CFTC REGULATION OF RTO-ADMINISTERED CAPACITY MARKETS: OBSTACLES OR LESSONS?

by Patrick Seroogy

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SUMMARY

Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) operate, and the Federal Energy Regulatory Commission (FERC) oversees, wholesale electricity markets that facilitate sale and purchase of electricity. Some transactions were potentially subject to Commodity Futures Trading Commission (CFTC) jurisdiction after the Dodd-Frank Act, but the agency later exempted transactions compliant with FERC-authorized tariffs. Through the electricity capacity market, RTOs/ISOs aim to secure reliable electricity supply and meet future demand, but various aspects of this market's design have been criticized for its long-term effectiveness and ensuing impact on grid reliability, prompting various reform proposals. This Article considers whether adopting or modeling CFTC regulation could assist or inform such reform. It concludes that FERC regulation is substantially similar to CFTC regulation in terms of market and compliance monitoring, but is appropriately tailored to physical electricity markets; and it is not clear whether adopting CFTC regulation would help or hurt efficient administration of these markets.

> The United States economy runs on enormous quantities of energy, much of which is used in the form of electricity that is generated, transmitted, and distributed through the electricity grid . . . . The modern electricity grid is so complex that it seems almost impossible that it is able to function as well and as reliably as it does. American households and businesses take for granted that the grid will provide power on demand at all times and in virtually any circumstances short of a catastrophic natural disaster.[1]

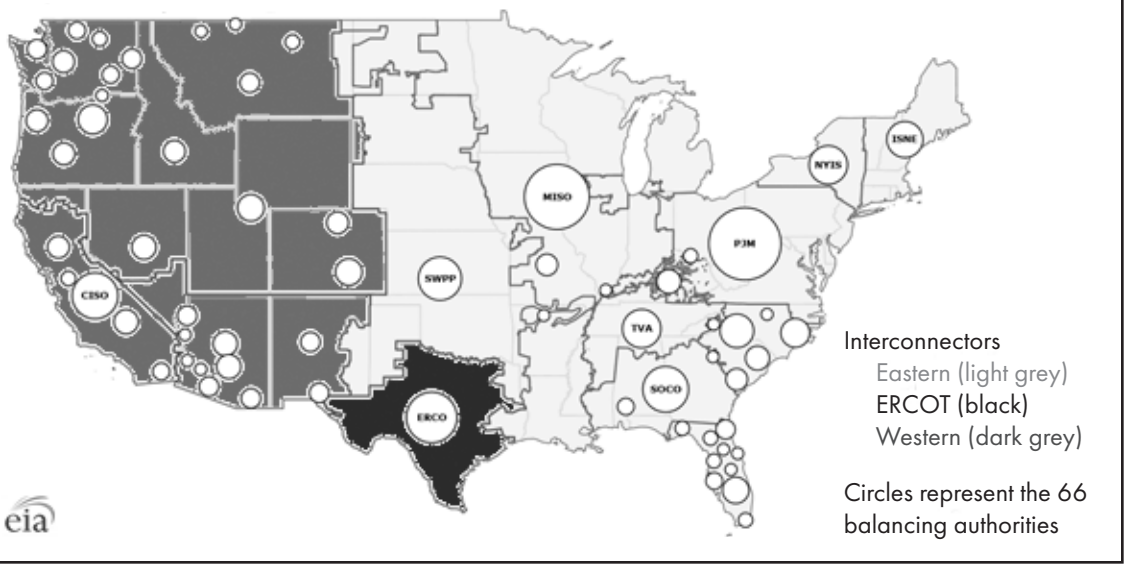
The electric grid, interchangeably called the power grid or transmission grid, is a "vast, synchronized machine" slowly built up by thousands of smaller utilities and cobbled together over a century.[2] The grid is made up of transformers, substations, and thousands of miles of transmission lines that facilitate the generation, transmission, and distribution of electricity.[3] There are three large, primary regional power grids in the United States, called "interconnections," that operate largely independently of each other: the Eastern Interconnection, the Western Interconnection, and the Electric Reliability Council of Texas (ERCOT).[4]

Each regional power grid is composed of local grids that are physically interconnected into a broader network: this makes for better reliability (and commercial enterprise) by "providing multiple routes for power to flow and allowing generators to supply electricity to many load centers. This redundancy helps prevent transmission line or power plant failures from causing interruptions in service to retail customers."[5] While the interconnections describe the grid's physical network, the entities that operate the grid, keep electricity flowing, and keep electricity demand and supply balanced are the balancing authorities: Regional Transmission Organizations (RTOs), Independent System Operators (ISOs), Power Marketing Administrations (PMAs), and electric utilities, whether investor-owned, tribal, cooperative, or municipal.[6]

Author's Note: The views and opinions expressed in this Article are the author's own and do not necessarily reflect any position of Enhesa nor any of its employees. He would like to thank Peter Malyshev for teaching the course in which the early drafts of this Article were developed.

1. Todd Aagaard & Andrew N. Kleit, *Too Much Is Never Enough: Constructing Electricity Capacity Market Demand*, 43 Energy L.J. 79, 80 (2022).
2. Nadja Popovich & Brad Plumer, *Why the U.S. Electric Grid Isn't Ready for the Energy Transition*, N.Y. Times (June 12, 2023), https://www.nytimes.com/interactive/2023/06/12/climate/us-electric-grid-energy-transition.html.
3. U.S. Energy Information Administration (EIA), *Electricity Explained: How Electricity Is Delivered to Consumers*, https://www.eia.gov/energyexplained/electricity/delivery-to-consumers.php (last updated Apr. 16, 2024).
4. *Id.*
5. *Id.*
6. *Id.* ("Most of the balancing authorities are electric utilities that have taken on the [electricity] balancing responsibilities for a specific part of the power system. All of the [RTOs] in the United States also function as balancing au-

Figure 1. U.S. Electric Power Regions



RTOs and ISOs (hereinafter RTOs)[7] are electric power transmission system operators (i.e., "grid" operators) that coordinate, control, and monitor the transfer of electricity along parts of the grid's transmission networks, ensuring their reliability and preventing undue discrimination in access to the grid.[8] They, along with other balancing authorities, occupy all space of the contiguous United States and its interconnections (as seen in Figure 1) that have a grid.[9] Hawaii[10] and Alaska[11] have their own electricity grids and are not part of any of the mainland interconnections.

The Federal Energy Regulatory Commission (FERC) is the primary federal regulatory body for the transmission of electricity (and natural gas).[12] It oversees the operation of RTOs and reviews their efforts to operate and coordinate the grid reliably (with the exception of ERCOT, which is outside of FERC's jurisdiction).[13] FERC is empowered under the Federal Power Act (FPA) with ensuring that the

thorities."); *Federal Power Marketing Administrations Operate Across Much of the United States*, EIA (June 12, 2013), https://www.eia.gov/todayinenergy/detail.php?id=11651 ("All four of the PMAs function as balancing authorities for their regions."). *See also* Sara Hoff, *U.S. Electric System Is Made Up of Interconnections and Balancing Authorities*, EIA (July 20, 2016), https://www.eia.gov/todayinenergy/detail.php?id=27152.

EIA uses the definition of "balancing authority" provided by the North American Reliability Corporation (NERC): "The responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balance within a Balancing Authority Area, and supports Interconnection frequency in real time." EIA, *Glossary*, https://www.eia.gov/tools/glossary/index.php?id=B (last visited Feb. 13, 2026) (citing NERC, Glossary of Terms Used in Reliability Standards 2 (Nov. 5, 2025), https://www.nerc.com/globalassets/standards/reliability-standards/glossary_of_terms.pdf. *See also id.* (defining "Balancing Authority Area" as "The collection of generation, transmission, and loads within the metered boundaries of the Balancing Authority. The Balancing Authority maintains load resource balance within this area.").

7. RTOs and ISOs are not one and the same, but their roles and functions are similar enough to warrant using one acronym to refer to both entities for the purpose of this Article, differentiated in text as necessary.
8. Federal Energy Regulatory Commission (FERC), *Energy Markets*, https://www.ferc.gov/opp/energy-markets (last updated Aug. 18, 2025).
9. Hoff, *supra* note 6 (displaying map of interconnections, RTOs and ISOs, and other balancing authorities in the contiguous United States); EIA, *supra* note 3 (displaying same map). While the map states that there are 66 balancing authorities (BAs) operating in the contiguous United States, other, more recent EIA data indicate that there are 62 BAs operating at the time of writing. *See* EIA, *Hourly Electric Grid Monitor: About the EIA-930 Data*, https://www.eia.gov/electricity/gridmonitor/about (last visited Feb. 24, 2026) (providing a list of 77 historical BAs, 15 of which are indicated to have retired across both Canada and the United States, and indicating that 62 BAs are still operating in the contiguous United States). Six BAs have retired since "July 1, 2015, the first date of" the EIA reporting the hourly operating data of BAs, either because they were incorporated into another's system or they "made other arrangements[.]" *Id.*

The same EIA webpage that provides a list indicating retired BAs mistakenly says elsewhere on the page that there are five retired BAs, missing one (Griffith Energy, LLC (GRIF)) provided in the "List of balancing authorities" at the top of the page. *See id.* Another EIA "real-time" dashboard indicates that it receives and reports hourly data from 68 BAs, but six of them are those that the EIA has indicated have retired. *See id.*; EIA, *Hourly Electric Grid Monitor: U.S. Electricity Overview (U.S. Lower 48)*, https://www.eia.gov/electricity/gridmonitor/dashboard/electric_overview/US48/US48 (last visited Feb. 24, 2026) (displaying, under the "View" drop-down option for "Balancing authority electricity overview" and under "List View," that real-time updates are being received from 68 BAs).

10. "Each of Hawaii's six main islands has its own electrical grid, not connected to any other island" and "four electric utility companies [are] engaged in the production, purchase, transmission, distribution, and sale of electric energy in the State[,]" and in this capacity they are functionally balancing authorities. *See* Hawaii Public Utilities Commission, *Energy*, https://puc.hawaii.gov/energy/ (last updated July 2025). *See also* FERC, *Reliability Explainer*, https://www.ferc.gov/reliability-explainer (last updated Aug. 16, 2023) ("FERC certified NERC as the Electric Reliability Organization for the United States mainland, not including Alaska and Hawaii[,]" and NERC can develop and legally enforce reliability standards for the power grid); Singularity, *Open Grid Emissions: Summary of the Data*, https://docs.singularity.energy/docs/open-grid-emissions/using_the_data-summary-of-the-data (last visited Feb. 24, 2026) (BAs in Hawaii and Alaska "do not report their electricity interchange to the EIA.").
11. *See id.*; University of Alaska Fairbanks, *Alaska's Arctic Energy System*, https://uaf-iarc.org/alaska-arctic-policy-trends/energy-issues/arctic-energy/ (last visited Feb. 10, 2026) ("[m]ore than 150 standalone electrical grids make up the state's energy system" and "[o]ver 100 utilities deliver energy to Alaska consumers[, with m]ost electric utilities [being] small, often serving just one community, with electric loads varying").
12. FERC, *What FERC Does*, https://www.ferc.gov/what-ferc-does (last updated June 18, 2025).
13. FERC, *supra* note 8.

grid operates reliably,[14] and that all "rates and charges [*inter alia*, the costs that utilities charge on consumers' power bills] . . . shall be just and reasonable"[15] if they are for or in connection with the "the transmission of electric energy in interstate commerce and [ ] the sale of electric energy at wholesale in interstate commerce."[16]

FERC can exercise this authority because FPA §206 empowers FERC to initiate a proceeding to address any "rate, charge, or classification" related to the transmission or sale of electricity that FERC determines is "unjust, unreasonable, unduly discriminatory or preferential."[17] Further, FPA §205(c) requires all public utilities to "file with [FERC] . . . all rates and charges for any transmission or sale subject to [FERC's] jurisdiction[.]"[18] FPA §§205 and 206 give rise to much of FERC's regulatory authority over the electric industry because of their broad (but ultimately limited) language.[19]

The way most consumers get electricity is through the purchase and sale of electricity—whether from fossil fuel sources like coal and natural gas, or renewable sources like wind and solar—in wholesale electricity markets.[20] "Generators (power plants or other power supply resources) produce electricity and offer it for sale in these markets. Then, suppliers (utilities) purchase the electricity to meet consumer demand."[21] About two-thirds of consumers (residential, commercial, and industrial) get their electricity through wholesale electricity markets, which are managed and administered by RTOs.[22] Non-RTO areas are typically served by "vertically integrated utilities" (i.e., monopolies) that handle all the steps in providing electricity to customers within their service area: generation, transmission, and distribution.[23]

The utilities and other power source owners (suppliers) in RTO markets are called load-serving entities (LSEs), and they deliver electric power (i.e., load) to customers "through a combination of self-supply, bilateral market purchases and purchases from RTO/ISO markets."[24] Each LSE operates according to a FERC-approved "tariff," which is a documentation of the compilation of rules and "rate schedules" (the costs, charges, and rules under which electric service is supplied to customers) pertaining to a particular utility or company.[25] Whereas "traditional" (vertically integrated) electric systems involve utilities selling the electricity generated by power plants they own to retail customers based on their cost of service (plus a regulated guaranteed return on profit), RTOs use their wholesale markets "to make operational decisions, such as generator dispatch, and to price the resulting electricity" that LSEs purchase for resale.[26]

However, the transactions made in RTO-administered and non-RTO energy markets are not solely under FERC's jurisdiction. A range of transactions occur in energy markets, which expand beyond wholesale markets to include both physical and financial markets:

> [t]he physical markets contain the natural resources, infrastructure, institutions and market participants involved in producing energy and delivering it to consumers[, while t]he financial markets include the buying and selling of financial instruments that derive value from the price of the physical commodity. These financial markets have their own set of market structures and institutions, market participants, and traded products which have their own drivers of supply and demand.[27]

The financial markets for commodity derivatives and futures contracts are primarily regulated by the Commodity Futures Trading Commission (CFTC).[28] The Commodities Exchange Act (CEA) regulates trading in commodity futures, option contracts, and, more recently because of the Dodd-Frank Act, swaps.[29] Derivatives are "financial contracts that 'derive' their value by reference to an underlying asset (or rate or index), whose prices rise or fall based on fluctuations in the value of that underlying asset" and stand in contrast to a contract for the sale and prompt delivery of a good (i.e., derivatives involve a lack of physical deliverability).[30] That asset can be, for example, oil or natural gas (including the index for that asset). Futures contracts, per CEA §4(a), are those standardized contracts "for the purchase or sale of a commodity for future delivery" at a future date and price.[31]

Options contracts (or commodity options) are contracts in which the applicable party has the right or ability, but not the obligation, to sell or purchase the underlying asset (commodity).[32] Finally, "swaps" are customizable derivative contracts where the parties exchange or *swap* the cash

14. FPA §215, 16 U.S.C. §824o (directing FERC to create and certify an "Electric Reliability Organization," charged with developing mandatory reliability standards for electricity).
15. FPA §205, 16 U.S.C. §824d.
16. FPA §201, 16 U.S.C. §824(b); *id.* §824(d) (defining "wholesale" as sale for resale).
17. 16 U.S.C. §824e.
18. *Id.* §824d(c).
19. Adam Vann, Congressional Research Service, IF11411, The Legal Framework of the Federal Power Act 2 (2020), https://crsreports.congress.gov/product/pdf/IF/IF11411.
20. FERC, *supra* note 8.
21. *Id.*
22. *Id.*
23. *Id.*
24. FERC, Energy Primer: A Handbook of Energy Market Basics 53 (2023), https://www.ferc.gov/media/energy-primer-handbook-energy-market-basics [hereinafter 2024 Energy Primer]:
    > Self-supply means that the LSE generates power from plants it owns or operates to meet demand. With bilateral purchases, the LSE buys power from a supplier. RTO/ISO market purchases means the supplying company purchases power through the RTO's/ISO's markets.
25. FERC, *Glossary*, https://www.ferc.gov/about/what-ferc/about/glossary (last updated Aug. 31, 2020) (definitions for "tariff" and "rate schedule").
26. 2024 Energy Primer, *supra* note 24, at 53.
27. *Id.* at vi.
28. Nicole Vanatko, Congressional Research Service, LSB10227, CFTC and Virtual Currencies: New Court Rulings and Implications for Congress (last updated Dec. 6, 2018).
29. 7 U.S.C. §§1 et seq.
30. Vanatko, *supra* note 28.
31. 7 U.S.C. §6(a).
32. Jason Fernando, *Futures Trading: What It Is, How It Works, Factors, and Pros & Cons*, Investopedia, https://www.investopedia.com/terms/f/futures.asp (last updated Dec. 30, 2025).

flows of an asset based on commodity prices or index prices.[33] Swap transactions, which are vital for hedging against exposure to price volatility in physical markets (and thus financial losses), used to largely occur in unregulated over-the-counter trading. However, the Dodd-Frank Act brought them into the CFTC's regulatory fold and parties now transact in a documented, regulated manner.[34]

Importantly, except with respect to general anti-fraud authority, the CFTC does not have regulatory authority or jurisdiction over "spot" market trading. This involves:

> contracts for sale . . . that [1] result[ ] in actual delivery within 28 days or such other longer period as the [CFTC] may determine . . . based upon the typical commercial practice in cash or spot markets for the commodity involved; or [2] create[ ] an enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with the line of business of the seller and buyer[.]"[35]

Energy markets involve not just physical and financial markets, but also a range of complicated spot and derivative transactions. One of those is transactions that occur in the "electricity capacity market" of various RTOs and serve the purpose of securing a reliable power supply beyond just immediate demand for electricity. One of those RTOs, the Pennsylvania-New Jersey-Maryland (PJM) Interconnection, has a massive backlog of energy projects (generators such as solar farms) in its interconnection queue (i.e., project developers waiting to interconnect their project to PJM's grid, sometimes for as long as five years).[36] The effectiveness of PJM's capacity market has been criticized over the years, and various changes to the market have been proposed and enacted, with discussion of other proposed reforms going on constantly.[37]

However, a semi-resolved jurisdictional issue has appeared since the Dodd-Frank Act's passage that expanded the CFTC's authority. While the CFTC has always had jurisdiction over trading in certain energy markets, the CFTC's expanded jurisdiction over swaps risked "intruding" on the operation of RTOs whose market transactions were regulated by FERC. Thus, the CFTC exempted certain transactions following the RTOs requesting that it do so, using a "public interest exemption" power which the Dodd-Frank Act authorized the CFTC to exercise and extend, specifically, to FERC-authorized (tariff-pursuant) market transactions.[38]

While the issue is resolved in the sense that the CFTC does not "interfere" with *current* transactions taking place in RTO-administered markets because it exempted them from exclusive jurisdiction, certain reforms to an energy market like the electricity capacity market, such as utilizing a new category of transaction outside of those already exempted, may run into this roadblock of again requiring exemption from the CFTC. However, that does not mean that all CFTC regulation constitutes roadblocks: when considering certain reforms to the capacity market, CFTC regulation may also have lessons because of the extensive and historical regulatory experience that the agency has with regulating financial markets and countering fraud.

This Article examines whether CFTC regulation of financial markets may be able to inform FERC regulation of its RTO-administered markets. Part I describes the markets subject to the jurisdiction of FERC and the CFTC, relevant laws pertaining to them, and how each agency regulates and monitors them. Part II performs the analysis that the CFTC did not perform in its exemptive order for RTOs, which is (and answers the question of) whether RTO-administered markets are derivatives markets, in particular swap markets, legally subject to the CFTC's regulatory jurisdiction (not including their present exemption).

Part III examines whether, considering the Article's resulting conclusion that real-time and day-ahead electricity market transactions and capacity market transactions probably are *not* CFTC-jurisdictional derivatives, they should, in fact, be regulated as such. This analysis considers factors such as prevention of market manipulation, whether CFTC regulation fits the purpose of the FPA given that it has certain mandates in the public interest, and if CFTC regulation would interrupt the operation of capacity markets. Part IV summarizes and evaluates what lessons FERC could take from consideration of CFTC's regulation of its markets, focusing on anti-price manipulation and certain expanded reporting requirements. The conclusion is that there is no obvious answer other than more express anti-manipulation regulation, including broader antitrust authority and enforcement.

I. Jurisdictional Markets and Their Scope

This part summarizes the operation of markets under FERC and CFTC jurisdiction. FERC oversees RTO-administered markets that tie financial markets and various financial instruments to the physical operation of the transmission grid, namely, to its physical integrity and reliability. The CFTC oversees financial markets, including swap markets, that cross over into energy markets. The CFTC carved out specific tariff-pursuant transactions—financial transmission rights, energy transactions, forward

33. Michael McCaffrey, *What Are Swaps in Finance?*, Investopedia, https://www.investopedia.com/articles/optioninvestor/07/swaps.asp (last updated June 8, 2025).
34. *Id.*
35. 7 U.S.C. §2(c)(2)(D)(ii)(III)(aa-bb).
36. Clara Summers, *PJM Broke the Capacity Auction—But Here's How They Can Fix It*, Citizens Util. Bd. (Nov. 6, 2024), https://www.citizensutilityboard.org/blog/2024/11/06/pjm-broke-the-capacity-auction-but-heres-how-they-can-fix-it/.
37. *See, e.g.*, Jeff St. John, *Why Won't PJM Let Batteries and Clean Power Bolster a Stressed-Out Grid?*, Canary Media (Oct. 3, 2024), https://www.canarymedia.com/articles/transmission/why-wont-pjm-let-batteries-and-clean-power-bolster-a-stressed-out-grid (discussing PJM's changes in market operation and a September 2024 webinar where energy industry professionals debated PJM's capacity market and surplus interconnection rules).
38. *See infra* Section II.C.

capacity transactions, and reserve or regulation transactions—that occur in RTO-administered markets.

A. *FERC: RTO-Administered Markets*

The early era of electricity regulation consisted predominantly of "public utilities" that were private, investor-owned, and vertically integrated, handling all of the generation, transmission, and distribution of electricity (so-called traditional electricity systems).[39] Most U.S. states, by the early 1900s, had established regulatory utility commissions to handle and regulate utilities like electricity, including their practices and what rates they could charge their customers.[40] When the U.S. Supreme Court circumscribed and precluded these state agencies from exercising authority over rates sold in interstate commerce in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*,[41] the sudden vacuum of authority ("Attleboro gap") spurred the U.S. Congress to pass the FPA[42] (and later the Natural Gas Act of 1938), which established the Federal Power Commission.

Vertically integrated utilities continued to dominate the production of electricity until the 1970s, when Congress and FERC took a series of progressive steps to "deregulate" the industry by breaking it up and ensuring nondiscriminatory access to the grid. Congress first encouraged "alternative" forms of generation by providing incentives to nonutility electricity producers by passing the Public Utility Regulatory Policies Act in 1978.[43] Congress followed that up in 1992 by requiring electric utilities, many of which owned transmission, to provide "open access" to the grid by providing power "wheeling" services (i.e., transmitting electric power for entities besides itself) and directing FERC to implement this mandate.[44] FERC accordingly issued Orders 888[45] and 889[46] in 1996, requiring utility companies to unbundle (separate) electricity transmission from electricity sales in wholesale markets as well as to provide nondiscriminatory access to its transmission service, basically as common carriers, for both affiliated companies and non-affiliated entities.

"As a consequence of this unbundling, FERC began to authorize wholesale sellers of electricity to charge market-based rates on a broad scale, conditioning those grants of authority on the sellers' lack of market power."[47] Incumbent public utilities, as a result of competition, began to sell off generation assets or spin them off into subsidiaries, "increasing the profile of independent merchant generators, marketers, and brokers within the industry. . . . [T]he number and volume of [bilateral] transactions on wholesale electricity markets grew by leaps and bounds, straining the capacity of both the transmission grid and regulators."[48]

FERC then issued Order 2000,[49] which pushed utilities to join RTOs and ISOs: giving up operational control of their power plants and transmission systems to these centralized controllers, whose coordination would manage the grid reliably and fairly, shielding against discriminatory service and the exercise of market power. Wholesale electricity markets, including capacity markets, would grow out of the "active electricity trading hubs [that] had arisen around several of these ISOs and RTOs, including the Pennsylvania-New Jersey-Maryland (PJM) ISO, the New York ISO, the California ISO, and the New England ISO."[50] This Article focuses on the PJM capacity market but, where relevant, also discusses those of the other RTOs/ISOs.

Electricity capacity markets, also called forward capacity markets, operate in furtherance of wholesale electricity spot markets. While wholesale spot markets and transactions facilitate the transfer of electricity, as commodities, in the present through the real-time and day-ahead markets, capacity markets serve the central purpose of securing electric-grid reliability by creating a market for "capacity."[51] This is the commitment to produce energy when needed for a specified period in the future, as cemented by a generator submitting a bid into an auction and contractually receiving payment in exchange for this commitment.[52] For example, PJM's capacity market, called the Reliability Pricing Model (RPM), conducts a competitive auction annually to procure capacity three years before it is needed and ensure that there is enough supply available to satisfy peak demand.[53] The market pays a power supplier for its ability to produce power if required, rather than for directly producing power.[54]

39. As explained above, these remain in some energy markets, and large vertically integrated utilities include federal power agencies. *See* 2024 Energy Primer, *supra* note 24, at 60 ("Utilities in these [vertically integrated] markets . . . may also include federal systems, such as the Bonneville Power Administration[ ], the Tennessee Valley Authority and the Western Area Power Administration[,]" among others).
40. David B. Spence & Robert Prentice, *The Transformation of American Energy Markets and the Problem of Market Power*, 53 B.C. L. Rev. 131, 142-43, 142 n.60 (2012) ("The National Association of Regulatory Utility Commissioners was established in 1889, offering testimony to the existence of multiple state commissions by that point").
41. 273 U.S. 83 (1927).
42. Pub. L. No. 74-333, §2, 49 Stat. 803, 847-48 (1935).
43. Pub. L. No. 95-617, 92 Stat. 3117 (1978).
44. Energy Policy Act, Pub. L. No. 102-486, 106 Stat. 2776 (1992).
45. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21540, 75 FERC ¶ 61080 (1996).
46. Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, 61 Fed. Reg. 21737, 75 FERC ¶ 61078 (1996).
47. Spence & Prentice, *supra* note 40, at 147-48 (citing as an example Entergy Services, Inc., 58 FERC ¶ 61234 (1992) (authorizing electricity sales at market-based rates)).
48. *Id.* at 148.
49. Regional Transmission Organizations, 89 FERC ¶ 61285 (1999).
50. Spence & Prentice, *supra* note 40, at 148.
51. *See Different Markets: Energy Versus Capacity*, EnPowered, https://enpowered.com/different-markets-energy-versus-capacity/ (last visited Feb. 24, 2026).
52. PJM, *Capacity Market (RPM)*, https://learn.pjm.com/three-priorities/buying-and-selling-energy/capacity-markets.aspx (last visited Feb. 24, 2026).
53. *Id.*
54. FERC, *An Introductory Guide to Electricity Markets Regulated by the Federal Energy Regulatory Commission*, https://www.ferc.gov/introductory-guide-electricity-markets-regulated-federal-energy-regulatory-commission (last updated Apr. 3, 2025) [hereinafter *An Introductory Guide to Electricity Markets*].

This is additionally meant to incentivize development of new generation, because the prices in the auction are the price per megawatt (MW) of generation that generators ("bidders" or "sellers" in the auction) receive as revenue for their operation above their marginal cost.[55] This price varies depending on subregional zones determined by PJM within its territory.[56]

Capacity markets have certainly received a significant amount of consistent criticism and proposed changes.[57] However, their *reform* is being discussed, rather than their abolition, because of the importance of grid reliability as well as their general success at procuring capacity combined with a mixed approach to incentivizing new resource construction: "They continue to survive . . . because no one has yet implemented a better mousetrap for maintaining reliability in fully-restructured markets."[58]

Overall, centralized wholesale electricity markets, as they exist in the six U.S. RTOs,[59] balance electricity supply and demand carefully. Bilateral markets accomplish the same in a decentralized structure, albeit more areas and utilities are undergoing a centralization trend because of the efficiency.[60] Within RTO-administered markets, generators and LSEs conduct electricity transactions by making short-term commitments for the "day ahead," and then adjusting those trades in "real time":

- In the **day-ahead electric energy market**, the [RTO] schedules electricity production to meet forecasted demand one day in advance. Supply and demand forecasts are influenced by many factors, including weather, the day of the week, and planned power plant outages. For example, predicted high temperatures will likely result in higher usage from air conditioning.
    - Th[is] approach gives power plant owners and other suppliers time to plan (as large plants need to be started up well in advance of production) and make any necessary fuel arrangements. It also provides the RTO/ISO time to prepare for electric transmission line congestion—power lines overloaded with too much electric power . . . can create physical and safety limits on the ability to move more power. The majority of energy market transactions take place in the day-ahead market rather than the real-time market . . . .
- Through the **real-time electric energy market**, the [RTO] adjusts to system conditions within short intervals, frequently between 5 and 15 minutes. These differences may arise from issues such as unplanned outages of power plants, unexpected levels of congestion on electric transmission lines, or increased demand for electricity due to weather. To avoid a shortfall of energy supply in real-time, the RTO seeks electricity for immediate delivery from power suppliers that have the ability to increase their supply.[61]

In other words, these markets handle the immediate and short-term needs of demand for electricity wherein generators sell the electricity they generate, LSEs purchase that electricity for resale (sale for resale, i.e., a wholesale transaction), and later distribute it to end-use customers, such as households and retail businesses.

Electricity capacity markets, as PJM's market monitor put it, "exist[ ] to make the[se] energy market[s] work, by providing the additional net revenues required for the incentive to invest in new units and to maintain old units."[62] This is known as the "missing money problem," whereby the LSEs' private preferences for generation resources are posited to not facilitate their "purchase [of] the amount of capacity sufficient to attain the optimal level of grid reliability[,]" but for which the capacity market compensates.[63] Additionally, grid reliability is not just important generally, but arguably a public good.[64]

However, the demand in capacity markets is administratively constructed.[65] Since there is no "natural" market for capacity (the "natural" demand is little or none), as opposed to the real-time (and, arguably, the day-ahead) electricity market where transactions are conducted based on present need, the market demand is *constructed* to be competitive, while the supply side is "natural" or other-

55. Bob Johnson, *Understanding PJM's Capacity Market: A Simplified Overview*, StanwichEnergy (Nov. 22, 2024), https://stanwichenergy.com/insights/understanding-pjms-capacity-market-a-simplified-overview.
56. *Id.*
57. John S. Moot, *Subsidies, Climate Change, Electric Markets and the FERC*, 35 Energy L.J. 345, 350 ("Capacity markets are the most controversial element of market design"). "Consumer groups argue they provide windfall profits to existing generators; state regulators argue they impinge on their resource planning prerogatives[; g]enerators argue they have so many flaws they do not achieve their primary purpose of attracting new generation or forestalling retirements." *Id.* at 350 n.16 (citations omitted).
58. *Id.* at 350.
59. They are all as follows: PJM Interconnection (PJM), Midcontinent ISO (MISO), California ISO (CAISO), Southwest Power Pool (SPP), New York ISO (NYISO), and ISO-New England (ISO-NE). *An Introductory Guide to Electricity Markets*, *supra* note 54.
60. *See, e.g.*, Ethan Howland, *FERC Approves Western Resource Adequacy Program for Regional Capacity Sharing*, Util. Dive (Feb. 13, 2023), https://www.utilitydive.com/news/ferc-western-resource-adequacy-wrap-power-pool-capacity/642592/ (FERC "approved a regional resource adequacy program[,]" the Western Resource Adequacy Program, "that will allow [geographically U.S.] Western utilities such as Arizona Public Service, PacifiCorp and Puget Sound Energy to share [electrical] capacity[; this is] set to take effect in mid-2025, with penalties for participants that fail to meet its requirements.").
61. *An Introductory Guide to Electricity Markets*, *supra* note 54.
62. Monitoring Analytics, Analysis of the 2025/2026 RPM Base Residual Auction Part A 2 (Sept. 20, 2024), https://www.monitoringanalytics.com/reports/Reports/2024/IMM_Analysis_of_the_20252026_RPM_Base_Residual_Auction_Part_A_20240920.pdf (Independent Market Monitor for PJM's 2024 capacity auction report).
63. Aagaard & Kleit, *supra* note 1, at 81; *id.* at 81 n.6 ("In addition, the RTOs also operate zonal submarkets for capacity so that areas impacted by transmission congestion will have adequate supply to meet peak demand.") (citing NextEra Energy Res., LLC v. Fed. Energy Regul. Comm'n, 898 F.3d 14, 20 (D.C. Cir. 2018) (noting ISO NE's use of zonal demand curves in its capacity market)).
64. *See* Aagaard & Kleit, *supra* note 1, at 82 n.10 ("National defense and basic research are examples of public goods. Markets tend to undersupply public goods because people know they can free ride—that is, obtain the benefit of a public good without paying for it.") (citations omitted).
65. *Id.* at 82.

wise responds naturally to the constructed demand (the variable resource requirement (VRR) curve, in the PJM capacity market).[66]

Market power is endemic to capacity markets based on their structure. PJM's independent market monitor puts it straightforwardly:

> The demand for capacity in the capacity market is almost entirely inelastic because the market rules require loads to purchase their share of the system capacity requirement. The downward sloping portion of the VRR curve is everywhere inelastic. The result is that any supplier that owns more capacity than the typically small difference between total supply and the VRR defined demand [due both to the required reserve margin and the delicate balance between electricity supply and demand] is individually pivotal and therefore has structural market power. Any supplier that, jointly with two other suppliers, owns more capacity than the difference between supply and the VRR defined demand either in aggregate or for a local market is jointly pivotal and therefore has structural market power.
>
> [Thus, t]he market design for capacity leads, almost unavoidably, to structural market power in the capacity market. The capacity market is unlikely ever to approach a competitive market structure in the absence of a substantial and unlikely structural change that results in much greater diversity of ownership. Market power is and will remain endemic to the structure of the PJM Capacity Market. Nonetheless a competitive outcome can be assured by appropriate market power mitigation rules. Detailed market power mitigation rules are included in the PJM Open Access Transmission Tariff (OATT[ ]). Reliance on the RPM design for competitive outcomes means reliance on the market power mitigation rules. Attenuation of those rules means that market participants are not able to rely on the competitiveness of the market outcomes.[67]

In other words, the demand constructed by the RTO to constitute the demand in the capacity market is inelastic because the RTO determines a certain volume of required capacity necessary for grid reliability, and assigns to LSEs their portion of it. However, suppliers have market power in the capacity market when their capacity is above the level of demand. This is demonstrated, for example, when a supplier withholds capacity: this causes the capacity auction price to be set artificially high (tighter supply raising the price of the demanded good).

This sets up the problem of managing market power in RTO-administered markets. To prevent this, FERC exercises control over the markets it oversees through its authority to approve tariff filings and schedules and orders market monitoring.[68] For FERC-jurisdictional markets, including RTO-administered ones, sellers are subject to ex ante screens for market power before they are granted the authority to charge market-based rates.[69] FERC relies on and directs the RTOs to conduct market monitoring (i.e., they "must provide for objective monitoring of markets [they] operate[ ] or administer[ ] to identify market design flaws, market power abuses and opportunities for efficiency improvements, and propose appropriate actions.")[70] RTOs can take mitigation actions for sellers deemed to have market power.[71]

RTOs rely on independent marketing monitors termed "market monitoring units" (MMUs)[72] to carry out these responsibilities. The MMU carries out its "core functions" of evaluating "existing and proposed market rules, tariff provisions[,] and market design elements[,] and recommend[ing] proposed rule and tariff changes[,]" and "identify[ing] and notify[ing] [FERC's] Office of Enforcement . . . of instances in which a market participant's [or an RTO's] behavior may require investigation, including, but not limited to, suspected Market Violations."[73] The MMU must "[r]eview and report [to FERC and the RTO] on the performance of the [RTO-administered] wholesale markets . . . on at least a quarterly basis and submit a more comprehensive annual state of the market report. The [MMU] may issue additional reports as necessary."[74]

Additionally, there are a number of significant reporting requirements that market participants must abide by. The most significant is that "[e]ach public utility as well as each non-public utility with more than a *de minimis* market presence shall file an updated Electric Quarterly Report with [FERC] covering all services it provides" in wholesale energy markets, including all transactions, purchases, and sales of energy or transmission service.[75] The next most significant is that a seller in a wholesale market must report quarterly any change in status, including ownership, control, or long-term purchases, that causes a "cumulative net increase[ ] (i.e., the difference between increases and decreases in affiliated generation capacity) of 100 MW or more of capacity," including any affiliation that experiences such a change in status.[76]

For these and other requirements, RTOs "develop[ ], refine[ ], and implement[ ] surveillance tools and algorithmic screens to perform continuous surveillance and analysis of market participant behavior, economic incentives, operations, and price formation[.]"[77] Among other things, RTOs screen for, in particular:

> (1) uneconomic virtual transactions by node, zone, and constraint; (2) potential day-ahead and real-time market congestion manipulation that would benefit financial

66. *Id.*
67. Monitoring Analytics, *supra* note 62, at 3 (Independent Market Monitor for PJM describing market power in the PJM capacity market).
68. 16 U.S.C. §824d.
69. 18 C.F.R. §35.37 ("Market power analysis required").
70. *Id.* §35.34(k)(6).
71. *Id.* §35.38.
72. *Id.* §35.28(b)(7) (defining a "market monitoring unit" as "the person or entity responsible for carrying out the market monitoring functions that [FERC] has ordered [FERC]-approved [ISOs] and [RTOs] to perform").
73. *Id.* §35.28(g)(3)(ii)(A), (C).
74. *Id.* §35.28(g)(3)(ii)(B).
75. *Id.* §35.10b.
76. *Id.* §35.42.
77. FERC, 2024 Report on Enforcement 76 (2024) (Docket No. AD07-13-018) [hereinafter 2024 FERC Report on Enforcement].

> transmission rights in the ISO/RTO markets, synthetic real-time financial transmission rights, swap-futures positions for physical load, and generation portfolios; (3) anomalies in physical offer patterns, particularly in non-price based parameters; (4) abnormal out-of-market payments; (5) irregularities in capacity market sell offers; and (6) loss making physical fixed-price offer strategies in bilateral electricity markets.[78]

B. CFTC: Swap Markets

The CFTC regulates commodities and derivatives (i.e., financial instruments) as well as the markets on which they must be traded. The agency has exclusive jurisdiction:

> 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.[79]

While not all things are commodities, CEA §1a(9) defines a commodity as "wheat, cotton," and, inter alia, "all other goods and articles, except onions[,]" and "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in."[80]

Title VII of the Dodd-Frank Act amended the CEA and set forth a broad definition of "swap." CEA §1a(47)(A) in relevant part defines "swap" as any agreement, contract, or transaction:

> (i) that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;
>
> (ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence;
>
> (iii) that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any agreement, contract, or transaction commonly known as[, inter alia]—
>
> > (I) an interest rate swap; . . .
> >
> > (VI) a basis swap; . . .
> >
> > (XVIII) an energy swap; . . . and
> >
> > (XXII) a commodity swap;
>
> (iv) that is an agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap; . . . or . . .
>
> (vi) that is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through [(iv)].[81]

As CEA§1a(47)(B) also makes clear, the definition of "swap" does not include, as relevant:

> (i) any contract of sale of a commodity for future delivery (or option on such a contract), leverage contract authorized under section 23 of this title, security futures product, or agreement, contract, or transaction described in section 2(c)(2)(C)(i) of this title or section 2(c)(2)(D)(i) of this title; [or] (ii) any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled[.][82]

If not an exchange like the New York Mercantile Exchange, which is a designated contract market (DCM), then a facility meeting certain requirements is a "swap execution facility" (SEF). The CEA defines an SEF as "a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—(A) facilitates the execution of swaps between persons; and (B) is not a designated contract market."[83]

Certain swaps are required to be cleared. Where required, they must be cleared by a derivatives clearing organization (DCO). In making a determination that a category swap must be cleared, the CFTC follows five factors pursuant to CEA §2(h)(2)(D)(ii):

78. *Id.* at 78.
79. CFTC, 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, 19881 (Apr. 2, 2013) (citing 7 U.S.C. §2(a)(1)(A)).
80. 7 U.S.C. §1a(9).
81. *Id.* §1a(47)(A).
82. *Id.* §1a(47)(B).
83. *Id.* §1a(50).

> (I) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data[;]
>
> (II) the availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is [ ] traded[;]
>
> (III) the effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the [DCOs] available to clear the contract[;]
>
> (IV) the effect on competition, including appropriate fees and charges applied to clearing[; and]
>
> (V) the existence of reasonable legal certainty in the event of the insolvency of the relevant [DCO] or [one] or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property.[84]

The CEA and the agency's regulations have extensive reporting requirements to ensure the integrity of markets in which these are traded. The CFTC's enforcement through deterrence is essential because its authority technically stretches over millions of transactions from small to large. The notional value amount of outstanding interest rate swaps in April 2022, for example, was $5.2 trillion.[85]

The reporting requirements in 17 C.F.R. Part 45 are extensive with respect to recordkeeping and reporting. For example, for many of the swaps that constitute trillions of dollars' worth of transactions, SEFs and DCMs are required to report, for each executed swap, "required swap creation data electronically to a swap data repository . . . not later than the end of the next business day following the execution date."[86] This necessarily involves screening millions of transactions.

C. *CEA and CFTC Carve-Outs of Certain RTO-Administered Market Transactions*

In 2013, the CFTC issued an order that exempted certain transactions within RTO markets granted that they happen pursuant to FERC-approved tariffs and schedules.[87] Anticipating that there may be overlapping jurisdictional problems between FERC and the CFTC,[88] the Dodd-Frank Act provided a "savings" clause that authorized the CFTC to issue public interest exemptions, exempting from its exclusive jurisdiction (i.e., regulatory control) certain transactions, including those that are entered into pursuant to a tariff or rate schedule approved by FERC or a state or municipal regulatory utility commission.[89]

The CFTC laid out the steps of analysis for its determination of a public interest exemption for these FERC-approved transactions:

> The Commission must act "in accordance with" sections 4(c)(1) and (2) of the CEA, [7 U.S.C. §6(c)(1) & (2)], when issuing an exemption under section 4(c)(6)[*id.* §6(c)(6), pertaining to FERC]. Section 4(c)(1) of the CEA grants the [CFTC] 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." Section 4(c)(2) of the Act further provides that the [CFTC] 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;" and (3) the exemption will not have a material adverse effect on the ability of the [CFTC] or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA. 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.[90]

The primary reason for the CFTC's grant of exemptions to defined RTO transactions was it being convinced that the transactions are sufficiently tied to the "physical delivery of electric energy."[91] The CFTC iterated that in fact, exempted 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."[92] The CFTC strongly considered limitations to the transactions that the RTOs requested to be exempted, so as to limit the "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" CFTC.[93] While seeming to agree with the relative importance of grid reliability, the physical delivery of electricity is how the CFTC decided to "cabin" the transactions, with this limitation being necessary for the mitigation of such risk inuring "to

84. *Id.* §2(h)(2)(D)(ii).
85. Wenqian Huang & Karamfil Todorov, *The Post-Libor World: A Global View From the BIS Derivatives Statistics*, BIS Q. Rev. (Dec. 5, 2022), https://www.bis.org/publ/qtrpdf/r_qt2212e.htm.
86. 17 C.F.R. §45.3(a).
87. 78 Fed. Reg. 19880.
88. H.R. Rep. No. 156-100 (Conf. Rep.) (2010):
> To avoid the potential for overlapping or duplicative FERC and CFTC authority, the bill provides the CFTC with the authority to exempt financial instruments traded within an RTO/ISO from CFTC regulation if the CFTC determines the exemption would be consistent with the public interest and the purposes of the Commodity Exchange Act.
89. 7 U.S.C. §4(c)(6)(A)-(B).
90. 78 Fed. Reg. 19880, 19882 (citing congressional history in H.R. Rep. No. 102-978, 102d Cong. 2d Sess. at 82-83 (1992)).
91. *Id.* at 19905.
92. *Id.*
93. *Id.* at 19911.

the benefit of the [RTOs], market participants, and the public, especially electric energy ratepayers."[94]

With stipulation as to who can enter into them, the CFTC exempted four categories of specifically described transactions from its exclusive jurisdiction, but not its general anti-fraud and anti-manipulation authority:

> 1. Types of covered transactions
>
> a. Financial transmission rights (FTRs), defined as:
>
> i. "a transaction, however named, that entitles one party to receive, and obligates another party to pay, an amount[—including FTRs in the form of options (where one party has only the obligation to pay, and the other party only the right to receive, an amount as described above)—]based solely on the difference between the price for electricity, established on an [RTO-administered] electric energy market . . . , at a[n RTO-]specified source . . . and a[n RTO-]specified sink"; and
>
> ii. that 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 [grid.]"
>
> b. Energy transactions, defined as:
>
> i. transactions in a real-time or day-ahead market, where
>
> 1. "real-time market" is defined as "an [RTO-administered] electric energy market . . . on which the price of electric energy at a specified location is determined . . . for specified time periods within the same 24-hour period"; and
>
> 2. "day-ahead market" is defined as "an [RTO-administered] electric energy market . . . on which the price of electric energy at a specified location is determined . . . for specified time periods, none of which is later than the second operating day following the day on which the Day-Ahead Market clears",
>
> ii. "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 . . . [d]elivery or receipt of the specified electric energy, or . . . [a] cash payment or receipt at the price established in the Day-Ahead Market or Real-Time Market[ ]; 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 [grid] . . . for that period of time[.]
>
> "Forward capacity transactions, defined as:
>
> iii. "transactions in which a[n RTO], for the benefit of LSEs, purchases any of the [following] rights[, as limited by available transmission capacity:]"
>
> 1. Generation capacity: "the right to . . . [r]equire certain sellers to maintain the interconnection of electric generation facilities to specific physical locations in the [grid] during a future period of time[; r]equire such sellers to offer specified amounts of electric energy into the Day-Ahead or Real-Time Markets for electric energy transactions; and . . . [r]equire . . . such sellers to inject electric energy into the [grid];"
>
> 2. Demand response: "the right . . . to require that certain sellers of such rights[, i.e., demand response resource owners] curtail consumption of electric energy from the [grid] during a future period of time . . . ;" or
>
> 3. Energy efficiency: "the right . . . 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[.]"
>
> c. Reserve or regulation transactions, defined as:
>
> i. a transaction where an RTO, "for the benefit of [LSEs] and [other] resources, purchases[ ] through auction[ ] the right . . . to require the seller of such right to operate electric facilities [i.e., generators] in a physical state [during a specified period of time] 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 [grid] . . . with:"
>
> 1. "physical performance by the seller's facilities within a response time interval [ ] (Reserve Transaction); or"
>
> 2. "prompt physical performance by the seller's facilities (Area Control Error Regulation Transaction);"
>
> ii. "For which the seller receives, in consideration, one or more of the following":
>
> 1. "[p]ayment at the price established in the [RTO's] Day-Ahead or Real-Time Market . . . for electric energy applicable whenever the [RTO] exercises its right that electric energy be delivered (including Demand Response[ ]);"
>
> 2. "[c]ompensation for the opportunity cost of not supplying or consuming electric energy or other services during any period during which the [RTO] requires that the seller not supply energy or other services;"
>
> 3. "[a]n upfront payment determined through the [RTO-administered capacity] auction[ ];"
>
> 4. "[a]n additional amount indexed to the frequency, duration, or other attributes of physical performance as specified in the [RTO's] Tariff; and"

94. *Id.*

iii. "[i]n which the value, quantity, and specifications of such transactions for a[n RTO] for any period of time shall be limited to the physical capability of the [grid] for that period of time."[95]

2. Covered transactions "must be entered into by . . . 'appropriate persons,' as defined in sections 4(c)(3)(A) through (J) of the Act, 'eligible contract participants,' as defined in section 1a(18) of the Act and Commission regulations, 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."[96]

II. Are RTO-Administered Markets Considered Swap Markets?

This part considers whether the RTO-administered market transactions of real-time and day-ahead transactions and capacity market transactions are swap markets or otherwise derivatives markets that are legally subject to CFTC jurisdiction (not counting their present exemption). While the CFTC's 2013 carveout classified certain RTO-administered market transactions as exempt from its exclusive jurisdiction, it never conducted the analysis of whether they count as swap market transactions.

This section conducts that analysis. The result is that real-time and day-ahead market transactions are spot market transactions, and as such they are not theoretically covered by CFTC exclusive jurisdiction. Capacity market transactions are more complicated, but they are most likely service agreements or forward contracts with embedded optionality and a legitimate commercial purpose of grid reliability and securing a reliable power supply, and thus are not under CFTC exclusive jurisdiction.

A. *Wholesale Electricity Markets (Real-Time and Day-Ahead)*

The analysis for this category of transactions is short. The transactions involved here are the energy transactions that occur in the real-time and day-ahead markets.[97] They are transactions that involve the real-time or short-term physical delivery of electricity as a nonfinancial commodity. In particular, as explained in Section II.A, electricity production is scheduled in the day-ahead electric energy market one day in advance.[98] Most transactions take place in this market.[99]

In the real-time electric energy market, near-term adjustments to system conditions are made, whereby RTOs solicit the generation of electricity for immediate delivery from power suppliers that can increase their supply quickly.[100] Given the transactions that are specifically planned for physical delivery on the next day, and the short intervals of time (between 5 and 15 minutes) that RTOs seek to make to electricity supply to balance with demand, these would most likely be categorized as spot transactions taking place in spot markets.

As aforementioned, the CFTC does not have regulatory authority or jurisdiction over "spot" market trading. This involves:

> contracts for sale . . . that [1] result[ ] in actual delivery within 28 days or such other longer period as the [CFTC] may determine . . . based upon the typical commercial practice in cash or spot markets for the commodity involved; or [2] create[ ] an enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery[.][101]

The transactions that take place in the day-ahead and real-time electricity markets are not swaps or otherwise derivatives potentially subject to the CFTC's jurisdiction. CFTC-jurisdictional derivatives involve contracts for sale resulting in actual physical delivery within 28 days. Transactions in electricity spot markets take place within minutes or hours, and are contracted for on the relevant RTO-administered financial platform or system only a day ahead of time. As such, they are spot transactions, and thus do not qualify as regulated swaps.

Reserve or regulation transactions—those that occur in the energy and ancillary services markets—are not addressed in this Article, which focuses on capacity markets. They are, however, listed in Section II.C to illustrate fully the CFTC's RTO exemptive order. Capacity transactions are analyzed in the swap framework in the next section.

B. *Electricity Capacity Markets*

Capacity is more complicated to determine as a swap, because the nature of the product is tied to the *ability* and commitment to deliver a physical product—electricity—and capacity is additionally directly determined by the structure of the market. In this case, in the PJM capacity market, resource adequacy requirements compel certain generators (sellers) and LSEs (buyers) to participate in "base" or primary auctions where LSEs purchase from bidding generators their required RTO-allotted share of capacity.

However, the contract forming the capacity agreement between seller and buyer has an option for the generator to offload some, but not all, of its capacity commitment in following incremental auctions throughout the year.[102]

95. *Id.* at 19912-14.
96. *Id.* at 19880.
97. *See id.* at 19912-14.
98. *An Introductory Guide to Electricity Markets*, *supra* note 54.
99. *Id.*
100. *Id.*
101. 7 U.S.C. §2(c)(2)(D)(ii)(III)(aa)-(bb).
102. PJM Power Providers Group, Incremental Auctions: PJM's Second Step to Securing Reliability (2025), https://epsa.org/wp-content/uploads/2025/12/P3-BRA_One-Pager-1.pdf; PJM, PJM Manual 18: PJM Capacity Market 149-55 (2025), https://www.pjm.com/-/media/DotCom/documents/manuals/m18.ashx.

There are "First, Second, and Third Incremental Auctions [that] are conducted to allow for replacement resource procurement, and increases (procurement) and decreases (selling excess) in resource commitments due to reliability requirement adjustments."[103]

It would seem that capacity transactions are forwards rather than swaps, even if they qualify as swaps (thus excluded from CFTC exclusive jurisdiction). This is primarily because there is no exchange in cash flow. As mentioned, CEA §1a(47)(A) in relevant part defines "swap" as any agreement, contract, or transaction:

> (i) that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind; [or] (ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence[.][104]

The price determined at a capacity market auction does in part depend on the value of electricity as a commodity because of how the RTO constructs the demand curve, and thus directly influences the price in the RTO market. A factor in the demand curve is the "cost of new entry" (CONE) that RTOs calculate the construction of a power plant involves. The CONE considers the net revenue that a power resource needs to cover its capital and fixed costs, and is "meant to represent the long-run marginal cost of supply in the capacity market."[105]

The CONE's calculation takes into account the revenue that power plant owners earn in the electricity spot markets that would cover its variable cost. "Estimating revenues in these markets depends on factors such as energy prices, ancillary services prices, fuel prices," and so on.[106] As such, transactions in the capacity market are affected by the price of electricity on the spot markets. Broadly, this meets the criteria set forth in 7 U.S.C. §1a(47)(A)(i).

Further, capacity is not the actual physical delivery of electric energy, but rather the commitment by (or otherwise phrased, the RTO's right to require[107]) generators to be *available* to produce energy, if so required, for a specific period of time. This seems to satisfy 7 U.S.C. §1a(47)(A)(ii) because whether the generator bid into the capacity market actually produces electricity "is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of" it needing to do so and to input that energy into the spot market, which seems like "an event or contingency associated with a potential financial, economic, or commercial consequence" given that revenue is earned from selling electricity into the electricity spot market.

Additionally, in any market, the most basic economic explanation for the price of a good is that that is where supply and demand meet. RTOs estimate how much supply of electricity will be needed to meet peak demand for electricity—i.e., the capacity requirement that RTOs apportion to LSEs—and in doing so, they must estimate peak demand for electricity.[108] "For PJM for delivery year 2018/19, for example, the forecasted peak was 161,418 MW."[109] For one thing, peak demand is a factor of price in the day-ahead and real-time spot markets because of the short-term transactions needed to meet that demand, and that determines the revenue that participants in those markets get. This wraps back around to energy prices being a factor in how RTOs construct demand, which reinforces that aspect of capacity prices being based on the price value of electricity in the spot markets.

However, capacity transactions do not involve the exchange of cash flow. Capacity transactions also do not inherently involve speculative activity, but are, in fact, ultimately contingent upon, or at least invariably tied to the physical delivery of electricity—if the RTO deems it necessary, the generator-seller must generate electricity and input it into the grid. In a sense, this is different from *Transnor (Bermuda) Ltd. v. BP North American Petroleum*,[110] where there were issues of material fact as to whether contracts for the physical delivery of oil involved speculative activity or actual physical delivery. If a capacity market participant decides to defraud the market, then it may be treating its contract like a speculative financial instrument. However, given the nature of the bid-auction system and actual allotted requirements for LSEs which involve commitment by generators, it would suggest that a description of capacity market transactions as speculative swaps is dubious.

Capacity market transactions might instead qualify as service agreements or as forward contracts with some level of volumetric optionality. Service agreements are non-derivatives, and so exempted from CFTC's exclusive jurisdiction if the generator's commitment to be available to produce electricity counts sufficiently as a service, like a utility distributing electricity. As mentioned, the CFTC termed exempted capacity market transactions as "forward capacity transactions," which hints that the CFTC, in fact, views them as forward contracts. Specifically exempted were transactions where the RTO, as the central-facility counterparty in the bid-auction system used, purchased the right to:

103. PJM, *supra* note 102, at 149.
104. 7 U.S.C. §1a(47)(A).
105. Aagaard & Kleit, *supra* note 1, at 98 (citation omitted).
106. *Id.* at 101.
107. 78 Fed. Reg. 19880, 19912-14 (forward capacity transactions include purchasing the right to require generators "to offer specified amounts of electric energy into the Day-Ahead or Real-Time Markets for electric energy transactions; and . . . inject electric energy into the [grid]").
108. Aagaard & Kleit, *supra* note 1, at 90-91.
109. *Id.* (citing PJM, 2018/2019 RPM Base Residual Auction Planning Period Parameters, *available at* https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2018-2019-planning-parameters-report.ashx.).
110. 738 F. Supp. 1472 (S.D.N.Y. 1990).

> [r]equire certain sellers [generators] to maintain the interconnection of electric generation facilities to specific physical locations in the [grid] during a future period of time[; r]equire such sellers to offer specified amounts of electric energy into the Day-Ahead or Real-Time Markets for electric energy transactions; and . . . [r]equire . . . such sellers to inject electric energy into the [grid.][111]

These contracts that both sellers and buyers enter into have specified obligations, but the sellers can apparently sell off certain excesses in their commitments to provide capacity, even while keeping some "core" of their commitment, making the contract inherently adjustable. LSEs, meanwhile, seem unchanging in their capacity requirements because their allotment does not change. Per the "Brent Interpretation,"[112] forward contracts with a genuine intent to deliver the underlying commodity—in this case, electricity, where a quasi-governmental body authorized by a federal agency is obligating entities to deliver it if the body deems it necessary—are exempt from CFTC exclusive jurisdiction.

Forward contracts with embedded optionality, like if the intent of a generator going into the capacity auction is to sell off some of its commitment, might arguably render the selling off of some of its resource commitment in a following incremental auction as a variable pricing term. Arguably, the "legitimate commercial purpose" of the contract is overriding and thus excluding (from CFTC exclusive jurisdiction) because of the purpose the capacity transaction serves, which is grid reliability and securing a reliable power supply sufficient to satisfy peak (estimated) demand for electricity at a future period.

Overall, this Article concludes that transactions in RTO-administered transactions in the day-ahead and real-time markets are spot transactions and that capacity markets are not swaps, even though capacity transactions may highly resemble derivatives in some respects.

III. CFTC v. FERC Regulation: Should RTO-Administered Markets Be Regulated Like Swap Markets?

So goes the *Cargill* maxim for the regulation and prevention of fraud: "[t]he methods and techniques of manipulation are limited only by the ingenuity of man."[113] Before giving a "like" answer, that is, addressing the question of whether the RTO markets should be regulated *like* swap markets begets another question: whether the CFTC should exert exclusive jurisdiction over RTO-pursuant electricity transactions that might qualify as, or otherwise resemble, swaps (having already made the determination that capacity market transactions are probably not swaps).

This Article summarily asserts that the agency should not do so, as consistent with the public interest determination it made in exempting those transactions from its exclusive jurisdiction. The nature of electricity markets is different from more "purely" financial markets, because markets in the six RTOs are uniquely structured to handle, and are tied to, the physical capacity of the transmission grid. Further, FERC uses markets for a purpose beyond the integrity of financial transactions: the facilitation of just and reasonable rates and a reliable power supply. The analysis discusses these questions as if FERC would adopt some level of CFTC regulation, not the CFTC asserting greater jurisdiction. Ultimately, the Article adopts the position that CFTC regulation is rather similar to FERC regulation in terms of market resources and monitoring, and cannot clearly inform what issues pervade FERC's problems with either market design or operation.

What the previous part, and this part, illustrate is that several wholesale RTO-administered markets and many of their respective transactions under FERC jurisdiction are based on securities law and regulation. However, the grid-reliability purpose of capacity markets raises the question of whether securities regulation involving derivatives is, in fact, an adequate model for the capacity markets' function and accomplishment of that purpose. While the CFTC exempted RTO-administered transactions happening pursuant to a FERC-approved tariff from CFTC exclusive jurisdiction, overlapping jurisdiction between the two agencies was, for example, at issue in *Hunter v. Federal Energy Regulatory Commission*, where the issue of jurisdiction was authority over natural gas-based futures contracts.[114]

This Article does not expand on that case, but it does make a point that the anti-fraud and anti-manipulation authorities that the agencies depend on could be more effective through a stronger presence of antitrust authority in market oversight. FERC still in great part uses the securities model to police energy market manipulation, even if it is not limited to this model. This informs the broader question of whether CFTC regulations fit the form, operation, and purpose of the FPA and the markets that FERC oversees under its FPA jurisdiction.

A. *Effective Enforcement and Prevention of Market and Price Manipulation*

Both FERC's and the CFTC's frameworks for regulating competition are based on securities law and regulation. With respect to general enforcement, this framework centers around the prevention of fraud. Both agencies' statutory anti-fraud authorities for policing commodities and derivatives stem from §10(b) of the Securities

111. 78 Fed. Reg. 19880, 19913.
112. Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39188 (Sept. 25, 1990) ("Brent Interpretation").
113. Cargill, Inc. v. Hardin, 452 F.2d 1154, 1163 (8th Cir. 1971).
114. 711 F.3d 155, 160 (D.C. Cir. 2013) (the CFTC has exclusive jurisdiction over prohibition of manipulation of natural gas futures contracts, but "FERC is free to prohibit manipulative trading in markets outside the CFTC's exclusive jurisdiction") (citation omitted).

Exchange Act of 1934 (SEA).[115] Section 10 provides in relevant part that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[116]

The Energy Policy Act of 2005 explicitly borrowed this language in amending the FPA to prohibit, "in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to [FERC's] jurisdiction, . . . *any manipulative or deceptive device or contrivance* (as those terms are used in section 78j(b) of Title 15 [SEA Section 10(b)]), in contravention of such rules and regulations as [FERC] may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers."[117]

FERC, equipped with this broad new power and directive to focus on energy market fraud,[118] laid out in Order 670 in 2006 a new Anti-Manipulation Rule that was modeled after the Securities and Exchange Commission's (SEC's) in its Rule 10b-5, which was promulgated pursuant to SEA §10(b).[119] FERC opted to "define[ ] fraud generally," to "include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market."[120] FERC's Anti-Manipulation Rule reads as follows:

> (a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,
>
> (1) To use or employ any device, scheme, or artifice to defraud,
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.
>
> (b) Nothing in this section shall be construed to create a private right of action.[121]

This language's enactment followed the early-2000s "Enron scandal." Enron, a public utility, traded in energy commodities markets and manipulated California's energy market (such as by creating and profiting from electricity supply shortages and scheduling transfer of power to deliberately create congestion in transmission lines), ultimately contributing to statewide blackouts and electricity shortages, exposing the inadequacies of existing energy market regulation (including of early capacity markets) to deal with fraud, and catalyzing many of its changes.[122]

Compared to FERC's Anti-Manipulation Rule, the CFTC's authority is slightly different in that it has both explicit anti-manipulation and anti-fraud rules.[123] Section 6(c)(1) of the CEA, with similar language to the SEA and FPA, makes it unlawful, "in connection with any swap, or a contract of sale of any commodity in interstate commerce[ ] or for future delivery," to "use or employ . . . any manipulative or deceptive device or contrivance" in contravention of CFTC-promulgated rules.[124] Section 753 of

115. 15 U.S.C. §78j(b). *See* Thomas R. Millar & Paul J. Pantano Jr., *Open Market Manipulation: The Dangers of Policing Thought*, 39 Futures & Derivatives L. Rep. n.2 (2019) ("Collectively, we refer to these provisions as the 'Anti-Manipulation Laws.'").
116. 15 U.S.C. §78j (2010). For the purpose of regulation of the use of manipulative and deceptive devices, there was not significant change between the 2010 language and the language after the SEA's 2000 amendments. *Compare id. with* Pub. L. No. 106-554, tit. III, §303(d), 114 Stat. 2763, 2763A-454 (2000).
117. FPA §222, 16 U.S.C. §824v (2005) (emphasis added); Energy Policy Act of 2005, Pub. L. No. 109-58, §1283, 119 Stat. 594, 979-80 (codified as amended at 16 U.S.C. §824v (2005)).
118. Congress "drafted broadly to combat manipulation in all its forms. Indeed, preventing manipulation is one of the central purposes of the Securities Exchange Act of 1934, as well as the Commodities Exchange Act." Maxwell K. Multer, *Open-Market Manipulation Under SEC Rule 10b-5 and Its Analogues: Inappropriate Distinctions, Judicial Disagreement and Case Study: FERC's Anti-Manipulation Rule*, 39 Sec. Reg. L.J. 97, 100 (2011) (citing Steve Thel, *Regulation of Manipulation Under Section 10(B): Securities Prices and the Text of the Securities Exchange Act of 1934*, 1988 Colum. Bus. L. Rev. 359, 433-34 (1988)). "[I]t was [the Energy Policy Act's] expansive statutory language that [made clear] Congress granted FERC broad authority and considerable flexibility to proscribe and prosecute all forms of electricity-market manipulation." Matthew Evans, *Regulating Electricity-Market Manipulation: A Proposal for New Regulatory Regime to Proscribe All Forms of Manipulation*, 113 Mich. L. Rev. 585, 592 (2015) (citing 16 U.S.C. §824v & Multer, *supra*, at 98-101).
119. Prohibition of Energy Market Manipulation, Order No. 670, 114 FERC ¶ 61047, para. 5, 71 Fed. Reg. 4244, 4246 (2006) (FERC using SEC Rule 10b-5 as a guide for its Anti-Manipulation Rule) (to be codified at 18 C.F.R. §1c) [hereinafter FERC Order 670]; 18 C.F.R. §1c.2 (2006) (Section 2 of FERC's Anti-Manipulation Rule: "Prohibition of electric energy market manipulation"); 17 C.F.R. §240.10b-5 (2006) (SEC's Anti-Manipulation Rule; authority derived from 15 U.S.C. §78j (SEA §10(b))); Federal Energy Regul. Comm'n v. Barclays Bank PLC, 105 F. Supp. 3d 1121, 1146 (E.D. Cal. 2015) ("FPA §222[, 16 U.S.C. §824v,] makes unlawful the use of 'any manipulative or deceptive device or contrivance[ ]' as those terms are used in . . . Section 10(b) of the Securities Exchange Act [ ] and its corresponding Rule 10b-5").
120. Public Citizen, Inc. v. Federal Energy Regul. Comm'n, 7 F.4th 1177, 1183-84 (D.C. Cir. 2021) (quoting FERC Order 670, *supra* note 119, at paras. 38-39).
121. 18 C.F.R. §1c.2. See identical language in the SEC's Anti-Manipulation Rule at 17 C.F.R. §240.10b-5.
122. *See* Evans, *supra* note 118, at 592 (citing Timothy P. Duane, *Regulation's Rationale: Learning From the California Energy Crisis*, 19 Yale J. on Reg. 471, 472-73 (2002)); Spence & Prentice, *supra* note 40, at 154-57 (2012). For a discussion of the "California Electricity Crisis and Its Aftermath," see Spence & Prentice, *supra* note 40, at 154-75.
123. *See* CFTC, Anti-Manipulation and Anti-Fraud Final Rules, https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/amaf_factsheet_final.pdf [hereinafter CFTC Rules Fact Sheet].
124. 7 U.S.C. §9(1).

the Dodd-Frank Act amended §6c to prohibit manipulation and fraud involving swaps and commodity sales and added a "special provision for manipulation by false reporting, including an exception for good faith mistakes."[125] The CFTC's Anti-Manipulation Rule, Rule 180.1, is substantially similar to FERC's and is also modeled on SEC Rule 10b-5.[126] Rule 180.1 reads in relevant part as follows:

> (a) It shall be unlawful for any person, directly or indirectly, *in connection with any swap*, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly:
>
> (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;
>
> (2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;
>
> (3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person; or,
>
> (4) Deliver or cause to be delivered, or attempt to deliver or cause to be delivered, for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate. Notwithstanding the foregoing, no violation of this subsection shall exist where the person mistakenly transmits, in good faith, false or misleading or inaccurate information to a price reporting service.[127]

There are two differences compared with FERC's and the SEC's rules. First, the CFTC's rule specifically prohibits the use of a "manipulative device" as opposed to just a "device," and it includes an intent element with "intentionally or recklessly" language.[128] Second, the CFTC rule prohibits misleading communication about market information with knowing or reckless disregard, reflecting CEA §6c(1)(a).[129]

The CFTC's regulation goes further with its Anti-Price Manipulation Rule, Rule 180.2, which "mirrors text of new CEA section 6(c)(3)."[130] The Dodd-Frank Act codified in §6(c)(3) the CFTC's "long-standing authority to prohibit price manipulation."[131] The Anti-Price Manipulation Rule reads as follows: "It shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity."[132] While other rules accompany these laws and regulations and implement their authority, such as granting the ability to level civil penalties, these are the core rules enumerating these agencies' anti-manipulation provisions.

With respect to enforcement, it is not clear whether the CFTC or FERC is "better" or more effective with respect to deterrence of fraud through enforcement, such as through penalties. This Article finds generally that each agency's regimes are somewhat effective for the purpose of enforcement, and leaves it to other scholarship to analyze theories of better enforcement strategies. One exception is the notion that the CFTC's explicit Anti-Price Manipulation Rule puts forth a broader foundation for countering market manipulation beyond fraud (i.e., non-deceptive manipulation), and FERC, which lacks such a rule, should adopt a modified version of it because it more effectively handles price manipulation, even though FERC applies its existing authority fairly flexibly and successfully.[133]

The 2005 Energy Policy Act's expansion of FERC's anti-fraud enforcement powers "translated into a massive expansion of FERC's market analysis and surveillance operations as well as a substantial increase in the capacity of its enforcement division."[134] This accounts for the massive amount of electric surveillance screening that FERC's Division of Analytics and Surveillance does, in the range of hundreds of thousands of screen trips (in 2024, that number was 619,416) triggered among few of millions of transactions that the agency reviews for uneconomic transactions, transmission congestion manipulation, abnormal payments and offers, and loss-making offer strategies.[135]

This does bear out in detection of defrauding market participants and barring of their participation in the market. Following are two examples.

First, in December 2024, FERC ordered a demand response resource owner to pay civil penalties for making bogus offers into Midcontinent ISO's (MISO's) capacity market.[136] The entity had been registering and clearing demand response resources with MISO without their

125. CFTC Rules Fact Sheet, *supra* note 123; 7 U.S.C. §9(1)(a) (titled "Special provision for manipulation by false reporting").
126. *See* 18 C.F.R. §1c.2; CFTC Rules Fact Sheet, *supra* note 123 ("Final Rule 180.1, which is modeled on Securities and Exchange Commission Rule 10b-5 . . . .").
127. 17 C.F.R. §180.1(a) (2011) (the CFTC's Anti-Manipulation Rule: "Prohibition on the employment, or attempted employment, of manipulative and deceptive devices").
128. *Compare id. with* 18 C.F.R. §1c.2 (FERC rule) & 17 C.F.R. §240.10b-5 (SEC rule).
129. *Id.* §180.1(a)(4).
130. 7 U.S.C. §9(3); CFTC Rules Fact Sheet, *supra* note 123.
131. *Id.*
132. 17 C.F.R. §180.2 (2011) (the CFTC's Anti-Price Manipulation Rule: "Prohibition on price manipulation").
133. Evans, *supra* note 118, pt. III, at 600 (arguing that FERC should adopt a "modified version" of the CFTC Anti-Price Manipulation Rule).
134. William Boyd, *Ways of Price Making and the Challenge of Market Governance in U.S. Energy Law*, 105 Minn. L. Rev. 739, 803 (2020).
135. 2024 FERC Report on Enforcement, *supra* note 77, at 78-79.
136. Ketchup Caddy, LLC and Philip Mango, Order Assessing Civil Penalties, Docket No. IN23-14-000, 189 FERC ¶ 61176 (2024):
> Ketchup Caddy's uncontracted MW suppressed the zonal and system-wide capacity price in several Planning Years, which harmed suppliers and sent inaccurate [capacity] price signals to the market . . . . [Office of Enforcement] Staff determined that other suppliers would have received $17,639,142.07 in additional revenue had Ketchup Caddy not offered fraudulent MW in the PRA[,]

knowledge or consent (i.e., by not contracting with them) by scraping customer data about their electricity usage from a utility company's website and offering it into MISO's capacity market auctions from 2019 until 2021.[137]

While FERC only issued an order assessing civil penalties after 2-3 years of investigation and a February 2024 show-cause order (a chance for the entity to explain why it did not violate FERC's Anti-Manipulation Rule and thus not have to pay a penalty) elicited no response, the entity was barred from participating in the capacity market in October 2021 once MISO became aware of its fraudulent registrations.[138] "The conduct . . . potentially risked the reliability of the MISO grid as MISO could not rely on Ketchup Caddy's fraudulent capacity in an emergency."[139]

Second is a 2023 court case against an entity conducting wash trades in PJM's real-time and day-ahead markets.[140] FERC issued penalties against this entity in 2015 for violating its Anti-Manipulation Rule by conducting round-trip trades, trades "pre-arranged to cancel each other out involv[ing] no economic risk" (wash trades), and netting payment "because it learned that in certain situations PJM paid out credits that at times exceeded the transaction fees charged by PJM."[141]

After 7+ years of discovery, FERC "plausibly and amply" asserted "well-pleaded allegations . . . [that] meet the requirements for market manipulation because FERC shows Powhatan committed (1) fraud, with the (2) requisite scienter, (3) in connection with the purchase or sale of electric energy within FERC's jurisdiction."[142] FERC noted in its 2023 and 2024 reports on enforcement that, "while most enforcement actions conclude in settlements, this marks the first time a federal district court has issued a final judgment against an entity the Commission has found to have committed market manipulation[,]" and successfully at that.[143]

While considering that deceitful fraud and the broader "problem of market manipulation [are] hardly unique to electricity, . . . FERC deserves enormous credit for substantially enhancing its ability to monitor market conduct and police against manipulation."[144]

However, deterrence through enforcement is necessary but insufficient for wholesale markets, in particular capacity markets. FERC applies its anti-manipulation flexibly and with good success. However, while the CFTC is not concerned with price-making in the markets that it regulates, FERC very much is. The manners in which FERC makes such prices "just and reasonable" is discussed in the next section, but here I illustrate the problems that FERC has with the "actual mechanisms of price formation at the center of these markets" that make it "difficult [ ] to determine whether certain conduct should be considered legitimate or not,"[145] even when it does not directly have to do with fraud based on deceit.

This issue centers around exercises of market power, which have more to do with price manipulation and less with outright fraud, although it does cover it. While it is beyond the scope of this Article to discuss all market power-related issues related to capacity markets, it will cover the way that the exercise of market power manifests within monopolies on the sides of the buyer and seller in capacity markets. One of the most high-profile issues is state subsidies for certain generation resources, whether nuclear power or renewable energy.

State subsidies are less a matter of monopoly than just subsidization, but such subsidization still distorts the capacity market price.[146] States are pursuing their policy goals in preferring certain resources, but their subsidization of certain generator resources means that those resources can bid lower prices into the capacity market auction. Lower bids suppress (or have the potential to suppress) the resulting price to lower than it should be competitively, because the highest-cost bid meeting the VRR curve (RTO-constructed demand) is the single clearing price. If that price is lower, generators receive less revenue from the capacity market, and when this market is relied on to incentivize new generator resource construction, such market power is (necessarily) mitigated. This was the issue in *Hughes v. Talen Energy Marketing*,[147] where a state's contract for differences with a generator subsidized its operation while it bid at a price lower than its marginal cost, which violated federal law by distorting a FERC-authorized market price and thus encroaching on FERC's ability to set rates in interstate commerce.

Except with respect to the CFTC's Anti-Price Manipulation Rule, it is not precisely clear, based on the resources available to each agency's enforcement capabilities and the majority of their reporting requirements, that market manipulation is ineffectively unnoticed and unpunished (see the above examples)—and because it is noticed and

i.e., Ketchup Caddy cost other market participants that amount in pecuniary losses due to its market distortion, so FERC assessed a civil penalty sum of $25,000,000. *Id.* at paras. 35, 68, 76.

137. *Id.* at paras. 1-2, 20 n.50. The entity and its owner did admit to FERC that its activities were illegal. *Id.* at para. 45.

138. *Id.* at paras. 7, 13, 30. Another recent, even more dramatic grid-reliability-risking MISO case saw FERC issue a show-cause order for the fraudulent scheme of entities clearing energy efficiency resources through MISO and PJM capacity auctions that did not actually reduce energy usage (to the tune of a $722 million penalty and the disgorgement of $253 million in unjust profits); the entities were barred from participating in ISO-NE and MISO capacity markets before it expanded into PJM's capacity market in 2014. Ethan Howland, *American Efficient Faces $975M FERC Hit for "Manipulative Scheme" in MISO, PJM*, Util. Dive (Dec. 18, 2024), https://www.utilitydive.com/news/american-efficient-ferc-enforcement-pjm-miso-affirmed-energy/735874/ (citing American Efficient, LLC, Order to Show Cause and Notice of Proposed Penalty, Docket No. IN24-2-000, 189 FERC ¶ 61196 (2024)).

139. 189 FERC ¶ 61176, at para. 35.

140. Fed. Energy Regul. Comm'n v. Powhatan Energy Fund, LLC, 2023 WL 2603381 (E.D. Va. Mar. 22, 2023).

141. *Id.* at *1 (citation omitted).

142. *Id.* at *4, 6.

143. FERC, 2023 Report on Enforcement 11 (2023) (Docket No. AD07-13-017); 2024 FERC Report on Enforcement, *supra* note 77, at 78-79.

144. Boyd, *supra* note 134, at 804.

145. *Id.* at 804-05.

146. *See* Press Release, FERC, Danly Office White Paper: The Requirement That Competitive Markets Be Protected From the Exercise of Market Power Applied to RTO Capacity Markets (May 20, 2021), https://www.ferc.gov/news-events/news/danly-office-white-paper-requirement-competitive-markets-be-protected-exercise.

147. 136 S. Ct. 1288 (2016).

punished, meaning the regulation is reliably enforced, then anticompetitive behavior is somewhat deterred.[148]

However, I agree with the already-iterated argument that FERC should adopt the CFTC's Anti-Price Manipulation Rule to explicitly expand its enforcement ability to price manipulation.[149] This makes explicit and expectable a broader protection of competition in the market, which is useful for giving regulated entities fair notice and an opportunity for compliance.

B. Does CFTC Regulation Fit the FPA's Mandates?

The central question of this section is whether CFTC rules would fit the FPA's mandates. This can be, of course, rendered down to a matter of degree by arguing that *some* adoption of CFTC rules might, inevitably, be helpful. However, FERC and CFTC regulation each accomplish different goals pursuant to their organic statutes, and it is those goals that will be compared and discussed relative to each other. The short answer to this question is that no, CFTC regulation (nor jurisdiction) would not straightforwardly fit with and accomplish the FPA's mandates of reliability and just and reasonable rates better than FERC's existing regulation. Given that the form of reporting requirements is similar across markets subject to both the CFTC's and FERC's jurisdictions, the real-time reporting has no real impact.

Broadly, the "mission of the [CFTC] is to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation."[150] The CEA accomplishes this through providing clearing requirements, enabling the CFTC to operate a comprehensive regime for regulating swaps, futures, and other derivatives as a matter of making sure that investors are well-informed about the decisions they make. "One of the main premises of securities regulation in the United States is that a fair and efficient securities market requires that accurate information be available to all investors . . . . Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions."[151]

However, "[t]his type of information-based regulation proves insufficient to prohibit all forms of manipulation in the electricity markets."[152] Further, the FPA charges FERC with ensuring that the electric grid operates reliably, ensuring that rates which are levied on retail customers are just and reasonable. Ensuring the integrity of markets, even when FERC relies on market-based rates to produce rates that are just and reasonable,[153] is not sufficient to produce outcomes where, for example, the transmission system does not get overwhelmed and cause blackouts.

This is because the markets that FERC operates are invariably tied to the physical delivery of electric energy, and markets that RTOs administer along with managing operational control of the grid on which the transfer of electricity underlying electricity spot market transactions operate are delicate operations. They require balancing in a more physical sense than financial or derivatives markets do, so FERC regulations are specifically tailored to physical energy markets and mitigation against exercises of market power that cause increased rates to retail consumers.[154]

C. Would CFTC Swap Regulation Interfere With the Operation of RTO Markets?

On the one hand, the reporting requirements comprising compliance monitoring are, in fact, substantially similar between FERC and CFTC market regulation, but are tailored differently. Swap dealers report hourly, daily, and other periodic data that underlie the transactions, business actions such as changes in market power, and trading strategies, similar to what participants in RTO-administered markets do. The largest difference with respect to effectiveness of reporting requirements is that the CFTC largely handles non-physical and financial markets, whereas FERC focuses on physical markets, including for electricity. FERC's reporting requirements solicit data from the market participants and are subject to the monitoring of compliance of advanced data-analytic software that reviews the data.[155]

In terms of market size, the CFTC's market monitoring is spread across a more diverse set of financial instruments and markets, while FERC is more focused on fewer but larger and more complex physical infrastructure and

148. "When regulations are universally understood and reliably enforced, the regulated entities are more likely to comply voluntarily—a more efficient outcome than enforcement actions, and an outcome that mitigates any perceived injustice or capriciousness." Evans, *supra* note 118, at 597 (2015) (citing Jason Nichols, *"Sorry! What the Regulation Really Means Is . . . ": Administrative Agencies' Ability to Alter an Existing Regulatory Landscape Through Reinterpretation of Rules*, 80 Tex. L. Rev. 951, 953 (2002)).

149. *See* Evans, *supra* note 118, pt. III, at 600 (arguing that FERC should adopt a "modified version" of the CFTC Anti-Price Manipulation Rule).

150. *About the CFTC*, Commodities Future Trading Comm'n, https://www.cftc.gov/About/AboutTheCommission (last visited Mar. 3, 2026).

151. Evans, *supra* note 118, at 594.

152. *Id.*

153. FERC's market-based approach has been deemed by courts to be:

> consistent with the Federal Power Act's requirement of "just and reasonable" rates, reasoning that, in a "competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment."

Public Citizen, Inc. v. Fed. Energy Regul. Comm'n, 7 F.4th 1177, 1184 (D.C. Cir. 2021) (citing Tejas Power Corp. v. Fed. Energy Regul. Comm'n, 908 F.2d 998, 1004 (D.C. Cir. 1990); Louisiana Energy & Power Auth. v. Fed. Energy Regul. Comm'n, 141 F.3d 364, 365 (D.C. Cir. 1998); California ex rel. Lockyer v. Fed. Energy Regul. Comm'n, 383 F.3d 1006, 1013 (9th Cir. 2004); Elizabethtown Gas Co. v. Fed. Energy Regul. Comm'n, 10 F.3d 866, 870 (D.C. Cir. 1993)).

154. *See, e.g.*, FERC, Staff Analysis of Energy Offer Mitigation in RTO and ISO Markets 3 (2014) (Docket No. AD14-14-000), https://www.ferc.gov/sites/default/files/2020-05/AD14-14-mitigation-rto-iso-markets_0.pdf (discussing approaches to market power mitigation):

> Prices in organized electricity markets are established through tariffs and practices that enable a competitive market. Market power mitigation measures help to ensure competitive outcomes and are carried out by a combination of independent internal market monitoring units within each RTO and ISO and an independent external market monitor, or an independent external market monitor alone.

155. 2024 Report on Enforcement, *supra* note 77, at 78-79.

energy markets. FERC has a larger budget than the CFTC does. Overall, FERC is well-resourced for monitoring energy markets in particular, especially given its high budget (in the hundreds of millions of dollars)[156] and focus on large-scale infrastructure, whereas the CFTC's resources are more widely distributed across the diverse financial markets it oversees.

Capacity markets have two purposes: securing reliable electricity supply and incentivizing the development of new generation resources. While these have their own criticisms, such as market concentration in capacity markets,[157] a change through CFTC swap regulation, as applied to FERC markets, would have mixed success based on the implemented alterations in reporting requirements and certain real-time reporting of transactions, where applicable. While the reporting duties required by each agency are obviously tailored to their respective agencies, they are actually similarly substantial in their scope. Considering that securities regulation is the model for both agencies' anti-fraud authority, the agencies have developed monitoring regimes that are also remarkably alike in their comprehensiveness, despite their tailored differences, namely physical markets versus financial markets. Given the relatively similar substantiveness between the reporting requirements, not much would change in that respect.

What does or would constrain FERC is that the CFTC's exemptive authority is required to be exercised in order to implement certain reforms. That is obstructive for capacity market reforms. If anything, this Article argues that a broader grant of exemption should be granted to FERC, given how limited the CFTC made its exemptions of RTO-administered market transactions to be.[158] RTOs are themselves market authorities and are subject to FERC's direct regulation and oversight.[159] Reform of RTO-administered markets might take new forms and adopt new commodities or other financial instruments to accomplish such reforms. While considering the existing cross-market memorandum agreement to which FERC and the CFTC have agreed,[160] the administration of RTO-administered markets would benefit from a somewhat broader exclusion from the CFTC's exclusive jurisdiction that allows some greater, reasonable amount of flexibility in such market administration going into the future.

Moreover, along the point of sufficiently overseen market competition, this Article draws a final point to the fact that while both of these agencies have similar regimes of market enforcement and monitoring, a broader and stronger enforcement of antitrust authority would benefit consumers if applied to both agencies' jurisdictional markets.[161] FERC, for instance, could have use for broader antitrust authority enforcement to enhance competition in the markets it oversees.[162] In any market, including electricity markets, "[a]ntitrust, properly applied, promotes competition on the merits, fostering strong rivalries and competitive vigor[.]"[163] FERC, of course, moderates the market power of the utilities it oversees, many monopolistic, with numerous checks on said power.[164] Given ever-more complicated demand of the transmission grid, ever-more effective and strong enforcement of consumer protection and price competition would benefit the consumers of the RTO-administered markets that FERC oversees.[165]

IV. Conclusion

In conclusion, the transactions that occur in RTO-administered markets, especially the spot markets and capacity markets, are not swaps. Capacity transactions, in particular, do resemble swaps, but their invariable tie to physical delivery of electric energy most likely does not render them swaps. Even if they were, the monitoring and compliance regimes between FERC and the CFTC are similar and substantial enough that applying CFTC regulation and requirements would have, at best, mixed results. This is because FERC's purpose and mandate go beyond ensuring the integrity of its markets to establishing just and reasonable rates and the reliability of the transmission system, which requires delicate balancing of electricity demand and supply.

156. *See* FERC, *FY 2026 Congressional Justification*, https://www.ferc.gov/media/fy-2026-congressional-justification (last updated June 20, 2025).
157. *See FERC v. the Biden Executive Order: Reversing Course on Competition in the Energy Sector?*, Am. Antitrust Inst. (Sept. 6, 2022), https://www.antitrustinstitute.org/work-product/ferc-v-the-biden-executive-order-reversing-course-on-competition-in-the-energy-sector/.
158. *See* 78 Fed. Reg. 19880, 19905.
159. *See, e.g.*, Maryland Off. of People's Couns. v. Federal Energy Regul. Comm'n, 2026 U.S. App. LEXIS 806, __ F. 4th __ (D.C. Cir. 2026).
160. Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Commodity Futures Trading Commission (Jan. 2, 2014), https://ferc.gov/sites/default/files/2021-04/mou-ferc-cftc-jurisdictional.pdf; Press Release, CFTC, FERC, CFTC Sign MOUs on Jurisdiction and Information Sharing (Jan. 2, 2014), https://www.cftc.gov/PressRoom/PressReleases/6816-14.
161. This Article notes that the current policy in CFTC-jurisdictional markets in 2026 is neither regulation nor policy by enforcement. *See* Michael Selig, *America's Financial Markets Are Ready for a Golden Age*, Wash. Post (Jan. 20, 2026), https://www.washingtonpost.com/opinions/2026/01/20/cftc-trump-administration-markets-regulation (describing a stop to "policymaking [and regulation] by enforcement").
162. *See* Sandeep Vaheesan, *Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity*, 46 U. Mich. J.L. Reform 921 (2013); Mark C. Christie, *It's Time to Reconsider Single-Clearing Price Mechanisms in U.S. Energy Markets*, 44 Energy L.J. 1 (2023) (discussing the complex market impact entailed by "public policies [that] have distorted the pricing mechanisms in RTO power markets that use marginal costs to determine outcomes and how these policies are likely to continue to do so").
163. *See* Alden Abbot, *Can Antitrust Promote Competitiveness?*, Forbes (Feb. 24, 2025), https://www.forbes.com/sites/aldenabbott/2025/02/24/can-antitrust-promote-competitiveness/ (citing *The Role & Responsibility of Antitrust*, U.S. Chamber Comm. (Sept. 20, 2021), https://www.uschamber.com/antitrust/the-role-responsibility-of-antitrust).
164. *See, e.g.*, Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697-A, 123 FERC ¶ 61055, para. 419 (Apr. 21, 2008); FERC, *Electric Competition*, https://www.ferc.gov/industries-data/electric/power-sales-and-markets/electric-competition (last updated Aug. 6, 2020) (FERC's "goal has always been to find the best possible mix of regulation and competition to protect consumers from the exercise of monopoly power.").
165. *See Power Markets 101: How Competition Keeps the Lights On—and Costs Down*, Elec. Power Supply Ass'n (Oct. 28, 2025), https://epsa.org/power-markets-101/.

However, FERC's adoption of an explicit, if modified, version of the CFTC Anti-Price Manipulation Rule would give it more juice to handle price manipulation in its jurisdictional markets, even if FERC already applies its existing Anti-Manipulation Rule flexibly. This would help with preventing the exercise of market power in an electricity market like the capacity market. The capacity market has an abundance of criticisms, but as stated, it is vital for procuring reliable power supply sufficient to meet demand.

Considering that both the CFTC and FERC base their enforcement regimes off of securities regulation, their compliance and monitoring efforts are indeed remarkably similar. FERC's existing regime could use change, but not necessarily more from securities regulation, tailored as FERC's regime already is to the physical delivery of energy. It could, instead, utilize generally broader and stronger antitrust enforcement and authority.