

CFTC's Exemption Orders and Private Rights of Action in Energy Markets

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The Texas Approach to Markets

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- ERCOT has an energy-only market.
 - \$9,000/MWH system wide offer cap and Operating Reserve Demand Curve help ensure:
 - Proper scarcity pricing to reward generation and to encourage new build.
 - Promote operational reliability.
- ERCOT market is a \$35 billion electric market that covers 75% of Texas land region and almost 90% of the state's load.
- In Texas, ERCOT has both wholesale and retail responsibilities.
 - System reliability – grid planning and operations.
 - Open access to transmission.
 - Wholesale
 - Schedules and dispatches.
 - Manages both real time, day ahead and congestion revenue rights markets.
 - Retail
 - Manages switching customers between retail electric providers (REPs).
 - Handles billing.
 - Meter reads come in to ERCOT.
 - ERCOT provides customers usage data to the respective REP.

ERCOT's Footprint

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- Total number of generating units: 550+
- Total market participants: 1,100+
- Total Qualified Scheduling Entities (QSE): 496 as of the end of September 2015, with 280 representing neither load nor generation, 103 representing load, 81 representing generation and 32 representing both load and generation.
- Total generation for 2014: 340 million MWh (a 2.5% increase over 2013)
 - 73% Competitive.
 - 16% municipalities.
 - 12% cooperatives.
- 98.5% of energy is settled in 15 minute intervals through data from AMI or IDR meters (as of May 31, 2015).

Market Power and ERCOT's Small Fish Rule

- Texas Public Utility Regulatory Act (PURA) § 39.154 limits generators from owning more than 20% of installed capacity in ERCOT in order to minimize the potential for market power abuse.
- “Small Fish Rule,” adopted September 2006. 16 Texas Admin. Code (TAC) § 25.504(c). A generator that controls less than 5% of the installed capacity in ERCOT (not including wind or like capacity) is deemed not to have ERCOT-wide market power.
- TAC 25.503 provides standards for market participants, including 503(f)(12).
 - Market participants are required to call to ERCOT's attention any provision in ERCOT procedures that produces an outcome inconsistent with efficient and reliable market operation.
- Aspire Commodities LP and Raiden Commodities, LP (Aspire) petitioned PUCT to repeal the Small Fish Rule, PUCT rejected after stakeholders (other than Aspire) unanimously supported maintaining the existing rule.

The CFTC's Proposed SPP Exemption Order

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- On May 21, 2015, the CFTC published a proposed order that would exempt SPP transactions, SPP members, and SPP from all but the anti-fraud and anti-manipulation provisions of the Commodity Exchange Act (CEA).
- In the preamble to the proposed SPP order, the CFTC stated that it had intended to preserve private rights of actions under Section 22 of the CEA in connection with the final SPP order and the ISO-RTO final exemption order that the CFTC issued in 2013.
- The CFTC's comment was triggered by the U.S. district court's (S.D. Tex.) ruling that the final exemption precluded private claims asserted by Aspire against GDF-Suez Energy North America, Inc.

Conflict Between the CFTC's Statement of Intent, the Order Text, and Congressional Intent

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- The text of the Proposed SPP Order and the original ISO-RTO Final Order does not preserve a private right of action under CEA Section 22.
- Congress clearly intended maintaining the status quo regarding the energy markets' regulatory framework when enacting Dodd-Frank financial reform legislation.
- Neither the Federal Power Act (FPA) nor PURA provide for private rights of action.

Impact of CFTC's Statement of Intent

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- The CFTC's stated intent to preserve private claims raises a number of troubling issues.
- The CFTC did not provide the ISO-RTO Proposed Order commenters, their members, and other interested parties, including the FERC and the PUCT, with prior notice of, and an opportunity for hearing on, its statement of intent.
- In addition, the CFTC's statement will have a number of unintended and adverse consequences, including the potential for inconsistent rulings among the nation's hundreds of federal district court judges, the CFTC, and the FERC concerning the scope of the CEA and the FPA.

Impact of CFTC's Statement of Intent (*cont'd*)

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- If the CFTC permits parties to bring private claims under the CEA related to ISO-RTO transactions, it will enable plaintiffs to attack collaterally rules approved by FERC or permitted to take effect by the PUCT by claiming that actions made pursuant to, and in compliance with, those rules are unlawful.

Comments on the Proposed SPP Order

- Many interested persons filed comments on the proposed SPP exemption order (Aspire, FERC, PUCT, ISOs-RTOs, Electric Trade Assocs.)
 - The ISOs-RTOs requested that the CFTC revise the preamble language to conform to the express terms of the ISO-RTO Final Order; the actual language of the Proposed SPP Order; and other previous CEA Section 4(c) exemptions.
 - Alternatively, the ISOs-RTOs requested that the CFTC refrain from addressing in the SPP exemption order the scope of private rights of action under the CEA with respect to alleged manipulative and fraudulent schemes arising in organized wholesale electricity markets.

Concerns

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- Unless the CFTC withdraws or modifies its statement of intent, expect plaintiffs lawyers to file private CEA claims as soon as FERC issues a notice of alleged violation that a market participant has manipulated the price of an ISO-RTO transaction.
 - This provides an end-run around the absence of a private right of action in the FPA.
- Aspire appealed the district court's dismissal of its complaint to the US Court of Appeals for the Fifth Circuit.
 - On August 7, 2015, amicus briefs supporting the district court's dismissal were filed by the Texas PUCT and ERCOT, PJM and CAISO.

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