



February 23, 2016

Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: *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*

Dear Secretary Kirkpatrick:

The ISO/RTO Council ("IRC") submits these comments before the CFTC's Energy and Environmental Markets Committee ("EEMAC") as the Commission considers the interrelationship between private rights of action under section 22 of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* ("CEA") and the exemption application under CEA section 4(c) filed by the Southwest Power Pool ("SPP").¹ The ISO/RTO Council is comprised of the U.S. Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") and two Canadian ISOs. Together, the U.S. IRC members serve the electric needs of over two thirds of the nation and include ISO-New England, the New York ISO, PJM Interconnection, the Mid-Continent ISO, the Southwest Power Pool, the Electric Reliability Council of Texas, SPP and the California ISO.² The IRC is submitting this statement because the Commission's disposition of this issue in connection with the pending SPP exemption order could adversely impact SPP's market and could have precedential implications for the other RTOs and ISOs that previously were granted exemptions by the Commission. For the reasons discussed below, the Commission's specifically reserving CEA section 22 private rights of action in the final SPP order, and potentially reopening this issue as applied to other RTOs and ISOs covered by the ISO-RTO Final Order, will trigger a number of unintended consequences and create new jurisdictional challenges as to the Commission's authority over various RTO/ISO products.³

¹ 80 Fed. Reg. 29490 (May 21, 2015).

² The Ontario Electric System Operator and Alberta Electric System Operator are members of the IRC but are not jurisdictional to U.S. regulation and as a result are not participating in these comments.

³ The IRC notes that in the Preamble to the proposed SPP Order, the Commission appeared inclined to address the issue of reservation of private rights of action as applied not just to the SPP exemption, but the other RTO exemptions it previously had granted. 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 FR 19880, April 2, 2013 ("**ISO-RTO Final Order**").

At the outset, the IRC notes that it continues to support the Commission's reservation of its enforcement jurisdiction in the draft SPP order and the ISO-RTO Final Order as a sound means to address manipulative activity that might cross both FERC-regulated markets (such as ISO markets) and CFTC-regulated markets (such as the Intercontinental Exchange). The Commission's reservation of enforcement jurisdiction in those instances, coupled with the Congressionally-directed MOU between FERC and CFTC, precludes market participants from evading enforcement oversight by taking actions in the FERC-regulated markets that impacts futures, swap or option markets regulated by the CFTC or vice versa. The IRC continues to believe it is sound public policy to support the jurisdiction of both enforcement agencies when addressing schemes that cross two markets. Moreover, the ISO-RTO Final Order, and the proposed SPP exemption, provide appropriate checks and balances (as negotiated between the RTOs and ISOs, and CFTC staff) while avoiding litigation over which agency (as between FERC and CFTC) has jurisdiction over each of the myriad of RTO and ISO products. As constructed, the ISO-RTO Final Order is a pragmatic solution that protects the public interest while avoiding the risk of costly and potentially inconsistent litigation results.

The IRC is concerned that the Commission's statement in the Preamble to the proposed SPP order, which appears to authorize broad private rights of action over a myriad of undefined RTO/ISO products, could effectively undo the careful balance achieved in the ISO/RTO Final Order. More significantly, the statement in the Preamble, if acted upon in the final SPP order or in an amendment to the Final ISO/RTO Order, may have profound and adverse consequences for the comprehensive regulatory schemes that Congress, the FERC, and the Public Utility Commission of Texas have implemented for these RTO and ISO markets as well as the careful balance of public interests that Congress struck when it directed coordination between the CFTC and the FERC to avoid "duplicative regulation". By specifically providing for coordination between FERC and CFTC, Congress created the means to establish an effective and efficient regulatory framework that recognizes and respects the uniqueness of ISO/RTO markets with respect to the pervasive oversight already applied to them by the FERC and the Texas PUC. Introducing the potential for private rights of action in the context of the ISO/RTO Final Order (or the SPP order) will disrupt the effective and efficient regulatory paradigm that provides for structural oversight by FERC and the Texas PUC, but also allows for behavioral oversight by CFTC through its enforcement authority where applicable. This approach was sanctioned by the Congress, FERC, this Commission, the affected ISOs/RTOs and market participants and the IRC urges the Commission to preserve this paradigm.

Since the ISO-RTO Final Order was granted, the FERC has launched a significant number of enforcement actions addressing manipulation confined to various ISO/RTO markets. The CFTC appears, quite appropriately in the IRC's opinion, to have regarded the reservation of its enforcement authority provided in the Final ISO-RTO Order as reserving its authority to address schemes that might involve *both* FERC and CFTC regulated markets without seeking to assert jurisdiction over or preempt FERC enforcement efforts that solely address manipulation in the RTO/ISO markets.

However, the potential of a private right of action under the CEA, when private rights of action for manipulation are not permitted under the Federal Power Act, threatens to upset this balance. The Commission's proposed reservation of private rights of action introduces the possibility for private litigation in cases involving activity completely confined to and traded *exclusively* within a FERC-regulated market. Of course, in order for a private litigant to maintain such an action, it will have to demonstrate that the financial transmission right, virtual trade, or demand side transaction is a swap, option or futures contract under the CEA. Putting this question before a court, noting of course that a number of parties, potentially including the IRC, will forcefully argue that these types of ISO/RTO

products are not jurisdictional under the CEA, is the very situation that Congress sought to avoid in 2010 and why the RTOs and ISOs pursued section 4(c) relief in the first instance. Respectfully, the CFTC too should see value in avoiding putting this question before multiple federal courts to decide.

Introducing private rights of action under the CEA risks negatively impacting the CFTC's, FERC's and the Texas PUC's regulatory programs over RTO/ISO market products which are interrelated in a manner that collectively facilitates effective administration of ISO/RTO reliability and market functions. Congress recognized this through its directive in the Dodd-Frank Act that the CFTC and the FERC work together for the express purpose of avoiding "duplicative regulation" under the Federal Power Act and the CEA. Express application of Section 720(a)(1)(A) of the Dodd-Frank Act (which authorizes private causes of action unless exempted under Section 4(c)) through an amended ISO/RTO Final Order or the SPP order, would, in fact, open up these markets to potential conflicting rulings by the CFTC, the FERC (or in the case of ERCOT the Texas PUC) and the approximate 100 District Courts of the United States. The target of the action would be forced to litigate the very issue that was intentionally avoided through the exemption process—namely whether or which of these products are indeed subject to regulation by the CFTC. And, as a result of that potential flood of litigation, the CFTC itself would run the risk of inconsistent rulings among the various district courts on that very question. Such inconsistent rulings as to the applicability of the CEA versus the Federal Power Act would likely make less clear the Commission's own reservation of its enforcement authority in the ISO/RTO Final Order and lead to a patchwork of inconsistent rulings governing different federal court districts around the nation.

In the same vein, administration of products such as Financial Transmission Rights would no longer be clearly linked to the underlying physical attributes of the grid as it inevitably would be argued that FERC was divested of jurisdiction over these products due to the "exclusive jurisdiction" provisions of the CEA. Such an outcome would create, for the first time, a "regulatory gap" between the allocation and trading of the product itself and its use in addressing real time congestion on the grid, a matter clearly within FERC's jurisdiction. Moreover, market participants would face the risk of simultaneously being subject to enforcement oversight by three authorities: the CFTC, the FERC (or, in the case of ERCOT, the Texas PUC), and hundreds of District Court judges making it virtually impossible for any single claim to be timely resolved or settled.

Although it is true that private causes of action have existed under the CEA for many years, in the Dodd-Frank Act Congress recognized that the RTO and ISO products and transactions in question are unique and potentially overlapped both FERC and CFTC jurisdiction. As a result, Congress directed that the two agencies take steps, both through their overall regulatory programs and their enforcement programs, to avoid "duplicative regulation". Given the unique attributes of products such as FTRs that are inextricably bound to the physical grid and the reliable delivery of electricity to customers at a regulated price, the specific directive of Congress to avoid "duplicative regulation" should be read in *pari materia* with the general grant of private causes of action and the Commission's broad authority under section 4(c). The only *rational* way to harmonize these statutory provisions is to leave the original ISO-RTO Final Order in place (and parallel its provisions in the pending SPP order) and not seek to amend those orders by engrafting, for the first time, a private cause of action into exemption Orders that the markets have accepted for the past three years and upon which they now rely.

Such a result is in accordance with the Congressional mandate of CEA section 4(c)(6). While the Commission in the preamble to the draft SPP order raised a concern with the Commission reserving enforcement authority to itself without similarly authorizing private causes of action, *in fact* Congress

anticipated exactly such a division in the reach of the Commission's exemption authority when it granted the Commission broad exemption authority under the CEA. CEA Section 4(d) makes clear that the grant of any exemption under section 4(c)(6) shall not affect the *Commission's* authority to take enforcement action in connection with the conditions of such an exemption leaving open the potential for a different approach to private causes of action under the CEA's exemption provisions.⁴

Finally, the IRC notes that addressing this issue in piecemeal fashion by reserving a private cause of action under the CEA in the SPP order could well effectively prejudge this issue for all of the RTOs and ISOs. For this reason, the IRC further urges that the Commission, if it is to address this issue at all, address it generically rather than create the timing anomalies associated with issuing a Final Order opening up SPP to private causes of action while at the same time, seeking comment on that very question as applied to the other affected RTOs. Such timing anomalies can only further confuse the marketplace and ultimately call into question whether the notice and comment process for the other RTOs is meaningful if the Commission will have effectively already decided the issue in the context of the SPP Order. Accordingly, the Commission should not delay issuing the SPP Final Order, but the order should not reach this issue. Rather, as recommended above, to the extent the Commission decides it wishes to continue to examine this issue, it should do so generically after notice and comment as well as after coordination and consultation with the FERC and the Texas PUC.

The IRC appreciates this opportunity to provide this statement to the EEMAC and commits to continuing to work with the CFTC and its Staff to ensure a regulatory scheme that advances the public interest while recognizing both the unique nature of ISO/RTO market products and the multiple effective layers of regulation that already exist. We welcome further dialogue on this issue and urge the Commission's consideration of these comments as the only rational way to address the ISO/RTO Final Order that it has issued or, in the case of SPP, may soon issue.

Respectfully submitted,

/s/ ISO/RTO Council
ISO/RTO Council

cc: Ajay B. Sutaria, Secretary
Energy & Environmental Markets Advisory Committee
U.S. Commodity Futures Trading Commission

⁴ See CEA section 4(d) which provides: "The granting of an exemption under this section shall not affect the authority of the Commission under any other provision of this Act to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of this Act or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements."