

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

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PUBLIC UTILITY COMMISSION OF TEXAS**

**PRESENTATION FOR PUBLIC UTILITY LAW SECTION,
STATE BAR OF TEXAS ANNUAL MEETING
AUGUST 5, 2016**

Effect of Dodd Frank Wall Street Reform on ISOs and RTOs

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- July '10 – Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) is signed.
- The law dramatically expands the U.S. Commodity Future Trading Commission's (CFTC) exclusive authority under the Commodities Exchange Act (CEA) to include transactions in RTO-ISO energy markets.
- However, to maintain the status quo with respect to Federal Regulatory Commission (FERC) authority over its Federal Power Act regulated markets and PUCT jurisdiction over ERCOT, Section 4(c)(6) of the CEA directed the CFTC to use its authority to exempt from the CEA any “agreement, contract, or transaction” entered into in the FERC or PUCT regulated markets if the CFTC finds it to be in the public interest.

Section 22 of Commodities Exchange Act

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- Section 22 of the CEA creates an explicit private cause of action for damages (including punitive damages if the acts are “willful and intentional”) arising out of alleged manipulative market behavior and other prohibited actions and includes claims against aiders and abettors. In addition, the section permits an aggrieved party to bring claims against “[A] registered entity that fails to enforce any “bylaw, rule, regulation, or resolution that it is required to enforce” under the CEA.

Timeline For CFTC Exemptive Relief

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- March '13 – CFTC issues RTO-ISO Order (applicable to ERCOT and other RTOs-ISOs), exempting entities from all provisions of CEA other than CFTC's market anti-manipulation enforcement authority (RTO-ISO Order).
- October '13 – SPP files application for its own exemptive order.
- February '15 – U.S. District Court (S.D. Tex.) dismisses private lawsuit on grounds that private right of action under CEA Sec. 22 is not available to plaintiffs under terms of RTO-ISO Order.
- May '15 – CFTC issues proposed order regarding SPP exemptive relief that purports (in preamble) not to exempt SPP and its covered entities from private rights of action brought under CEA Sec. 22; arguing for the first time that it never intended to include Section 22 in the exemptions previously granted.

Timeline For CFTC CEA Sec. 22 Exemptive Relief (cont'd)

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- February '16 – U.S. Court of Appeals for the Fifth Circuit affirms S.D. Tex. decision.
- April '16 – U.S. Senate Committee on Agriculture votes with bipartisan support to amend pending CFTC reauthorization bill to require all 4(c) exemptive orders include an exemption from CEA Sec. 22.
- May '16 – CFTC Issues Notice of Proposed Amendment to RTO-ISO Order and the pending proposed SPP order to provide explicitly that RTO-ISO Order does not exempt covered entities from CEA Sec. 22 private right of action.
- June '16 – Chair and ranking member of House Committee on Agriculture (along with Chair and ranking member of Subcommittee on Commodity Exchanges, Energy and Credit) submit letter to CFTC raising concerns regarding allowing Sec. 22 claims in the RTO-ISO energy markets.
- June '16 – Chair and ranking member of House Committee on Energy and Commerce submit letter to CFTC expressing concerns about private rights of action under CEA Sec. 22 in the RTO-ISO energy markets.

Consequences of CFTC's Proposed Amendment

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- The CFTC's stated intent to preserve private claims raises a number of troubling issues among which are:
 - PUCT and FERC are more efficient venues and provide more consistency in resolving disputes than private legal proceedings in federal district courts.
 - Private causes of action will permit collateral attacks on FERC and PUCT authorized market rules, undermining the efficient operation and regulation of electricity markets.
 - ISOs-RTOs are essentially non-profit entities whose expenses are borne by electricity consumers.

FERC and PUCT Regulatory Framework Is Structured For Enforcement and To Resolve Conflict

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- Both FERC and PUCT have oversight and enforcement divisions.
- Both FERC and PUCT have deep experience with their respective energy markets and the applicability of their rules, procedures and precedents to those markets.
- PUCT has an Independent Market Monitor that reviews market activity by all market participants and works closely with the PUCT's oversight and enforcement division.
- Aggrieved market participants and third-parties with standing can bring their non-contract disputes against each other and ERCOT to the PUCT for resolution. The PUCT staff has the option to participate in these proceedings representing the public interest and help provide regulatory consistency and certainty.

Private Causes of Action Will Allow Collateral Attacks On Market Rules

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- Transactions that are lawful under FERC or PUCT approved ISO-RTO rules can be challenged under the CEA by third parties without the prior knowledge or participation of the regulator in the proceedings.
- Federal courts will be interpreting PUCT and FERC regulations and RTO-ISO market rules instead of the regulatory authority.
- It is likely that inconsistent determinations by different federal courts will result.
- This will weaken the market and regulatory structure and cause market uncertainty regarding what conduct is permitted under the rules.

Private Causes of Action Will Allow For Collateral Attacks (cont'd)

- The result is regulation by the courts rather than by the expert regulator.
 - Provides an end-run around the absence of a private right of action in the FPA and PURA.
 - Enforcement actions will take place in a federal district court by private litigants instead of being resolved at the agency where expertise resides.
 - Judicial review of agency decisions remain available to parties unhappy with the agency's resolution of a dispute.

Private Causes of Action Will Increase Cost to Consumers

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- RTOs-ISOs are non-profit entities whose costs are borne by electricity consumers.
- As central counterparties, RTOs-ISOs are parties to every transaction and thus can and will be sued as an aider and abettor, or for failing to enforce their market rules.
- RTO-ISO participation in federal court proceedings will result in litigation costs that will be passed on to consumers.
- If a party, the RTO-ISO could become subject to potential damages. Any damages will be passed on to consumers.
- There's even the risk that Transmission and Distribution Utilities can be sued as aiders and abettors.

Review of Comments Filed To-Date

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- Of the 48 comments filed in response to the CFTC's proposed amended order, 43 are against (including FERC and PUCT).
- Of the 4 in support, 2 came from the plaintiffs in the dismissed lawsuit from S.D. Tex. The other 2?
 - One comment was in its entirety: "Well, this is great, I love your effort."
 - Another was in its entirety: "I support this."
- The remaining comment was an advertisement for a Turkish window supplier.
- While the comments received do not control the outcome of the decision, there does not seem to be much of a public concern regarding the existing exemption from CEA Sec. 22.

Review of Comments Filed To-Date (cont'd)

- PUCT's comments can be found at www.puc.texas.gov under "Featured Topics"
- My presentation to CFTC's Energy and Environmental Markets Advisory Committee can be found by following the "Presentations" link on my webpage at www.puc.texas.gov.
- The National Association of Regulatory Utility Commissioners (NARUC) at its 2016 summer meeting adopted a formal position opposing any CFTC action to allow Sec. 22 claims in RTO-ISO markets and intends to advocate its position both to the CFTC and Congress.

43 Parties United In Opposition To The Amendment

- PUCT, FERC, Missouri Joint Municipal Electric Utility Commission, Omaha Public Power District, Oklahoma Municipal Power Authority
- Offices of Public Counsel: Delaware, D.C., New Jersey, and West Virginia
- Trade Groups: ISO-RTO Council, Edison Electric Institute, Electric Power Supply Assoc., International Energy Credit Assoc., Commercial Energy Working Group, American Gas Assoc., Texas Industrial Energy Consumers, Large Public Power Council Assoc., North Carolina Electric Membership Corporation, Coalition of Physical Energy Companies.
- Co-operatives: Minnkota Power, National Rural Electric, Golden Spread Electric, Old Dominion Electric, Basin Electric Power, Arizona Electric Power, Southern Illinois Power, Western Farmers Electric, East Kentucky Power, East Texas Electric, Hoosier Energy Rural Electric.
- Businesses: GDF Suez, Tenaska Energy, PSEG Companies, Kansas City Power and Light, ITC Great Plains, Exelon, American Electric Power, Xcel, Weststar Energy, Sunflower Electric Power, Prairie Power, MISO Transmission Owners.

Excerpts From CFTC Commissioner Giancarlo's Dissent

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- For over three years, U.S. power market participants have been operating in reliance on the RTO-ISO Order. They have trusted in the reasonable, unambiguous understanding that transactions covered by the Order are exempt from all provisions of the Commodity Exchange Act (“CEA or Act”) except for those specifically enumerated as reserved (the “Reserved Provisions”). They have relied on the plain language of the RTO-ISO Order that “[e]xempts . . . The execution of [specified] electric energy-related agreements, contracts and transactions . . . 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 . . . “

Too bad for them.

Excerpts From CFTC Commissioner Giancarlo's Dissent, Cont'd

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- “...by taking this action the Commission is introducing a disturbing precedent regarding the legal certainty of its orders.”
- “In particular, the Commission’s proposal to change the scope of the RTO-ISO Order, based not on any change in facts or circumstances but on a legal fiction that it intended to reserve section 22 all along, calls into question the legal certainty of all other section 4(c) orders in which the Commission failed to discuss or reserve the applicability of section 22 for violations of the Act or regulations reserved for itself.”
- <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement051016>

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