



U.S. COMMODITY FUTURES TRADING COMMISSION

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CFTC Letter No. 14-18
No-Action
February 20, 2014
Division of Clearing and Risk
Division of Market Oversight
Division of Swap Dealer and Intermediary Oversight

Nicholas A. Brown, President and Chief Executive Officer
Southwest Power Pool, Inc.
201 Worthen Drive
Little Rock, Arkansas 72223-4936

Re: No-Action Relief with Respect to Certain Commodity Exchange Act Provisions That May Apply to Southwest Power Pool, Inc. and/or Its Participants

Dear Mr. Brown:

This is in response to your letter dated October 7, 2013 (“No-Action Request Letter”),¹ to the Division of Market Oversight, Division of Swap Dealer and Intermediary Oversight, and the Division of Clearing and Risk (“Divisions”) of the Commodity Futures Trading Commission (“Commission”). In the No-Action Request Letter, you request that the Divisions confirm that they will not recommend that the Commission take enforcement action against Southwest Power Pool, Inc. (“Southwest Power Pool”) and its market participants with respect to contracts, agreements and transactions for the purchase or sale of certain electric energy products (as discussed below) for failure to comply with certain provisions of the Commodity Exchange Act (“CEA” or “Act”) and the implementing regulations thereunder (“Commission regulations”), as applicable.

Statement of Facts

Southwest Power Pool is a Regional Transmission Organization (“RTO”) approved by the Federal Energy Regulatory Commission (“FERC”). On October 1, 2013, Southwest Power Pool submitted an exemption application (“Exemption Application”)² to the Commission requesting that the Commission exercise its authority under section 4(c)(6) of the CEA³ and section 712(f)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection

¹ No-Action Request Letter dated October 7, 2013 from Southwest Power Pool to the Divisions.

² In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Southwest Power Pool, Inc. (filed on Oct. 17, 2013).

³ 7 U.S.C. 6(c)(6).

Act⁴ to exempt certain contracts, agreements, and transactions for the purchase or sale of certain electric energy products, that are offered pursuant to a FERC-approved tariff, 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), 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 thereunder including, but not limited to Commission regulations 23.410(a) and (b), 32.4, and part 180 (collectively, the "Enforcement Provisions").

The Commission issued a final order ("RTO-ISO Order") that exempts specified transactions of particular RTOs and Independent System Operators ("ISOs") from certain provisions of the CEA and Commission regulations.⁵ Under the RTO-ISO Order, a transaction may be exempt so long as the transaction falls within the definitions of "Financial Transmission Rights," "Energy Transactions," "Forward Capacity Transactions," or "Reserve or Regulation Transactions," is offered or sold in a market administered by one of the petitioning RTOs or ISOs⁶ pursuant to a tariff or protocol that has been approved or permitted to take effect by FERC or the Public Utility Commission of Texas, and complies with all other enumerated terms and conditions in the RTO-ISO Order.⁷ For example, the RTO-ISO Order requires that, to be eligible for the exemption, the transactions must be entered into by persons who are: (1) "appropriate persons," as defined in section 4(c)(3)(A) through (J) of the CEA; (2) "eligible contract participants," as defined in section 1a(18) of the CEA and in Commission regulation 1.3(m); or (3) 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 (collectively, "Appropriate Persons Requirement").⁸

Southwest Power Pool represents that it has requested exemptive relief that is substantially similar to the exemptive relief granted in the RTO-ISO Order. Specifically, Southwest Power Pool requests that the Commission exempt from most CEA provisions certain "transmission congestion rights," "energy transactions," and "operating reserve

⁴ 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/LawRegulation/OTCDERIVATIVES/index.htm>.

⁵ 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 the Act, 78 FR 19880 (April 2, 2013). The RTO-ISO Order does not, however, provide an exemption from the Enforcement Provisions.

⁶ Southwest Power Pool was not one of the RTOs or ISOs that petitioned for the RTO-ISO Order.

⁷ While the RTO-ISO Order included "Forward Capacity Transactions" in the scope of transactions for which the exemption was granted, Southwest Power Pool's Integrated Marketplace does not include such transactions.

⁸ 78 FR at 19913.

transactions,” as those terms are defined in the Exemption Application,⁹ if such transactions are offered or entered into pursuant to Southwest Power Pool’s FERC-approved tariff (“Subject Transactions”), as well as any persons (including Southwest Power Pool, its members, and its market participants) offering, entering into, rendering advice, or rendering other services with respect to such transactions.¹⁰ According to Southwest Power Pool, the Integrated Marketplace will consist of the Subject Transactions and is scheduled to commence operations on March 1, 2014. Southwest Power Pool further states that its markets and the associated Subject Transactions are substantially similar to those of the RTOs and ISOs that are subject to the RTO-ISO Order.¹¹ Finally, Southwest Power Pool represents that FERC has accepted its tariff revisions, which become effective March 1, 2014 and require a market participant to demonstrate to Southwest Power Pool that such participant meets the Appropriate Persons Requirement in order to be eligible to participate in the Integrated Marketplace.¹²

On October 7, 2013, Southwest Power Pool submitted the No-Action Request Letter pending the Commission’s final action on the Exemption Application. As noted above, the Integrated Marketplace is expected to commence on March 1, 2014. Southwest Power Pool also has stated that certain preliminary activities related to its transmission congestion right market are necessary in order to support the launch of the Integrated Marketplace (“Pre-Launch Activities”). Such activities include the first allocation of auction revenue rights (“ARRs”),¹³ which the Commission understands took place on November 1, 2013, and the first transmission congestion right auction, which the Commission understands took place on

⁹ Southwest Power Pool represents that the terms “transmission congestion right,” “energy transactions,” and “operating reserve transactions” are Southwest Power Pool’s equivalent of the following terms set forth in the RTO-ISO Order issued by the Commission on April 2, 2013: “Financial Transmission Right,” “Energy Transactions,” and “Reserve or Regulation Transactions,” respectively. Southwest Power Pool also avers that the Subject Transactions are defined in a manner consistent with the terms set forth in the RTO-ISO Order. However, Southwest Power Pool notes that its definition of transmission congestion right does not include transmission congestion right options whereas the RTO-ISO Order’s definition of financial transmission right includes financial transmission rights in the form of options. See No-Action Request Letter at 6-8; Exemption Application at 4, 11-13; *supra* note 5.

¹⁰ See No-Action Request Letter at 5-6.

¹¹ See *id.*

¹² See *Sw. Power Pool, Inc.*, FERC Letter Order (Nov. 22, 2013).

¹³ ARR are allocated to transmission customers based on historical network load or transmission service reservations (or equivalent service taken under a grandfathered agreement between a Southwest Power Pool transmission owner and a customer). ARR are granted exclusively to transmission service customers (i.e., not to other market participants or speculators) based on their transmission service (or grandfathered service) and are subject to Southwest Power Pool’s simultaneous feasibility analysis of the capability of the Southwest Power Pool Transmission System. ARR are not traded in the Integrated Marketplace; instead, ARR entitle the holder to a share of revenues from Southwest Power Pool-administered transmission congestion right auctions or may be “self-converted” at the customer’s election into a transmission congestion right. See Exemption Application at 11 n.47.

December 3, 2013.¹⁴ In the No-Action Request Letter, Southwest Power Pool requested that no-action relief be granted to it and all of its members and other market participants under its FERC-approved tariff with respect to these Pre-Launch Activities in order to enable it to continue to develop and implement its Integrated Marketplace during the pendency of its Exemption Application.¹⁵

Discussion and Grant of No-Action Relief

The Commission is currently considering the Exemption Application submitted by Southwest Power Pool on October 1, 2013. As a result, the Divisions believe that it is appropriate to take a no-action position with respect to Southwest Power Pool's Pre-Launch Activities and the associated Subject Transactions when transactions are offered or entered into pursuant to Southwest Power Pool's FERC-approved tariff. However, the Divisions believe that this no-action relief should be limited in scope to match the scope of the RTO-ISO Order. The Divisions note that Southwest Power Pool's Integrated Marketplace is not expected to commence until March 1, 2014 and, since this market is not in operation, there is no need to preserve the status quo. In addition, the Divisions note that Southwest Power Pool has represented that its Integrated Marketplace and the transactions covered thereon will fit within the scope of the RTO-ISO Order. Thus, the Divisions believe it appropriate to limit this no-action relief, in a manner consistent with the scope of the RTO-ISO Order, to Southwest Power Pool and all of its members and other market participants who meet the Appropriate Persons Requirement (each an "Exempted Person") with respect to Southwest Power Pool's Pre-Launch Activities and the associated Subject Transactions.

This no-action position will be effective on the date that this letter is issued (the "Effective Date"). This no-action position will expire on the earlier of August 31, 2014 or the date on which the Commission takes final action on the Exemption Application (the "Termination Date").

Accordingly, the Divisions will not recommend that the Commission take enforcement action against any Exempted Person, with respect to any of the Subject Transactions or Pre-Launch Activities, for failure to comply with any of the provisions of the CEA and

¹⁴ See generally No-Action Request Letter at 9 (stating that these Pre-Launch Activities would be taking place on the specified dates). In addition, Southwest Power Pool has represented to the Commission that these Pre-Launch Activities occurred on the specified dates.

¹⁵ No-Action Request Letter at 9-10. Southwest Power Pool also noted that the Divisions granted no-action relief to the other RTOs and ISOs prior to issuance of the RTO-ISO Order. CFTC Letter No. 12-11 (Oct. 11, 2012) (granting no-action relief to preserve the regulatory status quo to allow the Commission time to consider public comments filed in response to a proposed order). See also 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, 77 FR 52137 (Aug. 28, 2012).

Commission regulations, other than the Enforcement Provisions, during the period between the Effective Date and the Termination Date.

Conclusion

This letter, and the positions taken herein, represent the views of the Divisions only, and do not necessarily represent the positions or views of the Commission or of any other office or division of the Commission. The relief issued by this letter concerns enforcement action only and does not excuse persons relying on this letter from compliance with any other applicable requirements contained in the CEA or in the Regulations issued thereunder. Further, this letter, and the relief contained herein, is based upon the representations made to the Divisions. Any different, changed, or omitted material facts or circumstances might render this no-action relief void. As with all no-action letters, the Divisions retain the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in their discretion. In addition, this no-action relief is without prejudice to any decision by the Commission, following consideration of the Exemption Application, to take final action on the Exemption Application that is, in any respect, the same as, narrower than, or broader than, that which was in the RTO-ISO Order.

Should you have any questions, please do not hesitate to contact M. Laura Astrada at lastrada@cftc.gov or (202) 418-7622, Alicia Lewis at alewis@cftc.gov or (202) 418-5862, or Riva Spear Adriance at radriance@cftc.gov or (202) 418-5494.

Very truly yours,

Ananda Radhakrishnan
Director, DCR

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