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November 27, 2009

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

Received CFTC
Records Section

11/30/09

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RE: Significant Price Discovery Contract Comments

- ICE SP-15 Financial Day-Ahead LMP Peak (SPM) Contract;
- ICE SP-15 Financial Day-Ahead LMP Peak Daily (SDP) Contract;
- ICE SP-15 Financial Day-Ahead LMP Off-Peak Daily (SQP) Contract;
- ICE SP-15 Financial Swap Real Time LMP-Peak Daily (SRP) Contract;
- ICE SP-15 Financial Day-Ahead LMP Off-Peak (OFP) Contract;
- ICE NP-15 Financial Day-Ahead LMP Peak Daily (DPN) Contract;
- ICE NP-15 Financial Day-Ahead LMP Off-Peak Daily (UNP) Contract;
- ICE Mid-C Financial Peak (MDC) Contract;
- ICE Mid-C Financial Peak Daily (MPD) Contract;
- ICE Mid-C Financial Off-Peak (OMC) Contract; and
- ICE Mid-C Financial Off-Peak Daily (MXO) Contract

COMMENT

Mr. Stawick,

The Western Power Trading Forum ("WPTF") respectfully submits the following comments in response to the Commodity Futures Trading Commission's (the "Commission" or "CFTC") October 6, 2009 Notice of Intent to consider whether the above-referenced contracts offered for trading on the IntercontinentalExchange, Inc. ("ICE") perform a significant price discovery function.¹

¹ See Notice of Intent, Pursuant to the Authority in Section 2(h)(7) of the Commodity Exchange Act and Commission Rule 36.3(c)(3), to Undertake a Determination Whether the Mid-C Financial Peak Contract; Mid-C Financial Peak Daily Contract; Mid-C Financial off-Peak Contract; and Mid-C Financial Off-Peak Daily Contract, Offered for Trading on the IntercontinentalExchange, Inc., Perform Significant Price Discovery Functions, 74 Fed. Reg. 51,261 (Oct. 6, 2009); Notice of Intent, Pursuant to the Authority in Section 2(h)(7) of the Commodity Exchange Act and Commission Rule 36.3(c)(3), to Undertake a Determination Whether the SP-15 Financial Day-Ahead LMP Peak Contract; SP-15 Financial Day-Ahead LMP Peak Daily Contract; SP-15 Financial Day-Ahead LMP Off-Peak Daily Contract; SP-15 Financial Swap Real Time LMP-Peak Daily Contract; SP-15 Financial Day-Ahead LMP Off-Peak Contract; NP-15 Financial Day-Ahead LMP Peak Daily Contract; and NP-15 Financial Day-Ahead LMP Off-Peak Daily Contract, Offered for Trading on the IntercontinentalExchange, Inc., Perform Significant Price Discovery Functions, 74 Fed. Reg. 51,264 (Oct. 6, 2009). On November 5, 2009, the Commission reopened the relevant comment periods, establishing a new deadline of November 27, 2009. 74 Fed. Reg. 58,259 (Nov. 12, 2009).

WPTF is a broad-based membership organization dedicated to encouraging competition in Western power markets. By focusing on developing competitive electricity markets throughout the Western states, WPTF strives to reduce the long-run cost of electricity to consumers throughout the region while maintaining the current high level of system reliability. WPTF members include energy service providers, scheduling coordinators, power generators, power marketers, energy consultants and public utilities, all of whom are active in the Western power markets, including the California Independent System Operator (“CAISO”) markets. Many of its members use the above-referenced ICE SP-15, NP-15 and Mid-C contracts (the “ICE Contracts”) to hedge their physical positions in the Western electric power markets.

Comments

WPTF agrees with the other commenters who have concluded that the Commission has not met its burden of demonstrating that the ICE Contracts qualify as significant price discovery contracts (“SPDCs”). The record clearly establishes that the ICE Contracts reference the day-ahead and real-time Locational Marginal Prices (“LMPs”), which are set by physical supply and demand in the CAISO cash markets and regulated by the Federal Energy Regulatory Commission (“FERC”). Ultimately, LMPs are the price discovery mechanisms for electric power in the California and Pacific Northwest electric power markets, not the ICE Contracts.

As a general matter, the ICE Contracts neither contribute to nor rely upon the prices of contracts traded on, or subject to, the rules of a designated contract market (“DCM”). Nor is there any evidence that market participants reference the ICE Contracts in their electric power contracts; in fact, to do so would be as pointless as referencing the final settlement price of an index-based swap that settles at an index when the underlying index is readily available for reference.

Moreover, fundamental differences between the electric power markets and other markets such as natural gas and crude oil, cause the ICE Contracts to be less likely to function as SPDCs. For example, the highly regulated, liquid and transparent nature of the underlying electric power markets, the general inability to store electricity in the way that other commodities can be stored and limits on transmission all contribute to the importance of the physical cash markets and reduce the potential for derivative markets to influence, or act as effective price discovery tools, for the underlying markets or other derivative markets.

With regard to the specific criteria required to be considered by the Commission, WPTF respectfully submits that the Federal Register notices² laying out the Commission’s arguments in support of its proposed SPDC finding for the ICE Contracts actually do not provide the requisite

² WPTF notes that the Commission appears to be using the same format for each SPDC notice, with little customization for each listed contract. The Commission cannot meet its burden without a more tailored evidentiary record to support its proposed SPDC finding. The comments submitted to date related to the ICE Contracts highlight why such a tailored approach is needed – a review of the facts against the statutory test would show that the contracts are not SPDCs.

evidence under the criteria for an SPDC determination prescribed by statute and implemented through Commission regulations: (1) price linkage; (2) arbitrage; (3) material price reference; and (4) material liquidity.³

Price Linkage. The ICE Contracts do not use or otherwise rely on any “contracts listed for trading on or subject to the rules of a designated contract market or a derivatives transaction execution facility.”⁴ In fact, neither the Commission nor any commenter has suggested any price linkage between the ICE Contracts and any contracts subject to the rules of a DCM.

Arbitrage. As explained in the comments of the Edison Electric Institute, the ICE Contracts do not “permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.”⁵ In fact, there is absolutely no evidence in the record to date of any actual or theoretical arbitrage opportunities between the ICE Contracts and DCM-regulated contracts.

Material Price Reference. As more fully discussed in the comments of the Working Group of Commercial Energy Firms, there is no evidence, direct or indirect, that the ICE Contracts are material price references.⁶ Because the ICE Contracts settle at LMPs set by the CAISO cash markets, the bids, offers, and transactions in the underlying markets are not “based on [or] determined by referencing, the prices generated by” any of the ICE Contracts.⁷ In fact, the opposite is true: the settlement price of the ICE Contracts are based on and determined by referencing the LMPs. Moreover, although the ICE Contracts are useful for hedging price risk, they are not useful price references for the underlying physical markets. To the extent that any parties ever chose to reference the ICE Contracts in their underlying physical contracts, the practical effect would be identical to referencing the arithmetic average LMPs during the specified periods.

Material Liquidity. Trading in the ICE Contracts has no effect on any other contracts. As discussed in the comments of the Financial Institutions Energy Group, the lack of price linkage

³ See Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1623 (June 18, 2008); *Significant Price Discovery Contracts on Exempt Commercial Markets*, 74 Fed. Reg. 12,178 (Mar. 23, 2009) (“SPDC Final Rule”); 17 CFR § 36.3 (2009).

⁴ See 17 CFR § 36.3(c)(1)(i) (2009).

⁵ See Comments of Edison Electric Institute, Comments File No. 09-11, at p. 6-7 (filed Oct. 21, 2009) (discussing Mid-C contracts) quoting “Order Finding That the ICE Henry Financial LD1 Fixed Price Contract Traded on the IntercontinentalExchange, Inc., Performs a Significant Price Discovery Function, Final Order,” 74 Fed. Reg. 37,989 (July 30, 2009) (designating ICE Henry Financial an SPDC); see also, Comments of Edison Electric Institute, Comments File No. 09-12, at p. 7 (filed Oct. 21, 2009) (same for ICE SP-15 and NP-15 contracts).

⁶ See Comments of Working Group of Commercial Energy Firms, Comments File No. 09-11, at pp. 5-6 (filed Oct. 21, 2009) (discussing Mid-C contracts); Comments of Working Group of Commercial Energy Firms, Comments File no. 09-12, at pp. 5-6 (filed Oct. 21, 2009) (same for ICE SP-15 and NP-15 contracts).

⁷ See 17 CFR § 36.3(c)(1)(iii) (2009).

and arbitrage between the ICE Contracts and NYMEX contracts prevents trading in the ICE Contracts from having any material effect on corresponding NYMEX contracts.⁸ As such, the material liquidity criterion is not satisfied.

Other Material Factors. Finally, WPTF agrees with other commenters who have noted the importance of these markets for hedging and expressed concern about the unnecessary imposition of the rules that would accompany designations as SPDCs. In particular, the FERC's extensive presence in the underlying physical markets has filled the regulatory space, and any theoretical benefit from additional regulation of the ICE Contracts would be outweighed by the unnecessary regulatory burdens that would accompany designations as SPDCs.

Reply Comments to the California PUC

WPTF would like to take this opportunity to comment on the filing made in regard to the CFTC Notice of Intent by the California Public Utilities Commission (CPUC) on October 26, 2009. First, the CPUC was not responsive to whether or not the earlier-referenced ICE contracts perform a significant price discovery function. Rather, the CPUC advocated for greater price transparency, apparently misunderstanding that the ICE postings are fully transparent, and that ICE is regulated by the CFTC as an Exempt Commercial Market (ECM). Second, as their comments state, they were filed by staff and, therefore, neither endorsed formally by the CPUC as an agency, nor any individual commissioner⁹. As such, WPTF notes that the CPUC comments should be viewed exclusively as those of its staff, and not of the CPUC.

WPTF appreciates the opportunity to provide these comments, including the Commission's decision to extend the comment period as requested by FIEG, and respectfully requests that the Commission conclude that the ICE Contracts are not SPDCs.

Sincerely,



Gary B. Ackerman
Executive Director

⁸ See Comments of Financial Institutions Energy Group, Comments File No. 09-11, at p. 4 (filed Oct. 21, 2009).

⁹ Normal CPUC procedure is for staff to seek formal Commission endorsement of comments prior to submitting such to a federal agency. In the instant case, staff did not seek CPUC approval prior to submitting their October 26 comments to the CFTC.