COMMODITY FUTURES TRADING COMMISSION

RIN 3038-AE02

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 Section 4(c)(6) of the Act.

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: The Commodity Futures Trading Commission ("CFTC" or "Commission") is issuing a final order ("Final Order") in response to a consolidated petition ("Petition")[1] from certain regional transmission organizations ("RTOs") and independent system operators ("ISOs") (collectively, "Requesting Parties") to exempt specified transactions ("Covered Transactions") from the provisions of the Commodity Exchange Act ("CEA" or "Act"),[2] and Commission regulations. The Final Order exempts contracts, agreements, and transactions for the purchase or sale of the limited

[1] In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent Service Operator Corporation; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by the Electric Reliability Council of Texas, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by ISO New England Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Midwest Independent Transmission System Operator, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by New York Independent System Operator, Inc.; and In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by PJM Interconnection, L.L.C. (Feb. 7, 2012, as amended June 11, 2012).

[2] 7 U.S.C. 1 et seq.

electric energy-related products that are specifically described within the Final Order from the 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 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. To be eligible for the exemption contained in the Final Order, the contract, agreement, or transaction must be offered or entered into in a market administered by a Requesting Party pursuant to that Requesting Party's tariff, rate schedule, or protocol (collectively, "Tariff"), and the relevant Tariff must have been approved or permitted to have taken effect by either the Federal Energy Regulatory Commission ("FERC") or the Public Utility Commission of Texas ("PUCT"), as applicable. 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,[3] "eligible contract participants," as defined in section 1a(18) of the Act and Commission regulations,[4] 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 Final Order also extends to any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to the Covered Transactions. Finally, the

[3] 7 U.S.C. 6(c)(3)(A)-(J).

[4] 7 U.S.C. 1a(18). "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.

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.[5]

A copy of the Petition is available on the Commission's website at http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/iso-rto4capplication.pdf; the attachments to the Petition are posted at http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/iso-rto4cappattach.pdf. A chart submitted by the Requesting Parties that sets forth the status of their respective implementation of the standards set forth in FERC Order No. 741 ("FERC Order No. 741 Implementation Chart") is posted at http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/iso-rto4cappfercchart.pdf, and a revised version of the chart ("Revised FERC Order No. 741 Implementation Chart") is posted at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rtoisoltr011813.pdf. A copy of the "Notice of Proposed Order and Request for Comment on 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 Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in Section 4(c)(6) of the Act" ("Proposed Order") is available at 77 FR 52138, Aug. 28, 2012, and on the Commission's website at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-

[5] 7 U.S.C. 6(c)(6).

20965a.pdf. A copy of the comment file is also available on the Commission's website at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1265.

DATES: Effective date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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VI. Order

I. Relevant Dodd-Frank Provisions

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[6] Title VII of the Dodd-Frank Act amended the CEA[7] and altered the scope of the Commission's exclusive jurisdiction.[8] In particular, it expanded the Commission's exclusive jurisdiction, which had included futures traded, executed and cleared on CFTC-regulated

[6] 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.htm.

[7] 7 U.S.C. 1 et seq.

[8] Section 722(e) of the Dodd-Frank Act.

exchanges and clearinghouses, to also cover swaps traded, executed, or cleared on CFTC-regulated exchanges or clearinghouses.[9] As a result, the Commission's exclusive jurisdiction now includes swaps as well as futures, and is clearly expressed in CEA section 2(a)(1)(A), which reads:

> The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and subparagraphs (C), (D), and (I) of this paragraph and subsections (c) and (f), with respect to accounts, agreements (including any transaction which is of the character of * * * an "option"), and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts) traded or executed on a contract market . . . or a swap execution facility . . . or any other board of trade, exchange, or market . . . .[10]

The Dodd-Frank Act also added a savings clause that addresses the roles of the Commission, FERC, and state agencies as they relate to certain agreements, contracts, or transactions traded pursuant to the tariff or rate schedule of an RTO or ISO.[11] Toward that end, paragraph (I) of CEA section 2(a)(1) repeats the Commission's exclusive jurisdiction and clarifies that the Commission retains its authorities over agreements, contracts or transactions traded pursuant to FERC- or state-approved tariff or rate schedules.[12] The same paragraph (I) also explains that the FERC and state agencies preserve their existing authorities over agreements, contracts, or transactions "entered into pursuant to a tariff or rate schedule approved by [FERC] or

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[9] 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).

[10] 7 U.S.C. 2(a)(1)(A).

[11] See 7 U.S.C. 2(a)(1)(I).

[12] See 7 U.S.C. 2(a)(1)(I)(i) and (ii).

a State regulatory agency," 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 a[n RTO] or [ISO]."[13]

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 new sections to the CEA, sections 4(c)(6) (A) and (B). Specifically, sections 4(c)(6)(A) and (B) provide for exemptions for certain transactions

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[13] 7 U.S.C. 2(a)(1)(I)(i)(II). The savings clause in CEA section 2(a)(1)(I) provides that:

> (I)(i) Nothing in this Act shall limit or affect any statutory authority of the Federal Energy Regulatory Commission or a State regulatory authority (as defined in section 3(21) of the Federal Power Act (16 U.S.C. 796(21)) with respect to an agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved by the Federal Energy Regulatory Commission or a State regulatory authority and is—
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> (I) not executed, traded, or cleared on a registered entity or trading facility; or
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> (II) executed, traded, or cleared on a registered entity or trading facility owned or operated by a regional transmission organization or independent system operator.
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> (ii) In addition to the authority of the Federal Energy Regulatory Commission or a State regulatory authority described in clause (i), nothing in this subparagraph shall limit or affect—
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> (I) any statutory authority of the Commission with respect to an agreement, contract, or transaction described in clause (i); or
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> (II) the jurisdiction of the Commission under subparagraph (A) with respect to an agreement, contract, or transaction that is executed, traded, or cleared on a registered entity or trading facility that is not owned or operated by a regional transmission organization or independent system operator (as defined by sections 3(27) and (28) of the Federal Power Act (16 U.S.C. 796(27), 796(28)).

In addition, Dodd-Frank Act section 722(g) (not codified in the United States Code) expressly states that FERC's pre-existing statutory enforcement authority is not limited or affected by amendments to the CEA. Section 722(g) states:

> (g) AUTHORITY OF FERC.—Nothing in the Wall Street Transparency and Accountability Act of 2010 or the amendments to the Commodity Exchange Act made by such Act shall limit or affect any statutory enforcement authority of the Federal Energy Regulatory Commission pursuant to section 222 of the Federal Power Act and section 4A of the Natural Gas Act that existed prior to the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

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 and charges for the sale of electric energy within the State or municipality.[14]

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).[15] Section 4(c)(1) of the CEA

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[14] The exemption language in section 4(c)(6) reads:

> (6) 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), exempt from the requirements of this Act an agreement, contract, or transaction that is entered into—
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> (A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission;
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> (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
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> (C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)).

[15] Section 4(c) was added to the CEA by the Futures Trading Practices Act of 1992, Pub. L. 102-564. The Commission's authority under section 4(c) was explained by the Conferees:

> In granting exemptive authority to the Commission under new section 4(c), the Conferees recognize the need to create legal certainty for a number of existing categories of instruments which trade today outside of the forum of a designated contract market.
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> The provision included in the Conference substitute is designed to give the Commission broad flexibility in addressing these products
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> ****
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> In this respect, the Conferees expect and strongly encourage the Commission to use its new exemptive power promptly upon enactment of this legislation in four areas where significant concerns of legal uncertainty have arisen: (1) hybrids, (2) swaps, (3) forwards, and (4) bank deposits and accounts.

The Commission is not required to ascertain whether a particular transaction would fall within its jurisdiction prior to exercising its exemptive authority under section 4(c). The Conferees stated that they did:

> not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument, or transaction for which an exemption is sought is subject to the Act. Rather, this

grants the Commission the authority to exempt any transaction or class of transactions, including swaps, from certain provisions of the CEA, in order to "promote responsible economic or financial innovation and fair competition."[16] Section 4(c)(2)[17] 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;"[18] 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.[19] 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.[20]

> provision provides flexibility for the Commission to provide legal certainty to novel instruments where the determination as to jurisdiction is not straightforward...

H.R. Rep. No. 102-978, 102d Cong. 2d Sess. at 82-83 (1992).

[16] 7 U.S.C. 6(c)(1).

[17] 7 U.S.C. 6(c)(2).

[18] 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 this Final Order:

> (a) any person that qualifies for one of ten defined categories of appropriate persons; or
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> (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.

[19] 7 U.S.C. 6(c)(2).

[20] H.R. Rep. No. 102-978, 102d Cong. 2d Sess. at 82-83 (1992).

II. Background

A. The Petition

On February 7, 2012, the Requesting Parties[21] filed a joint Petition[22] with the Commission requesting that the Commission exercise its authority under section 4(c)(6) of the CEA[23] and section 712(f) of the Dodd-Frank Act[24] to exempt certain contracts, agreements and transactions for the purchase or sale of specified electric energy[25] products, that are offered pursuant to a FERC- or PUCT-approved Tariff,[26] from most provisions of the Act.[27] The Requesting Parties include three RTOs (Midwest Independent Transmission System Operator, Inc. ("MISO"); ISO New England, Inc. ("ISO NE"); and PJM Interconnection, L.L.C. ("PJM")), and two ISOs (California Independent System Operator Corporation ("CAISO") and New York Independent System Operator, Inc. ("NYISO")), whose central role as transmission utilities is subject to regulation by FERC. The Requesting Parties also include the Electric Reliability Council of Texas, Inc. ("ERCOT"), an entity that performs the role of an ISO, but whose central role as a transmission utility in the electric energy market is subject to regulation by PUCT, the authority with jurisdiction to regulate rates and charges for the sale of

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[21] In the preamble to the Proposed Order, the Requesting Parties were also referred to as "Petitioners." For consistency with the Final Order, the term "Requesting Parties" is used throughout the preamble to the Final Order.

[22] Requesting Parties submitted an amended Petition on June 11, 2012. Citations herein to "Petition" are to the amended Petition.

[23] 7 U.S.C. 6(c)(6).

[24] See section 712(f) of the Dodd-Frank Act.

[25] In the Proposed Order, "electric energy" was also referred to as "electricity" and "electric power." For the sake of consistency in the Final Order, the term "electric energy" is used throughout the Final Order.

[26] "Tariff" collectively refers to a tariff, rate schedule, or protocol, to account for differences in terminology used by the Requesting Parties and their respective regulators.

[27] See 77 FR 52139. See also Petition at 2-3, 6.

electric energy within the state of Texas.[28] The Requesting Parties represented that the roles, responsibilities and services of ISOs and RTOs are substantially similar.[29] As described in the Proposed Order, the Requesting Parties represented that FERC encouraged the formation of ISOs to consolidate and manage the operation of electric energy transmission facilities in order to provide open, non-discriminatory transmission service for generators and transmission customers.[30] The Requesting Parties also represented that FERC encouraged the formation of RTOs to administer the transmission grid on a regional basis.[31]

The Requesting Parties specifically petitioned the Commission to exempt from most provisions of the CEA certain "financial transmission rights," "energy transactions," "forward capacity transactions," and "reserve or regulation transactions," as defined in the Petition, if such transactions are offered or entered into pursuant to a Tariff under which a Requesting Party operates that has been approved by FERC or PUCT, as applicable, as well as any persons (including the Requesting Parties, their members and their market participants) offering, entering into, rendering advice, or rendering other services with respect to such transactions.[32] The Requesting Parties asserted that each of the transactions for which an exemption was requested is (a) subject to a long-standing, comprehensive regulatory framework for the offer and sale of such transactions

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[28] See 77 FR 52139. See also Petition at 2-4; 16 Tex. Admin. Code ("TAC") 25.1 (1998).

[29] See 77 FR 52139. See also Petition at 2 n.2.

[30] See 77 FR 52139. See also FERC Order No. 888 Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Facilities ("FERC Order No. 888"), 61 FR 21540, April 24, 1996.

[31] See 77 FR 52139. See also Petition at 3.

[32] See 77 FR 52139. See also Petition at 2-3.

established by FERC, or in the case of ERCOT, PUCT, and (b) part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to the regulation and oversight of FERC or PUCT, as applicable.[33] The Requesting Parties expressly excluded from the Petition a request for relief from sections 4b, 4o, 6(c), and 9(a)(2) of the Act,[34] and such provisions explicitly have been carved out of the exemption set forth in the Final Order.[35] The Requesting Parties asked that, due to the commonalities in the Requesting Parties' markets, the exemption apply to all Requesting Parties and their respective market participants with respect to each category of electric energy-related transactions described in the Petition, regardless of whether such transactions are offered or entered into at the current time pursuant to an individual Requesting Party's Tariff.[36] The Requesting Parties asserted that this uniformity would avoid an individual Requesting Party being required to seek future amendments to the exemption in order to offer or enter into the same type of transactions currently offered by another Requesting Party.[37]

B. The Proposal

On August 28, 2012, the Commission issued the Proposed Order.[38]

1. Transactions Proposed to Be Exempted

The Commission proposed to exempt the purchase and sale of four types of transactions[39] defined within the Proposed Order: (1) Financial Transmission Rights

[33] See 77 FR 52139. See also Petition at 11.

[34] See 77 FR 52139. See also Petition at 3.

[35] See discussion in section IV.D. infra.

[36] See 77 FR 52139. See also Petition at 6.

[37] See id.

[38] 77 FR 52138.

("FTRs"), (2) Energy Transactions, (3) Forward Capacity Transactions, and (4) Reserve or Regulation Transactions, pursuant to section 4(c)(6) of the CEA.[40]

An "FTR" 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 electricity, established on an electricity market administered by a Requesting Party at a specified source (i.e., where electricity is deemed injected into the grid of a Requesting Party) and a specified sink (i.e., where electricity is deemed withdrawn from the grid of a Requesting Party)."[41] As set forth in the Proposed Order, FTRs would be exempt only where each FTR is linked to, and the aggregate volume of FTRs for any period of time is limited by, the physical capability (after accounting for counterflow) of the electric energy transmission system operated by the Requesting Party offering the contract for such period; a Requesting Party serves as the market administrator for the market on which the FTR is transacted; each party to the FTR is a member of a particular Requesting Party (or is the Requesting Party itself); the FTR is executed on a market administered by that Requesting Party; and the FTR does not require any party to make or take physical delivery of electric energy.[42]

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[39] In the preamble to the Proposed Order, the term "Transactions" was used to collectively refer to the transactions covered by the Proposed Order. For clarity, the term "Covered Transactions" is used throughout the preamble to the Final Order to refer collectively to the transactions covered by the Final Order.

[40] Id. at 52141, 52166-67.

[41] Id. at 52166. The proposed definition of FTRs included such rights "in the form of options (i.e., where one party has only the obligation to pay, and the other party only the right to receive, an amount as described above)." Id.

[42] Id. at 52166. See also id. at 52141.

"Energy Transactions" were proposed to be defined as transactions in a "Day-Ahead Market"[43] or "Real-Time Market" ("RTM")[44] as those terms were defined in the Proposed Order, for the purchase or sale of a specified quantity of electric energy at a specified location, including "Demand Response,"[45] as defined in the Proposed Order, where: (1) the price of electric energy is established at the time the Energy Transaction is executed;[46] (2) performance occurs in the RTM by either the physical delivery or receipt of the specified electric energy or a cash payment or receipt at the price established in the RTM; 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 a Requesting Party for that period of time.[47]

"Forward Capacity Transactions" were proposed to include transactions in which a Requesting Party, for the benefit of load-serving entities ("LSEs") purchases the rights

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[43] "'Day-Ahead Market'" was defined in the Proposed Order as "an electricity market administered by a Requesting Party on which the price of electricity at a specified location is determined, in accordance with the Requesting Party'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 52167.

[44] "'Real-Time Market'" was defined in the Proposed Order as "an electricity market administered by a Requesting Party on which the price of electricity at a specified location is determined, in accordance with the Requesting Party's Tariff, for specified time periods within the same 24-hour period." Id.

[45] "'Demand Response'" was defined in the Proposed Order as "the right of a Requesting Party to require that certain sellers of such rights curtail their consumption of electric energy from the electric power transmission system operated by a Requesting Party during a future period of time as specified in the Requesting Party's Tariff." Id. The definition of Demand Response, as adopted in this Order, should be read to be consistent with FERC's definition of demand response, and thus any demand response rights recognized under this Order must comport with the definition provided by FERC. See 18 CFR 35.28(b)(4) (2012) (providing that demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy).

[46] See id. at 52141-42, 52166-67. For purposes of the Final Order, the Commission is clarifying that Energy Transactions include virtual and convergence bids and offers, as they are methods of conducting such Energy Transactions. See section IV.A.1.c. infra.

[47] See 77 FR 52167. See also id. at 52142; Petition at 7.

described in the Proposed Order.[48] The Commission proposed to limit eligibility of Forward Capacity Transactions for the exemption by requiring that the aggregate cleared volume of all such transactions for any period of time must be limited to the physical capability of the electric energy transmission system operated by the applicable Requesting Party for that period of time.[49]

"Reserve Regulation Transactions" were defined in the Proposed Order as transactions:

> (1) In which a Requesting Party, for the benefit of [LSEs] and resources, purchases, through auction, the right, during a period of time specified in the Requesting Party's Tariff, to require the seller to operate electric facilities in a physical state such that the facilities can increase or decrease the rate of injection or withdrawal of electricity to the electric power transmission system operated by the Requesting Party with:
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> > (a) Physical performance by the seller's facilities within a response interval specified in the Requesting Party's Tariff (Reserve Transaction); or
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> > (b) Prompt physical performance by the seller's facilities (Area Control Error Regulation Transaction);
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> (2) For which the seller receives, in consideration, one or more of the following:
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> > (a) Payment at the price established in the Requesting Party's Day-Ahead or Real-Time Market, as those terms are defined in the Proposed Order, price for electricity applicable whenever the Requesting Party exercises its right that electric energy be delivered (including Demand Response, as defined [in the Proposed] Order);
> >
> > (b) Compensation for the opportunity cost of not supplying or consuming electricity or other services during any period during which the Requesting Party requires that the seller not supply energy or other services;

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[48] See 77 FR at 52167.

[49] See id.

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

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

(3) In which the value, quantity and specifications for such Transactions for a Requesting Party for any period of time are limited by the physical capability of the electric transmission system operated by Requesting Parties.[50]

Finally, in the 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 Proposed Order, because such activity would not be inextricably linked to the physical delivery of electric energy.[51]

The Commission proposed to limit the exemption to the transactions described in the Proposed Order in which all parties thereto fall within one of the appropriate persons categories in CEA sections 4(c)(3)(A) through (J), or, pursuant to CEA section 4(c)(3)(K), that otherwise qualify as an eligible contract participant (''ECP''), as such term is defined in section 1a(18)(A) of the Act and in Commission regulation 1.3(m).[52] The Proposed Order also required that the delineated "Transactions be offered or sold pursuant to a Requesting Party's Tariff, which has been approved or permitted to take

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[50] See id. See also id. at 52145.

[51] See id. at 52143.

[52] For those ECPs engaging in the transactions delineated in the Proposed Order in markets administered by a Requesting Party that do not fit within the categories of "appropriate persons" set forth in sections 4(c)(3)(A) through (J), the Commission proposed to determine that they are appropriate persons pursuant to section 4(c)(3)(K), "in light of their financial or other qualifications, or the applicability of appropriate regulatory protections." The Commission also noted that CEA section 2(e) permits all ECPs to engage in swaps transactions other than on a designated contract market ("DCM") and that such entities should similarly be appropriate persons for the purpose of the Proposed Order. See id. at 52145-46.

effect by: (1) In the case of ERCOT, the PUCT or (2) In the case of all other Requesting Parties, FERC."[53]

2. Conditions to the Proposed Order

a. Conditions Precedent to the Proposed Order

In the Proposed Order, the Commission proposed two conditions precedent to the issuance of a final exemption. First, the Commission proposed that it would not issue a final order to a specific RTO or ISO until (i) such time as the Requesting Parties had adopted in their Tariffs all of the requirements set forth in FERC regulation 35.47;[54] (ii) such Tariff provisions have been approved or have been permitted to take effect by FERC or PUCT, as applicable; and (iii) such Tariff provisions, have become effective and have been fully implemented by the particular RTO or ISO.[55] Second, as an additional prerequisite to the issuance of a final order, the Commission proposed to require that each Requesting Party provide a well-reasoned legal opinion or memorandum from outside counsel that, in the Commission's sole discretion, provides the Commission with assurance that the netting arrangements contained in the approach selected by the particular Requesting Party to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Code[56] in the event of the bankruptcy of the market participant.[57]

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[53] See id.

[54] 18 CFR 35.47. See detailed discussion in section IV.3.a.i. infra regarding the requirements set forth in FERC regulation 35.47.

[55] See 77 FR 52164.

[56] See 11 U.S.C. 553.

[57] See 77 FR 52165.

b. Conditions Subsequent to the Proposed Order

The Proposed Order included two information-sharing conditions subsequent. First, the Commission proposed that, after promulgation of the order, none of a Requesting Party's Tariffs or other governing documents may include any requirement that the Requesting Party notify a member prior to providing information to the Commission in response to a subpoena or other request for information or documentation.[58]

Second, the Commission proposed that the exemption be conditioned upon information sharing arrangements that are satisfactory to the Commission between the Commission and FERC and between the Commission and PUCT being in full force and effect.[59]

3. Additional Limitations

In the Proposed Order, the Commission expressly noted that the proposed exemption was based upon the representations made in the Petition and in the supporting materials provided by the Requesting Parties and their counsel, and that any material change or omission in the facts and circumstances that alter the grounds for the 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.[60] The Commission highlighted several of the Requesting Parties' representations of particular importance, including: (1) the exemption sought by the

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[58] See id. at 52142.

[59] See id. When the Proposed Order was published, the Commission and FERC had already entered into a Memorandum of Understanding, available at http://www.ferc.gov/legal/maj-ord-reg/mou/mou-33.pdf.

[60] See id. at 52167. See also id. at 52142, 52165.

Requesting Parties relates to the transactions described in the Proposed Order, which are primarily entered into by commercial participants that are in the business of generating, transmitting, and distributing electric energy;[61] (2) the Requesting Parties were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region;[62] (3) the transactions described in the Proposed Order are an essential means, designed by FERC and PUCT as an integral part of their statutory responsibilities, to enable the reliable delivery of affordable electric energy;[63] (4) each of the transactions defined in the Proposed Order taking place on the Requesting Parties' markets is monitored by Market Monitoring Units ("MMUs") responsible to either FERC or, in the case of ERCOT, PUCT;[64] and (5) each transaction defined in the Proposed Order is directly tied to the physical capabilities of the Requesting Parties' electric energy grids.[65] In the Proposed Order, the Commission explicitly reserved the authority to, in its discretion, revisit any of the terms of the relief provided by the Proposed Order including, but not limited to, making a determination that certain entities should be subject to the Commission's jurisdiction.[66] The Commission also explicitly reserved the authority to, in its discretion, suspend, terminate, or otherwise modify or restrict the Proposed Order.[67] Finally, the Commission announced its intention to exclude from the exemptive relief its general anti-fraud, anti-manipulation, and enforcement authority under the CEA over the

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[61] See id. at 52142. See also Petition at 20.

[62] See 77 FR 52142.

[63] See id. See also generally FERC Order No. 888; FERC Order No. 2000; 18 CFR 35.34(k)(2); TAC 25.1; Petition at 11, 13-14.

[64] See 77 FR 52142. See also Petition at 15-18.

[65] See 77 FR 52142.

[66] See id. at 52167. See also id. at 52142.

[67] See id. at 52167-68. See also id. at 52142; Petition at 15-18.

Requesting Parties and the transactions defined in the Proposed Order, including, but not limited to, sections 2(a)(1)(B), 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, Commission regulations 23.410(a) and (b), 32.4, and part 180.[68]

III. Summary of the Comments

The public comment period on the Proposed Order ended on September 27, 2012. The Commission received twenty-three (23) comment letters on the Proposed Order,[69] the majority of which provided general support for the proposed exemption.[70] The comment letters addressed a variety of issues including: the scope of the transactions set forth in the Proposed Order; the scope of the definition of appropriate persons for

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[68] See 77 FR at 52166. See also id. at 52163.

[69] All comment letters are available through the Commission's Web site at: http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1265. Comments addressing the Proposed Order were received from: AB Energy; American Public Power Association ("APPA"); Coalition of Physical Energy Companies ("COPE"); The Commercial Energy Working Group ("Commercial Working Group"); DC Energy, LLC ("DC Energy"); Staff of the Federal Energy Regulatory Commission ("FERC Staff"); Financial Institutions Energy Group ("FIEG"); Financial Marketers Coalition; the Industrial Coalitions (collectively referring to PJM Industrial Customer Coalition, NEPOOL Industrial Customer Coalition, and Coalition of Midwest Transmission Customers); Joint Trade Associations (collectively referring to Electric Power Supply Association, Edison Electric Institute; National Rural Electric Cooperative Association, APPA, and Large Public Power Council); New England Power Pool Participants Committee ("NEPOOL"); New York Public Service Commission ("NYPSC"); New York Transmission Owners ("NYTOs") (collectively referring to Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester and Electric Corporation); PUCT; Tarachand Enterprises, Inc. ("Tarachand"); and Texas Energy Association and Alliance for Retail Markets (collectively, "TEAM/ARM"). The Requesting Parties jointly submitted a comment letter, which contained a supplement pertaining solely to NYISO ("NYISO Supplement to Requesting Parties' Comment Letter, Attachment B"). In addition, CAISO and ISO NE jointly submitted two supplemental comment letters ("CAISO/ISO NE January" and "CAISO/ISO NE March"), NYISO and PJM each submitted supplemental comment letters on their own behalf, and ERCOT submitted two supplemental comment letters ("ERCOT October" and "ERCOT December").

[70] See, e.g., APPA at 1; Commercial Working Group at 1; DC Energy at 1; FIEG at 1; Financial Marketers Coalition at 1; Industrial Coalitions at 1, 3; Joint Trade Associations at 1, 3, 5; NEPOOL at 2; NYTOs at 1, 3; PUCT at 2.

purposes of the exemption; the use of the derivatives clearing organization ("DCO") and swap execution facility ("SEF") Core Principles in the public interest and purposes of the CEA analysis; both proposed conditions precedent (i.e., – the requirements that the Requesting Parties fully comply with the standards set forth in FERC regulation 35.47 and submit a legal opinion or memorandum providing assurances regarding the netting arrangements in their respective approach to satisfying the standard set forth in FERC regulation 35.47(d)); the proposed information sharing agreement between the Commission and PUCT; the proposed condition subsequent that the Requesting Parties revise their Tariffs to remove requirements to notify their members upon receipt of requests for information by the Commission; whether other conditions should be imposed; the Commission's jurisdiction; the Commission's reservation of anti-fraud, anti-manipulation, and enforcement authority; the effectiveness of the exemption[71]; the issuance of a separate or collective Final Order; the extension of supplemental relief to all Requesting Parties; and other considerations regarding the costs and benefits of the exemptive relief. In determining the scope and content of the Final Order, the Commission has taken into account issues raised by commenters, including those issues with respect to the costs and benefits associated with the exemption.

IV. Determinations

A. Scope of the Final Order

1. Covered Transactions Subject to the Final Order

The Commission received multiple comments regarding the scope of the transactions that are covered by the exemption set forth in the Final Order, including

[71] See section IV.E. infra.

comments requesting: (1) clarification of the types of transactions that the Commission intended to include within the definitions of the transactions proposed for exemption; (2) a broad expansion of the Covered Transactions in the Final Order to include, for example, additional transactions that are "logical outgrowths" of a Requesting Party's core function as an RTO or ISO; (3) expansion of the exemptive relief specifically to include virtual and convergence bids and offers; and (4) an expedited process for expanding the exemption to include additional transactions.

a. Determinations With Respect to Types of Transactions

Some commenters requested that the Commission confirm that the exemption is not limited to products currently traded in their respective markets, and that modifications to existing products and new products, however named, that fall within the definitions of the Covered Transactions and that are offered pursuant to the Requesting Parties' Tariffs would be covered by the Final Order.[72] On the other hand, one commenter requested that the Commission identify, and provide notice and an opportunity to comment on, any specific categories of transactions that the Commission intends to exclude from the Final Order.[73]

The Commission confirms that the definitions of the Covered Transactions included in the Final Order do not limit the exemption to those products that are currently traded in a Requesting Party's markets. Any products that are offered by a Requesting Party, presently or in the future, pursuant to a FERC- or PUCT-approved Tariff and that fall within these definitions, as well as any modifications to existing products that are

[72] See NYTOs at 5; Requesting Parties at 9-10.

[73] See Joint Trade Associations at 3 n.3.

offered by a Requesting Party pursuant to a FERC- or PUCT-approved Tariff and that do not alter the characteristics of the Covered Transactions in a way that would cause such products to fall outside these definitions, are intended to be included within the Final Order. Accordingly, with respect to the request to expressly specify transactions that are excluded from the exemption, the Commission notes that a Requesting Party would not be required to request or to obtain future supplemental relief for a product that is modified as described above or a product that it subsequently (but does not currently) offer, if the product qualifies as one of the four types of Covered Transactions in the Final Order.

The Commission notes that the definitions of the Covered Transactions set forth in the Final Order are sufficiently broad to include modifications to existing products and new products that fall within such definitions. These definitions are substantially similar to the specific definitions that were requested in the Petition. Moreover, commenters have had the opportunity to identify and comment upon instances, if any, of existing transactions that fall outside the scope of the Proposed Order. In addition, the Commission is concerned that providing lists of excluded transactions may limit the Requesting Parties' flexibility, may require more frequent requests for supplemental relief (possibly incurring inadvertent delays), and may add market confusion. As such, consistent with the confirmation set forth above, the Commission believes it would be inappropriate and inefficient to set forth all transactions that would be excluded from the scope of the Final Order.

b. Determinations With Respect to Requests to Broadly Expand the Covered Transactions in the Final Order

Multiple commenters requested that the scope of transactions eligible for the exemption in the Final Order be expanded to include (a) transactions and services that are logical outgrowths of the Requesting Parties' functions as RTOs or ISOs,[74] (b) transactions that are directly related to, and a natural outgrowth of, the four categories of transactions set forth in the Proposed Order,[75] or (c) transactions and services that are "economically comparable" in substance to the four types of transactions described in the Proposed Order.[76] Commenters generally argued that such expansion was necessary to allow flexibility in the adaption and development of the transactions and services of the RTOs and ISOs, which flexibility is necessary for reliable and cost-effective distribution of electric energy services.[77] In addition, one commenter specifically asked whether 'logical outgrowth' "transactions [should] be viewed as Commission-regulated until a future exemption is issued..."[78]

Nonetheless, one commenter agreed that a modification to the Final Order should be required for new products that do not logically fit within the Final Order's specified

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[74] See, e.g., FERC Staff at 5; FIEG at 2; Joint Trade Associations at 9; NEPOOL at 5.

[75] See, e.g., PUCT at 7-8.

[76] See, e.g., Requesting Parties at 10-11; NYTOs at 5.

[77] See, e.g., FERC Staff at 5 (stating that the products and services offered by the RTOs and ISOs are an "essential means for carrying out FERC's statutory responsibilities" and that the failure to expand the scope of the exemption as requested could "unduly inhibit or delay innovation by RTOs and ISOs"); Joint Trade Associations at 9-10 (arguing that the product restrictions contained in the Proposed Order "could have a chilling effect" on the development of "more efficient or innovative market structures which, in turn, will affect the efficient operation of the markets"); NEPOOL at 4-5 (arguing that absent an expansion, market participants may need additional exemptions from the Commission for relatively minor modifications regardless of whether such modifications are designed to ensure reliability and cost-effective electric energy services); PUCT at 7-8 (asserting that requiring supplemental relief for products that are directly related to, and a natural outgrowth of, the four categories of transactions specified in the Final Order "could have a chilling effect on innovation and overall market efficiency.").

[78] COPE at 5.

categories, noting that the Commission should have the opportunity to evaluate whether exempting such products would be consistent with the public interest.[79] The Requesting Parties also stated that they "have not requested a blanket exemption and agree that they should seek to supplement the Proposed Order if they develop new products that are potentially within the Commission's jurisdiction and that present significantly different economic characteristics from those products covered by the Proposed Order."[80]

As set forth above, the Commission re-affirms that the exemption extends to any transaction that falls within the Covered Transactions set forth in this Final Order, whether currently existing or later included in a Requesting Party's Tariff. The Commission declines, however, to magnify the Final Order to include the expansive terms requested by the specified commenters. Section 4(c)(6) of the CEA, by its terms, was not intended to permit a blanket exemption for all transactions entered into pursuant to a FERC- or PUCT- approved Tariff. Moreover, section 4(c)(6) expressly prohibits the Commission from issuing an exemption for such transactions unless it affirmatively determines that exempting them would be consistent with the public interest and the purposes of the CEA. While the Commission has been able to perform this evaluation for the Covered Transactions delineated in the Final Order, phrases such as "logical outgrowth," "natural outgrowth," and "economically comparable" are too vague and potentially too far reaching to permit meaningful analysis under the statutory standard of review. Commenters have not provided, by way of explanation or example, sufficient

[79] PUCT at 7.

[80] Requesting Parties at 11.

insight as to what, if any, boundaries an exemption would have if it were extended to the degrees requested.

Moreover, the Commission's determination that this exemption is in the public interest and consistent with the purposes of the CEA is grounded, in part, on certain characteristics of the Covered Transactions and market circumstances described by the Requesting Parties including, for example, that the Covered Transactions are "part of, and inextricably linked to, the organized wholesale electricity markets that are subject to FERC or PUCT regulation and oversight."[81] Such qualities may or may not be shared by other, as yet undefined, transactions. Additionally, it is impossible for the Commission to determine whether unidentified transactions include novel features or have market implications or risks that are not present in the Covered Transactions, which could, in turn, impact the Commission's public interest and purposes of the CEA analysis or necessitate the inclusion of additional or differing terms and conditions in a final order.

Finally, there may be differences in opinion among the Requesting Parties with respect to the expansion of relief beyond the Covered Transactions. Indeed, the Requesting Parties themselves request that future supplemental relief not be automatically granted to all Requesting Parties and the Commission notes that it has already received supplemental requests for relief that would apply only to certain Requesting Parties, and might be objected to by other Requesting Parties.[82]

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[81] 77 FR 52144. See also Petition at 11.

[82] See In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by ISO New England Inc. (April 30, 2012); In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent System Operator Corporation (May 30, 2012).

In light of these considerations and the potential for adverse consequences that may result from an exemption that includes transactions whose qualities and effect on the broader market cannot be fully appreciated absent further specification, a virtually unlimited exemption would be contrary to the public interest and purposes of the CEA. In addition, consideration of new categories of transactions could be aided by the public notice and comment process. Furthermore, the Commission notes that it is prepared to review requests for supplemental relief from the Requesting Parties.[83]

c. Determinations With Regards to Scope of "Energy Transactions" Definition

In discussing the scope of "Energy Transactions" included in the Proposed Order, the Commission stated that such transactions "are also referred to as Virtual Bids or Convergence Bids."[84] Commenters noted,[85] however, that, in a later discussion of the categories of transactions to which the exemption would apply, the Commission stated that "virtual and convergence bids/transactions" would be included within the scope of the exemption only to the extent that they would qualify under one of the four categories of transactions explicitly defined in the Proposed Order.[86] Multiple commenters

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[83] See 77 FR 52163.

[84] 77 FR 52142 (citing Petition at 6).

[85] See, e.g., DC Energy at 2; PUCT at 5-6; Requesting Parties at 12.

[86] Specifically, the Proposed Order explained:

> The particular categories of contracts, agreements and transactions to which the Proposed Exemption would apply correspond to the types of transactions for which relief was explicitly requested in the Petition. Petitioners requested relief for four specific types of transactions and the Proposed Exemption would exempt those transactions. With respect to those transactions, the Petition also included the parenthetical "(including generation, demand response or convergence or virtual bids/ transactions)." The Commission notes that such transactions would be included within the scope of the exemption if they would qualify as the financial transmission rights, energy transactions, forward capacity transactions or reserve or regulation transactions for which relief is explicitly provided within the exemption.

requested that the Commission clarify that virtual and convergence bids and offers are explicitly included within the scope of the Covered Transactions that qualify for an exemption under the Final Order.[87] Specifically, the Requesting Parties asked that the Final Order define "Energy Transactions" to include "virtual and convergence bids and offers."[88]

Several commenters expressed concerns that certain statements regarding the physical nature of transactions proposed to be exempt, and the role of market participants as physical generators, transmitters, and distributors of electric energy, cast further doubt as to whether the Commission intended to include virtual and convergence bids and offers within the scope of the Proposed Order. One commenter noted that the Commission's statement that the transactions proposed to be exempt are "primarily entered into by commercial participants that are in the business of generating, transmitting and distributing electricity" suggested that virtual and convergence bids and offers may not qualify as Covered Transactions because both traditional and non-traditional utilities engage in such transactions, yet many do not own physical generation or wholesale transmission facilities.[89] Similarly, the Requesting Parties requested the removal of the statement in the Proposed Order that provided "[t]o be eligible for the proposed exemption, the contract, agreement, or transaction would be required to be

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77 FR 52163 (internal citations omitted).

[87] Commercial Working Group at 2; DC Energy at 2; FIEG at 2; NEPOOL at 10; Requesting Parties at 12; PUCT at 5.

[88] Requesting Parties at 13.

[89] See Financial Marketers Coalition at 3-4 (quoting 77 FR 52144). The Commission notes that the statement referenced by this commenter was intended to summarize a representation made by the Requesting Parties. See 77 FR 52144 ("Petitioners also explain that the Transactions are primarily entered into by commercial participants that are in the business of generating, transmitting, and distributing electricity").

offered or entered into in a market administered by a Petitioner pursuant to that Petitioner's tariff or protocol for the purposes of allocating such Petitioner's physical resources."[90] Finally, other commenters noted concern with the Commission's qualification that "financial transactions that are not tied to the allocation of the physical capabilities of an electric transmission grid would not be suitable for exemption because such activity would not be inextricably linked to the physical delivery of electricity,"[91] suggesting that the phrase potentially excluded virtual and convergence bids and offers from the scope of Covered Transactions, depending upon the interpretation of the relationship between virtual transactions and the physical delivery of electricity.[92]

Despite their uncertainty with respect to particular statements, multiple commenters contended that virtual and convergence bids and offers fell within the transactions described in the Proposed Order.[93] Commenters posited that virtual and convergence bids and offers, like all other transactions described in the Proposed Order, are entered into pursuant to FERC- or PUCT-approved Tariffs, and thus are subject to the oversight of the Requesting Parties' MMUs. In addition, certain commenters argued that virtual and convergence bids and offers are inextricably linked to the physical delivery of

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[90] Requesting Parties at 13 (citing 77 FR 52138).

[91] 77 FR 52143.

[92] See Financial Marketers Coalition at 7-8; FIEG at 2; NEPOOL at 3.

[93] See, e.g., Requesting Parties at 12 (noting that virtual transactions fall into the category of "Energy Transactions," specifically, as such term was defined in the Proposed Order). The Commercial Working Group noted that, in addition to virtual transactions, "financial schedules" and "internal bilateral transactions" can appropriately be placed in one of the four enumerated categories of transactions defined in the Proposed Order, and as such, should be explicitly included in the Final Order as Covered Transactions. See Commercial Working Group at 2. The Commission notes that financial schedules and internal bilateral transactions are the subject of a separate request for supplemental relief filed by CAISO and ISO NE and, therefore, the Commission is taking no position in this Final Order with respect to those products. See note 82 supra.

electric energy by being tied to the allocation of the physical capabilities of the electric energy transmission grid.[94]

Commenters represented that virtual and convergence bids and offers were established as a means by which to improve efficiency and competitiveness in the electric energy markets through the convergence of Day-Ahead Market and RTM prices,[95] and have been promoted by FERC and PUCT.[96] The Requesting Parties further explained that "[a] Virtual Transaction is a cleared offer to sell energy in the day-ahead market (an 'incremental offer' or 'inc') or a cleared bid to buy energy in the day-ahead market (a 'decremental bid' or 'dec')," and "may be submitted by market participants that do not have a physical position in the ISO/RTO markets, which is to say, they do not own

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[94] Requesting Parties at 14 ("On a net basis, Virtual Transactions in the RTOs and ISOs are modeled identically to generation and load; therefore, the net cleared amount of all bids and offers (including virtual bids and offers) cannot exceed the physical capability of the grid to flow electricity."); PUCT at 6; DC Energy at 2 ("[V]irtual energy transactions also serve to converge the Day-Ahead and Real-Time markets as well as provide liquidity and price discovery, all of which are inextricably linked to the physical capabilities of an efficient electricity market and grid."); FIEG at 2 ("While virtual bids are indeed financial, they do not exist in isolation from the capabilities of the electric grid. Indeed, RTOs significantly restrict virtual bids based in large part on their potential to tangibly impact the electric grid itself."); Financial Marketers Coalition at 8-9 ("Virtual Transactions cannot be entered into unless the selected node and the grid are capable of supporting the transaction. If the physical node is not available, the transaction is rejected. Thus the aggregate cleared volume of Virtual Transactions for any period is limited by the physical capability of the electricity system operated by the RTOs/ISOs and is based on the projected physical power needs of the system for the specific hour, day, month or year.").

[95] PUCT at 6 ("The [Day-Ahead Market] was instituted in the ERCOT market to provide opportunities for increased efficiency in the market for physical energy transactions," and "would not exist but for its direct linkage to the real-time market for energy and ancillary services necessary to operate the electric system."); Financial Marketers Coalition at 8 (noting that Day-Ahead Market modeling "results in both price and operational efficiency because it allows the system operator to determine which units to dispatch based on the best price and projected demands considering all offers and bids including virtuals."); NEPOOL at 3 ("Virtual bidding allows virtual traders to supply power to service areas where physical competition is constrained due to insufficient transmission and to increase market efficiency by making pricing less volatile as day-ahead prices converge with real-time prices.").

[96] PUCT at 6; Financial Marketers Coalition at 3-4, 12 (noting that FERC has encouraged, and in some cases even required, unbundling of services, and promoted market entry by non-traditional utilities lacking physical resources in order to enhance competition).

generation or serve load."[97] Day-Ahead Market transactions are not, however, limited to non-generating or non-LSEs, as "owners of physical generating units that are capacity resources in the ISO/RTO must submit an offer to sell the energy output of their units into the day-ahead market," and "[s]imilarly, participants that serve load in an ISO/RTO market may additionally submit bids into the day-ahead market."[98] The Requesting Parties asserted that, because the Day-Ahead Market is cleared by modeling all bids and offers without distinction as to whether they are virtual or physical in nature, virtual and convergence bids and offers satisfy the proposed criteria that the aggregate cleared volume of Energy Transactions be limited by the physical capability of the electric energy transmission system in order for an Energy Transaction to be subject to the exemption.[99]

In response to commenters' concerns, the Commission has added language to the Energy Transactions definition to clarify in the Final Order that Energy Transactions "includ[e] . . . Virtual and Convergence Bids and Offers."[100] This clarification is based on Requesting Parties' and other regulators' representations that virtual and convergence bids and offers are "Energy Transactions" in the "Day-Ahead Market," as such terms are defined in the Final Order,[101] that enable market participants to buy and sell electric

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[97] Requesting Parties at 14. PUCT explained that, "in the ERCOT market, Virtual Transactions are limited to transactions in the Day Ahead Market (DAM)." PUCT at 6. The Financial Marketers Coalition defined a "virtual transaction" as "a purchase or sale of energy in the day-ahead market that is settled against real-time energy prices." Financial Marketers Coalition at 2 n.2.

[98] Requesting Parties at 14.

[99] See id.

[100] See paragraph 5(b) of the Order. Additionally, in response to the Requesting Parties' comment, the Commission has not included any reference in the Final Order suggesting that the purpose of a Covered Transaction must be to allocate a Requesting Party's physical resources.

[101] Consistent with the Commission's understanding of industry practice as reflected in the Requesting Parties' current Tariffs, "the day on which the Day-Ahead Market clears" in the Order definition of "Day-

energy without physically producing or consuming it.[102] Although there is an apparent financial settlement nature of virtual and convergence bids and offers transacted in the Day-Ahead Market, Requesting Parties represented that they are inextricably linked to the physical delivery of electric energy due to their being subject to the same aggregate physical capabilities of the electric energy transmission grid as other physical Energy Transactions.[103] Requesting Parties also represented that virtual and convergence bids and offers are integral to achieving increased efficiency, and ultimately lower consumer costs, through the convergence of Day-Ahead Market and RTM prices.[104] Accordingly, based on these representations, the Commission confirms that the inclusion of virtual and convergence bids and offers that are Energy Transactions within the scope of the Covered Transactions in the Final Order is consistent with the public interest and purposes of the CEA.

Finally, CAISO and ISO NE requested that the proposed definition of "Energy Transactions" be amended to allow for cash settlement based upon the Day-Ahead Market price (in addition to the Real-Time Market price), due to the fact that for both CAISO and ISO NE, the Day-Ahead Market may be preferable to the Real-Time Market as a source of settlement prices for certain energy transactions.[105] CAISO and ISO NE requested such a change to account for certain energy transactions in their markets that otherwise might not be included within the scope of the Energy Transactions definition,

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Ahead Market" shall mean the same day that the relevant transaction in the Day-Ahead Market is entered into. See paragraph 5(e) of the Order.

[102] Requesting Parties at 14. See also PUCT at 6.

[103] Requesting Parties at 14.

[104] See, e.g., NYISO at 3-4.

[105] See CAISO/ISO NE March at 2-3.

but nonetheless are settled "under tariff provisions which have been approved by the FERC" and that "[o]nce entered into the settlement system . . . , are operationally treated the same as any other Energy Transaction included in the Commission's Proposed Order."[106] Accordingly, the Commission has amended the definition to provide that the requisite performance of an energy transaction may occur in the Real-Time Market through "[a] cash payment or receipt at the price established in the Day-Ahead Market or Real-Time Market (as permitted by each Requesting Party in its Tariff)."[107] The Commission stresses that any Energy Transaction settling based upon the Day-Ahead Market price must be inextricably linked to the physical delivery of electric energy.

d. Determinations With Regards to the Process for Expanding the Transactions Covered by the Final Order

Several commenters requested a streamlined or expedited process for Commission review of supplemental requests for related exemptions submitted by the Requesting Parties.[108] Specifically, some commenters argued that Commission action is not necessary where a "FERC- or PUCT-approved change was made to an already exempted transaction"[109] and where Tariff changes that are related to core RTO and ISO market functions are filed and accepted by FERC.[110]

Another commenter generally noted that "the Commission . . . should provide an efficient process for Petitioners to confirm the applicability of the exemptive relief to new

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[106] Id. at 3.

[107] See paragraph 5(b) of the Order (emphasis added).

[108] See generally Joint Trade Associations at 10; NEPOOL at 4; PUCT at 8; Requesting Parties at 10-11.

[109] See generally Joint Trade Associations at 10.

[110] See generally NEPOOL at 4.

or modified products in a timely manner,"[111] while the Requesting Parties asked "the Commission [to] adopt a process whereby a Petitioner could simultaneously provide the Commission a copy of its FERC filing (or in the case of ERCOT, the Protocol revisions). . . ."[112] The Requesting Parties proposed that, for FERC-regulated RTOs and ISOs, "if, during the 60-day FERC review period, the Commission informs the Petitioners that the new or modified product is not covered by the exemption or that the Commission needs additional time to review the product, the Petitioner would delay offering the new product until such time as the Commission completes its review or grants supplemental relief."[113]

As discussed above, the Commission notes that that there is no need to review new or revised Tariffs that are limited to transactions that fall within the definitions of the Covered Transactions set forth in the Final Order. A supplemental exemption is not necessary in such instances. The Commission declines to adopt a streamlined or expedited process for the review of supplemental requests to expand the exemption to additional transactions. As noted above, section 4(c)(6) of the CEA mandates that the Commission, in granting any exemption thereunder, must act in accordance with CEA sections 4(c)(1) and (2). The Commission will strive to address any requests for supplemental relief as expeditiously as possible.

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[111] PUCT at 8.

[112] Requesting Parties at 10-11.

[113] Id.

2. Additional Definitions and Provisions in the Final Order

The Commission proposed to exempt any persons (including the Requesting Parties, their members and their market participants) offering, entering into,[114] rendering advice, or rendering other services with respect to the transactions defined in the Proposed Order.[115] The Commission also proposed that, in order to be eligible for exemptive relief, "[t]he agreement, contract or transaction must be offered or sold pursuant to a Requesting Party's tariff and that tariff must have been approved or permitted to take effect by: (1) [i]n the case of [ERCOT], the [PUCT] or (2) in the case of all other Requesting Parties, [FERC]."[116] The Commission did not receive any comments with respect to this requirement. In addition, this requirement is consistent with the range of the Commission's authority as set forth in section 4(c)(6) of the CEA and with the scope of the relief requested,[117] and therefore the Commission has not altered the requirement in the Final Order.

In the Proposed Order, the term "Requesting Party" was defined to include the six Requesting Parties (i.e., CAISO, ERCOT, ISO NE, MISO, NYISO, and PJM) and any of their respective successors in interest.[118] The Commission has incorporated this definition into the Final Order without alteration. In the Proposed Order, "[r]eference to

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[114] The Commission clarifies that the exemption is only available to persons "entering into" the Covered Transactions if such persons satisfy the criteria set forth in paragraph 2(b) of the Order (i.e., such persons are "appropriate persons," as defined in sections 4(c)(3)(A) through (J) of the CEA; "eligible contract participants," as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or "persons who actively participate in the generation, transmission, or distribution of electric energy" as defined in paragraph 5(g) of the Order.

[115] 77 FR at 52166.

[116] Id.

[117] See id. at 52142, 521664; Petition at 2-3.

[118] 77 FR 52167.

a Requesting Party's 'tariff' includes a tariff, rate schedule or protocol,"[119] in order to account for differences in terminology used by such entities and their respective regulators.[120] The Commission did not receive any comment on this definition and, accordingly, has incorporated this definition into the Final Order unchanged.

3. Conditions to the Final Order

a. Conditions to the Effectiveness of the Exemption Set Forth in the Final Order

i. FERC Regulation 35.47

On October 21, 2010, FERC adopted FERC regulation 35.47[121] to encourage clear and consistent risk and credit practices in the organized wholesale electric energy markets to, inter alia, "ensure that all rates charged for the transmission or sale of electric energy in interstate commerce are just, reasonable, and not unduly discriminatory or preferential."[122] As more fully described in the Proposed Order,[123] FERC regulation 35.47 directs each of the RTOs and ISOs within its jurisdiction to adopt Tariffs that implement specified credit practice reforms.[124] These credit reforms include limitations on the amount of credit an RTO or ISO may extend for each market participant; shortened billing and settlement periods of no more than seven days; the elimination of unsecured credit in FTR or equivalent markets; requiring RTOs and ISOs to ensure the

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[119] Id.

[120] See id. at 52164.

[121] The Proposed Order referred to FERC Order 741 to collectively describe 75 FR 65942 ("FERC Original Order 741") and 76 FR 10492 ("FERC Revised Order 741") (slightly amending and clarifying FERC Original Order 741). The standards set forth in these FERC Orders are codified as FERC regulation 35.47 and, therefore, for clarity, reference herein is to the regulation.

[122] 75 FR 65942, 65942, Oct. 21, 2010. These requirements were later amended and clarified in an order on rehearing. See 76 FR 10492, Feb. 25, 2011.

[123] See 77 FR at 52147-48.

[124] See id.

enforceability of their netting arrangements in the event of the insolvency of a member by (1) establishing a single counterparty to all market participant transactions, (2) requiring each market participant to grant a security interest in the receivables of its transactions to the relevant RTO or ISO, or (3) providing another method that supports netting that is approved by FERC and that provides a similar level of protection to the market; adoption of a two-day grace period for curing collateral calls; establishment of minimum market participation eligibility requirements that apply consistently to all market participants and that require RTOs and ISOs to engage in periodic verification of market participant risk management policies and procedures; and Tariff clarifications regarding the conditions under which RTOs and ISOs will request additional collateral due to a material adverse change.[125] In the Proposed Order, the Commission stated that these credit requirements appear to achieve goals that are similar to the regulatory objectives of the Commission's DCO Core Principles,[126] and set forth a detailed analysis of each credit requirement and DCO Core Principle supporting such assertion.[127] Due, in part, to the consistency in regulatory objectives between FERC regulation 35.47 and several of the Commission's DCO Core Principles, the Commission proposed requiring each Requesting Party, including ERCOT, to comply with FERC regulation 35.47 as a condition precedent to the

[125] See id. at 52147-48, 52150-53.

[126] See id. at 52147.

[127] See id. at 52147-48; 52150-53.

granting of a 4(c)(6) exemption for the transactions described in the Proposed Order.[128] The Commission requested comment on this proposal.[129]

Several commenters argued against this prerequisite, citing FERC's authority over the implementation of FERC regulation 35.47,[130] while others proposed that the Commission rely on FERC's determination that the Requesting Parties have complied with FERC regulation 35.47.[131] Further, commenters requested clarification from the Commission as to "what will constitute a finding that an RTO or ISO is fully compliant with" FERC regulation 35.47,[132] with one commenter suggesting that the Requesting Parties' ongoing efforts to comply with FERC regulation 35.47 are a sufficient demonstration of compliance.[133] In addition, several commenters proposed that a final order from FERC, or, with respect to ERCOT, PUCT, is adequate to demonstrate compliance and the Commission need not do any further analysis upon receipt of such a final order.[134]

With respect to ERCOT, several commenters objected to the condition precedent because ERCOT is subject to PUCT's jurisdiction and not that of FERC,[135] and further asserted ERCOT should be evaluated on its compliance with PUCT regulations.[136] One

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[128] See 77 FR 52164-65. The Commission noted that, while ERCOT is not subject to FERC regulation, the fact that these mandates were developed specifically for RTOs and ISOs suggests that holding ERCOT to these standards may well be appropriate. See id. at 52165.

[129] See id. at 52172.

[130] See, e.g., Joint Trade Associations at 15; COPE at 7.

[131] See generally Commercial Working Group at 4.

[132] See, e.g., Joint Trade Associations at 14-15; Commercial Working Group at 4.

[133] See, e.g., Joint Trade Associations at 15.

[134] See, e.g., id.

[135] See, e.g., COPE at 7-8; Joint Trade Associations at 14; PUCT at 3, 11; Requesting Parties at 19.

[136] See, e.g., COPE at 7-8; Joint Trade Associations at 14.

commenter cited the successful operation of the ERCOT market over the past decade as support for its position.[137] In addition, commenters noted that ERCOT has, in part, voluntarily and, in part, in conjunction with regulations set forth by PUCT, implemented protocols that are comparable to those identified in FERC regulation 35.47.[138] Indeed, these commenters argued that some of these efforts are more conservative than those required by FERC regulation 35.47, and thus these commenters expressed concern that the condition precedent will require ERCOT to adopt less stringent practices.[139]

ERCOT has represented that it implemented protocols that are comparable to[140] all of the standards set forth in FERC regulation 35.47, with the sole exception of the billing period requirement in the RTM.[141] FERC regulation 35.47(b) requires that RTO and ISO Tariffs "[a]dopt a billing period of no more than seven days and allow a settlement period of no more than seven days."[142] ERCOT represented that its rules applicable to the Day-Ahead Market are more conservative than FERC regulation 35.47(b) obligations with respect to both the statement issuance and payment deadlines.[143] ERCOT's RTM settlement rules have a longer issuance period of nine days,

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[137] See COPE at 8.

[138] See PUCT at 11; Requesting Parties at 19.

[139] See PUCT at 11-12; Requesting Parties at 19-22.

[140] See Revised FERC Order No. 741 Implementation Chart at 1 n.1, 3. See also Requesting Parties at 19 ("ERCOT has adopted credit standards that are either the same as or substantially equivalent to those set forth in FERC Order No. 741.").

[141] See Requesting Parties at 19-22; Revised FERC Order No. 741 Implementation Chart. ERCOT indicates that it has implemented these practices "with the approval of PUCT," Requesting Parties at 19, and that all applicable changes became effective on or before January 1, 2013, with the exception of a protocol that "will further reduce the [Real-Time] settlement cycle in phases by an additional two days," which was in the stakeholder process" as of January 18, 2012. Revised FERC Order No. 741 Implementation Chart.

[142] 18 CFR 35.47(b).

[143] See Requesting Parties at 20.

but a shorter payment period of two bank business days within issuance of the statement and invoice.[144] ERCOT asserted that its "RTM settlement timeline is consistent with the goals of FERC" regulation 35.47 because RTM transactions are paid within eleven and thirteen days (shorter than the fourteen-day time frame established by FERC regulation 35.47(b)) for 92% of operating days and within the fourteen-day period for 98% of operating days.[145] ERCOT claimed that ERCOT RTM transactions that are paid beyond the fourteen days from the operating day are paid on the fifteenth day.[146] ERCOT also contended that any incremental risk related to ERCOT's RTM nine-day statement issuance period is mitigated because RTM positions in the ERCOT market are known and fully collateralized subsequent to the relevant operating day and prior to the FERC-required seven day statement issuance period.[147]

As discussed in detail below in section IV.B.2.e.ii., the Commission believes that the DCO Core Principles provide a useful framework to help measure the extent to which the exemption is in the public interest and consistent with the purposes of the CEA. Because substantial compliance with the standards set forth in FERC regulation 35.47 forms the basis for the determination that the Tariffs and activities of the Requesting Parties are congruent with, and – in the context of the Covered Transactions – sufficiently accomplish, the regulatory objectives of the DCO Core Principles, such compliance is necessary for the Commission's public interest and purposes of the CEA

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[144] See id.

[145] Id.

[146] See id. at 20-21. ERCOT represents that longer payment and settlement timelines are "expected to be primarily due to weekend and holiday schedules." Revised FERC Order No. 741 Implementation Chart at 3. See also Requesting Parties at 21.

[147] See id. at 21.

determination.[148] Nonetheless, the Commission notes that each Requesting Party has represented to the Commission that its Tariffs have been revised to substantially meet the standards set forth in FERC regulation 35.47.[149] Indeed, the Commission notes that the Requesting Parties have represented that several of those Tariff revisions have already been approved or permitted to take effect by FERC or PUCT, as applicable.[150] As such, and after careful consideration of the comments, the Commission believes that for each Requesting Party that is regulated by FERC, full compliance with FERC regulation 35.47, as measured by FERC's acceptance and approval of all of that Requesting Party's Tariffs necessary to implement the standards set forth in FERC regulation 35.47, is a necessary prerequisite to the effectiveness of the exemption in the Final Order with respect to that Requesting Party.

With respect to ERCOT, the Commission has considered the comments regarding ERCOT's efforts to reform its market protocols in a manner that is the same as or substantially similar to the credit requirements of FERC regulation 35.47. The Commission believes, on the basis of ERCOT's representations, as set forth above, that ERCOT's market protocols differ from the standards set forth in FERC regulation 35.47 in a manner that is sufficiently minor as to permit the Commission to accept them for the purpose of determining that the requested exemption with respect to ERCOT is in the public interest and consistent with the purposes of the CEA. Thus, for ERCOT, adopting measures that are substantially similar to standards that are the same as those set forth in

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[148] In the case of ERCOT, which is regulated by PUCT, what is necessary is compliance with standards that are the same as those set forth in FERC regulation 35.47.

[149] See FERC Order No. 741 Implementation Chart; Revised FERC Order No. 741 Implementation Chart.

[150] See Revised FERC Order No. 741 Implementation Chart.

FERC regulation 35.47, as measured by PUCT's permitting all of the ERCOT protocols that are discussed above and as set forth in the Revised FERC Order No. 741 Implementation Chart to take effect, is a necessary prerequisite to the effectiveness of the exemption in the Final Order with respect to ERCOT.

ii. Legal Memorandum or Legal Opinion of Counsel

The Proposed Order contemplated requiring, as a condition precedent to the issuance of a Final Order, that each Requesting Party provide a well-reasoned legal opinion or memorandum from outside counsel that, in the Commission's sole discretion, provides the Commission with assurance that the netting arrangements contained in the approach selected by the particular Requesting Party to satisfy the obligations contained in FERC regulation 35.47(d)[151] will provide the Requesting Party with legally enforceable rights of set off against any of its market participants under title 11 of the United States Bankruptcy Code in the event of a bankruptcy of the market participant. This condition precedent was proposed in light of diversity among the Requesting Parties surrounding the interpretation of the single counterparty requirement and whether a Requesting Party's adopted practices would provide enforceable set-off rights.[152] The Commission requested comment on this proposal.[153]

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[151] FERC regulation 35.47(d) was adopted as part of the "Credit Reforms in the Wholesale Electricity Market" established by FERC Order No. 741. It requires an organized electric energy market to have tariff provisions that establish a single counterparty to all market participant transactions, or require each market participant in an organized wholesale electric energy market to grant a security interest to the organized wholesale electric market in the receivables of its transactions, or provide another method of supporting netting that provides a similar level of protection to the market and is approved by the Commission. In the alternative, the organized wholesale electric energy market is not permitted to net market participants' transactions and must establish credit based on market participants' gross obligations. 18 CFR 35.47(d).

[152] 77 FR 52165. Requesting Parties have defined the term "single counterparty" differently. In addition, each Requesting Party plans on implementing a central counterparty structure based on its individual views. Because of these differing views, the legal opinion or memorandum requirement is meant to provide comfort to the Commission that the single counterparty structure chosen by each Requesting Party provides

The Commission received three types of comments on this requirement: (1) comments that opposed the condition precedent; (2) comments that did not opine on the propriety of the requirement, but expressed concern with respect to the possible unintended and adverse tax consequences the obligation may have for the Requesting Parties; and (3) a comment that objected to the specific requirement that the memorandum or opinion of counsel be signed by the law firm as opposed to an individual partner of the law firm.

Commenters that opposed the condition precedent generally did so on the basis that the Commission "should not be the arbiter of whether a FERC-approved RTO regime consistent with" FERC regulation 35.47 "meets bankruptcy goals,"[154] and that "the existence of FERC regulation should be the premise upon which an exemption is granted."[155]

In addition, two commenters urged the Commission to avoid taking any action that could undermine a Requesting Party's tax-exempt status and continued ability to use tax-exempt financing to finance its operations,[156] while the Requesting Parties asked the Commission to "clarify that any memorandum or opinion of counsel need not be signed by a law firm that provides it, as opposed to any individual partner."[157]

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enforceable set off rights, without having the Commission specify what would be an acceptable central counterparty structure, which could contrast with what FERC and PUCT have permitted.

[153] See id. at 52172.

[154] COPE at 8.

[155] Id.

[156] See generally APPA at 4; Joint Trade Associations at 15.

[157] Requesting Parties at 16-17.

With respect to the comments opposing the condition precedent, the Commission reiterates that this requirement is designed to permit the Commission to avoid being the arbiter of whether a Requesting Party has satisfied the requirements of FERC regulation 35.47(d). The Commission notes that no Requesting Party has asserted that it would be unable to obtain such a document. In addition, the Commission notes that the ambiguities discussed in the Proposed Order with respect to some Requesting Parties' interpretations of the single counterparty requirement have not been clarified.[158] The Commission continues to believe that the legal memorandum requirement will provide the Commission with assurance that the netting arrangements contained in the approach selected by each Requesting Party to satisfy the standards set forth in FERC regulation 35.47(d) (or in the case of ERCOT, standards that are the same as those set forth in FERC regulation 35.47(d)) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Bankruptcy Code, in the event of the bankruptcy of a market participant. However, the Commission believes that this condition may be met subsequent to the issuance of this Final Order, provided that as a condition to the effectiveness of the exemption set forth in this Final Order, the Commission must receive, from each Requesting Party, a legal memorandum or opinion of outside counsel that is satisfactory to the Commission. In addition, the Commission clarifies that it retains discretion as to whether the legal opinion or memorandum provides the Commission with the assurances desired, and may elect not to require that a memorandum or opinion be signed by the law firm if the circumstances so warrant. Moreover, as discussed further in section IV.E. below, the Commission is

[158] See 77 FR 52165.

delegating its authority to review and accept the legal memoranda or opinions to the Director of the Division of Clearing and Risk and to his designees, in consultation with the General Counsel or the General Counsel's designees,[159] which will expedite the process by which the Requesting Parties are able to satisfy this condition.

With respect to the comment that the condition precedent requiring a legal memorandum or opinion of outside counsel may create adverse tax consequences, the Commission notes that such tax issues are beyond the scope of this Final Order.

b. Conditions Subsequent to the Final Order

i. Notification of Requests for Information

The Proposed Order included a condition requiring that "neither the tariffs nor any other governing documents of the particular RTO or ISO pursuant to whose tariff the agreement, contract, or transaction is to be offered or sold, shall include any requirement that the RTO or ISO notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation."[160] As noted in the Proposed Order, a "notice requirement could significantly compromise the Commission's enforcement efforts as there are likely to be situations where it would be neither prudent nor advisable for an entity under investigation by the Commission to learn of the investigation prior to Commission notification to the entity."[161] The Commission requested comment on this proposal and

[159] See paragraph 7 of the Order.

[160] Id. at 52166.

[161] Id.

as to whether there may be an alternative condition that the Commission might use to achieve the same result.[162]

One commenter asked "[d]oes the Commission's subpoena secrecy requirement described in the Proposed Order mandate that FERC approve tariff changes that are required by the Commission regardless of whether FERC views them to be 'just and reasonable' as required by the Federal Power Act?"[163] Another commenter opposed this condition, arguing that "[r]eopening a tariff could result in multiple issues arising, many of which have nothing to do with the notice of inquiry, and may result in undue delay."[164]

In response to the comments, the Commission recognizes that while this condition may require a Tariff change for some Requesting Parties, this is a necessary condition to the exemptive relief. As an initial matter, RTOs and ISOs amend their Tariffs on a regular basis. Thus, amending one Tariff provision would not necessarily result in opening unrelated Tariff provisions.[165] The Commission notes that none of the Requesting Parties have indicated in their comment letters that they need to revise their Tariffs to comply with this condition. Moreover, the Commission notes that RTOs and ISOs have proposed, and FERC has approved,[166] similar changes to RTO and ISO Tariffs enabling FERC Enforcement staff to issue subpoenas or requests for information without

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[162] See id.

[163] COPE at 4 (internal footnote omitted).

[164] Commercial Working Group at 3 n.4.

[165] See e.g., 18 CFR 35.9(c), 35.10(b)-(c) (providing procedures for amending individual tariff provisions, and requiring that OATT and other open access documents filed by ISOs or RTOs must be filed either as individual sheets or sections).

[166] In the absence of evidence to the contrary, the Commission would anticipate that PUCT would act similarly with respect to ERCOT.

notification to RTO or ISO members.[167] This requirement provides the same protections to CFTC Enforcement investigations. Commenters have not explained why doing so would not be "just and reasonable." In addition, the Commission notes that, in their respective comment letters, neither FERC staff nor the PUCT opposed the inclusion of this condition. Therefore, the Commission has determined that the removal of notice requirements from the Requesting Party's Tariffs will remain a condition to the Final Order.

ii. Information Sharing Agreements

The Proposed Order contemplated two conditions that addressed the Commission's ability to obtain information from the Requesting Parties.[168] First, with respect to ERCOT, the Proposed Order required that an information sharing arrangement acceptable to the Commission be executed between PUCT and the Commission and continue to be in effect. Second, for all FERC-regulated Requesting Parties, the Proposed Order required that information sharing arrangements between FERC and the Commission that are acceptable to the Commission continue to be in effect. The Commission specifically sought comment as to whether the information sharing arrangement to be executed between PUCT and the Commission should be a condition precedent to the effectiveness of a final exemption for ERCOT, and whether all Requesting Parties should be required, as a condition of any final exemption, to cooperate with the Commission's requests for information with respect to agreements, contracts, or

[167] See, e.g., PJM Interconnection, L.L.C. Open Access Transmission Tariff, Sixth Revised Volume No. 1, Attachment M, Market Monitoring Plan (permitting the MMU to provide information to FERC on a confidential basis without notice to any party).

[168] See 77 FR 52166.

transactions that are, or are related to, the agreements, contracts, or transactions that were the subject of the Proposed Order.[169]

Of those commenters that addressed the information sharing condition precedent for ERCOT, all viewpoints received requested that the Commission refrain from requiring that an information sharing agreement between PUCT and the Commission be in place prior to a final exemption becoming effective for ERCOT. The Requesting Parties and PUCT noted that fulfillment of such a requirement is beyond the control of ERCOT in terms of timing and terms, and therefore would be more appropriate as a condition subsequent to the effectiveness of the exemption in order to avoid uncertainty.[170] Similarly, another commenter suggested that the Commission grant preliminary approval of the exemption for ERCOT while discussions between the Commission and PUCT remained ongoing due to ERCOT's comparable market position with respect to the other Requesting Parties, and the lack of any specific timeline under which the information sharing agreement must be completed.[171] Another commenter objected to the condition precedent, noting that "[a] one-way information sharing requirement acceptable to the CFTC is beyond what is necessary and implies that the Commission does not trust PUCT regulation."[172] Finally, notwithstanding its objection to the condition precedent, PUCT expressed full support of working with the Commission

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[169] See id. at 52172.

[170] Requesting Parties at 15; PUCT at 13.

[171] Commercial Working Group at 4.

[172] COPE at 8.

to develop and execute an appropriate information sharing arrangement on a timely basis.[173]

Regarding the Commission's contemplation of affirmatively requiring all Requesting Parties to cooperate with requests for information as a condition of the exemption, commenters did not respond directly, although one commenter suggested that the imposition of additional requirements upon the Requesting Parties for purposes of obtaining information through FERC or PUCT as the Requesting Parties' primary regulator amounts to indirect regulation.[174]

In response to the comments opposing an information sharing agreement between PUCT and the Commission as a condition precedent to the effectiveness of relief for ERCOT, the Commission has determined not to pursue such a condition, and thus has stricken the execution of an information-sharing agreement with PUCT as a condition of the Final Order. Rather, with respect to ERCOT, the Final Order conditions the exemption upon "the Commission's ability to request, and obtain, on an as-needed basis from ERCOT, concurrently with the provision of written notice to PUCT and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within ERCOT's possession for products in ERCOT's markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data, and ERCOT's compliance

[173] PUCT at 13.

[174] COPE at 8.

with such requests by sharing the requested information."[175] This revision dispels any concerns regarding potential delay to the effectiveness of the Final Order with respect to ERCOT that could result from the time it might take for PUCT and the Commission to complete an acceptable information sharing arrangement. This revision also responds to competitiveness concerns that ERCOT and the other Requesting Parties should be treated comparably with respect to conditions that could affect the timing of the effectiveness of the Final Order due to their comparable market positions.

Consistent with the revised language noted above requiring ERCOT to comply with the Commission's requests for related market data on an as-needed basis, the Commission has revised the information sharing condition applicable to the FERC-regulated Requesting Parties. The Final Order conditions the exemption with respect to FERC-regulated Requesting Parties upon: (1) information sharing arrangements between the Commission and FERC that are acceptable to the Commission and that continue to be in effect[176] and (2) "those Requesting Parties' 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 the Requesting Parties' possession for products in Requesting Parties' markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data."[177] The Commission notes that the Proposed

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[175] See paragraph 4(a)(2) of the Order. The Commission is finalizing this condition under authority in CEA section 4(c)(1) to issue 4(c) relief conditionally with respect to those entities requesting/benefiting from the relief. See 7 U.S.C. 6(c)(1).

[176] As discussed in the Proposed Order, the Commission notes that the CFTC and FERC executed a Memorandum of Understanding in 2005 pursuant to which the agencies have shared information successfully. 77 FR 52165.

[177] See paragraph 4(a)(1) of the Order.

Order only provided for information sharing arrangements. Thus, to qualify for the exemption provided by the Final Order, the Requesting Parties must comply with the Commission's requests for related market data, regardless of whether the request is made directly (in the case of ERCOT) or through FERC (in the case of all other Requesting Parties).[178]

The Commission notes that any contemplated request for related market data would not be an attempt to indirectly regulate the Requesting Parties or their markets, contrary to some commenters' suggestion. In order for the Commission to determine that the Final Order is consistent with the public interest and the purposes of the CEA, the terms of the Final Order cannot adversely affect the ability of the Commission to discharge its regulatory duties under the CEA in monitoring energy markets under its jurisdiction.[179] Therefore, conditioning the exemption provided in the Final Order upon the Commission's ability to obtain related transactional and positional data from the Requesting Parties, and the Requesting Parties' 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.[180] The Commission notes that such requested information should already be in the possession of the Requesting Parties.

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[178] The Commission has delegated to the Director of the Division of Market Oversight 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 Requesting Parties pursuant to sections 4(a)(1) and 4(a)(2) of the Order. See paragraph 7 of the Order.

[179] See 7 U.S.C. 6(c)(2)(B)(ii).

[180] 7 U.S.C. 5.

B. 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 for exemptions for 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 and charges for the sale of electric energy within the State or municipality, as eligible for exemption pursuant to the Commission's 4(c) exemptive authority.[181] Indeed, 4(c)(6) provides that "[i]f the Commission determines that the exemption would be consistent with the public interest and the purposes of this chapter, the Commission shall" issue such an exemption.[182] However, any exemption considered under 4(c)(6)(A) and/or (B) must be done "in accordance with [CEA section 4(c)(1) and (2)]."[183]

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[181] The exemption language in section 4(c)(6) reads:

> (6) 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), 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)).

[182] Id. (emphasis added).

[183] 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)]."

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).[184]

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[184] Section 4(c)(1), 7 U.S.C. 6(c)(1), states:

> (c)(1) In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 5 of this Act) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a), or from any other provision of this Act (except subparagraphs (C)(ii) and (D) of section 2(a)(1), except that—
>
> (A) unless the Commission is expressly authorized by any provision described in this subparagraph to grant exemptions, with respect to amendments made by subtitle A of the Wall Street Transparency and Accountability Act of 2010—
>
> (i) with respect to—
>
> (I) paragraphs (2), (3), (4), (5), and (7), paragraph (18)(A)(vii)(III), paragraphs (23), (24), (31), (32), (38), (39), (41), (42), (46), (47), (48), and (49) of section 1a, and sections 2(a)(13), 2(c)(1)(D), 4a(a), 4a(b), 4d(c), 4d(d), 4r, 4s, 5b(a), 5b(b), 5(d), 5(g), 5(h), 5b(c), 5b(i), 8e, and 21; and
>
> (II) section 206(e) of the Gramm-Leach-Bliley Act (Public Law 106–102; 15 U.S.C. 78c note); and
>
> (ii) in sections 721(c) and 742 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and
>
> (B) the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D)) if the Commissions determine that the exemption would be consistent with the public interest.

c. 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 transactions will be entered into solely between appropriate persons;[185] 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.[186]

d. 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 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.

2. CEA Section 4(c) Determinations

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

[185] See CEA 4(c)(2)(B)(i) and the discussion of CEA section 4(c)(3) in sections I. supra and IV.B.1.d. infra.

[186] 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).

consistent with the public interest and purposes of the CEA.[187] The Commission received several comments relating to the Commission's interpretation of its jurisdiction pursuant to section 4(c)(6).

Two commenters argued that, the Commission should "interpret the Dodd-Frank Act as not applying to any contract or agreement traded in an RTO or ISO market pursuant to a FERC-accepted or approved rate schedule or tariff" and that the Commission should exclude RTO or ISO contracts or instruments from the definition of swap.[188] One of these commenters further argued that "Congress did not intend for Petitioners to be subject to such regulation under the Dodd-Frank Act. Congress recognized the impropriety of imposing duplicative regulation over entities such as Petitioners and instructed the Commission and FERC to 'appl[y] their respective authorities in a manner so as to ensure the effective and efficient regulation in the public interest' and to '[avoid], to the extent possible, conflicting or duplicative regulation.'"[189]

A different commenter claimed that the Commission should not regulate "[a]ccess to physical electricity markets."[190] This commenter argued that the Proposed Order is "more of a delegation of authority (to FERC and the PUCT) than an exemption," which "establishes a sort of joint regulation going forward with the CFTC setting minimum RTO participation standards, approving new transactions or 'material modifications,'

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[187] See discussion regarding CEA section 4(c)(6) in sections I. supra and IV.B.1.a. infra.

[188] Joint Trade Associations at 5. See also id. at 3, 8; FERC Staff at 4.

[189] Joint Trade Associations at 5 (alterations in original).

[190] COPE at 10.

and, through its ability to alter or withdraw the exemption, indirectly regulating RTOs."[191]

Another commenter recognized the Commission's exemptive authority under section 4(c)(6), but requested that the Commission affirmatively state in any final order that it makes no determination as to whether the transactions included in the final order fall within the Commission's jurisdiction because the absence of such statement "could actually undermine the very regulatory certainty being requested by Petitioners, and potentially give rise to unnecessary jurisdictional disputes."[192]

In response to the comments, the Commission notes that the definition of a "swap" set forth in Commission regulations is beyond the scope of this Final Order. The Commission further notes that the interpretation of the Dodd-Frank Act proffered by the commenters 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. Section 2(a)(1)(I) of the Act repeats the Commission's exclusive jurisdiction and clarifies that the Commission retains its authority over transactions that are within its jurisdiction. Moreover, while, section 4(c)(6) of the CEA, added by the Dodd-Frank Act, empowers the Commission to exempt contracts,

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[191] Id. (arguing that the Commission in fact proposed to retain jurisdiction over RTOs and ISOs because it did not propose to issue a blanket exemption and rather proposed to: (1) refrain from issuing a final order until two preconditions have been met; (2) require information sharing agreements while failing to negotiate a Congressionally-mandated memorandum of understanding with PUCT; (3) require Requesting Parties to change their Tariffs to remove member notification requirements in the event of Commission requests for information; (4) retain the authority to alter or revoke the exemption upon a change of material facts; (5) require Requesting Parties to submit supplemental filings; (6) reject that 'logical extensions" of exempted transactions also be subject to the order; and (7) impose limitations on participation the Requesting Parties' market through the Commission's application of the appropriate person standard).

[192] PUCT at 4.

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.

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 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 risk, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.[193] Section 3(b) of the CEA identifies the purposes of the CEA:

> It is the purpose of this Act to serve the public interests described in subsection (a) through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission. To foster these public interests, it is further the purpose of this Act 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

[193] 7 U.S.C. 5(a).

responsible innovation and fair competition among boards of trade, other markets and market participants.[194]

Consistent with the proposed determinations set forth in the Proposed Order,[195] the Commission finds that: (a) the 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; and (b) the 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. 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 or ISO to demonstrate that it has four minimum characteristics: (1) independence from any market participant; (2) a scope and regional configuration which enables the RTO or ISO 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.[196] In addition, the Requesting Parties stated that an RTO or ISO must demonstrate to FERC that it performs certain self-regulatory and/or market monitoring functions,[197] and analogous requirements are applicable to ERCOT under PUCT and the

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[194] 7 U.S.C. 5(b).

[195] See 77 FR 52144-45.

[196] See id.

[197] See id. (explaining that, according to the Requesting Parties, each RTO and ISO 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

Public Utility Regulatory Act[198] ("PURA").[199] Requesting Parties also represented that they are responsible for "ensur[ing] the development and operation of market mechanisms to manage transmission congestion . . . The market mechanisms 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."[200]

Furthermore, as explained by the Requesting Parties and discussed in the Proposed Order, the Commission notes that the Covered Transactions are entered into primarily by commercial participants that are in the business of generating, transmitting, and distributing electric energy,[201] and the Requesting Parties were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region.[202] Additionally, the Covered Transactions that take place on the Requesting Parties' markets are overseen by an MMU, required by FERC for each

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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 also Petition at 13-14.

[198] TEX. UTIL. CODE ANN. 11.001 et seq. (Vernon 1998 & Supp. 2005).

[199] See id.; Petition at 14-15. ERCOT represented that, pursuant to PURA 39.151(a), its roles and duties are to provide access to the transmission and distribution systems for all buyers and sellers of electric energy on nondiscriminatory terms; ensure the reliability and adequacy of the regional electric energy network; ensure that information relating to a customer's choice of retail electric energy provider is conveyed in a timely manner to the persons who need that information; and ensure that electric energy production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region. See 77 FR 52144-45; Petition at 14-15.

[200] See 77 FR 52144 (quoting Petition at 14). See also 18 CFR 35.34(k)(2).

[201] See 77 FR 52144. See also generally Petition at 20.

[202] See 77 FR 52144. See also Petition at 3-4.

Requesting Party under its jurisdiction and by PUCT in the case of ERCOT, to identify manipulation of electric energy on the Requesting Parties' markets.[203]

Moreover, fundamental to this "public interest" and "purposes of the [Act]" analysis is the fact that the Covered Transactions are inextricably tied to the Requesting Parties' physical delivery of electric energy.[204] Another important factor is that the Final Order is explicitly limited to Covered Transactions taking place on markets that are monitored by either an independent MMU, a market administrator (the RTO, ISO, or ERCOT), or both, and a government regulator (FERC or PUCT). 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,[205] is unlikely to be in the public interest or consistent with the purposes of the CEA, taking such transactions outside the scope of the Final Order.

Finally, the extent to which the 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 Tariffs and activities of the Requesting Parties, and supervision by FERC and PUCT, are congruent with, and sufficiently accomplish, the regulatory objectives of the relevant Core Principles set forth in the CEA for DCOs and SEFs. Specifically, 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

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[203] See 77 FR 52144. See also Petition at 15-18.

[204] See id. See also Petition at 6-9 (describing the transactions for which an exemption was requested and noting that each of them "is part of, and inextricably linked to, the organized wholesale electricity markets that are subject to FERC and PUCT regulation and oversight").

[205] See 77 FR 52145-47.

Principles for SEFs. Ensuring the financial integrity of the 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. Deterrence of price manipulation (or other disruptions to market integrity) and protection 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 Proposed Order, into its consideration of the Final Order's consistency with the public interest and the purposes of the Act.[206] 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 the Requesting Parties comply with FERC's credit reform policy.[207]

The Commission specifically requested comment on whether it used the appropriate standard in making its section 4(c) determination. The Commission received comments with respect to compliance with FERC's credit reform policy as a precondition to the issuance of a Final Order, which are discussed in sections IV.A.3.a.i. and IV.B.2.e.i., and on the Commission's use of the DCO and SEF Core Principles, which are discussed in sections IV.B.2.e.i.-ii. below.

The Commission received a number of comments regarding the appropriateness of the public interest and purposes of the CEA standard outlined above.[208] One commenter stated that the standard set forth in the Proposed Order, and in particular

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[206] See sections IV.B.2.e.ii.-iii. infra; 77 FR at 52149-62. The Commission received several comments regarding the use of the DCO and SEF Core Principles as a measure for the Commission's public interest and purposes of the CEA determination. These comments are addressed in sections IV.B.2.e.ii.-iii. infra.

[207] See sections IV.A.3.a.i. infra and IV B.2.e.ii. infra; 77 FR at 52147-48.

[208] See, e.g., COPE at 6; Commercial Working Group at 4.

compliance with FERC regulation 35.47, "sufficiently demonstrates that the proposed exemption is consistent with the public interest and the purposes of the Act."[209] However, another commenter argued that the Commission did not use the appropriate standard in analyzing whether the exemption is in the public interest and consistent with the purposes of the Act, because the Requesting Parties are "physical electricity transmission and market operators pervasively regulated by either FERC or the PUCT," and "[t]he existence of such regulation should be the premise upon which an exemption is granted."[210]

The Commission has considered the comments, and believes that it has used the appropriate standard in making its public interest and purpose of the CEA determination for purposes of this Final Order. The Commission disagrees that the existence of pervasive FERC and PUCT regulations is, by itself, a sufficient standard to analyze that the requested exemptive relief is consistent with the public interest and the purposes of the CEA, because, as set forth above,[211] section 4(c)(6) of the CEA, added by the Dodd-Frank Act, does not permit the Commission to automatically or mechanically apply an exemption.

After consideration of the comments received and for the reasons set forth in this Final Order, the Commission has determined that the exemption set forth in this Final Order is consistent with the public interest and the purposes of the CEA.

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[209] Commercial Working Group at 4.

[210] COPE at 6.

[211] See sections I. and IV.B.1.a. supra.

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 Covered Transactions described in the 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 Proposed Order, the Commission has examined the Covered Transactions, the Requesting Parties, and their 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.[212] 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.B.2.f. below. In so doing, the Commission has determined that, due to the FERC or PUCT regulatory scheme and the RTO or ISO market structure already applicable to the Covered Transactions, the linkage between the Covered Transactions and those regulatory schemes, and the unique nature of the market participants that would be eligible to rely on the exemption,[213] CEA section 4(a) should not apply to the Covered Transactions under the Final Order.

d. Appropriate Persons

Section 4(c)(2)(B)(i) of the CEA[214] requires, for an exemption to be granted, that the Commission make a determination that the exemption is restricted to Covered Transactions entered into solely between "appropriate persons," as that term is defined in

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[212] See sections IV.B.2.e.i.-ii. infra; 77 FR at 52149-62.

[213] See appropriate persons analysis, section IV.B.2.d. infra; 77 FR at 52147-48.

[214] 7 U.S.C. 6(c)(2)(B)(i).

section 4(c)(3) of the Act.[215] 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).[216] 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 regulatory protections."[217]

The Commission proposed to limit the exemption to transactions where all parties thereto either (a) satisfy the appropriate persons criteria set forth in sections 4(c)(3)(A) through (J) or, (using its authority under section 4(c)(3)(K)) (b) qualify as ECPs, as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m).[218] The Commission requested comment as to whether ECPs should be considered appropriate persons for purposes of the Final Order.[219] The Commission recognized, however, that "the market participant eligibility standards of an individual RTO or ISO may not be coextensive with the criteria required by sections 4(c)(3)(A) through (J) or section 1a(18) of the Act"[220] and that, therefore, there may be certain RTO or ISO market participants engaging in the transactions proposed for exemption that would not qualify for the

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[215] 7 U.S.C. 6(c)(3).

[216] Id.

[217] Id.

[218] 77 FR 52166. See also id. at 52145-46, 52163-64.

[219] See generally id. at 52146. The Commission proposed to deem ECPs as "appropriate persons" pursuant to the authority set forth in section 4(c)(3)(K) of the CEA.

[220] Id. at 52163-64.

exemption as set forth in the Proposed Order. Accordingly, the Commission requested comment as to whether there are any entities currently engaging in the transactions delineated in the Proposed Order, and in the markets administered by the Requesting Parties that are neither appropriate persons under sections 4(c)(3)(A)-(J) of the CEA nor ECPs, and on what basis the Commission should exercise its authority under section 4(c)(3)(K) with respect to such entities to conclude that such parties should be appropriate persons for purposes of the Final Order.[221] The Commission also requested descriptions of the additional parties that should be included in the scope of the term appropriate persons for these purposes,[222] and expressed particular interest in considering the inclusion of market participants who actively participate in the generation, transmission, or distribution of electric energy.[223] Finally, the Commission requested that any comments seeking to include additional parties within the scope of the appropriate person definition for purposes of the Final Order be accompanied by an explanation of the financial or other qualifications of such persons or the available regulatory protections that would render such persons appropriate persons and the bases for determining that (1) such parties could bear the financial risks of the transactions,[224] (2) the inclusion of such parties would not have any adverse effect on the relevant RTO or ISO, and (3) failing to include such parties would have an adverse effect on the relevant RTO or ISO.[225]

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[221] See id. at 52146, 52166, 52172.

[222] See id. at 52172.

[223] See id. at 52164, 52172.

[224] See id.

[225] See id. at 52172.

The Commission did not receive any comment objecting to its proposed determination, pursuant to section 4(c)(3)(K) of the Act, that ECPs be included within the definition of appropriate persons for purposes of the Final Order. Accordingly, and pursuant to the authority set forth in section 4(c)(3)(K) of the CEA, the Commission has determined that ECPs, as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), are appropriate persons for purposes of the Final Order in light of their financial or other qualifications, or the applicability of regulatory protections. In addition, in response to confusion regarding whether market participants are required to establish compliance with section 4(c)(3)(F) or demonstrate their ECP status for purposes of this Final Order through the use of audited financial statements, the Commission also is clarifying that market participants that qualify as appropriate persons under section 4(c)(3)(F) of the CEA or on the grounds that they are ECPs as defined in section 1a(18)(A) of the Act and Commission regulation 1.3(m), are not required to prove such qualification through the use of audited financial statements.

The Commission also received several comments requesting that it exercise its statutory authority under section 4(c)(3)(K) to expand further the definition of appropriate person for purposes of the Final Order. These comments generally fell into three categories: requests to extend the definition to specific subsets of market participants; requests to expand the definition more broadly to include, for example, all market participants that satisfy the participant eligibility criteria established by the Requesting Parties; and requests to clarify that certain market participants are included in the definition of appropriate person set forth in CEA sections 4(c)(3)(F) and (H). Several commenters also requested that all market participants who engage in particular types of

transactions (such as virtual and demand response transactions) be included in the definition of appropriate person for the purpose of the Final Order.

i. Determinations Regarding the Inclusion of Specifically Identified Market Participants as Appropriate Persons for Purposes of the Final Order

The Commission received multiple requests to include various categories of market participants within the scope of appropriate person for purposes of the Final Order. One commenter urged the Commission to expand the definition to include all persons who actively participate in the generation, transmission, or distribution of electric energy, noting that the proposed definition of appropriate person could exclude traditionally active market participants whose participation facilitates demand response activities, and reduces costs.[226] Other commenters requested the inclusion of specifically identifiable groups of market participants such as electric cooperatives,[227] retail electric providers ("REPs"),[228] load serving entities ("LSEs"),[229] curtailment service providers ("CSPs"),[230] and persons who engage in virtual and convergence bids and offers.[231]

Multiple commenters requested that electric cooperatives be deemed appropriate persons for purposes of the Final Order.[232] One commenter asserted that electric cooperatives, by their nature, "actively participate in the generation, transmission or

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[226] See generally Industrial Coalitions at 4-5.

[227] See, e.g., APPA at 3; FERC Staff at 6; Joint Trade Associations at 11-13; PUCT at 11. The Joint Trade Associations also requested, in the alternative, that the Commission determine that electric cooperatives are ECPs. See generally Joint Trade Associations at 3.

[228] See, e.g., TEAM/ARM at 2-3; PUCT at 10.

[229] See, e.g., Industrial Coalitions at 4; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6-7.

[230] See, e.g., Industrial Coalitions at 4.

[231] See, e.g., Financial Marketers Coalition at 2-13; NYISO at 2-10.

[232] See, e.g., APPA at 3, FERC Staff at 6; Joint Trade Associations at 11-13; PUCT at 11.

distribution of electricity."[233] Certain commenters asserted that electric cooperatives may be required to obtain transmission and other services from RTOs and ISOs and that the participation of electric cooperatives in the RTO and ISO markets assists in ensuring the availability of electric energy, transmission, or capacity to their consumers.[234] One commenter additionally noted the operational qualifications and non-profit status of electric cooperatives in support of their consideration as appropriate persons.[235] Some commenters requested that the Commission designate all REPs that have been certified by PUCT as appropriate persons for purposes of the Final Order.[236] One commenter asserted that REP transactions "are generally conducted for the narrow purposes of purchasing electricity for provision to retail customers and for hedging the dynamic risks of purchasing supply to meet demand" and that "the relatively small scale" of these transactions makes it "unlikely that the transactions will result in market harm."[237] This commenter also noted that REPs are subject to certification requirements in addition to the capital requirements set forth in applicable market protocols.[238] Another commenter argued that the inclusion of REPs would further the public interest in a "vibrant, diverse market."[239] Multiple commenters also requested the inclusion of LSEs.[240] One of the Requesting Parties stated that at least ten percent of the LSEs in its market may not

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[233] See generally Joint Trade Associations at 11-12.

[234] See generally APPA at 3; Joint Trade Association at 12.

[235] See generally Joint Trade Associations at 12.

[236] See, e.g., TEAM/ARM at 2-3; PUCT at 10.

[237] See, e.g., TEAM/ARM at 2-3.

[238] Id.

[239] PUCT at 10.

[240] See, e.g., Industrial Coalitions at 4; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6-7.

qualify as appropriate persons under the proposed standard and maintained that the loss of these market participants could undermine a program through which the LSEs compete to offer end-use customers competitive energy prices and services.[241] Another commenter suggested that certain LSEs and CSPs could participate in the market in a manner that facilitates demand response and reduces costs.[242] Certain commenters requested that market participants who engage in virtual and convergence bids and offers be deemed appropriate persons for purposes of the exemption.[243] Finally, one commenter requested confirmation that market participants "do not have to own physical assets, such as transmission lines or generating facilities," in order to qualify for the exemption set forth in the Proposed Order.[244]

After consideration of the comments described above, 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 Final Order, is an appropriate person for purposes of the exemption provided therein.[245] The 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

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[241] See generally NYISO Supplement to Requesting Parties' Comment, Attachment B at 6-7.

[242] See generally Industrial Coalitions at 4-5.

[243] See, e.g., Financial Marketers Coalition at 2-13; NYISO at 2-10.

[244] See generally Financial Marketers Coalition at 2-10.

[245] Accordingly, the exemption provided by the Final Order will apply to agreements, contracts or transactions where (1) each party thereto is an "appropriate person," as defined in sections 4(c)(3)(A) through (J) of the CEA; an "eligible contract participant," as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or a "person who actively participates in the generation, transmission, or distribution of electric energy," as defined in Final Order and (2) that satisfy the additional parameters for inclusion in the exemption set forth in the Final Order.

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 provide them with the requisite "qualifications" necessary to be deemed an "appropriate person" under section 4(c)(3)(K) for purposes of the Final Order.

Although the Commission expects that the definition of a "person who actively participates in the generation, transmission, or distribution of electric energy" will capture many of the market participants referenced in the comments that the Commission received,[246] the Commission has chosen to define the phrase generally by reference to the relevant person's business activities, rather than referencing or delineating particular market participant labels or terms that may have different meanings in different markets and that may be subject to change over time. By way of example, however, the Commission notes that the definition would include an entity that is in the business of providing demand response services in the markets as they are currently operated by the Requesting Parties. In response to the request for clarification of this issue, the Commission confirms that, to be eligible for the exemption set forth in this Final Order, a transaction (including a virtual or convergence bid or offer) need not be entered into by market participants who own physical transmission or generation assets, as long as the transaction is entered into by persons who satisfy the criteria set forth in the Final Order. The Final Order would not, however, extend to agreements, contracts, or transactions that are entered into by individuals and entities that are engaged in the business of entering

[246] See generally CAISO/ISO NE January at 4 (noting that "the Petitioners' wholesale electricity markets mainly cater to Load Serving Entities, their suppliers, and others whose primary business is the physical generation of electricity and most transactions on the market involve the actual supply and demand of electricity"). See also Petition at 27.

into or facilitating financial transactions (such as virtual and convergence bids and offers), and that (1) do not actively participate in the generation, distribution and transmission of electric energy, (2) are not ECPs, or (3) do not satisfy any of the criteria set forth in sections 4(c)(3)(A) through (J) of the CEA. The Commission is concerned that a person or entity that is engaged in purely financial transactions in the RTO or ISO markets, but that does not meet either the ECP or the CEA sections 4(c)(3)(A) through (J) appropriate person criteria may be operating on inadequate resources and may pose inappropriate risks to itself and other market participants.

ii. Determinations Regarding the Inclusion of All RTO and ISO Market Participants as Appropriate Persons for Purposes of the Final Order

Several commenters advocated that the Commission use the authority provided by section 4(c)(3(K) of the CEA to expand the definition of appropriate persons for purposes of the Final Order to include all entities that satisfy the market participant eligibility requirements established by the RTOs and ISOs.[247] Commenters generally supported their positions by: (1) citing to the capitalization, financial security and/or other requirements that RTO and ISO market participants must satisfy;[248] (2) alleging potential adverse effects of the exit from the RTO and ISO markets of current participants that would be unable to meet the proposed appropriate person criteria;[249] and/or (3) asserting

[247] See, e.g., AB Energy at 1; Commercial Working Group at 2-4; COPE at 7; ERCOT October at 1-11; ERCOT December at 2, 10; FERC Staff at 6; Financial Marketers Coalition at 2, 11-16; Industrial Coalitions at 1, 3-5; Joint Trade Associations at 11-13; NEPOOL at 2-3; NYISO Supplement to Requesting Parties' Comment, Attachment B at 1; NYTOs at 3-4; NYPSC at 2; Requesting Parties at 2-5; PJM at 1, 4; PUCT at 9; Tarachand at 1-2.

[248] See, e.g., AB Energy at 1; ERCOT October at 2-11; Industrial Coalitions at 5; NEPOOL at 2; NYISO Supplement to Requesting Parties' Comment, Attachment B at 1-4; NYPSC at 2; NYTOs at 4; PUCT at 10; Requesting Parties at 2-5; Tarachand at 1-2; TEAM/ARM at 2.

[249] See, e.g., Commercial Working Group at 3; ERCOT December at 7; FERC Staff at 6; Financial Marketers Coalition at 11-12; Industrial Coalitions at 5; NYPSC at 3; PJM at 4; PUCT at 11; Tarachand at 2.

a perceived lack of risk to the overall economy from a default in an RTO or ISO market.[250]

Multiple commenters asserted that the Commission should deem all RTO and ISO market participants as appropriate persons for purposes of the Final Order by referencing specific types of participation standards established by the RTOs and ISOs.[251] Certain of those commenters claimed that such requirements minimize the risks in the applicable markets[252] and help to ensure that only sophisticated players enter the markets.[253] Commenters cited, for example, the RTO and ISO market participant obligations to either satisfy a baseline capitalization requirement and/or to post participation-based financial security[254] as well as credit,[255] disclosure,[256] training,[257] risk management,[258] personnel,[259] and/or technical capability requirements[260] that may apply to market participants. Multiple commenters noted that RTO- and ISO-established market participation criteria

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[250] See, e.g., AB Energy at 1-2; FERC Staff at 6; Financial Marketers Coalition at 15; NYTOs at 4; PUCT at 11; Requesting Parties at 4; Tarachand at 2.

[251] See, e.g., AB Energy at 2; CAISO/ISO NE January at 6; ERCOT October at 4-11; ERCOT December at 7; Financial Marketers Coalition at 13-14; Industrial Coalitions at 5; NEPOOL at 2; NYISO Supplement to Requesting Parties' Comment, Attachment B at 1-4; NYPSC at 2; NYTOs at 4; Requesting Parties at 3-6, 8; PJM at 4; PUCT at 9; Tarachand at 2.

[252] See, e.g., AB Energy at 2; CAISO/ISO NE January at 6-7; Financial Markets Coalition at 13-15; PUCT at 10.

[253] See generally CAISO/ISO NE January at 7.

[254] See, e.g., ERCOT October at 2-5; Financial Marketers Coalition at 14, 15; NYPSC at 3; PUCT at 10; Requesting Parties at 3-5, 8.

[255] See, e.g., ERCOT October at 2-3, 6-9; ERCOT December at 7; Financial Marketers Coalition at 15; NYISO Supplement to Requesting Parties' Comment, Attachment B at 2-4; NYPSC at 2; PUCT at 10; Requesting Parties at 4; TEAM/ARM at 2.

[256] See, e.g., Financial Marketers Coalition at 15-16; NYPSC at 2.

[257] See, e.g., CAISO/ISO NE January at 7; Requesting Parties at 4.

[258] See, e.g., Commercial Working Group at 4; ERCOT October at 5-6; NYPSC at 2; Requesting Parties at 4.

[259] See generally Requesting Parties at 4.

[260] See generally id.

have been approved by FERC or PUCT, as applicable.[261] Other commenters cited the regulatory oversight and/or market monitoring to which the RTOs and ISOs are subject[262] and/or certain mechanisms employed by RTOs and ISOs to support the financial integrity of the market.[263] Multiple commenters also expressed concern with potential conflicts between the appropriate persons determinations being made by the Commission and the determinations made by an RTO or ISO and its regulator with respect to market participation eligibility.[264] One commenter questioned whether, through the appropriate persons limitations, the Commission intended to regulate minimum RTO participation standards[265] and another asserted that it is "unnecessary" and "burdensome" for the Commission to duplicate the efforts of the RTOs and ISOs and their regulators in establishing market participation requirements.[266]

Certain commenters claimed that some entities that currently participate in the RTO and ISO markets might not be able to satisfy the appropriate person standard set forth in the Proposed Order and would exit the market.[267] While some commenters did not name the specific types of entities that they believed would be excluded,[268] others

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[261] See, e.g., AB Energy at 1; CAISO/ISO NE January at 3; Commercial Working Group at 3; Financial Marketers Coalition at 4; COPE at 10; Joint Trade Associations at 11; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6; Tarachand at 1; TEAM/ARM at 2.

[262] See, e.g., CAISO/ISO NE January at 3, 8; ERCOT October at 2; Financial Marketers Coalition at 11-12; Joint Trade Associations at 11-13; NYISO Supplement to Requesting Parties' Comment, Attachment B at 5-6; NYPSC at 2; NYTOs at 4; Requesting Parties at 2-5.

[263] NYISO Supplement to Requesting Parties' Comment, Attachment B at 4-5; Requesting Parties at 5.

[264] See, e.g., NEPOOL at 2-3; PJM at 4; PUCT at 9; Requesting Parties at 2-5.

[265] See generally COPE at 5.

[266] See generally AB Energy at 2.

[267] See, e.g., AB Energy at 2; Commercial Working Group at 3-4; Financial Marketers Coalition at 11-12, 13-16; NYPSC at 3; NYTOs at 4.

[268] See, e.g., Commercial Working Group at 4; NYPSC at 2.

identified particular groups of market participants that could be eliminated, including municipalities and electric cooperatives,[269] REPs,[270] emergency load providers,[271] LSEs,[272] special case resources,[273] demand response providers,[274] marketers,[275] and generators.[276] One commenter asserted that exempting some market participants, but not others, would create an artificial distinction between market participants that conflicts with the Federal Power Act and would create an unfairly discriminatory regulatory scheme.[277] Commenters also expressed concern that market participants who fall outside the exemption would be subject to duplicative regulation,[278] with some questioning the efficiency or operational workability of a dual regulatory structure.[279]

Several commenters alleged that the exit of existing market participants would have a negative impact on the functioning of the RTO and ISO markets.[280] Certain

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[269] See, e.g., FERC Staff at 6; Joint Trade Associations at 11-13; NEPOOL at 2-3; PUCT at 11. But see ERCOT December at 6 ("The proposed 'Appropriate Persons' limitation would not affect any ... electric cooperatives.").

[270] See, e.g., PUCT at 9; TEAM/ARM at 2-3.

[271] See, e.g., PJM at 2.

[272] See, e.g., Financial Marketers Coalition at 14; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6; Requesting Parties at 6; PJM at 2.

[273] See, e.g., Requesting Parties at 6; Tarachand at 2.

[274] See, e.g., PJM at 2; Requesting Parties at 6; Tarachand at 2.

[275] See, e.g., Financial Marketers Coalition at 14; NYISO at 2-10; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6; Requesting Parties at 6.

[276] See, e.g., Financial Marketers Coalition at 14; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6; Requesting Parties at 6; PJM at 2.

[277] See, e.g., Financial Marketers Coalition at 10-11 (alleging that "[t]he Federal Power Act states that '[n]o public utility shall, with respect to any transmission or sale subject to the jurisdiction of [FERC], make or grant any undue preference or advantage of any person or subject any person to any undue prejudice or disadvantage ....'") (citing 16 U.S.C. 824d(b)); NYISO at 9-10.

[278] See, e.g., NYPSC at 3.

[279] See, e.g., CAISO/ISO NE January at 3; Financial Marketers Coalition at 3, 11, 16-18.

[280] See, e.g., CAISO/ISO NE January at 3; Commercial Working Group at 3-4; FERC Staff at 6; Tarachand at 2.

commenters claimed that reduced participation would result in volatility[281] or reduced liquidity,[282] including one commenter that noted the effect of liquidity on the price discovery process.[283] In addition, certain commenters asserted that decreased participation would result in increased market concentration and diminished competition,[284] including one commenter who alleged that the increased market concentration that could result from the forced exit of small market participants is "at cross-purposes to the legislative spirit" of the Dodd-Frank Act, which was intended to end "too-big-to-fail."[285] One commenter also noted that the high barriers to entry and high concentration of ownership in the RTO and ISO markets make such markets more susceptible to abuse when smaller entities are forced out,[286] while another commenter stated that reduced competition would result in higher electric energy prices, causing harm to rate payers.[287] One commenter claimed that the departure of market participants would cause remaining participants who serve the load of the withdrawing participants to face higher prices to procure the additional electric energy and would cause existing load forecasts to be inaccurate as new customers would not factor into the remaining participants' forecast models and would limit the available electric energy in instances of

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[281] See generally Commercial Working Group at 3.

[282] See, e.g., CAISO/ISO NE January at 3, 6, 8; Commercial Working Group at 3-; Financial Marketers Coalition at 11-12; NYPSC at 2-3; Tarachand at 2. But see ERCOT December at 6 ("[I]t does not appear that the proposed Appropriate Person limitation would have a significant impact on market liquidity in ERCOT.").

[283] See generally Tarachand at 2.

[284] See, e.g., Commercial Working Group at 4; Financial Marketers Coalition at 11-12, 14, 16; Industrial Coalitions at 5; NYPSC at 3; Tarachand at 2.

[285] Tarachand at 2.

[286] Industrial Coalitions at 4-5.

[287] See generally Financial Marketers Coalition at 12.

unplanned outages, thereby increasing the risks posed to remaining providers, the RTOs and ISOs, and the marketplace as a whole.[288] Another commenter alleged that a "chilling effect on the development of technologies to provide renewable energies and the systems that complement the integration of renewable resources" would result if certain small market participants that are the "vanguard of innovation" are removed.[289] Some commenters also stated that reduced market participation would eliminate jobs and reduce tax revenue.[290] Certain commenters asserted that the exclusion of certain market participants would create regulatory uncertainty.[291] Others claimed that the exclusion of participants would violate the Congressional intent behind section 4(c)(3)(K) of the CEA[292] or the competitive principles underlying the administration of electric energy competition in the relevant area.[293]

Certain commenters supported the inclusion of all RTO and ISO market participants in the appropriate persons definition for purposes of the Final Order by claiming that recently increased collateral requirements have reduced the default risks of particular RTOs[294] and/or that the mutualized risk of market participants for participant defaults has reduced the risk of a financial default in an RTO or ISO market spreading to the rest of the economy.[295] Some of those commenters specifically noted that market

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[288] See generally Commercial Working Group at 3-4.

[289] Tarachand at 2.

[290] See, e.g., AB Energy at 2; Tarachand at 2.

[291] See, e.g., FERC Staff at 6; PUCT at 9; Requesting Parties at 3, 8.

[292] See, e.g., CAISO/ISO NE January at 7-8; Requesting Parties at 3.

[293] See generally ERCOT December at 8-9.

[294] See generally Tarachand at 2.

[295] See, e.g., AB Energy at 2; Commercial Working Group at 3; Tarachand at 2.

participant failures have not posed a significant threat to the health of the RTO or ISO or other market participants.[296]

However, certain commenters who contended that the Commission should invoke the authority provide by section 4(c)(3)(K) of the CEA to include all RTO and ISO market participants in the definition of appropriate persons for purposes of the Final Order nonetheless suggested that the market impact of the participation limitations imposed by the proposed appropriate persons definition could be minimal.[297]

As set forth above, the Commission considered requests from the commenters to categorize particular types of entities as appropriate persons for purposes of the Final Order and, pursuant to the authority provided by section 4(c)(3)(K) of the CEA, is expanding the definition to include a "person who actively participates in the generation, transmission, or distribution of electric energy."[298] 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 and the determination, as proposed, to include ECPs, as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m),

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[296] See, e.g., AB Energy at 2; Tarachand at 2; PUCT at 11.

[297] For example, one Requesting Party stated that "past experience has shown that many market participants, when faced with modestly higher capitalization requirements, will meet these requirements in order to remain active market participants." See generally PJM at 3. The commenter further noted that, although the number of entities potentially affected by the proposed appropriate person limitations "appear[s] to compromise a very large percentage of the Petitioners' market participants," such entities "account for minimal transactional activity" in comparison to the Requesting Party's "market transactions as a whole" and, thus, the appropriate persons limitation "would likely not have a significant impact on Petitioners' market liquidity." Id. Similarly, another Requesting Party stated that, if the Commission were to add LSEs to the definition of appropriate persons pursuant to section 4(c)(3)(K) of the Act, only three financial traders would be excluded from its markets when taking into account its own revised market participant eligibility requirements, which "is arguably insignificant when viewed solely from the impact to the number of eligible market participants." ERCOT December at 4-5. According to this Requesting Party, the appropriate persons limitation "would appear to have an immaterial incremental liquidity impact" above that associated with the effects of its own eligibility standards and "no impact on the competitive retail market." Id. at 5.

[298] Paragraph 5(g) of the Order.

would appear to strike the appropriate balance. It would not exempt only those RTO and ISO market participants that can demonstrate neither the financial wherewithal nor the requisite business activities and congruent expertise to qualify as appropriate persons under section 4(c)(3)(K) of the CEA.

The Commission declines to generally and broadly extend the exemption contained in the Final Order to transactions involving all persons that satisfy the market participant eligibility criteria established by the RTOs and ISOs. The Commission notes that the definition of appropriate person set forth in sections 4(c)(3)(A) through (J) of the CEA explicitly defines the types of qualified entities that Congress intended to be eligible for an exemption under section 4(c).[299] Certain of these categories reflect an intention to limit a section 4(c) exemption to entities of reasonably significant financial means, while others apply to entities that have regulatory status that implies functional expertise. For example, section 4(c)(3)(F) defines "appropriate person" to include "a corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding $1,000,000 or total assets exceeding $5,000,000 or the obligations of which under the agreement, contract or transaction is guaranteed by 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 subparagraphs (A), (B), (C), (H), (I), or (K) of [section 4(c)(3)]."[300] Moreover, section 4(c)(3)(K) of the CEA expressly restricts the Commission's authority to expand the definition of appropriate person beyond persons whom the Commission determines are "appropriate in light of [such persons'] financial or other qualifications, or

[299] 7 U.S.C. 6(c)(A)-(J).

[300] 7 U.S.C. 6(c)(F).

the applicability of appropriate regulatory protections." As noted by one of the commenters, the RTO and ISO "markets are complex and not geared to unsophisticated traders . . . . [T]hey are designed as wholesale . . . markets."[301] The Commission believes that the ability of persons who fail to satisfy an RTO's or ISO's capitalization criteria to nonetheless participate in the RTO's or ISO's market by providing financial security in an amount below the standard established in section 4(c)(3)(F), as indicated in the Petition,[302] would render the section 4(c)(3)(K) determination difficult to make on a wholesale basis. While the Commission understands that the Requesting Parties, with the oversight of FERC or PUCT, as applicable, have established participation standards that they believe are sufficient to protect their own markets, the Commission notes that those participation standards are not directed to meeting the language of section 4(c)(3)(K), which is focused on protecting market participants. As set forth in the Proposed Order, the Commission's preliminary determination that the exemption would not have a material adverse effect on the ability of the Commission or any contract market to discharge its duties under the CEA was based on the reasoning that "the limitation of the exemption to Transactions between certain 'appropriate persons' . . . avoids potential issues regarding financial integrity and customer protection. That is, this approach would appear to ensure that Transactions subject to the Final Order would be limited to sophisticated entities that are able to, from a financial standpoint, understand and manage the risks associated with such Transactions."[303] Notwithstanding the comments received, the Commission has determined to limit the exemption set forth in the Final Order to

[301] CAISO/ISO NE January at 7.

[302] See, e.g., Petition at 27-28.

[303] 77 FR 52146.

Covered Transactions in which each party to the Covered 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 that term is defined in the Final Order.

iii. Determinations Regarding the Inclusion of Public Power Systems and Tribal Governments as Appropriate Persons Pursuant to Section 4(c)(3)(H) of the CEA

One commenter asked that the Commission affirm that public power systems, and that units or instrumentalities of tribal governments are "appropriate persons" under section 4(c)(3)(H) of the CEA.[304] This commenter asserted that, because public power systems are "units of state or local governments, or agencies or instrumentalities of the foregoing," they properly are within the scope of "appropriate persons," as defined by section 4(c)(3)(H).[305] In addition, the commenter argued that because units or instrumentalities of tribal governments are governmental entities, they too fall within the definition of "appropriate persons" set forth in section 4(c)(3)(H).[306]

The Commission interprets section 4(c)(3)(H) to include public power systems and the units or instrumentalities of tribal governments within the meaning of "governmental entities." This interpretation is consistent with both the Commission's

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[304] APPA at 3.

[305] Id. In support of this position, APPA noted that, in the preamble to the Proposed Order, the Commission observed that "municipal entities . . . appear to qualify as 'appropriate persons' pursuant to CEA section 4(c)(3)(H)" and that the definition would cover "municipalities and other government owned market participants." Id. at 2 (citing 77 FR 52145 n.99).

[306] Id.

approach to public power entities, which are operated by local governments for the benefit of its citizens[307] and Indian tribes in the exemption for 201(f) entities.[308]

iv. Clarifications with Respect to Certain Language in Section 4(c)(3)(F) of the CEA for Purposes of the Final Order

Section 4(c)(3)(F) of the CEA defines "appropriate person" to include "[a] corporation, partnership, proprietorship, organization, trust or other business entity with a net worth exceeding $1,000,000 or total 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 sections 4(c)(3)(A), (B),(C), (H), (I) or (K)] of the CEA]."[309] One commenter argued that the language "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" can be interpreted to mean that a market participant that provides an RTO or ISO with a letter of credit that has been issued by an appropriate person[310] in the amount of the RTO or ISO-specific credit requirements (i.e.,

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[307] E.g., municipal utilities such as the Los Angeles Department of Water and Power and the Sacramento Municipal Utility District, or a PUD ("public utility district") organized under state law and operated by a city, county, state, or regional agency. "Proposal to Exempt Certain Transactions Involving Not-For-Profit Electric Utilities," 77 FR 50998 at 51004 nn.43-44, Aug. 23, 2012.

[308] Id. at 51004-05 (Commission determination that electric utilities owned by federally-recognized Indian tribes are no different substantively than government-owned electric utilities for purposes of the relief provided). The Commission's interpretation is also informed by CEA section 4s(h)(2), which directs the Commission (albeit in another context) to look to section 3 of ERISA (29 U.S.C. 1002) for the purposes of defining "special entity," including "any governmental plan." ERISA includes Indian tribes within the meaning of "governmental plan." Further, the Commission incorporates by reference the list of Indian tribes recognized by the Department of Interior's Bureau of Indian Affairs (BIA) as set forth in, "Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs," 77 FR 47868, Aug. 10, 2012, or any successor to that document issued by the BIA.

[309] 7 U.S.C. 6(c)(3)(F) (emphasis added).

[310] As described by Requesting Parties, "appropriate person" in this context would include only those market participants that are defined under the Commission's regulations as "appropriate persons" or "eligible contract participants." Requesting Parties at 7-8.

the amount of its estimated obligations to the RTO or ISO) satisfies the "appropriate person" standard set forth in section 4(c)(3)(F) of the CEA.[311] This commenter also interpreted the quoted language to mean that a market participant that provides to the RTO or ISO an unlimited guaranty that has been issued by an appropriate person[312] thereby supports its obligation to the RTO or ISO and, thus, satisfies the section 4(c)(3)(F) criteria.[313]

In addition, one commenter requested that the Commission provide guidance as to what would be acceptable as a "keepwell, support, or other agreement" for purposes of section 4(c)(3)(F),[314] and specifically asked whether a parental guaranty would be sufficient and whether audited financial statements would be required. This commenter also asked how the Commission would quantify the obligations of a business entity for purposes of this provision.[315]

The Commission clarifies that a market participant that provides to the RTO or ISO an unlimited guaranty or other support in the form of a "letter of credit or keepwell, support, or other agreement," which guarantee or other support has been issued by an appropriate person, thereby supports its obligation to the RTO or ISO and, thus, satisfies the section 4(c)(3)(F) criteria. The guaranteeing or supporting entity will not be required

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[311] Id.

[312] As described by Requesting Parties, "appropriate person" in this context would include only those market participants that are defined under the Commission's regulations as "appropriate persons" or "eligible contract participants." Id.

[313] Id.

[314] Financial Marketers Coalition at 15-16.

[315] Id.

by the Final Order to demonstrate its status as an "appropriate person"[316] through the use of audited financial statements.

e. Public Interest and Purposes of the CEA

i. FERC Credit Reform Policy

As discussed in greater detail above,[317] 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 is key to the Commission's determination that the Tariffs and activities of the Requesting Parties and supervision by FERC and PUCT are congruent with, and – in the context of the Covered Transactions – sufficiently accomplish, the regulatory objectives of each DCO Core Principle.

ii. Use of the DCO Core Principles in the Public Interest and Purposes of the CEA Analysis

In the Proposed Order, in determining whether an exemption for the transactions defined therein was consistent with the public interest and the purposes of CEA, the Commission preliminarily determined, based upon the Requesting Parties' representations and in the context of the Requesting Parties' activities with respect to the transactions within the scope of the Proposed Order, that the Requesting Parties' practices or Tariffs and supervision by FERC and PUCT appeared to be congruent with, and sufficiently accomplish, the regulatory objectives of the Core Principles set forth in

[316] As described by the Requesting Parties, "appropriate person" in this context would include only those market participants that are defined under the Commission's regulations as "appropriate person" or "eligible contract participants." Requesting Parties at 7-8.

[317] See section IV.A.3.i. infra.

the CEA for DCOs.[318] Following the analysis of each DCO Core Principle, the Commission expressly sought comment with respect to its preliminary conclusions.[319]

The Commission received several comments regarding the use of the DCO Core Principles as part of the public interest and purposes of the CEA analysis.[320] One commenter expressly "support[ed] the Commission's determination that the Petitioners' tariffs and market rules are consistent with the spirit of the DCO Core Principles[.]"[321] However, this commenter requested clarification that the Commission's DCO Core Principle analysis "does not equate to a finding on Petitioners' status as a . . . DCO or the transactions executed on or through the Petitioners' markets as swaps."[322] Another commenter stated that the DCO Core Principle analysis is not an appropriate standard in analyzing whether the exemption is in the public interest because "RTOs are physical electricity transmission and market operators pervasively regulated by either FERC or the PUCT" and are not DCOs,[323] while a different commenter asserted that the Commission "should not require RTOs and ISOs to comply with the" DCO Core Principles.[324]

The Commission believes that the analysis drawing from the DCO Core Principles contained in the Proposed Order should be used to determine whether the exemption is consistent with the public interest and the purposes of the CEA. The Commission is not using the analysis to determine whether the Requesting Parties are

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[318] See 77 FR 52148-57.

[319] See id.

[320] See, e.g., Joint Trade Associations at 4, 6; COPE at 6, 9; Commercial Working Group at 4.

[321] Joint Trade Associations at 6 (noting in particular Requesting Parties' credit-worthiness provisions and financial integrity rules).

[322] Id. at 4.

[323] COPE at 6, 9.

[324] Commercial Working Group at 4.

DCOs. The Commission is not holding the Requesting Parties to the same standards as DCOs, and is not concluding that the Requesting Parties would meet the standards set forth in section 5b(c)(2) of the CEA and part 39 of the Commission's regulations. Nonetheless, the Commission believes that the DCO Core Principles provide a useful framework by which to measure the extent to which the Tariffs and activities of the Requesting Parties, and supervision by FERC and PUCT, are congruent with, and – in the context of the Covered Transactions – sufficiently accomplish, the regulatory objectives of the CEA. As discussed herein, particularly in sections IV.A.3.a.i. and IV.B.2.e.i., 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. Moreover, as set forth in the Commission's DCO Core Principle analysis in the Proposed Order,[325] the Commission determines that the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of this Final Order, the regulatory objectives of the DCO Core Principles in the context of the Covered Transactions.

iii. Use of the SEF Core Principles in the Public Interest and Purposes of the CEA Analysis

In the Proposed Order, in determining whether the proposed exemption was consistent with the public interest and the purposes of CEA, the Commission preliminarily determined, based upon the Requesting Parties' representations and in the context of the Requesting Parties' activities with respect to the transactions within the scope of the Proposed Order, that the Requesting Parties' practices or Tariffs, and

[325] See 77 FR 524149-57.

supervision by FERC and PUCT, appeared to be congruent with, and sufficiently accomplish, the regulatory objectives of the Core Principles set forth in the CEA for SEFs.[326] Following the analysis of each SEF Core Principle, the Commission expressly sought comment with respect to its preliminary conclusions.[327]

One commenter implored the Commission to allow the RTO and ISO markets to continue to exist largely as they currently do by not requiring compliance with the SEF Core Principles.[328] Similarly, another commenter contended that, because the Requesting Parties are neither DCMs nor SEFs, "the application of [DCM or SEF] core principles to such markets provides little value," and the existence of [FERC or PUCT] regulation should be the premise upon which an exemption is granted.[329]

Regarding the Commission's 4(c) public interest analysis, one commenter agreed "that rules and regulations under the Petitioners' [Open Access Transmission Tariffs] in general satisfy the Core Principles and regulatory requirements that would apply to entities seeking designation as a SEF."[330] Notwithstanding this agreement, however, the commenter also requested that the Commission clarify that its public interest analysis and determinations regarding SEF Core Principles does not constitute a finding that the Requesting Parties are SEFs or that the transactions executed on their markets constitute swaps.[331]

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[326] See 77 FR 52157-62.

[327] See id.

[328] Commercial Working Group at 4.

[329] COPE at 6. Additionally, in response to the Commission asking whether "the procedures and principles in place allow the Requesting Parties to meet the requirements of SEF core principles 10-15," 77 FR 52173, COPE questioned why FERC and PUCT regulation in those areas would not be sufficient. Id. at 10.

[330] Joint Trade Associations at 6.

[331] Id. at 7.

Similar to its view of the DCO Core Principles analysis and comment received thereon, the Commission believes its analysis drawing from the SEF Core Principles contained in the Proposed Order should be used to determine whether the exemption is consistent with the public interest and purposes of the Act—not as a determination that the Requesting Parties are SEFs themselves, or that the products traded in their markets are swaps. To the contrary, and consistent with the legislative history behind CEA section 4(c), the Commission takes no position as to the jurisdictional status of any Requesting Party or Covered Transaction in the Final Order. Furthermore, in making its public interest and purposes of the CEA determination based upon, in part, the SEF Core Principle analysis, the Commission is not holding the Requesting Parties to the same standards as SEFs, nor is it concluding that the Requesting Parties would meet the standards set forth in section 5h(f) of the CEA.

Nonetheless, the Commission views the SEF Core Principles as a useful way of measuring the extent to which the Tariffs and activities of the Requesting Parties, and supervision by FERC and PUCT, are congruent with, and—in the context of the Covered Transactions—sufficiently accomplish, the regulatory objectives of the CEA. As set forth in the Commission's SEF Core Principles analysis in the Proposed Order,[332] the Commission has determined that the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of the Final Order, the regulatory objectives of the SEF Core Principles in the context of the Covered Transactions.

iv. Imposition of Position Limits

[332] 77 FR 52157-62.

In the Proposed Order, the Commission requested comment as to whether "the lack of position limits or position accountability thresholds for speculators in Petitioners' markets, given the nature of their markets and market participants, and the other regulatory protections applicable to these markets as described [in the Proposed Exemption], would prevent the Commission from determining that the Proposed Exemption is consistent with the public interest and the purposes of the CEA."[333] The Commission also specifically requested comment on the basis for concluding that market participants should or should not have to satisfy position limit requirements, particularly with respect to FTRs or virtual bids.[334]

Generally, commenters responded that the Commission should not impose position limits on the Covered Transactions. Several commenters objected on the ground that, because the Commission had not determined that the transactions subject to the Proposed Order were subject to the jurisdiction of the Commission, the imposition of an existing regulatory regime on such transactions would be unreasonable.[335] Another commenter argued that the transactions set forth in the Proposed Order are not based on any reference contract within the Requesting Parties' markets, and that imposition of position limits would be impractical and unnecessary because the Federal Power Act already requires rates to be just and reasonable.[336] Commenters also posited that the application of position limits would be a duplication of the currently applicable financial

[333] 77 FR 52159.

[334] 77 FR 52173.

[335] Requesting Parties at 17; Joint Trade Associations at 8; FIEG at 3.

[336] Joint Trade Associations at 8.

assurance requirements in FERC-approved RTO and ISO Tariffs[337] and, similarly, that FERC and PUCT regulation should be the only factor considered in issuing the exemption, even assuming position limits were relevant to RTO and ISO electric energy markets.[338]

Commenters also highlighted that the Requesting Parties' markets are administrated so that the total amount of energy represented by instruments created on the markets is related to the deliverable capacity of the physical transmission systems, making them a more effective limitation than position limits since, as currently constructed under the Commission's rules, position limits do not cap overall open interest.[339] Finally, the Requesting Parties pointed out the fact that the Commission developed speculative position limits on cash-settled contracts to ensure that no single trader can exert enough market power to influence the cash settlement price of that contract, whereas generators and LSEs are required to use the Requesting Parties' electric energy markets for the purpose of delivering electric energy, which effectively ensures the same result.[340]

Without making any determinations regarding the merits of the commenters' concerns regarding position limits, the Commission's Final Order does not impose position limits on the Covered Transactions. The Commission accepts the Requesting Parties' representations that the physical capability of their transmission grids limits the

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[337] FIEG at 3.

[338] COPE at 10.

[339] Requesting Parties at 17; see DC Energy at 3 (noting in particular that FTRs and virtual bids are constrained by the natural physical limits of RTO and ISO market design, due to the products' relation to the deliverable capacity of each RTO and ISO system).

[340] Requesting Parties at 17-18.

size of positions that any single market participant can take at a given time. Moreover, based upon the representations made in the Petition, the Proposed Order provided that each category of exempted transaction, including FTRs, would be limited by the physical capability of the electric energy transmission system. Accordingly, as the Final Order continues to limit each Covered Transaction category to the physical capability of the transmission grid,[341] the Commission believes that imposing position limits on the Covered Transactions is not necessary at this time in order to make the requisite public interest and purposes of the CEA determinations.

v. Ability to Re-Create the Day-Ahead Market and Real-Time Prices

The Proposed Exemption specifically sought public comment as to whether the Requesting Parties "should [be] capable of re-creating the Day-Ahead Market and Real-Time prices."[342]

Some commenters contested the underlying utility of being able to re-create the market. The Requesting Parties argued that it is impossible to predict how other market participants would have reacted to a hypothetical situation.[343] One commenter argued that claiming an ability to re-create market prices would "create the misimpression that such recreations can be done accurately," and thus would negatively affect market certainty.[344] Similarly, another commenter opposed any requirement that the RTO and

[341] The Final Order explicitly includes "Virtual and Convergence Bids and Offers" as a type of Energy Transaction. Consistent with DC Energy's comments, such transactions are also limited to the physical capabilities of the physical transmission grid, as required by the definition in the Final Order. See section IV.A.1.c. supra.

[342] 77 FR 52173.

[343] Requesting Parties at 18 (citing several FERC decisions and related RTO and ISO filings that "unequivocally reject the market re-run concept").

[344] PUCT at 13.

ISOs be able to "re-create, re-state or in any way change prices," believing that it would negatively affect confidence in the integrity of markets if prices could be altered after-the-fact.[345] Another commenter argued that the ability to re-create the Day-Ahead Market and Real-Time prices was unnecessary because MMUs already have substantial tools and broad authority to obtain and analyze market data in order "to address potential market flaws, as well as instances of potential fraudulent market activity."[346] Finally, one commenter questioned the relevance of such a requirement for transactions that are being exempted.[347]

Regardless of underlying utility, necessity, or relevance, the Requesting Parties noted that building the capability to re-run a market (other than a straight reproduction of what occurred) would be extremely expensive in all cases, and in some cases, impossible to do.[348]

Generally, the Commission notes that the ability to re-create market prices entails simulating what price outcomes in a market auction would have occurred, but for certain bids and offers being placed. This ability is required of Commission-regulated DCMs[349] in order to allow the Commission's Division of Enforcement to determine the magnitude of loss caused by any fraudulent or manipulative trading scheme that may have occurred,

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[345] DC Energy at 3.

[346] See PUCT at 13-14. PUCT also noted that its enforcement approach, as implemented by ERCOT, "makes remediation a matter of enforcement rather than of disrupting markets by using post-hoc resettlement tools." PUCT at 14.

[347] COPE at 8.

[348] Requesting Parties at 18-19 (listing such costs as entailing development of a user interface to vary price inputs that kept track of changes in market rules and data formats over time, as well as the physical maintenance of the hardware and software involved with all trading and clearing over time).

[349] See 17 CFR 38.552(c). The SEF proposed rules contained a similar requirement in section 37.406. See "Core Principles and Other Requirements for Swap Execution Facilities," 76 FR 1214 at 1247, Jan. 7, 2011.

as opposed to providing an initial means of detecting fraud or manipulation, or enabling third parties to contest market outcomes through private rights of action. Therefore, the Commission disagrees with the assertions that it is impossible to retroactively predict market outcomes based upon hypothetical price inputs, or that the ability to re-create prices would result in market uncertainty or loss of confidence in the integrity of prices.

Nevertheless, due to the potentially significant costs for the Requesting Parties that could be associated with building the capability to re-run their markets, the Commission is not requiring such a capability as a condition of the Final Order. While the Commission encourages FERC and PUCT to continue contemplating requiring the Requesting Parties to implement the ability to re-run their markets, the Commission does not believe that such a capability is necessary at this time to its determination that the Final Order is consistent with the public interest and purposes of the Act.[350]

f. 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 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.[351] 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."[352] These considerations are similar to the purposes of the

[350] See 77 FR 52158-59.

[351] 7 U.S.C. 6(c)(2)(B).

[352] See H.R. Rep. No. 102-978, 102d Cong. 2d Sess. at 79 (1992).

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. In the Proposed Order, the Commission noted the following assertion by the Requesting Parties as support for its determination:

> Under Section 4(d) of the Act, the Commission will retain authority to conduct investigations to determine whether Petitioners are 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. The Petitioners will continue to retain records related to the Transactions, consistent with existing obligations under FERC and PUCT regulations.
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> 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 Petitioners' 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 the ISOs/RTOs or of a contract market will be affected by the Commission's granting the requested exemptions.[353]

In addition, the Commission stated that the limitation of the exemption to transactions delineated in the Proposed Order between certain appropriate persons avoids potential issues regarding financial integrity and customer protection.[354]

Moreover, the Commission did not propose to exempt the Requesting Parties from certain CEA provisions, including, but not limited to, sections 2(a)(1)(B),4b, 4c(b),

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[353] 77 FR at 52146 (quoting Petition at 28).

[354] See id.

4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 or and any implementing regulations promulgated 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.[355] As such, the Commission proposed to expressly retain authority to pursue fraudulent or manipulative conduct.[356]

In addition, the Commission proposed that granting the exemption for the transactions delineated in the Proposed Order would not have a material adverse effect on the ability of any contract market to discharge its self-regulatory duties under the Act.[357] Specifically, with respect to FTRs, Forward Capacity Transactions, and Reserve or Regulation 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.[358] 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 the Requesting Parties have market

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[355] See id. at 52143.

[356] Nor did the Requesting Parties seek an exemption from these provisions. See 77 FR at 52146; Petition at 2-3. See section IV.D. infra for a detailed discussion regarding the comments the Commission received regarding this reservation of authority.

[357] See 77 FR at 52147.

[358] See id. at 52146.

monitoring systems in place to detect and deter manipulation that takes place on their markets.[359] In addition, the Commission noted that, as a condition to the exemption, the Commission would be able to obtain data from FERC and PUCT with respect to activity on the Requesting Parties' markets that may impact trading on Commission regulated markets.[360]

Finally, the Commission noted that if the transactions described in the Proposed Order could ever be used in combination with trading activity or in a position in a DCM contract to conduct market abuse, both the Commission and DCMs have sufficient independent authority over DCM market participants to monitor for such activity.

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, important caveats should be made. With regard to the SEF Core Principle 3 analysis and general statements regarding the Requesting Parties' MMUs' ability to detect and deter manipulation,[361] 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 the Requesting Parties' markets. The Commission retains the authority to question and obtain additional information in a timely manner regarding the underlying prices to which FTRs 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

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[359] See id. at 52148, 52151, 52157-58.

[360] See id. at 52146-47.

[361] See note 359 and accompanying text supra.

the settlement mechanism produces prices that accurately reflect the underlying supply and demand fundamentals of the RTO and ISO markets and are not readily susceptible to manipulation. For this reason, the Commission has conditioned the Final Order upon access to related transactional and positional data from the Requesting Parties' markets.[362]

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

C. Issuance of Separate or a Collective Order

The Commission proposed to issue a single exemptive order for all Requesting Parties in lieu of the six separate exemptive orders requested by the Requesting Parties because, as explained in the Proposed Order, there are "'[congruents] in [the Petitioners'] markets and operations,'"[363] and "it would appear that issuing six separate but identical . . . [e]xemptions that raise the same issues and questions is unnecessary, could result in needlessly duplicative comments, and would be an inefficient use of Commission resources."[364] The Commission further "disagree[d] with the Requesting Parties' assertion that separate orders are necessary because a solitary order would require each Requesting Party to submit an individual application to obtain supplemental relief or to amend the relief provided thereby."[365]

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[362] See section IV.A.3.b.ii. supra.

[363] 77 FR 52164 (alterations in original).

[364] Id. C.f. section IV.B.2.a. supra.

[365] 77 FR 52164.

Several commenters urged the Commission to adopt separate final orders for particular Requesting Parties because of concerns surrounding the delays and regulatory uncertainty that may be caused by requiring compliance by all Requesting Parties with the proposed conditions precedent.[366] One commenter specifically asked the Commission to grant ERCOT's exemption pursuant to a separate order that recognizes the differences between the ERCOT regulatory regime and the regime applicable to the other RTOs and ISOs.[367]

Another commenter requested that the Commission clarify that any supplemental relief requested by one Requesting Party would not, if granted, apply to any other Requesting Party, unless specifically requested by that Requesting Party.[368] The commenter claimed that the Requesting Parties' respective operations are not identical and that "[i]t is necessary for each Petitioner to have the ability to evaluate whether any supplemental relief requested by another Petitioner should apply to its market and whether the Petitioner is willing to be bound by conditions, if any, set forth in such supplemental relief."[369]

After careful consideration of these comments, the Commission has determined, for the same reasons set forth in the Proposed Order,[370] to issue a single final order on the basis of administrative economy. The Commission notes that the issuance of a single final order should not delay any particular Requesting Party's relief as the relief will

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[366] See, e.g., Requesting Parties at 14-15; Joint Trade Associations at 14-15.

[367] See, e.g., PUCT at 4.

[368] See, e.g., Requesting Parties at 15.

[369] Id. at 15-16.

[370] See 77 FR 52164.

become effective for any particular Requesting Party upon that party's compliance with the conditions in the Final Order.[371]

The Commission also confirms that individual Requesting Parties may file individual requests for supplemental exemptions. Future requests for supplemental relief will be dealt with as expeditiously as practicable based upon the petition submitted, the facts and circumstances at the time of the submission, and the Commission's resources at the time. The Requesting Parties have noted the importance of quick action, and the Commission notes that certain efficiencies may stem from coordinated action for relief.

D. Additional Limitations

As described in detail above,[372] the Commission expressly noted in the Proposed Order[373] that the proposed exemption was based upon the representations made in the Petition and in the supporting materials provided by the Requesting Parties and their counsel, and that any material change or omission in the facts and circumstances that alter the grounds for the 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 Final Order is based on the representations made by the Requesting Parties and their counsel in the Petition, 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 Final Order:

[371] See discussion regarding effectiveness of the exemption, section IV.E. infra.

[372] See section II.B.3. supra.

[373] See 77 FR at 52142, 52165.

(1) the exemption requested by the Requesting Parties relate to Covered Transactions that are primarily entered into by commercial participants that are in the business of generating, transmitting and distributing electric energy;[374] (2) the Requesting Parties were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region;[375] (3) the Covered Transactions are an essential means, designed by FERC and PUCT as an integral part of their statutory responsibilities, to enable the reliable delivery of affordable electric energy;[376] (4) each of the Covered Transactions taking place on the Requesting Parties' markets is monitored by MMUs responsible to either FERC or, in the case of ERCOT, PUCT;[377] and (5) each Covered Transaction is directly tied to the physical capabilities of the Requesting Parties' electric energy grids.[378] Therefore, the Commission affirms that any material change or omission in the facts and circumstances that alter the grounds for the 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 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.

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[374] See id. at 52142. See also Petition at 20.

[375] See 77 FR 52142.

[376] See id. See also generally FERC Order No. 888; FERC Order No. 2000; 18 CFR 35.34(k)(2); TAC 25.1; Petition at 11, 13-14.

[377] See 77 FR 52142. See also Petition at 15-18.

[378] See 77 FR 52142.

In addition, the Commission proposed to exclude from the exemptive relief its general anti-fraud, anti-manipulation, and enforcement authority over the Requesting Parties and the transactions described in the Proposed Order under the CEA, including, but not limited to, sections 2(a)(1)(B), 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, Commission regulations 23.410(a) and (b), 32.4, and part 180.[379] The Commission received several comments regarding this reservation of authority.[380]

One commenter expressed full support for this reservation of authority because "the Commission's continued oversight in these vital areas protects the markets, market participants, and the customers they serve."[381] Another commenter noted that CEA section 4c(b) and regulation 32.4 are not part of the Commission's anti-fraud and anti-manipulation enforcement authority, but rather "articulate the Commission's jurisdiction over option transaction[s]" and requested that section 4c(b) and regulation 32.4 be removed from the carve-out in the final order.[382] Additionally, one commenter stated that it had no issue with the Commission's retention of anti-manipulation jurisdiction generally, but cautioned that the Commission cannot use an exemption order to extend the CFTC's anti-manipulation jurisdiction beyond that which the Dodd-Frank Act provides.[383]

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[379] See id. at 52163, 52166.

[380] See, e.g., Industrial Coalitions at 3; Joint Trade Associations at 10-11; FERC Staff at 5.

[381] See, e.g., Industrial Coalitions at 3.

[382] See, e.g., Joint Trade Associations at 10-11.

[383] See, e.g., FERC Staff at 5.

After consideration of the comments, the Commission believes it prudent to reserve in the 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). While the commenter is correct that section 4c(b) and regulation 32.4 do not articulate the Commission's general anti-fraud, anti-manipulation, and enforcement authority directly, these provisions exemplify a possible statutory basis for bringing an enforcement action, should there be a need for the Commission to do so, and notes that the inclusion of these provisions is not intended to bring any transactions under CFTC jurisdiction for purposes other than enforcement. In addition, these carve-outs are consistent with past exemptive orders and do not expand the Commission's jurisdiction.

The Commission also is adding CEA section 4(d) to the non-exclusive list of reserved enforcement authority. The Commission 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."[384]

[384] See 7 U.S.C. 6(d).

E. Effectiveness of the Exemption

The Commission proposed to make the exemption effective immediately.[385] In response to the Commission's general request for comments, the Commission received two types of comments with respect to the effectiveness of the exemption: (1) comments requesting that the Commission issue a final order rapidly, and (2) one comment asking for clarification as to when the exemption will become effective with respect to individual Requesting Parties in light of the conditions precedent.

Several commenters requested that the Commission issue a final order as quickly as possible or practical, respectively.[386] Of these, one commenter also requested that the Commission issue an interim or temporary order to make it clear that the RTO and ISO transactions are "temporarily exempt" and not subject to the Commission's jurisdiction until a final order is issued.[387]

Another commenter stated that, if the Commission determines not to issue separate exemption orders, it should specify how and when a single order will take effect for each Requesting Party.[388] This commenter noted that "[e]ach Petitioner's ability to satisfy the proposed conditions precedent depends on the terms of the final exemption and the individual Petitioner's stakeholder process for amending its tariff or protocol."[389] As a result, each Requesting Party is likely to satisfy the proposed conditions precedent at

[385] See 77 FR at 52167.

[386] Commercial Working Group at 2; DC Energy at 2.

[387] DC Energy at 2.

[388] Requesting Parties at 15.

[389] Id.

a different time.[390] This commenter also asserted that it would be unreasonable for the Commission to delay the effectiveness of a final order until all of the Requesting Parties have satisfied all of the conditions precedent.[391]

The Commission notes that it is not anticipated that any individual Requesting Party will be in need of a final order to continue its present business until the date by which all Requesting Parties have satisfied the conditions precedent described in the Proposed Order. Indeed, the Commission also notes that the Commission's Divisions of Clearing and Risk, Market Oversight, and Swap and Intermediary Oversight issued a no-action letter preserving the regulatory status quo of the transactions that are the subject of the Proposed Order until the earlier of March 31, 2013, or such earlier date as the Commission may establish in taking final action on the Proposed Order.[392] Nonetheless, the Commission recognizes the concerns raised by the commenters with respect to the market uncertainty that may be caused if publication of a final order is delayed until all Requesting Parties have satisfied the conditions precedent. Moreover, with one exception, all Requesting Parties have represented that all of the necessary Tariffs and other documents have been submitted to, and have either already been approved or permitted to take effect or are currently being reviewed by, FERC or PUCT, as applicable.[393] Accordingly, the Commission has decided to publish this Final Order in advance of the full satisfaction by each Requesting Party of the prerequisites to the exemption set forth therein, so as to provide market participant with sufficient notice of

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[390] Id.

[391] Id.

[392] CFTC Staff Letter 12-11.

[393] See Revised FERC Order No. 741 Implementation Chart.

the prerequisites and conditions attendant to the Final Order. The Commission notes, however, that the exemption provided under the Final Order will not become effective with respect to a particular Requesting Party until that Requesting Party has complied with all of the specified prerequisites provided in the Final Order. That is, the conditions precedent are now prerequisites to the effectiveness of the exemption contained in the Final Order and not to the issuance of the Final Order. Specifically, a Requesting Party and its participants will not benefit from the exemption described in the Final Order unless and until: (1) submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission with assurance that the netting arrangements contained in the approach selected by the particular Requesting Party to satisfy the standards set forth in FERC regulation 35.47(d) (or in the case of ERCOT, standards that are the same as those set forth in FERC regulation 35.47(d)) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Code[394] in the event of the bankruptcy of the market participant,[395] and (2) in the case of Requesting Parties that are subject to regulation by FERC, the Requesting Party is in full compliance with FERC regulation 35.47[396] or, in the case of ERCOT, which is subject to regulation by PUCT, ERCOT is in substantial compliance with standards that are the same as those set forth in FERC regulation 35.47.[397]

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[394] See 11 U.S.C. 553.

[395] See section IV.A.3.a.ii. supra.

[396] See section IV.A.3.a.i. supra.

[397] See id.

With respect to the required legal memorandum or opinion of counsel, the Commission is delegating to the Director of the Division of Clearing and Risk and to his designees, in consultation with the General Counsel or the General Counsel's designees, the authority to accept or reject the legal memorandum or opinion. The Director of Clearing and Risk will affirmatively communicate to the Requesting Party when the Requesting Party's legal memorandum or opinion has been accepted or rejected.

With respect to the condition requiring compliance with the standards set forth in FERC regulation 35.47, Requesting Parties governed by FERC will be deemed to have satisfied this condition upon FERC's acceptance and approval of all of the Requesting Parties' Tariffs that are necessary to implement such standards.[398] ERCOT will be deemed to have satisfied this condition upon PUCT permitting all of the necessary ERCOT protocol revisions to take effect, except that the Commission will accept a demonstration that ERCOT has protocols in effect that substantially meet the settlement and billing standards set forth in FERC regulation 35.47(b).[399]

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires that agencies consider whether the exemption set forth in the Final 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.[400] In the Proposed Order, the Commission found that the Requesting Parties should not be considered small entities based on the central role they

[398] See sections IV.A.3.a.i. and IV.B.2.e.i. supra.

[399] See id.

[400] 5 U.S.C. 601 et seq.

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,[401] analogous to functions performed by DCMs and DCOs, which the Commission has previously determined not to be small entities.[402] The Proposed Order included entities that qualify as "appropriate persons" pursuant to CEA sections 4(c)(3)(A) through (J), or 4(c)(3)(K) that otherwise qualify as ECPs, as defined in CEA section 1a(18)(A) and Commission regulation 1.3 (m).[403] The Commission previously determined that ECPs are not "small entities" for purposes of the RFA.[404] As a result, the Commission certified

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[401] See RFA analysis as conducted by FERC regarding five of the Requesting Parties, CAISO, NYISO, PJM, MISO, and ISO NE, https://www.federalregister.gov/articles/2011/10/26/2011-27626/enhancement-of-electricity-market-surveillance-and-analysis-through-ongoing-electronic-delivery-of#h-17.

Commission staff also performed an independent RFA analysis based on Subsector 221 of sector 22 (utilities companies), which defines any small utility corporation as one that does not generate more than 4 million of megawatts of electric energy per year, and Subsector 523 of Sector 52 (Securities Commodity Contracts, and Other Financial Investments and Related Activities) of the SBA standards, 13 CFR 121.201 (1–1–11 Edition), which identifies a small business size standard of $7 million or less in annual receipts. Staff concluded that none of the Requesting Parties is a small entity, based on the following information:

MISO reports 594 million megawatt hours per year, https://www.midwestiso.org/Library/Repository/Communication%20Material/Corporate/Corporate%20Fact%20Sheet.pdf.

ERCOT reports 335 million megawatt hours per year, http://www.ercot.com/content/news/presentations/2012/ERCOT_Quick_Facts_June_%202012.pdf

CAISO reports 200 million megawatts per year, http://www.caiso.com/Documents/CompanyInformation_Facts.pdf

NYISO reports 17 million megawatts per month, which calculates to 204 megawatts per year, http://www.nyiso.com/public/about_nyiso/nyisoataglance/index.jsp.

PJM reports $35.9 billion billed in 2011, http://pjm.com/markets-and-operations.aspx.

ISO NE reports 32,798 gigawatt hours in the first quarter of 2011, which translates into almost 33 million megawatts for the first quarter of 2011, http://www.iso-ne.com/markets/mkt_anlys_rpts/qtrly_mktops_rpts/2012/imm_q1_2012_qmr_final.pdf.

[402] See A New Regulatory Framework for Clearing Organizations, 66 FR 45604 at 45609, Aug. 29, 2001 (DCOs); Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, 47 FR 18618 at 18618-19, April 30, 1982 (DCMs).

[403] See 77 FR at 52145. Under CEA section 2(e), only ECPs are permitted to participate in a swap, subject to the end-user clearing exception.

[404] See Opting Out of Segregation, 66 FR 20740 at 20743, April 25, 2001.

that the 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.[405] After further consideration of the comments received, the Commission has again determined that the Final Order would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

In response to its request for comments on the Proposed Order, the Commission received comment letters relevant to the RFA that primarily focused on the scope of the term "appropriate persons."[406] Specifically, the Commission requested comments on whether to expand the list of appropriate persons to include those entities that "actively participate in the generation, transmission or distribution of electricity," but that are not ECPs and do not fall within CEA sections 4(c)(3)(A) through (J).[407] Multiple commenters urged the Commission to expand the definition to include all persons who actively participate in the generation, transmission, or distribution of electric energy or specified types of entities that do so, noting that the proposed definition of an appropriate person was not sufficiently inclusive and could exclude traditionally active market participants whose participation facilitates demand response activities and reduces costs.[408] The Commission has carefully considered the comments and, using the authority provided by section 4(c)(3)(K) of the CEA, has determined that a "person who actively participates in the generation, transmission, or distribution of electric energy" as defined in the Final Order, is an appropriate person for purposes of the exemption

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[405] See 77 FR at 52168.

[406] See discussion in section IV.b.2.d. supra.

[407] See 77 FR at 52164, 52172.

[408] See, e.g., Industrial Coalitions at 4-5. See section IV.B.2.d.ii. supra.

provided therein.[409] The Commission has based its determination, in part, on the view that the Covered Transactions "subject to the Final Order would be limited to sophisticated entities that are able to, from a financial standpoint, understand and manage the risks associated with such Transactions."[410]

The relief provided in the 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 Small Business Administration ("SBA") regulations defining entities with electric energy output of less than 4,000,000 megawatt hours per year as a "small entity."[411] However, based on the Commission's existing information about the RTO and ISO markets and the comments received, market participants consist mostly of entities exceeding the thresholds defining "small entities" set out above.[412] Therefore, based on the comments received and

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[409] Accordingly, the exemption provided by the Final Order will apply to agreements, contracts, and transactions where (1) each party thereto is an "appropriate person," as defined in sections 4(c)(3)(A) through (J) of the CEA; an "eligible contract participant," as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or a "person who actively participates in the generation, transmission, or distribution of electric energy," as defined in Final Order and (2) that satisfy the additional parameters for inclusion in the exemption set forth in the Final Order. See paragraph 2 of the Order.

[410] See section IV.B.2.d.ii. supra (citing 77 FR at 52146).

[411] See note 401 supra (citing 13 CFR 121.201).

[412] PJM indicates that 55 of its 588 market participants may not be appropriate persons because they might not meet the requirements in CEA sections 4(c)(3)(A) through (J). However, PJM states that this number accounts for less than 10% of the total number of participants and thus is not considered significant. See PJM at 2. Similarly, in the CAISO market, 74 participants are authorized to purchase or hold FTRs. Of those, 13 are estimated to be market participants that actively participate in the generation, transmission, or distribution of electric energy, but that may not be appropriate persons because they might not meet the requirements in CEA sections 4(c)(3)(A) through (J) or qualify as ECPs ("Additional Participants"). In terms of total dollar volume, approximately 6.5% of the FTR payments and charges are with Additional Participants. See CAISO/ISO NE January at 5. With respect to ISO NE, as of September 20, 2012, there were 392 market participants that actively participated in the generation, transmission, or distribution of electric energy. However, while ISO NE did not provide financials on which to make a determination as to whether 169 of the 392 active market participants would be Additional Participants, in each instance, such active market participants are required to post sufficient collateral to cover the risk of their positions. Among the participants that have filed financial statements with ISO NE, 23 would be active market participants. These active

industry feedback, the Commission is of the view that the Final Order would not affect a substantial number of small entities.[413]

The Commission is further of the view that the Final Order relieves the economic impact that the exempt entities, including any small entities that may opt to take advantage of the exemption set forth in the 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. Indeed, pursuant to section 4(c)(3)(K) of the CEA, the Final Order expands the category of persons that are "appropriate persons" that may avail themselves of the exemption. Accordingly, the Commission does not expect the Final Order to have a significant 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 Final Order would not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. ("PRA") 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

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market participants constitute 3.2% of the gross invoices billed to the 392 active market participants across all ISO NE markets in 2011. Of these 23 participants, ten (10) representing 2.8% of the total invoices billed to the 392 market participants in 2011 have met their participation qualification by posting supplemental collateral. Id.

[413] The Commission notes that to the extent that market participants are required to meet capitalization requirement totaling $1 million net worth or $10 million total assets and are sophisticated entities that are able to, from a financial standpoint, understand and manage the risks associated with the exempted transactions, they are not considered "small entities" for RFA purposes. See, e.g., Industrial Coalitions at 4 n.12 (citing FERC regulation 35.47 and stating that "all market participants are required to meet a baseline capitalization requirement totaling $1 million net worth or $10 million total assets").

greatest possible uses, and 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 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.'' The Proposed Order provided that the exemption would be expressly conditioned upon information sharing: "With respect to ERCOT, information sharing arrangements between the Commission and PUCT that are acceptable to the Commission are executed and continue to be in effect. With respect to all other Requesting Parties, information sharing arrangements between the Commission and FERC that are acceptable to the Commission continue to be in effect."[414] The Commission determined that the Proposed Order did not impose any new recordkeeping or information requirements, or other collections of information on ten or more persons that require approval of the Office of Management and Budget (''OMB''), and did not receive any comments regarding this determination.

The Final Order has amended the information sharing conditions to provide that the exemption is expressly conditioned upon information sharing:

> (1) With respect to all Requesting Parties subject to the jurisdiction of FERC, information sharing arrangements between the Commission and FERC that are acceptable to the Commission continue to be in effect, and those Requesting Parties' 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 the Requesting Parties' possession for

[414] 77 FR at 52166.

> products in the Requesting Parties' markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data.
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> (2) With respect to ERCOT, the Commission's ability to request, and obtain, on an as-needed basis from ERCOT, concurrently with the provision of written notice to PUCT and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within ERCOT's possession for products in ERCOT's markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data, and ERCOT's compliance with such requests by sharing the requested information.[415]

Nevertheless, the PRA would not apply in this case, given that the information sharing conditions in the Final Order would not impose any new recordkeeping or information collection requirements, or other collections of information on ten or more persons that require OMB approval.

C. Consideration of Costs and Benefits

1. Background

As discussed in section I. above, the Dodd-Frank Act amended CEA section 4(c) to add sections 4(c)(6)(A) and (B), which permit exemptions for 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 and charges for the sale of electric energy within the State or municipality pursuant to the

[415] Paragraph 4(a) of the Order.

Commission's 4(c) exemptive authority. However, the Commission must act "in accordance with" sections 4(c)(1) and (2) of the CEA.[416]

On February 7, 2012, the Requesting Parties filed a joint Petition[417] 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, agreements and transactions for the purchase or sale of specified electric energy products, that are offered pursuant to a FERC- or PUCT-approved Tariff, from most provisions of the Act.[418] The Requesting Parties 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, or in the case of ERCOT, PUCT, and (b) part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to regulation and oversight of FERC or PUCT, as applicable. The Requesting Parties expressly excluded from the Petition a request for relief from sections 4b, 4o, 6(c), and 9(a)(2) of the Act,[419] and such provisions, among others, explicitly have been carved out of the Final Order.[420]

The Requesting Parties requested that, due to the commonalities in their markets, the exemption apply to all Requesting Parties and their respective market participants with respect to each category of electricity energy transactions described in the Petition, regardless of whether such transactions are offered or entered into at the current time

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[416] See more detailed discussion in section I. supra.

[417] As noted above, the Requesting Parties amended their Petition on June 11, 2012 and citations to Petition herein are to the amended Petition. See note 22 supra.

[418] See 77 FR 52139. See also Petition at 2-3, 6.

[419] See 77 FR 52139. See also Petition at 3.

[420] See paragraph 1 of the Order.

pursuant to an individual RTO or ISO's Tariff. The Requesting Parties asserted that this uniformity would avoid an individual RTO or ISO being required to seek future amendments to the exemption in order to offer or enter into the same type of transactions currently offered by another RTO or ISO.[421]

2. The Statutory Mandate to Consider the Costs and Benefits of the Commission's Action: Section 15(a) of the CEA

Section 15(a) of the CEA[422] requires the Commission to "consider the costs and benefits" of its actions before promulgating a regulation under the CEA or issuing certain orders. 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.

3. Proposed Order and Request for Comment on the Commission's Proposed Consideration of Costs and Benefits

Upon consideration of the Petition, the Commission issued the Proposed Order which proposed to exempt certain transactions pursuant to section 4(c)(6) of the CEA.[423] The Commission proposed to limit the exemption set forth in the Proposed Order to entities that meet one of the appropriate persons categories in CEA sections 4(c)(3)(A)

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[421] See 77 FR 52139. See also Petition at 6.

[422] 7 U.S.C. 19(a).

[423] 77 FR 52166-67. See also section II.B.1. supra.

through (J), or, pursuant to CEA section 4(c)(3)(K), that otherwise qualify as an ECP.[424] Furthermore, under the Proposed Order, "the covered agreements, contracts or transactions must be offered or sold pursuant to a Petitioner's tariff, which has been approved or permitted to take effect by: (1) In the case of ERCOT, the PUCT or (2) In the case of all other Petitioners, FERC."[425]

In the 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 Proposed Order because such activity would not be inextricably linked to the physical delivery of electric energy.[426]

The Proposed Order expressly requested public comment on the Commission's proposed cost-benefit consideration, 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).[427]

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[424] For those ECPs engaging in the transactions delineated in the Proposed Order in markets administered by a Requesting Party that do not fit within the categories of "appropriate persons" set forth in sections 4(c)(3)(A) through (J), the Commission proposed to determine that they are appropriate persons pursuant to section 4(c)(3)(K), "in light of their financial or other qualifications, or the applicability of appropriate regulatory protections." The Commission also noted that CEA section 2(e) permits all ECPs to engage in swaps transactions other than on a DCM and that such entities should similarly be appropriate persons for the purpose of the Proposed Order. See 77 FR 52145-46.

[425] Id.

[426] See id. at 52143.

[427] See id. at 52172. 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 Final Order mostly in qualitative terms because the commenters, including the Requesting Parties, provided no such data or information to assist the Commission in doing so despite the Proposed Order's request.

4. Summary of Comments on the Costs and Benefits of the Proposed Order

The Commission requested, but received no comments providing data or other information to enable the Commission to better quantify the expected costs and benefits attributable to the Final Order. In terms of qualitative cost and benefit comments, COPE stated that the Commission's Proposed Order creates confusion and inefficient, duplicative regulation, thus, imposing unnecessary costs.[428] COPE also stated that the Commission should recognize the regulation of FERC and the PUCT and limit to the degree possible any regulatory burden imposed on RTOs, ISOs, and their members.[429] The Joint Trade Associations stated that any additional regulation by the Commission would be duplicative and would lead to increased costs passed on to consumers.[430]

Another commenter, NYSIO, asserted that the benefit of Commission regulation of smaller NYSIO market participants was unclear, but stated that costs of such regulation were certain.[431] NYSIO noted that consequence of the Commission's possible conclusion that all authorized participants in NYSIO's markets were not "appropriate persons" would result in regulatory uncertainty and would result in potential exclusion of significant number of market participants from the NYSIO's markets. NYSIO also noted that, as a result, NYSIO would have to increase its resources to respond to the new regulatory and compliance requirements. NYSIO pointed out that this increase in their operating costs would be passed on to New York electricity consumers. More specifically, NYISO noted that the decision not to expand the scope of the Final Order to

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[428] COPE at 2, 5.

[429] Id. at 11.

[430] Joint Trade Associations at 5.

[431] NYISO Supplement to Requesting Parties' Comment, Attachment B at 7.

encompass all current market participants that otherwise qualify to participate in NYISO's markets would result in one of two consequences: "(1) NYISO would be subject to Commission regulation by virtue of the ongoing participation by market participants that do not qualify as Appropriate Persons; or (2) NYISO would have to seek to amend its tariffs with FERC to change its participation criteria to effectively exclude these market participants."[432] Under the first scenario, "[t]he potential for inconsistent regulatory requirements would significantly weaken the regulatory certainty that is the intended benefit of the Exemption," and "[s]uch additional and potentially conflicting regulation would be certain to lead to increased costs to the NYISO, its market participants, and ultimately electric ratepayers."[433] Under the second scenario, NYISO would have "to seek approval to amend its tariffs to make its minimum participation criteria consistent with the Commission's definition of Appropriate Persons," which requires showing "that the proposed tariff amendments are 'just and reasonable' and do not 'grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.'"[434]

The Financial Marketers Coalition stated that excluding one set of market participants (i.e., those that do not own physical assets) from the exemption delineated in the Proposed Order would cause many market participants to exit the market because they could not operate based on the requirements of a dual regulatory structure.[435] Such an outcome, according the Financial Marketers Coalition, would decrease competition,

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[432] NYISO at 9.

[433] Id.

[434] Id. (citing 16 U.S.C. 824d).

[435] Financial Marketers Coalition at 11-12.

harm liquidity in the markets and allow the continued exercise of market power.[436] The PUCT stated that excluding persons currently authorized to participate in ERCOT would introduce significant negative implications on the competitive (wholesale and retail) electric energy markets.[437] Similarly, Tarachand commented that the exit of small market participants could adversely affect liquidity and the price discovery process.[438] The Requesting Parties expressed similar concerns regarding the potential detrimental impact on the robustness of their markets.[439]

The Industrial Coalitions generally supported the Proposed Order, stating that the Commission's continued jurisdiction over fraud and manipulation in the ISO and RTO markets provides crucial ongoing market oversight necessary for market transparency and customer protection.[440] The Commercial Working Group stated that the Commission's Proposed Order offers legal certainty, and it commended the Commission for eliminating an unnecessary layer of regulation in an area that is highly complex and highly regulated.[441] The Requesting Parties commented that regulatory certainty is the primary benefit of the exemption set forth in the Proposed Order.[442]

Regarding whether the Commission should extend the definitions of the transactions set forth in the Proposed Order to include "logical outgrowths" of the same, NEPOOL stated that absent such an inclusion, market participants and Requesting Parties

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[436] Id.

[437] PUCT at 9.

[438] Tarachand at 2.

[439] Requesting Parties at 8.

[440] Industrial Coalitions at 3.

[441] Commercial Working Group at 2.

[442] Requesting Parties at 3.

would be required to seek additional exemptions from the Commission for relatively minor modifications to existing Tariffs and/or transactions, which in turn could dramatically increase the Commission's workload.[443]

Regarding the proposed requirement related to the memorandum of counsel stating that their netting arrangements satisfy FERC regulation 35.47(d), the Requesting Parties stated that the Commission should forego that requirement as redundant with their existing obligations to FERC.[444]

In response to a request for comment, the Requesting Parties stated that the Commission should not require RTOs and ISOs to have the ability to recreate Day-Ahead and RTM prices.[445]

5. Summary of Final Order -- Determinations and Conditions

As discussed above, the Final Order makes certain determinations with respect to the scope of relief, including the scope of the Covered Transactions[446] and the process for expanding the Covered Transactions.[447] The Commission determined that any products that are offered by a Requesting Party, presently or in the future, pursuant to a Tariff that has been approved or permitted to take effect by FERC or PUCT and that fall within the provided definitions of the Covered Transactions, as well as any modifications to existing products that are offered by a Requesting Party pursuant to a Tariff that has been approved or permitted to take effect by FERC and PUCT and that do not alter the

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[443] NEPOOL at 4.

[444] Requesting Parties at 16.

[445] Id. at 18.

[446] See sections II.A.1.a.-c. supra.

[447] See section II.A.1.d. supra.

characteristics of the Covered Transactions in a way that would cause such products to fall outside these definitions are intended to be included within the Final Order. In this way, the Commission's Final Order provides beneficial flexibility and efficiency in that, if the product qualifies as one of the four Covered Transactions in the Final Order, the Requesting Party 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 phrases such as "logical outgrowth," "natural outgrowth," and "economically comparable" in the definitions of the Covered Transactions because such phrases are too vague and too potentially far reaching to permit meaningful analysis under the Commission's statutory standard of review.

The Final Order also sets forth certain conditions subsequent and conditions to the effectiveness of the exemption set forth therein. More specifically, two conditions subsequent relate to information requests by the Commission. First, the Commission must be able to obtain, either directly from ERCOT, or through FERC with respect to the other Requesting Parties, positional and transactional data within the Requesting Parties' possession for products in the Requesting Parties' markets that are related to markets subject to the Commission's jurisdiction, including any pertinent information concerning such data. Second, the exemption is expressly conditioned upon the requirement, that with respect to each Requesting Party, neither the Tariffs nor any other governing documents of the particular RTO or ISO pursuant to whose Tariff the agreement, contract or transaction is to be offered or sold, shall include any requirement that the RTO or ISO

notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation.[448]

There are also two conditions to the effectiveness of the exemption set forth in the Final Order. For a Requesting Party subject to the jurisdiction of FERC, the exemption set forth in the Final Order is effective upon satisfaction of all of the following: (1) submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission with assurance that the netting arrangements contained in the approach selected by that Requesting Party to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant; and (2) demonstration that the Requesting Party has fully complied with FERC regulation 35.47, as measured by FERC's acceptance and approval of all of the Requesting Party's submissions that are necessary to implement the requirements of FERC regulation 35.47.[449] For ERCOT, which is subject to the jurisdiction of PUCT, the exemption set forth in the Final Order is effective upon satisfaction of all of the following: (1) submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission with assurance that the netting arrangements contained in the approach selected by ERCOT to satisfy standards that are the same as those contained in FERC regulation 35.47(d) will, in fact, provide the

[448] Paragraph 4(b) of the Order.

[449] Paragraph 6(a) of the Order.

ERCOT with enforceable rights of set off against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant; and (2) demonstration that ERCOT has fully complied with standards that are the same as those set forth in FERC regulation 35.47, as measured by PUCT permitting all of the necessary ERCOT protocol revisions to take effect; provided that the Commission will accept a demonstration that ERCOT has protocols in effect that substantially meet the settlement and billing period standards set forth in FERC regulation 35.47(b).[450]

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

6. Costs of the Final Order

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

In response to the comments of NYISO and others, the Commission is of the view that the Requesting Parties will experience minimal, if any, ongoing costs as a result of the determinations and conditions set forth in the Final Order because, as the Requesting

[450] Paragraph 6(b) of the Order.

Parties certify pursuant to Commission regulation 140.99(c)(3)(ii), the attendant conditions are substantially similar to requirements that the Requesting Parties and their market participants already incur in complying with FERC or PUCT regulations.

The requirement that all parties to the agreements, contracts, or transactions that are covered by the exemption in the 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(g) of the Order – is not likely to impose any significant, incremental costs on the Requesting Parties because their existing legal and regulatory obligations under the FPA and FERC or PUCT regulations mandate that only eligible market participants may engage in the Covered Transactions, as explained above.[451] To the comments of NYISO and others, the Commission recognizes that this requirement will mean that certain entities that currently operate in RTOs and ISOs but that do not satisfy the minimum financial criteria described above will not be able to avail themselves of the exemption. Such a result could cause those market participants wishing to avail themselves of the exemption to incur costs to satisfy the Final Order's minimum criteria or exit the market. The Commission considered these costs but has

[451] See section IV.B.2.d. supra. While not compelled to, if a Requesting Party decided to amend its Tariff to conform with the Final Order's participant criteria for purposes of securing regulatory certainty—and assuming FERC would approve such an amendment—the Commission believes that a minimal cost would be imposed, mitigated to the extent that the Requesting Party already is required to amend its Tariff to comply with other terms of the Final Order. Alternatively, the Commission does not believe it is likely that the Requesting Parties themselves would become dually regulated by virtue of market participants not qualifying under the scope of the Final Order continuing to transact in the Requesting Parties' markets. To the extent that any Covered Transaction would be subject to the Commission's jurisdiction, the potential dual-regulatory requirements resulting from other Dodd-Frank rulemakings would be most likely to affect the market participants that do not qualify for the exemption set forth in the Final Order.

determined that these market participants must be excluded because they lack the minimum financial wherewithal the Commission believes is necessary to make the requisite finding under CEA section 4(c)(3)(K) that they meet the statutory requirements of CEA section 4(c)(3)(K). In response to the comments of the Financial Marketers Coalition, the Commission has clarified that if an entity meets the minimum criteria set forth in the Final Order, they may continue to operate in these markets even if they do not own or operate physical assets.

The requirement that the Covered Transactions must be offered or sold pursuant to a Requesting Party's Tariff – which has been approved or permitted to take effect by: (1) in the case of ERCOT, the PUCT or; (2) in the case of all other Requesting Parties, 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.[452] Moreover, requiring that the Requesting Parties not operate outside their approved Tariffs derives from existing legal requirements and is not a cost attributable to this Final Order.

As described above, FERC and PUCT impose on the Requesting Parties, and their MMUs, various information management requirements. These existing requirements are not materially different from the condition that none of a Requesting Party's Tariffs or other governing documents may include any requirement that the Requesting Party notify a member prior to providing information to the Commission in response to a subpoena, special call, or other request for information or documentation. While the Commission is mindful that the process of changing Tariffs will cause the Requesting Parties to incur

[452] See 7 U.S.C. 6(c)(6)(A), (B).

costs, those costs are necessary for the Commission to find that the exemption is in the public interest and consistent with the purposes of the CEA.

Requiring that an information sharing arrangement between the Commission and FERC be in full force and effect is not a cost to the Requesting Parties or to other members of the public because it has been an inter-agency norm since 2005. The requirement that the Requesting Parties comply with the Commission's requests on an as-needed basis for related transactional and positional market data will impose only minimal costs on the Requesting Parties to respond because the Commission contemplates that any information requested will already be in the possession of the Requesting Parties.[453]

The legal opinion or memorandum of counsel requirement[454] will require the Requesting Parties to incur costs to acquire. Based on the Laffey Matrix for 2012, assuming the opinion or memorandum is prepared by an experienced attorney (with 20 plus years of legal practice), his/her hourly rate ($734 per hour) multiplied by the amount of hours taken to prepare the opinion, will be the basic cost of such an opinion.[455] The Commission estimates that the cost of such memoranda will range between $15,000 and $30,000, part of which depends on the complexity of the analysis necessary to support the conclusion that the Requesting Party's set off rights are enforceable, and assuming that

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[453] See section IV.A.3.b.ii. supra.

[454] See section IV.A.3.a.ii. supra.

[455] The Court in Laffey v. Northwest Airlines, Inc., 572 F.Supp. 354, 371 (D.D.C. 1983) ruled that hourly rates for attorneys practicing civil law in the Washington, DC metropolitan area could be categorized by years in practice and adjusted yearly for inflation. For 2012 Laffey Matrix rates, see http://www.justice.gov/usao/dc/divisions/civil_Laffey_Matrix_2003-2012.pdf.

the opinion will take 20-40 hours to prepare.[456] While important, these costs are mitigated by the Commission determination, in response to comments, not to require that the opinions or memoranda be signed on behalf of the law firm that is issuing the opinion.

7. Benefits

The Commission's comprehensive action in this Final Order benefits the public and market participants in several substantial if unquantifiable ways, as discussed below. First, by considering a single application from all Requesting Parties at the same time, and deciding to allow all provisions of the exemption set forth in the Final Order to apply to all Requesting Parties and their respective market participants, the Final Order provides a cost-mitigating, procedural efficiency.

By cabining the Covered Transactions to the definitions provided in this Final Order, the Commission limits the potential that purely financial risk can accumulate outside the comprehensive regime for swaps regulation established by Congress in the Dodd-Frank Act and implemented by the Commission. The mitigation of such risk inures to the benefit of the Requesting Parties, market participants, and the public, especially electric energy ratepayers.

The condition that only appropriate persons may enter the Covered Transactions benefits the public, and the excluded market participants 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

[456] There are possibilities of economies of scale if multiple Requesting Parties share the same counsel in preparing these memoranda or opinions.

Covered Transactions only be offered or sold pursuant to a FERC- or PUCT-approved Tariff benefits the public by, for example, ensuring that the 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. Moreover, the Commission's requirement that the Requesting Parties file an opinion of counsel regarding the right of set off in bankruptcy provides a benefit in that the analytical process necessary to formulate such an opinion would highlight risks faced by the Requesting Parties, and permit them to adapt their structure and procedures in a manner best calculated to mitigate such risks, and thus helps ensure the orderly handling of financial affairs in the event a participant defaults as a result of the Covered Transactions. Further, ensuring that the Requesting Parties have enforceable rights of set off against any of its market participants in the event of a bankruptcy of a market participant also provides a benefit in reducing costs to the Requesting Party that arise from a bankruptcy proceeding.

The Commission's retention of its authority to redress any fraud or manipulation in connection with the Covered Transactions protects market participants and the public generally, as well as the financial markets for electric energy products. For example, the Final Order is conditioned upon the Commission's ability to obtain certain positional and transactional data within the Requesting Parties' possession from the Requesting Parties.

Through this condition, the Commission expects that it will be able to continue discharging its regulatory duties under the CEA. Further, the condition that the Requesting Parties remove any Tariff provisions that would require a Requesting Party to notify members prior to providing the Commission with information will help maximize the effectiveness of the Commission's enforcement program.

8. Consideration of Alternatives

The chief alternatives to this Final Order relate to the scope of RTO and ISO market participants that are eligible for the exemption set forth therein, and the scope of Covered Transactions.

As discussed above in section IV.B.2.d.i., the Commission received several requests to include various subsets of market participants in the definition of "appropriate person" pursuant to 4(c)(3)(K) of the CEA for purposes of the exemption described in the Proposed Order, including requests to extend the exemption to (1) any persons who qualify under market participant standards set forth in FERC- or PUCT-approved Tariffs, (2) persons who actively participate in the generation, transmission, or distribution of electric energy, and (3) more specific requests to include particular market participants, such as CSPs, LSEs, and REPs.[457] The exemption set forth in the Final Order includes those entities described in (2) and (3), but does not include other entities who are not "appropriate persons" as defined in sections 4(c)(3)(A) through (J) of the Act, are not ECPs, and are not in the business of (i) generating, transmitting, or distributing electric energy or (ii) providing electric energy services that are necessary to support the reliable

[457] See section IV.B.2.d.i. supra.

operation of the transmission system.[458] For those excluded entities, the exemption in the Final Order would impose costs relative to a definition that would allow all current market participants to avail themselves of the exemption. These affected market participants are excluded because, in the Commission's opinion, they lack the minimum financial wherewithal and therefore pose a risk to themselves and the physical electric energy market.[459]

Regarding the scope of Covered Transactions, the Commission considered the costs and benefits of various alternatives posed by commenters, including whether to expand the definition of Covered Transactions to include future products that are the "logical outgrowth" of existing products.[460] 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 Covered Transactions, which are explicitly defined in the Final Order, and any modifications to existing transactions that do not alter the Covered Transactions' characteristics in a way that would cause them to fall outside those definitions, that are offered by a Requesting Party pursuant to a FERC- or PUCT-approved Tariff, are intended to be included within the exemption in the Final Order.[461] This provides a benefit in that no supplemental relief for such products would be required, which is a cost-mitigating efficiency gain for the Requesting Parties.

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[458] See paragraph 2(b) of the Order.

[459] See section IV.B.2.d.i. supra.

[460] See section IV.A.1.d. supra.

[461] See id.

9. Consideration of CEA Section 15(a) Factors

a. Protection of Market Participants and the Public

As explained above, the Commission does not foresee that the Final Order will have any negative effect on the protection of market participants and the public. More specifically, the Covered Transactions, in light of the representations of the Petitioners and in the context of their regulation by FERC and PUCT, 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 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 Final Order to persons with resources sufficient to understand and manage the risks of the Covered Transactions. This requirement serves to protect excluded market participants and it minimizes the risk of potential misuse of the exempt transactions.

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

The Commission foresees little, if any, negative impact from the Final Order on the efficiency, competitiveness, and financial integrity of markets regulated under the CEA. Further, as an exercise of the Commission's CEA section 4(c) authority to provide legal certainty for novel instruments as Congress intended, the Final Order affords 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.

c. Price Discovery

The Commission does not believe that the Final Order will materially impair price discovery in non-exempt markets subject to the Commission's jurisdiction. As discussed above, the Covered Transactions are used to manage unique electric industry operational risks, which appears to make them ill-suited for exchange trading and/or to serve a useful price discovery function.

d. Sound Risk Management Practices

The Commission believes that the Final Order will promote the ability of RTOs, ISOs, and their 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 Covered Transactions are an important tool facilitating the ability of the Requesting Parties to efficiently manage operational risk in fulfillment of their public service mission to provide affordable, reliable electric energy.

e. Other Public Interest Considerations

In exercising its sections 4(c)(1) and 4(c)(6)(C) exemptive authority in the 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.[462]

VI. Order

Upon due consideration and consistent with the determinations set forth above, the Commission hereby issues the following Order:

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462 See related discussion in section I. supra.

Pursuant to its authority under section 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.

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

         (a) Each Financial Transmission Right is linked to, and the aggregate volume of Financial Transmission Rights for any period of time is limited by, the physical capability (after accounting for counterflow)

of the electric energy transmission system operated by a Requesting Party, as defined in paragraph 5(h) of this Order, offering the contract, for such period;

(b) The Requesting Party serves as the market administrator for the market on which the Financial Transmission Rights are transacted;

(c) Each party to the transaction is a member of the Requesting Party (or is the Requesting Party itself) and the transaction is executed on a market administered by that Requesting Party; 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) "Forward Capacity Transactions," as defined in paragraph 5(c) of this Order.

(4) "Reserve or Regulation Transactions" as defined in paragraph 5(d) of this Order.

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

(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(g) of this Order.

c. The agreement, contract, or transaction is offered or sold pursuant to a Requesting Party's Tariff and that Tariff has been approved or permitted to take effect by:

(1) In the case of the Electricity Reliability Council of Texas ("ERCOT"), the Public Utility Commission of Texas ("PUCT"), or

(2) In the case of all other Requesting Parties, the Federal Energy Regulatory Commission ("FERC").

3. Applicability to particular regional transmission organizations ("RTOs") and independent system operators ("ISOs). Subject to the conditions contained in the Order, the Order applies to all Requesting Parties 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:

(1) With respect to all Requesting Parties subject to the jurisdiction of FERC, information sharing arrangements between the Commission and FERC that are acceptable to the Commission continue to be in effect, and those Requesting Parties' 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 the Requesting Parties' possession for products in the Requesting Parties' markets that are related to markets that

are subject to the Commission's jurisdiction, including any pertinent information concerning such data.

(2) With respect to ERCOT, the Commission's ability to request, and obtain, on an as-needed basis from ERCOT, concurrently with the provision of written notice to PUCT and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within ERCOT's possession for products in ERCOT's markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data, and ERCOT's compliance with such requests by sharing the requested information.

b. Notification of requests for information: With respect to each Requesting Party, neither the Tariffs nor any other governing documents of the particular RTO or ISO pursuant to whose Tariff the agreement, contract or transaction is to be offered or sold, shall include any requirement that the RTO or ISO 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 "Financial Transmission 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 a Requesting

Party, at a specified source (i.e., where electric energy is deemed injected into the grid of a Requesting Party) and a specified sink (i.e., where electric energy is deemed withdrawn from the grid of a Requesting Party). The term "Financial Transmission Rights" includes Financial Transmission Rights and Financial Transmission Rights in the form of options (i.e., where one party has only the obligation to pay, and the other party only the right to receive, an amount as described above).

b. "Energy Transactions" are transactions in a "Day-Ahead Market" or "Real-Time Market," as those terms are defined in paragraphs 5(e) and 5(f) of this Order, for the purchase or sale of a specified quantity of electric energy at a specified location (including virtual and convergence 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 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 Market (as permitted by each Requesting Party 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 a Requesting Party for that period of time.

c. "Forward Capacity Transactions" are transactions in which a Requesting Party, for the benefit of load-serving entities, purchases any of the rights described in subparagraphs (1), (2), and (3) below. In each case, to be eligible for the exemption, the aggregate cleared volume of all such transactions for any period of time shall be limited to the physical capability of the electric energy transmission system operated by a Requesting Party for that period of time.

(1) "Generation Capacity," meaning the right of a Requesting Party to:

(a) Require certain sellers to maintain the interconnection of electric generation facilities to specific physical locations in the electric-energy transmission system during a future period of time as specified in the Requesting Party's Tariff;

(b) Require such sellers to offer specified amounts of electric energy into the Day-Ahead or Real-Time Markets for electric energy transactions; and

(c) Require, subject to the terms and conditions of a Requesting Party's Tariff, such sellers to inject electric energy into the electric energy transmission system operated by the Requesting Party;

(2) "Demand Response," meaning the right of a Requesting Party to require that certain sellers of such rights curtail consumption of electric energy from the electric energy transmission system operated

by a Requesting Party during a future period of time as specified in the Requesting Party's Tariff; or

(3) "Energy Efficiency," meaning the right of a Requesting Party to require specific performance of an action or actions that will reduce the need for Generation Capacity or Demand Response Capacity over the duration of a future period of time as specified in the Requesting Party's Tariff.

d. "Reserve or Regulation Transactions" are transactions:

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

(a) physical performance by the seller's facilities within a response time interval specified in a Requesting Party'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 the Requesting Party's Day-Ahead or Real-Time Market, as those terms are defined in paragraphs 5(e) and 5(f) of this Order, price for electric energy applicable whenever the Requesting Party exercises its right that electric energy be delivered (including Demand Response," as defined in paragraph 5(c)(2) of this Order);

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

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

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

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

e. "Day-Ahead Market" means an electric energy market administered by a Requesting Party on which the price of electric energy at a specified location is determined, in accordance with the Requesting Party'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.

f. "Real-Time Market" means an electric energy market administered by a Requesting Party on which the price of electric energy at a specified location is determined, in accordance with the Requesting Party's Tariff, for specified time periods within the same 24-hour period.

g. "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.

h. "Requesting Party" means California Independent Service Operator Corporation ("CAISO"); ERCOT; ISO New England Inc. ("ISO NE"); Midwest Independent Transmission System Operator, Inc. ("MISO"); New York Independent System Operator, Inc. ("NYISO") or PJM Interconnection, L.L.C. ("PJM"), or any successor in interest to any of the foregoing.

i. "Tariff." Reference to a Requesting Party's "Tariff" includes a tariff, rate schedule or protocol.

j. "Petition" means the consolidated petition for an exemptive order under 4(c)(6) of the CEA filed by CAISO, ERCOT, ISO NE, MISO, NYISO, and PJM on February 7, 2012, as amended June 11, 2012.

6. Effectiveness of the Exemption.

a. For a Requesting Party subject to the jurisdiction of FERC, the exemption set forth in this Order is effective upon satisfaction of all of the following:

(1) submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission with assurance that the netting arrangements contained in the approach selected by that Requesting Party to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant; and

(2) demonstration that the Requesting Party has fully complied with FERC regulation 35.47, as measured by FERC's acceptance and approval of all of the Requesting Party's submissions that are necessary to implement the requirements of FERC regulation 35.47.

b. For ERCOT, which is subject to the jurisdiction of PUCT, the exemption set forth in this Order is effective upon satisfaction of all of the following:

(1) submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission

with assurance that the netting arrangements contained in the approach selected by ERCOT to satisfy standards that are the same as those contained in FERC regulation 35.47(d) will, in fact, provide the ERCOT with enforceable rights of set off against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant; and

(2) demonstration that ERCOT has fully complied with standards that are the same as those set forth in FERC regulation 35.47, as measured by PUCT permitting all of the necessary ERCOT protocol revisions to take effect; provided that the Commission will accept a demonstration that ERCOT has protocols in effect that substantially meet the settlement and billing period standards set forth in FERC regulation 35.47(b).

7. Delegation of Authority. The Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Clearing and Risk 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 accept or reject any legal memorandum or opinion that is required by sections 6(a)(1) and 6(b)(1) of this Order. Further, The Commission hereby delegates to the Director of the Division of Market Oversight 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 Requesting Parties pursuant to sections 4(a)(1) and 4(a)(2) of this Order.

This Order is based upon the representations made in the consolidated petition for an exemptive order under 4(c) of the CEA filed by the Requesting Parties[463] and supporting materials provided to the Commission by the Requesting Parties and their counsel. 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 otherwise modify or restrict the exemption granted in this Order, as appropriate, upon its own motion.

Issued in Washington, DC, on March 28, 2013, by the Commission.

Christopher J. Kirkpatrick,
Deputy Secretary of the Commission.

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[463] In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent Service Operator Corporation; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by the Electric Reliability Council of Texas, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by ISO New England Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Midwest Independent Transmission System Operator, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by New York Independent System Operator, Inc.; and In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by PJM Interconnection, L.L.C. (Feb. 7, 2012, as amended June 11, 2012).