

***Resolution Relating to the Federal/State Jurisdictional Boundaries in
Resource Planning and Procurement by Electric Utilities***

WHEREAS, While there are different models for the provision of retail electric service in effect in the United States, most State commissions have a constitutional or statutory responsibility to ensure a reliable and economic supply of electric power for delivery to consumers served by a regulated utility with a power supply obligation within their States (“regulated utilities”); *and*

WHEREAS, The Federal Power Act of 1935 grants to the Federal Energy Regulatory Commission (FERC) jurisdiction over electric power sales for resale and transmission in interstate commerce; *and*

WHEREAS, The Federal Power Act explicitly provides that federal regulation extends only to matters which are not subject to regulation by the States; *and*

WHEREAS, The Federal Power Act provides that FERC shall not have jurisdiction over generation facilities; *and*

WHEREAS, FERC recognized in Order No. 888 that its jurisdiction did not extend to resource planning and procurement decisions of utilities subject to regulation at the State level; *and*

WHEREAS, State commissions, especially in States that have restructured their retail electric industry, are supportive of robust wholesale markets as an important option available to regulated utilities to meet the needs of consumers, along with self-build, demand response, and other options which should be evaluated in an integrated and comprehensive fashion; *and*

WHEREAS, State commissions support power purchases and asset acquisitions, whether from third-parties or affiliated companies, that benefit consumers, occur fairly, and are made without undue bias or discrimination; *and*

WHEREAS, State commissions and Legislatures have been overseeing resource planning and procurement for decades so that State processes for evaluating resource options have evolved and improved over time to include statutes, rules, and standards of conduct that address, *inter alia*, prudence reviews (for asset acquisition, rate cases and fuel clause proceedings), resource planning, siting, asset transfers, affiliate transactions, and affiliate pricing; *and*

WHEREAS, State commission regulation and authority over resource planning and procurement decisions have not changed in States which have not restructured their retail electric industries, and even in restructured States, State Commissions may have retained such authority with respect to regulated utilities operating within their States; *and*

WHEREAS, There are multiple price and non-price factors, such as financing, price stability, security of supply, deployment of new technologies, and fuel diversity, that must be considered by regulated utilities in making resource planning and procurement decisions and by State Commissions in reviewing and/or approving such decisions; *and*

WHEREAS, In a series of recent pronouncements [including *Allegheny Energy* (ER04-730), *SCE/Mountainview* (ER04-316), *Entergy Services* (ER03-583), *Southern Power Company* (ER03-713), *Ameren* (EC03-53 and ER02-1451), *Oklahoma Gas and Electric* (EC03-131), *Cinergy Services* (ER02-113), *Conectiv Energy Supply, Inc.* (ER05-121-000), and in two recent policy statements (PL04-6 and PL04-9)], FERC has made decisions and enunciated policies that create uncertainty for participants in State planning and procurement processes; *and*

WHEREAS, In *Ameren* FERC declared that it would apply the standard in *Boston Edison Co. Re: Edgar Electric Co.* 55 FERC ¶61,382 (“*Edgar*”) to State-approved purchases of affiliate generation assets under §203 of the Federal Power Act; *and*

WHEREAS, In *Ameren* and *Allegheny* FERC declared that in applying the *Edgar* standard in its review of both purchase power agreements under §205 of the Federal Power Act and generation asset acquisitions under §203 of the Federal Power Act, while not abandoning completely the traditional application of the *Edgar* standard, it would favor the use of competitive requests for proposals that complied with certain principles; *and*

WHEREAS, While the input of FERC concerning utility resource procurement decisions can be constructive and FERC’s guidelines concerning competitive requests for proposals are helpful, States are concerned that FERC’s application of the *Edgar* standard to future utility resource procurement decisions involving affiliates reflects a lack of understanding of, and confidence in, the regulatory efforts of State commissions which have retained such authority and, as a practical matter, might have the effect of imposing a federal procurement regulatory standard on a matter subject to State jurisdiction; *and*

WHEREAS, While respecting FERC’s role in reviewing wholesale transactions, FERC orders appear to have broad implications for State regulatory and legislative policies, and make it difficult for the National Association of Regulatory Utility Commissioners (NARUC) and many of its members to participate and otherwise provide input in a comprehensive and effective manner; *and*

WHEREAS, While State commissions share FERC’s concerns about potential affiliate abuse, State commissions which have retained comprehensive jurisdiction over utility planning and procurement decisions have both the legal authority and factual context to evaluate utility planning and resource procurement options based on the local environment, economic development concerns, and competing local interests, and can best determine the most appropriate balance of resources that best serves the utility’s consumers and the overall public interest; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its February 2005 Winter Meetings in Washington, D.C., hereby states its belief that FERC can play a constructive role in assisting States in fulfilling their responsibilities to ensure a reliable and economic supply of electric power to consumers but should not establish policies which might have the effect of mandating or standardizing any aspect of a regulated utility’s resource planning, procurement, and acquisition process; FERC should acknowledge the jurisdiction, practices, and expertise of the States in the planning,

procurement, and acquisition process; and, in exercising its authority under §§ 203 and 205 of the Federal Power Act in this context, FERC should be cognizant of the context in which the subject matter of its review arises and give substantial deference to the decisions made by a State; *and be it further*

RESOLVED, That States, groups of States in a region with shared jurisdiction over multi-jurisdictional utilities, and existing and future Regional State Committees, can and should continue to coordinate regional resource planning efforts to maximize efficiencies and synergies for incremental resource construction, acquisition, or implementation in a manner that is legally and pragmatically appropriate, thereby being a more effective solution than federal intervention; *and be it further*

RESOLVED, That a forum should be developed for State and federal regulators, with input from industry, legislators, and other stakeholders to make their views known regarding the proper role of State commissions, regional bodies where they exist, and FERC in utility resource and acquisition decisions; to identify any perceived gaps between Federal and State regulations, policies, or practices concerning such decisions; and to identify best practices for resource planning, procurement, and acquisitions that might be adopted and implemented by States which choose to do so; *and be it further*

RESOLVED, The NARUC staff should immediately begin working with State commissions to design, fund, organize and conduct a forum to address the issues raised by this Resolution in a comprehensive and effective manner.

Sponsored by the Committee on Electricity

Adopted by the NARUC Board of Directors February 16, 2005