

Resolution on Preserving State Authority over New Electric Generation

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) is a national organization representing State Commissions statutorily responsible for regulating utilities that provide energy services; *and*

WHEREAS, State Commissions have a statutory obligation to ensure that the electric utilities they regulate provide safe and reliable service to retail customers at just and reasonable rates; *and*

WHEREAS, State Commissions have long had exclusive regulatory responsibility for assuring generation resource adequacy for retail electric customers; *and*

WHEREAS, In Section 201 of the Federal Power Act (FPA), Congress specifies that federal regulation under the FPA "extend[s] only to those matters that are not subject to regulation by the States"; *and*

WHEREAS, The FPA reserves to the States authority over facilities used in the generation of electric energy; *and*

WHEREAS, The FPA protects State authority over "integrated resource planning and utility buy-side" decisions and "utility generation and resource portfolios," *New York v. FERC*, 535 U.S. 1, 24 (2002) (*quoting* FERC Order No. 888 at 31,782 n.544); *and*

WHEREAS, Over the last several years, storms and periods of extraordinary weather events have challenged the existing generation infrastructure; *and*

WHEREAS, Numerous States have enacted or are considering the enactment of statutes and their commissions have implemented or may consider implementing programs designed to address the States' need to ensure the construction of new generation, to maintain existing generation, and to address environmental concerns; *and*

WHEREAS, The U.S. Court of Appeals for the Fourth Circuit, in its published decision in *PPL EnergyPlus, LLC v. Nazarian*, __ F.3d __, 2014 WL 2445800 (4th Cir. June 2, 2014), has ruled that Maryland's programs providing for regulated retail utilities to contract with new generators are preempted by the FPA; *and*

WHEREAS, The U.S. District Court for the District of New Jersey, utilizing the same reasoning as adopted by the 4th Circuit, ruled that New Jersey's statute which is similar to Maryland's program, is also preempted by the FPA, *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D.N.J. 2013), appeal pending, Nos. 13-4330 et al. (argued Mar. 27, 2014); *and*

WHEREAS, The application of broad and sweeping field preemption doctrine in these two decisions has the potential to adversely impact the States' FPA-protected authority over integrated resource planning, utility procurement decisions, utility generation, distribution, and resource portfolios; *and*

WHEREAS, The two decisions' application of broad and sweeping field preemption doctrine to prohibit or invalidate State-sanctioned contracts supporting new generation undermines and conflicts with the State Commissions' jurisdictional authority to ensure clean, affordable and reliable electric energy; *now, therefore be it resolved*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its Summer Meeting in Dallas, Texas convened at its 2014 Summer Committee Meetings in Dallas, Texas, continues to support legal and legislative actions to protect and preserve States' authority to decide the type, amount and timing of new or existing generation facilities that will be constructed or maintained within the State to achieve legitimate State policy objectives; to promote such new development through State supervision of retail utility contracting; to safeguard and guarantee States' continued right to operate programs to procure new generation or maintain existing generation for reliability, affordability and environmental purposes through use of long-term contracts or any State statutory or regulatory actions; and to ensure that nothing in the Federal Power Act be deemed to preempt or prohibit such activity by the States.

*Passed by the Committees on Electricity and on Energy Resources and the Environment.
Adopted by the Board of Directors, July 16, 2014.*