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June 4, 1998

BY INDIVIDUAL HAND DELIVERY

COMMENT

Hon. Brooksley E. Born, Chairperson  
Hon. Barbara Pedersen Holum  
Hon. David D. Spears  
Hon. John E. Tull, Jr.  
Commodity Futures Trading Commission  
Three Lafayette Center  
1155 21st Street, Northwest  
Washington, D.C. 20581

Re: Application of Chicago Board of Trade for Contract Market Designation  
for TVA Hub Futures and Options, Tendered Under Fast-Track  
Procedure

Dear Commissioners:

On April 2, 1998, the Commodity Futures Trading Commission ("CFTC" or "Commission") issued public notice of an application for contract market designation filed by the Chicago Board of Trade ("CBT"). CBT is seeking designation by the CFTC as a contract market for a "TVA Hub." Assuming CBT's submission complied with all CFTC requirements for contract market designation, CBT would have been deemed to be designated a contract market under section 6 of the Commodity Exchange Act ("CEA" or "Act") on May 8, 1997.

By letter dated May 7, 1998, the Commission notified CBT that, in light of certain "novel and complex" issues engendered by CBT's application, an additional thirty days would be taken to review the submission. As stated in a letter from Mr. Steven Manaster, Director of the Commission's Division of Economic Analysis, to Mr. Thomas Donovan of CBT:

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The CBT is hereby notified that, because the applications raise issues which are novel and complex requiring additional time for review (see Commission rule 5.1(c)), I am extending the fast-track review period an additional 30 days, from May 8, 1998, to June 8, 1998. . . . The issues for which additional time for review is required related to federal laws that govern sales of power outside the TVA region and their relationship to the delivery provisions of the proposed futures contract<sup>1</sup>

Since May 7, 1998, TVA Watch has tendered to the CFTC several requests for information under the Freedom of Information Act ("FOIA") seeking all documents pertaining to CBT's application. The initial CFTC response to TVA Watch's FOIA requests has revealed the following:

- (1) CBT has amended unilaterally the terms and conditions of the proposed TVA Hub contracts by unilateral amendment. CBT's amendments to its application are material in nature.<sup>2</sup>
- (2) Although substantially modifying the terms and conditions of the proposed TVA Hub contracts, CBT has failed to supplement its application to explain the purposes and effects of the amended terms and conditions of the proposed contract.

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<sup>1</sup> May 7, 1998 Letter to Mr. Thomas Donovan from Mr. Steven Manaster.

<sup>2</sup> CBT has amended the proposed TVA Hub futures contract in several significant ways: (i) to provide that shorts taking a contract to delivery must certify that they are not restricted by Federal law as to whom they may sell electric energy from the Tennessee Valley Control Area (note that this is contrary to cash market and legal requirements); (ii) to add detailed specification of a schedule to determine delivery units; (iii) to rescind a requirement for daily notification of interface point specification; (iv) to add two new methods for delivery; (v) to add new requirements that margins be deposited with the Clearing House and in the amount and form required by the Clearing House; and (vi) to reduce the position limit for spot months by more than one-half from 350 to 150.

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In addition to substantive concerns raised in previous correspondence, TVA Watch remains concerned about several procedural matters germane to the CFTC's review of CBT's application. First, Mr. Manaster's letter to CBT notifying that staff needs an additional thirty days to consider novel and complex issues relating to "the delivery provisions of the proposed futures contract," suggests CBT's submittal qualifies for fast-track review. However, the CFTC's rules are clear -- if a board of trade unilaterally amends the terms or conditions of a proposed contract (as has happened here)<sup>3</sup> the application for designation must be reviewed under the usual procedures under section 6 of the Act. See 17 CFR § 5.1(b)(4). TVA Watch urges the CFTC to apply its rules to CBT's application and thereby to instruct staff to review same under the usual procedures under section 6 of the Act.<sup>4</sup>

The Commission's rules also specify that no application for contract market designation is eligible for fast-track review if the submission fails to comply with the requirements of Appendix A of 17 CFR Part 5, Guideline No. 1 and 17 CFR § 1.61. As shown and discussed in TVA Watch's previous submittals, CBT's application fails to satisfy both the requirements of Appendix A and of Section 1.61 of 17 CFR. Appendix A is not satisfied because a number of material amendments have been made to the terms and conditions of the proposed contract. Although the proposed contract has been substantially amended, CBT's Appendix A (specifically, Appendix A(a)(2)) submittal has not been revised to explain and justify the modified individual contract terms and conditions. Because of the novel and complex issues unique to the CBT application, a thorough analysis and justification of each of the individual contract terms and conditions that are featured in the proposed contract is required. See 17 CFR Part 5, Appendix A (a)(2). Simply put, this has not been done.

So too, CBT's application fails to comport with Section 1.61 of 17 CFR, a necessary precondition to fast-track review and to contract market designation generally. Under 17 CFR § 5.1(b)(4), CBT's submission must comply with Section 1.61. Section 1.61 provides that "each contract market shall, for each separate type of contract for which delivery months are listed to trade" a limit on the "maximum net long and net short positions" that any one person

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<sup>3</sup> TVA Watch sought in its FOIA any evidence or documents that CFTC staff requested CBT to make an amendments to the terms or conditions of the proposed contract. CFTC's responses have not contained any such documents. As such, it appears that CBT's amendments have been tendered on its own initiative.

<sup>4</sup> See, e.g., Achnar Broadcasting Co. v. FCC, 62 F.3d 1441, 1447 (D.C. Cir. 1995).

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may hold or control. However, governmental entities such as TVA, are exempt from regulation or limitation of net positions. See 7 U.S.C. § 6a(d). CBT appears, therefore, unable *per se* to meet the requirements of Section 1.61 as it relates to trading by TVA.

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CBT's application for contract market designation under fast-track rules should be rejected. CBT's application is materially deficient, has been materially altered through amendment, and fails to satisfy statutory and regulatory requirements. CBT should be required to fix the problems inherent in its current application and to reapply for contract market designation under the regular section 6 process. If, however, the Commission permits fast-track designation, TVA Watch respectfully requests the Commission to publish a written order setting forth the basis and rationale of the decision. Such an explanation would help the public better understand the rationale for the Commission's decision and would help facilitate judicial review.<sup>5</sup>

Sincerely yours,



Lyle D. Larson  
Attorney for TVA Watch

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cc: Ms. Jean A. Webb, Secretary ✓

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<sup>5</sup> Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Huls America, Inc. v. Browner, 83 F.3d 445 (D.C. Cir. 1996); Armstrong v. CFTC, 12 F.3d 401, appeal after remand, 77 F.3d 445 cert. denied, 116 S.Ct. 2502 (1993).