> Again, the PUCT disclaims any assertion that market participant submission of same-day offer curve changes would give rise to an actionable claim under Section 22.

<sup>22</sup> See CAISO Bidding Rules Enhancements Issue Paper, 3 (Dec. 3, 2014) *available at* <https://www.caiso.com/Documents/IssuePaper-BiddingRulesEnhancements.pdf>.

<sup>23</sup> ERCOT Nodal Protocol 4.4.9.3.

<sup>24</sup> *Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, Order No. 809, 151 FERC ¶ 61,049 (Apr. 15, 2016).

<sup>25</sup> See, e.g., *Order Conditionally Accepting Tariff Revisions*, 145 FERC ¶ 61,014 (Oct. 3, 2013).

generate locational marginal prices that more accurately reflect suppliers' operational cost to serve load. Transparent price signals in ERCOT are particularly important because they inform decisions about where to invest in and locate generation within the system, a critical aspect of ensuring generation supply adequacy in an energy-only market. However, a Section 22 lawsuit brought against a market participant for making same-day offer changes has the potential to chill the bidding behavior of other participants. This could lead to a distortion of price signals that results in inadequate system capacity.

***C. Aspire Commodities, LP v. GDF Suez Energy N. Am. Inc.***

Recently and more concretely, the Fifth Circuit addressed a private claim brought under the CEA against an ERCOT market participant.<sup>26</sup> Although the court held that the RTO-ISO Order precluded such a claim, the case provides an example of the potential confusion and harm that private CEA Section 22 claims could inflict on the ERCOT market. The plaintiffs in *Aspire* alleged that the defendant engaged in manipulative behavior by submitting offers for electricity in ERCOT with the intent to manipulate prices in the derivative commodities market.<sup>27</sup> The plaintiffs asserted that the defendant was able to engage in such behavior because of a provision of the PUCT Substantive Rules that deems electricity generators controlling less than 5% of the total installed generation capacity in the ERCOT region as not having market power, which is a prerequisite for exercising market power abuse. This rule is commonly referred to as the "Small Fish Rule" and is so called in these comments.

The Small Fish Rule serves an important purpose in the ERCOT market and any private party lawsuit that jeopardizes the validity of the Small Fish Rule would frustrate that purpose. The PUCT adopted the Small Fish Rule to provide certainty to small suppliers that they would not be found to have market power.<sup>28</sup> The Small Fish Rule, which has been in effect for almost ten years, thus furthers PURA's objective to develop a robust, competitive wholesale market. The Small Fish Rule does so by encouraging increased participation because it shields small new entrants in

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<sup>26</sup> *Aspire Commodities, LP v. GDF Suez Energy N. Am. Inc.*, No. 15-20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

<sup>27</sup> *Id.* at 1.

<sup>28</sup> Rulemaking on Wholesale Electric Market Power and Resource Adequacy in the ERCOT Power Region, PUCT Project No. 31972, Order Adopting Amendment to §25.502, New § 25.504 and New § 25.505 as Approved at the August 10, 2006 Open Meeting at 89-90 (Aug. 24, 2006).



the generation market from claims of market power abuse by allowing smaller generation owners greater flexibility in their energy bidding behavior. This, in turn, permits energy prices to reach levels that provide the opportunity for a sufficient return on investment in order to further encourage new generation, which results in enhanced competition and system reliability.<sup>29</sup> Because it removes potential uncertainty that might otherwise discourage the entry of new generation, the Small Fish Rule plays an important part in ERCOT's energy-only market. The PUCT market rules, including the Small Fish Rule, are designed to strike the appropriate balance to allow open, unrestricted competition among new generation resources while also preventing market power abuse. It is precisely that balance that the PUCT sought to achieve by implementing the Small Fish Rule after careful consideration of comments presented by interested parties in a rulemaking proceeding that was commenced over a decade ago.<sup>30</sup> History has shown that this approach has succeeded in delivering competitive market outcomes.<sup>31</sup>

Upon adoption of the Small Fish Rule, the PUCT stated that it was “not a free pass for entities to abuse the market in whatever way they wish.”<sup>32</sup> The PUCT explained that the independent market monitor would continue to examine the behavior of small suppliers for instances of local market power and advise the commission of possible violations no matter the size of the entities.<sup>33</sup> Indeed, the ERCOT real-time market itself operates to discipline smaller operators because of the lost opportunity cost imposed upon such market participants. Their risk of missing periods of scarcity prices by withholding power is significantly greater than power producers with larger fleets. Lastly, it is worth mentioning that the Small Fish Rule does not implicate federal antitrust laws because a refusal to sell in the absence of collusion does not constitute a restraint of trade.<sup>34</sup>

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<sup>29</sup> PURA 31.001(c) (“The development of a competitive wholesale market that allows for increased participation by electric utilities and certain nonutilities is in the public interest.”); Mark Watson, *Texas PUC Urged to Abolish “Small Fish” Rule*, MEGAWATT DAILY, Apr. 23, 2014 at 1.

<sup>30</sup> Rulemaking on Wholesale Electric Market Power and Resource Adequacy in the ERCOT Power Region, PUCT Project No. 31972.

<sup>31</sup> 2015 State of the Market Report for the ERCOT Wholesale Electricity Markets, Potomac Economics, at i, available at [www.potomaceconomics.com/uploads/ercot\\_documents/2015\\_ERCOT\\_State\\_of\\_the\\_Market\\_Report.pdf](http://www.potomaceconomics.com/uploads/ercot_documents/2015_ERCOT_State_of_the_Market_Report.pdf). Earlier State of the Market Reports are available at [potomaceconomics.com/index.php/markets\\_monitored/ERCOT](http://potomaceconomics.com/index.php/markets_monitored/ERCOT).

<sup>32</sup> Rulemaking on Wholesale Electric Market Power and Resource Adequacy in the ERCOT Power Region, PUCT Project No. 31972, Order Adopting Amendment to §25.502, New § 25.504 and New § 25.505 as Approved at the August 10, 2006 Open Meeting at 90 (Aug. 24, 2006).

<sup>33</sup> *Id.*

<sup>34</sup> *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Recently, the PUCT had the opportunity to reconsider the Small Fish Rule and, after extensive stakeholder comment and study, declined to do so. In April of 2014, Raiden Commodities, LP filed a petition asking the PUCT to eliminate or modify the Small Fish Rule.<sup>35</sup> Interestingly, in that proceeding, all commenting stakeholders except the petitioner agreed that the Small Fish Rule should be retained without modification.<sup>36</sup> These stakeholders represented a variety of interests in the electricity sector, including public power providers,<sup>37</sup> small and large private generators, and consumers. However, it is entirely unclear whether a federal court would have taken these facts into consideration if the suit had proceeded to an analysis on its merits.

In sum, ERCOT benefits from the certainty that the Small Fish Rule provides because it allows market participants to rely on a clear and stable market rule that enhances competition in the ERCOT market. However, if activity undertaken in compliance with the Small Fish Rule were subject to judicial scrutiny under a private CEA claim then the federal proceeding could raise doubts about the prudence of relying on the rule. The effect would be to impair a market rule that is designed to benefit electricity consumers.

#### **D. Application of the Filed Rate Doctrine and the CEA Savings Clause**

In its questions to commenters, the Commission specifically asked how lawsuits such as the hypothetical ones above could survive a motion for summary judgment based on the filed rate doctrine. While the PUCT, ERCOT, and other market participants would likely advocate for dismissal based on the filed rate doctrine among other defenses, it is unclear whether the doctrine would apply in this scenario or others. The U.S. Court of Appeals for the Fifth Circuit has applied the doctrine to preclude a claim of a retail electric provider against a generator that was alleged to have manipulated the ERCOT market.<sup>38</sup> However, even that case noted that the filed rate doctrine is susceptible to exceptions.<sup>39</sup> Accordingly, it would be unrealistic to characterize the filed rate

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<sup>35</sup> Petition of Raiden Commodities, LP for Rulemaking to Remove § 25.504(c), the Exemption from the Market Power Definition for Entities Controlling Less Than 5% of the Generation Capacity in the ERCOT Region, PUCT Project No. 42424, Order Denying the Petition for Rulemaking (Jun. 20, 2014).

<sup>36</sup> *Id.* at 11.

<sup>37</sup> In Texas, public power providers include electric cooperatives (both those who own generation and those who do not), municipal utilities (who own generation), and municipal distribution-only utilities that purchase power in the ERCOT wholesale market.

<sup>38</sup> *Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503 (5th Cir. 2005).

<sup>39</sup> *Id.* at 510 (quoting *City of Groton v. Conn. Light and Power Co.*, 662 F.2d 921, 929 (2nd Cir. 1981)).

doctrine as an iron-clad defense in Section 22 lawsuits, especially considering the numerous forms those lawsuits may take.

Additionally, the Commission asked about the effect of the savings clause captured in section 2(a)(1)(I)(i) if a federal court were to determine that a covered transaction under the RTO-ISO Order were a swap. By its terms, it appears that the savings clause merely preserves pre-existing jurisdiction of utility regulators. Accordingly, the Proposed Amendment only adds to jurisdictional uncertainty in this regard because it sets up a scenario in which it is unclear whether an RTO or the regulators retain authority to regulate the covered transaction or whether the CFTC has exclusive authority because it is a swap.

#### **E. The Current Oversight Regime Over ERCOT Should Remain In Place**

Proper oversight authority for market participant behavior in ERCOT rests with the PUCT, not with private litigants seeking to pursue private claims for personal economic benefit under the CEA in federal courts. The PUCT has significant experience and expertise in regulating the activities of market participants in the ERCOT market. Market participants in ERCOT aggrieved by the activities of other participants may bring complaint actions to ERCOT and the PUCT to adjudicate their claims. In certain situations, such as a complaint against ERCOT, cases may be brought directly to the PUCT. In the case of complaints brought to ERCOT, ERCOT decisions in those cases are then subject to PUCT review on appeal. If the non-prevailing party is dissatisfied with the PUCT's determination then it may seek appellate review in Texas state courts. This complaint process is designed to accommodate claims of fraud and market manipulation, and it does so with proper regard for the mechanisms that support the efficient operation of the ERCOT wholesale market. This process has served the ERCOT market well for over 20 years.

By law, the PUCT must select an independent market monitor to detect and prevent market manipulation strategies and recommend measures to enhance the efficiency of the ERCOT wholesale market.<sup>40</sup> ERCOT's independent market monitor works closely with the PUCT's Oversight and Enforcement Division to ensure that market participants act in accordance with state law, PUCT regulations, and ERCOT market rules. The PUCT's Oversight and Enforcement

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<sup>40</sup> PURA §§ 39.1515 and 39.157. The independent market monitor for ERCOT is Potomac Economics.


division and the independent market monitor review all facets of ERCOT activity, including without limitation, instances of potential ERCOT market manipulation. Importantly, the PUCT's Oversight and Enforcement Division and the independent market monitor undertake review of market participant behavior with a view toward upholding the rules that support the ERCOT market to advance the common benefit of all market participants and electricity consumers. Additionally, these entities have an intimate understanding of the unique attributes of the ERCOT market along with a contextual understanding of how PUCT and ERCOT rules affect and support the electricity market. Simply stated, ERCOT already has a proficient and robust oversight scheme to detect and take action against market manipulation within its market. Allowing private litigants to bring Section 22 CEA claims would conflict with and undermine the PUCT's vigorous oversight mechanisms established to ensure the viability of the ERCOT market.

### III. CONCLUSION

The difficulty with an allowance for Section 22 claims is that the main objective of private plaintiffs is to obtain money damages for an alleged harm, and this objective has no regard for the viability or endurance of the market rules that support the efficient operation of wholesale markets. Necessarily, the goals of private causes of action brought by Section 22 plaintiffs and the goals of market rules developed by regulators and RTOs are distinct. If the Proposed Amendment is adopted, it is entirely possible that federal courts will make determinations in CEA cases that nullify the effectiveness of market rules and create uncertainty about market participant reliance on those rules. The attendant effects on electricity consumers would be substantial.

For the reasons discussed in this letter, the PUCT urges the Commission to leave the RTO-ISO Order in its current form, thereby clarifying that Section 22 claims are precluded. We thank the Commission in advance for its consideration of these comments.

Very truly yours,



Kenneth W. Anderson, Jr.  
Commissioner