

***Resolution Opposing the Commodity Futures Trading Commission
Plan to Allow for Private Lawsuits***

WHEREAS, The Commodity Futures Trading Commission (CFTC) issued its *Notice of Proposed Amendment to and Request for Comment on the 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* on May 16, 2016; *and*

WHEREAS, The CFTC is proposing to amend an order issued on March 28, 2013, that exempted specified electric energy transactions from certain provisions of the Commodity Exchange Act (CEA) and CFTC regulations (RTO-ISO Order). The CFTC is proposing to amend the text of the RTO-ISO Order to explicitly provide that the RTO-ISO Order does not exempt the entities covered under the RTO-ISO Order from the private right of action found in Section 22 of the CEA with respect to anti-fraud and anti-manipulation claims made by private third parties; *and*

WHEREAS, The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), in part, amended the CEA and altered the scope of the CFTC's jurisdiction. The Dodd-Frank Act also included a savings clause, paragraph (I)(i) of CEA section 2(a)(1), which preserves the existing statutory authority of FERC and State regulatory authorities over agreements, contracts, or transactions entered into pursuant to a tariff or rate schedule approved by FERC or a State regulatory authority, that are (1) not executed, traded, or cleared on an entity or trading facility subject to registration with the CFTC, or (2) executed, traded, or cleared on a registered entity or trading facility owned or operated by a Regional Transmission Organization (RTO) or Independent System Operator (ISO); however, paragraph (I)(ii) of CEA section 2(a)(1) also preserves the CFTC's statutory authority over such agreements, contracts, or transactions. Thus, the CFTC does not have sole jurisdiction over transactions covered by the RTO-ISO Order; *and*

WHEREAS, The Federal Power Act specifically prohibits a private cause of action; *and*

WHEREAS, The Federal Energy Regulatory Commission (FERC) staff has submitted comments to the CFTC opposing the introduction to FERC-jurisdictional markets of a private right of action under the CEA. Among the arguments against the proposal, FERC staff noted that Congress directed that the CFTC and FERC establish cooperative procedures for avoiding conflicts where the agencies' jurisdiction may overlap and that, as required by Congress, the CFTC and FERC have set forth such procedures in a memorandum of understanding. FERC staff warned that the CFTC's proposal to establish a private right of action under the CEA risks the potential of jurisdictional conflicts between the CFTC and FERC being disputed by private actors in court proceedings, rather than through the inter-agency cooperation that Congress intended; *and*

WHEREAS, The Public Utilities Commission of Texas has submitted comments to the CFTC that urge the CFTC "to leave the RTO-ISO Order in its current form, thereby clarifying that Section 22 claims are precluded;" *and*

WHEREAS, Chairman Fred Upton and Ranking Member Frank Pallone, Jr., of the Committee on Energy and Commerce, U.S. House of Representatives, the House Committee with jurisdiction over the FERC, have written to the CFTC requesting a briefing regarding the CFTC's proposal because they are concerned about the impact the proposal could have on the wholesale electricity markets; *and*

WHEREAS, The CFTC proposal to allow for private rights of action for transactions in the RTO or ISO markets could upset the Congressionally-mandated balance, increase regulatory uncertainty and litigation risk, and make the markets less efficient; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2016 Summer Meetings in Nashville, Tennessee, urges that the Commodity Futures Trading Commission not take any actions that would permit Section 22 claims in the RTO and ISO markets.

Sponsored by the Committee on Electricity on July 26, 2016
Adopted by the NARUC Board of Directors July 27, 2016