



June 22, 2015

Via Electronic Submission

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments of the Joint Trade Association on the 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 Mr. Kirkpatrick:

I. INTRODUCTION

The American Public Power Association (“APPA”)¹, Edison Electric Institute (“EEI”)², Electric Power Supply Association (“EPSA”)³, and the National Rural Electric Cooperative Association (“NRECA”)⁴ (“Joint Trade Associations”) respectfully submit these comments in

¹ APPA is the national service organization representing the interests of government-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate electric customers. APPA’s member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some government-owned electric utilities generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. Government-owned utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a government-owned electric utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

² EEI is the association of U.S. shareholder-owned electric companies. EEI’s members serve 99 percent of the ultimate customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members and more than 170 industry suppliers and related organizations as Associate members.

³ 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 seeks to bring the benefits of competition to all power customers.

⁴ Formed in 1942, NRECA is the national service organization for more than nine hundred not-for-profit rural electric utilities and public power districts that provide electric energy to approximately forty-two million consumers in forty-seven states or twelve percent of the nation’s population. Kilowatt-hour sales by rural electric cooperatives

response to the Commodity Futures Trading Commission's ("CFTC" or "Commission") Proposed Order and Request for Comment on an Application for an Exemptive Order from the Southwest Power Pool ("SPP") ("Proposed Exemption").⁵ The Commission issued the Proposed Exemption in response to SPP's Exemption Application requesting that the Commission exercise its authority under § 4(c)(6) of the Commodity Exchange Act ("CEA") and § 712 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") to exempt certain contracts, agreements and transactions for the purchase or sale of certain categories of electricity-related products, Transmission Congestion Rights, Energy Transactions and Operating Reserve Transactions (collectively "Covered Transactions") that are offered pursuant to a Federal Energy Regulatory Commission ("FERC") approved tariff, from certain provisions of the CEA ("Exemption Application").

In its Exemption Application, SPP requested the same relief with substantially the same conditions as granted to the Midcontinent Independent Transmission System Operator, Inc. ("MISO"); ISO New England, Inc. ("ISO NE"); PJM Interconnection, L.L.C. ("PJM"); California Independent System Operator Corporation ("CAISO"); New York Independent System Operator, Inc. ("NYISO"); and the Electric Reliability Council of Texas, Inc. ("ERCOT") in April 2013 ("2013 RTO-ISO Order").⁶ The Commission found that the specific categories of transactions established in the Proposed Exemption meet the criteria set forth in § 4(c) (6) of the CEA and requested comment on the Commission's findings and on the Proposed Exemption order.

Joint Trade Association's members are physical commodity market participants that routinely engage in transactions on and through the delivery stage and account reconciliation mechanisms of the markets administered by SPP under its FERC approved tariff provisions ("SPP Tariff Transaction"). As such, the Joint Trade Association members are active participants within the markets operated by SPP, and use the SPP Tariff Transactions to perform their commercial operational activity in SPP markets. In that capacity, the Joint Trade Associations largely support the Proposed Exemption and request that the Commission grant it based upon the existence of pervasive regulation of SPP by FERC and the continued ability of the Commission to discharge its duties under the CEA. However, as discussed herein, Joint Trade Associations request that the Commission delete the reference to third party actions in the Preamble to the Proposed Exemption

account for approximately eleven percent of all electric energy sold in the United States. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members.

⁵ *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) (hereafter "Proposed Exemption").

⁶ *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 (April 2, 2013) ("2013 RTO-ISO Order").

and provide clarification on what constitutes a “member” of SPP for purposes of the Proposed Exemption.

II. COMMENTS

A. The Exemption Application is in the Public Interest and Should be Granted

New § 4(c)(6)(A) of the CEA, added to the CEA by the Dodd-Frank Act, allows the Commission to exempt from the CEA transactions entered into pursuant to a tariff or rate schedule approved or permitted to take effect by FERC. Consistent with this provision, the Proposed Exemption proposes to exempt the Covered Transactions as specifically defined in the Proposed Exemption from the CEA, subject to certain conditions, and the following provisions for which the Commission *expressly* retains jurisdiction: the Commission’s general anti-fraud and anti-manipulation authority and scienter based provisions under sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4 and part 180.⁷ In order to qualify for the Proposed Exemption, a contract, agreement or transaction must be offered or entered into in a market administered by SPP, pursuant to SPP’s tariff, for the purposes of allocating SPP’s physical resources, and the SPP tariff must have been approved or permitted to have taken effect by FERC. Except for the reference to CEA § 22 in the Preamble of the Proposed Exemption, which is discussed in more detail in section B, the conditions imposed and the sections of the CEA under which the Commission specifically retains jurisdiction are consistent with the 2013 RTO-ISO Order.

Due to the pervasive regulation of SPP by FERC and the conditions imposed by the Commission in the Proposed Exemption, the Proposed Exemption will not have an adverse effect on the ability of the Commission to discharge regulatory or self-regulatory duties under the CEA. SPP as well as each of the markets that it administers must meet detailed and specific FERC requirements and operate under FERC approved tariffs. In order to be considered a RTO, SPP had to demonstrate compliance with a wide range of requirements, similar to the process necessary under the CEA for an exchange to be granted designation as a Contract Market. In addition to the general rules and orders establishing requirements for consideration as an RTO, FERC has also issued orders and rules that govern many specific tasks required for any particular RTO to properly function. FERC exercises extensive regulatory oversight over not just the markets operated by SPP, but also the transactions that are executed on or through the physical delivery and account reconciliation mechanisms of the markets administered by SPP. As such, any transactions executed on a market operated by SPP under a FERC-approved tariff should fall under the exemption. In addition to the regulatory requirements in SPP’s Tariff, SPP is subject to many other statutory and regulatory requirements imposed by FERC rules and regulations on wholesale markets and all participants in the markets. This includes the requirement under the Federal Power

⁷ Proposed Exemption at 29516.

Act (“FPA”) that wholesale rates for the transmission and sale of electric energy are just and reasonable and not unduly discriminatory or preferential in terms of the rates’ effects on customers, or discriminatory or preferential to them and affiliated entities.

In addition to evaluating the transactions included in the request and the currently existing regulations and oversight of SPP and the specific transactions by FERC, the Commission also evaluated SPP against the Core Principles established for Derivatives Clearing Organizations (“DCOs”) and Swap Execution Facilities (“SEFs”). The Commission’s analysis reviewed the currently existing rules under SPP’s Tariff as approved by FERC and the regulations and oversight of FERC to evaluate if the currently existing oversight satisfies the public interest finding required under CEA § 4(c)(6) for granting a public interest waiver of jurisdiction in the Proposed RTO/ISO Exemption. The Joint Trade Associations support the Commission’s determination that the Petitioners’ practices and market rules are consistent with the spirit of the DCO Core Principles.

Thus, the Joint Trade Associations support the Commission’s finding that the Proposed Exemption as requested by SPP, without the reference to CEA § 22, is in the public interest. The Proposed Exemption is also consistent with Congressional intent to avoid duplicative regulation. Congress recognized the impropriety of imposing duplicative regulation over entities and transactions, and instructed the Commission and FERC to “appl[y] their respective authorities in a manner so as to ensure effective and efficient regulation in the public interest” and to “[avoid], to the extent possible, conflicting or duplicative regulation.”⁸ As noted above, SPP is already subject to pervasive regulation and oversight by FERC and any additional regulation by the CFTC would be duplicative and potentially inconsistent. The retention of market manipulation authority and the ongoing information sharing with FERC⁹ will ensure that the Commission is able to effectively discharge its duties under the CEA.

The Joint Trade Associations respectfully comment, however, that failing to grant the Proposed Exemption, with the modifications discussed below, will likely result in conflicting and duplicative regulation of SPP. Such duplicative regulation would, in turn, lead to increased compliance costs for both SPP and SPP market participants (including the Joint Trade Association members), which would then be passed on to consumers, in the form of increased prices for electric energy.

B. The Reference to CEA § 22 Creates Regulatory Uncertainty and Should be Deleted

As previously indicated, in April of 2013, prior to SPP filing its Exemption Application, the Commission issued the 2013 RTO-ISO Order. The plain language of the 2013 RTO-ISO

⁸ Dodd-Frank Act, § 720(a)(1)(A), (C) (2010).

⁹ See Memorandum of Understanding between the Commodity Futures Trading Commission and the Federal Energy Regulatory Commission Regarding Information Sharing and the Treatment of Proprietary Trading and Other Information (Jan. 2, 2014).

Order exempted Financial Transmission Rights, Energy Transactions, Forward Capacity Transactions and Reserve or Regulation Transactions as defined in the 2013 RTO-ISO Order from the CEA subject to the enumerated conditions and specified CEA sections.¹⁰ The 2013 RTO-ISO Order specifically “Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission’s general antifraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.”¹¹

In the Preamble in the Proposed Exemption, the Commission raises for the first time the issue of a private right of action under CEA § 22 as it relates to both the Proposed Exemption for SPP and the 2013 RTO-ISO Order. The Commission comments that “[i]t would be highly unusual for the [CFTC] to reserve to itself the power to pursue claims for fraud and manipulation... while at the same time denying private rights of action and damages remedies for the same violations... Thus, the [CFTC] did not intend to create such a limitation, and believes the [ISO-RTO Final Order and the Proposed SPP Order do not] prevent private claims for fraud or manipulation under the [CEA].”¹² As discussed below, the inclusion of this language in the Preamble to the Proposed Exemption greatly reduces the certainty provided to market participants by the 2013 RTO-ISO Order and should be removed.

For more than two years, MISO, ISO NE, PJM, NYISO and ERCOT markets and the market participants in those markets have been operating in reliance on the 2013 RTO-ISO Exemption Order and with the unambiguous understanding that the energy transactions specifically identified in the 2013 RTO-ISO Order were exempt from the CEA except for the specifically enumerated reserved sections. This commentary about a differing Commission “intent”, despite the clear language in the 2013 RTO-ISO Order, creates a situation in which market participants in existing RTO-ISO markets are concerned that they cannot rely on the plain language in the 2013 RTO-ISO Exemption Order. Stakeholders and market participants need to be able to rely on the language in the Commission Orders and could not anticipate that the Commission would seek to retroactively impose requirements that were not contemplated or discussed in prior proceedings through an unrelated order or proceeding. This proposal does not provide due process and does not meet the notice and public comment requirements of the Administrative Procedures Act.

¹⁰ 2013 RTO-ISO Order at 19912.

¹¹ *Id.* Joint Trade Associations note that CEA section 4c(b) and Commission regulation 32.4 are not part of the general anti-fraud, anti-manipulation and enforcement authority under the CEA. Instead, those sections articulate the Commission’s jurisdiction over option transactions.

¹² Proposed Exemption at 29493.

The inclusion of this language in the Preamble to the Proposed Exemption, as it relates back to the 2013 RTO-ISO Order, is even more concerning as the issue was not raised by the Commission's 2012 Proposed Order on the RTO/ISO exemption application, or by any of the commenters in response to the request for comment on that 2012 Proposed Order.¹³ As such, there was no notice or opportunity for market participants to comment on the consequences of the inclusion of this commentary in the Preamble to the Proposed Exemption.

Another aspect of the uncertainty related to the 2013 RTO-ISO Order is that the commentary in the Proposed Exemption about CEA § 22 could call into question, or even undercut, the very purpose and effectiveness of the 2013 RTO-ISO Order itself. In its analysis and in the adopting release for the 2013 RTO-ISO Order, the Commission intentionally states that it is not required to make a determination as to whether the identified transactions are or are not "swaps."¹⁴ And yet, one issue that will likely be addressed in any private right of action under CEA § 22 is whether a transaction in an ISO-RTO market is or is not a swap, futures contract, or option. Thus, the Commission's commentary about CEA § 22, in a context of the Proposed Exemption (and the 2013 RTO/ISO Order), which grants the exemption without such a determination, has the potential to undercut the regulatory certainty that the 2013 ISO-RTO Order and the Proposed Exemption are intended to give the market participants in these markets. Any changes as to how these exempted transactions should be viewed under Commission regulations should only occur through a transparent rulemaking process with notice and opportunity for public comment from affected market participants.

Inclusion of the commentary in the Preamble to the Proposed Exemption also creates a renewed concern about conflicting regulation which also creates uncertainty for market participants. Under the 2013 RTO-ISO Order, there is clarity as to market oversight. In the Proposed Exemption and the 2013 RTO-ISO Order, the Commission expressly retained its general antifraud and anti-manipulation authority. As such both the Commission and FERC have authority to investigate and levy fines for violations of the market manipulations sections under substantially similar provisions under the CEA and the FPA. In furtherance of its authority FERC has issued orders establishing market oversight. FERC Order No. 2000 required each RTO and ISO to establish and maintain a market monitoring function.¹⁵ Additionally, FERC Order No. 719 requires the RTO/ISO Market Monitoring Units to identify ineffective market rules, recommend proposed rule changes and OATT modifications, review and report on the performance of the

¹³ *Proposed Order and Request for Comment on 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 Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act*, 77 Fed. Reg. 52138 (Aug. 28, 2012).

¹⁴ See e.g. adopting release for the 2013 RTO-ISO Order at 19901.

¹⁵ *Regional Transmission Organizations*, 89 FERC ¶ 61,285 (Dec. 20, 1999), 65 Fed. Reg. 809 (Jan. 6, 2000) ("Order No. 2000"). The RTOs/ISOs meet these requirements by establishing a distinct and independent market monitoring program that serves a role similar to that of a market regulation function required for a DCM. Under Order No. 2000, Petitioners' market monitoring programs are required to have access to all market data and maintain the resources necessary to carry out their market monitoring functions.

markets to the respective RTO or ISO as well as to FERC, and notify FERC when instances of a market participant's behavior may require further investigation.¹⁶

Thus, prior to the issuance of the Proposed Exemption, there was regulatory certainty as to who had oversight over the exempted RTO/ISO markets. The issuance of the Proposed Exemption with the commentary about CEA § 22 creates renewed uncertainty and concern about overlapping or inconsistent regulation, as FPA § 222 prohibiting market manipulation specifically does not provide for a private right of action.¹⁷ As such, there is a potential conflict between the CEA and the FPA, and a differing view between the agencies as to whether these markets and these transactions should be the basis for a private right of action.

As discussed in section A, RTO/ISO markets are carefully structured markets subject to comprehensive FERC regulation and oversight. Market participants make billions of dollars in investment and market decisions based on the certainty provided by the FERC approved market rules, the Commission's 2013 RTO/ISO Order and the Proposed Exemption, and the knowledge that they will only be changed after stakeholder discussions and rulemakings with notice and an opportunity for public comment. The Commission's commentary about CEA § 22 in the Preamble to the Proposed Exemption, which is contrary to the FPA and existing regulations and orders, changes this dynamic and creates a situation in which, a transaction approved by FERC, exempted by the Commission, and subject to oversight by the market monitor in the affected RTO/ISO (and the state public service commission, in the case of ERCOT), could still be subject to a private claim. Further, the plain language of FPA § 222 demonstrates that Congress did not provide for a private right of action in FERC-jurisdictional markets. As such, market participants may no longer be able to rely on regulator or market monitor assurances (or even clear tariff and rate design elements) which would adversely affect the certainty provided by the market rules.

Due to these concerns and possible consequences, the Joint Trade Associations respectfully request that, in the adopting release for the final Exemption Order, the Commission delete or withdraw the paragraphs referencing CEA § 22 in the Preamble to the Proposed Exemption. If the Commission chooses to impose additional conditions on the RTOs and ISOs and the market participants in those markets, then it should do so only after consultation with FERC and after providing notice and opportunity for public comment. This would be consistent with Congressional direction that FERC and the Commission coordinate their actions so as to avoid duplicative or inconsistent regulation.¹⁸

¹⁶ *Wholesale Competition in Regions with Organized Electric Markets*, 125 FERC ¶ 61,071 (Oct. 17, 2008). (“Order No. 719”).

¹⁷ 16 U.S.C § 824v (2006); 18 C.F.R § 1c.2 (2009). Section (b) specifically states that “nothing in this section shall be construed to create a private right of action.” It should be noted that while private parties are not able to bring private rights of action under the market manipulation provisions of the FPA, FERC has allowed parties to bring concerns to the Commission's attention under § 306 of the FPA which allows a private complaint to be brought to the Commission for any alleged violation of the FPA. See *Richard Blumenthal, Attorney General for the State of Connecticut vs. ISO New England et al*; 128 FERC ¶ 61,182 at P 56 (2009).

¹⁸ Section 722 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; 7 U.S.C. § 2(a)(1)(I). See also

C. The Commission Should Clarify What Entities Are “Members” of SPP for Purposes of the Proposed Exemption

The Proposed Exemption frequently uses the term “member” but does not define the term in the context of the RTO-ISO markets. Although the term “member” is defined in the CFTC rules as such term is used within the context of other CFTC-regulated market structures, for purposes of certainty, the Joint Trade Associations respectfully request that the Commission clarify in the final exemption order that a “member,” when such term is used in the context of the RTO-ISO markets, is a market participant that is bound by the RTO-ISO Tariff and that also meets the conditions to be considered an “appropriate person” that are set forth elsewhere in the Proposed Exemption.

III. CONCLUSION

Joint Trade Associations appreciate the Commission’s consideration of SPP’s Exemption Application and the opportunity to submit comments. Joint Trade Associations support the Commission’s conclusion that the granting the exemption request is in the public interest. However, the Joint Trade Associations strongly urge the Commission to approve the Proposed Exemption without including in the adopting release the language referencing CEA § 22. In addition, the Joint Trade Associations request clarification as to the entities are “members” of the RTO for purposes of the exemption. These changes will further sound regulatory policy, certainty and clarity.

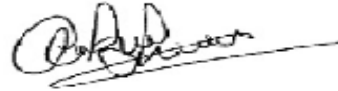
Please contact the undersigned if you have any questions.

Respectfully Submitted,

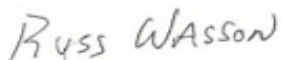
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