



6351-01-P

COMMODITY FUTURES TRADING COMMISSION

Final Order Regarding Southwest Power Pool, Inc. Application to Exempt Specified Transactions; Amendment to the Final Order Exempting Specified Transactions of Certain Independent System Operators and Regional Transmission Organizations

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: The Commodity Futures Trading Commission (“CFTC” or “Commission”) is issuing a final order in response to an application from Southwest Power Pool, Inc. (“SPP”) to exempt specified transactions from certain provisions of the Commodity Exchange Act (“CEA” or “Act”) and Commission regulations. In this release, the Commission is also amending an order issued on March 28, 2013 exempting other specified transactions from certain provisions of the CEA and Commission regulations.

DATES: The effective date for the SPP Final Order and the Amended RTO-ISO Order is [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Chief Counsel, 202-418-5092, rwasserman@cftc.gov, Alicia L. Lewis, Special Counsel, 202-418-5862, alewis@cftc.gov, or Andrée Goldsmith, Special Counsel, 202-418-6624, agoldsmith@cftc.gov, Division of Clearing and Risk; David P. Van Wagner, Chief Counsel, 202-418-5481, dvanwagner@cftc.gov, or Riva Spear Adriance, Senior Special Counsel, 202-418-5494, radriance@cftc.gov, Division of Market Oversight, in each case

at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Overview

The Commission is issuing a final order (“SPP Final Order”) in response to an application (“Exemption Application”)¹ from SPP to exempt certain Transmission Congestion Rights, Energy Transactions, and Operating Reserve Transactions (collectively, the “SPP Covered Transactions”) from certain provisions of the CEA² and Commission regulations. The SPP Final Order exempts contracts, agreements, and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the SPP Final Order from certain provisions of the CEA and Commission regulations, with the exception of the Commission’s general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4d, 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 180.³ The exemption in the SPP Final Order also will exempt such transactions from private actions pursuant to CEA section 22.⁴ To be eligible for the exemption contained in the SPP Final Order, the contract, agreement, or transaction must be offered or entered into in a market administered by SPP pursuant to SPP’s tariff, rate schedule, or protocol

¹ In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Southwest Power Pool, Inc., Oct. 17, 2013, as amended Aug. 1, 2014.

² 7 U.S.C. 1 *et seq.*

³ The foregoing provisions are referred to as the “Excepted Provisions.”

⁴ 7 U.S.C. 25.

(collectively, “Tariff”), and the Tariff must have been approved by the Federal Energy Regulatory Commission (“FERC”). In addition, the contract, agreement, or transaction must be entered into by persons who are “appropriate persons,” as defined in sections 4(c)(3)(A) through (J) of the Act,⁵ “eligible contract participants,” as defined in section 1a(18)(A) of the Act and Commission regulations,⁶ or persons who are in the business of: (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system. The SPP Final Order also extends to any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to the SPP Covered Transactions. Finally, the SPP Final Order is subject to other conditions set forth therein. Authority for issuing the exemption is found in section 4(c)(6) of the Act.⁷ The Commission issued a proposed order and request for comment with respect to SPP’s Exemption Application (“SPP Proposed Order”) on May 18, 2015.⁸

A copy of the Exemption Application is available on the Commission’s website at <http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/spp4camdappl080114.pdf>; the attachments to the Application are posted at <http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/spp4cattach-a-gg080114.pdf>. A chart submitted by SPP that sets forth the status of its implementation of the standards set forth in FERC Order No. 741 is posted at

⁵ 7 U.S.C. 6(c)(3)(A) through (J).

⁶ 7 U.S.C. 1a(18)(A). See also Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 FR 30596, May 23, 2012.

⁷ 7 U.S.C. 6(c)(6).

⁸ 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 FR 29490, May 21, 2015. The SPP Proposed Order was published in the Federal Register on May 21, 2015.

http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/spp4caddendum_b.pdf. A copy of the SPP Proposed Order is available at 80 FR 29490, and on the Commission's website at

<http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2015-12346a.pdf>. A copy of the comment file with respect to the SPP Proposed Order is available on the Commission's website at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1586>.

The Commission is also amending an order issued on March 28, 2013 pursuant to the authority in section 4(c)(6) of the Act exempting specified electric energy transactions from certain provisions of the CEA and Commission regulations ("RTO-ISO Order").⁹ The RTO-ISO Order was issued in response to a consolidated petition from certain regional transmission organizations ("RTOs") and independent system operators ("ISOs"). The RTO-ISO Order exempted contracts, agreements, and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the RTO-ISO Order from certain provisions of the CEA and Commission regulations, with the exception of the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4e, 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

⁹ 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, Apr. 2, 2013. The RTO-ISO Order was published in the Federal Register on April 2, 2013.

180. The RTO-ISO Order did not specifically mention CEA section 22. The Commission issued a proposal to amend the RTO-ISO Order and request for comment on May 9, 2016 (“RTO-ISO Order Proposed Amendment”).¹⁰ The Commission is amending the text of the RTO-ISO Order to also exempt the transactions covered under that order from private actions pursuant to CEA section 22 (“Amended RTO-ISO Order”).

A copy of the RTO-ISO Order is available at 78 FR 19880 (April 2, 2013), and on the Commission’s website at

[http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-](http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-07634a.pdf)

[07634a.pdf](http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-07634a.pdf). A copy of the RTO-ISO Order Proposed Amendment is available at 81 FR 30245 (May 16, 2016), and on the Commission’s website at

[http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-](http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-11385a.pdf)

[11385a.pdf](http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-11385a.pdf). A copy of the comment file with respect to the RTO-ISO Order Proposed Amendment is available on the Commission’s website at

<http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1697>.

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I. Relevant Dodd-Frank Provisions¹¹

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").¹² Title VII of the Dodd-Frank Act amended the CEA and altered the scope of the Commission's exclusive jurisdiction.¹³ In particular, it expanded the Commission's exclusive jurisdiction, which had included futures traded, executed, and cleared on CFTC-regulated exchanges and clearinghouses, to also cover swaps traded, executed, or cleared on CFTC-regulated exchanges or clearinghouses.¹⁴ As a result, the Commission's exclusive jurisdiction now includes swaps as well as futures.

The Dodd-Frank Act also added a savings clause that addresses the roles of the Commission, FERC, and state regulatory authorities as they relate to certain agreements, contracts, or transactions traded pursuant to the tariff or rate schedule of an RTO or ISO

¹¹ For a fuller discussion, see RTO-ISO Order at 19881-82.

¹² See Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf.

¹³ Section 722(e) of the Dodd-Frank Act.

¹⁴ See 7 U.S.C. 2(a)(1)(A). The Dodd-Frank Act also added section 2(h)(1)(A), which requires swaps to be cleared if required to be cleared and not subject to a clearing exception or exemption. See 7 U.S.C. 2(h)(1)(A).

that has been approved by FERC or the state regulatory authority.¹⁵ That savings clause, paragraph (I)(i) of CEA section 2(a)(1), preserves the 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 (I) not executed, traded, or cleared on an entity or trading facility subject to registration, or (II) executed, traded, or cleared on a registered entity or trading facility owned or operated by an RTO or ISO.¹⁶ However, paragraph (I)(ii) of CEA section 2(a)(1) also preserves the Commission’s statutory authority over such agreements, contracts, or transactions.¹⁷

The Dodd-Frank Act granted the Commission specific powers to exempt certain contracts, agreements, or transactions from duties otherwise required by statute or Commission regulation by adding, as relevant here, new section 4(c)(6) to the CEA. Section 4(c)(6) provides that the Commission shall, if certain conditions are met, issue exemptions from the “requirements” of the CEA for certain transactions entered into pursuant to a tariff or rate schedule approved or permitted to take effect by FERC or a state regulatory authority.¹⁸

The Commission must act “in accordance with” sections 4(c)(1) and (2) of the CEA when issuing an exemption under section 4(c)(6).¹⁹ Section 4(c)(1) grants the Commission the authority to exempt any agreement, contract, or transaction or class of

¹⁵ See 7 U.S.C. 2(a)(1)(I).

¹⁶ 7 U.S.C. 2(a)(1)(I)(i).

¹⁷ See 7 U.S.C. 2(a)(1)(I)(ii).

¹⁸ See 7 U.S.C. 6(c)(6). CEA section 4(c)(6) provides that the Commission shall issue an exemption only if the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act. Moreover, the Commission must act in accordance with 4(c)(1) and 4(c)(2) when issuing an exemption under section 4(c)(6).

¹⁹ 7 U.S.C. 6(c)(6).

transactions, including swaps, from certain provisions of the CEA, in order to promote responsible economic or financial innovation and fair competition.²⁰ Section 4(c)(2)²¹ of the Act further 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” as that term is defined in section 4(c);²² 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.²³ In enacting section 4(c), Congress noted that 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

II. Background

A. RTO-ISO Order

On March 28, 2013, the Commission issued the RTO-ISO Order, which exempts specified transactions of particular RTOs and ISOs²⁵ from certain provisions of the CEA

²⁰ 7 U.S.C. 6(c)(1).

²¹ 7 U.S.C. 6(c)(2).

²² Section 4(c)(3) of the CEA further outlines who may constitute an appropriate person for the purpose of a particular 4(c) exemption and includes, as relevant to the SPP Final Order: (a) any person that qualifies for one of ten defined categories of appropriate persons; or (b) such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

²³ 7 U.S.C. 6(c)(2).

²⁴ H.R. Rep. No. 102-978, 102d Cong. 2d Sess., 1992 U.S.C.C.A.N. 3179, 3213 (1992).

²⁵ Six entities (the “Requesting Parties”) jointly filed a petition requesting the exemption provided in the RTO-ISO Order: Midwest Independent Transmission System Operator, Inc. (“MISO”), ISO New England, Inc. (“ISO NE”), and PJM Interconnection, L.L.C. (“PJM”) are RTOs subject to regulation by FERC; California Independent System Operator Corporation (“CAISO”) and New York Independent System Operator, Inc. (“NYISO”) are ISOs subject to regulation by FERC; and the Electric Reliability Council of

and Commission regulations. The scope of the RTO-ISO Order includes transactions that fall within the definitions of “Financial Transmission Rights,” “Energy Transactions,” “Forward Capacity Transactions,” or “Reserve or Regulation Transactions”²⁶ (collectively, the “RTO-ISO Covered Transactions”) and that are offered or sold in a market administered by one of the petitioning RTOs or ISOs pursuant to a tariff, rate schedule, or protocol that has been approved or permitted to take effect by FERC or PUCT.²⁷ In addition, to be eligible for the exemption in the RTO-ISO Order, all parties to the agreements, contracts, or transactions that are covered by the RTO-ISO Order must be: (1) “appropriate persons,” as defined in section 4(c)(3)(A) through (J) of the CEA; (2) “eligible contract participants,” as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or (3) in the business of (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.²⁸ To be eligible for the exemption in the RTO-ISO Order, the transactions must comply with all other enumerated terms and conditions in the RTO-ISO Order.²⁹ The relief granted in, and the conditions imposed by, the SPP Proposed Order are consistent with the analogous provisions of the RTO-ISO Order.

In the RTO-ISO Order, the Commission excepted from the exemption the Commission’s general anti-fraud and anti-manipulation authority, and scienter-based

Texas, Inc. (“ERCOT”) performs the role of an ISO and is subject to regulation by the Public Utility Commission of Texas (“PUCT”). See RTO-ISO Order at 19882.

²⁶ See id. at 19912-13.

²⁷ See id. at 19913. The exemption in the RTO-ISO Order also applies to “any person or class of persons offering, entering into, rendering advice, or rendering other services with respect” to any of the RTO-ISO Covered Transactions. See id. at 19912. These entities, including the six Requesting Parties (see supra note 25) are hereinafter referred to collectively as the “RTO-ISO Covered Entities.”

²⁸ See id. at 19913-14.

²⁹ See id. at 19912-15.

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 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 180.³⁰ The RTO-ISO Order did not discuss CEA section 22.

B. SPP Exemption Application

On October 17, 2013, SPP filed an Exemption Application³¹ with the Commission requesting that the Commission exercise its authority under section 4(c)(6) of the CEA³² and section 712(f) of the Dodd-Frank Act³³ to exempt certain contracts, agreements, and transactions for the purchase or sale of specified electric energy products, that are offered pursuant to a FERC-approved Tariff, from most provisions of the Act.³⁴ SPP is an RTO subject to regulation by FERC. As described in greater detail below, FERC encouraged the formation of RTOs to administer the electric energy transmission grid on a regional basis.³⁵

SPP specifically requested that the Commission exempt from most provisions of the CEA certain “transmission congestion rights,” “energy transactions,” and “operating reserve transactions,” as those terms are defined in the Exemption Application, if such transactions are offered or entered into pursuant to a Tariff under which SPP operates that has been approved by FERC, as well as any persons (including SPP, its members and its market participants) offering, entering into, rendering advice, or rendering other services

³⁰ See *id.* at 19912.

³¹ SPP filed an amended Exemption Application on August 1, 2014. Citations herein to “Exemption Application” are to the amended Exemption Application.

³² 7 U.S.C. 6(c)(6).

³³ See section 712(f) of the Dodd-Frank Act.

³⁴ See Exemption Application at 1.

³⁵ See *id.* at 2 n.7.

with respect to such transactions.³⁶ SPP asserted that each of the transactions for which an exemption is requested is: (a) subject to a long-standing, comprehensive regulatory framework for the offer and sale of such transactions established by FERC, and (b) part of, and inextricably linked to, SPP's delivery of electric energy and the organized wholesale electric energy markets that are subject to regulation and oversight by FERC.³⁷ SPP expressly excluded from the Exemption Application any request for relief from the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4d, 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 180,³⁸ and such provisions explicitly have been carved out of the SPP Proposed Order. SPP asserted that it is seeking the requested exemption in order to provide greater legal certainty with respect to the regulatory requirements that apply to the transactions that are the subject of the Exemption Application.³⁹

As discussed above,⁴⁰ the relief that SPP requested is substantially similar to the relief the Commission granted in the RTO-ISO Order.

C. SPP Proposed Order

On May 18, 2015, the Commission issued the SPP Proposed Order.⁴¹ The exemptive relief proposed in the SPP Proposed Order was substantially similar to the exemptive relief granted by the Commission in the RTO-ISO Order.

³⁶ See *id.* at 11-15.

³⁷ See *id.* at 17.

³⁸ See *id.* at 1.

³⁹ See *id.* at 11.

⁴⁰ See *supra* section II.A.

1. Transactions Proposed to Be Exempted

In the SPP Proposed Order, the Commission proposed to exempt the purchase and sale of three types of SPP Covered Transactions: (1) Transmission Congestion Rights (“TCRs”), (2) Energy Transactions, and (3) Operating Reserve Transactions, each as defined below, pursuant to section 4(c)(6) of the CEA.⁴²

A TCR⁴³ was proposed to be defined as “a transaction, however named, that entitles one party to receive, and obligates another party to pay, an amount based solely on the difference between the price for electric energy, established on an electric energy market administered by SPP, at a specified source (i.e., where electric energy is deemed injected into SPP’s grid) and a specified sink (i.e., where electric energy is deemed withdrawn from SPP’s grid).”⁴⁴ As set forth in the SPP Proposed Order, TCRs would be exempt only where each TCR is linked to, and the aggregate volume of TCRs for any period of time is limited by, the physical capability (after accounting for counterflow) of SPP’s electric energy transmission system for such period; SPP serves as the market

⁴¹ 80 FR 29490 (May 21, 2015).

⁴² Id. at 29493-94, 29516-17. As set forth in the SPP Proposed Order, SPP represents that the terms “Transmission Congestion Rights,” “Energy Transactions,” and “Operating Reserve Transactions” are SPP’s equivalent of the following terms set forth in the RTO-ISO Order: “Financial Transmission Right,” “Energy Transactions,” and “Reserve or Regulation Transactions,” respectively. SPP also avers that its transactions are defined in a manner consistent with the terms set forth in the RTO-ISO Order. Id. at 29493 n.51.

⁴³ As set forth in the SPP Proposed Order, SPP’s markets will also include Auction Revenue Rights (“ARRs”). ARR are allocated to transmission customers based on historical network load or transmission service reservations (or equivalent service taken under a grandfathered agreement between an SPP transmission owner and a customer). ARR are granted exclusively to transmission service customers (i.e., not to other market participants or speculators) based on their transmission service (or grandfathered service) and are subject to SPP’s simultaneous feasibility analysis of the capability of the SPP Transmission System. ARR are not traded in SPP’s market; instead, ARR entitle the holder to a share of revenues from SPP-administered transmission congestion right auctions or may be “self-converted” at the customer’s election into a transmission congestion right. Id. at 29493 n.52.

⁴⁴ Id. at 29493; see also id. at 29517. The proposed definition of TCR is similar to the definition of financial transmission right (“FTR”) in the RTO-ISO Order. However, the proposed definition of TCR does not include TCR options, whereas the RTO-ISO Order’s definition of FTR includes such rights in the form of options. Id. at 29493 n.53; cf. RTO-ISO Order at 19913 (defining the term FTR to include FTRs and FTRs in the form of options).

administrator for the market on which the TCRs are transacted; each party to the transaction is a market participant of SPP (or is SPP itself) and the transaction is executed on a market administered by SPP; and the transaction does not require any party to make or take physical delivery of electric energy.⁴⁵

“Energy Transactions” were proposed to be defined as transactions in the SPP “Day-Ahead Market”⁴⁶ or “Real-Time Balancing Market,”⁴⁷ as those terms are defined in the SPP Proposed Order, for the purchase or sale of a specified quantity of electric energy at a specified location (including virtual bids and offers) where the price of electric energy is established at the time the transaction is executed.⁴⁸ Performance occurs in the Real-Time Balancing Market by either the physical delivery or receipt of the specified electric energy or a cash payment or receipt at the price established in the Day-Ahead Market or Real-Time Balancing Market; and the aggregate cleared volume of both physical and cash-settled energy transactions for any period of time is limited by the physical capability of the electric energy transmission system operated by SPP for that period of time.⁴⁹

“Operating Reserve Transactions” were proposed to be defined as transactions:

- (1) In which SPP, for the benefit of load-serving entities and resources, purchases, through auction, the right, during a period of time as specified in SPP’s Tariff, to require the seller of such right to operate electric energy

⁴⁵ 80 FR at 29493.

⁴⁶ “Day-Ahead Market” was defined in the SPP Proposed Order as “an electric energy market administered by SPP on which the price of electric energy at a specified location is determined, in accordance with SPP’s Tariff, for specified time periods, none of which is later than the second operating day following the day on which the Day Ahead Market clears.” Id. at 29517.

⁴⁷ “Real-Time Balancing Market” was defined in the SPP Proposed Order as “an electric energy market administered by SPP on which the price of electric energy at a specified location is determined, in accordance with SPP’s Tariff, for specified time periods within the same 24-hour period.” Id.

⁴⁸ Id. at 29493; see also id. at 29517. The definition of Energy Transactions is similar to the definition used by the Commission in the RTO-ISO Order. See RTO-ISO Order at 19913.

⁴⁹ 80 FR at 29493; see also id. at 29517.

facilities in a physical state such that the facilities can increase or decrease the rate of injection or withdrawal of a specified quantity of electric energy into or from the electric energy transmission system operated by SPP with:

(a) physical performance by the seller's facilities within a response time interval specified in SPP's Tariff (Reserve Transaction); or

(b) prompt physical performance by the seller's facilities (Area Control Error Regulation Transaction);

(2) For which the seller receives, in consideration, one or more of the following:

(a) Payment at the price established in SPP's Day-Ahead or Real-Time Balancing Market, as those terms are defined in the SPP Proposed Order, price for electric energy applicable whenever SPP exercises its right that electric energy be delivered (including "Demand Response," as defined in the SPP Proposed Order);

(b) Compensation for the opportunity cost of not supplying or consuming electric energy or other services during any period during which SPP requires that the seller not supply energy or other services;

(c) An upfront payment determined through the auction administered by SPP for this service;

(d) An additional amount indexed to the frequency, duration, or other attributes of physical performance as specified in SPP's Tariff; and

(3) In which the value, quantity, and specifications of such transactions for SPP for any period of time shall be limited to the physical capability of the electric energy transmission system operated by SPP for that period of time.⁵⁰

Finally, in the SPP Proposed Order, the Commission clarified that financial transactions that are not tied to the allocation of the physical capabilities of an electric energy transmission grid would not be suitable for exemption, and were therefore not

⁵⁰ Id. at 29517; see also id. at 29493-94.

covered by the SPP Proposed Order, because such activity would not be inextricably linked to the physical delivery of electric energy.⁵¹

2. Conditions to the SPP Proposed Order

In the SPP Proposed Order, the Commission proposed four conditions, each of which is consistent with the RTO-ISO Order. First, the Commission proposed that all parties to the agreements, contracts, or transactions that are covered by the SPP Proposed Order must be “appropriate persons,” as such term is defined in sections 4(c)(3)(A) through (J) of the Act, “eligible contract participants,” as such term is defined in section 1a(18)(A) of the Act and in Commission regulation 1.3(m),⁵² or persons who are in the business of: (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.⁵³

Second, the Commission proposed that the agreements, contracts, or transactions that are covered by the SPP Proposed Order must be offered or sold pursuant to SPP’s Tariff, which has been approved or permitted to take effect by FERC.⁵⁴

Third, the Commission proposed that neither SPP’s Tariff nor other governing documents may include any requirement that SPP notify a member prior to providing

⁵¹ See id. at 29494.

⁵² Id. Consistent with the RTO-ISO Order, the Commission proposed to use its authority pursuant to CEA section 4(c)(3)(K) to include eligible contract participants as appropriate persons for the purposes of this SPP Final Order. See RTO-ISO Order at 19896, 19913; see also 7 U.S.C. 1a(18)(A) and Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 FR 30596, May 23, 2012.

⁵³ 80 FR at 29494. Consistent with the RTO-ISO Order, the Commission also proposed to use its authority pursuant to CEA section 4(c)(3)(K) to include persons who are in the business of: (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system. See RTO-ISO Order at 19899, 19913, 19914.

⁵⁴ 80 FR at 29494.

information to the Commission in response to a subpoena or other request for information or documentation.⁵⁵

Finally, the Commission proposed that information-sharing arrangements that are satisfactory to the Commission between the Commission and FERC must remain in full force and effect.⁵⁶ The Commission proposed that this condition also requires that SPP comply with the Commission's requests on an as-needed basis for related transactional and positional market data.⁵⁷

3. Additional Limitations

In the SPP Proposed Order, the Commission expressly noted that the proposed exemption was based upon the representations made in the Exemption Application and in the supporting materials provided by SPP and its counsel, and that any material change or omission in the facts and circumstances that alter the grounds for the SPP Proposed Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or in the public interest and consistent with the purposes of the CEA.⁵⁸ The Commission highlighted several of SPP's representations as being of particular importance, including: (1) the exemption sought by SPP relates to the transactions described in the SPP Proposed Order, which are primarily entered into by commercial participants that are in the business of generating, transmitting, and

⁵⁵ Id.

⁵⁶ Id. The CFTC and FERC signed a Memorandum of Understanding ("MOU") Regarding Information Sharing and Treatment of Proprietary Trading and Other Information on January 2, 2014 ("CFTC-FERC Information Sharing MOU"), which addresses the sharing of information in connection with market surveillance and investigations into potential market manipulation, fraud, or abuse. The MOU is available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcfercismou2014.pdf>.

⁵⁷ 80 FR at 29494.

⁵⁸ See id.; see also id. at 29518. These limitations are consistent with the RTO-ISO Order. See RTO-ISO Order at 19914-15.

distributing electric energy;⁵⁹ (2) SPP was established for the purpose of providing affordable, reliable electric energy to consumers within its geographic region;⁶⁰ (3) the transactions described in the SPP Proposed Order are an essential means, designed by FERC as an integral part of its statutory responsibilities, to enable the reliable delivery of affordable electric energy;⁶¹ (4) each of the transactions defined in the SPP Proposed Order taking place on SPP's markets is monitored by both a market administrator (SPP) and an independent market monitor ("SPP Market Monitor") responsible to FERC;⁶² and (5) each transaction defined in the SPP Proposed Order is directly tied to the physical capabilities of SPP's electric energy grid.⁶³

In the SPP Proposed Order, the Commission explicitly reserved the authority to, in its discretion, revisit any of the terms of the relief provided by the SPP Proposed Order, including, but not limited to, making a determination that certain entities and transactions should be subject to the Commission's jurisdiction.⁶⁴ The Commission also explicitly reserved the authority to, in its discretion, suspend, terminate, or otherwise modify or restrict the exemption granted in the SPP Proposed Order.⁶⁵ Finally, the Commission announced its intention to exclude from the exemptive relief its general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under the CEA over SPP and the transactions defined in the SPP Proposed Order, including sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4d, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and

⁵⁹ See 80 FR at 29494; see also Exemption Application at 17.

⁶⁰ See 80 FR at 29494; see also Exemption Application at 2, 17.

⁶¹ See 80 FR at 29494; see also generally FERC Order No. 888; FERC Order No. 2000; 18 CFR 35.34(k)(2); Exemption Application at 17.

⁶² See 80 FR at 29494; see also Exemption Application at 17.

⁶³ See 80 FR at 29494; see also Exemption Application at 12-15.

⁶⁴ See 80 FR at 29518.

⁶⁵ See *id.*

13 of the CEA and any implementing regulations promulgated thereunder including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.⁶⁶

The Commission explained in the SPP Proposed Order that neither the proposed nor the final RTO-ISO Order discussed, referred to, or mentioned CEA section 22, which provides for private rights of action for damages against persons who violate the CEA, or persons who willfully aid, abet, counsel, induce, or procure the commission of a violation of the Act.⁶⁷ The Commission explained that by enacting CEA section 22, Congress provided private rights of action as a means for addressing violations of the Act as an alternative or supplement to Commission enforcement action.⁶⁸ The Commission observed that it would be highly unusual for the Commission to reserve to itself the power to pursue claims for fraud and manipulation—a power that includes the option of seeking restitution for persons who have sustained losses from such violations or a disgorgement of gains received in connection with such violations—while at the same time, without explanation, denying private rights of action and damages remedies for the same violations.⁶⁹ The Commission stated that if it intended to take such a differentiated approach (i.e., to limit the rights of private persons to bring such claims while reserving to itself the right to bring the same claims), the RTO-ISO Order would have included a discussion or analysis of the reasons therefore.⁷⁰ The Commission therefore stated that, in the Commission’s view, the RTO-ISO Order does not prevent private claims for fraud

⁶⁶ See id. at 29515, 29516.

⁶⁷ Id. at 29493.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

or manipulation under the CEA.⁷¹ The Commission further stated that this view would apply equally to the SPP Proposed Order.⁷²

D. Aspire v. GDF Suez

In February 2015, the United States District Court for the Southern District of Texas dismissed a private lawsuit on the ground that the CEA section 22 private right of action was not available to the plaintiffs under the RTO-ISO Order.⁷³ The lawsuit alleged that certain electricity generators in ERCOT's market manipulated the market price of electricity by, among other things, intentionally withholding electricity generation during times of tight supply.⁷⁴ The suit further alleged that this conduct created artificial and unpredictable prices in the secondary futures markets.⁷⁵ The claim thus alleged that defendants were manipulating contract prices in the derivatives commodities market in violation of the Act.⁷⁶ The District Court dismissed the claim, finding that under the RTO-ISO Order, the private right of action in CEA section 22 was "unavailable to [p]laintiffs."⁷⁷ In February 2016, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's ruling.⁷⁸

E. RTO-ISO Order Proposed Amendment

On May 9, 2016, the Commission issued a notice of proposed order and request for comment which proposed to amend the text of the RTO-ISO Order to explicitly

⁷¹ Id.

⁷² Id.

⁷³ Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc., No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

⁷⁴ Id. at *1-*2.

⁷⁵ Id. at *2.

⁷⁶ See id.

⁷⁷ Id. at *5.

⁷⁸ See Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc., No. 15-20125, 640 F. App'x 358 (5th Cir. Feb. 25, 2016).

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 CEA⁷⁹ with respect to the Excepted Provisions.⁸⁰

In the RTO-ISO Order Proposed Amendment, the Commission noted that, currently, Paragraph 1 of the RTO-ISO Order states that the Commission:

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 anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4e, 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 180.⁸¹

The RTO-ISO Order Proposed Amendment stated that, under the RTO-ISO Order, for those CEA requirements from which the RTOs and ISOs are exempt, there can be no claim under CEA section 22 with respect to those requirements.⁸² The Commission further stated RTO-ISO Order did not specifically note that the exemption contained therein did not apply to actions pursuant to CEA section 22 with respect to the Excepted Provisions.⁸³

In light of the Aspire court ruling discussed above,⁸⁴ in the RTO-ISO Order Proposed Amendment, the Commission proposed to amend the text of the RTO-ISO Order to clarify that the RTO-ISO Covered Entities are not exempt from the private right

⁷⁹ 7 U.S.C. 25.

⁸⁰ 81FR 30245.

⁸¹ 81 FR at 30247; see also RTO-ISO Order at 19912.

⁸² 81 FR 30247.

⁸³ Id.

⁸⁴ See supra section II.D.

of action in CEA section 22 with respect to the Excepted Provisions. Specifically, the Commission proposed to amend Paragraph 1 of the RTO-ISO Order to read as follows (the additional language is italicized):

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 anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*d*, 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. This exemption also does not apply to actions pursuant to CEA section 22 with respect to the foregoing enumerated provisions.⁸⁵

The Commission proposed the foregoing amendment to the RTO-ISO Order in order to ensure clarity.⁸⁶ In addition, the RTO-ISO Order Proposed Amendment gave the following additional reasons for proposing the amendment: (1) amending the RTO-ISO Order to explicitly preserve the private right of action with respect to fraud and manipulation would not cause regulatory uncertainty or duplicative or inconsistent regulation; (2) conflicting judicial interpretations regarding the nature of the RTO-ISO Covered Transactions would not affect the jurisdiction of FERC or any relevant state regulatory authority; (3) the private right of action in the CEA is instrumental in protecting the American public, deterring bad actors, and maintaining the credibility of the markets subject to the Commission's jurisdiction; (4) the private right of action under CEA section 22 was established by Congress as an integral part of the CEA's enforcement and remedial

⁸⁵ 81 FR 30248. The RTO-ISO Order Proposed Amendment did not alter any of the other terms or conditions of the RTO-ISO Order.

⁸⁶ Id.

scheme; and (5) the Commission's preservation of section 22 liability with respect to the Excepted Provisions is consistent with the Commission's actions in prior 4(c) orders.⁸⁷

III. Summary of Comments

A. Overview of Comments

The Commission requested public comments on both the SPP Proposed Order and the RTO-ISO Order Proposed Amendment.

The public comment period on the SPP Proposed Order ended on June 22, 2015. The Commission received thirteen (13) comment letters on the SPP Proposed Order from twelve (12) commenters,⁸⁸ the majority of which provided general support for the proposed exemption.⁸⁹ The comment letters on the SPP Proposed Order addressed the following issues: preservation of the private right of action found in section 22 of the CEA; the Commission's jurisdiction; and the use of the term "member" in the SPP Proposed Order. In determining the scope and content of the SPP Final Order, the Commission has taken into account the issues raised by commenters.

⁸⁷ See *id.* at 30248-49.

⁸⁸ All comment letters are available through the Commission's Web site at: <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1586>. Comments addressing the SPP Proposed Order were received from: Aspire Commodities, LP ("Aspire (1)"); Association of Electric Companies of Texas, Inc. ("AECT"); Coalition of Physical Energy Companies ("COPE"); Staff of the Federal Energy Regulatory Commission ("FERC Staff (1)"); First Principles Economics, LLC ("First Principles"); GDF Suez Energy North America, Inc. ("GSENA (1)"); International Energy Credit Association ("IECA (1)"); Joint Trade Associations (collectively referring to the American Public Power Association, Edison Electric Institute, Electric Power Supply Association, and the National Rural Electric Cooperative Association); Public Utility Commission of Texas ("PUCT (1)"); RTO-ISO Commenters (collectively referring to PJM Interconnection, L.L.C., Electric Reliability Council of Texas, Inc., and the California Independent System Operator Corporation); SPP; and Texas Competitive Power Advocates ("TCPA"). COPE submitted an original comment letter on June 22, 2015 and submitted a second comment letter on June 23, 2015. The second comment letter, which was dated June 22, 2015, contained a correction to the version of COPE's comment letter that was originally submitted, and therefore superseded COPE's original comment letter. The corrected version of COPE's comment letter is herein referred to as "COPE (1)." COPE submitted a third comment letter after the expiration of the comment period, on June 25, 2015.

⁸⁹ See, e.g., Aspire at 1; AECT at 1; COPE (1) at 2; First Principles at 1; GSENA (1) at 2; IECA at 3; Joint Trade Associations at 2; PUCT (1) at 2; SPP at 1; and TCPA at 2.

The public comment period on the RTO-ISO Order Proposed Amendment ended on June 15, 2016. The Commission received forty-eight (48) comment letters on the RTO-ISO Order Proposed Amendment from forty-six (46) commenters,⁹⁰ all of which addressed the proposed preservation of the private right of action found in section 22 of the CEA. In determining the scope and content of the Amended RTO-ISO Order, and the scope and content of the portions of the SPP Final Order related to the private right of action, the Commission has taken into account the issues raised by commenters.

B. Private Right of Action Under CEA Section 22

⁹⁰ All comment letters are available through the Commission's Web site at: <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1697>. Comments addressing the RTO-ISO Order Proposed Amendment were received from: AKCSC; American Electric Power Company, Inc. ("AEP"); American Gas Association ("AGA"); Arizona Electric Power Cooperative, Inc.; Aspire Commodities, LP ("Aspire (2)"); Basin Electric Power Cooperative ("Basin"); Better Markets; Catherine Corn; bilmem ne; Coalition of Physical Energy Companies ("COPE (2)"); Commercial Energy Working Group ("CEWG"); Delaware Division of the Public Advocate, Indiana Office of Utility Consumer Counselor, Maryland Office of People's Counsel, Office of People's Counsel for the District of Columbia, New Jersey Division of Rates Council, Pennsylvania Office of Consumer Advocate, Consumer Advocate Division of the Public Service Commission of West Virginia ("PJM JCA"); East Kentucky Power Cooperative, Inc.; East Texas Electric Cooperative, Inc.; Edison Electric Institute ("EEI"); Electric Power Supply Association ("EPSA"); Exelon Generation Company ("Exelon"); Staff of the Federal Energy Regulatory Commission Staff ("FERC Staff (2)"); GDF Suez Energy North America, Inc. ("GSENA (2)"); Golden Spread Electric Cooperative ("Golden Spread"); Hoosier Energy Rural Electric Cooperative, Inc.; International Energy Credit Association ("IECA (2)"); ISO/RTO Council ("IRC"); ITC Great Plains, LLC ("ITC"); Kansas City Power & Light Company ("KCP&L"); Large Public Power Council ("LPPC"); Minnkota Power Cooperative, Inc.; MISO Transmission Owners; Missouri Joint Municipal Electric Utility Commission ("MJMEUC"); National Association of Regulatory Utility Commissioners ("NARUC"); National Rural Electric Cooperative Association and American Public Power Association (collectively, the "NFP Electric Associations"); North Carolina Electric Membership Corporation; Oklahoma Municipal Power Authority ("OMPA"); Old Dominion Electric Cooperative; Omaha Public Power District ("OPPD"); Prairie Power, Inc.; PSEG Companies ("PSEG"); Public Utility Commission of Texas ("PUCT (2)"); Raiden Commodities ("Raiden"); Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; Tenaska Energy, Inc. ("Tenaska"); Texas Industrial Energy Consumers ("TIEC"); Westar Energy, Inc. ("Westar"); Western Farmers Electric Cooperative; and Xcel Energy Services Inc. ("Xcel"). Both Exelon and Golden Spread submitted two duplicate comments; any reference to either commenter below refers to the letter attachment on the Commission's Web site at the above link. In addition, twelve electric cooperatives submitted substantively identical comment letters: Arizona Electric Power Cooperative, Inc., East Kentucky Power Cooperative, Inc., East Texas Electric Cooperative, Inc., Golden Spread Electric Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Minnkota Power Cooperative, Inc., North Carolina Electric Membership Corporation, Old Dominion Electric Cooperative, Prairie Power, Inc., Southern Illinois Power Cooperative, Sunflower Electric Power Corporation, and Western Farmers Electric Cooperative. These twelve commenters are collectively referred to in the discussion that follows as the "Electric Cooperative Commenters," and any citations to such commenters are to the letter of the Arizona Electric Power Cooperative.

1. Summary of Comments

In response to the SPP Proposed Order, a number of commenters objected to the inclusion in the SPP Proposed Order of language proposing to preserve, in the RTO-ISO Order, private rights of action under CEA section 22 with respect to the Excepted Provisions, and these commenters asked that such language not be included in the SPP Final Order.⁹¹ Some commenters asserted that the Commission's proposed clarification of the RTO-ISO Order would deprive the RTOs and ISOs of due process and the right to comment on this aspect of the RTO-ISO Order. The Joint Trade Associations, for example, argued that the Commission's preservation of a private right of action under section 22 of the CEA in the proposed exemption would retroactively impose requirements that were not contemplated or discussed in prior proceedings.⁹² GSENA likewise stated that the Commission cannot retroactively alter the RTO-ISO Order "by simply reciting its belief or intent."⁹³ COPE echoed this objection.⁹⁴ A number of commenters asserted that the language regarding the preservation of private rights of action under CEA section 22 would amount to a retroactive alteration of the RTO-ISO Order, so the Commission should have provided notice to market participants and an opportunity to comment on the alteration.⁹⁵ Also, commenters argued that the inclusion in the SPP Proposed Order of language stating that the intent of the RTO-ISO Order was to preserve such private rights of action would be contrary to the plain meaning of the

⁹¹ See, e.g., Joint Trade Associations at 5; COPE (1) at 3, 5; GSENA (1) at 3; PUCT (1) at 3.

⁹² Joint Trade Associations at 5.

⁹³ GSENA (1) at 3.

⁹⁴ COPE (1) at 5 ("[A] retroactive statement of agency intent" is not sufficient to change the plain meaning of the RTO-ISO Order).

⁹⁵ Joint Trade Associations at 5-6; COPE (1) at 5; IECA (1) at 2; RTO-ISO Commenters at 3; PUCT (1) at 4.

RTO-ISO Order.⁹⁶ In addition, in response to the SPP Proposed Order, commenters asserted that allowing private rights of action could (1) create a regulatory conflict that would be inconsistent with Congress' directive that the CFTC and FERC coordinate their actions to avoid conflicting or duplicative regulation;⁹⁷ (2) give rise to inconsistent rulings among the Commission, FERC, state regulatory agencies and federal district courts regarding the regulatory scheme for transactions in the RTO-ISO markets;⁹⁸ (3) adversely affect the ability of the Commission and FERC to determine under the CFTC-FERC jurisdictional MOU⁹⁹ how to exercise their respective authorities;¹⁰⁰ (4) result in inconsistent court decisions;¹⁰¹ (5) be costly;¹⁰² and (6) be inconsistent with other orders issued by the Commission pursuant to the authority in CEA section 4(c).¹⁰³ Separately, in response to the SPP Proposed Order, FERC Staff raised concerns about the effect of allowing private rights of action under CEA section 22 on FERC's regulatory authority, and requested that the Commission clarify that its action on SPP's application does not limit or otherwise affect FERC's authority.¹⁰⁴

In light of the comments received with respect to the SPP Proposed Order, the Commission proposed an amendment to the RTO-ISO Order to address the private right of action issue directly and to solicit further comment from the public on that issue.

⁹⁶ See, e.g., Joint Trade Associations at 5; COPE (1) at 3; PUCT (1) at 3-4.

⁹⁷ Joint Trade Associations at 7; IECA at 3.

⁹⁸ RTO-ISO Commenters at 5.

⁹⁹ Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Commodity Futures Trading Commission ("CFTC-FERC Jurisdictional MOU"), Jan. 2, 2014, available at <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcfercmou2014.pdf>.

¹⁰⁰ RTO-ISO Commenters at 5-6; 9-10.

¹⁰¹ Joint Trade Associations at 6; RTO-ISO Commenters at 8-9.

¹⁰² COPE (1) at 4; PUCT (1) at 6.

¹⁰³ RTO-ISO Commenters at 6-7.

¹⁰⁴ FERC Staff (1) at 2.

As noted above, the Commission received comments in response to the RTO-ISO Order Proposed Amendment. Specifically, a number of commenters asserted that the private right of action is not necessary in the context of the RTO-ISO markets given the comprehensive regulatory scheme to which those markets are subject. For example, IRC asserted that the RTO-ISO markets are “comprehensively regulated” by FERC and PUCT, with substantial enforcement tools, resources, and experience.¹⁰⁵ According to several commenters, FERC’s broad enforcement authority over the RTO-ISO markets, including the authority to conduct investigations, re-settle markets, grant refunds, order disgorgement, impose civil penalties, and refer cases to the Department of Justice for criminal prosecution, renders the private right of action unnecessary in such markets.¹⁰⁶ In addition, FERC Staff noted that section 206 of the Federal Power Act (“FPA”) authorizes FERC to 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 to establish prospectively a just and reasonable rate.¹⁰⁷ Similarly, PUCT argued that it has an established complaint process to accommodate claims of fraud and manipulation.¹⁰⁸ More broadly, commenters asserted that both FERC and PUCT have sufficient processes in place for private parties to air their concerns.¹⁰⁹ Commenters also noted that the RTO-ISO markets are subject to an additional layer of oversight by independent market monitors, which are tasked with tracking the behavior of RTO-ISO market participants and reporting suspicious behavior to FERC or PUCT.¹¹⁰ On the other hand, Aspire, Better Markets, and Raiden asserted that the private

¹⁰⁵ IRC at 5-6. The IRC also argued that a Commission order should not be amended, expanded, or withdrawn absent a change in the law or the facts underlying the order. *Id.* at 12.

¹⁰⁶ See, e.g., EPSA at 4; GSENA (2) at 3; MISO Transmission Owners at 5; PSEG at 2.

¹⁰⁷ FERC Staff (2) at 3.

¹⁰⁸ PUCT (2) at 11.

¹⁰⁹ See, e.g., AGA at 3; EPSA at 5; GSENA (2) at 3; PUCT (2) at 11.

¹¹⁰ See, e.g., EEI at 10; PJM JCA at 4; MISO Transmission Owners at 5-6; PUCT (2) at 11-12; Xcel at 2.

right of action protects market participants by deterring fraudulent or manipulative conduct in the RTO-ISO markets, and that private rights of action serve as a vital tool to augment the Commission's limited resources.¹¹¹ Aspire and Raiden further argued that market participants are in the best position to observe and take action with respect to market manipulation, and that they are properly incentivized to bring private claims to seek compensation for any damages suffered.¹¹²

In addition, several commenters argued that preserving the CEA section 22 private right of action in this context would result in regulatory and/or legal uncertainty. A number of commenters asserted that private rights of action could disrupt the regulatory framework in place over the RTO-ISO markets,¹¹³ undermine the efficiency and effectiveness of the RTO-ISO markets,¹¹⁴ interfere with FERC's and PUCT's ability to maintain the integrity and efficiency of the RTO-ISO markets,¹¹⁵ and interfere with FERC's and PUCT's ability to determine how the transactions in the RTO-ISO markets should be regulated so as to produce just and reasonable rates.¹¹⁶ Several commenters asserted that a judicial determination regarding the nature of the transactions in the RTO-ISO markets (i.e., whether a particular transaction is a swap) could affect FERC's or PUCT's jurisdiction over such transactions.¹¹⁷ In response to the Commission's question regarding the effect of the CEA's savings clause on such concerns, several commenters expressed the view that such clause is subject to differing interpretations, and as such, it is not clear how a court would interpret the interaction between the savings clause in

¹¹¹ Aspire (2) at 2; Better Markets at 2-3; Raiden at 4.

¹¹² Aspire (2) at 6; Raiden at 6.

¹¹³ See, e.g., Basin at 1; EEI at 8; ITC at 2; OMPA at 1; TIEC at 1-2.

¹¹⁴ Westar at 2.

¹¹⁵ EPSA at 8.

¹¹⁶ IRC at 8.

¹¹⁷ See, e.g., EEI at 7; IRC at 9; MISO Transmission Owners at 12.

CEA section 2(a)(1)(I) and the “exclusive jurisdiction” language in section 2(a)(1)(A).¹¹⁸ Better Markets and Aspire, on the other hand, argued that allowing private rights of action in the RTO-ISO markets would not blur the boundaries of the Commission’s and FERC’s jurisdiction over such markets, and that the savings clause in CEA section 2(a)(1)(I) would prevent any judicial interpretations regarding the nature of the transactions in the RTO-ISO markets from affecting FERC’s or PUCT’s jurisdiction over such transactions.¹¹⁹ Separately, FERC Staff requested that, if the Commission were to amend the RTO-ISO Order to provide a private right of action under the CEA in the RTO-ISO markets, the Commission reiterate in its final order that the Commission does not have exclusive jurisdiction over transactions covered by the RTO-ISO Order.¹²⁰

Separately, a number of commenters argued that permitting private actions under CEA section 22 against RTO-ISO market participants could result in conflicting or inconsistent court decisions.¹²¹ In addition, commenters claimed that allowing private rights of action in the RTO-ISO markets could provide an opportunity for private plaintiffs to collaterally attack market rules, tariffs, or filed rates that have been approved or permitted to take effect by the relevant regulator.¹²² Such a result, commenters argued, could make it difficult for market participants to rely on the established market rules,

¹¹⁸ See, e.g., MISO Transmission Owners at 12; PUCT at 11.

¹¹⁹ Better Markets at 3-4; Aspire at 7.

¹²⁰ FERC Staff (2) at 4.

¹²¹ See, e.g., AGA at 3-4; PUCT (2) at 5.

¹²² See, e.g., AEP at 2; AGA at 3; COPE (2) at 6, 7; EPSA at 7; Exelon at 2; GSENA at 2; IRC at 10; MISO Transmission Owners at 7; OPPD at 5; PUCT (2) at 5; Tenaska at 2; Westar at 3. In response to the Commission’s request for comments regarding the filed rate doctrine, the IRC and PUCT noted that courts have identified several exceptions to the filed rate doctrine, so there is no guarantee that a federal judge would grant a motion to dismiss based on such doctrine. IRC at 11; PUCT (2) at 10-11; see also MISO Transmission Owners at 11-12. The IRC further argued that, to the extent the filed rate doctrine would bar the types of private claims brought under CEA section 22, such a fact would undercut the rationale for allowing such private claims. IRC at 11.

resulting in a chilling effect on otherwise appropriate market behavior, and could inject uncertainty and instability into the RTO-ISO markets.¹²³ Several commenters also suggested that private rights of action could create an opportunity for courts to second-guess policy decisions made by FERC and PUCT,¹²⁴ or for private litigants to force judicial revision of RTO-ISO market rules with which they disagree.¹²⁵ Aspire and Better Markets argued, on the other hand, that the private right of action does not present any increased risk of inconsistent judicial decisions, as the Commission already has the authority to bring actions under the fraud and manipulation provisions that are reserved in the RTO-ISO Order.¹²⁶

Furthermore, a number of commenters argued that allowing private rights of action in the RTO-ISO markets would be contrary to congressional intent. Several commenters pointed out that the FPA expressly prohibits private rights of action; thus, commenters argued that allowing CEA section 22 private actions in the RTO-ISO markets would be contrary to the express intent of Congress.¹²⁷ Commenters also urged that allowing private rights of action would create a regulatory conflict that is inconsistent with Congress' directive that the CFTC and FERC coordinate their actions to avoid conflicting or duplicative regulation,¹²⁸ and would adversely affect the ability of the Commission and FERC to determine under the CFTC-FERC Jurisdictional MOU¹²⁹

¹²³ See, e.g., PUCT (2) at 5; MISO Transmission Owners at 7; COPE (2) at 7; EPSA at 7; GSENA (2) at 2-3; OMPA at 3; OPPD at 5; PSEG at 3; Tenaska at 2-3; TIEC at 3-4; Xcel at 3.

¹²⁴ AGA at 4; TIEC at 3.

¹²⁵ EEI at 10.

¹²⁶ Aspire at 7; Better Markets at 3.

¹²⁷ See, e.g., CEWG at 2; EEI at 8; Exelon at 2; IRC at 6; KCP&L at 7; MISO Transmission Owners at 9; IECA at 4; FERC Staff (2) at 2-3.

¹²⁸ AGA at 3; CEWG at 5; FERC Staff (2) at 3.

¹²⁹ See supra note 99.

how to exercise their respective authorities.¹³⁰ On the other hand, Better Markets argued that preserving the private right of action would not be contrary to congressional intent, since Congress specifically included a private right of action in the CEA.¹³¹

Several commenters also claimed that preserving the CEA section 22 private right of action would be inconsistent with prior Commission action. According to EEI, the RTO-ISO Order was consistent with previous orders issued by the Commission in that it did not contain any reference to or discussion of CEA section 22.¹³² EEI further pointed to a grant of temporary exemptive relief from provisions of the CEA added or amended by Title VII of the Dodd-Frank Act that referenced certain terms that the Commission had not yet defined.¹³³ That order expressly stated that “[t]o the extent that the Final Order provides [4(c)] exemptive relief [from certain provisions of the CEA], such exemptive relief would, in effect, preclude a person from succeeding in a private right of action under CEA section 22(a) for violation of such provisions.”¹³⁴ Both the IRC and EEI noted that the Commission has only expressly preserved the CEA section 22 private right of action in two prior 4(c) orders, both of which were superseded by Congress.¹³⁵ The IRC claimed that it is not unusual for the Commission to reserve its own authority to address fraud and manipulation without also reserving private litigants’ right to do so.¹³⁶ COPE argued that there is no valid policy argument to require all orders issued under CEA section 4(c) to be the same.¹³⁷ EPSA echoed this argument, noting that the

¹³⁰ OPPD at 2-3; FERC Staff (2) at 2.

¹³¹ Better Markets at 3.

¹³² EEI at 6.

¹³³ Effective Date for Swap Regulation, 76 FR 42508, July 19, 2011.

¹³⁴ EEI at 6-7.

¹³⁵ EEI at 7 n.19; IRC at 12 n.32.

¹³⁶ IRC at 12.

¹³⁷ COPE (2) at 8.

Commission's actions in prior 4(c) orders should not control its decision on the private right of action here.¹³⁸

A number of commenters addressed the cost implications of allowing private rights of action in the RTO-ISO markets. For instance, several commenters argued that allowing private actions in the RTO-ISO markets would be costly, and that costs will be passed onto electricity consumers.¹³⁹ The Electric Cooperative Commenters noted that costs will arise due to private litigation whether or not a private plaintiff can prove that market manipulation occurred.¹⁴⁰ In addition, COPE asserted that private litigants could be motivated in part by monetary gain, whereas FERC, PUCT, and the Commission are motivated by the public interest.¹⁴¹ A number of commenters further asserted that consumers will bear the indirect costs of increased private litigation in the RTO-ISO markets, claiming that such costs would include indirect costs due to (1) increased regulatory uncertainty;¹⁴² (2) increased risk;¹⁴³ (3) decreased liquidity in RTO-ISO products that are used to hedge and manage risk as market participants limit or forego activity in the RTO-ISO markets;¹⁴⁴ and (4) court decisions forcing RTOs and ISOs to change their infrastructure.¹⁴⁵ PUCT also argued that allowing private litigants to bring actions against participants in the RTO-ISO markets would increase the costs associated with operating

¹³⁸ EPSA at 11.

¹³⁹ See, e.g., AGA at 4; CEWG at 4; EPSA at 5-6; Exelon at 3-4; IRC at 10; KCP&L at 4; MISO Transmission Owners at 9; MJMEUC at 3; NFP Electric Associations at 6; PUCT (2) at 5; and TIEC at 4.

¹⁴⁰ Electric Cooperative Commenters at 3. The Electric Cooperative Commenters also requested that, if the Commission were to allow private rights of action under CEA section 22 in the RTO-ISO markets, such actions not be allowed (1) against commercial end-user-only entities, or (2) to challenge commercial-end-user-only hedging transactions. Id.

¹⁴¹ COPE (2) at 6; see also AEP at 2-3; EEI at 11; NFP Electric Associations at 5-6; Xcel at 3.

¹⁴² AEP at 2.

¹⁴³ Exelon at 3-4.

¹⁴⁴ Id.

¹⁴⁵ EPSA at 6.

those markets.¹⁴⁶ On the other hand, Better Markets argued that if the private right of action were available, market participants would not incur any increased costs of compliance because they would already be on notice of, and complying with, the fraud and manipulation provisions in the CEA.¹⁴⁷

Lastly, Xcel and GSENA argued that allowing private rights of action in the RTO-ISO markets would ultimately result in reduced investment in renewable and efficient energy.¹⁴⁸

2. Commission Determination

The Commission has determined, in the limited context of the RTO-ISO markets which are the subject of the Amended RTO-ISO Order and the SPP Final Order, to issue a complete exemption from the private right of action in CEA section 22, including with respect to claims based on fraud or manipulation. The Commission is persuaded by several factors raised by the commenters. Considering all of these factors together, rather than any of these factors alone, or any subset of these factors, the Commission concludes that in the limited context of activities within the RTO-ISO markets, there should be a complete exemption from private claims under CEA section 22.

Initially, the Commission agrees that the unique nature of the RTO-ISO markets differentiates this issue from other contexts in which a private right of action is essential.

The RTO-ISO markets are heavily regulated by FERC and PUCT, with whom the Commission shares jurisdiction. This regulation is “pervasive” and it includes rate monitoring, tariff approval, authorization of market rules and pricing mechanisms, and

¹⁴⁶ PUCT (2) at 5.

¹⁴⁷ Better Markets at 3.

¹⁴⁸ Xcel at 3-4; GSENA (2) at 4.

real-time oversight of markets.¹⁴⁹ As part of an articulated regulatory structure, these markets are also subject to close surveillance not only by the regulators but also by independent market monitors.¹⁵⁰ In addition, FERC and PUCT support their regulation of the electric power markets with an enforcement program that includes the authority to order civil penalties, disgorgement, and to reset the market.¹⁵¹

Furthermore, the Commission will continue to police these markets for fraud, manipulation and other unfair trading activities and, as contemplated by Congress, it can and will cooperate with these fellow regulators to deter and prevent unlawful trading activities in the RTO-ISO markets. In the same vein, the Commission and FERC both have the authority to take enforcement action, and to seek restitution on behalf of injured market participants that fall in their jurisdiction.¹⁵²

Moreover, the Commission is further persuaded to issue an express exemption from the private right of action in the context of the RTO-ISO markets because private rights of action appear in tension with the intent of Congress in this context. In 2005, Congress amended the FPA to give FERC the authority to pursue manipulation of the electricity markets.¹⁵³ At that time, Congress focused on whether there should be a private right of action for manipulation of these specific markets. Congress explicitly declined to grant such a right of action.¹⁵⁴ This was a more particularized determination

¹⁴⁹ FERC Staff (2) at 1-3.

¹⁵⁰ E.g., FERC Staff (2) at 2; PJM JCA at 4; PUCT (2) at 11-12.

¹⁵¹ FERC Staff (2) at 2; EPSA at 3-4.

¹⁵² 7 U.S.C. 13a-1(d)(3) (Commission authority to seek restitution); 16 U.S.C. 825h (describing FERC's remedial authority under the FPA); Pub. Util. Comm'n of Cal. v. FERC, 462 F.3d 1027, 1047-48 (9th Cir. 2006) (holding that section 309 of the FPA authorizes FERC to order restitution for profits gained as a result of a statutory or tariff violation); see also Consol. Edison Co. of N.Y., Inc. v. FERC, 347 F.3d 964, 967 (D.C. Cir. 2003) (same).

¹⁵³ E.g., FERC Staff (2) at 2-3 & n.2.

¹⁵⁴ Id.

regarding the merits of private enforcement in these unique markets than the legislative judgment reflected in CEA section 22 that there should be a generally applicable private right of action for fraud and manipulation in the Commission's jurisdictional markets.

Finally, the Commission is persuaded that there is a potential for private rights of action regarding the entities and transactions in the RTO-ISO markets to interfere with FERC and PUCT oversight of these markets. Based on the totality of these factors, the Commission concludes that in the limited context of activities within these unique markets, there should be a complete exemption from private claims under CEA section 22.

The Commission's determination regarding the CEA section 22 private right of action does not in any way affect the Commission's own authority to address fraudulent or manipulative conduct in these markets within the Commission's jurisdiction. And, in cooperation with electricity regulators, the Commission will remain vigilant in policing these markets for fraud, manipulation and other illegal activity.

In addition, in light of the above, the Commission encourages market participants who observe potential fraud or manipulation in the markets subject to the Commission's jurisdiction to bring their concerns to the Commission. The whistleblower provisions of the Commodity Exchange Act and Commission regulations continue to apply in this context and are available pursuant to their terms.¹⁵⁵

C. Use of the Term "Member" in the SPP Proposed Order

¹⁵⁵ The Commission recognizes the arguments of Aspire, Raiden, and Better Markets regarding the fact that the existence of a private right of action would protect market participants by deterring fraudulent or manipulative conduct in the RTO-ISO markets. Aspire (2) at 2; Raiden at 4; Better Markets at 2-3. However, the Commission is of the view that, for all of the reasons stated in this section, such concerns are mitigated.

With respect to the Commission’s use of the term “member” in the SPP Proposed Order, the Joint Trade Associations noted that the Commission used the term “member” throughout the SPP Proposed Order, and that while such term may have a defined meaning within the context of other Commission-regulated markets, such term is not defined for purposes of the SPP Proposed Order in the context of RTO and ISO markets.¹⁵⁶ The Joint Trade Associations urged the Commission to clarify that the term “member,” as used in the context of RTO and ISO markets, refers to a market participant that is bound by the relevant tariff and that also meets the conditions to be considered an “appropriate person” that are set forth in the SPP Proposed Order.¹⁵⁷ The Commission notes that this is consistent with its understanding of the term “member” in this context.¹⁵⁸

IV. Section 4(c) Determinations

A. Section 4(c) Analysis

1. Overview of CEA Section 4(c)
 - a. Sections 4(c)(6)(A) and (B)

As discussed above in section I., the Dodd-Frank Act amended CEA section 4(c) to add sections 4(c)(6)(A) and (B), which provide authority to exempt certain transactions entered into: (a) pursuant to a tariff or rate schedule approved or permitted to take effect by FERC, or (b) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates

¹⁵⁶ Joint Trade Associations at 8.

¹⁵⁷ Id.

¹⁵⁸ This is also intended to address the concerns raised in SPP’s comment letter with respect to the use of the terms “member” and “market participant.” SPP at 3-4.

and charges for the sale of electric energy within the State or municipality.¹⁵⁹ Indeed, section 4(c)(6) provides that if the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act, the Commission shall issue such an exemption.¹⁶⁰ However, any exemption considered under section 4(c)(6)(A) and/or (B) must be done “in accordance with [CEA sections 4(c)(1) and (2)].”¹⁶¹

b. Section 4(c)(1)

As described above in section I., CEA section 4(c)(1) requires that the Commission act “by rule, regulation, or order, after notice and opportunity for hearing.” It also provides that the Commission may act “either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both” and that the Commission may provide an exemption from any provisions of the CEA except subparagraphs (C)(ii) and (D) of section 2(a)(1).

c. Discussion of Comments on Sections 4(c)(6) and 4(c)(1)

The Commission noted in the RTO-ISO Order Proposed Amendment that, based on the difference in language between CEA sections 4(c)(6) and 4(c)(1), it is not clear that section 4(c)(6) provides the Commission with the authority to exempt from the

¹⁵⁹ The exemption language in section 4(c)(6) states that if the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act, the Commission shall, in accordance with paragraphs (1) and (2) of section 4(c), exempt from the requirements of this Act an agreement, contract, or transaction that is entered into (A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission; (B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or (C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)).

¹⁶⁰ 7 U.S.C. 6(c)(6).

¹⁶¹ CEA section 4(c)(6) explicitly directs the Commission to consider any exemption proposed under 4(c)(6) in accordance with CEA sections 4(c)(1) and (2).

section 22 private right of action. The Commission further noted that, while section 4(c)(1) authorizes the Commission to grant exemptions from the Act’s “requirements” or “from any other provision of this Act,” section 4(c)(6) authorizes the Commission to exempt from the Act’s “requirements” only.¹⁶²

In response to this discussion, Aspire argued that section 4(c)(6), in authorizing exemptions from the CEA’s “requirements” only, does not authorize the Commission to grant an exemption from the section 22 private right of action, since the private right of action is not a “requirement” of the CEA.¹⁶³ IRC argued, on the other hand, that the narrower language in section 4(c)(6) does not limit the scope of the exemptions that the Commission may grant under sections 4(c)(1) and 4(c)(2).¹⁶⁴

As noted above in section IV.A.1.a., in granting an exemption under section 4(c)(6) of the CEA, the Commission must act “in accordance with” section 4(c)(1), which grants the Commission the discretionary authority to exempt from the Act’s “requirements” or “from any other provision of this Act” if it makes certain findings.¹⁶⁵ The policy basis for the Commission’s decision to grant an exemption from the CEA section 22 private right of action under section 4(c)(6) applies equally, in the context of the present issue, to a decision to take the same action pursuant to section 4(c)(1), and the Commission has made the findings required under that provision in sections III.B.2., IV.A.2., and IV.A.3. Accordingly, even if the Commission were limited under section 4(c)(6) from granting an exemption from the CEA section 22 private right of action in the

¹⁶² See 81 FR 30249.

¹⁶³ See Aspire (2) at 4.

¹⁶⁴ See IRC at 13.

¹⁶⁵ 7 U.S.C. 6(c)(1). The Commission has also considered that CEA section 22 may in fact be interpreted to impose a “requirement.” Section 22 states that certain persons who violate the Act or Commission regulations “shall be liable for actual damages.” 7 U.S.C. 25(a). This could be construed as a “requirement” to compensate the victim.

present context, the Commission would and does, for the reasons discussed above in section III.B.2., in the alternative exercise its discretion to grant such an exemption pursuant to its authority in section 4(c)(1) of the Act.

d. Section 4(c)(2)

As set forth above in section I., CEA section 4(c)(2) requires the Commission to determine that: to the extent an exemption provides relief from any of the requirements of CEA section 4(a), the requirement should not be applied to the agreement, contract or transaction; the exempted agreement, contract, or transaction will be entered into solely between appropriate persons;¹⁶⁶ and 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 duties under the CEA.¹⁶⁷

e. Section 4(c)(3)

As explained in section I. above, CEA section 4(c)(3) outlines who may constitute an appropriate person for the purpose of a 4(c) exemption, including as relevant to this SPP Final Order: (a) any person that fits in one of ten defined categories of appropriate persons; or (b) such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.¹⁶⁸

¹⁶⁶ See CEA section 4(c)(2)(B)(i) and the discussion of CEA section 4(c)(3) below.

¹⁶⁷ See CEA section 4(c)(2)(B)(ii). CEA section 4(c)(2)(A) also requires that the exemption would be consistent with the public interest and the purposes of the CEA, but that requirement duplicates the requirement of section 4(c)(6).

¹⁶⁸ CEA section 4(c)(3), 7 U.S.C. 6(c)(3), provides that the term “appropriate person” shall be limited to the following persons or classes thereof: (A) A bank or trust company (acting in an individual or fiduciary capacity); (B) A savings association; (C) An insurance company; (D) An investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); (E) A commodity pool formed or operated by a person subject to regulation under this Act; (F) A corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding \$1,000,000 or total

2. CEA Section 4(c) Determinations—SPP Final Order

a. Commission Jurisdiction

Subject to the limitations set forth in the CEA, sections 4(c)(6)(A) and (B) of the Act grant the Commission the authority to exempt certain electric energy transactions provided that the Commission determines, among other things, that such exemption is consistent with the public interest and purposes of the CEA.¹⁶⁹ The Commission received a comment from FERC in response to the SPP Proposed Order relating to the Commission’s interpretation of its jurisdiction pursuant to section 4(c)(6).¹⁷⁰

FERC argued that the Commission should “interpret the [Dodd-Frank Act] as not applying to any contract or instrument traded in an RTO or ISO market pursuant to a FERC-accepted or approved tariff or rate schedule.”¹⁷¹ Specifically, in its comment letter in response to the SPP Proposed Order, FERC maintained that RTO and ISO markets and transmission services are “tightly integrated” and “regulated to a greater extent than other

assets exceeding \$5,000,000, or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to in subparagraph (A), (B), (C), (H), (I), or (K) of this paragraph; (G) An employee benefit plan with assets exceeding \$1,000,000, or whose investment decisions are made by a bank, trust company, insurance company, investment adviser registered under the Investment Advisers Act of 1940 (15 U.S.C. 80a-1 et seq.), or a commodity trading advisor subject to regulation under this Act; (H) Any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing; (I) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) acting on its own behalf or on behalf of another appropriate person; (J) A futures commission merchant, floor broker, or floor trader subject to regulation under this Act acting on its own behalf or on behalf of another appropriate person; (K) Such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

¹⁶⁹ See discussion regarding CEA section 4(c)(6) in section IV.A.1.a. supra. As noted above in section IV.A.1.c., to the extent that the Commission’s action on the private right of action issue, with respect to both the SPP Final Order and the Amended RTO-ISO Order, requires further authority under section 4(c)(1), the Commission can and does exercise its discretion to take such action pursuant to such authority.

¹⁷⁰ FERC Staff (1) at 2. The Commission received the same comment from FERC Staff in response to the RTO-ISO Order Proposed Amendment. See FERC Staff (2) at 2. The Commission’s determination with respect to this comment applies to both the SPP Final Order and the Amended RTO-ISO Order.

¹⁷¹ FERC Staff (1) at 2; see also FERC Staff (2) at 2.

commodity markets.”¹⁷² FERC thus asserted that interpreting the Dodd-Frank Act to not apply to contracts or instruments traded in an RTO or ISO market pursuant to a FERC-accepted or approved tariff or rate schedule is “the most appropriate application of [the Dodd-Frank Act] to these circumstances.”¹⁷³ FERC further asserted that, while it does not take issue with the Commission’s retention of anti-manipulation authority in the SPP Proposed Order, FERC also “retains its anti-manipulation authority, as well as its regulatory and oversight responsibilities, with respect to RTO and ISO markets.”¹⁷⁴ FERC accordingly requested that the Commission “clarify that its action on SPP’s application, including any statements in this proceeding with respect to private claims for fraud or manipulation under the Commodity Exchange Act, do not limit or otherwise affect FERC’s authority.”¹⁷⁵

In response to FERC’s comment, the Commission notes that the interpretation of the Dodd-Frank Act proffered by FERC is contrary to the express language of that statute. The Dodd-Frank Act added a savings clause to the CEA that addresses the roles of the Commission, FERC, and state agencies as they relate to transactions traded pursuant to FERC- or state-approved tariffs or rate schedules. As noted above in section I., section 2(a)(1)(I) of the Act states that nothing in the Act limits or affects the 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, and also preserves the Commission’s statutory authority over such agreements, contracts, or transactions. Moreover, while section 4(c)(6) of the CEA,

¹⁷² FERC Staff (1) at 2.

¹⁷³ Id.

¹⁷⁴ Id.

¹⁷⁵ Id.

added by the Dodd-Frank Act, empowers the Commission to exempt contracts, agreements, or transactions traded pursuant to a Tariff or rate schedule that has been approved or permitted to take effect by FERC or a state regulatory authority, it does not permit the Commission to automatically or mechanically apply the exemption. Instead, section 4(c)(6) mandates that the Commission initially determine that the exemption would be in the public interest and consistent with the purposes of the CEA, that the exemption would be applied only to agreements, contracts, or transactions that are entered into solely between appropriate persons, and that 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 duties under the CEA.

The Commission further notes, for purposes of clarification and as requested by FERC, that nothing in the SPP Final Order (or in the Amended RTO-ISO Order) limits or otherwise affects FERC's authority.

b. Consistent with the Public Interest and the Purposes of the CEA

As required by CEA section 4(c)(2)(A), as well as section 4(c)(6), the Commission determines that the SPP Final Order is consistent with the public interest and the purposes of the CEA. Section 3(a) of the CEA provides that transactions subject to the CEA affect the national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.¹⁷⁶ Section 3(b) of the CEA identifies the purposes of the CEA as follows: (1) to serve the public interests described in subsection (a) through a system of effective self-regulation of trading facilities,

¹⁷⁶ 7 U.S.C. 5(a).

clearing systems, market participants and market professionals under the oversight of the Commission; and (2) to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this Act and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.¹⁷⁷

Consistent with the proposed determinations set forth in the SPP Proposed Order,¹⁷⁸ the Commission finds that: (a) the SPP Covered Transactions have been, and are, subject to a long-standing regulatory framework for the offer and sale of the Transactions established by FERC; and (b) the SPP Covered Transactions administered by SPP are part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC regulation and oversight. For example, FERC Order No. 2000 (which, along with FERC Order No. 888, encouraged the formation of RTOs and ISOs to operate the electronic transmission grid and to create organized wholesale electric energy markets) requires an RTO to demonstrate that it has four minimum characteristics: (1) independence from any market participant; (2) a scope and regional configuration which enables the RTO to maintain reliability and effectively perform its required functions; (3) operational authority for its activities, including being the security coordinator for the facilities that it controls; and (4) short-term reliability.¹⁷⁹ In addition, SPP stated that an RTO must demonstrate to FERC that it performs certain self-

¹⁷⁷ 7 U.S.C. 5(b).

¹⁷⁸ See 80 FR at 29495-96.

¹⁷⁹ See id. at 29495.

regulatory and/or market monitoring functions.¹⁸⁰ SPP also represented that it is “responsible for ensur[ing] the development and operation of market mechanisms to manage transmission congestion”¹⁸¹ and for establishing “market mechanisms [that] must accommodate broad participation by all market participants, and must provide all transmission customers with efficient price signals that show the consequences of their transmission usage decisions.”¹⁸²

Furthermore, as explained by SPP and discussed in the SPP Proposed Order, the Commission notes that the SPP Covered Transactions are entered into by commercial participants that are in the business of generating, transmitting, and distributing electric energy,¹⁸³ and that SPP was established for the purpose of providing affordable, reliable electric energy to consumers within its geographic region.¹⁸⁴ Additionally, the SPP Covered Transactions that take place on SPP’s markets are overseen by the SPP Market Monitor, required by FERC to identify manipulation of electric energy on SPP’s markets.¹⁸⁵

¹⁸⁰ See id.; see also id. at 29495 n.81 (explaining that, according to SPP, SPP must employ a transmission pricing system that promotes efficient use and expansion of transmission and generation facilities; develop and implement procedures to address parallel path flow issues within its region and with other regions; serve as a provider of last resort of all ancillary services required by FERC Order No. 888 including ensuring that its transmission customers have access to a Real-Time balancing market; be the single OASIS (Open-Access Same-Time Information System) site administrator for all transmission facilities under its control and independently calculate Total Transmission Capacity and Available Transmission Capability; provide reliable, efficient, and not unduly discriminatory transmission service, it must provide for objective monitoring of markets it operates or administers to identify market design flaws, market power abuses and opportunities for efficiency improvements; be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades; and ensure the integration of reliability practices within an interconnection and market interface practices among regions). See Exemption Application at 18.

¹⁸¹ See 80 FR at 29495-96; see also Exemption Application at 18.

¹⁸² See 80 FR at 29496; see also Exemption Application at 18-19; 18 CFR 35.34(k)(2).

¹⁸³ See 80 FR at 29496; see also Exemption Application at 17.

¹⁸⁴ See id.

¹⁸⁵ See id.

Moreover, fundamental to the Commission’s “public interest” and “purposes of the [Act]” analysis is the fact that the SPP Covered Transactions are inextricably tied to SPP’s physical delivery of electric energy.¹⁸⁶ Another important factor is that the SPP Final Order is explicitly limited to SPP Covered Transactions taking place on markets that are monitored by the SPP Market Monitor, SPP, or both, and FERC. In contrast, an exemption for transactions that are not so monitored, or not related to the physical capacity of an electric transmission grid, or not directly linked to the physical generation and transmission of electric energy, or not limited to appropriate persons,¹⁸⁷ is unlikely to be in the public interest or consistent with the purposes of the CEA, taking such transactions outside the scope of the SPP Final Order.

Finally, the extent to which the SPP Final Order is consistent with the public interest and the purposes of the Act can, in major part, be assessed by the extent to which the Tariff and activities of SPP, and supervision by FERC, are congruent with, and sufficiently accomplish, the regulatory objectives of the relevant Core Principles set forth in the CEA for derivatives clearing organizations (“DCOs”) and swap execution facilities (“SEFs”). Specifically, ensuring the financial integrity of the SPP Covered Transactions and the avoidance of systemic risk, as well as protection from the misuse of participant assets, are addressed by the Core Principles for DCOs. Providing a means for managing or assuming price risk and discovering prices, as well as prevention of price manipulation and other disruptions to market integrity, are addressed by the Core Principles for SEFs. Deterrence of price manipulation (or other disruptions to market integrity) and protection

¹⁸⁶ See 80 FR at 29496; see also Exemption Application at 12-15, 17 (describing the SPP Covered Transactions and noting that each of them “is part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC’s regulation and oversight”).

¹⁸⁷ See appropriate persons discussion infra IV.A.2.d.

of market participants from fraudulent sales practices is achieved by the Commission retaining and exercising its jurisdiction over these matters. Therefore, the Commission has incorporated its DCO and SEF Core Principle analyses, set forth in the SPP Proposed Order,¹⁸⁸ into its consideration of the SPP Final Order's consistency with the public interest and the purposes of the Act. In the same way, the Commission has considered how the public interest and the purposes of the CEA are also addressed by the manner in which SPP complies with FERC's credit reform policy.¹⁸⁹

The Commission specifically requested comment on (a) whether it used the appropriate standard in making its section 4(c) determination, and (b) whether the SPP Proposed Order is consistent with the public interest and the purposes of the CEA. The Commission received no comments in response to these requests. The Commission therefore determines that it used the appropriate standard in making its public interest and purposes of the CEA determination. The Commission believes that the standards set forth in FERC regulation 35.47 appear to achieve goals similar to the regulatory objectives of the Commission's DCO Core Principles.¹⁹⁰ Moreover, as set forth in the Commission's DCO Core Principle analysis in the SPP Proposed Order, the Commission determines that SPP's policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of this SPP Final Order, the regulatory objectives of the DCO Core Principles in the context of the SPP Covered Transactions.¹⁹¹ Also, as set forth in the Commission's SEF Core Principles analysis in the SPP Proposed Order, the Commission has determined that SPP's policies and procedures appear to be consistent

¹⁸⁸ See 80 FR at 29499-515.

¹⁸⁹ See section IV.B. *infra*; 80 FR at 29498-99.

¹⁹⁰ *Cf.* RTO-ISO Order at 19900-01.

¹⁹¹ *Cf. id.* at 19901.

with, and to accomplish sufficiently for purposes of this SPP Final Order, the regulatory objectives of the SEF Core Principles in the context of the SPP Covered Transactions.¹⁹²

The Commission further determines that, for the reasons set forth in this SPP Final Order, the requested exemptive relief is consistent with the public interest and the purposes of the CEA.

c. CEA Section 4(a) Should Not Apply to the Transactions or Entities Eligible for the Exemption

CEA section 4(c)(2)(A) requires, in part, that the Commission determine that the SPP Covered Transactions described in the SPP Final Order should not be subject to CEA section 4(a)—generally, the Commission’s exchange trading requirement for a contract for the purchase or sale of a commodity for future delivery. As set forth in the SPP Proposed Order, the Commission has examined the SPP Covered Transactions, SPP, and its markets using the CEA Core Principle requirements applicable to a DCO and to a SEF as a framework for its public interest and purposes of the CEA determination.¹⁹³ As further support for this determination, the Commission also is relying on the public interest and the purposes of the Act analysis in subsection IV.A.2.b. above. In so doing, the Commission has determined that, due to the FERC regulatory scheme and the RTO market structure applicable to the SPP Covered Transactions, the linkage between the SPP Covered Transactions and that regulatory scheme, and the unique nature of the

¹⁹² Cf. id. at 19902.

¹⁹³ See 80 FR at 29499-515.

market participants that would be eligible to rely on the exemption,¹⁹⁴ CEA section 4(a) should not apply to the SPP Covered Transactions under the SPP Final Order.¹⁹⁵

d. Appropriate Persons

Section 4(c)(2)(B)(i) of the CEA¹⁹⁶ requires that the Commission determine that the exemption is restricted to SPP Covered Transactions entered into solely between “appropriate persons,” as that term is defined in section 4(c)(3) of the Act.¹⁹⁷ Section 4(c)(3) defines the term “appropriate person” to include: (1) any person that falls within one of the ten categories of persons delineated in sections 4(c)(3)(A) through (J) of the Act; or (2) such other persons that the Commission determines to be appropriate pursuant to the limited authority provided by section 4(c)(3)(K).¹⁹⁸ The Commission may determine that persons that do not meet the requirements of sections 4(c)(3)(A) through (J) are “appropriate persons” for purposes of section 4(c) only if it determines that such persons are “appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.”¹⁹⁹

Consistent with the RTO-ISO Order, the Commission proposed to limit the exemption to transactions where all parties thereto are “appropriate persons,” as defined in sections 4(c)(3)(A) through (J) of the Act,²⁰⁰ “eligible contract participants,” as defined in section 1a(18)(A) of the Act²⁰¹ and in Commission regulation 1.3(m),²⁰² or persons

¹⁹⁴ See appropriate persons analysis, section IV.A.2.d. *infra*; see also 80 FR at 29496-97.

¹⁹⁵ The Commission notes that such a determination would be consistent with a similar determination made in the RTO-ISO Order. See RTO-ISO Order at 19895.

¹⁹⁶ 7 U.S.C. 6(c)(2)(B)(i).

¹⁹⁷ 7 U.S.C. 6(c)(3).

¹⁹⁸ *Id.*; see also *supra* note 168.

¹⁹⁹ 7 U.S.C. 6(c)(3)(K).

²⁰⁰ 7 U.S.C. 6(c)(3)(A)-(J).

²⁰¹ 7 U.S.C. 1a(18)(A).

²⁰² 17 CFR 1.3(m).

who are in the business of: (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.²⁰³ The Commission did not receive any comments objecting to this proposed limitation. Therefore, pursuant to the authority set forth in section 4(c)(3)(K) of the CEA and consistent with the RTO-ISO Order, the Commission has determined that “eligible contract participants,” as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), and “persons who are in the business of: (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system,” are appropriate persons for purposes of the SPP Final Order, in light of their financial or other qualifications. Accordingly, this limitation has been incorporated into the SPP Final Order unchanged.

The Commission believes that this expansion, when combined with the “appropriate persons” definition delineated in sections 4(c)(3)(A) through (J) of the CEA, would appear to strike the appropriate balance because the exemption would apply only to those market participants that can demonstrate the financial wherewithal or the requisite business activities and congruent expertise to qualify as appropriate persons under section 4(c)(3)(K) of the CEA.²⁰⁴ The Commission has determined that “eligible contract participants,” as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), are appropriate persons for purposes of the SPP Final Order in light of their financial or other qualifications, or the applicability of regulatory protections.

²⁰³ 80 FR 29496-97. The Commission notes that the proposed limitation is consistent with the RTO-ISO Order. See RTO-ISO Order at 19913.

²⁰⁴ Cf. RTO-ISO Order at 19899.

Moreover, the Commission is using the authority provided by section 4(c)(3)(K) of the CEA to determine that a “person who actively participates in the generation, transmission, or distribution of electric energy,” as defined within the SPP Final Order, is an appropriate person for purposes of the exemption provided therein.²⁰⁵ The SPP Final Order defines a “person who actively participates in the generation, transmission, or distribution of electric energy” as “a person that is in the business of: (1) generating, transmitting, or distributing electric energy; or (2) providing electric energy services that are necessary to support the reliable operation of the transmission system.” The Commission has determined that the inclusion of transactions entered into by such persons is proper because such persons’ active participation in the physical markets provides them with the requisite “qualifications” necessary to be deemed an “appropriate person” under CEA section 4(c)(3)(K) for purposes of the SPP Final Order.

e. Effect on the Commission’s or Any Contract Market’s Ability to Discharge Its Regulatory or Self-Regulatory Duties Under the CEA

CEA section 4(c)(2)(B)(ii) requires the Commission to make a determination regarding whether exempting the SPP Covered Transactions will have a material adverse effect on the ability of the Commission or any contract markets to perform regulatory or self-regulatory duties.²⁰⁶ In making this determination, the Commission should consider such regulatory concerns as “market surveillance, financial integrity of participants, protection of customers, and trade practice enforcement.”²⁰⁷ These considerations are

²⁰⁵ Cf. *id.* at 19897.

²⁰⁶ 7 U.S.C. 6(c)(2)(B)(ii).

²⁰⁷ See H.R. Rep. No. 102-978, 102d Cong. 2d Sess., 1992 U.S.C.C.A.N. 3179, 3211 (1992).

similar to the purposes of the CEA as defined in section 3, initially addressed in the public interest and purposes of the CEA discussion.

The Commission proposed to determine that the exemption would not have a material adverse effect on the Commission's or any contract market's ability to discharge its regulatory function.²⁰⁸ In the SPP Proposed Order, the Commission noted the following assertion by SPP as support for its determination:

Under Section 4(d) of the Act, the Commission will retain authority to conduct investigations to determine whether SPP is in compliance with any exemption granted in response to this request. . . . [T]he requested exemptions would also preserve the Commission's existing enforcement jurisdiction over fraud and manipulation. This is consistent with section 722 of the Dodd-Frank Act, the existing MOU between the FERC and the Commission and other protocols for inter-agency cooperation. SPP will continue to retain records related to the Transactions, consistent with existing obligations under FERC regulations.

The regulation of exchange-traded futures contracts and significant price discovery contracts ("SPDCs") will be unaffected by the requested exemptions. Futures contracts based on electricity prices set in SPP's markets that are traded on a designated contract market and SPDCs will continue to be regulated by and subject to the requirements of the Commission. No current requirement or practice of SPP or of a contract market will be affected by the Commission's granting the requested exemptions.²⁰⁹

In addition, the Commission stated that the limitation in the SPP Proposed Order to SPP Covered Transactions between certain appropriate persons avoids potential issues regarding financial integrity and customer protection.²¹⁰

Moreover, the Commission did not propose to exempt SPP from certain CEA provisions, including sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4g, 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

²⁰⁸ 80 FR 29497-98.

²⁰⁹ Id. at 29497 (quoting Exemption Application at 22).

²¹⁰ Id.

thereunder including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180, to the extent that those sections prohibit fraud or manipulation of the price of any swap, contract for the sale of a commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market.²¹¹ As such, the Commission proposed to expressly retain authority to pursue fraudulent or manipulative conduct.²¹²

In addition, the Commission proposed that granting the SPP Proposed Order for the SPP Covered Transactions would not have a material adverse effect on the ability of any contract market to discharge its self-regulatory duties under the Act.²¹³ Specifically, with respect to TCRs and Operating Reserve Transactions, the Commission found that the exemption would not have a material adverse effect on any contract market carrying out its self-regulatory function because these transactions did not appear to be used for price discovery or as settlement prices for other transactions in Commission-regulated markets.²¹⁴ With respect to Energy Transactions, the Commission proposed that, while these transactions did have a relationship to Commission-regulated markets because they can serve as a source of settlement prices for other transactions within Commission jurisdiction, they should not pose regulatory burdens on a contract market because SPP has market monitoring systems in place to detect and deter manipulation that takes place on its markets.²¹⁵ In addition, the Commission noted that, as a condition to the SPP

²¹¹ Id.

²¹² Id. Nor did SPP seek an exemption from these provisions. See id. at 29497 n.107; Exemption Application at 1.

²¹³ 80 FR at 29497.

²¹⁴ Id.

²¹⁵ Id.; see also id. at 29494, 29496.

Proposed Order, the Commission would be able to obtain data from FERC with respect to activity on SPP's markets that may impact trading on Commission-regulated markets.²¹⁶

Finally, the Commission noted that if the SPP Covered Transactions ever could be used in combination with trading activity or in a position in a designated contract market ("DCM") contract to conduct market abuse, both the Commission and DCMs have sufficient independent authority over DCM market participants to monitor for such activity.²¹⁷

While the Commission did not receive any comments on its proposed determination that the exemption would not have a material adverse effect on the Commission's ability to discharge its regulatory duties, an important caveat should be made. With regard to the SEF Core Principle 3 analysis and general statements regarding the SPP Market Monitor's ability to detect and deter manipulation, the Commission notes that such statements were not meant to be construed as a final and irrevocable approval of the integrity of reference prices derived from SPP's markets. The Commission retains the authority to question and obtain additional information in a timely manner regarding the underlying prices to which TCRs and other electric energy contracts, which are subject to the Commission's jurisdiction, settle. As previously discussed, the Commission maintains the responsibility of ensuring that exchange-traded and cleared financial electric energy contracts are constructed such that the settlement mechanism produces prices that accurately reflect the underlying supply and demand fundamentals of SPP's markets and are not readily susceptible to manipulation. For this reason, as

²¹⁶ Id. at 29497.

²¹⁷ Id. at 29497-98.

originally proposed, the Commission has conditioned the SPP Final Order upon access to related transactional and positional data from SPP's markets.²¹⁸

For the reasons set forth herein and in the SPP Proposed Order, the Commission determines that the exemption for the SPP Covered Transactions in this SPP Final Order would not have a material adverse effect on the Commission's or any contract market's ability to discharge its regulatory function.

3. CEA Section 4(c) Determinations—Amended RTO-ISO Order

a. Consistent with the Public Interest and Purposes of the CEA

As required by CEA section 4(c)(2)(A), as well as section 4(c)(6), the Commission previously determined that the exemption set forth in the RTO-ISO Order is consistent with the public interest and the purposes of the CEA.²¹⁹ The amendment to the RTO-ISO Order does not alter the Commission's prior determinations with respect to the

²¹⁸ See section IV.B. *infra*.

²¹⁹ See RTO-ISO Order at 19894-95, 19900-02. The Commission's prior determination was based on a number of findings, including that (a) the RTO-ISO Covered Transactions have been, and are, subject to a long-standing, regulatory framework for the offer and sale of the Transactions established by FERC or PUCT; (b) the RTO-ISO Covered Transactions administered by the RTOs, ISOs, or ERCOT are part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC and PUCT regulation and oversight; (c) the RTO-ISO Covered Transactions are entered into primarily by commercial participants that are in the business of generating, transmitting, and distributing electric energy; (d) the Requesting Parties were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region; (e) the RTO-ISO Covered Transactions that take place on the Requesting Parties' markets are overseen by Market Monitoring Units, required by FERC and PUCT to identify manipulation of electric energy on the RTO-ISO Covered Entities' markets; (f) the RTO-ISO Covered Transactions are inextricably tied to the Requesting Parties' physical delivery of electric energy; (g) the RTO-ISO Order is explicitly limited to RTO-ISO Covered Transactions taking place on markets that are monitored by either an independent Market Monitoring Unit, a market administrator (the RTO, ISO, or ERCOT), or both, and a government regulator (FERC or PUCT); (h) the standards set forth in FERC regulation 35.47 appear to achieve goals similar to the regulatory objectives of the Commission's DCO Core Principles, and substantial compliance with such requirements was key to the Commission's determination that the tariffs and activities of the Requesting Parties and supervision by FERC or PUCT are congruent with, and—in the context of the RTO-ISO Covered Transactions—sufficiently accomplish, the regulatory objectives of each DCO Core Principle; (i) the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of the RTO-ISO Order, the regulatory objectives of the DCO Core Principles in the context of the RTO-ISO Covered Transactions; and (j) the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of the RTO-ISO Order, the regulatory objectives of the SEF Core Principles in the context of the RTO-ISO Covered Transactions. *Id.*

public interest and purposes of the CEA, and the Commission incorporates such prior determinations into the Amended RTO-ISO Order.

In addition, the Commission determines that the current amendment to the RTO-ISO Order, which explicitly provides that the exemption set forth therein extends to private actions under CEA section 22, is in the public interest for all of the reasons stated in section III.B.2.²²⁰

b. Other Section 4(c) Determinations

In the RTO-ISO Order, the Commission made a number of other determinations under CEA section 4(c), including:

- The Dodd-Frank Act applies to contracts and instruments traded in RTO or ISO markets pursuant to a FERC- or state-approved tariff or rate schedule, subject to the Commission's authority under CEA section 4(c)(6) to exempt contracts, agreements, or transactions traded pursuant to such a tariff or rate schedule upon determining that the exemption would be in the public interest and consistent with the purposes of the CEA; that the exemption would be applied only to agreements, contracts, or transactions that are entered into solely between appropriate persons; and that 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 duties under the CEA.²²¹

²²⁰ The Commission received one comment regarding the public interest findings in the RTO-ISO Order Proposed Amendment. EPSA argued that in the RTO-ISO Order Proposed Amendment, the Commission proposed to "automatically or mechanically bypass the required analysis" under CEA sections 4(c)(1) and 4(c)(2), and that the Commission's proposed public interest findings with respect to the proposed amendment to explicitly preserve the CEA section 22 private right of action were insufficient. EPSA at 7-8. The Commission is of the view that the public interest analysis in the RTO-ISO Order Proposed Amendment, and that set forth herein, is neither automatic nor mechanical, and that such analyses meet the requirements of sections 4(c)(1) and 4(c)(2). Moreover, given the Commission's determination with respect to the private right of action issue, the Commission is of the view that EPSA's concern is now moot.

²²¹ See RTO-ISO Order at 19893-94; see also CEA section 4(c)(6).

- Due to the FERC or PUCT regulatory scheme and the RTO or ISO market structure already applicable to the SPP Covered Transactions, the linkage between the SPP Covered Transactions and those regulatory schemes, and the unique nature of the market participants that are eligible to rely on the exemption in the RTO-ISO Order, CEA section 4(a) should not apply to the SPP Covered Transactions under the RTO-ISO Order.²²²

- Eligible contract participants, as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), are appropriate persons for purposes of the RTO-ISO Order in light of their financial or other qualifications, or the applicability of regulatory protections.²²³ In addition, a “person who actively participates in the generation, transmission, or distribution of electric energy,” as defined within the RTO-ISO Order, is an appropriate person for purposes of the exemption provided therein.²²⁴

- The exemption in the RTO-ISO Order for the SPP Covered Transactions would not have a material adverse effect on the Commission’s or any contract market’s ability to discharge its regulatory function.²²⁵

The amendment to the RTO-ISO Order does not alter the Commission’s determination with respect to any of the above 4(c) determinations. Therefore, the Commission hereby incorporates such prior 4(c) determinations, and the findings on which such determinations are based, into the Amended RTO-ISO Order. All transactions that were permitted pursuant to the exemption set forth in the RTO-ISO Order are still permitted under the Amended RTO-ISO Order. The only change made by

²²² See RTO-ISO Order at 19895; see also CEA section 4(c)(2)(A).

²²³ See RTO-ISO Order at 19896; see also CEA section 4(c)(2)(B)(i).

²²⁴ See RTO-ISO Order at 19897; see also CEA section 4(c)(2)(B)(i).

²²⁵ See RTO-ISO Order at 19903-04; see also CEA section 4(c)(2)(B)(ii).

the amendment to the RTO-ISO Order is that the Amended RTO-ISO Order provides explicitly that the exemption set forth therein also extends to actions pursuant to CEA section 22.

B. Additional Limitations and Provisions—SPP Final Order

As described in detail above,²²⁶ the Commission expressly noted in the SPP Proposed Order²²⁷ that the proposed exemption was based upon the representations made in the Exemption Application and in the supporting materials provided by SPP and its counsel,²²⁸ and that any material change or omission in the facts and circumstances that alter the grounds for the SPP Proposed Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or in the public interest and consistent with the purposes of the CEA. The Commission did not receive any comments on this proposal. As such, the SPP Final Order is based on the representations made by SPP and its counsel in the Exemption Application, the supplemental information, and supporting materials filed with the Commission. In particular, the Commission notes that the following representations are of particular importance and integral to the Commission's decision to grant the exemption set forth in this SPP Final Order: (1) the exemption requested by SPP relates to SPP Covered Transactions that are primarily entered into by commercial participants that are in the business of generating,

²²⁶ See section II.C.3. *supra*.

²²⁷ See 80 FR at 29494, 29518.

²²⁸ As part of its Exemption Application, SPP provided the Commission with a legal opinion that provided the Commission with assurance that the netting arrangements contained in the approach selected by SPP to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide SPP with enforceable rights of setoff against any of its market participants under Title 11 of the United States Code in the event of the bankruptcy of the market participant. See Memorandum regarding Enforceability of Netting Practices from Hunton & Williams LLP to SPP, dated December 2, 2013.

transmitting and distributing electric energy;²²⁹ (2) SPP was established for the purpose of providing affordable, reliable electric energy to consumers within its geographic region;²³⁰ (3) the SPP Covered Transactions are an essential means, designed by FERC as an integral part of its statutory responsibilities, to enable the reliable delivery of affordable electric energy;²³¹ (4) each of the SPP Covered Transactions taking place on SPP's markets is monitored by both a market administrator (SPP) and the SPP Market Monitor;²³² and (5) each SPP Covered Transaction is directly tied to the physical capabilities of SPP's electric energy grid.²³³ Therefore, the Commission affirms that any material change or omission in the facts and circumstances that alter the grounds for the SPP Final Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and consistent with the public interest and purposes of the CEA. The Commission reiterates that the SPP Covered Transactions must be tied to the allocation of the physical capabilities of an electric energy transmission grid in order to be suitable for exemption because such activity would be inextricably linked to the physical delivery of electric energy.

In addition, the Commission proposed to exclude from the exemptive relief its general anti-fraud and anti-manipulation, and scienter-based prohibitions over SPP and the SPP Covered Transactions under the CEA, including 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 CEA and any implementing regulations promulgated thereunder including, but not limited to,

²²⁹ See 80 FR at 29494; see also Exemption Application at 17.

²³⁰ See 80 FR at 29494; see also Exemption Application at 2, 17.

²³¹ See 80 FR at 29494; see also generally FERC Order No. 888; FERC Order No. 2000; 18 CFR 35.34(k)(2); see also Exemption Application at 17.

²³² See 80 FR at 29494; see also Exemption Application at 17.

²³³ See 80 FR at 29494; see also Exemption Application at 12-15.

Commission regulations 23.410(a) and (b), 32.4, and part 180.²³⁴ The Commission received no comments regarding this reservation of authority.

The Commission believes it prudent to reserve in the SPP Final Order its anti-fraud and anti-manipulation authority, as well as those scienter-based prohibitions in the specified provisions of the Act and Commission regulations (without finding it necessary in this particular context to preserve other enforcement authority). The Commission notes that reservation of enforcement authority is standard practice with exemptive orders issued pursuant to CEA section 4(c). The Commission also believes it is important to highlight that, as with all exemptions issued pursuant to CEA section 4(c), the exemption shall not affect the authority of the Commission under any other provision of the CEA 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 the CEA or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.²³⁵

In the SPP Proposed Order, the Commission also proposed to make a number of additional determinations, including but not limited to the following:

- The Commission proposed to determine that the requirements set forth in FERC regulation 35.47 appear to achieve goals similar to the regulatory objectives of the Commission's DCO Core Principles, and substantial compliance with such requirements is key to the Commission's determination that the Tariff and activities of SPP and supervision by FERC are congruent with, and—in the context of the SPP Covered

²³⁴ See 80 FR at 29515, 29516.

²³⁵ See 7 U.S.C. 6(d).

Transactions—sufficiently accomplish, the regulatory objectives of each DCO Core Principle.²³⁶

- The Commission proposed to determine that, on the basis of SPP’s representations and consistent with the RTO-ISO Order, it is not necessary, when considering the requisite public interest and purposes of the CEA determinations, to impose position limits on SPP’s Integrated Marketplace.²³⁷

- The Commission proposed to determine that SPP’s practices or Tariff and supervision by FERC are congruent with, and, in the context of the SPP Covered Transactions, sufficiently accomplish, the regulatory objectives of the Core Principles set forth in the CEA for DCOs.²³⁸

- The Commission proposed to determine that SPP’s practices or Tariff and supervision by FERC are congruent with, and, in the context of the SPP Covered Transactions, sufficiently accomplish, the regulatory objectives of the Core Principles set forth in the CEA for SEFs.²³⁹

In the SPP Proposed Order, the Commission proposed to limit the scope of the exemption to certain specified transactions:

- The SPP Proposed Order would exempt Transmission Congestion Rights, Energy Transactions, and Operating Reserve Transactions from most requirements of the CEA, and the SPP Proposed Order would not extend the exemption beyond these three specifically-defined transactions.²⁴⁰ The SPP Proposed Order would include any

²³⁶ 80 FR 29498-99.

²³⁷ Id. at 29511.

²³⁸ Id. at 29499-508.

²³⁹ Id. at 29508-15.

²⁴⁰ Id. at 29515.

modifications to existing transactions that do not alter the SPP Covered Transactions' characteristics in a way that would cause them to fall outside the definitions of the SPP Covered Transactions, and that are offered by SPP pursuant to a FERC-approved Tariff.

- The SPP Proposed Order would exempt products that qualify as one of the three defined SPP Covered Transactions, regardless of whether or not SPP offers the particular product at the present time.²⁴¹

In the SPP Proposed Order, the Commission proposed to condition the exemption on the following:

- The SPP Proposed Order would be conditioned upon requiring (1) that an information sharing arrangement acceptable to the Commission be executed between the Commission and FERC and continue to be in effect, and (2) "SPP's compliance with the Commission's requests through FERC to share, on an as-needed basis and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within SPP's possession for products in SPP's markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data."²⁴²

- The SPP Proposed Order would be conditioned upon requiring that "[n]either the Tariff nor any other governing documents of SPP shall include any requirement that SPP notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation."²⁴³

²⁴¹ Id. at 29516.

²⁴² Id. at 29517.

²⁴³ Id.

The Commission received no comments on the above proposed determinations, limitations, and conditions, and hereby incorporates such determinations, limitations, and conditions into the SPP Final Order. As noted in the SPP Proposed Order and earlier in this SPP Final Order, the SPP Covered Transactions are inextricably tied to SPP's physical delivery of electric energy, and they take place on markets that are monitored by the SPP Market Monitor, SPP, or both, and FERC. Specifically, with respect to TCRs and Operating Reserve Transactions, the Commission found that the exemption would not have a material adverse effect on any contract market carrying out its self-regulatory function because these transactions did not appear to be used for price discovery or as settlement prices for other transactions in Commission-regulated markets. With respect to Energy Transactions, while Energy Transactions did have a relationship to Commission-regulated markets because they can serve as a source of settlement prices for other transactions within Commission jurisdiction, they should not pose regulatory burdens on a contract market because SPP has market monitoring systems in place to detect and deter manipulation that takes place on its markets. Furthermore, conditioning the exemption provided in the SPP Final Order upon the Commission's ability to obtain related transactional and positional data from SPP, and SPP's compliance with such requests by sharing the requested information, is meant to enable the Commission to continue discharging its regulatory duties under the Act as set forth in CEA section 3.²⁴⁴

V. Related Matters

A. Regulatory Flexibility Act

1. Introduction

²⁴⁴ 7 U.S.C. 5.

The Regulatory Flexibility Act (“RFA”) requires that the Commission consider whether the exemptions set forth in the SPP Final Order and in the Amended RTO-ISO Order will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.²⁴⁵

2. SPP Final Order

In the SPP Proposed Order, the Commission found that SPP should not be considered a small entity based on the central role it plays in the operation of the electronic transmission grid and the creation of organized wholesale electric markets that are subject to FERC regulatory oversight,²⁴⁶ analogous to functions performed by DCMs and DCOs, which the Commission has previously determined not to be “small entities.”²⁴⁷ The SPP Proposed Order included entities that qualify as (1) “appropriate persons” pursuant to CEA sections 4(c)(3)(A) through (J), (2) “eligible contract participants” (“ECPs”), as defined in CEA section 1a(18)(A) and Commission regulation 1.3 (m), or (3) persons who are in the business of: (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.²⁴⁸ The Commission previously

²⁴⁵ 5 U.S.C. 601 *et seq.*

²⁴⁶ 80 FR at 29518. *See* Enhancement of Electricity Market Surveillance and Analysis Through Ongoing Electronic Delivery of Data From Regional Transmission Organizations and Independent System Operators, 77 FR 26674, 26685-86, May 7, 2012 (RFA analysis as conducted by FERC regarding six RTOs and ISOs, including SPP).

Commission staff also performed an independent RFA analysis based on Subsector 221 of sector 22 (utilities companies) of the Small Business Administration (“SBA”), which defines any small utility corporation as one that does not have more than 250 employees. *See* 13 CFR 121.201 (1–15 Edition). Staff concludes that SPP is not a small entity, since SPP represents that it employs more than 500 employees. *See* Exemption Application Attachments at 8.

²⁴⁷ *See* A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, Aug. 29, 2001 (DCOs); Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18618-19, Apr. 30, 1982 (DCMs).

²⁴⁸ *See* 80 FR at 29517. Under CEA section 2(e), only ECPs are permitted to participate in a swap, subject to the end-user clearing exception.

determined that ECPs are not “small entities” for purposes of the RFA.²⁴⁹ As a result, the Commission certified that the SPP Proposed Order would not have a significant economic impact on a substantial number of small entities for purposes of the RFA, and requested written comments regarding this certification.²⁵⁰ The Commission did not receive any comments with respect to its RFA analysis in the SPP Proposed Order.

The relief provided in the SPP Final Order to a person who actively participates in the generation, transmission, or distribution of electric energy may impact some small entities to the extent they may fall within standards established by the SBA regulations defining any small utility corporation as one that does not have more than 250 employees.²⁵¹ However, based on the Commission’s existing information about SPP’s markets, its market participants consist mostly of entities exceeding the thresholds defining “small entities” set out above.

The Commission is of the view that the SPP Final Order alleviates the economic impact that the exempt entities, including any small entities that may opt to take advantage of the exemption set forth in the SPP Final Order, otherwise would be subjected to by exempting certain of their transactions from the application of substantive regulatory compliance requirements of the CEA and Commission regulations thereunder. Accordingly, the Commission is of the view that the SPP Final Order does not have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b),

²⁴⁹ See *Opting Out of Segregation*, 66 FR 20740, 20743, Apr. 25, 2001.

²⁵⁰ 80 FR at 29518.

²⁵¹ See note 246 *supra* (citing 13 CFR 121.201).

that the exemption set forth in the SPP Final Order would not have a significant economic impact on a substantial number of small entities.

3. Amended RTO-ISO Order

With respect to the Amended RTO-ISO Order, the Commission previously determined that the RTO-ISO Order would not have a significant economic impact on a substantial number of small entities.²⁵² The Amended RTO-ISO Order does not substantively change the scope of the exemption set forth in the RTO-ISO Order. Furthermore, the RFA analysis in the RTO-ISO Order is still valid. Specifically, the RTOs and ISOs covered by the Amended RTO-ISO Order should not be considered small entities based on the central role they play in the operation of the electronic transmission grid and the creation of organized wholesale electric markets that are subject to FERC and PUCT regulatory oversight,²⁵³ analogous to functions performed by DCMs and DCOs, which, as noted above, the Commission has previously determined not to be “small entities.”²⁵⁴ In addition, the Amended RTO-ISO Order includes entities that qualify as (1) “appropriate persons” pursuant to CEA sections 4(c)(3)(A) through (J), (2) ECPs, as defined in CEA section 1a(18)(A) and Commission regulation 1.3 (m), or (3) persons who are in the business of: (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system. As noted above, the Commission has previously determined that ECPs are not “small entities” for purposes of the RFA.²⁵⁵ The Commission is of the view that, based on the Commission’s existing information about

²⁵² See RTO-ISO Order at 19906-07.

²⁵³ See note 246 *supra*; see also RTO-ISO Order at 19906.

²⁵⁴ See note 247 *supra*; see also RTO-ISO Order at 19906.

²⁵⁵ See note 249 *supra*; see also RTO-ISO Order at 19906.

the RTOs' and ISOs' markets, their market participants consist mostly of entities exceeding the thresholds defining "small entities."²⁵⁶

Also, the Amended RTO-ISO Order would continue to alleviate the economic impact that the exempt entities, including any small entities that may opt to take advantage of the exemption set forth in the RTO-ISO Order, otherwise would be subjected to by continuing to exempt certain of their transactions from the application of substantive regulatory compliance requirements of the CEA and Commission regulations thereunder. Accordingly, the Commission does not expect the Amended RTO-ISO Order to have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the exemption set forth in the Amended RTO-ISO Order would not have a significant economic impact on a substantial number of small entities.²⁵⁷

B. Paperwork Reduction Act

1. Introduction

The purposes of the Paperwork Reduction Act of 1995 ("PRA")²⁵⁸ are, among other things, to minimize the paperwork burden to the private sector, ensure that any collection of information by a government agency is put to the greatest possible uses, and

²⁵⁶ See note 246 *supra* (citing 13 CFR 121.201). The threshold established by the SBA regulations define any small utility corporation as one that does not have more than 250 employees; see also RTO-ISO Order at 19907.

²⁵⁷ The Commission received one comment with respect to the RFA analysis in the RTO-ISO Order Proposed Amendment. The NFP Electric Associations argued that the RFA analysis in the RTO-ISO Order Proposed Amendment was "abbreviated and conclusory," that the members of the NFP Electric Associations are "small entities" for purposes of the RFA, and that the amendment proposed in the RTO-ISO Order Proposed Amendment would have a negative impact on such entities. See NFP Electric Associations at 8. The Commission is of the view that the RFA analysis in the RTO-ISO Order Proposed Amendment, and that set forth herein, is sufficiently detailed and not conclusory. Moreover, given the Commission's determination with respect to the private right of action issue, the Commission is of the view that the NFP Electric Associations' concern is now moot.

²⁵⁸ 44 U.S.C. 3501 *et seq.*

minimize duplicative information collections across the government. The PRA applies to all information, “regardless of form or format,” whenever the government is “obtaining, causing to be obtained [or] soliciting” information, and includes and requires “disclosure to third parties or the public, of facts or opinions,” when the information collection calls for “answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.”²⁵⁹

2. SPP Final Order

The SPP Proposed Order provided that the exemption would be expressly conditioned upon information sharing arrangements between the Commission and FERC that are acceptable to the Commission continuing to be in effect.²⁶⁰ The Commission determined that the PRA would not apply because the SPP Proposed Order did not impose any new recordkeeping or information collection requirements, or other collections of information on ten or more persons that require approval of the Office of Management and Budget (“OMB”). The Commission did not receive any comments regarding this determination. The SPP Final Order thus incorporates the information sharing condition unchanged from the SPP Proposed Order, and this condition is consistent with the RTO-ISO Order.

3. Amended RTO-ISO Order

With respect to the Amended RTO-ISO Order, the Commission previously determined that the RTO-ISO Order did not impose any new recordkeeping or information collection requirements, or other collections of information on ten or more

²⁵⁹ 44 U.S.C. 3502(3).

²⁶⁰ 80 FR at 29517.

persons that require OMB approval.²⁶¹ The Amended RTO-ISO Order does not impose any recordkeeping or information collection requirements, or other collections of information on ten or more persons that require OMB approval.

C. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA²⁶² requires the Commission to “consider the costs and benefits” of its actions before promulgating a regulation under the CEA or issuing certain orders. In issuing the SPP Final Order and the Amended RTO-ISO Order, the Commission is required by CEA sections 4(c)(6) and 4(c)(1) to ensure that they are consistent with the public interest. In much the same way, section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

1. SPP Final Order

a. Background

On October 17, 2013, SPP filed an Exemption Application²⁶³ with the Commission requesting that the Commission exercise its authority under section 4(c)(6) of the CEA and section 712(f) of the Dodd-Frank Act to exempt certain contracts,

²⁶¹ See RTO-ISO Order at 19907-08.

²⁶² 7 U.S.C. 19(a).

²⁶³ As noted above, SPP filed an amended Exemption Application on August 1, 2014, and citations to “Exemption Application” herein are to the amended Exemption Application. See note 31 supra.

agreements, and transactions for the purchase or sale of specified electric energy products, that are offered pursuant to a FERC-approved Tariff, from most provisions of the Act.²⁶⁴ SPP asserted that each of the transactions for which an exemption is requested is (a) subject to a long-standing, comprehensive regulatory framework for the offer and sale of such transactions established by FERC, and (b) part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to regulation and oversight by FERC. SPP expressly excluded from the Exemption Application any request for relief from the Commission’s general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, 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 180,²⁶⁵ and such provisions explicitly have been carved out of the SPP Final Order.²⁶⁶

b. SPP Proposed Order and Request for Comment on the Commission’s Proposed Consideration of Costs and Benefits

Upon consideration of the Exemption Application, the Commission issued the SPP Proposed Order, which proposed to exempt Transmission Congestion Rights, Energy Transactions, and Operating Reserve Transactions pursuant to section 4(c)(6) of the CEA.²⁶⁷ The Commission proposed to limit the exemption set forth in the SPP Proposed Order to persons who are (1) “appropriate persons,” as defined in CEA sections 4(c)(3)(A) through (J); (2) “eligible contract participants,” as defined in CEA section

²⁶⁴ See 80 FR at 29491; see also Exemption Application at 1-2, 11-15.

²⁶⁵ See 80 FR at 29491; see also Exemption Application at 1.

²⁶⁶ See paragraph 1 of the SPP Final Order.

²⁶⁷ See 80 FR at 29516-18; see also section II.C.1. supra.

1a(18)(A) and Commission regulation 1.3(m); or (3) persons who actively participate in the generation, transmission, or distribution of electric energy.²⁶⁸ Furthermore, under the SPP Proposed Order, the agreement, contract, or transaction must be offered or sold pursuant to SPP's Tariff, which has been approved by FERC.²⁶⁹ The exemption in the SPP Proposed Order would extend to any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to the SPP Covered Transactions.²⁷⁰

In the SPP Proposed Order, the Commission clarified that financial transactions that are not tied to the allocation of the physical capabilities of an electric energy transmission grid would not be suitable for exemption, and were therefore not covered by the SPP Proposed Order because such activity would not be inextricably linked to the physical delivery of electric energy.²⁷¹

The SPP Proposed Order expressly requested public comment on the Commission's proposed cost-benefit considerations, including with respect to reasonable alternatives; the magnitude of specific costs and benefits, and data or other information to estimate a dollar valuation; and any impact on the public interest factors specified in CEA section 15(a).²⁷² The Commission did not receive any comments on its proposed cost-benefit considerations as set forth in the SPP Proposed Order.

c. Summary of the SPP Final Order

²⁶⁸ See 80 FR at 29517.

²⁶⁹ See *id.*

²⁷⁰ See *id.* at 29516.

²⁷¹ See *id.* at 29494.

²⁷² See *id.* at 29522. As a general matter, in considering the costs and benefits of its actions, the Commission endeavors to quantify estimated costs and benefits where reasonably feasible. Here, however, the Commission considers the costs and benefits of this SPP Final Order mostly in qualitative terms because the commenters provided no such data or information to assist the Commission in doing so despite the SPP Proposed Order's request.

As discussed above, the SPP Final Order makes certain determinations with respect to the scope of relief, including the scope of the SPP Covered Transactions.²⁷³ The Commission determined that any products that are offered by SPP, presently or in the future, pursuant to a Tariff that has been approved by FERC and that fall within the provided definitions of the SPP Covered Transactions, as well as any modifications to existing products that are offered by SPP pursuant to a Tariff that has been approved by FERC and that do not alter the characteristics of the SPP Covered Transactions in a way that would cause such products to fall outside these definitions, are intended to be included within the SPP Final Order.²⁷⁴ In this way, the Commission's SPP Final Order provides beneficial flexibility and efficiency in that, if the product qualifies as one of the three SPP Covered Transactions in the SPP Final Order, SPP would not be required to request or to obtain future supplemental relief for a modified product. At the same time, however, the Commission declined to include the phrase "directly related to, and a logical outgrowth of" in the definitions of the SPP Covered Transactions because such phrase is too vague and too potentially far reaching to permit meaningful analysis under the Commission's statutory standard of review.

The SPP Final Order also sets forth certain conditions to the effectiveness of the exemption set forth therein. First, the Commission must be able to obtain through FERC positional and transactional data within SPP's possession for products in SPP's markets that are related to markets subject to the Commission's jurisdiction, including any pertinent information concerning such data.²⁷⁵ Second, the exemption is expressly

²⁷³ See section IV.B. *supra*.

²⁷⁴ See *id.*

²⁷⁵ Paragraph 4(a) of the SPP Final Order.

conditioned upon the requirement that neither the Tariff nor any other governing documents of SPP shall include any requirement that SPP notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation.²⁷⁶

In the discussion that follows, the Commission considers the costs and benefits of the SPP Final Order to the public and market participants generally, and to SPP specifically. It also considers the costs and benefits of the exemption described in the SPP Final Order, in light of the public interest factors enumerated in CEA section 15(a).

d. Baseline

The Commission's baseline for consideration of the costs and benefits of the SPP Final Order is the costs and benefits that the public and market participants (including SPP) would experience in the absence of this proposed regulatory action. In other words, the baseline is a situation in which the Commission takes no action and exercises jurisdiction, meaning that the transactions that are the subject of SPP's Exemption Application would be required to comply with all of the CEA and Commission regulations, as applicable.²⁷⁷ In such a scenario, the public and market participants would experience the full benefits and costs related to the CEA and Commission regulations, but as discussed in detail above, the transactions would still be subject to the congruent regulatory regime of FERC.²⁷⁸

²⁷⁶ Paragraph 4(b) of the SPP Final Order.

²⁷⁷ Under this situation, the statutory private right of action in CEA section 22 would remain intact and would apply, in accordance with its terms, to all applicable provisions of the CEA.

²⁷⁸ Some benefits of CFTC regulation overlap with benefits of FERC regulation and, therefore, are attributable to both regimes.

The Commission also considers the regulatory landscape as it exists outside the context of the Dodd-Frank Act's enactment. In this instance, it also is important to highlight the fact that each of the transactions for which an exemption is requested is already subject to a long-standing, comprehensive regulatory framework for the offer and sale of such transactions established by FERC.²⁷⁹ For example, the costs and benefits attendant to the Commission's condition that transactions be entered into between "appropriate persons" as described in CEA section 4(c)(3) has an analog outside the context of the Dodd-Frank Act in FERC's minimum criteria for RTO market participants as set forth in FERC Order No. 741. Moreover, the Commission has granted similar relief to other RTOs and ISOs regulated by either FERC or PUCT.²⁸⁰

In the discussion that follows, the Commission endeavored to, where reasonably feasible, estimate quantifiable dollar costs of the SPP Final Order. The benefits and costs of the SPP Final Order, however, are not presently susceptible to meaningful quantification. Most of the costs arise from limitations on the scope of the SPP Final Order, and many of the benefits tied to those limitations arise from avoiding defaults and their implications that are clearly large in magnitude, but impracticable to estimate. Being unable to quantify, the Commission discusses proposed costs and benefits in qualitative terms.

e. Benefits

The Commission's comprehensive action in this SPP Final Order benefits the public and market participants in several substantial if unquantifiable ways, as discussed below. First, by cabining the SPP Covered Transactions to the definitions provided in

²⁷⁹ See supra section IV.A.2.b.

²⁸⁰ See RTO-ISO Order; see also supra section II.A.

this SPP Final Order, the Commission limits the financial risk that may impact the markets. The mitigation of such risk inures to the benefit of SPP, market participants, and the public, especially SPP's members and electric energy ratepayers.

The condition that only "appropriate persons" may enter into the SPP Covered Transactions benefits the public and the entities that fall under the "appropriate persons" definition themselves, by ensuring that only persons with resources sufficient to understand and manage the risks of the transactions are permitted to engage in the same. Further, the condition requiring that the SPP Covered Transactions only be offered or sold pursuant to a FERC-approved Tariff benefits the public by, for example, ensuring that the SPP Covered Transactions are subject to a regulatory regime that is focused on the physical provision of reliable electric energy, and also has credit requirements that are designed to achieve risk management goals congruent with the regulatory objectives of the Commission's DCO and SEF Core Principles. Absent these and other similar limitations on participant- and financial-eligibility, the integrity of the markets at issue could be compromised, and members and ratepayers left unprotected from potentially significant losses resulting from purely financial, speculative activity.

The Commission's retention of power to redress any fraud or manipulation in connection with the SPP Covered Transactions protects market participants and the public generally, as well as the financial markets for electric energy products. For example, the SPP Final Order is conditioned upon the Commission's ability to obtain certain positional and transactional data within SPP's possession from SPP. Through this condition, the Commission expects that it will be able to continue discharging its regulatory duties under the CEA. Further, the condition that SPP may not, in the future,

maintain any Tariff provisions that would require SPP to notify members prior to providing the Commission with information will help maximize the effectiveness of the Commission's enforcement program.

In addition, explicitly providing an exemption from private claims under CEA section 22 will benefit market participants by allowing them to avoid legal and compliance costs due to an increased risk of private litigation under section 22. Moreover, granting an explicit exemption from the CEA section 22 private right of action reflects Congress' intent regarding how manipulation and fraud in the context of the RTO-ISO markets should be addressed. Lastly, providing an exemption from private actions pursuant to CEA section 22 will prevent any potential tension between the enforcement programs of FERC and PUCT, on the one hand, and private enforcement under the CEA, on the other.

f. Costs

The SPP Final Order is exemptive and provides "appropriate persons" engaging in SPP Covered Transactions relief from certain requirements of the CEA and attendant Commission regulations. As with any exemptive rule or order, the exemption in the SPP Final Order is permissive, meaning that SPP was not required to request it and is not required to rely on it. Accordingly, the Commission assumes that SPP would rely on the exemption only if the anticipated benefits warrant the costs of the exemption.

The Commission is of the view that SPP, market participants, and the public will experience minimal, if any, ongoing costs as a result of the determinations and conditions set forth in the SPP Final Order because, as SPP certifies pursuant to Commission regulation 140.99(c)(3)(ii), the attendant conditions are substantially similar to

requirements that SPP and its market participants already incur in complying with FERC regulations.

The requirement that all parties to the agreements, contracts, or transactions that are covered by the exemption in the SPP Final Order must be (1) an “appropriate person,” as defined sections 4(c)(3)(A) through (J) of the CEA; (2) an “eligible contract participant,” as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or (3) a “person who actively participates in the generation, transmission, or distribution of electric energy,” as defined in paragraph 5(f) of the SPP Final Order—is not likely to impose any significant, incremental costs on SPP because its existing legal and regulatory obligations under the FPA and FERC regulations mandate that only eligible market participants may engage in the SPP Covered Transactions.

The requirement that the SPP Covered Transactions must be offered or sold pursuant to SPP’s Tariff, which has been approved by FERC, is a statutory requirement for the exemption set forth in CEA section 4(c)(6) and therefore is not a cost attributable to an act of discretion by the Commission.²⁸¹ Moreover, requiring that SPP not operate outside its approved Tariff derives from existing legal requirements and is not a cost attributable to this SPP Final Order.

As described above, FERC imposes on SPP and the SPP Market Monitor various information management requirements.²⁸² These existing requirements are not materially different from the condition that neither SPP’s Tariff nor other governing documents may include any requirement that SPP notify a member prior to providing information to the Commission in response to a subpoena, special call, or other request for information or

²⁸¹ See 7 U.S.C. 6(c)(6)(A), (B).

²⁸² See section IV.A.2.b. *supra*.

documentation. This requirement is not likely to impose any significant, incremental costs on SPP because SPP's existing Tariff governing the sharing of information meets this condition.

Requiring that an information sharing arrangement between the Commission and FERC be in full force and effect is not a cost to SPP or to other members of the public because it has been an inter-agency norm since 2005.²⁸³ The requirement that SPP comply with the Commission's requests on an as-needed basis for related transactional and positional market data will impose only minimal costs on SPP to respond because the Commission contemplates that any information requested will already be in SPP's possession.²⁸⁴

In addition, in granting an explicit exemption from the CEA section 22 private right of action, the Commission notes that there may be minimal costs associated with the fact that private litigants will not be permitted to vindicate their own interests or directly contribute to those interests through litigation with respect to fraud and manipulation in the RTO-ISO markets. However, as stated above in section III.B.2., such costs are mitigated by the fact that FERC and PUCT will continue to pervasively regulate such markets. In addition, nothing in the SPP Final Order affects the Commission's own authority to address fraudulent or manipulative conduct in the RTO-ISO markets, including the Commission's authority to seek restitution for the benefit of victims. Also, as noted above in section III.B.2., the Commission encourages market participants who

²⁸³ The CFTC and FERC first signed an information sharing MOU on October 12, 2005. On January 2, 2014, as directed by Congress under the Dodd-Frank Act, the Commission and FERC entered into the CFTC-FERC Information Sharing MOU, which superseded the 2005 MOU and provided for the sharing of information for use in analyzing market activities and protecting market integrity. See supra note 56.

²⁸⁴ SPP represents that its Tariff requires the sharing of information with the Commission without prior notice to market participants. See Exemption Application Attachments at 52, 54; see also section IV.B. supra.

observe potential fraud or manipulation in the markets subject to the Commission's jurisdiction to bring their concerns to the Commission.

g. Consideration of Alternatives

The Commission considered the costs and benefits of not issuing the exemption found in the SPP Final Order. The Commission declined this approach as inconsistent with Congressional intent and contrary to the public interest, since Congress, in the Dodd-Frank Act, required the Commission to exempt certain contracts, agreements or transactions from duties otherwise required by statute or Commission regulation by adding a new section that requires the Commission to exempt from its regulatory oversight agreements, contracts, or transactions traded pursuant to a FERC-approved tariff, where such exemption is in the public interest and consistent with the purposes of the CEA. In addition, not issuing the exemption found in the SPP Final Order would result in SPP being treated differently from the RTOs and ISOs covered by the Commission's previous RTO-ISO Order.

The Commission also considered the costs and benefits of expanding the definition of SPP Covered Transactions to include future products that are "directly related to, and a logical outgrowth of" existing products, as requested by SPP. The Commission declined this approach in part because of the concern that such an open-ended definition could present risks beyond those contemplated. At the same time, the Commission made clear that any new transactions that fall within the SPP Covered Transactions, which are explicitly defined in the SPP Final Order, and any modifications to existing transactions that do not alter the SPP Covered Transactions' characteristics in a way that would cause them to fall outside those definitions, that are offered by SPP

pursuant to a FERC-approved Tariff, are intended to be included within the exemption in the SPP Final Order.²⁸⁵ This provides a benefit in that no supplemental relief for such products would be required, which is a cost-mitigating efficiency gain for SPP.

The Commission also considered expressly preserving the statutory private right of action found in CEA section 22 with respect to fraud and manipulation. The Commission has considered the costs and benefits of such action in light of the comments received, and, for the reasons stated in section III.B.2., has been persuaded that issuing an explicit exemption from CEA section 22 is the appropriate course of action.

h. Consideration of CEA Section 15(a) Factors

i. Protection of Market Participants and the Public

As explained above, the Commission does not foresee that the SPP Final Order will have any negative effect on the protection of market participants and the public. More specifically, the SPP Covered Transactions, in light of the representations of SPP and in the context of SPP's regulation by FERC, do not appear to generate significant risks of the nature of those addressed by the CEA. The Commission has attempted to delineate the definitional boundaries for the SPP Covered Transactions in a manner that appropriately ring-fences against the possibility that they could generate such risks, either now or as they may evolve in the future. In addition, the Commission has limited the exemption set forth in the SPP Final Order to persons with resources sufficient to understand and manage the risks of the SPP Covered Transactions. This requirement serves to protect excluded market participants and it minimizes the risk of potential misuse of the exempt transactions.

²⁸⁵ See section IV.B. supra.

ii. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission foresees little, if any, negative impact from the SPP Final Order on the efficiency, competitiveness, and financial integrity of markets regulated under the CEA. As discussed above, the Commission believes that the SPP Final Order will promote efficiency by allowing entities who partake of the exemption delineated therein transactional flexibility that the Commission understands to be valuable to their ability to efficiently deploy their limited resources. Further, the Commission believes that the SPP Final Order will increase competition by granting an exemption to SPP and appropriate persons, as defined in the SPP Final Order, that is similar in scope to the exemption granted to other RTOs and ISOs in the RTO-ISO Order. In addition, as discussed above, the Commission's retention of its full enforcement authority will help ensure that any misconduct in connection with the exempted transactions does not jeopardize the financial integrity of the markets under the Commission's jurisdiction.

iii. Price Discovery

The Commission does not believe that the SPP Final Order will materially impair price discovery in non-exempt markets subject to the Commission's jurisdiction. As discussed above, the SPP Covered Transactions are used to manage unique electric industry operational risks. As such, Transmission Congestion Rights and Operating Reserve Transactions appear to be ill-suited for exchange trading and/or to serve a useful price discovery function. In addition, as discussed above, while Energy Transactions can serve as a source of settlement prices for other transactions in Commission-regulated markets, SPP has a market monitoring system in place to detect and deter manipulation that takes place on its markets.

iv. Sound Risk Management Practices

The Commission believes that the SPP Final Order will promote the ability of SPP and its market participants to manage the operational risks posed by unique electric energy market characteristics, including the non-storable nature of electric energy and demand that can and frequently does fluctuate dramatically within a short time-span. As discussed above, the Commission understands that the SPP Covered Transactions are an important tool facilitating SPP's ability to efficiently manage operational risk in fulfillment of its public service mission to provide affordable, reliable electric energy.

v. Other Public Interest Considerations

In exercising its sections 4(c)(1) and 4(c)(6) exemptive authority in the SPP Final Order, the Commission is acting to promote the broader public interest by facilitating the supply of affordable, reliable electric energy, as contemplated by Congress.²⁸⁶

3. Amended RTO-ISO Order

a. Background

As discussed above, the RTO-ISO Order currently exempts contracts, agreements, and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the RTO-ISO Order from certain provisions of the CEA and Commission regulations, with the exception of the Commission's general anti-fraud 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

²⁸⁶ See related discussion in section I. supra.

including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.²⁸⁷ The RTO-ISO Order did not discuss CEA section 22.

b. RTO-ISO Order Proposed Amendment and Request for Comment on the Commission's Proposed Consideration of Costs and Benefits

As discussed above, the Commission issued the RTO-ISO Order Proposed Amendment on May 9, 2016. The RTO-ISO Order Proposed Amendment proposed to amend the RTO-ISO Order to clarify that the RTO-ISO Order would not exempt the RTO-ISO Covered Entities from the private right of action found in section 22 of the CEA with respect to the Excepted Provisions.²⁸⁸

The RTO-ISO Order Proposed Amendment expressly requested public comment on the Commission's proposed cost-benefit considerations, including with respect to reasonable alternatives; the magnitude of specific costs and benefits, and data or other information to estimate a dollar valuation; and any impact on the public interest factors specified in CEA section 15(a).²⁸⁹

The Commission received four comments regarding the cost-benefit analysis in the RTO-ISO Order Proposed Amendment. The four commenters argued that the Commission's cost-benefit analysis of the amendment proposed in the RTO-ISO Order Proposed Amendment was inadequate or insufficient, and/or that the Commission underestimated the legal and regulatory costs of allowing private claims against market participants in the RTO-ISO markets.²⁹⁰

c. Summary of the Amended RTO-ISO Order

²⁸⁷ See RTO-ISO Order at 19912.

²⁸⁸ See *supra* section II.E.

²⁸⁹ 81 FR at 30253.

²⁹⁰ EEI at 11; EPSA at 10; IRC at 13; NFP Electric Associations at 7.

The Amended RTO-ISO Order exempts the RTO-ISO market participants and RTO-ISO Covered Transactions from private actions pursuant to CEA section 22.

In the discussion that follows, the Commission considers the costs and benefits of the Amended RTO-ISO Order to the public and market participants generally, and to the RTO-ISO Covered Entities specifically. It also considers the costs and benefits of the Amended RTO-ISO Order in light of the public interest factors enumerated in CEA section 15(a).

d. Baseline

In the RTO-ISO Order Proposed Amendment, the Commission proposed to exclude from the exemption set forth in the RTO-ISO Order the private right of action under CEA section 22. Thus, the Commission's proposed baseline for consideration of the costs and benefits was the opposite of that action, i.e. the costs and benefits that the public and market participants would experience if the existing RTO-ISO Order were to be interpreted to exempt market participants from liability under the CEA section 22 private right of action.²⁹¹ As discussed above,²⁹² the Commission received a number of comments in response to the RTO-ISO Order Proposed Amendment, and was persuaded by specific points made by such commenters to amend the RTO-ISO Order to grant an explicit exemption from the CEA section 22 private right of action. Given this change, the Commission believes it is more informative, for purposes of this analysis, to use as the baseline the costs and benefits that the public and market participants would have experienced if the RTO-ISO Order were amended as the Commission originally proposed

²⁹¹ See 81 FR at 30252.

²⁹² See supra sections III.B.1. and III.B.2.

to do in the RTO-ISO Order Proposed Amendment (in other words, if the RTO-ISO Order were amended to explicitly preserve the CEA section 22 private right of action).²⁹³

In the discussion that follows, the Commission endeavored to, where reasonably feasible, estimate quantifiable dollar costs of the amendment to the RTO-ISO Order. The costs and benefits of the amendment, however, are not presently susceptible to meaningful quantification. Being unable to quantify, the Commission discusses proposed costs and benefits in qualitative terms.

e. Benefits

Using the baseline described above,²⁹⁴ amending the RTO-ISO Order to address the issue of exemption from the CEA section 22 private right of action one way or another will prevent future uncertainty with respect to the scope of the RTO-ISO Order. Amending the RTO-ISO Order to provide an express exemption from CEA section 22 will benefit RTO-ISO market participants by allowing them to avoid legal and compliance costs due to an increased risk of private litigation under section 22. Moreover, granting an explicit exemption from the CEA section 22 private right of action reflects Congress' intent regarding how manipulation and fraud in the context of the RTO-ISO markets should be addressed. Lastly, providing an exemption from private actions pursuant to CEA section 22 will prevent any potential tension between the enforcement programs of FERC and PUCT, on the one hand, and private enforcement under the CEA, on the other.

f. Costs

²⁹³ See 81 FR 30247-48.

²⁹⁴ See *supra* section V.C.3.d.

Using the baseline described above,²⁹⁵ the Commission notes that there may be minimal costs associated with the fact that private litigants will not be permitted to vindicate their own interests or directly contribute to those interests through litigation with respect to fraud and manipulation in the RTO-ISO markets. However, as stated above in section III.B.2., such costs are mitigated by the fact that FERC and PUCT will continue to pervasively regulate such markets. In addition, nothing in the Amended RTO-ISO Order affects the Commission's own authority to address fraudulent or manipulative conduct in the RTO-ISO markets, including the Commission's authority to seek restitution for the benefit of victims. Also, as noted above in section III.B.2., the Commission encourages market participants who observe potential fraud or manipulation in the markets subject to the Commission's jurisdiction to bring their concerns to the Commission.

g. Consideration of Alternatives

The Commission considered not issuing the Amended RTO-ISO Order. The Commission considered the uncertainty that has arisen with respect to the scope of the RTO-ISO Order and the availability of a private right of action under the RTO-ISO Order, particularly following the court rulings in the Aspire v. GDF Suez action,²⁹⁶ and has determined that a no-amendment alternative would prolong such uncertainty and thus be contrary to the public interest.

The Commission also proposed to amend the RTO-ISO Order to explicitly preserve the CEA section 22 private right of action with respect to fraud and

²⁹⁵ See id.

²⁹⁶ See supra section II.D.

manipulation.²⁹⁷ The Commission has considered the costs and benefits of its proposed amendment in light of the comments received, and, for the reasons stated in section III.B.2., has been persuaded that issuing an explicit exemption from CEA section 22 is the appropriate course of action.

h. Consideration of CEA Section 15(a) Factors

i. Protection of Market Participants and the Public

The Commission notes that, while under the Amended RTO-ISO Order, private litigants will not be permitted to pursue fraud or manipulation claims under CEA section 22 with respect to the RTO-ISO markets, market participants will still be protected through the pervasive regulation of those markets by FERC and PUCT, and by the Commission's own authority to address fraud and manipulation in such markets.

ii. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission does not believe that the amendment to the RTO-ISO Order will have an effect on the efficiency, competitiveness, and financial integrity of the futures markets.

iii. Price Discovery

The Commission does not believe that the amendment to the RTO-ISO Order will have an effect on price discovery.

iv. Sound Risk Management Practices

The Commission does not believe that the amendment to the RTO-ISO Order will have a material effect on sound risk management practices.

v. Other Public Interest Considerations

²⁹⁷ See 81 FR 30245.

The Commission believes that the amendment to the RTO-ISO Order will foster the public interest for the reasons discussed above in section III.B.2.

VI. SPP Final Order

Upon due consideration and consistent with the determinations set forth above, the Commission hereby issues the following order (“Order”):

Pursuant to its authority under sections 4(c)(1) and 4(c)(6) of the Commodity Exchange Act (“CEA” or Act”) and in accordance with sections 4(c)(1) and (2) of the Act, the Commodity Futures Trading Commission (“CFTC” or “Commission”)

1. 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 anti-fraud 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. For the avoidance of doubt, this exemption applies to private actions pursuant to CEA section 22 with respect to all provisions of the Act, including the foregoing enumerated provisions, but does not restrict the Commission’s enforcement authority pursuant to those provisions.

2. Scope. This exemption applies only to agreements, contracts and transactions that satisfy each of the following requirements:

a. The agreement, contract or transaction is for the purchase and sale of one of the following electric energy-related products:

(1) “Transmission Congestion Rights” defined in paragraph 5(a) of this Order, except that the exemption shall only apply to such Transmission Congestion Rights where:

(a) Each Transmission Congestion Right is linked to, and the aggregate volume of Transmission Congestion Rights for any period of time is limited by, the physical capability (after accounting for counterflow) of the electric energy transmission system operated by SPP for such period;

(b) SPP serves as the market administrator for the market on which the Transmission Congestion Rights are transacted;

(c) Each party to the transaction is a member of SPP (or is SPP itself) and the transaction is executed on a market administered by SPP; and

(d) The transaction does not require any party to make or take physical delivery of electric energy.

(2) “Energy Transactions” as defined in paragraph 5(b) of this Order.

(3) “Operating Reserve Transactions” as defined in paragraph 5(c) of this Order.

b. Each party to the agreement, contract or transaction is:

(1) an “appropriate person,” as defined in sections 4(c)(3)(A) through (J) of the CEA;

(2) an “eligible contract participant,” as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or

(3) a “person who actively participates in the generation, transmission, or distribution of electric energy,” as defined in paragraph 5(f) of this Order.

c. The agreement, contract or transaction is offered or sold pursuant to SPP’s Tariff and that Tariff has been approved by the Federal Energy Regulatory Commission (“FERC”).

3. Applicability to SPP. Subject to the conditions contained in the Order, the Order applies to SPP with respect to the transactions described in paragraph 2 of this Order.

4. Conditions. The exemption provided by this Order is expressly conditioned upon the following:

a. Information sharing: Information sharing arrangements between the Commission and FERC that are acceptable to the Commission continue to be in effect, and SPP’s compliance with the Commission’s requests through FERC to share, on an as-needed basis and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within SPP’s possession for products in SPP’s markets that are related to markets that are subject to the Commission’s jurisdiction, including any pertinent information concerning such data.

b. Notification of requests for information: Neither the Tariff nor any other governing documents of SPP shall include any requirement that SPP notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation.

5. Definitions. The following definitions shall apply for purposes of this Order:

a. A “Transmission Congestion Right” is a transaction, however named, that entitles one party to receive, and obligates another party to pay, an amount based solely on the difference between the price for electric energy, established on an electric energy market administered by SPP, at a specified source (i.e., where electric energy is deemed injected into the grid of SPP) and a specified sink (i.e., where electric energy is deemed withdrawn from the grid of SPP).

b. “Energy Transactions” are transactions in a “Day-Ahead Market” or “Real-Time Balancing Market,” as those terms are defined in paragraphs 5(d) and 5(e) of this Order, for the purchase or sale of a specified quantity of electric energy at a specified location (including virtual bids and offers), where:

(1) The price of the electric energy is established at the time the transaction is executed;

(2) Performance occurs in the Real-Time Balancing Market by either:

(a) Delivery or receipt of the specified electric energy, or

(b) A cash payment or receipt at the price established in the Day-Ahead Market or Real-Time Balancing Market (as permitted by SPP in its Tariff); and

(3) The aggregate cleared volume of both physical and cash-settled energy transactions for any period of time is limited by the physical capability of the electric energy transmission system operated by SPP for that period of time.

c. “Operating Reserve Transactions” are transactions:

(1) In which SPP, for the benefit of load-serving entities and resources, purchases, through auction, the right, during a period of time as specified in SPP’s Tariff, to require the seller of such right to operate electric energy facilities in a physical state such that the

facilities can increase or decrease the rate of injection or withdrawal of a specified quantity of electric energy into or from the electric energy transmission system operated by SPP with:

(a) Physical performance by the seller's facilities within a response time interval specified in SPP's Tariff (Reserve Transaction); or

(b) prompt physical performance by the seller's facilities (Area Control Error Regulation Transaction);

(2) For which the seller receives, in consideration, one or more of the following:

(a) Payment at the price established in SPP's Day-Ahead or Real-Time Balancing Market, as those terms are defined in paragraphs 5(d) and 5(e) of this Order, price for electric energy applicable whenever SPP exercises its right that electric energy be delivered (including "Demand Response," as defined in paragraph 5(g) of this Order);

(b) Compensation for the opportunity cost of not supplying or consuming electric energy or other services during any period during which SPP requires that the seller not supply energy or other services;

(c) An upfront payment determined through the auction administered by SPP for this service;

(d) An additional amount indexed to the frequency, duration, or other attributes of physical performance as specified in SPP's Tariff; and

(3) In which the value, quantity, and specifications of such transactions for SPP for any period of time shall be limited to the physical capability of the electric energy transmission system operated by SPP for that period of time.

d. “Day-Ahead Market” means an electric energy market administered by SPP on which the price of electric energy at a specified location is determined, in accordance with SPP’s Tariff, for specified time periods, none of which is later than the second operating day following the day on which the Day-Ahead Market clears.

e. “Real-Time Balancing Market” means an electric energy market administered by SPP on which the price of electric energy at a specified location is determined, in accordance with SPP’s Tariff, for specified time periods within the same 24-hour period.

f. “Person who actively participates in the generation, transmission, or distribution of electric energy” means a person that is in the business of: (1) generating, transmitting, or distributing electric energy; or (2) providing electric energy services that are necessary to support the reliable operation of the transmission system.

g. “Demand Response” means the right of SPP to require that certain sellers of such rights curtail consumption of electric energy from the electric energy transmission system operated by SPP during a future period of time as specified in SPP’s Tariff.

h. “SPP” means Southwest Power Pool, Inc. or any successor in interest to Southwest Power Pool.

i. “Tariff.” Reference to a SPP “Tariff” includes a tariff, rate schedule or protocol.

j. “Exemption Application” means the application for an exemptive order under 4(c)(6) of the CEA filed by SPP on October 17, 2013, as amended August 1, 2014.

6. Effective Date. This Order is effective upon publication in the Federal Register.

7. Delegation of Authority. The Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight (“Division”) and to such members of the Division’s staff acting under his or her direction as he or she may designate, in consultation with the General Counsel or such members of the General Counsel’s staff acting under his or her direction as he or she may designate, the authority to request information from SPP pursuant to section 4(a) of this Order.

This Order is based upon the representations made in the Exemption Application for an exemptive order under section 4(c) of the CEA filed by SPP,²⁹⁸ including those representations with respect to compliance with FERC regulation 35.47. It is also based on supporting materials provided to the Commission by SPP and its counsel, including a legal memorandum that, in the Commission’s sole discretion, provides the Commission with assurance that the netting arrangements contained in the approach selected by SPP to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide SPP with enforceable rights of setoff against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant. Any material change or omission in the facts and circumstances pursuant to which this Order is granted might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or consistent with the public interest and purposes of the CEA. Further, the Commission reserves the right, in its discretion, to revisit any of the terms and conditions of the relief provided herein, including but not limited to, making a determination that certain entities and transactions described herein should be subject to the Commission’s full jurisdiction, and to condition, suspend, terminate or

²⁹⁸ In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Southwest Power Pool, Inc., amended Aug. 1, 2014.

otherwise modify or restrict the exemption granted in this Order, as appropriate, upon its own motion.

VII. Amended RTO-ISO Order

The Preamble to and Paragraph 1 of the RTO-ISO Order are revised to read as follows:

Pursuant to its authority under sections 4(c)(1) and 4(c)(6) of the Commodity Exchange Act (“CEA”) or (“Act”) and in accordance with sections 4(c)(1) and (2) of the Act, the Commodity Futures Trading Commission (“Commission”)

1. 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 anti-fraud 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. For the avoidance of doubt, this exemption applies to private actions pursuant to CEA section 22 with respect to all provisions of the Act, including the foregoing enumerated provisions, but does not restrict the Commission’s enforcement authority pursuant to those provisions.

Issued in Washington, DC, on October 18, 2016 by the Commission.

Christopher J. Kirkpatrick,
Secretary of the Commission.

Appendices to Final Order in Response to an Application From Southwest Power Pool, Inc. to Exempt Specified Transactions; Amendment to the Final Order Exempting Specified Transactions of Certain Independent System Operators and Regional Transmission Organizations – Commission Voting Summary, Chairman’s Statement, and Commissioner’s Statement.

Appendix 1 – Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

Appendix 2 – Statement of Chairman Timothy G. Massad

I support this order, which comes after careful review of the issue, including comments from many market participants.

Our electric markets are subject to regulation by the Federal Energy Regulatory Commission (FERC) and state regulators. Those regulators work to ensure that energy rates remain reasonable, transmission systems function reliably, and the interests of market participants are balanced with the protection of electricity consumers. In light of this, the CFTC exempted certain transactions in the regional transmission organization (RTO) and independent system operator (ISO) markets from most provisions of the Commodity Exchange Act (CEA), other than our own authority to pursue fraud and manipulation in those markets.

One issue was left uncertain, which was whether private rights of action under the CEA could be brought against RTOs, ISOs, and other market participants. As a general matter, private rights of action are important to our regulatory structure. They can deter bad actors and protect market participants. But many market participants expressed concern that private actions could create costs within the markets in ways regulators did not anticipate. For example, several state consumer advocate offices noted that private rights of action could inadvertently introduce regulatory uncertainty and increase costs for consumers. So while private rights of action will remain critical overall in our markets, I am persuaded that, in this limited instance, they could cause instability and adversely affect consumers without necessarily enhancing supervision of markets or consumer protection.

In making this determination, it is important that the CFTC continues to retain the authority to pursue fraud and manipulation within those markets. Aggrieved market participants and consumers also still have the ability to file complaints with the CFTC and our Whistleblower program.

I thank the CFTC staff and my fellow Commissioners for their work on this matter, as well as those who took the time to provide us with feedback.

Appendix 3 – Statement of Commissioner J. Christopher Giancarlo

I support this commonsense decision that it is not in the public interest to allow private lawsuits against electric utilities trading in wholesale energy markets.

Two months ago, I visited a construction site for a state-of-the-art electric power plant in my home state of New Jersey. The facility was being built to withstand future

weather events like Superstorm Sandy. The power it will produce will serve millions of local residents.

Without today's practical decision, power utilities across the country may have hesitated or delayed building such new power plants because of the regulatory uncertainty and costs associated with private litigation—costs that surely would be passed on to millions of ratepayers throughout the country.

As I have observed, preserving the Section 22 private right of action is not necessary in these heavily regulated markets.¹ Both the CFTC and the FERC have the authority to seek redress for the claims of private persons who raise meritorious allegations of fraud or manipulation.

I am heartened that the Commission now agrees and has concluded, with today's action, that allowing private lawsuits is not in the public interest.

It is just commonsense.

¹ See 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 FR 30245, 30254-55 (May 16, 2016) (Statement of Dissent by Commissioner J. Christopher Giancarlo); J. Christopher Giancarlo, Op-Ed, Unneeded mandate would hurt N.J. consumers, The Record, Aug. 18, 2016, available at <http://www.northjersey.com/opinion/opinion-guest-writers/unneeded-mandate-would-hurt-n-j-consumers-1.1647129>.

