

CFTC's Exemption Orders and Private Rights of Action in Energy Markets

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**COMMISSIONER KENNETH W. ANDERSON, JR.
PUBLIC UTILITY COMMISSION OF TEXAS**

**PRESENTATION FOR COMMODITY FUTURES TRADING
COMMISSION ENERGY AND ENVIRONMENTAL MARKETS
ADVISORY COMMITTEE**

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The CFTC's Proposed SPP Exemption Order

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- The Public Utility Commission of Texas (PUCT), with one important exception, supports the CFTC's proposed order exempting SPP transactions, SPP members, and SPP from all but the CFTC's anti-fraud and anti-manipulation enforcement authority under the Commodity Exchange Act (CEA).
- The proposed exemption is consistent with exemption orders already issued by the CFTC to other ISOs in the country.
- The PUCT's concern arises from language in the preamble to the proposed SPP order that states that CFTC had intended to preserve private causes of action under Section 22 of the CEA in the final SPP order and the ISO-RTO final exemption order that was issued in 2013.

Consequences of CFTC's Statement of Intent

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- **The CFTC's stated intent to preserve private claims raises a number of troubling issues.**
 - FERC and PUCT allow for greater efficiency in resolving disputes than private legal proceedings
 - Private causes of action will allow collateral attacks on FERC and PUCT authorized valid market rules, undermining the efficient operation and regulation of electricity markets.
 - ISO's-RTO's are essentially non-profit entities whose expenses are borne by electricity consumers.

FERC and PUCT Regulatory Framework Is Structured To Resolve Conflict and For Enforcement

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- Both FERC and PUCT have oversight and enforcement divisions.
- Their enforcement divisions are familiar with each agency's rules and procedures.
- PUCT has an Independent Market Monitor that reviews market activity by all market participants and works closely with the PUCT's oversight and enforcement division.
- Aggrieved market participants and third-parties with standing can bring their non-contract disputes against each other and ERCOT to the PUCT for resolution. The PUCT staff has the option to participate in these proceedings representing the public interest.

Private Causes of Action Will Allow For Collateral Attacks

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- Transactions that are lawful under FERC or PUCT approved ISO-RTO rules can be challenged under the CEA by third parties without the participation of the regulator in the proceedings.
- Federal court's will be interpreting PUCT and FERC regulations and RTO-ISO market rules, instead of the regulatory authority.
- It is likely that inconsistent determinations by different federal courts will result.
- This will weaken the market and regulatory structure and cause market uncertainty regarding what conduct is permitted under the rules.

Private Causes of Action Will Allow For Collateral Attacks (cont'd)

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- **Potential for regulation by the courts results rather than by the expert regulator.**
 - This provides an end-run around the absence of a private right of action in the FPA and PURA.
 - Enforcement will be conducted by a court, instead of being resolved by the agency where the expertise resides.

Private Causes of Action Will Increase Cost to Consumers

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- **ISOs-RTOs are non-profit entities whose costs are borne by electricity consumers.**
- **If an RTO must participate in a federal court proceeding it will incur litigation costs (particularly if the ISO-RTO is made a party) that will be passed to consumers.**
- **If a party, the ISO-RTO could become subject to potential damages. Any damages will be passed on to consumers.**

Contact Information

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Kenneth W. Anderson, Jr.

512-936-7005

kenneth.anderson@puc.texas.gov