



June 15, 2016

Via Electronic Submission

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments of the American Gas Association Re: Notice of Proposed Order and Request for Comment – Proposed Amendment to the March 28, 2013 RTO-ISO Order.

Dear Mr. Kirkpatrick:

Pursuant to the notice of proposed order and request for comments, the American Gas Association (“AGA”) respectfully provides these comments on the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) Proposed Amendment¹ to the March 28, 2013 RTO-ISO Order² (“Proposed Amendment”).

AGA files these comments expressing concern over the Proposed Amendment because of the implications it raises by permitting third party actions in federal district court under the Commodity Exchange Act (“CEA”) with respect to market activities that are comprehensively regulated by the Federal Energy Regulatory Commission (“FERC”). Accordingly, as stated in these comments, AGA respectfully requests that the Commission not adopt the Proposed Amendment, as it is not in the public interest.

I. Communications

All correspondence in regard to this proceeding should be delivered to the following:

Susan Bergles
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
sbergles@aga.org | 202.824.7090

Michaela Burroughs
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
mburroughs@aga.org | 202.824.7311

¹ Notice of Proposed Amendment to and Request for Comment on 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, 81 Fed. Reg. 30245 (May 16, 2016).

² 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 Fed. Reg. 19880, Apr. 2, 2013.

II. Identity and Interests

The AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 72 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent – just under 69 million customers – receive their gas from AGA members. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international gas companies and industry associates. Today, natural gas meets more than one-fourth of the United States’ energy needs.³

AGA member companies provide natural gas local distribution services to residential, commercial and industrial customers under rates, terms and conditions that are regulated at the local level by a state utility commission or other regulatory authority with jurisdiction. In most cases, this regards the procurement and provision of physical natural gas commodity for use by customers in equipment in their homes and businesses, and the distribution of that natural gas commodity to such homes and businesses. AGA member companies hold capacity and are shippers on interstate natural gas pipelines that are subject to the regulation of FERC. To ensure reasonable rates for the natural gas commodity that is provided to natural gas utility customers, AGA’s members engage in financial risk management transactions in markets regulated by the Commission. Many gas utilities also use a variety of financial tools, such as futures contracts traded on Commission-regulated exchanges and over-the-counter energy derivatives, to hedge the commercial risks associated with providing safe, reliable and cost-effective natural gas service to their customers.

III. Background

The Commission is proposing to amend an order issued on March 28, 2013 pursuant to the authority in section 4(c)(6) of the CEA exempting specified electric energy transactions from certain provisions of the CEA and Commission regulations (“2013 RTO-ISO Order”).⁴ The 2013 RTO-ISO Order did not specifically state that the exemption contained therein does not apply to the CEA section 22 private right of action with respect to those substantive provisions that are excepted from the exemption (i.e., the “Excepted Provisions”).

In February 2015, the United States District Court for the Southern District of Texas dismissed a private lawsuit on the ground that the CEA section 22 private right of action was not available to the plaintiffs in light of the 2013 RTO-ISO Order.⁵ Additionally, in February 2016, the United States Court of Appeals for the Fifth Circuit affirmed the District Court’s ruling.⁶

In the Proposed Amendment, the Commission states that, while it was silent on this issue, it did not intend the 2013 RTO-ISO Order to provide an exemption from the private right of action in CEA section 22.⁷ In light of the *Aspire* court ruling, the Commission is thus proposing to amend

³ For more information, please visit www.aga.org.

⁴ See 2013 RTO-ISO Order, 78 Fed. Reg. 19880, April 2, 2013.

⁵ See *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

⁶ See *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. 15-20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

⁷ See Proposed Amendment, 81 Fed. Reg. 30245, May 16, 2016.

the text of the 2013 RTO-ISO Order to clarify that the entities covered by it are not exempt from the private right of action in CEA section 22 with respect to the Excepted Provisions.

IV. Comments

A. Adoption of the Proposed Amendment Would Create *Regulatory* Uncertainty

AGA appreciates the Commission’s efforts to balance the value of regulatory certainty with the need to make sure that there is adequate recourse for injured parties. However, AGA is concerned that allowing private rights of action in contexts where FERC is comprehensively regulating the market activities at issue does not strike an appropriate balance and will contribute to undue regulatory uncertainty.

Allowing private rights of action in situations such as in the Proposed Amendment would result in market participants, which are subject to FERC’s jurisdiction for their activities, potentially having to address challenges in federal district court regarding conduct that has already been FERC-approved. Moreover, the use of such private actions (or even the threat of such lawsuits) could force market participants to abandon certain transactional activities that may have already been found to be permissible by FERC. This outcome would unacceptably undermine the regulatory certainty that market participants currently have, and rely on, by virtue of FERC’s primary authority, approval and oversight of the activities they engage in that are subject to FERC jurisdiction. Moreover, when an activity is already comprehensively regulated and monitored, the need to provide for the policing of such activities by private lawsuits is absent. AGA is concerned that, in such a circumstance, providing a private right of action would likely increase costs and result in detrimental impacts to market activity – both of which would adversely affect the very energy consumers the Proposed Amendment says it is trying to protect.

Further, private actions under the CEA for FERC-jurisdictional activity may create confusion and blurred jurisdictional lines between FERC and the CFTC. This would undermine the congressional intent that these regulators, where applicable, work together to provide for “effective and efficient regulation in the public interest,” and to avoid, “to the extent possible, conflicting or duplicative regulation.”⁸

B. Adoption of the Proposed Amendment Would Create *Legal* Uncertainty

AGA members are concerned that subjecting market participants’ FERC-approved activities to private lawsuits could create legal uncertainty because of the potential for conflicting judicial decisions among the federal district courts. The Proposed Amendment downplays the risk of uncertainty or inconsistent regulation on the theory that entities covered by the 2013 RTO-ISO Order “will be subject to the same substantive CEA provisions, including judicial interpretations of those provisions, regardless of whether the plaintiff who brings an action alleging a violation of one of those provisions is the Commission or a private party . . .”⁹ This incorrectly assumes that the dichotomy is a single action brought either by the CFTC or a private party. However, AGA

⁸ See, 16 U.S.C. § 824v (2012).

⁹ See Proposed Amendment, 81 Fed. Reg. at 30248, May 16, 2016.

members are concerned that the Proposed Amendment will, rather, result in a myriad of private lawsuits in multiple courts resulting in many disparate decisions.

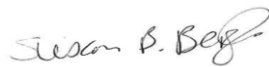
In fact, when the issue of allowing a private right of action was discussed in regard to the proposed Southwest Power Pool order during the February 25, 2016 meeting of the CFTC's Energy & Environmental Markets Advisory Committee, the panelists cited a lengthy list of important concerns, including: the potential for inconsistent or duplicative treatment of established FERC/CFTC policy which would be subject to interpretation by approximately 400 judges in 100 judicial districts; the ability to do an "end run" around the policy while the regulatory bodies themselves are not a party to the proceedings (and may lack the resources to participate as *amicus curiae* in every case); that sound, business-based industry judgment regarding operations could be second-guessed by aggrieved market participants; that industry already has robust and efficient dispute resolution, monitoring and enforcement mechanisms; and that significant costs would be associated with defending third-party lawsuits.¹⁰ The price of all of these adverse developments would be ultimately borne by end users and customers of the defending market participants.¹¹ AGA submits these are compelling reasons for the Commission to consider and which support a Commission determination not to adopt the Proposed Amendment.

V. Conclusion

AGA believes that in circumstances when market activities are already comprehensively regulated for example, by FERC, it is critical that market participants have both regulatory and legal certainty and do not have to face the potential for costly, time-consuming, lawsuits which may be in contrast to decisions already made by the primary regulator of a specific activity. The CFTC should avoid such regulatory and legal uncertainty, which ultimately harms consumers and which, therefore, is not in the public interest.

AGA appreciates this opportunity to comment and respectfully requests that, for the reasons set forth herein, the Proposed Amendment not be adopted.

Respectfully submitted,



Susan Bergles
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
Email: sbergles@aga.org

¹⁰ See http://www.cftc.gov/PressRoom/Events/opaevent_eemac022516.

¹¹ The Proposed Amendment's cost-benefit consideration includes a passing acknowledgement that "the costs of private litigation would be avoided" if the Commission instead explicitly exempted the CEA section 22 private right of action. See Proposed Amendment, 81 Fed. Reg. at 30252, May 16, 2016. However, it does not recognize, or consider, that those costs would be borne by the energy consumers that the Proposed Amendment purportedly is seeking to protect.