

Received CFTC
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FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

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OFFICE OF THE GENERAL COUNSEL

October 20, 2009

COMMENT

OFFICE OF THE SECRETARIAT
C.F.T.C.
2009 OCT 27 PM 3 11

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Notice of Intent, Pursuant to the Authority in Section 2(h)(7) of the Commodity Exchange Act and Commission Rule 36.3(c)(3), To Undertake a Determination Whether the Mid-C Financial Peak Contract, et al., Offered for Trading on the IntercontinentalExchange, Inc., Perform Significant Price Discovery Functions (Comment File 09-011)

Comments of the Staff of the Federal Energy Regulatory Commission

Dear Mr. Stawick:

On September 22, 2009, the Commodity Futures Trading Commission (CFTC) issued a notice of action and request for comment on whether certain electricity contracts, referred to in the subject line of this letter, offered for trading on the IntercontinentalExchange, Inc. (ICE), an exempt commercial market (ECM), perform significant price discovery functions.¹ These are the comments of the staff of the Federal Energy Regulatory Commission (FERC).

Under the CFTC's rules implementing the Reauthorization Act of 2008, an ECM with significant price discovery contracts (SPDCs) is subject to certain self-regulatory and reporting requirements, as well as certain CFTC oversight authorities, with respect to those contracts. Specifically, such regulatory authority applies to agreements, contracts or transactions in exempt commodities (which includes electricity) executed on an electronic trading facility by certain eligible commercial entities on a principal-to-principal basis if the CFTC determines, in its discretion, that any such agreement, contract or transaction performs a significant

¹ 74 Fed. Reg. 51261 (October 6, 2009).

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price discovery function. If the CFTC determines that a particular agreement, contract or transaction performs a significant price discovery function, the ECM must demonstrate, with respect to that contract, compliance with nine “core principles” set forth in the section 2(h)(7)(C) of the Commodity Exchange Act (CEA) and the CFTC’s rules thereunder.

While a determination by the CFTC that any of the above-referenced ICE contracts serves a significant price discovery function would not appear to conflict with FERC’s exclusive jurisdiction under the Federal Power Act (FPA) over the transmission or sale for resale of electric energy in interstate commerce or with its other regulatory responsibilities under the FPA, the FERC staff will continue to monitor for any such conflict. Moreover, the FERC staff will monitor other similar determinations that could conflict with the FERC’s regulation of wholesale electric markets. In this regard, many FERC-regulated public utilities, in particular regional transmission organizations (RTOs) and independent system operators (ISOs), have electronic trading facilities used to provide FERC-jurisdictional services. With respect to RTOs and ISOs, the FERC comprehensively regulates transmission in interstate commerce and related financial transmission rights (FTRs), real-time and day-ahead energy markets, capacity markets, and ancillary services, all of which are conducted using electronic trading facilities and which are provided in accordance with detailed market rules contained in tariffs and contracts on file at the FERC. Congress has recognized that FERC’s regulation of RTOs, ISOs and their markets was not intended to be affected by the SPDC amendments to the CEA.² Accordingly, the FERC staff will monitor proposed SPDC determinations and advise the CFTC of any potential conflicts with the FERC’s exclusive jurisdiction over RTOs, ISOs or other jurisdictional entities.

² See, H.R. Conf. Rep. No. 110-627, 110 Cong., 2d Sess. at 986 (2008); and Cong. Record, Dec. 13, 2007, S15447 (confirming the intent of the sponsors of the Senate amendment, which added Title XIII to H.R. 2419, that the “significant price discovery contract” provision not have any impact on FERC’s authority over regional transmission organizations).

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The FERC staff thanks the CFTC for soliciting comments on its review of the ICE contracts. Any questions or comments on this submission may be directed to:

The Federal Energy Regulatory Commission
Office of the General Counsel
888 First Street, NE
Washington, DC 20426
Attention: Andrew F. MacDonald
Phone: 202-502-6541

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Sheets', with a long horizontal flourish extending to the right.

Thomas R. Sheets
General Counsel
Office of the General Counsel
Federal Energy Regulatory Commission

Cc: Jon Wellinohoff, Chairman
Suedeem G. Kelly, Commissioner
Phillip D. Moeller, Commissioner
Marc L. Spitzer, Commissioner