



N A R U C
National Association of Regulatory Utility Commissioners

August 4, 2016

Christopher 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, 81 Fed. Reg. 30,245 (May 16, 2016)*

NARUC Request to Submit Comments Out-of-Time and Comments

Dear Mr. Kirkpatrick:

The National Association of Regulatory Utility Commissioners (NARUC) respectfully requests that the Commodity Futures Trading Commission (CFTC or Commission) allow it to submit these comments out of time regarding the *Proposed Amendment to the Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act, 81 Fed. Reg. 30,245 (May 16, 2016) (Proposed Amendment)*.

NARUC recently held its Summer Committee Meetings and on July 27, 2016, the NARUC Board of Directors adopted a resolution concerning the Commission's Proposed Amendment (see Appendix). This resolution expresses NARUC's opposition to the Proposed Amendment and requires the filing of these comments.

NARUC urges the CFTC not to allow Section 22 claims in the regional transmission organization (RTO) and independent system operator (ISO) markets.

I. Background

NARUC is a quasi-governmental, nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with, among other things, ensuring the provision of safe, affordable and reliable electric service to the citizens within their respective borders.¹ The Public Utility Commission of Texas (PUCT) is a NARUC member. Additionally, more than half of the States of NARUC's member commissions participate in RTO and ISO markets.

If adopted, the Proposed Amendment will have a direct impact on the functioning of those markets.

II. Comments

The Commission is proposing to amend a March 28, 2013 order exempting specified electric energy transactions from certain provisions of the Commodity Exchange Act (CEA) and CFTC regulations (RTO-ISO Order). That March order specifically reserves the CFTC's authority to monitor and prevent fraud, market manipulation or other market abuses in concert with the Federal Energy Regulatory Commission (FERC) and the PUCT.

The Proposed Amendment specifies that the RTO-ISO Order does not exempt covered entities from the CEA Section 22 private right of actions allowing anti-fraud and anti-manipulation claims by private third parties. Unfortunately, the Amendment would thereby create a separate, additional, external mechanism to address market abuses that would necessarily involve Courts unfamiliar with the RTO and ISO markets that do not have a background in the regulated utility industry. From NARUC's perspective, this is contrary to the structure that Congress established.

The Federal Power Act specifically prohibits a private cause of action.

A close examination of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which, in part, amended the CEA, indicates a Congressional reaffirmation of that prohibition. Dodd-Frank includes a savings clause at 7 U.S.C § 2(a)(1)(I)(i).

Significantly, that section preserves the existing statutory authority of FERC and State regulatory authorities over agreements, contracts, or transactions entered into pursuant to a tariff or rate schedule approved by FERC or a State regulatory authority, that are (1) not executed,

¹ Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interests of State regulatory commissions. *See e.g.*, 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. *See also USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd on other grounds*, 471 U.S. 48 (1985).

traded, or cleared on an entity or trading facility subject to registration with the CFTC, or (2) executed, traded, or cleared on a registered entity or trading facility owned or operated by an RTO or ISO. The next section, 7 U.S.C § 2(a)(1)(I)(ii), also preserves the CFTC's statutory authority over such agreements, contracts, or transactions. It is clear the CFTC does not have exclusive jurisdiction over transactions covered by the RTO-ISO Order.

Moreover, as FERC staff explained in its comments in this proceeding, "Congress required the CFTC to work with FERC to, among other things, establish procedures for 'resolving conflicts concerning overlapping jurisdiction' between the two agencies and avoid 'to the extent possible, conflicting or duplicative regulation.'"² The CFTC and FERC have established procedures to avoid such duplicative/conflicting regulation in a memorandum of understanding.

To expand jurisdiction even further to include private rights of action unnecessarily complicates the jurisdictional balance and certainly creates duplicative regulations (and conflicting approaches by adjudicators purporting to operate under different sections of the U.S. Code – adjudicators that have widely varying levels of expertise). This appears on its face to be contrary to Congressional intent.

NARUC's *Resolution Opposing the Commodity Futures Trading Commission Plan to Allow for Private Lawsuits* expresses NARUC's concern that this "proposal to allow for private rights of action for transactions in the RTO or ISO markets could upset the Congressionally-mandated balance, increase regulatory uncertainty and litigation risk, and make the markets less efficient."

As the PUCT stated in its comments, 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 [Electric Reliability Council of Texas] market by creating uncertainty, impairing liquidity, and imposing unnecessary cost on retail consumers of electricity."³

This provision is opposed by more than just the policy experts at FERC and PUCT. Chairman Fred Upton and Ranking Member Frank Pallone, Jr., of the Committee on Energy and Commerce, U.S. House of Representatives, the House Committee with jurisdiction over FERC, have requested a CFTC briefing on this proposal because they are concerned about its possible impact on the wholesale electricity markets.⁴ Members of the Committee on Agriculture, the committee in the U.S. House of Representatives that has jurisdiction over the CFTC, are also concerned about the proposal. Chairman K. Michael Conway and Ranking Member Collin C.

² Comments of the Staff of the Federal Energy Regulatory Commission at 2 (June 14, 2016), available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60835&SearchText=>.

³ PUCT Comment Letter to CFTC at 2 (June 15, 2016), available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60861&SearchText=>.

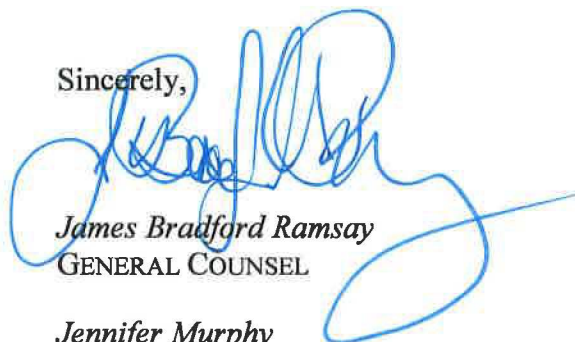
⁴ *Letter to CFTC Chairman Timothy G. Massad from Chairman Fred Upton and Ranking Member Frank Pallone, Jr., Committee on Energy and Commerce, U.S. House of Representatives* (June 24, 2016), available at: <https://energycommerce.house.gov/news-center/letters>.

Peterson of the Committee on Agriculture, and Chairman Austin Scott and Ranking Member David Scott of the Committee's Subcommittee on Commodity Exchanges, Energy and Credit sent a letter to CFTC Chairman Timothy G. Massad, stating that the uncertainty that could be created by private suits was "something Congress specifically sought to avoid in the Dodd-Frank Act and could ultimately inhibit the [FERC] and the CFTC's efforts to effectively and cooperatively oversee the electricity markets."⁵ Indeed, a review of the filed comments indicates clearly that the opposition is not only bipartisan in Congress, but opposed on policy grounds by more than just FERC and State Commissions. Not-for-profit and the for-profit market participants oppose the measure as well. Such record-based broad opposition across a range of stakeholders suggests the Commission should suspend further action in this proceeding.

III. Conclusion

For the forgoing reasons, NARUC respectfully urges the Commission to not take any actions that would permit Section 22 claims in the RTO and ISO markets.

Sincerely,



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⁵ Letter to CFTC Chairman Timothy G. Massad from Chairman K. Michael Conway and Ranking Member Collin C. Peterson, Committee on Agriculture, and Chairman Austin Scott and Ranking Member David Scott, Subcommittee on Commodity Exchanges, Energy and Credit, U.S. House of Representatives at 1 (June 23, 2016), available at: <http://agriculture.house.gov/news/documentsingle.aspx?DocumentID=3454>.

Appendix

EL-1 Resolution Opposing the Commodity Futures Trading Commission Plan to Allow for Private Lawsuits

WHEREAS, The Commodity Futures Trading Commission (CFTC) issued its *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* on May 16, 2016; *and*

WHEREAS, The CFTC is proposing to amend an order issued on March 28, 2013, that exempted specified electric energy transactions from certain provisions of the Commodity Exchange Act (CEA) and CFTC regulations (RTO-ISO Order). The CFTC is proposing to amend the text of the RTO-ISO Order to explicitly provide that the RTO-ISO Order does not exempt the entities covered under the RTO-ISO Order from the private right of action found in Section 22 of the CEA with respect to anti-fraud and anti-manipulation claims made by private third parties; *and*

WHEREAS, The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), in part, amended the CEA and altered the scope of the CFTC's jurisdiction. The Dodd-Frank Act also included a savings clause, paragraph (I)(i) of CEA section 2(a)(1), which preserves the existing statutory authority of FERC and State regulatory authorities over agreements, contracts, or transactions entered into pursuant to a tariff or rate schedule approved by FERC or a State regulatory authority, that are (1) not executed, traded, or cleared on an entity or trading facility subject to registration with the CFTC, or (2) executed, traded, or cleared on a registered entity or trading facility owned or operated by a Regional Transmission Organization (RTO) or Independent System Operator (ISO); however, paragraph (I)(ii) of CEA section 2(a)(1) also preserves the CFTC's statutory authority over such agreements, contracts, or transactions. Thus, the CFTC does not have sole jurisdiction over transactions covered by the RTO-ISO Order; *and*

WHEREAS, The Federal Power Act specifically prohibits a private cause of action; *and*

WHEREAS, The Federal Energy Regulatory Commission (FERC) staff has submitted comments to the CFTC opposing the introduction to FERC-jurisdictional markets of a private right of action under the CEA. Among the arguments against the proposal, FERC staff noted that Congress directed that the CFTC and FERC establish cooperative procedures for avoiding conflicts where the agencies' jurisdiction may overlap and that, as required by Congress, the CFTC and FERC have set forth such procedures in a memorandum of understanding. FERC staff warned that the CFTC's proposal to establish a private right of action under the CEA risks the potential of jurisdictional conflicts between the CFTC and FERC being disputed by private actors in court proceedings, rather than through the inter-agency cooperation that Congress intended; *and*

WHEREAS, The Public Utilities Commission of Texas has submitted comments to the CFTC that urge the CFTC “to leave the RTO-ISO Order in its current form, thereby clarifying that Section 22 claims are precluded;” *and*

WHEREAS, Chairman Fred Upton and Ranking Member Frank Pallone, Jr., of the Committee on Energy and Commerce, U.S. House of Representatives, the House Committee with jurisdiction over the FERC, have written to the CFTC requesting a briefing regarding the CFTC’s proposal because they are concerned about the impact the proposal could have on the wholesale electricity markets; *and*

WHEREAS, The CFTC proposal to allow for private rights of action for transactions in the RTO or ISO markets could upset the Congressionally-mandated balance, increase regulatory uncertainty and litigation risk, and make the markets less efficient; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2016 Summer Meetings in Nashville, Tennessee, urges that the Commodity Futures Trading Commission not take any actions that would permit Section 22 claims in the RTO and ISO markets.

Sponsored by the Committee on Electricity on July 26, 2016
Adopted by the NARUC Board of Directors, July 27, 2016