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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:

The Electric Power Supply Association ("EPSA")[1] respectfully submits these comments in response to the Commodity Futures Trading Commission's ("CFTC or "Commission") Notice of Proposed Amendment and Request for Comment ("Proposal"),[2] which proposes to amend an order ("RTO Order")[3] issued in response to a petition filed by certain Independent System Operators/Regional Transmission Organizations ("ISOs/RTOs") to exempt certain transactions authorized under a tariff or protocol approved by the Federal Energy Regulatory Commission ("FERC") or the Public Utility Commission of Texas ("PUCT") from certain Commodity Exchange Act ("CEA") provisions, pursuant to exemptive authority provided in CEA Section 4(c)(6).[4]

Through the Proposal, the CFTC seeks to permit for the first time private actions in federal district courts under CEA § 22(a)[5] in the ISO/RTO markets subject to the comprehensive regulatory schemes of the FERC or the PUCT. Notably, CEA § 22(a) is not among the sections of the CEA which the CFTC excluded from the list of exemptions it granted in the RTO Order for the ISO/RTO transactions covered

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1 EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA members participate in all of the ISO/RTO markets which will be affected by the Proposal.

2 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). ["Proposal"].

3 *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). ["RTO Order"].

4 Commodity Exchange Act, §§ 4(c)(1),(2),(6); 7 U.S.C. § 6(c)(6); § 6(c)(1)-(2).

5 Commodity Exchange Act, § 22(a)(1); 7 U.S.C. § 25(a)(1); Pub. L. 97-444, title II, § 235 (Jan. 11, 1983). ["CEA Private Suit Provision" or "CEA Private Right of Action"].

by that Order.[6] Thus, the CFTC proposes to substantively modify the public interest determination underlying the RTO Order: the Proposal suggests that permitting private suits under CEA § 22(a) in ISO/RTO markets is consistent with the public interest per the conditions and requirements of CEA §§ 4(c)(1),(2) and 4(c)(6).

EPSA contends the proposal is not a product of reasoned decision-making, not in accordance with the purposes of the CEA, and inconsistent with the public interest under CEA § 4(c)(6). EPSA respectfully submits the following comments in opposition to the Proposal.

Executive Summary

The Proposal is not in the public interest, nor does it further the purposes of the Commodity Exchange Act ("CEA"), for the following reasons:

(1) The Proposal is harmful to the interests of electricity consumers who are affected by misconduct in the RTO markets because a CEA Section 22 right of action cannot provide the comprehensive relief that consumers may obtain through regulatory proceedings of the FERC or the PUCT. Such lawsuits may in fact prevent all aggrieved parties from receiving appropriate remedies when harmed by manipulation occurring in an RTO. By contrast, FERC and the PUCT provide low-cost access for all entities to file complaints regarding potential manipulation, and comprehensive means to ensure remedies are provided to all affected parties if misconduct is found. The robust utilization by the FERC and PUCT of their authorities to punish wrongdoers in the RTO markets is a poignant reality which should allay concerns that CEA § 22 must apply in these markets as a prophylactic influence on potential wrongdoers.

(2) The Proposal would impose unnecessary and excessive costs on electricity consumers. The costs of these lawsuits will be passed on in electric bills whether or not such suits are frivolous. The ongoing risk of such lawsuits also raises the cost of participating in the RTO markets; load-serving entities will pass on these higher participation costs to consumers. ISOs/RTOs that are parties to such suits, or which have to change protocols, systems, or software as a result of such suits, will face significant cost increases which could be in the millions of dollars. ISOs/RTOs are nonprofit entities: any costs incurred will be ultimately passed through to members and thereafter reflected in higher prices for electricity consumers. There is no way to insulate consumers from the costs of this litigation.

(3) The Proposal will foster opportunistic, meritless lawsuits that would upset the important balance between the RTOs' responsibilities to send price signals and ensure reliability by intervening in the market, including ordering market participants to take actions that are uneconomic or inefficient. Market participants may be sued under a CEA manipulation standard, even if fully compliant with RTO rules and compliant with such out-of-market instructions from an RTO. Such suits could have the perverse outcome of penalizing compliance.

(4) The Proposal will have adverse effects on fostering fair competition in the ISO/RTO markets, and subvert the jurisdiction of the FERC and the PUCT. The Proposal will also have material, adverse consequences for the CFTC's own regulatory construct defining what energy market

[6] Proposal at 30245 ("The RTO–ISO Order did not specifically note that the exemption contained therein does not apply to actions pursuant to CEA section 22 with respect to those substantive provisions that are excepted from the exemption (i.e. the Excepted Provisions)"; *see also* RTO Order, *supra* note 2.

products are not "swaps." The Proposal thus conflicts with CEA § 4(c)(1),(2), the CEA Savings Clause, and Congressional intent. Congress did not intend for the FERC and the CFTC to delegate their enforcement authorities, or pass on the costs of administering enforcement programs, to electric ratepayers nor to end-use providers of electricity.

For these reasons, EPSA believes the Proposal will compromise the prior public interest determination made in the RTO Order. EPSA respectfully requests that the CFTC withdraw this Proposal and finalize relief for the Southwest Power Pool on the same terms and conditions as the RTO Order, including a clear exemption from CEA § 22(a).

I. The Proposal Damages the Interests of Electricity Consumers Who May Have Been Harmed by Misconduct in the ISO/RTO Markets

The Proposal damages the interests of electricity consumers because a CEA private right of action cannot provide ratepayers comprehensive relief when ISO/RTO markets have been distorted by manipulation. Only the substantial enforcement authorities of a regulator such as the FERC or the PUCT afford adequate and appropriate remedy, specifically for ratepayers, in light of misconduct in these markets.

The CEA does not provide any special protection to electricity consumers that would ensure that all such consumers harmed by a manipulation would be restored to the position they would have been in but for the manipulation. The remedy promised by Section 22 is incomplete for the purpose of restoring the balance of the equities in the energy markets. The benefits offered by Section 22 would accrue only to individual plaintiffs, who need not share nor look out for the interests of the entire class of aggrieved ratepayers. Such lawsuit can only promise a potential remedy only for the plaintiff(s) involved.

By contrast, the organic statutes of the energy regulators provide inclusive, public, transparent, and reliable processes for electricity consumers to seek relief, and for the markets to be re-settled when distorted by manipulation. Below, EPSA emphasizes this point by example of the substantial enforcement authorities of the FERC.

FERC has market-wide authority to re-settle the entire market – that is, to re-price energy market outcomes where those outcomes did not represent the functioning of a competitive market. FERC can therefore put consumers and ratepayers back in the position they would have enjoyed but for the manipulation. Only such a market-wide resettlement can adequately protect electricity consumers and restore certainty for the transmission and generation providers that rely on the markets to be competitive and free of manipulative influence. CEA § 22 cannot provide this protection.

Notably, any person who believes it may have been harmed by an alleged manipulation of the wholesale price of electricity has the absolute right to file a complaint with the FERC under FPA § 206.[7] FERC publically notices such complaints, affords third parties interventions and accepts comments. Thereafter, FERC must take an action on these complaints and ultimately issue an order on the merits. The issuance of an order on the merits is a guaranteed step in the administrative process which establishes legal grounds for the aggrieved party or parties to seek judicial review.

[7] *See* Comments of the Staff of the Federal Energy Regulatory Commission on CFTC Notice and Request for Comment, filed June 14, 2016, at pp. 3 ("Under section 206 of the FPA, FERC may determine, either on its own motion or as a result of a complaint, that an existing rate or market feature is unjust and unreasonable and, as such, FERC must establish a just and reasonable rate prospectively. This authority extends to the products at issue in the RTO-ISO Order.").

FERC also exercises powerful discretionary authority to initiate formal and informal investigations on its own authority.[8] Further, any person may informally communication through the FERC Enforcement Hotline as a means of influencing FERC's discretionary authority.[9]

FERC further has the authority to grant refunds, order the disgorgement of profits, require re-settlement of the market, and/or ensure that even those entities who are not wrongdoers but benefitted from the wrongdoing are subject to FERC's enforcement of a just and reasonable rate.

FERC's unique abilities to correct the effects of manipulative conduct also ensure that remedies in such cases are balanced against the need for certainty as to the rest of the market.[10] FERC orders relief on a prospective basis[11] so that the market is restored to the filed rate, and so that any remedies afforded do not result in retroactive ratemaking impacts on any other market participant or ratepayer in excess of the filed rate.[12]

Finally, FERC has robust civil penalty authorities and the ability to refer cases for criminal proceedings by the Department of Justice, resulting in separate sanctions or imprisonment if a violation is found. The Energy Policy Act of 2005 ("EPAct 2005")[13] raised the maximum civil penalty for FPA violations to $1,000,000 per violation for each day that the violation continues, and also bolstered the law's criminal sanction provisions.[14] The ISOs/RTOs can also issue penalties in certain cases where market participants fail to follow their rules and refer market participants to FERC for consideration of an enforcement action based their observation of the market participant's behavior.

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[8] *See* Comments of the Staff of the Federal Energy Regulatory Commission on CFTC Notice and Request for Comment, filed June 14, 2016.

[9] *See* FERC Website, "Enforcement Hotline," (providing local and toll-free phone numbers, email, and postal mail as means of reporting tips regarding market manipulation, fraud, bidding anomalies, inappropriate use of financial instruments, possible tariff violations, and other issues), at http://www.ferc.gov/enforcement/staff-guid/enforce-hot.asp.

[10] The Comments of the Federal Energy Regulatory Commission state that allowing § 22 private suits in the ISO/RTO markets would "frustrate the careful line Congress drew when establishing complaint proceedings under the FPA designed to balance the need for market certainty with the goal of consumer protection." *FERC Comments*, *supra* note 8, at pp. 3.

[11] *See* Comments of the Staff of the Federal Energy Regulatory Commission on CFTC Notice and Request for Comment, filed June 14, 2016, at pp. 3 ("Under section 206 of the FPA, FERC may determine, either on its own motion or as a result of a complaint, that an existing rate or market feature is unjust and unreasonable and, as such, FERC must establish a just and reasonable rate prospectively. This authority extends to the products at issue in the RTO-ISO Order.").

[12] Explanatory Note: The rule against retroactive ratemaking ensures that in the event of a re-settlement or disgorgement of profits from one entity, another entity's rates are not retroactively increased in contravention of the filed rate. *See, e.g., Duke Energy Corp.*, 154 FERC 61,156 at P 37 (2016) (rule against retroactive ratemaking "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods" (quoting *Towns of Concord v. FERC*, 955 F. 2d 67, 71 & n. 2 (D.C. Cir. 1992)); *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229 at P 208 (2015) (prohibition against retroactive ratemaking "prohibits imposing a rate increase for service already provided"). *Cf. Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 687 (D.C. Cir. 1978) (noting that there is a "statutory bias favoring retroactive rate reductions but not retroactive rate increases" and finding that FERC correctly denied a request that would result in "a retroactive assessment against the consumer and would have the same effect as a retroactive rate increase").

[13] *See* Energy Policy Act of 2005 (August 8, 2005), at http://www.ferc.gov/legal/fed-sta/ene-pol-act.asp.

[14] *See* Modified Penalty Guidelines for Enforcement Cases, via www.ferc.gov/enforcement/civil-penalties.asp (link to guidelines: http://www.ferc.gov/whats-new/comm-meet/2010/091610/M-1.pdf), accessed June 14, 2016.

FERC's robust utilization of these authorities and tools to punish wrongdoers in the ISO/RTO markets[15] is a poignant reality, and should allay any concerns that CEA § 22 must apply in these markets to provide a "backstop" or prophylactic influence on potential wrongdoers. Further, electricity consumers have unfettered access to FERC's enforcement program at relatively low costs. A CEA § 22 right under the CEA provides no additional benefits that the shared oversight of the CFTC and the FERC over the energy markets does not already provide.

Utilizing a CEA private suit provision would also demand legal expenses, procedural acrobatics, and ongoing litigation burdens and uncertainties that the average electricity consumer cannot afford. Aggrieved ratepayers do not currently need to pursue such high-risk enterprises to secure relief, nor should they have to.

EPSA believes the FERC, the PUCT, and the CFTC collectively retain the burden of ensuring cooperative, comprehensive oversight of the energy markets, and ensuring sufficient regulatory forums for ratepayers to seek relief. Congress did not intend that the CFTC delegate its energy market enforcement responsibilities to private plaintiffs, nor did Congress sanction a pass-through of these enforcement costs to consumers and to end-users that are responsible for delivering electricity.

For these reasons, EPSA contends the Proposal is detrimental to the interests of electricity consumers and should be withdrawn.

II. The Proposal Would Impose Unnecessary and Excessive Costs on Electricity Consumers

CEA § 22 suits are a likely avenue for wrongdoers to escape the full consequences and penalties which could have been assessed by a regulator. As a § 22 lawsuit cannot achieve the fulsome restoration of the equities in the market, the costs of inadequate remedies dispensed by a federal district court will be borne by those consumers who are excluded from such cases.

A related and unjust cost on those consumers would result if subsequent challenges to the same manipulative conduct are brought in another court or before a regulator like the FERC, and were precluded or collaterally barred by a decision issued in a prior CEA § 22 case. These potential outcomes are inequitable, costly, and unfair to the ratepayers that rely on the expertise of the FERC or the PUCT to oversee ISO/RTO market manipulation cases and ensure a complete remedy, including re-settlement, restitution, and disgorgement of excessive profits.

Another cost to resolving energy market manipulation cases through CEA § 22, is that cases between two parties cannot capture any market-wide windfalls of manipulative conduct. A court may make a finding of wrongdoing and assess damages as to the defendant(s), but it cannot address any windfall that may have accrued to third parties because of the manipulation. In a regulatory proceeding, by contrast, improper windfalls to third parties can be identified and re-distributed to make aggrieved parties whole. Aggrieved parties and consumers will thus bear the cost of court decisions that penalize misconduct but which cannot provide adequate monetary relief.

An additional concern is that RTOs, market monitors, and market participants will bear the costs of private complaints that have no relationship to the carefully constructed and monitored regulatory scheme governing these specialized markets. This is itself poses a tremendous cost for the electric industry. The resources in place today within ISOs/RTOs, FERC, and the PUCT represent decades of

[15] *See, e.g.* FERC Website, "All Civil Penalty Actions – 2016", at http://www.ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp.

collective expertise in supervising the markets – and millions of dollars in software and infrastructure upgrades to support increasingly sophisticated transactions and services. Several more millions have been also invested in the infrastructure of oversight, enforcement, and real-time surveillance of these markets. A line item appears in electric rates to reflect the costs of sustaining this infrastructure. Private decisions that force ISOs and RTOs to change their infrastructure will ultimately increase the bottom line for ratepayers – without any policy support from RTO stakeholder processes or regulators.[16]

The ultimate ratepayer stands to be worse off irrespective of whether private suits have merit. Any suit filed by a plaintiff against the ISO/RTO, and/or its members, will involve significant costs to fight that suit or conduct out-of-court settlement. ISOs and RTOs would pass on these costs to their members. Further, a component of electric bills will rise to counteract rising costs for the system operators and for the members that produce, sell, and deliver electricity, as higher credit/collateral requirements will be a natural outcome of the need for ISOs, RTOs, and their members to build an insurance policy against the cost of such suits.[17] By no means will the costs arising from such litigation regularly come out of the pockets of speculative firms or other entities that pose systemic risk to the CFTC's markets. In fact, there is no way to insulate consumers from these costs.

EPSA concurs with the many comments filed in this proceeding, that CEA § 22 private suits will create unnecessary and excessive costs on the end-user electricity providers and consumers, and raise the costs of using the ISO/RTO markets to procure electricity. [18] There will also be large costs for reliability, *i.e.*, the health and sound functioning of the markets, because § 22 litigation risk would be a new cost for all entities participating in these markets.

EPSA contends that these costs alone, far outweigh any benefit of permitting § 22 actions in the RTO markets and render the Proposal neither consistent with the public interest nor with the purposes of the CEA.

III. The Proposal will Foster Opportunistic Lawsuits that Would Increase the Costs and Risks of Participating in Markets that Support Reliability

Private suits would upset the important balance between the RTOs' responsibilities to administer markets by sending price signals, while also ensuring reliability by intervening in the market. This balance helps provide a critical service for electricity consumers at competitive prices: it is routine for

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16 *See, e.g.*, Order of the Federal Energy Regulatory Commission, *Coaltrain Energy, L.P.*, 155 FERC ¶ 61,204, Ordering Paragraph (G) (2016) (ordering RTO "to establish a method to resettle and distribute" amounts disgorged by market participants found to have engaged in market manipulation); *Houlian Chen*, 151 FERC ¶ 61,179, Ordering Paragraph (H) (2015) (same); American Elec. Power Serv. Corp., 103 FERC ¶ 61,345 (2003) (refunds and disgorgement required for market manipulation and violations of tariffs); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,121 at 61,370 (2000) (finding that refunds would be required "if the Commission finds that the wholesale markets in California are unable to produce competitive, just and reasonable prices, or that market power or other individual seller conduct is exercised to produce an unjust and unreasonable rate").

17 *Cf.* Comments of the National Rural Electric Cooperative Association and the American Public Power Association (filed June 15, 2016), at pp. 2 – 3 (discussing that increased legal costs would be borne directly and indirectly by members of each RTO, including hundreds of electric cooperatives and public power providers, and by the American businesses and electric consumers located in each RTO region).

18 *Cf.* Comments of the Edison Electric Institute, at pp. 11 (stating that "the Commission has substantially underestimated the additional legal and regulatory costs that will ultimately be borne by electric customers in each RTO/ISO as well as to the impacts upon each RTO/ISO, its tariff or protocol, its market rules, its software, and the established processes for market-related changes.").

RTOs to take "out of market" actions such as requiring "out of merit" dispatch of a generator or requiring a generator to stay online even if uneconomic, in order to support reliability conditions. Such system operator instructions ensure the lights stay on at all times, but often at the cost of market efficiency.

Therefore, even though individual participants are in compliance with RTO rules, protocols, tariffs, and with their FERC-approved Market-Based Rate authority, they may nevertheless be ordered by a system operator to behave in a manner that deviates from efficient market principles. As RTOs are single clearing price markets that are heavily mitigated by the system operator, the ultimate settlement price for energy or capacity may be a price that is different than the market's expectations. The ISO/RTO markets are atypical markets in this respect: they are highly specialized and highly regulated in terms of rules around bidding behavior and offering (such as offer caps).

It is in the public interest to encourage participation in these markets. However, the availability of CEA§ 22 suits against RTOs and market participants will have a penalizing effect on market participants and increase the costs of that participation. Under § 22, the ISOs/RTOs, the transmission and generation providers, and utilities may be sued by private entities with private interests, in spite of their compliance with rules, protocols, and/or out-of-market actions to support reliability. This is because the complexity that informs participants' behaviors will not be adequately considered in decisions from the federal district courts, which would only see a record produced by the private litigants. Further, the district courts do not have the benefit of expertise in reviewing energy market regulations, and cannot act to assure just and reasonable outcomes on the basis of policy considerations. Unless intervening in every such matter, the FERC, the PUCT and the affected market will have no role in resolving such litigation, nor influence on the consequences of such litigation on the subject RTO.

Given these factors, private suits could inadvertently signal that market participants can be punished for appropriate market behavior. This is a damaging outcome for market certainty, regulatory certainty, compliance with reliability objectives, and, a source of unnecessary costs on the entire electricity value chain, from supplier to consumer.

EPSA thus contends that litigation under the Proposal may have detrimental effects on the accessibility of the ISO/RTO markets for small and large market participants, and impede the ability of RTOs to balance their dual objectives of provide a competitive market structure and operating an efficient, reliable system.

IV. The Proposal is Not Consistent with the "Public Interest or Purposes of the CEA" Analysis in the 2013 RTO Order

The Proposal fails the statutory criteria which requires the Commission to act 'in accordance with' sections 4(c)(1) and (2) of the CEA when issuing an exemption under section 4(c)(6). The Proposal simply concludes that the CFTC should "incorporate [its § 4(c)] prior determinations herein" to support § 22 actions in RTO markets, because this change "does not alter the Commission's prior determinations [in the RTO Order] with respect to the public interest and the purposes of the CEA." [19] EPSA contends that this is an impermissible conclusion under the statute: just as CEA § 4(c)(6) does "not permit the Commission to automatically or mechanically apply an exemption",[20] it does not permit the CFTC to

[19] Proposal at 30250.

[20] RTO Order, at 19895.

automatically or mechanically bypass the required analysis to modify such an exemption with new terms or conditions.

The Proposal also makes several insufficient § 4(c) determinations, including that private suits would aid the "credibility of markets under the Commission's jurisdiction," play a supplemental role to the CFTC's authority to address the same conduct, and help deter or prevent fraudulent activity, price manipulation, or other disruptions to market integrity.[21] These determinations only discuss the potential effects of private suits on the CFTC's *own* authority. However, private suits are detrimental to the public interest and the purposes of the Act, because they affect *another regulator's* plenary jurisdiction and enforcement authority. Below, EPSA elaborates on this point and discusses several additional missing elements in the Proposal's § 4(c) analysis.

A. The Proposal Does Not Promote Responsible Economic/Financial Innovation or Fair Competition Nor Does it Further the Purpose of Section 4(c) to Support Markets.

The RTO Order cites to the pervasive and successful regulation of RTO markets by the FERC and the PUCT as a basis for satisfying CEA § 4(c)(1) and generally achieving the purposes of the CEA. [22] However, the Proposal contradicts the RTO Order, by suggesting a change to that Order which would collaterally subvert the very agency functions that advance the public interest and promote innovation and competition in the energy markets.

Nothing has changed in these markets since the RTO Order was issued. The FERC and the PUCT remain fully capable of performing enforcement functions in these markets. They continue to provide the fair, credible, efficient market environment that § 4(c)(1) requires as a pre-condition of the CFTC's exercise of exemptive authority. The Proposal will only dilute these regulators' ability to maintain the integrity and efficiency of their specialized markets, thereby conflicting with the requirements of CEA § 4(c)(1) and conflicting with the RTO Order's § 4(c)(1) determinations.

B. The Proposal Does Not Pass Muster Under CEA § 4(c)(2) because Private Suits Will Have a Material Adverse Effect on the Ability of the CFTC to Discharge its Own Regulatory Responsibilities While Also Divesting the FERC or the PUCT of Jurisdiction.

EPSA contends that in contravention of CEA § 4(c)(2),[23] the Proposal will have a material, adverse effect on the CFTC's ability to discharge its responsibility to ensure the comprehensive regulation and oversight

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21 Proposal, at 30250.

22 Note: In the RTO Order, the Commission determined that the exemption was consistent with CEA § 4(c)(1) because it promotes responsible innovation and fair competition among its market platforms, other markets, and market participants.[22] The Commission found it appropriate to exempt the subject ISO/RTO products and transactions because they are inextricably linked to wholesale electric energy sales in markets which are subject to tariffs, protocols, rules, and oversight of the FERC or PUCT, and monitored additionally by an independent MMU and/or a market administrator (ISO, RTO, ERCOT).[22] The Commission also noted the self-regulatory duties of market administrators and the operation of complex market-facilitating mechanisms, pursuant to statutes governing the ISOs/RTOs, namely the Federal Power Act ("FPA") and the Public Utilities Regulation Act ("PURA") respectively as to FERC and ERCOT markets. Finally, the CFTC also recognized that "fundamental to this 'public interest' and 'purposes of the [CEA] analysis' is the fact that the Covered Transactions are inextricably tied to the Requested parties' physical delivery of electric energy."[22] RTO Order, at 19894-95.

23 Note: Section 4(c)(2) of the Act provides that the Commission may not grant exemptive relief unless it determines that: (1) The exemption would be consistent with the public interest and the purposes of the CEA; (2) the transaction will be entered into solely between 'appropriate persons;' and (3) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.

of the energy markets. The Proposal will also have effects that are inapposite to Congress's intention that "[i]n enacting section 4(c)… 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."[24]

Pursuant to the jurisdictional "savings clause" in CEA Section 2(a)(1)(I)[25] and the provisions in Dodd-Frank, Congress clearly called for the FERC and the CFTC to resolve questions of jurisdictional overlap via cooperative means. Congress provided for the CFTC and the Securities Exchange Commission to pursue such disputes in the federal courts, but only provided for the FERC and the CFTC to achieve similar resolution through a Memorandum of Understanding. Private suits attempting the same resolution without either agency at the lead, are certainly adverse to the regulatory scheme Congress intended to play out between the two agencies.

Further, CEA § 22 lawsuits related to FERC and PUCT-regulated products *will* affect their authority over contracts and transactions that are subject to a tariff or rate schedule approved by the FERC or the PUCT. This is a direct contradiction of the CEA Savings Clause.

EPSA's primary concern in this regard, is that for a district court to find jurisdiction for a CEA § 22 claim regarding ISO/RTO transactions, there would likely need to be a finding that the ISO/RTO transaction in question involve futures, options, or swaps. This determination would occur irrespective of how the market participant has applied a CFTC rule or guidance to exclude such transaction from the regulatory definition of a "swap."[26]

Importantly, the CFTC has repeatedly declined to make a bright-line finding on the status of capacity products, financial transmission rights, or similar commodity transactions, instead creating various tests in its "Product Definition Order" that should be applied to determine that such products may not be "swaps". Market participants have relied on this Order, and yet, this reliance is most certainly prone to being subverted by private plaintiffs' assertion that such excluded products are "swaps."[27]

If a court were to make such a finding in lieu of the CFTC, there is significant risk that the FERC and PUCT could be divested of their jurisdiction based upon the exclusivity language in the CEA.[28] Such a result could undermine the market's certainty of the regulation and operation of the RTOs.

To avoid such a negative result, the CFTC has declined to make generic findings on jurisdiction. Presumably, this is because the CFTC is attempting to comply with Congressional mandates, which

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[24] RTO Order, at 19895.

[25] Commodity Exchange Act Section 2(a)(1)(I)(i)-(ii); 7 U.S.C. § 2(a)(1)(I)(i)-(ii) (July 21, 2010)(stating "Section 2(a)(1)(I)(i) of the CEA provides that nothing in the Act shall limit or affect any statutory authority of FERC or a State regulatory authority with respect to an agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved by FERC or a State regulatory authority and is—(1) not executed, traded, or cleared on a registered entity or trading facility; or (2) executed, traded, or cleared on a registered entity or trading facility owned or operated by an RTO] or ISO. ["CEA Savings Clause"].

[26] 7 U.S.C. § 2(a)(1).

[27] *Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement* Recordkeeping, 77 Fed. Reg. 48208 at 48261 (Aug. 13, 2012).

[28] 7 U.S.C. § 2(a)(1); *see also Hunter v. Federal Energy Regulatory Comm'n*, 711 F.3d 155, 157 (D.C. Cir. 2013).

require the CFTC and the FERC to cooperatively regulate these markets, and which direct that the CFTC shall defer to the primary regulators of energy market products where such deference furthers the purposes of the CEA and the public interest. It follows that the effects of jurisdictional confusion will be felt in the CFTC's regulatory arena as well – unwinding the jurisdictional agreements that the FERC and the CFTC may have already reached regarding certain products, and casting doubt on CFTC's own guidance, interpretations, and staff letters that opine on energy products exempted from the definition of "swap."

It is a further concern that jurisdictional disputes in the courtrooms will create new gaps in CFTC and FERC oversight: this is almost certainly a pathway for sophisticated financial market players to exploit the vagaries of legal semantics in such cases and evade the regulation of their products by the FERC, or by the CFTC.

It is EPSA's view that the Congress intended, and the CFTC effectuated in the RTO Order, clear deference to the FERC and the PUCT with respect to matters involving transactions in the RTO markets. The Proposal patently conflicts with Congressional intent, the CEA Savings Clause, and with § 4(c)(2) of the CEA.

V. The Record Does Not Support a Right to Third Party Claims Under the CEA in RTO Markets.

The Proposal contains an inadequate cost-benefit analysis and neglects to cite the substantial administrative record against the Proposal. Further, none of the cost-benefit findings in the Proposal are sufficiently detailed to support its adoption. This raises several concerns:

(1) The Commission claims that the Proposal will not cause regulatory uncertainty and does not represent inconsistent or duplicative regulation. As discussed above, it is hard to imagine a program that would undercut FERC and the PUCT more than that proposed here.

(2) To calm concerns, the Commission indicates that it often participates as *amicus curiae* and coordinates with FERC.[29] What the Commission fails to mention is that it would be FERC or the PUCT (and the affected ISO/RTO) that would need to intervene in court to protect its regulatory policies, not the CFTC. Further, while CFTC/FERC coordination is appropriate as both agencies act in furtherance of the public interest, the same is not true of third parties. CFTC/FERC coordination is irrelevant to the Proposal. It is the actions of third parties that are in question.

(3) The Commission asserts the Proposal will deter bad actors in ISO/RTO markets.[30] Contrary to the Commission's implication that FERC and the PUCT do not adequately monitor their markets under the current system, ISO/RTO markets are likely the most transparent, tightly structured and closely monitored in the United States. The FERC, PUCT and RTO market monitoring units are well resourced, diligent, and aggressive. There is no evidence that RTO markets lack adequate oversight or that bad actors are not caught and punished. In fact, EPAct 2005, a law enacted well before Dodd-Frank, specifically expanded ISO/RTO market oversight authorities of the FERC to better police bad actors in the energy markets.

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29 Proposal at 30248.

30 *Id.*

(4) The Commission states that third party claims are an important part of its statutory scheme and, in contrast, the Federal Power Act ("FPA") does not include third party rights of action.[31] The Commission does not note the important aspect of the CEA in which the statute can be waived in deference to pervasive regulation and oversight by FERC and the PUCT – a section of the law that has been enacted well after the 1983 provision for private suits in the commodity futures markets. Specifically, in recognition of the roles played by FERC and the PUCT as the architects and primary regulators of RTO markets, Congress permitted a targeted explicit 4(c) exemption for these markets. As evidenced by the RTO Order, that exemption included third party causes of action. Further, as the FPA does not permit third party claims, the Proposal would in effect create a "back-door" whereby third parties could seek to bring cases in district court to attack FERC regulation under the CEA, due to the lack of an available FPA avenue.

(5) The Commission states that it would be inconsistent with prior 4(c) orders to exempt RTO markets from third party claims.[32] As noted above, this 4(c) exemption is different. It is based on FERC and PUCT jurisdiction. The fact that other exemptions do not have this feature is not in any way dispositive nor particularly relevant to the unique circumstances that have defined the refinements and expansions to the enforcement and oversight of the FERC and the CFTC over their respective markets.

(6) Although the Commission references some of the administrative actions occurring since 2013 relating to the Proposal, the Proposal does not consider that the substance of these administrative actions did not ever discuss, deliberate, or seek public comment on – and therefore did not arrive at a public interest determination – with consideration of a private cause of action. Specifically, the record developed in the administrative process on the 2013 RTO Order, and in response to the 2015 SPP Proposed Order, [33] do not provide support for the Proposal's determination that a private cause of action *is* in the public interest:

- On February 7, 2012, the applicant RTOs filed a request with the Commission for a 4(c) exemption.[34] On August 28, 2012, the Commission issued a proposed order, which, if finalized, would have approved the request.[35] On April 2, 2013, the Commission issued the

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31 *Id.*

32 *Id.* at 30248-49.

33 *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").

34 In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent Service Operator Corporation; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by the Electric Reliability Council of Texas, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by ISO New England Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Midwest Independent Transmission System Operator, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by New York Independent System Operator, Inc.; and In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by PJM Interconnection, L.L.C. (Feb. 7, 2012, as amended June 11, 2012).

35 *Proposed Order and Request for Comment on a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by 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*, 77 Fed. Reg. 52138 (August 28, 2012).

RTO Order granting the 4(c) exemption. The basis for the Commission's action was that it was in the public interest and in furtherance of Congressional intent to avoid duplicative regulation, and that the affected markets and products were subject to extensive regulation and oversight by FERC and the PUCT (including market monitoring and enforcement).[36] In every step of this process, the Commission unambiguously included clear language exempting ISO/RTO markets from third party claims under the CEA.[37] No party at any stage of this process indicated any objection to the exemption and the Commission granted it in the public interest.[38]

- On May 21, 2015, the Commission issued the SPP Proposed Order. In that proposed order, the Commission proposed the identical regulatory text to that in the RTO Order exempting SPP from third party claims under the CEA.[39] However, in the preamble, the Commission provided language which seemed to contradict its public interest finding in the RTO Order and the regulatory text it was then proposing.[40] The CFTC received thirteen comments in the SPP docket. And yet, the Proposal does not address the substance of any of these comments and has not acted in the SPP matter.[41]

EPSA believes the Proposal would undo what the Commission has previously done, compromising the public interest analysis accompanying the RTO Order – which did not consider in any respect the costs on market participants related to potentially preserving § 22 private rights in the exempt ISO/RTO markets. There is now overwhelming support in the record, and in the comments filed in the instant docket, that permitting § 22(a) to operate in the exempt ISO/RTO markets is unfavorable to the public interest.

Additionally, EPSA believes it would be highly unusual for the Commission to finalize a Proposal that is shown to negatively impact the markets of another regulator, especially when that regulator has stated in the record that it "opposes the introduction to FERC-jurisdictional markets of a private right of action under the CEA."[42]

VI. Responses to Specific Questions

The Commission posed three specific questions with respect to the Proposal, each set forth below. EPSA's responses to these questions are provided below.

Q1. 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

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36 RTO Order at 19912.

37 *Id.*

38 *Id.*

39 SPP Proposed Order at 29492.

40 *Id.* at 29493.

41 At the February 2016 meeting of the EEMAC, participants from across the power industry discussed the issue of third party CEA claims in third party markets and the comments by EEMAC members were exclusively against the amendment to remove the exemption from such claims in the RTO Order. No EEMAC participant commented in the EEMAC record in favor of permitting a CEA private right of action in ISO/RTO markets subject to the RTO Order.

42 *See* Comments of the Staff of the Federal Energy Regulatory Commission (filed June 14, 2016), at pp. 2.

Commission requests comment on the following issues regarding such litigation. Please provide details as to the specifics of such litigation, including: i. What type of entity might sue what other type of entity? ii. What are the theories under which such litigation might be brought? 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?

Q1(a) Response:

As discussed above, it is highly unlikely that the average aggrieved electricity consumer would bring a challenge under the CEA to address wrongdoing in the energy markets. EPSA is very concerned that private suits in the ISO/RTO markets would instead be an easy avenue for persons that cannot obtain the results they seek from FERC or the PUCT to turn to a district court to collaterally attack the rulings of the market regulator. Unlike FERC and the PUCT, those persons would not be charged with acting in the public interest and would instead be acting in accordance with their own interests and motivations. Nor are those persons charged with any obligations, as are the FERC and the PUCT, to ensure just and reasonable rates, terms, and conditions for ratepayers and all participants in these markets. As is demonstrated by the *Aspire* case, such claims will bear no relationship to protecting consumers nor ensuring market certainty.[43]

The only example currently available to consider what entities could be plaintiffs to such lawsuits, is the *Aspire* case. In the *Aspire* case, the plaintiffs Aspire Commodities and Raiden Commodities did not have load or reliability obligations in an ISO/RTO. Aspire Commodities ("Aspire")[44] is registered with the National Futures Association,[45] but not with the CFTC per CFTC Reg. § 4.14(a)(8).[46] Aspire's business includes hedging its power futures portfolio against its expectations of electricity price convergence between the Texas day-ahead and real-time energy markets, informed by the virtual trading conducted in the Texas energy market by Raiden Commodities. The defendants in this case were commercial market participants in ERCOT markets, in compliance with the rules of the PUCT.

The *Aspire* suit demonstrates how CEA § 22 lawsuits may subvert legitimate regulation by FERC and the PUCT, in contravention of the objectives of the CEA jurisdictional savings clause, CEA § 4(c)(1). Aspire and Raiden support § 22 lawsuits because the provisions is a vehicle for collateral attacks on the regulation of the PUCT. Aspire is an opponent of the "small fish rule" that permits power generators in the Electric Reliability Council of Texas ("ERCOT") that have been found by the PUCT to not have market power, to

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[43] *Cf.* Comments of the Edison Electric Institute (filed June 15, 2016), at 11 ("Private litigants are not acting in the public interest but, rather, are acting to further their own ends.36 Unlike private parties, the CFTC, FERC and the PUCT have a common goal in maintaining the integrity of the markets, seeking to punish bad actors for impact on consumers or markets rather than personal financial gain.").

[44] *See supra* note 14.

[45] *See* National Futures Association, Exemptions and No-Actions, Aspire Commodities, LP, Exemption 4.14(a)(8)(filed 1/21/2015, last affirmed 02/03/2016), NFA ID: 0429730, at http://www.nfa.futures.org/basicnet/Exemptions.aspx?entityId=DFp6lXTKN58%3d (last accessed June 15, 2016).

[46] CFTC Regulation § 4.14(a)(8)(providing an exemption from registration as a commodity trade advisor if such person is "registered as an investment adviser under the Investment Advisers Act of 1940 or with the applicable securities regulatory agency of any State, or it is exempt from such registration, or it is excluded from the definition of the term "investment adviser" pursuant to the provisions of sections 202(a)(2) and 202(a)(11) of the Investment Advisers Act of 1940", subject to additional conditions), at http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=f9feb8915d291076015a66dd0d7ee1ba&mc=true&n=pt17.1.4&r=PART&ty=HTML#se17.1.4_114 (last accessed June 14, 2016).

offer to sell their physical electricity in an approved manner into the ERCOT market.[47] Aspire opposed the rule, which has been in place for over 10 years, alleging that this rule makes pricing outcomes less predictable for Aspire's financial speculation-driven business. It filed a petition with the PUCT requesting that the rule be revoked.[48] The PUCT initiated a proceeding at Aspire's request. All those that provided comments in that proceeding spoke in favor of retaining the rule.[49] The PUCT issued an order keeping the rule in effect.[50]

Not satisfied with a full regulatory proceeding before the PUCT, Aspire brought a claim in federal district court against a generator that offered the energy produced at its plants in accordance with the applicable PUCT rule.[51] The court, largely relying upon the RTO Order, dismissed the case.[52] Aspire appealed to the US Court of Appeals for the Fifth Circuit, which upheld the district court and denied rehearing.[53]

Had Aspire moved forward in district court, the likely outcome would have been that ERCOT generators would modify their legitimate behaviors and would cease following the PUCT's rule in light of the new threat of third party litigation and expense. While the Proposal notes the existence of the *Aspire* case,[54] it does not acknowledge the clear subversion of the PUCT's regulation of the ERCOT market that the case would cause if allowed to go forward.

In light of this example, EPSA believes private suits can become a serious obstacle and cost for commercial power providers in markets where their compliance with any market rule or system operator action is prone to perpetual private challenge. This is particularly problematic because unlike regulatory enforcement proceedings, such suits are likely to be devoid of any purpose tied to the general welfare of the markets, the interests of the public, or the policy objectives of ensuring consumer protection, adequate relief for aggrieved ratepayers, just and reasonable rates, or reliability.

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47 PUCT Docket No. 31972-78, Order Adopting Amendment to §25.502, New §25.504 and New §25.505 as Approved at the August 10, 2006, Open Meeting (August 23, 2006).

48 PUCT Docket. No. 42424-1, Petition for Rulemaking to Eliminate Section §25.504(c) (Apr. 21, 2014).

49 PUCT Docket No. 42424-4, Initial Comments of Texas Competitive Power Advocates (May 23, 2014); PUCT Docket No. 42424-5, Comments of GDF SUEZ Regarding P.U.C. Subst. R. 25.504(c) (May 23, 2014); PUCT Docket No. 42424-6, South Texas Electric Cooperative, Inc.'s Comments (May 23, 2014); PUCT Docket No. 42424-7, Texas Industrial Energy Consumer's Comments on Petition for Rulemaking to Eliminate P.U.C. Subst. R. 25.504(c) (May 23, 2014); PUCT Docket No. 42424-8, Luminant's Initial Comments Regarding Raiden's Petition for Rulemaking (May 23, 2014).

50 PUCT Docket No. 42424-11, Order Denying Petition for Rulemaking (June 20, 2014).

51 *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).

52 *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. H–14–1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

53 *Aspire Commodities LP v. GDF SUEZ Energy North America Inc.,* ---Fed. App'x---, No. 15-20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

54 Proposal at 30246-47.

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?

Q1(b) Response: Regardless of whether the litigation sure to be generated by the Proposal would survive motions to dismiss in any given case, the fact is that an increase in litigation would require legal expenses, time and effort to defend against. The litigation should not be permitted outside of the established regulatory structure of the ISOs/RTOs. A finding by a court of liability could negate the directives of the FERC and PUCT, discarding their policy objectives and authority.

Further, district courts are ill-equipped to understand RTO market design and oversight, and are an inadequate substitute for the judgment and expertise of the FERC and the PUCT on matters germane to enforcing filed rates and balancing the various policy objectives. Unlike other markets, ISO/RTO administered markets have a complex set of rules; they oversee the markets in minute detail, and provide orders to market participants which require them to comply by deviating from efficient market principles. Introducing CEA § 22 private rights in this environment will unduly interfere with the RTOs' mission to ensure reliable supply of electricity at reasonable rates.

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.

Q2 Response: The concern stated by the ISOs/RTOs is plain and is shared by EPSA: if a court ruling results in even a possible reading such that the CFTC has exclusive jurisdiction over swaps, then other agencies (or market participants) might reasonably conclude that the agencies do not or should not have jurisdiction. EPSA cannot speculate on the outcome of such a jurisdictional dispute; the harm would be done where the uncertainty arises, undermining the effectiveness of the established regulatory structures for these markets. Further, as stated above, uncertainty is an open opportunity for entities seeking to evade regulation of the FERC or the CFTC.

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.

Q3 Response: The ISOs/RTOs and the participants in their markets have been nearly unanimous in their opposition to the Proposal, because they understand the need for regulatory certainty and agree that private litigation cannot properly provide relief in instances of wrongdoing in these markets.

Conclusion

For the foregoing reasons, EPSA respectfully requests that the Commission withdraw the Proposal. EPSA also urges the Commission to issue a final order on the application of SPP which places SPP in the same position as the other ISOs and RTOs benefitting from the 2013 RTO Order, and which affirms the exemption for all ISOs and RTOs from CEA Section 22(a) private rights of action.

Respectfully Submitted,

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