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M E M O R A N D U M

JULY 23, 1999

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PAUGH) LJP

RE: UNDOCKETED: REGIONAL TRANSMISSION ORGANIZATIONS

Attached is a copy of responses submitted by Florida Power & Light Company, Florida Power Corporation, Tampa Electric Company, Southern Company, Duke Energy and Jacksonville Electric Authority for filing in the above referenced matter.

LJP/js
Attachment
I:rtomemo.ljp

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July 21, 1999

JEA

Commissioner Joe Garcia, Chairman
Florida Public Service Commission
Capital Circle Officer Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Commissioner Julia L. Johnson
Florida Public Service Commission
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Commissioner J. Terry Deason
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Commissioner Susan F. Clark
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Commissioner E. Leon Jacobs
Florida Public Service Commission
Capital Circle Office Center
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Tallahassee, FL 32399-0850

Re: Undocketed Matter of Regional Transmission Organizations

Dear Commissioners:

For several months, the Commission has been receiving and considering various proposals for a transmission model to serve Florida in the post FERC Order 888 environment. To date, the only two alternatives that have emerged for serious consideration have been that proposed by the Florida Municipal Power Agency, et al, and the FPL/FPC proposal. JEA believes that there is a third model, which would better serve the needs of Florida's electric consumers while treating all stakeholders equitably. That model is a publicly owned not-for-profit transco.

The proposal outlined in this letter is conceptual only, and does not purport to cover all the myriad of issues which would have to be resolved in moving the state toward such a model. The restructuring contemplated by FERC is an opportunity to go beyond piecing together a compromised version of the status quo. It is an opportunity to fashion a transmission system that will have as its primary purpose maximizing the efficiencies of a competitive generation market on behalf of the consuming public. JEA believes that this opportunity for Florida to embrace a not-for-profit transco is the best approach to assure a robust competitive generation market. It is a window of opportunity that will not remain open indefinitely.

JEA also believes there is great potential benefit for consumers in the wholesale environment contemplated by the Energy Policy Act of 1992. That benefit can be most fully achieved if the transmission system is exclusively focused on facilitating a robust generation market without the accompanying fiduciary obligations to stockholders to maximize return on investment. This is true regarding transmission because it will remain a natural monopoly subject to comprehensive regulation in the most probable scheme of things. To the contrary, generation will not be a natural monopoly, and a competitive regime in that dimension will best serve the public. The thrust of this proposal is to utilize the monopoly nature by subordinating it completely to the optimization of the competitive generation market.

The transco model, with a complete separation of beneficial interests in generation and transmission, is the best mechanism to assure meeting the FERC minimal requirements as set out in the NOPR. These are: a) independence of all market participants, b) appropriate scope and regional configuration to serve a rational market, c) possession of full operational authority for all transmission facilities, and d) exclusive authority to maintain short-term reliability.

In addition to most appropriately meeting those minimum requirements, a publicly owned not-for-profit transco has much to commend it as the better solution to the state's transmission needs. Its primary purpose would be unambiguous – facilitating a truly competitive wholesale generation market. The planning and financing of necessary expansion and renewal would be clarified by the unitary ownership, removing one of the most troublesome features of less-than-transco proposals. Social and environmental costs inherent in the use of the state's natural resources for transmission facilities could be transparently internalized and more readily managed in the public interest. It would remove, or substantially mitigate, the effects of over-regulation and over-litigation as various competing interests maneuvered for competitive advantage.

The proposal advanced here would require substantial amendment to existing law for effective implementation. The structure and governance would certainly be political questions that would have to be resolved in the legislative arena. There would be disputed questions as to the measure of compensation to be paid to owners of transmission incorporated into such an unitary system that would undoubtedly have to be resolved in the legislative forum, and most probably, in judicial forums ultimately. A suitable statutory pathway to regional coordination should be left open and the transco would be subject to any federal legislation affecting transmission reliability. The question of regulation of a unitary publicly owned system would also be a political question at both state and federal levels. The Florida PSC should fashion a proposal for completing a statutory framework for a transco that it feels would best serve the consumer needs of Florida, and address those to the legislature. In the long-run, the PSC role in such a mechanism should be designed to provide the technical and economic oversight necessary to assure the public through the legislative and executive branches that the state transmission system in fact serves its stated purpose.

There are numerous other elements, which would be highly contentious, and would have to be resolved in the political or judicial arenas. Even so, that would be preferable to the sub-optimization and almost certain perpetual state of litigation and legislative maneuvering that would accompany a less-than-transco solution. JEA respectfully requests the publicly owned not-for-profit transco model for transmission be included in the on-going consideration being given to Florida's response to the NOPR. If the commission is not so disposed, JEA respectfully suggests that maintaining the status quo is the next best option.

Respectfully,

Tracy Danese

Tracy Danese
Chief Public Affairs Officer

cc: Joe Jenkins, Director of Electric and Gas
Blanco S. Bayo, Director, Division of Records and Reporting
Leslie Paugh, Esquire

TD/ej

SOUTHERN RESPONSES

DUKE ENERGY RESPONSES

State of Florida
-M-E-M-O-R-A-N-D-U-M-

Public Service Commission

DATE: July 6, 1999

TO: JOE JENKINS, DIRECTOR, DIVISION OF ELECTRIC AND GAS
BOB TRAPP, DIVISION OF ELECTRIC AND GAS
BOB ELIAS, DIVISION OF LEGAL SERVICES
LESLIE PAUGH, DIVISION OF LEGAL SERVICES

FROM: CINDY MILLER, OFFICE OF GENERAL COUNSEL

RE: SOUTHERN'S ANTICIPATED COMMENTS ON THE FERC RTO NOPR

Attached is an outline of Southern's expected comments, as sent by Gary Livingston.

CBM/jb
cc: Chuck Hill

June 14, 1999

INITIAL OUTLINE OR RESPONSE TO FERC'S RTO NOPR

I. INTRODUCTION AND BACKGROUND

A. Statement Of Overall Recommendations

1. RTO formation and the evolution of transmission institutions must be voluntary and the States' concerns must be addressed
2. Utilities and others contemplating the transmission business must retain the discretion to keep their best options open
3. FERC must provide incentives for system improvement and expansion
4. FERC should pursue a market-driven and business-oriented resolution to transmission issues

II. PARTICIPATION IN AN RTO MUST BE VOLUNTARY

A. An RTO Is Not Necessary For Economic And Engineering Reasons

1. Economic and engineering inefficiency has not been shown
2. A heavily-regulated, bureaucratic RTO would be less efficient than a traditional utility

B. An RTO Is Not Necessary For Non-discriminatory Access

1. Orders 888 and 889 are working
2. Growth of wholesale market
3. No showing of large scale violations
4. Regulation based on "perceived discriminatory conduct" is inappropriate and probably harmful

C. States Do Not Desire A FERC Mandate

1. Regional flexibility
2. Retail markets
3. Transmission cost shifting
4. Participation of public power

D. FERC Lacks The Legal Authority To Mandate RTOs

1. Section 202 contemplates voluntary actions
2. Sections 205 and 206 do not allow action based on perception and mistrust
3. Sections 211 and 212 require specific actions that have not occurred

E. FERC Must Not Use Penalties To Coerce "Voluntary" Action
   1. Market rate authority
   2. Merger approval
   3. Other Actions

III. MINIMUM CHARACTERISTICS, FUNCTIONS, AND ARCHITECTURE

A. Minimum Characteristics
   1. Independence
      a. Non-stakeholder board and 1 % ownership limitation are to stringent
      b. Intrusive regulation to establish independence is largely unprecedented (e.g., acute concern for independence not a feature in natural gas or railroads and has been mandated by antitrust agencies and courts only as a remedy to substantial and substantiated antitrust injury)
   2. Scope and regional configuration
      a. Consistent with the idea that RTOs must be voluntary, FERC should allow participants to establish boundaries and scope
      b. Participants should be allowed to withdraw if configuration changes
   3. Operational authority
   4. Short-term reliability

B. Minimum Functions
   1. Tariff administration and design
   2. Congestion management
   3. Parallel path flow
   4. Ancillary services
   5. OASIS and TTC/ATC posting
   6. Market monitoring: need to ensure market monitoring does not turn the RTO into another, potentially duplicative and inefficient layer of regulation
   7. Planning and expansion

C. Open Architecture
   1. RTO must be able to evolve from one form to another (filing requirement for approved ISOs would appear to pose a potential threat to ISO evolution because of the need for protracted negotiations over new informational filing)
   2. Transmission owners should not be forced to be in RTO that has evolved in an undesirable manner.

IV. FERC SHOULD TAKE STEPS TO ENCOURAGE VOLUNTARY RTOS

A. Ratemaking For Transmission Facilities Under RTO Control
   1. Rates must be compensatory
   2. Rates must encourage expansion of the system
   3. Rates must prevent a subsidy of wholesale transactions by bundled retail customers
   4. Rates should be designed to alleviate cost shifting concerns

B. Incentives For RTO Participation
   1. Higher Returns
   2. Incentive rates
   3. Retain premium on divested assets
   4. Replacement value rather than net book rate base
   5. Shorter recovery period

C. Removal Of Impediments
   1. Adverse tax consequences
   2. IRS rules on public power

V. OTHER ISSUES

A. Preexisting Contracts

B. Existing Regional Transmission Entities

C. Providing Service To Utilities That Do Not Participate In An RTO

D. Power Exchange

E. Need For The Commission To Consider RTO Applications Expeditiously And Streamline The Adoption Of New Pricing Proposals

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Regional Transmission Organizations and FERC Questions Regarding Notice of Proposed Rulemaking	)	UNDOCKETED
	)	SUBMITTED: JULY 9, 1999

COMMENTS OF
DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY
AND DUKE ENERGY NORTH AMERICA

Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke New Smyrna"), and Duke Energy North America, L.L.C. ("DENA"), collectively referred to herein as "Duke," pursuant to the memorandum request of the Commission Staff dated May 28, 1999, hereby submit their comments regarding the issues relating to the Federal Energy Regulatory Commission's Notice of Proposed Rulemaking relating to Regional Transmission Organizations (the "FERC NOPR").

Background

On May 12, 1999, the FERC issued its Notice of Proposed Rulemaking regarding Regional Transmission Organizations ("RTOs"). 87 FERC ¶ 61,173 (FERC Docket No. RM99-2-000). Following the November 1998 issuance of the FERC's notice of intent to consult with the states regarding transmission issues, and anticipating the FERC NOPR, the Commission held a series of informal workshops to promote discussion of issues relating to the structure of the transmission sector of Florida's electric

industry. In the course of these workshops, which began in January 1999, the various participants expressed concerns regarding the present status of the transmission sector and desires regarding possible future structures for the transmission sector. One group of participants, which has come to be known as the ITA Working Group, met and developed a proposal for an Independent Transmission Administrator ("ITA"). This ITA Working Group consists of Seminole Electric Cooperative, Inc., the Florida Municipal Power Agency, Tampa Electric Company, Orlando Utilities Commission, Reliant Energy, Inc., Constellation Power Development, Inc., PG&E Generating (formerly U.S. Generating Company), and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. Another group of participants, consisting of Florida Power & Light Company ("FPL") and Florida Power Corporation ("FPC") also met and have put forth a proposal identified as a Regional Transmission Solution (the "RTS").

In the NOPR, the FERC has identified four characteristics that it believes RTOs should possess and seven functions that it proposes RTOs should perform. These are as follows:

Characteristics

1. Independence from market participants.
2. Serve a region of sufficient scope and configuration to permit the RTO to perform effectively and support efficient and non-discriminatory power markets.
3. Operational responsibility for all transmission facilities under its control.

4. Exclusive authority for maintaining the short-term reliability of the grid it operates.

Functions

1. Administer its own transmission tariff and use a transmission pricing system that promotes efficient use and expansions of transmission and generation facilities.
2. Ensure the development and operation of market mechanisms to manage transmission congestion.
3. Develop and implement procedures to address parallel path flow issues both within its own region and with other regions.
4. Serve as supplier of last resort for all ancillary services required by Order No. 888 and other Commission orders.
5. Be the single OASIS (Open Access Same-Time Information System) administrator for all transmission facilities under its control and independently calculate total transmission capacity (TTC) and available transmission capacity (ATC).
6. Monitor markets for transmission services, ancillary services and bulk power to identify design flaws and market power and propose appropriate remedial actions.
7. Be responsible for planning necessary transmission additions and upgrades in coordination with appropriate state authorities.

Duke's comments include both general comments and some specific comments addressing the characteristics and functions identified in the FERC NOPR.

General Comments

Duke supports the core objectives for transmission systems set forth in the FERC NOPR. Duke supports a market-based resolution to transmission issues, with appropriate financial incentives to encourage optimal, or at least optimizing, operation of existing transmission facilities and addition of new transmission facilities. Duke also supports flexibility in determining RTO structures, with appropriate input from market participants and state regulatory commissions. Duke similarly supports the FERC's "open architecture" policy.

Form is less important than characteristics and function: the investor-owned transmission company ("Transco"[1]) structure, the independent system operator ("ISO") structure, or other structures, including the Florida Independent Transmission Administrator ("ITA") structure, can all work effectively to meet the core objectives of the RTO NOPR. At this juncture, Duke tends to favor the Transco structure as being most likely to promote the development of efficient and robustly competitive wholesale power markets. An independent Transco with incentives to operate as a profitable business seems to afford the best option and opportunity for optimizing the configuration, operation, and economic use of transmission assets, and probably of generation assets as well, while providing the framework for

[1] For the purposes of these comments, Duke uses the term Transco to mean an owner and operator of transmission assets who does not have any financial interest in generation.

achieving the FERC's goal of ensuring reliable transmission services and non-discriminatory transmission access in competitive power markets. Transcos also have inherent incentives to operate efficiently, satisfy customer needs, and reduce operating costs.

Other RTO structures may be appropriate for other markets, as determined by market participants, with appropriate input and participation from state commissions. Hybrid and innovative structures can achieve the FERC's objectives while serving as transitional structures. Duke believes that the ITA proposal developed by the ITA Working Group represents a sound, viable, and workable first step for Florida, and accordingly, Duke supports the ITA proposal.

States should continue to have a regulatory role with regard to matters that affect state economies and the reliability of electricity delivered to end-use customers within them. States should also, at a minimum, have meaningful input into the formation of RTOs that include them. Again, function is more important than form. While Duke supports the core objectives of FERC's RTO NOPR, Duke opposes mandatory forms for regional transmission organizations.

Specific Comments

Characteristics

Independence. Of the FERC NOPR characteristics and functions, Duke believes that the bedrock principle must be

independence. Market forces should drive the appropriate governance structure, e.g., stakeholder or non-stakeholder governing bodies. For stakeholder boards and underlying members' committees of either stakeholder or non-stakeholder boards, independence is assured through the allocation of voting rights that satisfy FERC's original bedrock principle of independence as outlined in Order 888 and subsequent orders. Independence of RTOs should continue to be determined and evaluated on a case-by-case basis.

Regional Scope and Configuration. In general, the regional scope of an RTO should be as large as is reasonably possible, as determined by market considerations, and taking account of applicable technical and economic constraints. Market forces should drive the appropriate size of each RTO. Duke supports full consideration of regional configuration factors, including ATC calculation, loop flow internalization, one-stop shopping for transmission services, congestion management, and service at non-pancaked rates, in the determination of each RTO's size and scope.

Operational Responsibility. Duke agrees with the FERC's principle that, however an RTO is structured and however control over transmission facilities in the region is allocated (e.g., direct control, functional control, or a combination approach), the RTO must have operational responsibility for the transmission facilities in the region.

Authority for Short-Term Reliability. Duke agrees with the

FERC's principle that the RTO must have authority for maintaining short-term reliability of the grid that it operates. Duke also believes that it should exercise this authority with a view toward achieving optimum, or optimizing, value-based market resolutions of commercial and reliability issues. The RTO should also be responsible for developing appropriate local reliability standards where necessary and for adhering to national reliability standards.

Functions

Administer Its Own Efficiency-Enhancing Transmission Tariff. Duke strongly believes that, regardless of its form, an RTO should develop and administer its tariffs to promote the efficient use of the transmission system and to promote the economically efficient expansion of transmission facilities within its purview. The RTO should provide one-stop transmission service shopping. This would include, at a minimum, a tariff system that would be available and applicable to and within Peninsular Florida. The system should include the elimination of "pancaked" rates and pricing flexibility to promote optimizing, value-based market results. Duke believes that it is appropriate to provide for reasonable transitional periods and tariffs.

Market Mechanisms for Congestion Management. Duke strongly supports the use of market mechanisms and solutions for generation and loads in order to resolve transmission congestion and other transmission problems. A case-by-case approach to these issues is appropriate.

Address Parallel Path Flow Issues. RTOs should be of sufficient size to internalize loop flows. This may or may not result in the development of RTOs that match the geographic coverage of existing utility and reliability council regions.

Supplier of Last Resort for Ancillary Services. Consistent with its fundamental position regarding the market direction of RTOs generally, Duke strongly supports the FERC's principle that each RTO should promote the development of competitive markets for ancillary services wherever feasible. Duke believes that the RTO, as the transmission service provider, may appropriately be required to provide ancillary services pursuant to Orders 888 and 889, and that the express reservation of the self-supply option for ancillary services for which self-supply is feasible (i.e., other than system dispatch and reactive supply and voltage control from generation resources) are appropriate components of a market-directed approach to the provision of transmission services.

Single OASIS Administrator. The RTO should operate a single, system-wide OASIS with one-stop shopping for transmission services and ATC determination in a consistent manner.

Monitor Markets and Propose Remedial Actions. Again, market-based solutions are more likely to optimize the use and expansion of transmission systems, including Florida's, than direct control or management schemes. RTOs should be market facilitators, not regulators: the regulatory framework already exists. Duke believes that properly structured RTOs should not

engage in formal market monitoring. Again, Duke believes that a market-oriented RTO structure, with proper incentives to encourage economically optimal use of existing facilities and addition of new facilities, will generally tend to remedy or avoid potential problems in the normal course of its operations.

Plan and Coordinate Necessary Transmission Additions. The RTO will play a central role in planning and coordinating needed transmission additions. This will include establishing and enforcing (by contract) interconnection rules and procedures, as well as developing economic, market-justified new facilities.

Duke sincerely appreciates the opportunity to submit these comments to the Florida Public Service Commission as it considers the issues posed by the FERC's Notice of Proposed Rulemaking regarding Regional Transmission Organizations. Duke looks forward to continued participation with the Commission and the other Florida generation and transmission market participants in the Commission's consideration of these important issues.

Respectfully submitted this 9th day of July, 1999.

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and

Duke Energy North America, L.L.C.

State of Florida
-M-E-M-O-R-A-N-D-U-M-

Public Service Commission

DATE: July 12, 1999

TO: CHAIRMAN JOE GARCIA
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER JULIA JOHNSON
COMMISSIONER E. LEON JACOBS

FROM: OFFICE OF GENERAL COUNSEL (MILLER)
DIVISION OF ELECTRIC AND GAS (TRAPP)
DIVISION OF LEGAL SERVI[redacted]

RE: FLORIDA UTILITIES' DRAFT RESPONSES TO FERC RULEMAKING ON REGIONAL TRANSMISSION ORGANIZATIONS

We have received draft responses for FPL, FPC, TECO, Southern, and Duke Energy. We are attaching them for your information. Staff has reviewed the responses. There does not appear to be a consensus on issues; opinions vary depending on whether the company owns transmission. We expect to receive additional responses.

We are developing a draft FPSC response to the FERC Rulemaking which will be on the July 26 Internal Affairs. We do not plan to individually address the 184 questions; instead, we will have a response (approximately 10 pages) which addresses many of the issues from an overview perspective.

Reply comments are due September 15. If the FPSC would like us to provide detailed responses to the individual questions, we could do so at that time.

CBM/jb
Attachment
cc: Chuck Hill
Katrina Tew
Jim Dean
Kenneth Dudley

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FPC RESPONSES

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

WORKSHOP ON REGIONAL TRANSMISSION ORGANIZATIONS

COMMENTS OF FLORIDA POWER CORPORATION

1. **Public comments are requested on the extent to which there remains undue discrimination in transmission services, and if it remains, in what forms. (page 83-84)**

Florida Power has not experienced undue discrimination in transmission services, nor have any customers filed any formal complaints at the FERC alleging that Florida Power has engaged in undue discrimination. If undue discrimination remains in other parts of the country, however, the extent is a function of the newness of the rules which the FERC has recently adopted. The existing regulatory regime did not begin until April 24, 1996, when the FERC published Order Nos. 888 and 889. In those orders, the FERC directed the vertically-integrated, investor-owned utilities to separate their wholesale merchant function from their transmission system operations and reliability function, to create an OASIS, and to adopt standards of conduct. All of this work was to be done by the beginning of 1997. On March 4, 1997, the FERC issued Order Nos. 888-A and 889-A. These orders required the filing of a new open access tariff, changes to the posting requirements on the OASIS, and changes to the companies' standards of conduct. Those orders were followed by Order Nos. 888-B and 889-B on November 25, 1997, and 888-C on January 20, 1998. Since January 1998, orders interpreting the open access transmission tariff and the standards of conduct have been issued after almost every FERC meeting. Orders were still being issued in June 1999, approving companies' standards of conduct filings.

Since April 1996, industry groups have been developing the methodologies and technologies necessary to implement the separation of functions, OASIS, and standards of conduct ordered by FERC. These systems and processes have not had time to mature. It is far too soon to declare them ineffective, or even insufficiently effective. The industry and individual companies must be allowed time to implement the complex rules and tariff changes which have necessitated fundamental changes to the structure of companies and the way they do business. New solutions to the problems posed by these changes must be given time to work.

The majority of actual or alleged instances of undue discrimination that may remain appear to be related to the calculation and posting of ATC. Florida Power submits that disputes relating to ATC are more properly classified as unresolved technical issues than as examples of discriminatory conduct. As the FERC pointed out, "Given the technical problem, it may be impossible to distinguish an inaccurate ATC presented in good faith from an inaccurate ATC presented for the purpose of favoring the transmission provider's marketing interests." (NOPR, page 67) Common sense suggests that, once the technical issues have been resolved, the volume of disputes relating to ATC postings will be greatly diminished. We agree with the conclusion in the case of Wisconsin Public Service Corporation 83 FERC 61,198 at 61,859, where the FERC said, "We conclude that these types of disputes will be reduced in the future if ground rules are set up in advance as to the type of documentation that would balance the needs of Wisconsin Public Service and its transmission customers. We believe that this balance may vary from system-to-system and is best resolved by the parties." Moreover, as market information becomes more readily available and transparent, mistrust and the need to file complaints simply to obtain information will be diminished.

Functional unbundling, codes of conduct, the availability of information on OASIS and technical advances have been effective in reducing actual and perceived discriminatory

conduct in the industry. These measures are still relatively new, and will prove more effective and less burdensome as additional experience is gained over time. Also, the natural separation of business functions initiated with functional unbundling is continuing to evolve, which will reduce the potential for conflicts and abuse as this trend continues.

2. Comments are requested regarding what remedies should be imposed in an effort to eliminate any remaining discriminatory conduct. (page 84)

The FERC should continue to utilize the remedies already in place, including separation of functions, open access tariffs, codes of conduct and complaint proceedings. Allegations of discriminatory conduct, if any, should be addressed in complaint proceedings before the FERC on a case-by-case basis.

3. Should participation in RTOs be mandatory or are there other possible remedies? (page 84)

No. RTOs should not be mandated. RTOs offer uncertain and unquantified future benefits while creating certain and definite undesirable consequences. First, the formation of RTOs results in new and costly institutions. Second, costs are shifted between customer groups. Third, authority is shifted from the states to the Federal government. RTOs are not the only direction the industry can move and may not be the best direction. Even, however, if RTOs were a desirable solution, RTO formation and membership would have to be voluntary because the FERC has not been granted authority to mandate RTO membership. See Appendix 1 for discussion of the FERC's authority.

5. The FERC seeks comment on the effect of RTOs on electricity market performance, including any data or other information that shed light on quantifying the extent of those benefits. (page 101)

The question presumes that benefits to electric market performance will result from RTOs and ignores the certain costs that will be required to form RTOs. To determine whether RTOs are a desirable solution to transmission issues, the benefits, if any, of RTOs must be quantified along with the costs of those RTOs. Also, alternatives to the formation of RTOs should be included in the analysis.

10. The FERC seeks comments regarding how an RTO would affect power costs. (page 109)

The direct and immediate effect of RTOs will be to increase power costs. The substantial implementation and operating costs of the formation of RTOs will be borne by all customers in the marketplace. In Florida, wholesale power transactions are a relatively small portion of the total marketplace. Future benefits are uncertain and would likely occur in any case as the marketplace evolves. Under these circumstances, it is essential that Florida's local interests be protected by determining if the cost/benefit relation projected for the industry as a whole is applicable to the Florida marketplace. In general, each region and state should evaluate the costs and benefits of electric industry restructuring to determine what changes are appropriate and cost effective.

12. The FERC invites further comments from the state commissions on all aspects of the proposed rule. (page 114)

As a result of Orders 888 and 889 as well as other changes in the electric industry, transmission systems originally designed for local service are being subjected to an increased volume of new types of transmission transactions. Although the transmission grid in Florida continues to be adequate to provide reliable transmission service to all customers, that is not the case in all parts of the country. The interconnected transmission grid in some regions is in need of significant expansion. In recent years the FERC has devoted more attention and resources to the problem of allocating existing transmission capacity among users than to the problem of fostering investment in new transmission capacity. This overarching emphasis placed on industry restructuring has created an atmosphere of instability and uncertainty in the industry. Under the best of circumstances, the siting and construction of significant new transmission facilities has become a difficult, costly and uncertain enterprise that may require five to ten years to complete. When it becomes uncertain who may own such facilities when, and if, they are eventually constructed and equally uncertain who will be required to pay for those facilities, it becomes increasingly difficult to justify a commitment to such projects. The effects of these new risks are not reflected in the traditional method for setting the allowed return on equity for transmission investment.

We urge the FERC to balance its goal of rapidly restructuring the electric utility industry against the immediate needs to maintain reliability and to foster an environment conducive to transmission construction. The projected customer savings from competition cannot be realized unless the transmission infrastructure is able to accommodate the expanded marketplace envisioned by the FERC. Transmission costs represent a small portion of the delivered cost of energy to the average customer. It follows that the effect of a higher return on equity designed to elicit increased transmission investment would have a

nominal effect on delivered energy costs, yet could be instrumental in unlocking significant customers savings derived from an expanded marketplace. In order to achieve this goal, the FERC should include an assessment of the practical need to expand transmission infrastructure in setting allowed levels of return on equity, and set rates at levels commensurate with the prevailing levels of risk and uncertainty in the industry.

31. How should the FERC consider proposals for state regulatory or other governmental officials to select board members for either stakeholders or non-stakeholder boards? (page 123)

It may be appropriate for state government officials to select stakeholder or non-stakeholder board members for not-for-profit organizations such as an ISO that maintain operational control over transmission assets but do not own those assets. By contrast, it would not be appropriate for a state official to select board members for an organization that owns assets and is accountable to investors to earn a return on invested capital.

32. How should the FERC view proposals for state government officials to serve as voting members of RTO boards? (page 123)

It may be appropriate for state government officials to serve as voting board members of not-for-profit organizations such as an ISO that maintain operational control over transmission assets but do not own those assets. By contrast, it would not be appropriate for a state official to serve as a voting board member for an organization that owns assets and is accountable to investors to earn a return on invested capital.

33. The FERC seeks comment on whether one percent is an appropriate de minimus ownership interest and, if not, what would constitute appropriate de minimus ownership for purposes of establishing independence. (page 124)

A de minimus ownership restriction would make it difficult or impossible to design effective financial incentives for the formation of RTOs. Incentives designed to induce existing transmission owners to join RTOs will be ineffective if existing owners do not retain continuity of ownership and remain in a position to benefit from incentives after formation of the RTO. Therefore, utilities should be allowed to continue ownership of transmission assets up to and including 100% ownership as long as ownership satisfies requirements for independence.

41. In general, which type of institution would better serve the goal of independence: a transco with de minimus ownership and a non-stakeholder board or an ISO with a non-stakeholder board? (page 126)

The preferred structure for an RTO is a for-profit transco with governance by an independent board with two equal advisory panels, one composed of transmission providers and the other composed of transmission customers. This type of structure has the best potential to balance the needs of investors and stakeholders. By contrast, a not-for-profit ISO lacks the proper incentives to maximize the value of the transmission system for both the owners and the customers of the system.

42. Can an RTO be truly independent if it does not have the authority to file changes in its tariff without the approval of other entities such as transmission owners? (page 127)

Transmission asset owners must retain the right to file for rate changes in order to retain appropriate financial control over capital invested by shareholders. Decisions regarding the timing of rate filings, rate design and, potentially, performance under incentive rates are intertwined functions which cannot practically be separated. It is questionable if a utility which surrenders control over its rates and revenues would be able to continue to raise capital for investment in new transmission assets. Also, the Commission's proposal to consider performance based rates and its proposed requirement that non-RTO transmission owners lose the right to make section 205 filings are contradictory.

48. Are there other factors that may limit the geographic scope of an RTO? (page 132)

Historically, pancaked transmission rates have served as a surrogate for distance-sensitive rates. Transmission rate de-pancaking over large geographic areas should not be allowed to result in uneconomic power plant siting or improper subsidies to generators. Fuel transportation costs will continue to be distance-based. If transmission prices are insensitive to distance over a large regional area this may create a significant bias toward minimizing fuel costs irrespective of the resulting transmission cost.

As the geographic scope of an RTO increases so does the potential risk that benefits could accrue to neighboring utility's customers or to power marketers and brokers at the expense of native-load customers. This is particularly true under a postage stamp rate regime when a neighbor's system is both larger and has a higher transmission rate. In that

case, when the costs and loads of the two transmission systems are combined, the transmission rates for the smaller, lower cost system will increase and those of the larger, more expensive system will decrease. Thus, the customers of the smaller transmission system will unfairly pay a penalty for their provider's past frugal and efficient operation. Alternatively, the use of a license plate rate regime creates other problems, including the loss of revenues related to wheeling-through transactions. This again causes higher transmission rates for native-load customers who often derive no benefit from these transactions. Both of these pricing regimes may also send incorrect pricing signals to those wishing to site new generating resources.

58. Finally, the FERC seeks comment on the question of how much deference, if any, should be given to the proposed scope and regional configuration of a proposed RTO. (page 139)

The Commission should defer to the industry and the parties forming an RTO to determine the proper size and configuration of any RTO. Although there are theoretical arguments for boundaries to be established at either strong or weak points of interconnection between markets, regardless of the placement of boundaries, neighboring regions can coordinate and reinforce interfaces if necessary and economic.

128. The FERC intends to be flexible in reviewing pricing innovations, and asks for comments as to what specific requirements, if any, may best suit its RTO goals. (page 197)

In order to support the goal of expanding the transmission grid, the Commission should allow 'and' pricing for a utility to construct new transmission facilities in those

circumstances where few customers benefit from those facilities. More broadly, transmission pricing policies need to be revised to allow incremental pricing of new transmission facilities. The unavailability of incremental pricing methods such as 'and' pricing is a major barrier to transmission expansion. 'And' pricing allows a utility to provide service to a new customer without increasing the cost to existing customers.

It has been the Commission's policy to disallow "and" pricing under all circumstances. The unfortunate consequence of disallowing 'and' pricing is that an otherwise beneficial transaction is cancelled, or if it is consummated, it has a detrimental impact on other users of the transmission system by causing higher rates. An example will be useful to demonstrate this situation.

A network transmission customer contracts with a yet-to-be-built generating resource to provide 100 MW of capacity. The load of the customer has not increased, so this new resource will merely replace an existing one. However, due to the location of the new generation, a system upgrade is required to accommodate the flows resulting from the new transaction.

The transmission provider has two choices regarding how the cost of these facilities are recovered, neither of which is a good choice. One choice is to roll the cost of these facilities into existing rates. In this event, all transmission customers would share in the cost of these facilities, even though only one customer, that with the 100 MW load, derives a benefit. The second choice is to charge the customer requesting the facilities the full cost of the upgrade. However, since the load on the transmission system does not change (only the source of the 100 MW changes), the amount of network load used to derive the transmission price for all customers is now reduced by 100 MW, since the customer paid for the construction of the facilities directly to serve this load. This causes the cost for all

other customers to increase since the amount of load sharing in the cost of the rest of the system is reduced by 100 MW.

This is a case where 'and' pricing is appropriate. The customer should pay the cost of the system upgrade and should continue to pay the cost to deliver 100 MW over the existing system. This has the desired effect of leaving all other customers neutral when facilities are constructed for a specific customer and for which other customers derive no benefit. Additionally, it provides a proper pricing signal to those siting the generation resource.

129. The FERC seeks comments on applying PBR (performance based ratemaking) to RTOs. Should PBR be voluntary or applied to all RTOs? (page 198)

Florida Power encourages the Commission to consider and accept incentive ratemaking proposals from utilities regardless of whether the utility is part of an RTO. To the extent that PBR mechanisms are effective in creating savings that result in a win-win situation for customers and investors, they should be made available generally and on a voluntary basis, and not be restricted to RTO members.

140. The FERC seeks comments on whether to entertain case-by-case proposals of rate incentive treatments for RTO participants. Will transmission owners respond to incentives, and will incentives be sufficient to achieve our objective of RTO formation? (page 201)

To encourage the formation of RTOs the Commission should consider incentives and stipulations such as a higher ROE for members of the RTO, accelerated recovery of capital for RTO start up costs, and inclusion of an acquisition premium in transmission rates for

additional transmission assets acquired to increase the size of the RTO. The type and amount of incentives appropriate to each utility or each RTO should be considered on a case-by-case basis.

Transmission owners will respond positively to such incentives. It is an undisputed fact that incentives are employed pervasively in competitive markets from the enterprise level down to the level of individual employees. Providing incentives is a fundamental, proven business principle. Transmission owners will factor the effects of incentives into their decision to move forward to form RTOs. Incentives are needed to encourage voluntary participation in an RTO in order to compensate for the costs and potential risks of taking this action.

Financial incentives of the type discussed above are inconsistent with a restriction of de minimus RTO ownership for existing transmission owners. Such incentives will be effective only if existing owners remain in a position to benefit from those incentives after RTO formation. Utilities should be allowed to continue ownership of transmission assets as long as the ownership is properly structured to satisfy requirements for independence.

172. Would regional workshops advance RTO formation? (page 215)

No. This is a state issue. If regulatory assistance is needed, it should come from the state, not FERC.

179. The FERC seeks comment on whether the filing requirements discussed above are inconsistent with or otherwise would inhibit voluntary participation in RTOs. (page 218)

Mandatory filing requirements and deadlines for RTO formation are inconsistent with the fact that RTO membership is voluntary. Furthermore, the proposed filing requirements and deadlines for the formation of RTOs will very likely delay and inhibit voluntary RTO participation according to the schedule proposed by the Commission. Those utilities that file proposals for RTOs consistent with the final RTO Rule on October 15, 2000 will be subject to a deadline to become operational by December 15, 2001, while those utilities that elect to file a description of their efforts to participate in an RTO will be exempt from this deadline. Presumably, utilities that are prepared to file definite plans would be exempt from the later deadline if they simply style their filing as a 'description of efforts' rather than as a definitive plan. Thus, these requirements may have the effect of counter-incentives to utilities considering RTO formation.

Furthermore, the Commission's proposed schedule for the formation of RTOs is unreasonable, and is more onerous than the ISO start up schedule imposed on California utilities. In California, it took four years from the initiation of rulemaking in April, 1994 until the ISO was operational in April of 1998. After the final restructuring rule was adopted on December 20, 1995, a very aggressive implementation schedule required over two years to make the ISO operational. In contrast, the Commission is proposing that RTOs be operational on December 15, 2001, less than three years after the issuance of the RTO NOPR on May 13, 1999. Admittedly, there are arguments that some aspects of RTO formation today may proceed faster than did the formation of the California ISO. However, there are also arguments to support the contention that new RTOs may justifiably take longer than the process in California. For example, in California the boundaries and therefore at least the potential utility membership of the ISO was known, whereas the

boundary/membership issue has slowed and some instances contributed to the failure of ISO formation efforts in other areas of the country.

The original January 1, 1998 deadline for start-up of the California ISO was set by the California legislature in September of 1996. The start-up date was set with little or no consideration for the organizational, operational and systems changes which would be required to implement an operational ISO. As a result of the extremely aggressive schedule coupled with penalties for late performance, many vendors refused to submit bids to build the necessary systems, resulting in fewer vendor options and higher costs. As we now know, California failed to meet the start-up deadline set by the legislature and the start-up cost for the California ISO exceeded $200 million. The Commission's proposed schedule has the potential to result in similar implementation and cost problems.

180. The FERC seeks comment on whether it needs to generically mandate RTO participation by all public utilities to remedy undue discrimination under Sections 205 and 206 of the FPA. (page 218)

Section 202 of the FPA addresses and controls the Commission's authority with respect to RTOs. Section 202 does not provide the Commission with the authority to mandate RTO participation. FPC submits that this should be the end of the inquiry with respect to whether the Commission can mandate RTO participation pursuant to Section 202, 205, 206 or any other provision of the FPA. Nevertheless, by seeking comment on whether its Section 205/206 authority could allow it to mandate RTO participation, the Commission contemplates using less direct means to effectuate what it is precluded from doing directly. These attempts to circumvent Section 202(a) of the FPA cannot withstand scrutiny. See Appendix 1 for additional discussion of FERC's authority.

182. In considering what actions might be appropriate if a utility fails to voluntarily join an RTO, the FERC seeks comment on whether market-based rates for generation services could continue to be justified for a public utility that does not participate in an RTO, whether a merger involving a public utility that is not a member of an RTO would be consistent with the public interest, whether non-participants that own transmission facilities should be allowed to use the non-pancaked transmission rates of the RTO participants in that region, whether transmission service provided by a transmitting utility needs to be under RTO to satisfy the discrimination standards of Section 211 and 212 of the FPA, and whether a public utility's lack of participation would otherwise be in violation of the FPA.

FPC submits that the Commission lacks the authority to mandate RTO participation and that such participation can be only on a voluntary basis, if at all. For this reason, the Commission cannot impose penalties for failure to voluntarily participate in an RTO. To do so would effectively make participation mandatory – in contravention of the FPA. See Appendix 1 for discussion of the FERC's authority.

Appendix 1

I. The Commission Lacks The Statutory Authority To Do What Is Proposed In The NOPR

A central issue permeating the NOPR is the extent of the Commission's authority to order the establishment of RTOs. For its part, the Commission avoids addressing the issue directly, stating that the Commission "stops short of generically ordering utilities into RTOs but instead [adopts] 'a policy of encouraging voluntary RTO participation and filings.' " (NOPR at 116). Nevertheless, the Commission seeks comment on whether it should generically require public utilities to transfer control of their transmission facilities to an RTO. Id. FPC submits that because the NOPR proposes both mandatory filing requirements[1] and penalties for lack of participation,[2] the Commission proposes to force RTO participation upon public utilities. This is a far cry from the stated goal of "encouraging voluntary participation." (NOPR at 7). Moreover, the overall result of the NOPR would be to force utilities that choose not to join an ISO to divest their transmission assets. Not only is such an extreme action well beyond the Commission's authority, it will result in the taking of utility property for which

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[1] See NOPR at 242-44 ("all public utilities that own, operate or control interstate transmission facilities . . . must file with the Commission by October 15, 2000, either (1) a proposal to participate in an RTO . . . or (2) an alternative filing describing its efforts to participate in an RTO, obstacles to RTO participation, and any plans and timetables for future efforts."); see also proposed § 35.34(f) (requiring a utility to file, inter alia, an explanation why a utility has not participated in an RTO).

[2] The Commission appears to be considering punitive actions for failure to join an RTO. See, e.g. NOPR at 237 (The Commission seeks comment on "what actions might be appropriate if a utility fails to voluntarily join an RTO").

the utilities are entitled to just compensation. As discussed below, the Commission does not have the statutory authority to mandate RTO participation. FPC submits that the Commission's efforts to call participation "voluntary" but effectively force participation upon the utilities cannot withstand scrutiny because the Commission cannot do indirectly what it is prohibited from doing directly.

A. The Commission Cannot Mandate RTO Participation

The Commission seeks comment on whether it should generically mandate RTO participation by all public utilities in order to remedy undue discrimination under Sections 205 and 206 of the Federal Power Act ("FPA"), 16 U.S.C. §§ 824d and 824e. (NOPR at 222). The Commission first must address the threshold question of whether Section 205, Section 206 or any other provision of the FPA grants the Commission the authority to mandate such participation. FPC submits that the FPA does not provide such authority.

Section 202(a) of the FPA directly addresses the very issue of coordination of transmission facilities at the heart of the NOPR. Section 202(a) states in pertinent part:

> the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the . . . transmission and sale of electricity. . . . It shall be the duty of the Commission to promote and encourage such interconnection and coordination with each district and between such districts.

16 U.S.C. § 824a(a) (1998).[3] Section 202(a) is controlling with respect to whether the Commission can order RTO participation and clearly does not provide the Commission with such authority. Rather, Section 202(a) limits the Commission's authority under the FPA to establishing regional districts and encouraging voluntary interconnection and coordination. In a number of judicial decisions, the courts have reinforced the conclusion that coordination of transmission facilities is intended to be "expressly voluntary" in nature.[4] This should be the end of the Commission's inquiry on the subject. Resort to Sections 205 and 206 to contravene the clear dictates of Section 202 is inappropriate.

B. The Proposed Rule Will Force Utilities To Divest Their Transmission Assets, Which Is Beyond the Scope of the Commission's Authority And Would Effectuate A Taking

1. Asset Divestiture Is Beyond The Scope Of the Commission's Powers

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[3] This Section 202(a) authority has recently been delegated to the Commission from the Department of Energy. 63 Fed. Reg. 53,889 (Oct. 1, 1998). See NOPR at 37 & n.44.

[4] See, e.g., Central Iowa Power Co-op v. FERC, 606 F.2d 1156, 1168 (D.C. Cir. 1979) ("[g]iven the expressly voluntary nature of coordination under section 202(a), the Commission could not have mandated adoption of the Agreement, and failure of the MAPP participants to establish a fully integrated electric system could not justify rejection of the Agreement filed.") (emphasis added). See also Duke Power Co. v. FERC, 401 F.2d 930, 943 (D.C. Cir. 1968) ("We find nothing in [Section 202(a)] authorizing the Commission to compel any particular interconnection or technique of coordination."); City of Huntington v. FPC, 498 F.2d 778, 783 (D.C. Cir. 1974) (agreeing with petitioners' argument that Section 202(a) "does not empower the Commission to regulate the terms of specific interconnection agreements . . . .").

The NOPR's proposed requirement that an RTO remain independent of all market participants imposes a de minimis ownership limitation (NOPR at 124), which would effectively require utilities choosing not to join an ISO to divest their transmission assets. However, the Commission does not have the authority to compel the divestiture of a utility's transmission assets. Section 202(a) of the FPA circumscribes the Commission's authority with respect to the establishment of RTOs. As discussed above, Section 202(a) does not give the Commission authority to mandate RTO participation or to compel a utility to contribute its transmission assets to an RTO. The NOPR suggests that the Commission could provide itself with this authority, which is simply not permissible. Iglesias v. United States, 848 F.2d 362, 366 (1988) ("[a] regulation . . . may not serve to amend a statute . . . or to add to the statute something which is not there.").

Furthermore, comparing the language of the FPA to the Public Utility Holding Company Act ("PUHCA"), which was enacted as part of the same Act as Part II of the FPA (governing regulation of electric utilities) reinforces the conclusion that the Congress did not intend to grant the Commission authority to order divestiture of a utility's assets. Specifically, Section 11(b) of PUHCA grants the Commission authority to order divestiture of such assets as necessary to "limit the operations of the holding-company system . . . to a single integrated utility." 15 U.S.C. § 79k(b)(1). In so doing, PUHCA provides for the appointment of a trustee who, "with the approval of the court shall have power to dispose of any or all such assets . . . ." 15 U.S. C. § 79k(d); see

also North American Co. v. SEC, 327 U.S. 686 (1945) (upholding the constitutionality of such divestiture provisions). Clearly, there is no analogous grant of authority to the Commission in the FPA with respect to asset divestiture – Congress could have granted the Commission the same divestment authority that it granted to the SEC, but chose not to do so.

2. Asset Divestiture Is A Taking For Which The Utilities Are Entitled To Just Compensation

As discussed above, the net effect of the proposed rule will be either the compulsory contribution of utility transmission assets to an RTO or the forced divestiture of utility assets. FPC submits that either result constitutes a taking of utility property for which the utilities are entitled to just compensation.

The Takings Clause of the U.S. Constitution prohibits the federal government from taking private property for public use without just compensation. U.S. Const. amend. V. The forced divestiture of a utility's assets by virtue of an administrative action constitutes a physical taking for which the utility is entitled to just compensation. See, e.g., City of Stilwell v. Ozarks Rural Elec. Coop. Corp., 166 F.3d 1064 (10th Cir. 1999). Moreover, participation in an RTO requires the utility to submit its assets to physical occupation, which also is the type of intrusion that rises to the level of a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); see also Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

Although the Commission may not have so intended, the NOPR will effectively cause the takings of utility property in the process of establishing RTOs. As provided in the Constitution, the utilities would therefore be entitled to just compensation for these assets. In the context of a taking of utility assets, the valuation of utility assets is a complex factual inquiry and could include a consideration of: (1) the value of the facilities and properties acquired; (2) lost revenues; (3) stranded costs; and (4) the reintegration costs, the utility's estimated costs to reconfigure its system to provide service to its customers. See Stilwell, 166 F.3d at 1070-71. While such issues are arguably premature because the Commission has not taken any action that would constitute a taking, FPC respectfully submits that such issues will inevitably flow from any final rule which results in forced divestment of utility assets. For this reason alone, the Commission should refrain from taking such an extreme action.

II. The Commission Lacks the Authority to Utilize Other Means To Indirectly Mandate RTO Participation

As discussed above, Section 202 of the FPA precludes the Commission from directly mandating RTO participation. Nevertheless, the Commission contemplates using less direct means to effectuate what it is precluded from doing directly. These attempts to circumvent the FPA cannot withstand scrutiny. In a number of instances, the Courts of Appeals have rejected analogous attempts by the Commission to utilize

indirect means to accomplish what it cannot do directly.[5] For instance, in Northern States Power Co. v. FERC, 1999 U.S. App. LEXIS 9069 (8th Cir. May 14, 1999), a recent appeal of an Order No. 888-related issue, the Eighth Circuit Court of Appeals rejected the Commission's attempt to require NSP to curtail electric transmission to native/retail consumers on a comparable basis with its wholesale customers. Noting that the Commission had no jurisdiction over retail rates and practices, the court found that the "indirect effect" of Order No. 888 was an attempt to regulate curtailment of NSP's native/retail consumers. The court held that the Commission had "transgressed its Congressional authority . . . ." 1999 U.S. App. LEXIS at p*17. By analogy, in the RTO context, the Commission does not have direct authority to mandate RTO participation. Its efforts to require participation through indirect means must fail for the same reasoning that the Eighth Circuit used when it rejected the Commission's attempt to use its jurisdictional authority to regulate activity (retail curtailment) beyond its jurisdiction. Described below are the specific methodologies by which the NOPR attempts to indirectly force RTO participation upon utilities.

A. The Commission Cannot Utilize Other Provisions Of The FPA To Mandate RTO Participation

[5] Richmond Power & Light v. FERC, 574 F.2d 610, 620 (D.C. Cir. 1978); see Florida Power & Light Co. v. FERC, 660 F.2d 668, 673 (5th Cir. 1981) ("In two recent cases, the courts have rejected ingenious arguments which would have established the Commission's authority to require wheeling by indirect means.") (citing New York State Electric & Gas Corp. v. FERC, 638 F.2d 388, 403 (2d Cir. 1980); Richmond Power & Light).

In the NOPR, the Commission seeks comment on whether Sections 205 and 206 of the FPA could serve to provide the Commission with the authority to mandate RTO participation as a remedy for alleged industry-wide discrimination by transmission owning entities in favor of their affiliates in the post-Order No. 888 regulatory environment. (NOPR at 38-40). FPC submits that the Commission has not made the requisite showing necessary to utilize its Section 205/206 authority on a generic basis to remedy alleged industry-wide discrimination.

To utilize its authority under Section 206 of the FPA, the Commission must make a finding that, inter alia, any "rate, charge, or classification . . . charged, or collected by any public utility for any transmission . . . " subject to the jurisdiction of the Commission or "a rule, regulation, practice or contract" affecting such rates for transmission is unduly discriminatory or preferential. 16 U.S.C. § 824e(a); see also Order No. 888 at 31,669 (citing Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1988) ("AGD")). In only three prior instances has the Commission relied on these ratepayer protection provisions to order industry-wide changes in a rulemaking proceeding; that is, in Order No. 436, Order No. 636 and Order No. 888.[6]

In AGD, the D.C. Circuit Court of Appeals affirmed Order No. 436 in pertinent part, upholding the Commission's effort to impose open-access conditions on pipelines securing "blanket" certificates to transport natural gas in interstate commerce to remedy

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[6] In Order No. 436, the Commission initiated the implementation of open-access transportation on interstate natural gas pipelines which was completed by Order No. 636. In Order No. 888, the Commission ordered electric utilities to file open access transmission tariffs.

industry-wide discrimination in the natural gas transportation context. The AGD court held that the Commission "is not required to make individual findings if it exercises its § 5 authority [the equivalent of Section 206 of the FPA] by means of a generic rule." 824 F.2d at 1008. However, as set forth below, the AGD court rejected the Commission's attempt to use such authority to remedy an additional problem that was not demonstrated to exist on an industry-wide basis.

There are a number of factors that make such a generic finding – the predicate to any Section 205/206 action – inappropriate in the RTO context. First, in AGD, the court upheld the Commission's generic findings of discrimination in part on the basis that no party disputed the existence of such discrimination. AGD, 824 F.2d at 1000. While Order No. 888 utilizes the same premise to mandate open access transmission, the Commission's factual findings are in fact being challenged on appeal of that order. See Transmission Access Policy Study Group v. FERC, Case No. 97-1715 (Appeal pending D.C. Cir.). Thus, as a threshold matter, the Commission's ability to use its Section 205/206 authority on a generic basis to remedy alleged discrimination in the electric industry arguably has never been affirmed on appeal.[7]

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[7] In United Distribution Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996) ("UDC") the D.C. Circuit addressed only the limited question of whether the Commission's Section 5 authority extended over pipeline-LDC contracts. The D.C. Circuit held that the Commission's Section 5 authority permitted it to "modify the set of contracts that form[ed] the structure of the natural gas industry only as much as necessary to alleviate the anti-competitive sales component of the bundled contracts." UDC at 1133.

Moreover, in Order No. 888 and Order No. 436 (the subject of the AGD appeal), the Commission mandated open access in order to remedy discriminatory activity. In the NOPR, however, the Commission in attempting to address an allegedly analogous problem is proposing to take the remedy a giant step further -- to effectively mandate that utilities divest themselves of their transmission assets in an effort to remedy alleged discriminatory activity.[8] While the Commission's remedial authority is quite broad, it is not without limitations.[9] As the court in AGD noted, the Commission's remedial authority cannot utilize an industry-wide solution to resolve a problem that does not exist on an industry-wide basis. AGD, 824 F.2d at 1019. Thus, the remedy must be proportionate to the alleged problem. Id.; see UDC, at 1133. However, such a generic remedy is not appropriate in the RTO NOPR context because the Commission cannot demonstrate the predicate for its industry-wide solution -- an industry-wide problem. Thus, the Commission has neither made the requisite finding of discrimination necessary to mandate RTO participation nor could it do so if it had made such a finding, because such a mandate would effectively contravene the FPA.

B. The Commission's Rule As Proposed Would Impermissibly Impose Common Carrier Status On Utilities

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[8] See section I.B.1, above.

[9] See, e.g., Richmond Power & Light, 574 F.2d at 620-21 (noting that the Commission could not be forced to do indirectly what would effectively contravene the FPA's prescription of mandatory wheeling).

In Order No. 888, the Commission acknowledged that in enacting the FPA, Congress had expressly chosen not to impose common carrier status on utilities. Order No. 888 at 31,678; Order No. 888-A at 30,202. As drafted, the Commission's RTO NOPR would effectively impose such a status on utilities -- which the Commission is directly prohibited from doing.

Under the common law definition, a common carrier is one who holds himself out as engaged in the business of providing a particular service to the public. Florida Power & Light Co. v. FERC, 660 F.2d at 674 (citations omitted). Common carrier status has a quasi-public character, arising from the undertaking to carry for all people indifferently. Id. (citation omitted). A carrier will not become a common carrier where its practice is to make individualized decisions regarding whether and on what terms to provide service.[10] Id. (citations omitted). The NOPR would effectively force common carrier status on the transmission facilities owned by utilities, because if forced to participate in an RTO, utilities would be required to relinquish control over their transmission facilities and would relinquish any decision-making authority over the future use of such assets. Such a result would convert the utilities into common carriers, which, as the Commission acknowledged in Order No. 888, is prohibited by the FPA.

C. Sections 211 and 212 of the FPA Do Not Give the Commission Authority to Take the Action Proposed in the NOPR

[10] Obviously, a regulated utility's ability to make such decisions is within the context of the Commission's proscription of undue preference or discrimination. See 16 U.S.C. § 824d(a).

The Commission seeks comment on whether it can use its authority under Sections 211 and 212 of the FPA to require a utility to place its transmission facilities under the control of an RTO in order to satisfy the discrimination standards of the FPA. (NOPR at 219). FPC submits that the Commission cannot rely on Sections 211 and 212 of the FPA to mandate RTO participation. In Order Nos. 888 and 888-A, the Commission recognized that it does not have the authority to order wheeling pursuant to Sections 211 and 212 except in cases where it makes specific findings "after affording an opportunity for an evidentiary hearing." 16 U.S.C. § 824j; see Order No. 888-A at 30,206. Such a prerequisite to any exercise of the Commission's authority under these provisions would apply equally to the Commission's efforts to compel RTO participation. Thus, the Commission cannot use its Section 211/212 authority on a generic basis to further its goal of mandating RTO participation in this rulemaking proceeding.

D. The Commission Cannot Use Its Jurisdiction Over Other Utility Activities To Compel RTO Participation

The Commission seeks comment on whether it could condition certain activities under its jurisdiction, such as the authority to charge market-based rate for generation services and to approve mergers, on RTO participation. (NOPR at 219). FPC submits that the Commission's inquiry in this regard is a thinly-veiled attempt to use its statutory authority over one aspect of a utility's operations to exercise authority over RTO participation, which, as set forth above, is beyond the Commission's statutory authority.

As noted above, such attempts to circumvent the statutory boundaries of the Section 202(a) of the FPA cannot survive judicial scrutiny.

For reasons analogous to those set forth above which make RTO participation inappropriate on a generic basis, FPC submits that the Commission can use its authority to approve mergers and market-based rate applications only on a case-by-case basis. Specifically, the Commission has made no showing, nor does FPC submit could it make a showing, that mergers involving entities not committing transmission assets to an RTO will result in industry-wide problems which compel a generic remedy. Likewise, the Commission cannot demonstrate that all entities not participating in RTOs will inappropriately utilize their authority to charge market-based rates. Thus, the Commission cannot use this rulemaking proceeding to compel RTO participation through its merger authority or authority to approve market-based rates.

Nevertheless, consistent with Commission regulations, the Commission could find that a proposed merger was not in the public interest because one of the merging entities was not a participant in an RTO. See 18 C.F.R. § 2.26. In those instances, clearly the Commission could condition the merger on RTO participation if such participation would alleviate the detrimental impact of the merger. However, in other merger cases, the participation or lack of participation in an RTO by one or more of the merging entities might have no demonstrable impact on the public interest. In those instances, the Commission would overstep its authority in conditioning such a merger on RTO participation. In short, FPC submits that it is not appropriate to apply a per se

rule holding that lack of RTO participation would preclude merger approval. Instead, the Commission must make such decisions on a case-by-case basis.

Likewise, with respect to the Commission's contemplated conditioning of market-based rate authority on RTO participation, FPC submits that in certain instances the Commission's analysis of market power issues could lead it to the conclusion that the granting of market-based rate authority would not be appropriate unless the entity agreed to commit its transmission facilities to an RTO. In other instances, however, such a determination would have no basis in fact. Thus, FPC submits that the Commission can only make such a finding on a case-by-case basis and should avoid establishing a per se rule in this rulemaking proceeding.

Finally, FPC seeks clarification that the Commission does not contemplate ruling that existing market-based rate authority is no longer appropriate for any entity not participating in an RTO. FPC submits that such a ruling would be unsupported and would represent an attempt to indirectly mandate RTO participation, which, as discussed above, would not survive judicial scrutiny. Furthermore, existing grants of market-based rate authority were issued on a case-by-case basis in light of specific factual circumstances. FPC submits that the withdrawal of any existing approvals should be done on a case-by-case basis, if at all.

TECO RESPONSES

July 6, 1999

Mr. Joseph D. Jenkins, Director
Division of Electric and Gas
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Identification of Proposed Issues for FPSC Task Force

Dear Mr. Jenkins:

This is in response to the memorandum dated May 28, 1999, soliciting comments regarding the Florida Public Service Commission's (FPSC) ongoing workshops and the Federal Energy Regulatory Commission's Notice of Proposed Rulemaking on Regional Transmission Organizations.

Attached are suggested FPSC comments on the FERC's 184 NOPR questions. These comments are provided to the FPSC at this time for consideration in the preparation of its own comments and for the purposes of continued discussions in the Commission's ongoing workshops regarding Regional Transmission Organizations.

Thank you for your consideration, and we look forward to further discussions on these matters.

Sincerely,

Thomas Hernandez
V. P. Regulatory Affairs

cc: Leslie Paugh (w/enc.)
Robert Trapp (w/enc.)

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FERC Notice of Proposed Rulemaking
Regional Transmission Organizations
Docket No. RM99-2-000

Executive Summary

In May, 1995, the Federal Energy Regulatory Commission (the "Commission") issued its Notice of Proposed Rulemaking which ultimately, in April of 1996, resulted in a Rulemaking: "Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities" (Orders 888 and 889). The Commission's solution included the requirement for jurisdictional transmitting utilities to "functionally unbundle." Utilities were required to obtain transmission services for all new wholesale sales and purchases under their own "open access" transmission tariffs, include separately stated rates in their tariffs for transmission and ancillary services, and rely on the same electronic information system to obtain such services.

In its 1995 comments to the Commission on the Open Access NOPR, Tampa Electric Company ("Tampa Electric") stated, "Imposition of the comparability standard without a precise focus on specific implementation measures for unbundling will not

achieve the desired objective." At that time Tampa Electric believed functional unbundling could work to achieve the Commissions's goals if properly implemented. Now, three years after the implementation of wholesale transmission open access and the functional unbundling requirement, the perception of undue discrimination in wholesale transmission services remains within the Peninsular Florida region.

In recognition of the continued perception of undue discrimination within Peninsular Florida, interested parties have begun a deliberative process to identify and resolve the issues under the leadership of the Florida Public Service Commission (FPSC). The FPSC has held several workshops in 1999 to study Florida-specific issues regarding the advisability of establishing a Regional Transmission Organization (RTO) or Independent System Operator (ISO) for the region.

The interested parties participating in the FPSC workshops have focused on efforts to reach consensus on solutions to the relevant issues for purposes of the Peninsular Florida region. Some consensus has been reached already such as general consensus that the appropriate regional boundary be coextensive with the regional reliability boundaries of the FRCC. Peninsular Florida is a large and efficient marketplace of sufficient market size to allow benefits to all users of the grid. In addition, the region

has unique electrical characteristics and configuration and is situated such that the reliability of the system is under the jurisdiction of a single state regulatory authority, the FPSC, which facilitates efficient planning and operation of the system. Other relevant issues under discussion include governance, pricing, planning and operations.

Based on its reading of the current RTO NOPR, Tampa Electric believes it is in agreement with the Commission's ultimate goals in this proceeding, namely, to further encourage and promote efficient competitive wholesale electric markets. However, Tampa Electric believes that the Commission should defer to regional approaches that achieve regional market consensus, are endorsed by local state regulators, and that establish mechanisms to encourage further progress in those organizations. Within the Peninsular Florida region, the FPSC's strong leadership, including a rulemaking, will be required to effect the desired result, and the Commission should not micro-manage the process even under circumstances when regional approaches do not initially meet its ideal vision of an RTO. The Commission should allow state regulators, such as the FPSC, to lead discussions on these issues in areas where they are willing to do so, and be available to such regulators at their request to help.

The Commission should encourage regional discussions of

transmission issues, including all the RTO characteristics and functions discussed in the NOPR. As long as all the issues are considered, the Commission should defer to regional approaches that are endorsed by affected state regulators if they represent progress toward the Commission's goals. This policy would be totally consistent with its "open architecture" approach allowing regional approaches to evolve to ensure continued progress in this matter.

Tampa Electric provides responses herein to many of the questions posed in the Commission's NOPR with the view of defining what is currently needed within Peninsular Florida to resolve issues of trust and to improve the competitive wholesale market. This has been a matter of great importance to Tampa Electric as evidenced by its active engagement since the early 1990's to create a level playing field and efficient competitive wholesale electric market in Peninsular Florida.

ANSWERS TO SPECIFIC QUESTIONS

1. Public comments are requested on the extent to which there remains undue discrimination in transmission services, and if it remains, in what forms. (page 83-84)

The perception by many market participants of undue discrimination in the provision of wholesale transmission services remains within Peninsular Florida. Access to transmission services within this region is not as open as it could be to facilitate an efficient, robust wholesale market. Transmission users often must go to several individual transmission providers and OASIS nodes, sign multiple agreements with each provider, and attempt to piece together and navigate through various partial paths to connect a power sale to a buyer. There is no central source of information to help a new market participant figure out how to do wholesale electric trading within the region. Also, many market participants perceive that firm transmission capacity is being unfairly withheld from the market.

2. Comments are requested regarding what remedies should be imposed in an effort to eliminate any remaining discriminatory conduct. (page 84)

The appropriate remedy is to encourage regional approaches that resolve the problems present within the regions. For the

Peninsular Florida region, discussions on these issues are underway through the leadership of the Florida Public Service Commission (FPSC).

3. Should participation in RTOs be mandatory or are there other possible remedies? (page 84)

While participation in regional discussions on transmission issues within Peninsular Florida by all transmission owners and providers within the region should be required by the Federal Energy Regulatory Commission (FPSC), other entities using wholesale transmission services within the region should be encouraged to participate as well. Participation by all transmission owners will be important for a successful regional resolution. In any case, FERC should give deference to a regional approach that has been endorsed by the FPSC.

4. Could a performance-based rate system be designed to realign economic interests to remove the motive for discrimination? (page 84)

It is possible, but there could still be incentives to discriminate under a performance based rate system.

5. The FERC seeks comment on the effect of RTOs on electricity market performance, including any data or other information that shed light on quantifying the extent of those benefits. (page 101)

No comment.

6. The FERC seeks comment on what types of disputes or other matters would be appropriate for the Commission to defer to the decisions of the RTO? (page 102)

Once a regional approach on transmission issues is established, the FERC should defer to decisions on matters which are placed under the management of the region such as expansion planning, OASIS operations, as well as matters that are deemed to be subject to state jurisdiction, such as siting, permitting, need, etc.

7. In granting deference to decisions that result from an acceptable ADR process, would there be a need to distinguish between RTOs that are ISOs and RTOs that are transcos? (page 102)

No, so long as the FERC defers as appropriate to results of ADR processes that reflect regional solutions developed by market participants with active participation of the affected state regulatory authorities.

8. The FERC could also consider adopting streamlined filing and approval procedures. The FERC could consider different filing requirements for established RTOs. For example, should the threshold be lowered for the types of changes to operations or practices that would not require a filing with

the FERC?

Yes, the threshold should be lower for any region that resolves transmission issues with endorsement by relevant state regulators. Until recently, transmission providers were only required to file their pro forma open access tariffs with the FERC. Recently, the FERC has required more specific operating procedures (curtailment practices) and other implementation practices (OASIS practices) to be filed. If this trend continues, many detailed operating and planning procedures developed within the NERC and regional reliability councils may be required to be filed at FERC, including updates of those procedures each time they are changed. Once resolution of transmission issues have been reached within regions, there should be less need for involvement in such matters by the FERC. For regions which successfully transmission access issues, FERC should require only that general transmission access procedures and practices be filed with FERC, and allow the detailed day-to-day procedures to be posted on the OASIS.

Should such a policy be applied equally for non-profit and for-profit RTOs? (page 103)

Yes, so long as the FERC defers as appropriate to regional solutions resulting from participation of the market participants and active involvement of state regulatory authorities.

9. The FERC believes that the widespread formation of RTOs can provide substantial benefits. The FERC invites comment on the benefits of RTOs and the magnitude of these benefits. (page 103)

In Peninsular Florida, settlement of transmission issues, whether this results in an RTO or some other arrangement, would likely result in increased wholesale trade within the region at lower transmission cost. As long as transmission owners continue to recover their costs, there should be net benefits realized within the region. In addition, settlement and consensus on issues would lower litigation costs in Florida. The preparation of a cost-benefit analysis is under discussion within the region under the leadership of the FPSC.

10. The FERC seeks comments regarding how an RTO would affect power costs. (page 109)

Continued uncertainty in transmission markets will lead to reluctance on the part of market participants to actively engage in the market and can result in new entrants being reluctant to join in the market. Power cost savings within the Peninsular Florida region are likely if transmission issues are resolved. The desirability of doing such analyses is under discussion in the region under the direction of the FPSC.

11. The FERC requests comments on the appropriate state role in

RTO governance. For example, should state government officials participate as voting members of an RTO? (page 113)

The FPSC could participate as a non-voting member of the governing board of any regional transmission entity that may evolve from discussions on transmission issues within the Peninsular Florida region. Such involvement is important to keep the FPSC fully informed of goals and strategies considered by the Board, and of actions taken by the Board, yet keep the relationship appropriately distant to allow the FPSC to continue its authoritative role over issues within its jurisdiction.

12. The FERC invites further comments from the state commissions on all aspects of the proposed rule. (page 114)

The FPSC has provided comments to the FERC in the ISO workshop on June 8, 1998, in Orlando, and again at the St. Louis conference on RTO's on February 11, 1999. The FPSC continues to hold workshops on these issues and lead efforts toward resolution within the Peninsular Florida region. This effort should not be disrupted or superseded by federal actions at this time.

13. There are four proposed minimum characteristics for an RTO:

(1) independence from market participants;

(2) appropriate scope and regional configuration;

(3) possession of operational authority for all

transmission facilities under the RTOs control; and

(4) exclusive authority to maintain short-term reliability.

In addition, the are seven proposed minimum functions that an RTO must perform. An RTO must:

(1) administer its own tariff and employ a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities;

(2) create market mechanisms to manage transmission congestion;

(3) develop and implement procedures to address parallel path flow issues;

(4) serve as a supplier of last resort for all ancillary services required in Order No. 888 and subsequent orders;

(5) operate a single OASIS site for all transmission facilities under its control with responsibility for independently calculating TTC and ATC;

(6) monitor markets to identify design flaws and market power; and

(7) plan and coordinate necessary transmission additions and upgrades.

The FERC seeks comment on the following questions:

(1) whether the FERC's enumeration of minimum criteria

omits a necessary minimum characteristic or function, or includes an unnecessary minimum characteristic or function;

(2) whether there is a need to distinguish between minimum characteristics and minimum functions (i.e., adopt separate categories for the minimum requirements); and

(3) if so, whether any of the minimum characteristics should be re-characterized as minimum functions, and vice versa.

The distinctions drawn seem to be appropriate, but flexibility should be provided consistent with the Commission's "open architecture" policy.

Comments on these questions should take into account the FERC's objective in this rulemaking of encouraging the formation of RTOs that promote competitive markets and non-discriminatory access to, and reliable operation of, the electric grid. (pages 115-116)

14. The FERC seeks comments on whether the enumeration of minimum criteria omits a necessary minimum characteristic or function, or includes an unnecessary characteristic or function. (page 116)

No additional comments, see comments to number 13 above.

15. The FERC seeks comments on whether there is a need to

distinguish between minimum characteristics and minimum functions (that is, adopt separate categories for the minimum requirements). (page 116)

No additional comments, see comments to number 13 above.

16. The FERC seeks comments on whether any of the minimum characteristics should be re-characterized as minimum functions and vice versa. (page 116)

No additional comments, see comments to number 13 above.

17. The FERC seeks comments on whether RTO status should be granted to entities that are not able to perform the three functions immediately (establishing procedures for addressing parallel path flows with neighboring systems, managing congestion, and planning transmission expansion). (page 117)

FERC should defer to regional solutions that achieve consensus with market participants and the affected state regulatory authorities, even if the solution does not include performance of all of the identified functions initially.

18. The FERC also seeks comments on whether RTO status should be granted to entities that may not be able to perform on the first day of operation certain other (i.e., any of the remaining four) of the minimum functions. (page 117)

Yes. See comments to number 17 above.

19. Should the FERC differentiate, for purposes of initial implementation, between any of the seven minimum functions? If so, has the FERC appropriately identified those minimum functions that are most likely to require additional time to perform? (page 117)

No. See comments to number 17 above.

20. For five of the functions (tariff administration, congestion management, ancillary services, market monitoring and planning and expansion), the FERC proposes to establish standards for how the function is performed, but an RTO will have the option of demonstrating that an alternative proposal is consistent with or superior to the standards in the proposed rule. The FERC seeks comments on whether this flexibility -- i.e., the option of demonstrating that an alternative proposal is consistent with or superior to the proposed rulemaking standards -- should apply to any or all of the minimum characteristics. (page 117-118)

It should apply to any or all of the minimum characteristics after establishing the minimum list of characteristics and functions that should be considered within regions, and the FERC should defer to a regional approach that has been endorsed by the relevant state regulators.

Characteristic 1: Independence. The RTO must be independent of

market participants. (Proposed § 35.34(I)(1))

a. The RTO, its employees and any non-stakeholder directors must not have financial interests in any electricity market participants. (Proposed § 35.34(I)(1)(I))

21. Do the FERC need to define the financial independence requirement in more specific terms or is it sufficient to enunciate the general principle and then apply it on a case-by-case basis? (page 121)

The FERC should enunciate the general principle and evaluate individual regional approaches on a case-by-case basis.

22. Should the definition of stakeholders or market participants be expanded to include entities that operate distribution-only facilities (i.e., entities that perform the "wires" function at lower voltages) and transmission entities in neighboring regions? (page 121)

This issue should be determined on a regional basis.

23. Should this definition of stakeholders or market participants be broadened to include sellers and buyers of ancillary services? (page 121)

This issue should be determined on a regional basis.

24. Are there any circumstances in which the definition should be expanded to include entities that do not participate in

power markets in the region but that provide transmission services to the RTO or buy transmission service from the RTO? (page 121)

This issue should be determined on a regional basis.

25. Is more specificity needed relative to the requirement that RTOs have conflict of interest standards? (page 121)

No.

26. Are there lessons to be learned from the experience of ISOs with conflict of interest standards that can now be applied more generally to RTOs? (page 121)

No comment.

b. An RTO must have a decision making process that is independent of control by any market participant or class of participants. (Proposed § 35.34(I)(1)(ii))

27. The FERC seeks comment on whether this kind of RTO (i.e., non-stakeholder governing board and a prohibition on market participants having more than a de minimus -- one percent--ownership interest in the RTO) should be deemed to satisfy automatically this element of the independence requirement. (page 122)

Yes, this could satisfy the independence requirement for an RTO, but the standard should be more flexible and not require a non-stakeholder Board.

28. The FERC also requests comments on whether there should be a single standard for independent decision making for all RTOs regardless of whether they are for-profit or non-profit entities. (page 122)

This issue should be determined on a regional basis.

29. What, if any, additional requirements should apply to a governing board that is not a stakeholder board or to a governing board with both stakeholders and non-stakeholders? (page 123)

Stakeholders should be grouped and represented as determined in regional approaches endorsed by state regulators.

30. For either stakeholder or non-stakeholder boards, should an upper limit on the size of the board be imposed? (page 123)

No. The size of the Board should be determined by the regional participants and the relevant state regulatory authorities. In addition, the "open architecture" policy proposed by the FERC will allow needed changes in governance as experience dictates.

31. How should the FERC consider proposals for state regulatory or other governmental officials to select board members for either stakeholders or non-stakeholder boards? (page 123)

For the Peninsular Florida regional resolution of transmission issues, the FERC should defer to a FPSC agreed upon

methodology for selection of state regulatory or other governmental personnel for participation in the governance of any regional transmission entity that may be formed.

32. How should the FERC view proposals for state government officials to serve as voting members of RTO boards? (page 123)

See answer to number 31 above.

33. The FERC seeks comment on whether one percent is an appropriate de minimus ownership interest and, if not, what would constitute appropriate de minimus ownership for purposes of establishing independence. (page 124)

This issue should be determined on a regional basis.

34. Are there conditions under which market participants should be allowed to have more than a de minimus ownership interest in an RTO. (page 124)

This issue should be determined on a regional basis.

35. Should the FERC have a different standard for passive interests? (page 124)

This issue should be determined on a regional basis.

36. How should the FERC treat preferred equity shares? (page 124)

This issue should be determined on a regional basis.

37. Commenters are asked to address whether the FERC's

assessments of the effects of allowing market participants to have more than a de minimus ownership interest in RTOs are reasonable. (pages 125-126)

This issue should be determined on a regional basis.

38. Is there relevant experience from other regulated industries? (page 126)

No comment.

39. If the FERC were to allow market participants to have more than a de minimus ownership interest for a transition period, how long should the transition period be? (page 126)

There may be no need for a transition period. A regional solution may devise appropriate incentives for market participants to own transmission facilities.

40. Would any additional safeguards be required during such a transition period? (page 126)

See comments to number 39 above.

41. In general, which type of institution would better serve the goal of independence: a transco with de minimus ownership and a non-stakeholder board or an ISO with a non-stakeholder board? (page 126)

It depends on the overall structure and the market it oversees. The FERC's "open architecture" concept will allow

entities to evolve as experience dictates.

c. The RTO must have exclusive and independent authority to file changes to its transmission tariff with the Commission under Section 205 of the Federal Power Act. (Proposed § 35.34(I)(1)(iii))

42. Can an RTO be truly independent if it does not have the authority to file changes in its tariff without the approval of other entities such as transmission owners? (page 127)

No comment.

43. Should the ISO's unilateral filing authority be limited to transmission rate design and terms and conditions that directly affect access but not to changes that would affect transmission owners' ability to collect their overall revenue requirements? (page 127)

This possibility should be considered. In any event, regional approaches that include regional pricing should address the ability to change such pricing, or any other issue.

44. In practice, is this a viable distinction? (page 127)

It may be.

45. If an RTO's filed rate schedule also includes market design rules, should the RTO have Section 205 filing authority to make changes in the rules? (page 128)

The FERC's RTO principles should not be prescriptive on this

issue. Regional approaches should include consideration of such matters.

Characteristic 2: Scope and Regional Configuration. The RTO must serve an appropriate region. The region must be of sufficient scope and configuration to permit the RTO to effectively perform its required functions and to support efficient and nondiscriminatory power markets. (Proposed § 35.34(I)(2))

a. Factors Affecting The Appropriate Scope and Regional Configuration of an Acceptable Region.

I. Regional configuration factors.

ii. Factors for evaluating boundaries.

(a) Facilitate performing essential RTO functions and achieving RTO goals, as discussed elsewhere in this proposed rule.

(b) Recognize trading patterns.

© Not facilitate the exercise of market power.

(d) Encompass existing control areas.

(e) Encompass existing regional transmission entities.

(f) Encompass one contiguous geographic area.

(g) Encompass a highly interconnected portion of the grid.

(h) Take into account existing regional boundaries (e.g. North American Reliability

Council (NERC) regions) to the extent consistent with the Commission's goals for RTOs.

(I) Take into account international boundaries.

46. The FERC solicits comments on the technical limitations or cost limitations on how large an RTO can be if it is to have control area responsibilities. (page 132)

See response to number 48 below.

47. The FERC solicits comments on how the number of transmission systems to be combined would affect the cost and time required to form an RTO. (page 132)

Discussions are underway in Peninsular Florida. The merits of cost/benefit analyses have been discussed, but not yet performed under the leadership of the FPSC. Time requirements may be more a function of regional experience than the number of parties at the table.

48. Are there other factors that may limit the geographic scope of an RTO? (page 132)

Regional boundaries would be case-specific and should be justified individually. The primary criteria for the determination of regional boundaries must include reliability considerations. The FERC must give great credence to boundaries which utilize the existing reliability boundaries of the NERC

regions. The electrical topology (i.e. how the region is electrically designed to reflect geography and the historical development of an area) is critical to establishing initial regional boundaries. In the future, experience with new markets may dictate the development of different boundaries for reliability and market purposes. The drawing of regional boundaries without a transition time from the existing boundaries can have serious negative implications for reliability as well as cost.

The following regional reliability considerations and criteria are necessary in determining the boundaries of an RTO. These considerations are essential elements that contribute to the electrical topology of a region.

1. Generation & Transmission (G&T) Adequacy/Reliability -- The ability of a region to plan, site, and install G&T capacity (i.e. siting laws and an effective planning process) is fundamental to ensuring continued reliability. Boundaries shouldn't be drawn different than present boundaries with the assumption that the necessary state and/or federal planning and siting legislation will later be enacted. Such legislative changes would have to be made before any new boundaries are created.

Reliability of the bulk power transmission system is a G&T

issue and not just a transmission issue. The system is planned, designed, and operated as a single machine moving power in bulk from production to consumption. The FERC recognized this by including certain generation services (i.e. ancillary services) as part of the pro-forma transmission tariffs required under FERC Order 888. These services (e.g. Operating Reserves, Regulation, Reactive and Voltage Control) are essentially "enabling services" without which a power system could not function. The FERC recognized that denial of these services is, in effect, denial of basic transmission service and, thus, made transmission providers include these services in their tariffs.

The regulatory and legislative coordination and jurisdiction is an important issue in assuring regional reliability. In the State of Florida, the FRCC is unique because all of the FRCC region falls under the jurisdiction of one state regulatory body, the FPSC. There is no need for a joint regional/state regulatory board to address regional adequacy issues. The FPSC has a significant legislative mandate to plan, site, and install G&T to ensure and maintain a reliable, cost effective, and environmentally acceptable power system.

2. Location of Constraints -- A review of the Peninsular Florida region yields the following points:

- Geographically, it is a peninsula surrounded on three sides

by water

- The bulk transmission grid has regional interconnections only to the north with the Southern subregion of the Southeastern Electric Reliability Council (SERC) so that the Peninsular Florida regional grid does not experience any "through" or "parallel" flows from other electrical regions of the country.
- The majority of the Peninsular Florida transmission constraints are internalized within the Peninsular Florida region. This is not the case in other regions. In those areas many constraints exist at the regional boundary interfaces which can hamper reliability coordination and, thus, market facilitation.

3. Unique Electrical Characteristics -- Peninsular Florida has unique electrical characteristics. One good example is the under frequency load shedding program which is designed and operated to maintain FRCC regional reliability. Due to the peninsular nature of the electrical system, over half of the Peninsular Florida load is armed on the under frequency program. In the event of separation of the peninsular system from the SERC region, the generation and load unbalance could be as much as 5000 MW (3600 MW import plus loss of a major plant in Florida). This would cause a very severe frequency decline and would cause a peninsular blackout unless the frequency decline could be

arrested. Because of the steep decline in frequency, load has to be shed very quickly to allow generation to remain on line to begin restoration.

Although it might appear that for competitive market purposes, the larger the size of the region the better, such is not the case. A viable market can only develop within a region that provides the infrastructure necessary to support reliability. Significantly, the problems faced in operating electric power systems are local and regional, not national; they are related to network security, with generation control being an important but relatively minor burden. Stated differently, the big challenge is network security and not generation and load balancing. In a region such as Peninsular Florida, very large amounts of real-time data are required on voltages, currents, real and reactive power and the status of thousands of switches and circuit breakers. Using this data, extensive computations must be performed to verify accuracy and to display the network status to operators in a form that has meaning. With the advent of open access, the information and data requirements are increasing at an exponential rate.

In some respects, there is a parallel here with air traffic control centers. Could these centers be combined into one national center? Probably, but consider the amount of

information that would have to be collected at one place, or the effect of communication failures. And even if it worked, the problems would remain local and regional and cannot be managed on a super regional or national level.

This requires that the appropriate boundaries be coextensive with the regional reliability boundaries, or FRCC's boundaries in Peninsular Florida. Peninsular Florida, is a large and efficient marketplace. In terms of electrical demand, as the following table demonstrates, the FRCC ranks in size with ERCOT, PJM, the US portion of NPCC, and the US portion of MAPP.

Region	1997 Peak Demand (MW)
FRCC	37,127
ERCOT	45,636
PJM	45,628
NPCC (US)	48,950
MAPP (US)	29,199

This data suggests that the Peninsular Florida region is of sufficient market size to allow benefits to all users of the grid.

49. What are the relative merits of internalizing constraints within a region versus having constraints act as natural boundaries between regions. (page 136)

Internal and external constraints will need to be dealt with

in regional approaches. Addressing constraints is only one of many issues to be addressed in the determination of regional boundaries. The FERC should allow regions to present rationale for boundaries on a case-by-case basis. Generally speaking, resolving constraints may be better accomplished within regions where structures are agreed upon by affected parties on how to resolve such issues.

50. *The FERC seeks comments on the appropriateness of these* factors to determine an appropriate configuration for the regions in which RTOs would operate, and also asks if any additional factors may be appropriate. (page 137)

Other factors that may be appropriate include (1) state regulatory relationships and authorities, (2) the "size" of the region, measured by the load served within the region, (3) and technical and operational considerations. Also see the response to number 48 above.

b. Potential Geographic Configurations.

51. The FERC seeks comments on how well the regions served by existing institutions would satisfy the factors enunciated above, and specifically how well they would be able to satisfy the minimum RTO characteristics and functions outlined in this section, and the advantages and disadvantages of these three examples. (page 138)

The existing institution for Peninsular Florida, the FRCC, which is one of the ten NERC reliability councils, would meet appropriate geographic configuration criteria for a transmission region. Rationale for regional boundaries will be case-specific.

52. The FERC also welcomes presentation and evaluation of other methods to define appropriate regions. (page 138)

No comment.

c. Control of Facilities within a Region.

53. The FERC solicits comments on how best to balance its goal of having RTOs in place that operate all transmission facilities within an appropriately sized and configured region against the reality that there may be difficulties in obtaining 100 percent participation in all regions in the near term. (page 139)

In Peninsular Florida, the FPSC has sufficient jurisdiction over transmission reliability to ensure the appropriate operation of transmission facilities within the region.

54. Should the FERC deny RTO status for any proposal that does not include all transmission facilities within an appropriate region? (page 139)

The FERC should defer to any regional resolution of transmission issues which is endorsed by the relevant state regulators, to the extent that the resolution makes any progress

toward the FERC's goals in this matter.

55. If the FERC does not deny RTO status for less than 100 percent participation, is there some guideline that it should use for determining when the proponents represent an appropriate "critical mass" for the region? (page 139)

See answer to number 54 above.

56. Should the FERC require that the RTO at least negotiate certain agreements with any non-participants within its region to ensure maximum coordination? (page 139)

No. Non-participants are not likely to negotiate agreements with participants, and it would be unfair to require this of participants. However, participants may need to address treatment of non-participants in various regional procedures documents.

57. If so, what should be the terms of such agreements? (page 139)

No agreements should be required.

58. Finally, the FERC seeks comment on the question of how much deference, if any, should be given to the proposed scope and regional configuration of a proposed RTO. (page 139)

FERC should defer as appropriate to regional solutions that achieve consensus with market participants and the affected state regulatory authorities.

59. How readily, if at all, after balancing all appropriate factors, should the FERC be willing to substitute its vision of an appropriate RTO configuration for that of its proponents? (page 139-140)

The FERC should defer as appropriate to any regional approach on transmission issues that is endorsed by the relevant state regulators to the extent that the approach moves the region toward the achievement of the FERC's goals.

60. To what extent should the FERC take into account the degree of support in assessing a proposed RTO configuration? (page 140)

The level, or "degree" of consensus necessary to make a regional approach satisfactory should be measured based in part on the state regulatory authority's view as well as the "degree" of movement from the preexisting transmission situation.

61. Should approval or disapproval by affected state commissions of the scope or configuration of a proposed RTO affect the level of deference the FERC should afford such a proposal? (page 140)

Yes.

Characteristic 3: Operational Authority. The RTO must have operational responsibility for all transmission facilities under its control. (Proposed § 35.34(I) (3))

a. The Regional Transmission Organization may choose to directly operate facilities (direct control), delegate certain tasks to other entities (functional control) or use a combination of the two approaches. (Proposed § 35.43(I)(3)(I))

62. What has been the experience of existing tight power pools with master-satellite and hierarchical forms of control? (page 143)

No comment.

63. Was there a need to modify these operational arrangements when the pool was replaced by an ISO? (page 143)

No comment.

64. Outside of tight power pools, has the functional unbundling requirement in Order No. 888 led to any divisions of previously integrated internal operational systems? (page 143)

Yes. Various integrated systems, including software, hardware and organizations, were revamped to accommodate the functional separation of the merchant function from the transmission service function to ensure the blocking of non-public reliability information from those performing the merchant function.

65. If so, have these new divisions of operational

responsibilities created any reliability problems? (page 143)

No, although separation has resulted in higher costs and less efficient management and operations within the integrated utility, particularly for power purchases for native load.

b. The RTO must be the security coordinator for the transmission facilities that it controls. (Proposed § 35.34(I)(3)(ii))

No questions pertaining to this subpart.

Characteristic 4: Short-term Reliability. The RTO must have exclusive authority for maintaining the short-term reliability of the grid that it operates. (Proposed § 35.34 (I)(4))

a. The RTO must have exclusive authority for receiving, confirming and implementing all interchange schedules. (Proposed § 35.34 (I)(4)(I))

66. In addition to the current code of conduct standards, are there any actions that the FERC should require to reduce the likelihood of this problem (non-RTO control area operators who are also competitors in power markets may be "able to know their competitors" schedules or transactions and such knowledge would give the control area operators an unfair competitive advantage) that do not require the consolidation of all existing control areas within the region? (page 146)

This issue has already been resolved within the FRCC by requiring all entities who operate control areas within the region who require access to commercially-sensitive operating information to sign agreements that separate reliability personnel and the relevant information from their wholesale merchant personnel. The FERC's future actions should allow the continued implementation of the FRCC's resolution of this matter.

67. Is it feasible for a non-RTO control area operator, operating within an RTO region, to perform its functions without having access to commercially sensitive information involving its competitors? For example, could an RTO provide control area operators with information about scheduled net interchange between control areas without disclosing the individual transactions making up the new interchanges? (pages 146-147)

No. Current transmission scheduling, tagging and reservation practices reveal transaction information to control area operators. Such information is required to operate the system safely and reliably. It would not be feasible to shield commercially-sensitive information from control area operators. Adding transaction information into a "net" number would not sufficiently shield relevant market information and would result in less reliable operation.

b. The RTO must have the right to order redispatch of any generator connected to transmission facilities it operates if necessary for reliable operation of these facilities. (Proposed § 35.34 (I)(4)(ii))

No questions pertaining to this subpart.

c. When the RTO operates transmission facilities owned by other entities, the RTO must have authority to approve and disapprove all requests for scheduled outages of transmission facilities to ensure that the outages can be accommodated within established reliability standards. (Proposed § 35.34 (I)(4)(iii))

Any central operator of transmission facilities with responsibility for safety and reliability of the regional system would need to be the final authority for coordinating facility outages.

68. Does this requirement cede too much or too little authority to the RTO? (page 149)

The requirement should be stated in sufficiently general language to allow for regions to work out specific procedures, while requiring central operators to have the final authority.

69. If the RTO requires a transmission owner to reschedule its planned maintenance, should the transmission owner be compensated for any costs created by the required

rescheduling? (page 149)

Such details should be worked out regionally.

70. Would it be feasible to create a market mechanism to induce transmission owners to plan their maintenance so as to minimize reliability effects? (page 149)

Such details should be worked out regionally.

71. Should an RTO that is an ISO have any authority to require rescheduling of maintenance if it anticipates that the planned maintenance schedule will adversely affect power markets? (page 149)

No comment.

72. If the RTO is a transco, can it manipulate its transmission maintenance schedules in a manner that harms competition? (page 149)

No comment.

73. Should the RTO have some authority over generation maintenance schedules? If so, how much authority should it have? (page 150)

Such details should be worked out regionally.

74. Is it possible for a non-profit ISO to establish similar incentive schemes for the transmission owners whose facilities it operates? (page 150)

No comment.

75. Given that an RTO has responsibility for system reliability, what should be the extent of its liability for its actions? (page 153)

Liability for operating other entities' assets would be one of the most difficult aspects of regional operation of multiple owners' transmission facilities. Responsibilities would need to be very clearly defined. Line ratings, for example, are critical safety factors. An overheated transmission line could sag down into trees, streets, or pedestrian areas, resulting in destruction of property or possible loss of life. It is crucial that any entity responsible for operation of the system which also has financial incentives to maximize the use of the system be properly held responsible for unsafe operations. The appropriate liability responsibility would depend on the structure of the regional solution.

76. Would this differ depending on whether the RTO owns the facilities? (page 153)

It would depend more on the regional solution and the sharing between owners and operators of rights to the facilities.

d. If the RTO operates under reliability standards established by another entity (e.g., a regional reliability council), the RTO must report to the Commission if these standards hinder it from providing

reliable, non-discriminatory and efficiently priced transmission service. (Proposed § 35.30 (I)(4)(iv))

No questions pertaining to this subpart.

Minimum Functions

Function 1: Tariff Administration and Design. The RTO must administer its own transmission tariff and employ a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities. (Proposed § 35.30(j)(1))

77. The FERC invites commenters to address whether more specific guidance is required. (page 156)

Not at this time.

a. The Regional Transmission Organization must be the only provider of transmission service over the facilities under its control, and must be the sole administrator of its own Commission-approved open access transmission tariff. The RTO must have the sole authority to receive, evaluate, and approve or deny all requests for transmission service. The RTO must have the authority to review and approve requests for new interconnections. (Proposed § 35.30(j)(1)(I))

78. The FERC invites comments on how this standard can be made effective for RTOs that are ISOs. (page 158)

No comment.

79. Are there lessons to be learned from the experience of qualifying facilities (Qfs) under PURPA in getting interconnections to the grid that would be applicable to ISOs? (page 159)

No comment.

80. Should this standard be expanded to give the RTO the authority to review and approve all new interconnections (e.g., to connect new generators, to improve reliability, to increase trading opportunities with neighboring regions) or all transmission investments above some threshold dollar amount? (page 159)

No comment.

b. The RTO tariff must not result in transmission customers paying multiple access charges to recover capital costs over facilities that it controls (i.e., no pancaking of transmission access charges). (Proposed § 35.34(j)(1)(ii))

81. Would the requirement for a tariff with non-pancaked rates make the voluntary formation of RTOs more difficult because it might result in the potential for sudden and unacceptable transmission rate charges? (page 160)

Changes to rates as well as changes in revenues are probably the most difficult region-specific issues. Regional

discussions will have to include resolution of these matters, including a possible transition period. There are two issues of concern: (1) impact on rates and revenue collection resulting from transfer from state to federal jurisdiction for revenue requirement and earnings oversight, and (2) the potential for cost responsibility shifting among native load customers of the affected entities. These impacts result from differences in return-on-equity and revenue requirement calculation methods used by federal versus state regulators, loss of point-to-point revenues, elimination of prior contractual arrangements, etc. These are matters that will require encouragement from state regulators to resolve, along with cooperation from the FERC.

82. Is the severity of any such problem related to the scope and regional configuration of the proposed RTO? (page 160)

Not necessarily, but the number of parties involved and their relationships, and the number of state regulatory jurisdictions can raise significant issues. The successful resolution of these difficult issues will best be realized by keeping the affected region within Peninsular Florida where all the affected parties have similar reliability interests under the leadership of a single state regulatory authority.

83. Does the use of so-called license plate design allow the RTO to meet this requirement without cost-shifting? (page 160)

Some form of license plate pricing may ease the initial impact of change. License plate pricing would keep the majority of costs being paid by the same ratepayers with the owners receiving approximately the same revenues, particularly where bundled retail rate making continues, as in Peninsular Florida. Changes in point-to-point rates and revenues could be addressed in a comprehensive solution with some form of transition period.

84. Would the provision for a reasonable transition period help? (page 160)

Yes, and this is a region-specific issue.

85. Even if there is mutual waiving of access charges, are there other pricing impediments to inter-regional trade (e.g., differences in scheduling and curtailment conventions between regions) that are likely to impede trade? (page 161)

The FERC should focus on the initial development of regional transmission approaches at this time. Inter-regional pricing matters and other issues should be dealt with after the initial round of regional approaches. Many relevant issues are currently evolving within NERC, and the FERC staff should participate in and monitor these developments.

Function 2: Congestion Management. The RTO must ensure the development and operation of market mechanisms to manage

transmission congestion. (Proposed § 35.34(j)(2))

a. The market mechanisms must accommodate broad participation by all market participants, and must provide all transmission customers with efficient price signals regarding the consequences of their transmission usage decisions. The RTO must either operate such markets itself or ensure that the task is performed by another entity that is not affiliated with any market participant. (Proposed § 35.34(j)(2)(I))

86. The FERC invites comments on its requirement that RTOs must be responsible for managing congestion with a market mechanism. (page 164)

Solutions to congestion will be region-specific, except to the extent NERC operating policies evolve to encompass congestion management. The FERC should continue to participate in and monitor discussions of these issues within NERC, and not duplicate or foreclose their development and resolution. An appropriate Peninsular Florida regional solution to congestion could conceivably be quite different from a solution in a region where power can flow in and out from every direction.

87. Can decentralized markets for congestion management be made to work effectively and quickly? (page 165)

The FERC should not preclude this option. Regions may find

ways to make this work through automation.

88. Can the RTO's role be limited to that of a facilitator that simply brings together market participants for the purpose of engaging in bilateral transactions to relieve congestion? (page 165)

The FERC should not preclude this option. Regions may find ways to make this work through automation.

89. If not, will these markets require centralized operation by the RTO or some other independent entity? (page 165)

No comment.

90. How can an RTO ensure that enough generators will participate in the congestion management market to make possible a least-cost dispatch? (page 165)

A regional solution to congestion will need to be simple and fast to encourage participation.

91. Are there any special considerations in evaluating market power in a congestion market operated or facilitated by an RTO? (page 165)

No

No comment.

92. The FERC seeks comment on whether such an additional implementation time period is warranted (FERC proposes to allow up to one year after start-up for this function), and whether one year is an appropriate additional time period.

(page 165)

NERC and various regional entities are working on resolution of congestion management issues. The FERC should encourage such resolution, but be careful not to push for individual regional solutions which may ultimately conflict at the national level and at regional boundaries. However, regional discussions should include, and potentially commit, as to whether the region intends to ultimately adopt the NERC process or some other congestion management process.

Function 3: Parallel Path Flow. The RTO must develop and implement procedures to address parallel path flow issues within its region and with other regions. The RTO must satisfy this requirement with respect to coordination with other regions no later than three years after it commences initial operation. (Proposed § 35.34(j) (3))

93. The FERC seeks comment on whether such an additional implementation time period is warranted, and whether three years is an appropriate additional time period. (page 168)

Timing of resolution of parallel flow is a region-specific issue. For Peninsular Florida, internal parallel flow issues should be resolved initially. Inter-regional parallel flow is not an issue. Therefore, the FERC should allow for regional differences and not set a definitive schedule for resolution of

this issue. In addition, NERC continues to work toward a national resolution of this issue such that regions should include discussions, and potentially commitments, as to whether the region intends to ultimately adopt the NERC process or some other congestion management process.

Function 4: Ancillary Service. An RTO must serve as the supplier of last resort of all ancillary services required by Order No, 888, FERC Stats. & Regs. 31,038 (Final Rule on Open Access and Stranded Costs), and subsequent orders. (Proposed § 35.34(j)(4))

a. All market participants must have the option of self-supplying or acquiring ancillary services from third parties subject to any general restrictions imposed by the Commission's ancillary services regulations in Order No. 888, FERC Stats & Regs. ¶ 31,038 (Final Rule on Open Access and Stranded Costs), and subsequent orders. (Proposed § 35.34(j)(4)(I))

94. The ancillary service policies in Order Nos. 888 and 889 were developed for transmission providers that were generally vertically integrated utilities. There was an expectation that they would be able to provide many of the generation based ancillary services from their own generating resources. An RTO by definition will not own any generating resources. Does this difference necessitate a

different set of ancillary service requirements for RTOs? (page 170)

The FERC should consider approaches to this matter on a case-by-case basis. The design of ancillary services is still evolving within NERC. Those services which involve energy will likely be further unbundled as these services evolve. For example, energy balancing requires management and scheduling services that only a control area can provide, yet the energy portion of the service could be provided by generators competitively. Until these matters are worked out nationally, they will need to be dealt with in initial regional discussions. Ancillary services that provide control area balancing and reserve services, as well as energy for transmission losses, must be dealt with differently in regions with multiple control areas than in regions with a single control area.

95. Are there other ancillary services, in addition to scheduling, system control and dispatch, and reactive supply and voltage control from generation sources, for which the self-supply option should be eliminated? (page 170)

No comment.

96. Under what circumstances can the RTO's obligation as the ancillary services supplier of last resort be eliminated? (page 170)

There must always be a supplier or suppliers of last resort, but an RTO itself need not directly supply such services.

b. The RTO must have the authority to decide the minimum required amounts of each ancillary service and, if necessary, the locations at which these services must be provided. All ancillary service providers must be subject to direct or indirect operational control by the RTO. The RTO must promote the development of competitive markets for ancillary services whenever feasible. (Proposed § 35.34(j)(4)(ii))

97. The FERC requests commenters to address whether these are minimum requirements needed to ensure that the RTO can satisfy its obligation to maintain targeted levels of reliability. (page 171)

The FERC should consider approaches to this matter on a case-by-case basis. The issue of ancillary services is still evolving at NERC and will need to be dealt with in regional discussions. Ancillary services that provide control area balancing and reserve services, as well as energy for transmission losses, must be dealt with differently in regions with multiple control areas than in regions with a single control area.

98. Would it be feasible for the RTO to maintain reliability

with less authority? (page 171)

FERC should defer as appropriate to regional solutions that achieve consensus with market participants and the affected state regulatory authorities.

c. The RTO must ensure that its transmission customers have access to a real-time balancing market. The RTO must either develop and operate such markets itself or ensure that this task is performed by another entity that is not affiliated with any market participant. (Proposed § 35.34(j)(4)(iii))

99. The FERC invites comments on the use of market mechanisms to support overall system balancing and imbalances of individual transmission users. (page 176)

Balancing functions are control area functions. Regions where a regional transmission provider operates a single control area would offer such services in a different manner than regions where multiple control areas operate. Each control area must be separately "balanced." The FERC should not preclude either option at this time.

100. Is it feasible to rely on markets to support a function that is so time-sensitive? (page 176)

Yes. All aspects of electric system operations is time-sensitive. If there can be a market at all, it will need to be

able to work instantaneously.

101. Can such markets be made to function efficiently if the RTO is not a control area operator? (page 176)

Yes. This option should not be precluded at this time.

102. For the imbalances of individual transmission customers, should a distinction be made between loads and generators? (page 176)

Yes. Loads and generators can impact the system differently. Generators must be able to meet their schedules or arrange for back up. Generators can impact a control area's ability to meet its performance criteria imposed by NERC, which ultimately could lead to system failure or financial penalties. Loads should also make arrangements for adequate power supply, but operators can protect the integrity of the system by shedding load at any time supply is interrupted.

103. Should customers have the option of paying for all imbalances in such a market or only imbalances within a specified band? (page 177)

Individual transmission customers should not expect access to unlimited amounts of power at all times. Operations of control areas could not be managed reliably with such chaos. For example, if market prices suddenly rise and all generators simultaneously decided to oversell and under generate, the entire

system could shut down. Likewise, if load-serving entities do not arrange for sufficient power supply, they must face the consequence (and cost) of curtailment. Inadvertent energy accounting between control areas serves to enhance reliability for all participants transacting within or between control areas and should continue to be allowed within the operating standards of NERC.

Function 5: OASIS and TTC and ATC. The RTO must be the single OASIS site administrator for all transmission facilities under its control and independently calculate TTC and ATC. (Proposed § 35.34(j)(5))

No questions pertaining to this function.

Function 6: Marketing Monitoring. The RTO must monitor markets for transmission services, ancillary services, and bulk power to identify design flaws and market power and propose appropriate remedial actions. (Proposed § 35.34(j)(6))

a. The RTO must monitor markets for transmission service and the behavior of transmission owners, if any, to determine if their actions hinder the RTO in providing reliable, efficient, and nondiscriminatory transmission service (Proposed § 35.34(j)(6)(I))

b. The RTO must monitor markets for ancillary services and bulk power. This obligation is limited to markets that

the RTO operates. (Proposed § 35.34(j)(6)(ii))

c. The RTO must periodically assess how behavior in markets operated by others (e.g., bilateral power sales markets and power markets operated by unaffiliated power exchanges) affects RTO operations and conversely how RTO operations affect the performance of power markets operated by others. (Proposed § 35.34(j)(6)(iii))

104. The proposed requirements are arguably based on the presumption that an RTO will be a non-profit, system operator that does not own any facilities. The requirements may not be appropriate for a for-profit transco that owns facilities that it operates. Therefore, a threshold question is: what should be the market monitoring role, if any, of an independent, for-profit transco? (page 181)

No comment.

105. Is it reasonable to expect that such an RTO could be objective in its assessments? (page 181)

No comment.

106. If the RTO is an ISO, do its monitoring activities need to be further insulated to ensure independence and objectivity? (page 181)

No comment.

107. For example, should monitoring be performed by one or more individuals or organizations that are funded by the RTO but that have the right to issue reports without the RTO's approval? (page 182)

No comment.

108. Some argue that RTOs should not be charged with any monitoring responsibilities particularly with respect to market power abuses. They argue that the antitrust laws and the FERC offer sufficient protection against competitive abuses. Others have argued that RTOs are somewhat akin to organized stock exchanges and the FERC should follow the SEC precedent of requiring extensive and sophisticated market monitoring by all of the organized exchanges. Are there features of electricity and transmission markets that argue for imposing similar market monitoring responsibilities on RTOs? (page 184)

No comment.

109. Should the FERC rely on RTOs as the "first line of defense" for detecting both design flaws and market power abuses? (page 184)

No comment.

110. If this were the FERC's approach, what would be an appropriate role for the Commission in market monitoring?

(page 185)

The FERC should carefully monitor the market initially, and then to the extent as appropriate indicated by the level of disputes brought to its attention. The initial monitoring should be done through existing mechanisms, such as OASIS and other information already made available to the FERC. No additional reporting burdens should be imposed on market participants.

111. If the RTO is operating one or more markets (e.g., ancillary services), is it reasonable to expect that it can perform an objective self-assessment? (page 185)

No comment.

112. Is there a difference in the market monitoring that the FERC can expect from RTOs? For example, if the RTO proposes to take a market position in secondary transmission rights, is it plausible to expect that the RTO can perform an objective assessment of this market? (page 185)

No comment.

113. Since the success of retail competition will often depend critically on the actions of RTOs, what should be the role of state commissions in market monitoring? (page 185)

FERC should defer as appropriate to regional solutions that achieve consensus on this issue with market participants and the affected state regulatory authorities.

114. The FERC welcomes estimates of the amount of money spent by ISOs to monitor markets and their assessments as to whether they will need to spend more or less money in the future. (page 186)

No comment.

115. For abuses that arise from market power, should the RTO's role be limited to detecting and describing the abuses? (page 186)

No comment.

116. In the case of localized market power (e.g., generating units that must run for reliability reasons), should the RTO have the authority to take corrective actions? (page 186)

FERC should defer as appropriate to regional solutions that achieve consensus with market participants and the affected state regulatory authorities.

117. If the market power has structural causes, what role should the RTO have in developing structural solutions? (page 186)

No comment.

118. Should RTOs that are ISOs be required to make regular assessments as to whether they have sufficient operational authority? (Pages 186-187)

No comment.

119. The FERC seeks comment on whether RTOs should be allowed to

impose penalties and sanctions. (page 187)

As the market evolves, and as NERC moves to a system of penalties and sanctions for operators, and as transmission tariffs include pricing that simulates penalties, care must be taken to ensure against overlapping penalties from multiple sources.

120. Should the penalties be limited to violations of RTO rules and procedures? (page 187)

This would depend on how those rules correspond to penalties already imposed by NERC or within open access tariffs.

121. Should the RTO be allowed to impose penalties for the exercise of market power? For example, should the RTO's penalty authority be limited to collecting liquidated damages? (page 187)

No. Only the FERC should make determinations regarding the abuse of market power. Any market participant, including an RTO, should be able to bring cases and evidence to the FERC for such determination.

d. The RTO must provide reports on market power abuses and market design flaws to the Commission and affected regulatory authorities. The reports must contain specific recommendations about how observed market power abuses and market flaws can be corrected

(Proposed § 35.34(j)(6)(iv))

122. Should this reporting requirement be limited to producing reports only when a specific problem is encountered? Or should RTO's be required to make periodic reports that assess the state of competition and transmission access even in the absence of specific problems? (page 187)

Reporting requirements should be kept to a minimum. The FERC should consider specific reporting approaches on a case-by-case basis.

Function 7: Planning and Expansion. The RTO must be responsible for planning necessary transmission additions and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities. (Proposed § 35.34(j)(7))

a. The RTO planning and expansion process must encourage market-driven operating and investment actions for preventing and relieving congestion. (Proposed § 35.34(j)(7)(I))

b. The RTO's planning and expansion process must accommodate efforts by state regulatory commissions to create multi-state agreements to review and approve new transmission facilities. The RTO's planning and expansion process must be coordinated with programs of

existing Regional Transmission Groups (RTGs) where necessary. (Proposed § 35.34(j)(7)(ii))

c. If the Regional Transmission Organization is unable to satisfy this requirement when it commences operation, it must file a plan with the Commission with specified milestones that will ensure that it meets this requirement no later than three years after initial operation. (Proposed § 35.34(j)(7)(iii))

123. The FERC seeks comment on whether three years is an appropriate amount of time for implementation of this function. (page 192)

Regions should determine planning procedures at the onset, and the planning process should commence immediately. Given this premise, there is no need for a three year implementation period.

124. The FERC is interested in receiving comments regarding an open architecture policy to ensure that initial RTOs can develop. What flexibility needs to be built into RTO contracts? (page 194)

Any regional transmission approach should include the ability for the parties, or the governing board of a regional transmission entity, to vote to propose changes at any time, subject to endorsement by relevant state regulators and the FERC's approval, as appropriate.

125. What regulatory flexibility is needed from the Commission as part of an open architecture policy? (page 194)

The FERC should defer to regional transmission approaches that are endorsed by relevant state regulators and that move in the direction desired by the FERC, even if the approach falls short of the FERC's desire for and vision of a "perfect RTO." Any movement should be viewed as positive. Some regions may move slower or to a lesser degree than others, due to the circumstances particular to the regions.

126. In which areas of RTO organization or operations is it especially important for the FERC to expect improvement? (page 194)

It is likely that initial regional transmission approaches will leave room for further improvement in many important areas, including organization and operations, as the industry evolves toward competitive markets. The FERC's proposal for an "open architecture" will facilitate this "growing up" process.

127. The FERC proposes to continue its flexibility in allowing the recovery of current sunk transmission costs as transition mechanisms to single rates if proposed by RTOs, including the license plate approach as well as others. The FERC requests comment regarding whether the license plate approach to fixed cost recovery is an appropriate long-term

measure. (page 196)

The FERC's open architecture approach will allow pricing approaches to evolve such that it is not necessary for the FERC to determine at this time whether the license plate approach is appropriate for the long term.

128. The FERC intends to be flexible in reviewing congestion pricing innovations, and asks for comments as to what specific requirements, if any, may best suit its RTO goals. (page 197)

The flexibility the FERC proposes is appropriate for congestion pricing, since resolution of this issue is evolving and the opportunity for experimentation should not be foreclosed.

129. The FERC seeks comments on applying PBR (performance based rate making) to RTOs. Should PBR be voluntary or applied to all RTOs? (page 198)

FERC shoulddefer as appropriate to regional solutions that achieve consensus with market participants and the affected state regulatory authorities. Performance based rate making may make sense, but there needs to be a period of development before performance expectations can be established.

130. What degree of regulatory scrutiny would a PBR regime require? (page 198)

A PBR regime would require regulatory scrutiny similar to

the current, traditional rate regime, but may require a different reporting and oversight process.

131. In addition, the FERC seeks comment on the specifics of how PBR would be applied effectively to an RTO. For productivity incentives, what productivity objectives should be adopted and how should productivity be measured? (page 198)

No comment.

132. How would a revenue cap or a price cap be set? (page 198)

No comment.

133. What intermediate adjustments to the cap should be allowed? (page 198)

No comment.

134. How often should base costs be examined? (page 198)

No comment.

135. Is it appropriate to allow a higher ROE as a means of sharing the benefits created by RTOs or should higher ROEs be limited only to increases in risk? (page 199)

No comment.

136. Is the risk of transmission capital recovery increased or decreased by transferring transmission facilities to an RTO from a vertically integrated firm? (page 199)

It depends on who has transferred the facilities and the

structure of the RTO.

137. Another incentive that could be considered would be to keep transmission rates at current levels and allow participating RTO transmission owners to keep the benefits from cost savings over time or to lower transmission rates partly while owners keep part of the benefits. Would such treatment encourage better performance? (page 199)

No comment.

138. Similarly, the recovery of capital start-up costs of RTO participation could be accelerated as well. Is it appropriate to allow such accelerated recovery as an incentive to transfer transmission facilities to an RTO or should capital recovery periods continue to be based on the useful life of transmission facilities? (page 200)

FERC should defer to regional solutions that achieve consensus with market participants and the affected state regulatory authorities.

139. Is industry restructuring and the potential introduction of distributed generation technology likely to affect the risk associated with transmission investment recovery periods? (page 200)

No comment.

140. The FERC seeks comments on whether to entertain case-by-case

proposals of rate incentive treatments for RTO participants. Will transmission owners respond to incentives, and will incentives be sufficient to achieve our objective of RTO formation? (page 201)

FERC should defer to regional solutions that achieve consensus with market participants and the affected state regulatory authorities.

141. Which incentives are most likely to be successful in so doing? (page 201)

No comment.

142. Are there specific forms of incentive pricing that are inappropriate and problematic? (page 201)

No comment.

143. Are safeguards needed if the FERC decides to allow incentive treatments? (page 201)

No comment.

144. In justifying a proposed rate treatment, should an RTO be required to demonstrate that its benefits are likely to outweigh the pecuniary "costs" of the proposal? (page 201)

FERC should defer to regional rate treatments that achieve consensus with market participants and the affected state regulatory authorities.

145. Would certain incentive pricing encourage RTOs to favor

capital-based resource decisions (at the expense of more efficient alternatives) or to favor transmission solutions over alternative ways of relieving particular transmission constraints? (page 201-202)

No comment.

146. The FERC also seeks comment on whether and how public power transmission owners that participate in RTOs could benefit from flexible rate making and incentive pricing treatments. (page 202)

No comment.

147. The FERC requests comments that identify issues that public power entities and others face regarding RTO participation and that suggest ways the FERC might facilitate their resolution. (page 203)

No comment.

148. The FERC solicits comments on the extent to which IRS Code restrictions may limit the transfer of operational control or other forms of control, or ownership, of public power transmission facilities to a for-profit transco. (page 204)

No comment.

149. What impact would IRS Code restrictions have on public power participation in other forms of an RTO? (page 204)

No comment.

150. While IRS Code restrictions might prevent issue of additional tax-exempt bonds for transmission expansions made in accordance with RTO participation, are non-tax exempt forms of financing a viable option for public power participation in selected transmission additions? (page 204)

No comment.

151. In addition to private use restrictions, are there other restrictions on public power institutions that may limit their participation in RTOs? For example, to what extent would state or local charter limitations, prohibitions on participating in stock-owning entities, or the current policies of various local regulatory entities affect or impede full public power participation in RTOs? (page 204)

No comment.

152. Are there some forms of associate membership or participation in RTOs, or other special accommodations, that the FERC should consider to make it more feasible for public power entities to overcome obstacles to participation in RTOs? (page 204)

No comment.

153. The FERC seeks comment on legal restrictions or other considerations regarding the PMAs that prevent their

participation in RTOs. For example, Bonneville Power Administration and other entities in the Pacific Northwest may face unique circumstances that may affect RTO formation in that area. (page 204-205)

No comment.

154. How can the Commission help overcome any such limiting factors to full RTO formation? (page 205)

No comment.

155. What is the appropriate treatment of existing transmission agreements when an RTO is formed? (page 205)

FERC should defer as appropriate to regional solutions that achieve consensus with market participants and the affected state regulatory authorities. There may be financial settlements among parties to move all uses of transmission under the auspices of the regional approach.

156. In the ISO filings that the FERC has acted on to date, it has evaluated various "transition plans" regarding existing contracts on a case-by-case basis. At this juncture, the FERC does not intend to resolve this issue generically but instead propose to confine its policy to addressing this issue on an RTO-by-RTO basis. The FERC solicits comments on this approach. (page 206)

Case-by-case resolution is appropriate, as long as the issue

is dealt with at the onset.

157. How critical is this concern to transmission owners' and others' decisions on whether to support RTO formation? (page 206)

The issue of treatment of existing transmission arrangements is critical in Peninsular Florida because there are many long-term contracts in place, many of which are substantially different from open access pricing, terms and conditions under Order 888.

158. Is the financial impact of giving up an advantageous transmission arrangement significant enough to act as a disincentive to RTO membership? (page 206)

No comment.

159. The FERC is also concerned about impediments to transactions between existing transmission entities, as well as any future RTOs. It therefore encourages existing transmission entities to consider ways to reduce any impediments to transactions among them and direct them to provide the FERC with a progress report by January 15, 2001. The FERC seeks comment on this issue. (page 208)

No comment.

160. The FERC invites the comments of Canadian and Mexican authorities on these and other issues. (page 209)

No comment.

161. To what extent should transmission owners who do not participate in their region's RTO share in those benefits? (page 209)

FERC should defer to regional resolution of this issue that achieves consensus with market participants and the affected state regulatory authorities.

162. Would it be appropriate to allow RTO members to provide transmission service at individual system rates to non-participating transmission owners located in the RTO region, thereby denying non-participants the benefits of non-pancaked transmission rates? (page 209)

FERC should defer to regional resolution of this issue that achieves consensus with market participants and the affected state regulatory authorities.

163. The FERC seeks comment on the treatment by an RTO of non-participating transmission owners in the RTO region. (page 209)

FERC should defer to regional solutions to this issue that achieve consensus with market participants and the affected state regulatory authorities.

164. The FERC requests comments on whether it should provide for expedited or streamlined processing procedures for Section

203 transfers of jurisdictional facilities to RTOs that meet the characteristics and functions of the Final Rule, and for the related Section 205 transmission rates, terms, and conditions. (page 210)

All of the FERC's processing procedures should be as streamlined as possible.

165. The FERC also welcomes specific suggestions regarding how it can further expedite or streamline its procedures. (page 210)

The FERC should make information, clarification, and advice available directly to jurisdictional entities responsible for implementing the FERC's open access rules and policies, without having to engage in formal filings or running the risk of violating ex parte rules. This would likely lead to more uniform implementation of rules and reduced need for time-consuming proceedings. It would also be useful if the FERC would make available an on-line reference service that tracks, by issue, all current FERC guidance on specific implementation issues, updated regularly. The FERC should make its open access regulations more "user friendly" by facilitating access to its interpretive glosses.

166. Given that a power exchange is useful, should it be part of an RTO or otherwise associated with an RTO? (page 213)

On this issue, the FERC should defer to regional solutions that achieve consensus with market participants and the affected state regulatory authorities.

167. If an area has more than one PX, should the PXs have equal standing before the RTO? (page 213)

No comment.

168. Is an organized PX necessary for successful retail competition? (page 213)

No comment.

169. If an RTO operates congestion markets and balancing markets, are there efficiencies to be gained by allowing or encouraging the RTO to operate day ahead or hour ahead energy markets? (page 213)

No comment.

170. Is it feasible for an RTO to operate a spot energy market without compromising its ability to provide non-discriminatory transmission service to all market participants? (page 213)

Yes. Such a market can be automated. The Energy Broker Network operating in Florida is an example of such a market. Next-hour bids are matched automatically (highest with lowest). Transmission operators "operate" the system, without involvement in the market itself.

171. If a PX is operated by a non-RTO entity, is there a need to require certain specified forms of coordination between the two organizations? (page 213)

The same coordination would be required between any market and the control area operators and transmission providers, regardless of whether these functions are performed within a single room or spread among separate entities. Transmission costs and reservations need to be taken into account in setting up market "deals", whether or not the deals are set up remotely.

172. Would regional workshops advance RTO formation? (page 215)

Yes. Workshops are already underway for the Peninsular Florida region under the leadership of the FPSC.

173. Under whose auspices should regional workshops be held? (page 215)

For the Peninsular Florida region, ongoing regional workshops are and should be under the auspices of the FPSC. The FERC staff should make themselves available to attend and participate if requested by the FPSC.

174. Would it be beneficial to have the FERC's Dispute Resolution Service staff facilitate discussions regarding RTO formation? (page 215)

For the Peninsular Florida region, the FERC should defer to the leadership of the FPSC and make assistance available as

requested by the FPSC.

175. Should the FERC staff be made available to attend meeting convened by others? (page 215)

Yes. For the Peninsular Florida region, the FERC staff should be made available upon the request of the FPSC to attend such meetings.

176. If the FERC staff convenes workshops, in how many cities should meetings be convened and how should the cities be chosen? (page 215)

The FERC staff should convene workshops in regions where discussions are not progressing. The Peninsular Florida region discussions are currently progressing.

177. Would the three U.S. interconnections be appropriate starting points? (page 215)

No. See response to number 176 above.

178. Would participation by the FERC staff aid or stifle negotiations on RTO development? (page 215)

The FERC should defer to the recommendations of state regulators on this issue.

179. The FERC seeks comment on whether the filing requirements discussed above are inconsistent with or otherwise would inhibit voluntary participation in RTOs. (page 218)

Since the filing requirements constitute "status reports"

and do not require participation in an RTO, the requirements will not impact voluntary participation in RTOs.

180. The FERC also seeks comment on whether it needs to generically mandate RTO participation by all public utilities to remedy undue discrimination under sections 205 and 206 of the FPA. (page 218)

The FERC should continue to encourage regional discussions on transmission issues to promote progress toward the FERC's goals, but a federal mandate for such participation at this time would be premature.

181. The FERC also seeks comment on whether a performance based system could be designed to realign economic interests to remove the motive for discrimination. (page 218)

FERC should defer on this issue to regional solutions that achieve consensus with market participants and the affected state regulatory authorities.

182. In considering what actions might be appropriate if a utility fails to voluntarily join an RTO, the FERC seeks comment on whether market-based rates for generation services could continue to be justified for a public utility that does not participate in an RTO, whether a merger involving a public utility that is not a member of an RTO would be consistent with the public interest, whether non-

participants that own transmission facilities should be allowed to use the non-pancaked transmission rates of the RTO participants in that region, whether transmission service provided by a transmitting utility need to be under RTO control to satisfy the discrimination standards of sections 211 and 212 of the FPA, and whether a public utility's lack of participation would otherwise be in violation of the FPA. (page 219)

FERC should defer to regional solutions on these issues that achieve consensus with market participants and the affected state regulatory authorities. The FERC should continue to encourage the development of such solution, but should not resort to tying this development to favorable or unfavorable determinations in other proceedings.

183. How should the FERC consider the efficiency, reliability, and discrimination implications of an RTO non-participant? (page 219)

FERC should defer on this issue to regional solutions that achieve consensus with market participants and the affected state regulatory authorities.

184. How should the FERC consider non-participation by utilities that constitute "holes" in an RTO region?

FERC should defer to regional solutions that address this

issue and which are based on a consensus of market participants and have the support of the affected state regulatory authorities.

FPL RESPONSES

P.O. Box 029100, Miami, FL, 33102-9100

July 2, 1999

Ms. Leslie J. Paugh, Esq.
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Dear Ms. Paugh:

Florida Power & Light Company ("FPL") is submitting responses to the questions posed by the FERC in its Notice of Proposed Rulemaking on Regional Transmission Organizations in response to your memorandum dated May 28, 1999. These responses have been prepared to satisfy the July 2, 1999 submittal date established in the May 28 memorandum. They should be considered preliminary and may be revised by FPL prior to submission to FERC on August 16, 1999.

Respectfully submitted,

Samuel S. Waters, Director
Regulatory Affairs

Enclosure: Comments of Florida Power & Light Company

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

WORKSHOP: "REGIONAL TRANSMISSION ORGANIZATIONS – UNDOCKETED"

COMMENTS OF FLORIDA POWER & LIGHT COMPANY

By Memorandum dated May 28, 1999, the Florida Public Service Commission ("FPSC") has invited interested parties to submit responses to the questions posed by the FERC in its Notice of Proposed Rulemaking on Regional Transmission Organizations. The enclosed responses are submitted by Florida Power & Light Company ("FPL") in accordance with the May 28 Memorandum. These responses were prepared in order to satisfy the July 2, 1999 submittal date established in the May 28 Memorandum. They should be considered preliminary and may be revised by FPL between now and the August 16, 1999, FERC deadline for filing Comments on the NOPR.

(Note – The content of FPL's responses dictated that questions be grouped for combined responses. Where this is done, the responses are included after a listing of all the pertinent questions. In some instances, the answer to one question renders others not applicable; in those instances, the follow-on questions are not addressed.)

1. **Public comments are requested on the extent to which there remains undue discrimination in transmission services, and if it remains, in what forms. (page 83-84)**

FPL does not believe that significant discrimination problems remain with respect to the provision of wholesale transmission access in the wake of FERC's Order No. 888. FPL and its affiliates have not experienced discrimination in obtaining transmission access in other markets, nor has FPL received formal complaints from others alleging undue discrimination in its application of its own Order 888 open access tariff. Obviously, with the vast increase in the number of commercial energy transactions since Order 888, an increase in transmission disputes is to be expected, but given the increase in transactions, the number of disputes involving FPL's application of its tariff have been relatively small. Moreover, it is important to distinguish between legitimate disagreements over policy and/or the meaning of the Order 888 tariff, such as disputes FPL has had with municipal and cooperative customers regarding price-related issues, from true allegations of discriminatory conduct. It is unfair and inappropriate to deem every complaint by a transmission customer as evidence of discriminatory conduct.

FPL believes that many of the allegations of potentially discriminatory conduct referenced in the NOPR result from two principal causes: (1) lingering issues involving

the rights that should be afforded to native load customers versus wholesale wheeling customers, and (2) disputes resulting from the complex transaction priority scheme in the FERC's *pro forma* tariff. Neither of these areas of disagreement are easily resolved and they remain highly controversial.

There is unquestionably confusion and disagreement over the rights of native load customers vis-a-vis wholesale transmission customers under the FERC's *pro forma* tariff, as demonstrated by the conflicting interpretations of those priorities in the Northern States Power Co.[1/] series of decisions. Most of the disputes involving ATC calculations mentioned in the NOPR involve this very issue. Other disputes have arisen because of confusion and uncertainty surrounding the FERC's *pro forma* tariff. The *pro forma* tariff contains a complex multi-priority transaction scheme that is subject to differing interpretations. The FERC is still addressing priority rights issues in its ongoing OASIS proceeding. Additionally, the FERC should not dismiss the fact that some customers may use claims of discrimination to obtain unfair market advantages and/or illegitimate subsidies, such as transmission credits, where none is merited.

FPL's conclusions in this regard are confirmed by the experience with ISOs in the jurisdictions that have them. The decisions of ISOs are routinely challenged by market

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1/ *Northern State Power Co. v. FERC*, Case No. 98-3000 (8th Cir. 1999).

participants, and in many cases these decisions have ended up in litigation at FERC, thereby reinforcing FPL's belief that many disputes are the result of disagreements in policy and tariff interpretation rather than legitimate claims of undue discrimination exercised by the transmission providers.

2. Comments are requested regarding what remedies should be imposed in an effort to eliminate any remaining discriminatory conduct. (page 84)

FPL disagrees that there is a discrimination problem that requires an immediate structural remedy, other than continued enforcement of Order 888 requirements. As noted above, FERC cannot expect that any remedy will eliminate discrimination claims, in light of the Eighth Circuit's decision in *Northern States* and other legitimate interpretation issues under the FERC *pro forma* tariff. Additionally, illegitimate discrimination claims are simply a fact of doing business for transmission providers, whether RTOs or individual utilities.

Moreover, FPL believes that measures short of forming an RTO, as defined in the FERC NOPR, can resolve much of the remaining confusion and disagreement that exists in the post-Order 888 environment. FPL's proposal for creating greater coordination of transmission decision-making in Florida, without the huge expenditure and potential loss of FPSC authority associated with forming a FERC-regulated RTO, is discussed below. FPL supports the continuation of a transmission structure that recognizes the State's right

to continue to regulate bundled energy sales and that does not usurp the rights of native-load customers. If the goals of the NOPR can be achieved through less intrusive and less expensive means than an RTO (as defined in FERC's NOPR), such options should be approved by FERC.

Unlike prior NOPRs, FERC has not included in this NOPR a detailed description of the legal basis that it might have to compel RTO formation. In fact, FERC stresses that the NOPR only encourages voluntary participation. If FERC truly wants to encourage voluntary efforts, it should not mandate RTO characteristics and functions that are very restrictive and potentially interfere with service to retail native load customers. Although FERC claims that it is not being prescriptive, and wants to encourage diversity and innovation, it has left little room for deviation from its narrow vision of a properly constituted RTO. In addition, FERC does not appear to support efforts to move in the direction of greater coordination of decision-making, preferring instead that all transmission owners move fairly rapidly to an RTO with specific characteristics.

FPL is prepared to endorse steps to resolve legitimate remaining concerns about the application of Order 888, such as addressing the issue of rate pancaking, but it does not support the commitment of hundreds of millions of dollars in resources state-wide to implement what FERC, on the basis of limited experience, apparently considers to be the

perfect RTO. The NOPR should encourage movement toward more efficient regional markets with non-pancaked rates, as FPL is prepared to support. An "all or nothing" approach is a lose-lose proposition, where utilities will not file any progressive proposals for fear that they will have imposed on them expensive, super-regulatory bodies that add a layer of cost and provide few corresponding benefits to consumers.[2/]

In addition, in the event that structural changes are ultimately legislatively mandated sometime in the future, FPL believes that properly structured for-profit Transcos should remain as viable and robust alternatives to non-profit ISOs. If FERC were to mandate the formation of non-profit RTOs as an interim step, it would create a threat to the feasibility of later moving to a Transco. The transition from an ISO to a Transco would be made extremely difficult because of the ISO's independent board, legal structure, and separation of asset control and ownership. Absent a decision to move to retail choice, however, neither an RTO nor a Transco structure is a logical remedy, especially where the FPSC has no reason or need to cede its jurisdiction over retail service delivery to FERC. A FERC RTO mandate or near-mandate would interfere directly with a state's ability to exercise jurisdiction over bundled retail service. FPL

2/ At a public meeting, a FERC representative indicated that an RTO proposal that did not include a section 203 filing could not meet FERC's RTO standards. This narrow view of regional transmission solutions will slow the pace of change and may result in the matter being left largely to the courts to decide, on their time frame rather than FERC's and the industry's.

does not interpret the NOPR to require utilities to unbundle the transmission component of retail rates in order to participate in an RTO, thereby ousting States of their current jurisdiction. Therefore, the FERC should not take any action that would interfere with the rights of the States to make the choice of whether to unbundle retail rates as part of a move to retail competition.

3. Should participation in RTCs be mandatory or are there other possible remedies? (page 84)

4. Could a performance-based rate system be designed to realign economic interests to remove the motive for discrimination? (page 84)

A. Participation Should Not Be Mandatory.

Participation in RTOs should not be mandatory for the reasons stated in response to Questions 1 and 2 above. As a legal matter such participation cannot be mandatory, because FERC does not have the authority to mandate RTOs. In its NOPR, FERC cites Sections 202(a), 203, 205 and 206 of the FPA as authority for issuing its rulemaking. These provisions do not, individually or together, support mandatory RTOs.

Section 202(a) authorizes and directs the FERC "to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission and sale of electric energy . . ." for the purpose of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural

resources..." The word "voluntary" means that the FERC cannot require utilities to engage in the activities – interconnection and coordination of facilities – for which the country can be divided under the provision. Rather, the FERC is authorized only to "promote and encourage" those activities.

The legislative history of Section 202(a) confirms that the use of the word "voluntary" was deliberate and significant. Congress specifically rejected proposals requiring utilities to engage in interconnection and coordination of facilities under this provision, and chose instead to rely on the voluntary cooperation of utilities acting in their "enlightened self interest." S. Rep No. 5621, 74th Cong., 1st Sess. 49 (1935). The House Committee on Interstate and Foreign Commerce emphasized that Section 202(a) "authorizes the FERC to establish regional districts and to encourage voluntary interconnection within and between such districts, but the coordination of facilities is left to the voluntary action of the utilities." H.R. No. 1318, 74th Cong., 1st Sess. 27 (1935) (emphasis added).

Judicial interpretation of Section 202(a) reinforces that activities under the provision must be voluntary. In *Otter Tail Power Company v. United States*, 410 U.S. 366(1973), the Supreme Court declared that "[t]he essential thrust of § 202 . . . is to encourage voluntary interconnections of power." *Id.* at 373 (emphasis added). Speaking

of the FPA more generally, the Court stressed that "Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships." *Id.* at 374 (emphasis added).

In *Central Iowa Power Cooperative v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979), the D.C. Circuit affirmed an order of FERC's predecessor, the FPC, in which the FPC ruled that it had no authority to require the expansion of power pool services in light of the voluntary nature of Section 202(a). The court also rejected the notion that the combination of Sections 202(a) and 206 gives FERC broad powers to expand a voluntary pooling arrangement. *Id.* at 1168. In *Duke Power Co. v. FPC*, 401 F.2d 930, 943 (D.C. Cir. 1968), the D.C. Circuit declared, "We find nothing in this language [Section 202(a)] authorizing the FERC to *compel* any particular interconnection or technique of coordination." As that court explained in yet another case, "Whether or not one is impressed by the possible benefits of a fully integrated national power grid . . . only congress can change what has been wrought by Section 202(a)." *Richmond Power & Light v. FERC*, 574 F.2d 610, 619-20 (1978) (citations omitted). Moreover, even if FERC could establish a need to undertake such actions, the Supreme Court has observed that "a *need* for federal regulation does not establish . . . jurisdiction that Congress has not granted." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 635-36 (1972); *see*

also National Ass'n of Regulatory Util. Comm'rs v. FERC, 823 F.2d 1377, 1383 (10th Cir. 1987).

In addition, the NOPR appears to require utilities to take actions that extend far beyond the "interconnection and coordination of facilities" that FERC is permitted to encourage through voluntary action. FERC proposes to require utilities to transfer to RTOs, within the meaning of Section 203 of the FPA, operating responsibility for transmission and generation, and to give up significant rights normally associated with transmission ownership, including Section 205 rights to file for changes in rates, terms and conditions of jurisdictional services, which the FPA preserves for public utilities under the *Mobile-Sierra* doctrine. Nothing in Section 202(a) authorizes FERC to mandate such transfers.

It is also questionable whether the phrase "interconnection and coordination of facilities" includes the promotion of competition, which is FERC's *raison d'etre* for the RTO NOPR. Competition is in many respects the antithesis of voluntary coordination among utilities. Voluntary coordination is commonly understood to mean the planned and coordinated construction of transmission lines connecting utilities together for the purposes of achieving efficiencies in the production of electricity through energy trading, and enhancing reliability at the lowest reasonable cost through reserve sharing. FERC's

use of Section 202(a) to promote competition arguably is inconsistent with the underlying purposes of the provision.

FERC's reliance on Sections 205 and 206 is also misplaced. Those sections address discrimination in connection with FERC-jurisdictional services, but do not give FERC the far-reaching powers it would need to require utilities to transfer control of their transmission assets and system operating responsibilities to an RTO. For example, the Eighth Circuit recently held that FERC cannot directly or indirectly interfere with State regulation of retail electric service. *Northern States Power Company v. FERC*, 1999 U.S. App. LEXIS 9069. FERC seeks to require the transfer of significant traditional utility retail responsibilities, including functions integral to the provision of efficient and reliable retail service, to RTOs as part of a broad effort to restructure the electric industry. Thus, even more than Order No. 888, which was limited to wholesale transmission services, the RTO NOPR would have a direct and substantial impact on the provision of State-regulated services. For example, the FERC apparently proposes to put the system operations function – that includes the responsibility for dispatching generation for retail customers – under the ultimate control of FERC-regulated RTOs. These requirements go to the heart of providing retail service, affect the cost and reliability of such service, and involve the use of generation for retail service, all of

which are unquestionably outside FERC's jurisdiction.

Legislative and judicial history make clear that Congress' intent in the FPA was to grant federal authority only to fill a gap that had arisen because of limitations on the States' authority to regulate matters affecting interstate commerce. Congress did not intend to supplant existing State jurisdiction over electricity. *Public Utilities FERC of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927). The Supreme Court has noted that "the regulation of utilities is one of the most important functions traditionally associated with the police power of the States." *Arkansas Elec. Power Cooperative v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). If a State has not chosen to embrace retail choice, the formation of an RTO is a matter of particular concern, because it involves the transfer of authority over transmission and generation dispatch decisions directly affecting retail service to a FERC-regulated regional entity.

B. Other Options Will Achieve the FERC's Objectives.

An RTO is not required to resolve any residual transmission problems in Florida. FPL has presented to the FPSC a Peninsular Florida Regional Transmission Solution ("RTS") that addresses meaningfully the concerns raised by FERC and others about grid efficiency and discrimination. It does so without requiring the creation of a new, costly organization and without restructuring the electric systems in Peninsular Florida. The RTS is a Non-RTO solution that achieves the overall goals of the NOPR and will do so

in a much less intrusive manner than the mandatory imposition of an RTO. Further, the Peninsular Florida RTS can be implemented under existing FERC tariffs. And, the proposed RTS includes participation and oversight by the FPSC to ensure the protection of all Florida retail customer interests and an even playing field for all participants in the Florida energy market, while allowing state jurisdiction to remain intact with regard to retail service regulation and siting. FPL is proposing that the RTS be implemented on October 1, 1999.

The Peninsular Florida RTS has four components: planning, operations, governance and pricing. Under the planning proposal, the present coordinated transmission planning among entities will become more highly coordinated and the FPSC, acting as arbiter, will assume the role of final decision-making authority in the event of disputes with respect to the need for new transmission facilities. Interconnection standards will be adopted and will be the same as those established by the NERC.

Under the operations proposal, the present multiple OASIS system will be replaced with a one-stop, single OASIS for Peninsular Florida, with each utility being responsible for inputting its data on that OASIS. Total transmission capacity (TTC) and available transmission capacity (ATC) will be calculated by an agreed-upon process,

methodology and data base. In addition, procedures will be established to allow for independent real-time oversight of the Security Coordinator function, and planned and unplanned auditing of that function. Operating disputes that cannot be resolved by the entities will be ultimately resolved by the FPSC in its role as arbiter.

Under the governance proposal in the RTS, the Florida Reliability Coordinating Council ("FRCC") will remain a reliability-only organization with a voting structure that is ultimately established in accordance with nationwide criteria now being developed. A streamlined FPSC dispute resolution process that will be binding on all parties will be created, the details of which should be established in a rulemaking. FPL believes that there is sufficient authority under the Florida Grid Bill for the FPSC to perform these activities.

Finally, under the RTS pricing proposal, starting on October 1, 1999, transmission service would be discounted to mitigate the pancaking of transmission rates between FPL and FPC within Peninsular Florida; pancaking could be completely eliminated in Peninsular Florida if all Peninsular Florida transmission owners agree to participate in the RTS on equivalent terms. For example, with respect to short-term firm and non-firm transmission service involving service from both FPL and FPC and not originating on the systems of either FPL or FPC, each company has concluded that the charge

associated with such transmission service will be discounted by one half. With regard to new wholesale transactions requiring long-term firm point-to-point transmission service from both FPL and FPC in Florida, the charge for such services will be discounted, by either FPL or FPC depending on the specifics of the service requested, to the cost of any required incremental facilities, average losses, and out-of-dispatch costs. Finally, with regard to new wholesale transactions associated with network transmission service or network contract demand transmission service customers, where such transactions require long-term firm point-to-point transmission service from either FPL or FPC in Florida, the charge for such long-term firm point-to-point transmission service will be discounted to the cost of any incremental facilities, average losses, and out-of-dispatch costs.

More detailed descriptions of the individual parts of The Peninsular Florida RTS proposal are included in response to specific questions below. In summary, the RTS proposal would achieve or maintain the following goals:

- Continue the high reliability standards that now exist in Florida;
- Promote and facilitate wholesale electric competition;
- Ensure and facilitate non-discriminatory wholesale access;
- Create a structure that ensures fair and objective transmission planning and operations;

- Ensure efficient and effective planning, operations and maintenance of transmission facilities;
- Mitigate multiple transmission charges for wholesale transactions within Peninsular Florida;
- Mitigate cost shifting among Florida Native Load Customers;
- Avoid creating a costly infrastructure or costly bureaucratic process;
- A Florida solution that is consistent with the FERC Orders 888, 889 and associated Orders; and
- Ensure that transmission availability calculations are non-discriminatory, open to verification by all interested entities, accurate, readily available and beyond any perception of advantageous to any single entity.
- Implement a streamlined dispute resolution process to ensure an impartial and independent governance process.

5. **The FERC seeks comment on the effect of RTOs on electricity market performance, including any data or other information that shed light on quantifying the extent of those benefits. (page 101)**

9. **The FERC believes that the widespread formation of RTOs can provide substantial benefits. The FERC invites comment on the benefits of RTOs and the magnitude of these benefits. (page 103)**

10. **The FERC seeks comments regarding how an RTO would affect power costs. (page 109)**

While the NOPR made assertions of the benefits of RTOs, it made no attempt to quantify such benefits. FPL is unaware of any data that specifically and objectively show that ISOs have saved ratepayers money in those areas where ISOs have been established. Nor is it aware of any specific quantification of any other actual or projected benefits of

ISOs. On the other hand, there are data that show that creating an ISO, particularly in an area where there is no existing power pool, is extremely, and in some instances, prohibitively expensive. For example, in California, the initial infrastructure cost to establish the ISO was $220 million, and on top of that, the ISO has an annual operating cost of approximately $109 million, which is part of a total annual budget of $160 million. The California PX cost $100 million, with an additional annual operating cost of $50 million. In addition to the quantified ISO costs, individual utilities participating in the California ISO have incurred substantial internal costs associated with participation in the ISO development process and the need to vertically disaggregate their companies. In the Pacific Northwest, utilities found the cost of a contemplated ISO prohibitively expensive and have, at least temporarily, abandoned the effort. In addition, a recent study showed that the greater the scope of the RTO's functions, the higher the cost.[3/] The proposed Peninsular Florida RTS described above will achieve the principal benefits of an RTO without incurring the huge cost of creating a new RTO infrastructure with the multiple functions proposed by the FERC.

6. The FERC seeks comment on what types of disputes or other matters would be appropriate for the FERC to defer to the decisions of the RTO? (page 102)

3/ James A. Caldwell, *A Comparative Analysis of Operating Independent System Operators in the United States* (Oct. 15, 1998) (filed in Dkt. No. ER99-2730).

7. **In granting deference to decisions that result from an acceptable ADR process, would there be a need to distinguish between RTOs that are ISOs and RTOs that are Transcos? (page 102)**

8. **The FERC could also consider adopting streamlined filing and approval procedures. The FERC could consider different filing requirements for established RTOs. For example, should the threshold be lowered for the types of changes to operations or practices that would not require a filing with the FERC? Should such a policy be applied equally for non-profit and for-profit RTOs? (page 103)**

11. **The FERC requests comments on the appropriate state role in RTO governance. For example, should state government officials participate as voting members of an RTO? (page 113)**

12. **The FERC invites further comments from the state commissions on all aspects of the proposed rule. (page 114)**

As stated above, the FERC's objectives can be achieved without requiring or coercing utilities into RTOs. The types of disputes for which the FERC should defer to an RTO, the degree of deference the FERC should grant alternate dispute resolution ("ADR") decisions, the filing requirements the FERC should require for any particular regional solution, and the state role in the governance of the regional solution, RTO or otherwise, should be dependent on the type of regional solution adopted and, if that solution is an RTO, the type of RTO adopted.

The NOPR claims that state jurisdiction remains intact with regard to retail competition and regulation, siting and state oversight. FPL questions this determination given the scope of the RTO's proposed responsibilities. In contrast, the Peninsular

Florida RTS relies heavily on the FPSC to provide independent oversight and governance over transmission planning and operations, thereby resolving concerns (whether or not validly raised) that have been expressed about the present transmission planning and operations structure in Florida. The role contemplated for the FPSC is similar to the role it plays with regard to generation siting and construction. FPL believes that the independence and objectivity of the FPSC make it unnecessary to create a formal (and costly) separate entity to operate and oversee the Florida grid. Likewise, the involvement of the FPSC would justify a light-handed approach to regulation by FERC.

Under the RTS proposal, the FERC would be justified in deferring substantially to the RTS Proposal's ADR process. The RTS proposes that the FPSC initiate a rulemaking proceeding to establish a streamlined process that will handle disputes within an agreed-upon timeframe (e.g., 90-120 days). Some form of binding dispute resolution would be put in place.

The FPSC would also be directly involved in governance under the RTS proposal. What is different from the RTO alternatives discussed in the NOPR is that the individual entities in Peninsular Florida will continue to do their own transmission planning and control area operations through a highly coordinated process, with direct oversight by the

FPSC or its independent contractor. FPL believes that this is a cost effective solution that assures that efficient and non-discriminatory transmission service is provided to all transmission customers in Peninsular Florida. FPL also believes that such planning process is superior to a centralized planning process (i.e. an ISO).

With respect to operations, assurance is provided through both real-time monitoring of the Security Coordinator function by an FPSC official(s) or independent contractor(s), and by the combination of planned and unplanned audits. Unplanned audits can be performed in response to concerns raised by participants at the FPSC, when such concerns are deemed legitimate in the FPSC's judgment. FPL also proposes that the same official(s) or contractor(s) serve as an FPSC representative at the FRCC planning and operating committee meetings.

13. There are four proposed minimum characteristics for an RTO:

(1) independence from market participants;
(2) appropriate scope and regional configuration;
(3) possession of operational authority for all transmission facilities under the RTOs control; and
(4) exclusive authority to maintain short-term reliability.

In addition, the are seven proposed minimum functions that an RTO must perform. An RTO must:

(1) administer its own tariff and employ a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities;
(2) create market mechanisms to manage transmission congestion;

(3) develop and implement procedures to address parallel path flow issues;
(4) serve as a supplier of last resort for all ancillary services required in Order No. 888 and subsequent orders;
(5) operate a single OASIS site for all transmission facilities under its control with responsibility for independently calculating TTC and ATC;
(6) monitor markets to identify design flaws and market power; and
(7) plan and coordinate necessary transmission additions and upgrades.

The FERC seeks comment on the following questions:

(1) whether the FERC's enumeration of minimum criteria omits a necessary minimum characteristic or function, or includes an unnecessary minimum characteristic or function;
whether there is a need to distinguish between minimum characteristics and minimum functions (i.e., adopt separate categories for the minimum requirements); and
(3) if so, whether any of the minimum characteristics should be re-characterized as minimum functions, and vice versa.

Comments on these questions should take into account the FERC's objective in this rulemaking of encouraging the formation of RTOs that promote competitive markets and non-discriminatory access to, and reliable operation of, the electric grid. (pages 115-116)

14. The FERC seeks comments on whether the enumeration of minimum criteria omits a necessary minimum characteristic or function, or includes an unnecessary characteristic or function. (page 116)

15. The FERC seeks comments on whether there is a need to distinguish between minimum characteristics and minimum functions (that is, adopt separate categories for the minimum requirements). (page 116)

16. The FERC seeks comments on whether any of the minimum characteristics should be re-characterized as minimum functions and vice versa. (page 116)

17. **The FERC seeks comments on whether RTO status should be granted to entities that are not able to perform the three functions immediately (establishing procedures for addressing parallel path flows with neighboring systems, managing congestion, and planning transmission expansion). (page 117)**

18. **The FERC also seeks comments on whether RTO status should be granted to entities that may not be able to perform on the first day of operation certain other (i.e., any of the remaining four) of the minimum functions. (page 117)**

19. **Should the FERC differentiate, for purposes of initial implementation, between any of the seven minimum functions? If so, has the FERC appropriately identified those minimum functions that are most likely to require additional time to perform? (page 117).**

20. **For five of the functions (tariff administration, congestion management, ancillary services, market monitoring and planning and expansion), the FERC proposes to establish standards for how the function is performed, but an RTO will have the option of demonstrating that an alternative proposal is consistent with or superior to the standards in the proposed rule. The FERC seeks comments on whether this flexibility -- i.e., the option of demonstrating that an alternative proposal is consistent with or superior to the proposed rulemaking standards -- should apply to any or all of the minimum characteristics. (page 117-118)**

The purpose of the NOPR is to address and resolve problems in the transmission sector that are impeding fully competitive electric markets. The goals of the NOPR have been enumerated as follows:

- To address engineering/economic inefficiencies
- To ensure reliability
- To confront residual discrimination

- To improve market performance
- To act as a vehicle for transmission pricing reform
- To facilitate lighter-handed regulation.[4/]

The NOPR's underlying assumption that an RTO with four minimum characteristics and performing seven minimum functions is the only way to resolve the above problems is not correct. The Peninsular Florida RTS solves those problems at a fraction of the cost of an RTO. Given this background, FPL will address FERC's specific questions posed by FERC.

In the NOPR, FERC proposes that RTOs be required to have "operational responsibility for all transmission facilities under its control" and that the RTO be the NERC Security Coordinator. FPL is concerned that FERC has and will continue to require an RTO not only to have control over transmission as well as generation facilities. In its *Midwest ISO* decision, FERC opined that it prefers that an ISO have control not only over transmission activities but over generation dispatch functions. In that case, FERC questioned whether it is appropriate for RTO members to continue to be responsible for balancing resources and loads, scheduling generation, and economic dispatch. Compelling a utility to turn over such functions to an RTO is well beyond

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4/ Shelton Cannon, Presentation on "Regional Transmission Organizations, Docket No. RM 99-2-000," Edison Electric Institute Conference, Washington, D.C., June 10, 1999.

FERC's legal authority, which is limited to transmission and wholesale service. Of equal, if not greater concern, is that such a transfer directly interferes with the states' ability to regulate service to native load customers. In addition, the Midwest ISO Participants explained to FERC that collapsing all the control area functions into one entity could triple the estimated Midwest ISO cost from $30 - $50 million.[5/]

In the event that a determination is made by the FPSC that further restructuring is necessary sometime in the future, a for-profit affiliated Transco should remain a viable option. An affiliated Transco could satisfy all the minimum requirements and perform all the minimum functions of an RTO, but would achieve "independence" using a different mechanism, and could be superior to an ISO in several respects. A Transco would also have the following advantages over an ISO:

- Unity of ownership (or leasehold interests) of transmission facilities and operational control;
- Unity of liability and operational control;
- Unity of rate-setting authority and operational control;
- Unity of ownership and planning control;
- Elimination of need for bureaucratic superstructure;
- Efficiency and non-discrimination promoted by market forces and profit incentives rather than regulation.

5/ Response of Midwest ISO Participants, Dkt. No. PL95-8 (filed May 1, 1999).

21. **Does the FERC need to define the financial independence requirement in more specific terms or is it sufficient to enunciate the general principle and then apply it on a case-by-case basis? (page 121)**

22. **Should the definition of stakeholders or market participants be expanded to include entities that operate distribution-only facilities (i.e., entities that perform the "wires" function at lower voltages) and transmission entities in neighboring regions? (page 121)**

23. **Should this definition of stakeholders or market participants be broadened to include sellers and buyers of ancillary services? (page 121)**

24. **Are there any circumstances in which the definition should be expanded to include entities that do not participate in power markets in the region but that provide transmission services to the RTO or buy transmission service from the RTO? (page 121)**

25. **Is more specificity needed relative to the requirement that RTOs have conflict of interest standards? (page 121)**

26. **Are there lessons to be learned from the experience of ISOs with conflict of interest standards that can now be applied more generally to RTOs? (page 121)**

FERC should resist the temptation to be overly prescriptive or to indulge in regulatory overkill in defining the independence requirement. Even if the independence standard set forth in the NOPR is adopted, implementation will require flexibility, at least over a transitional period. Former utility employees who become employees or directors of the RTO must be given a reasonable time to divest their shares in their former employers, as was done in the NEPOOL ISO. The particular time needed for each RTO should be determined on a case-specific basis.

FPL does not agree that affiliated Transcos should be prohibited. FERC incorrectly assumes that an RTO cannot perform independently and engage in nondiscriminatory decision-making if the RTO is affiliated with a company that has merchant interests. To the contrary, in the natural gas industry there are numerous Transcos (pipelines) that are affiliated with gas producers, marketers and/or distribution companies, and there is no basis to conclude that this structure would be less likely to succeed in the electric power industry

In any event, FPL believes that the proposed Peninsular Florida RTS addresses FERC's concerns for independent oversight without the need for the creation of a specific RTO encompassing all of the functions proposed in the NOPR. The RTS relies heavily on the FPSC to provide independent oversight and governance over transmission planning and operations. The independence and objectivity of the FPSC fulfills the NOPR's goal of separation of transmission and marketing activities.

27. **The FERC seeks comment on whether this kind of RTO (i.e., non-stakeholder governing board and a prohibition on market participants having more than a de minimus -- one percent-- ownership interest in the RTO) should be deemed to satisfy automatically this element of the independence requirement. (page 122)**

28. **The FERC also requests comments on whether there should be a single standard for independent decision making for all RTOs regardless of whether they are for-profit or non-profit entities. (page 122)**

FERC's questions regarding the independence standard reflects a potential

bias against solutions to transmission issues that do not take the form of full-blown RTOs as defined by the FERC. Under the RTS proposal, the FPSC would play a crucial role in independent oversight of transmission planning and operations. The independence and objectivity of the FPSC can fulfill FERC's goal and render an RTO unnecessary. Under the RTS, the FPSC would, among other things, be the final arbiter on the need for new transmission facilities, resolve transmission disputes, provide on-site, real-time Security Coordinator oversight, and conduct planned and unplanned audits.

As for regions that opt for RTOs, as long as the board and management of an RTO acts and governs independently of market participants, FERC should not set forth further prescriptive rules for governance or declare that certain governance structures are presumed reasonable or unreasonable. Also, the independence standard should not turn on the issue of profit or non-profit status. Non-profit status creates a different set of incentives and biases than for-profit status, but the non-profit status is not devoid of bias, as the NOPR implies.

29. In the case of a non-stakeholder board, how can we ensure that the concerns of market participants are communicated effectively to the board? What, if any, additional requirements should apply to a governing board that is not a stakeholder board or to a governing board with both stakeholders and non-stakeholders? (page 123)

FPL does not support narrowly drawn rules that limit flexibility in crafting a governance scheme or in establishing communications with decision-makers. Both

stakeholder and non-stakeholder boards should provide means of communications such as customer outreach efforts, customer meetings, complaint procedures, dispute resolution mechanisms, and educational forums. While communicating with and responding to customers makes good business sense as a general rule, where an RTO is a Transco, customer satisfaction incentives also can be included in performance-based rates.

30. For either stakeholder or non-stakeholder boards, should an upper limit on the size of the board be imposed? (page 123)

This question is not relevant to the RTS proposal. In the context of an RTO, FPL believes that the industry should have the flexibility to create governing boards that are appropriate in size given an RTO's role and the characteristics of the region it controls. Where the RTO is a Transco, any FERC interference with the size and/or make up of the board, beyond its authority on interlocking directors, would be improper.

31. How should the FERC consider proposals for state regulatory or other governmental officials to select board members for either stakeholders or non-stakeholder boards? (page 123)

32. How should the FERC view proposals for state government officials to serve as voting members of RTO boards? (page 123)

Under the RTS proposal there is a recognition that the FPSC can and should play an important governance and oversight role. This is appropriate given the nature of the proposal, which relies heavily on FPSC oversight. Such a role for the FPSC is

appropriate given the FPSC's responsibilities with respect to Florida electric consumers, transmission siting, and due to the uniqueness of the Peninsular Florida transmission grid that has very limited interconnections with its neighbors to the north.

The RTS proposal does not include a governing board of the type adopted by other existing RTOs. The active role for the FPSC contemplated by the RTS is not necessarily appropriate in other RTO structures, and specifically, state Commission membership on the board of directors is unacceptable in a Transco structure. Where a Transco is in place, the state should resume its more traditional oversight and regulatory role.

33. **The FERC seeks comment on whether one percent is an appropriate *de minimus* ownership interest and, if not, what would constitute appropriate *de minimus* ownership for purposes of establishing independence. (page 124)**

34. **Are there conditions under which market participants should be allowed to have more than a *de minimus* ownership interest in an RTO. (page 124)**

35. **Should the FERC have a different standard for passive interests? (page 124)**

36. **How should the FERC treat preferred equity shares? (page 124)**

37. **Commenters are asked to address whether the FERC's assessments of the effects of allowing market participants to have more than a *de minimus* ownership interest in RTOs are reasonable. (pages 125-126)**

This line of questions addressing ownership interests in RTOs is not relevant to the RTS proposal, which does not envision creation of an RTO as defined by the

FERC. Under the RTS proposal, the equivalent of independence is achieved through multi-party coordination and involvement and FPSC participation and oversight. In the context of RTOs as defined by FERC, as discussed earlier, the FERC is being overly proscriptive in limiting ownership interests of market participants to one percent. As in the natural gas industry, affiliated Transcos should remain an option. In addition, further assurance of independent decision-making would exist if several utilities joined together to form an affiliated Transco. If the forming utilities each have merchant affiliates that compete with one another, the divergent interests of the competing merchant affiliates would mitigate the potential for the Transco to favor one entity in making transmission decisions, so long as none of the forming utilities retained a dominant voting interest.

Even Transcos that initially are comprised of one or a few utilities with affiliated merchant interests could be designed to ensure the independence is maintained. For example, the affiliated owners might only have passive (non-voting) equity interests, and thus no control over day-to-day operations, decision-making, or policy. The shareholders who did have voting equity would not be affiliated with the utilities and their interests would be driven by their motive to extract profits from their transmission assets. Entergy and the Alliance have taken the lead in making proposals that are intended to ensure independence, and these models should not be dismissed.

Additionally, in a Transco form, Standards of Conduct could be more easily enforced. Today, ISOs have not been able to relieve FERC of any regulatory burden associated with the Standards of Conduct; utilities that are ISO members must still abide by the Standards of Conduct under the ISO structure because the utility retains both transmission and merchant functions within one corporate entity. Under the Transco structure, the corporate separation is significantly more complete and thus should be easier to monitor and enforce. Again, the natural gas industry can serve as a model.

38. Is there relevant experience from other regulated industries? (page 126)

The natural gas industry has demonstrated that affiliations between transportation providers (pipeline owners) and both downstream and upstream entities are workable and should not be prohibited by FERC. FERC views its deregulation of the natural gas industry as a success, yet, it seems reluctant to adopt the same model for the electric transmission industry, by permitting affiliated transmission companies. FERC Commissioner Massey noted more than a year ago that the success of FERC's gas restructuring efforts "is now nearly taken for granted" and that there was no crisis in the gas industry that demanded FERC's attention.[9/] Pipelines continue to be affiliated with local distribution companies, marketers, and producers.

9/ "Over the Horizon -- Pending Natural Gas Policy Initiatives at the FERC," Remarks of William L. Massey (July 20, 1998).

39. If the FERC were to allow market participants to have more than a *de minimus* ownership interest for a transition period, how long should the transition period be? (page 126)

40. Would any additional safeguards be required during such a transition period? (page 126)

41. In general, which type of institution would better serve the goal of independence: a Transco with *de minimus* ownership and a non-stakeholder board or an ISO with a non-stakeholder board? (page 126)

Both forms of RTO would satisfy the independence criterion. Moreover, FPL believes, as discussed above, that other structures would provide adequate independence to achieve true transmission comparability and that the NOPR is overly proscriptive in this regard. FERC should not consider issues such as independence in a vacuum. The "most" independent structure may well be the most costly and least efficient structure for an RTO. Especially in states where power costs already are low, such as Florida, it makes little sense to trade off the greatest degree of independence for the highest cost structure. If a marginal improved appearance of impartiality is going to result in higher delivered energy costs and a minimal increase in customer satisfaction, the trade-off is not in the public interest.

Finally, no RTO is truly independent in the sense of not having any biases that affect the market. Each RTO, including non-profit RTOs have their own "stake" in the market. For example, a non-profit RTO may be encouraged by incentives to ensure

reliability at extreme cost, operating the system in a manner that is overly conservative, thereby reducing or unnecessarily prohibiting trading opportunities. It may also be biased toward over-construction of the grid. It has no economic incentive to act otherwise.

42. Can an RTO be truly independent if it does not have the authority to file changes in its tariff without the approval of other entities such as transmission owners? (page 127)

43. Should the ISO's unilateral filing authority be limited to transmission rate design and terms and conditions that directly affect access but not to changes that would affect transmission owners' ability to collect their overall revenue requirements? (page 127)

44. In practice, is this a viable distinction? (page 127)

Transmission owners have invested in transmission assets to provide regulated service and must be given the right to file for rate changes to ensure the recovery of their costs. This necessarily includes the design of rates, because rate design determines whether costs will be recovered. The same requirement exists for new transmission that may be built in the future. FERC's suggestion that RTOs be given the Section 205 authority does not recognize the need to ensure the ability to raise capital for transmission at reasonable costs and to provide incentives for investment in new transmission. In addition, FERC's suggestion that RTOs be given exclusive rate filing authority is inconsistent with its assertion that it favors incentive rates for transmission

owners.

In any event, the FERC does not have the authority to unilaterally eliminate the rights of private transmission facility owners under Section 205 of the FPA. In *Bluefield Waterworks & I. Co. v. Public Service FERC*, the Supreme Court stated, "Rates which are not sufficient to yield a reasonable return on the value of the property used . . . are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary: 'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.' (cite omitted)"[7/] Yet in the case of ISOs the NOPR proposes to eliminate the utility companies' right to ask for any particular return and instead vests that right in a third party that is not the investor in transmission and has no stake in assuring that the utility companies earn a fair return. In *United Gas Pipe Line Co. V. Mobile Gas Service Corp.*, the Supreme Court addressed the powers of the FERC as follows:

> The basic power of the FERC is that given by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential'. This is neither a 'rate-making'

7/ 262 U.S. 679, 690 (1923).

> nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. . . . The scope and purpose of the FERC's review remain the same – to determine whether the rate fixed by the natural gas company is lawful.[8/]

Of course, under longstanding case law, this NGA decision applies equally to the FPA. Nothing in the statutory scheme of the FPA, gives the FERC the authority to strip any jurisdictional utility of the right to set its rates under Section 205.

Limiting an ISO's unilateral filing authority to transmission rate design and terms and conditions that directly affect access and not including changes that would affect transmission owners' ability to collect their overall revenue requirements purports to create a bright line where none exists. A utility's revenue requirement, rate design, and terms and conditions are so intertwined that they cannot be neatly divided and allocated to different, independent organizations. At best this will lead to duplicative filings and litigation, at worst it will lead to incompatible results.

45. If an RTO's filed rate schedule also includes market design rules, should the RTO have Section 205 filing authority to make changes in the rules? (page 128)

FPL does not support an RTO model that allows the RTO to design market rules other than to the extent absolutely necessary to carry out its responsibilities with

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8/ 350 U.S. 332, 341 (1956).

regard to transmission and reliability.

46. **The FERC solicits comments on the technical limitations or cost limitations on how large an RTO can be if it is to have control area responsibilities. (page 132)**

47. **The FERC solicits comments on how the number of transmission systems to be combined would affect the cost and time required to form an RTO. (page 132)**

48. **Are there other factors that may limit the geographic scope of an RTO? (page 132)**

49. **What are the relative merits of internalizing constraints within a region versus having constraints act as natural boundaries between regions. (page 136)**

50. **The FERC seeks comments on the appropriateness of these factors to determine an appropriate configuration for the regions in which RTOs would operate, and also asks if any additional factors may be appropriate. (page 137)**

51. **The FERC seeks comments on how well the regions served by existing institutions would satisfy the factors enunciated above, and specifically how well they would be able to satisfy the minimum RTO characteristics and functions outlined in this section, and the advantages and disadvantages of these three examples. (page 138)**

52. **The FERC also welcomes presentation and evaluation of other methods to define appropriate regions. (page 138)**

FPL believes that Peninsular Florida is the appropriate scope for organizing a transmission solution for the Florida grid. First, Peninsular Florida has always operated as a distinct bulk power market with its own rules at the wholesale level. Second, Peninsular Florida has operated pursuant to its own reliability rules established by the

FRCC and subject to FPSC jurisdiction. Maintaining that structure would continue the high reliability standards that exist in Florida and avoid the high costs associated with changing that structure. Third, there are very limited interconnections between Florida and regions north of Florida, and as a result, loop-flow is generally internalized within the Peninsular Florida reliability region.

The proposed RTS maintains the existing regional configuration. By relying on the FPSC to provide independent oversight and governance of transmission planning and operations, the RTS addresses the concerns about grid efficiency and discrimination, but avoids the need to restructure the electric systems in Peninsular Florida.

53. **The FERC solicits comments on how best to balance its goal of having RTOs in place that operate all transmission facilities within an appropriately sized and configured region against the reality that there may be difficulties in obtaining 100 percent participation in all regions in the near term. (page 139)**

54. **Should the FERC deny RTO status for any proposal that does not include all transmission facilities within an appropriate region? (page 139)**

55. **If the FERC does not deny RTO status for less than 100 percent participation, is there some guideline that it should use for determining when the proponents represent an appropriate" critical mass" for the region? (page 139)**

56. **Should the FERC require that the RTO at least negotiate certain agreements with any non-participants within its region to ensure maximum coordination? (page 139)**

57. **If so, what should be the terms of such agreements? (page 139)**

All transmission owning entities should have the same requirements for participation in the RTS or any other form of regional transmission entity. Regardless of the type of regional arrangement -- ISO, Transco, or a more informal arrangement such as the Peninsular Florida RTS -- the structure should be flexible enough so that different forms of participation can be accommodated. If participation is not required on the same terms for all transmission owners, those entities that do not participate on equal terms should not be entitled to enjoy the benefits of participation such as non-pancaked rates. Likewise, non-participating utilities should be barred from requesting or receiving any credit for "integrated transmission facilities" from any participating utility. Further, entities owning transmission facilities that can not be considered part of the "integrated transmission grid" or is not providing a benefit to the integrated transmission grid should be barred from including such transmission facilities as a part of the RTS or RTO.

58. Finally, the FERC seeks comment on the question of how much deference, if any, should be given to the proposed scope and regional configuration of a proposed RTO. (page 139)

59. How readily, if at all, after balancing all appropriate factors, should the FERC be willing to substitute its vision of an appropriate RTO configuration for that of its proponents? (page 139-140)

60. To what extent should the FERC take into account the degree of support in assessing a proposed RTO configuration? (page 140)

61. Should approval or disapproval by affected state commissions of the scope or configuration of a proposed RTO affect the level of deference the FERC

should afford such a proposal? (page 140)

As discussed in response to Questions 3 and 4 above, under Section 202(a) FERC has authority to divide the country into regional districts. Such districts already exist in the form of NERC regional reliability councils. FERC has authority to consider changes to the existing boundaries of these districts after obtaining the "views and recommendations" of the States. Thus, substantial deference should be given to the proposed scope and regional configuration of a proposed RTO that has the support of the State or States involved. Under the Peninsular Florida RTS, the FPSC will have the role of the independent decisional authority. This is consistent with the NOPR's stated intent to keep State authority intact and to encourage accommodation of State oversight. Thus, the FPSC should be given deference with respect to performance of its responsibilities under the RTS.

62. What has been the experience of existing tight power pools with master-satellite and hierarchical forms of control? (page 143)

63. Was there a need to modify these operational arrangements when the pool was replaced by an ISO? (page 143)

Both before and after the formation of ISOs, the tight power pools have operated under a hierarchical arrangement that includes satellite control centers. FPL is not aware of problems that have been created by this structure.

64. Outside of tight power pools, has the functional unbundling requirement in

Order No. 888 led to any divisions of previously integrated internal operational systems? (page 143)

65. **If so, have these new divisions of operational responsibilities created any reliability problems? (page 143)**

The required separation of native load merchant functions from transmission has not created reliability problems to date in Florida. However, it has increased the internal operating cost of supplying retail service and has made essential communication more difficult. Whether the alleged benefits of functional unbundling have outweighed these costs is uncertain.

66. **In addition to the current code of conduct standards, are there any actions that the FERC should require to reduce the likelihood of this problem (non-RTO control area operators who are also competitors in power markets may be "able to know their competitors" schedules or transactions and such knowledge would give the control area operators an unfair competitive advantage) that do not require the consolidation of all existing control areas - within the region? (page 146)**

67. **Is it feasible for a non-RTO control area operator, operating within an RTO region, to perform its functions without having access to commercially sensitive information involving its competitors? For example, could an RTO provide control area operators with information about scheduled net interchange between control areas without disclosing the individual transactions making up the new interchanges? (pages 146-147)**

These questions pose and then seek to address a non-problem. Under current rules, improper use of commercially sensitive information obtained from a control area operator's competitors is a blatant violation of existing codes of conduct. FPL is unaware

of any case where an allegation has been made, no less proven, that there have been violations of such code of conduct requirements by control area operators and believes that any such violations would be readily detected. During remarks made to an EEI Conference on the RTO NOPR held on June 10, 1999, Shelton Cannon, Director of FERC's Office of Electric Power Regulation, stated that problems concerning residual discrimination and misuse of confidential information were largely problems of perception and that there is no evidence of actual wide-spread abuse.

The RTS provides additional protections for confidential information. Each Transmission Owner, Load Serving Entity ("LSE") and Transmission Service Requestor has agreed to supply confidential (generation economics and planned transactions) data in accordance with the provisions of this document for the development of FRCC databases to be used for planning studies. FRCC databases of all load levels needed to do planning studies will be developed using the data. The FRCC databases will be filed at FERC (Form 715) and distributed to each Transmission Owner, LSE and Transmission Service Requestors. The underlying data and assumptions used to develop the FRCC databases will not be made public. Each Transmission Owner, LSE and Transmission Service Requestor will have access to the FRCC databases in accordance with such FRCC Confidentiality Agreement. Each Transmission Owner, LSE and

Transmission Service Requestor may receive and review any composite document, data and other information that may be developed in this Local Area and Florida Planning Process, unless such information discloses any individual confidential data or information.

68. Does this requirement [When the RTO operates transmission facilities owned by other entities, the RTO must have authority to approve and disapprove all requests for scheduled outages of transmission facilities to ensure that the outages can be accommodated within established reliability standards. (Proposed § 35.34 (i)(4)(iii))] cede too much or too little authority to the RTO? (page 149)

This question assumes that transmission ownership and control are divorced from one another, which is not a market structure FPL supports. Today, Security Coordinators have the ability to review all transmission maintenance outage schedules and have the authority to request changes to planned and scheduled maintenance outages. If requested to alter a maintenance schedule, the transmission owner who is not the Security Coordinator is compelled to make every effort to comply with the request. The RTS proposal -- to have FPSC oversight of the Security Coordinator function -- should be sufficient to meet this facet of the operational authority characteristic. The other market structure that FPL believes should remain a viable option is a Transco, where ownership is not divorced from control. If the RTO is the transmission owner, i.e., a Transco, it will have the responsibility and authority to perform outage coordination in a

manner that will have minimal impacts to the transmission grid.

69. If the RTO requires a transmission owner to reschedule its planned maintenance, should the transmission owner be compensated for any costs created by the required rescheduling?

Again, this question is based on an assumption about market structure that FPL does not support. That said, assuming that an RTO has the authority to reschedule planned maintenance outages, the transmission owner should receive reimbursement for the incremental costs to reschedule the outage.

70. Would it be feasible to create a market mechanism to induce transmission owners to plan their maintenance so as to minimize reliability effects? (page 149)

Those incentives would exist under a Transco structure because ownership and operation of transmission would be combined, so that the entity responsible for reliability would also be responsible for scheduling maintenance outages. Likewise, the Pensinsular Florida RTS assures that the transmission owners responsible for scheduling maintenance outages are also responsible for reliability. The non-profit ISO structure, which separates ownership and operation, creates the problem posed by this question. Moreover, liability for bad decisions by a non-profit RTO falls on the member transmission owners and/or market participants.

71. Should an RTO that is an ISO have any authority to require rescheduling of [transmission] maintenance if it anticipates that the planned maintenance schedule will adversely affect power markets? (page 149)

The proper focus for the RTO is reliability; unless a reliability problem will result from a scheduled transmission outage, the RTO should not have the authority to reschedule maintenance. RTOs should not be trying to manage the performance of the market, which is simply a form of regulation.

72. If the RTO is a Transco, can it manipulate its transmission maintenance schedules in a manner that harms competition? (page 149)

This question assumes that a Transco would have an incentive to harm competition in the power markets. It would have no such incentive. While it may be theoretically possible for any kind of RTO to create congestion or harm competition through the scheduling of maintenance on the transmission system, a Transco would have no reason or incentive to do so. Presumably, FERC would not permit the Transco to design a rate that encourages it to create congestion or otherwise harm the market. An RTO that is not a Transco creates a greater risk of taking actions that harm competition because of its lack of economic accountability and because of its incentive to operate conservatively without regard to the effect on market costs. Conversely, this potential problem could not arise under the Florida Pensinsular RTS. The day-to-day oversight of the Security Coordinator function by the FPSC would eliminate this possibility.

73. Should the RTO have some authority over generation maintenance schedules? If so, how much authority should it have? (page 150)

RTOs, in any form, should not have authority over generation maintenance

schedules, other than to the degree necessary for transmission reliability. For example, the maintenance schedules of must-run generation may have to be coordinated with the RTO. RTOs also may need the authority to review and approve schedules for generation facilities that the RTO has under contract to supply ancillary services. If authority is given to RTOs for other than transmission reliability then the RTO, which is FERC-regulated, is directly regulating generation. Such authority would interfere with the provision of State-regulated retail service.

74. Is it possible for a non-profit ISO to establish similar incentive schemes [where transmission owners are rewarded or penalized for reliability of their facilities] for the transmission owners whose facilities it operates? (page 150)

This question puts the ISO into the role of regulating transmission owners. FERC does not have authority to transfer such regulatory functions to ISOs and it is should not propose such a result. The transmission owner certainly may propose a rate scheme that encourages reliability, and FERC could encourage such types of rates.

75. Given that an RTO has responsibility for system reliability, what should be the extent of its liability for its actions? (page 153)

76. Would this differ depending on whether the RTO owns the facilities? (page 153)

A primary flaw of not-for-profit RTOs is that such an entity is not financially liable for its actions. Because non-profit RTOs have no significant assets, reliability-related penalties, sanctions, judgments, damages, and the like imposed on such RTOs

ultimately are paid for by ratepayers and/or other market participants. Also, if transmission assets are operated and controlled by a third-party, such as an ISO, there is a risk that transmission owners will not maintain interest in the transmission business, and will reduce their investment in such assets. With a non-profit RTO, the transmission business becomes a passive investment and transmission owners, being removed from the business of controlling their assets, will inevitably turn their attention to competing interests. Under the Peninsular Florida RTS the transmission owners continue to have incentives to build needed facilities. Facilities have been added in Florida throughout the 1990s and several of the transmission owners have facility additions in their plans for the near future.

One significant advantage of both the RTS and Transcos is the ability to hold the transmission owner liable and accountable for its actions. The Transco and RTS structures better align incentives and encourage a focus on the transmission business. Clear incentives and objectives will provide better results than a non-profit RTO.

77. The FERC invites commenters to address whether more specific guidance is required. (page 156)

78. The FERC invites comments on how this standard can be made effective for RTOs that are ISOs. (page 158)

79. Are there lessons to be learned from the experience of qualifying facilities (QFs) under PURPA in getting interconnections to the grid that would be applicable to ISOs? (page 159)

80. Should this standard be expanded to give the RTO the authority to review and approve all new interconnections (e.g., to connect new generators, to improve reliability, to increase trading opportunities with neighboring regions) or all transmission investments above some threshold dollar amount? (page 159)

Under the FPL RTS Proposal, unified operation of the regional transmission system is achieved without the creation of a large regional superstructure. New connections can be handled by the individual member transmission providers

The Proposal provides that a Working Group will be formed to effectuate a "transparent, one-stop shopping" Open Access Same-Time Information System (OASIS) for Peninsular Florida to replace the present arrangement where each utility has its own OASIS. The Working Group will develop new procedures and processes in order to improve the OASIS registration process and to create the one-stop shopping location for customers submitting requests for transmission service. In short, even though each Transmission Owner will continue to be responsible for assessing requests for transmission service on its transmission system, the OASIS will be the vehicle for coordinating transmission service requests and for communications to and from the customer.

With respect to the OASIS registration process, it is envisioned that the registration process will be streamlined so that entities desiring to register for access to the OASIS will contact a single entity ("OASIS Administrator"). The OASIS

Administrator will coordinate with the applicable Transmission Owner to obtain the type of OASIS access requested by the customer (e.g., a customers may request transaction access and not have transmission service agreements in place, or a customer may not be an eligible customer for such access under the Transmission Owners' Open Access Transmission Tariff). Also, the OASIS Administrator will coordinate with the Transmission Owner for the addition and deletion of customer personnel who can have access to the OASIS.

With regard to customer submittals for transmission service, a one-stop shopping system will be put in place that will allow customers to initiate a single request for transmission service on the OASIS, even though such request may require transmission service from two or more Transmission Owners. It is envisioned that the OASIS will be modified so that such request will be automatically referred to the appropriate Transmission Owners for processing and approval. Subsequently, the response from each Transmission Owner to the transmission service request will be compiled by the OASIS system for communication to the customer as a single response. Such system and processes for submitting transmission service requests and receiving responses to such requests is efficient, non-duplicative, and accords with the requirements of FERC's open access transmission tariff.

The Working Group will also agree on the methodology and data used for calculating total transmission capacity (TTC) and available transmission capacity (ATC). TTC and ATC values will be posted on the OASIS and be made available to all interested entities. Further, since the methodology and data used by the Transmission Owners will be readily available to all other Transmission Owners, such results can be easily duplicated and verified for correctness. Finally, the Working Group will develop procedures to update in a more timely manner actual and projected TTC and ATC values. TTC and ATC values will be subject to audit by the FPSC in its role as overseer, and the FPSC will also act as final arbiter in any disputes over the calculation or values of TTC and ATC.

In summary, the streamlined, transparent, single-stop shopping modifications to the OASIS and the attendant procedures and process, coupled with a standard methodology and common data for the calculation of TTC and ATC values, should achieve the goals that the FERC is seeking to address in its proposed minimum function 1(a).

81. Would the requirement for a tariff with non-pancaked rates make the voluntary formation of RTOs more difficult because it might result in the potential for sudden and unacceptable transmission rate charges? (page 160)

82. Is the severity of any such problem related to the scope and regional configuration of the proposed RTO? (page 160)

83. Does the use of so-called license plate design allow the RTO to meet this requirement without cost-shifting? (page 160)

84. Would the provision for a reasonable transition period help? (page 160)

85. Even if there is mutual waiving of access charges, are there other pricing impediments to inter-regional trade (e.g., differences in scheduling and curtailment conventions between regions) that are likely to impede trade? (page 161)

Under the RTS Proposal, commencing on October 1, 1999, transmission service will be discounted to effectively eliminate alleged pancaking of transmission rates across the systems of at least FPL and FPC, which should eliminate most rate pancaking within Peninsular Florida. Remaining pancaking would be eliminated if other transmission owners in Peninsular Florida were to agree to the RTS pricing formula. The RTS pricing proposal is described in the response to questions 3 and 4 above.

While the RTS addresses most rate pancaking, it should be recognized that this is not a panacea. The elimination of rate pancaking across broad regions may distort efficient decisions by failing to account for the higher costs associated with transmitting power across longer distances. Some methods for eliminating rate pancaking can also create situations where transmission owners do not recover their costs, to the extent that revenues from third party transmission services are included in the calculation of rates and those revenues are not allowed to be collected under the new regime. The use of license plate pricing for a reasonable transition period reduces, but does not eliminate

cost shifting and the under-recovery of costs.

It is important to recognize that, so long as the rates, pancaked or otherwise, recover no more than the revenue requirements of each of the transmission providers in the RTO, any changes in pricing arrangements must be a zero-sum exercise from the standpoint of the market as a whole. The FERC should therefore be flexible and receptive to pricing plans that move toward its minimum requirement 1(b), whether or not that plan stems from a regional RTO administering its own tariff.

86. The FERC invites comments on its requirement that RTOs must be responsible for managing congestion with a market mechanism. (page 164)

87. Can decentralized markets for congestion management be made to work effectively and quickly? (page 165)

88. Can the RTO's role be limited to that of a facilitator that simply brings together market participants for the purpose of engaging in bilateral transactions to relieve congestion? (page 165)

89. If not, will these markets require centralized operation by the RTO or some other independent entity? (page 165)

90. How can an RTO ensure that enough generators will participate in the congestion management market to make possible a least-cost dispatch? (page 165)

91. Are there any special considerations in evaluating market power in a congestion market operated or facilitated by an RTO? (page 165)

FPL agrees that it is reasonable and appropriate to manage congestion with market-based mechanisms. However, this does not mean that the RTO must control or

dictate the mechanism to be used. Congestion management schemes typically provide the RTO generation redispatch authority. FPL does not support the transfer of this function to the RTO. As discussed above, the FERC has no authority under the FPA to require the transfer of dispatch authority to RTOs. FPL does not object to an RTO playing a facilitator role in this area. The Peninsular Florida RTS has the flexibility to accommodate market solutions to constraints, such as those recently approved by the FERC in NERC's Pilot Redispatch Program.[9]

The other serious problem with allowing an RTO to control congestion is the issue of native load rights and priorities. Virtually any congestion management scheme will intrude on native load rights because of the RTO's authority to operate the transmission grid for all services. The transmission loading relief procedures that FERC has required to be filed evidence the fact that congestion management schemes are likely to intrude on native load rights.

92. **The FERC seeks comment on whether such an additional implementation time period is warranted (FERC proposes to allow up to one year after start-up for this function), and whether one year is an appropriate additional time period. (page 165)**

93. **The FERC seeks comment on whether such an additional implementation time period is warranted, and whether three years is an appropriate additional time period. (page 168)**

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[9] *North American Electric Reliability Council*, 85 FERC ¶ 62,353 (1998).

If and to the extent that RTOs operate centralized congestion management regimes, such regimes should not have to be implemented within a set time frame, as artificially-imposed deadlines are likely to raise costs and reduce effectiveness. Solutions for dealing with interregional parallel flows involve wide-scale cooperation and may be difficult to negotiate. Thus, an artificial deadline for implementation is not warranted.

94. The ancillary service policies in Order Nos. 888 and 889 were developed for transmission providers that were generally vertically integrated utilities. There was an expectation that they would be able to provide many of the generation based ancillary services from their own generating resources. An RTO by definition will not own any generating resources. Does this difference necessitate a different set of ancillary service requirements for RTOs? (page 170)

97. The FERC requests commenters to address whether these are minimum requirements needed to ensure that the RTO can satisfy its obligation to maintain targeted levels of reliability. (page 171)

98. Would it be feasible for the RTO to maintain reliability with less authority? (page 171)

An RTO's responsibility for ancillary services should be limited to its obligation to operate a reliable transmission system. If possible, the RTO should only bear responsibility for providing the non-competitive ancillary services and should require users to purchase or self-provide the other, competitive services.

95. Are there other ancillary services, in addition to scheduling, system control and dispatch, and reactive supply and voltage control from generation sources, for which the self-supply option should be eliminated? (page 170)

FPL believes that FERC has properly identified the potentially competitive ancillary services for which there should be a self-supply option.

96. Under what circumstances can the RTO's obligation as the ancillary services supplier of last resort be eliminated? (page 170)

As long as ancillary services can be provided by the competitive market, there is no reason that the RTO should be the supplier of last resort. The market should remain free of interference from the RTO. If necessary for reliability, suppliers could compete with one another to be the supplier of last resort at a market-determined price.

99. The FERC invites comments on the use of market mechanisms to support overall system balancing and imbalances of individual transmission users.

100. Is it feasible to rely on markets to support a function that is so time-sensitive?

101. Can such markets be made to function efficiently if the RTO is not a control area operator?

102. For the imbalances of individual transmission customers, should a distinction be made between loads and generators?

103. Should customers have the option of paying for all imbalances in such a market or only imbalances within a specified band?

The Peninsular Florida RTS proposal does not envision the creation of an RTO to balance generation and load or otherwise operate the electric system. If an RTO is created that is the system operator, it would require access to generation in order to balance load in real-time. However, such access and control should be limited to load balancing and other services necessary for reliability reasons. FPL believes that a spot

market for energy should be a part of the market structure, but does not believe that the RTO should necessarily run the spot market or be the exclusive provider of spot market services.

104. The proposed requirements are arguably based on the presumption that an RTO will be a non-profit, system operator that does not own any facilities. The requirements may not be appropriate for a for-profit Transco that owns facilities that it operates. Therefore, a threshold question is: what should be the market monitoring role, if any, of an independent, for-profit Transco? (page 181)

105. Is it reasonable to expect that such an RTO could be objective in its assessments? (page 181)

106. If the RTO is an ISO, do its monitoring activities need to be further insulated to ensure independence and objectivity? (page 181)

107. For example, should monitoring be performed by one or more individuals or organizations that are funded by the RTO but that have the right to issue reports without the RTO's approval? (page 182)

There is no inherent problem with for-profit Transcos participating in a proper system of market monitoring. However, the monitoring system, whether for ISOs or Transcos, should be limited to monitoring the market to the extent necessary to assure that the RTO has sufficient authority to maintain reliability, and reporting to FERC and affected agencies any design flaws or market abuses that affect the RTO's ability to perform its functions. The monitoring system should not be a form of backdoor regulation, and therefore, the RTO's role should not include investigative or sanctioning

authority. If FERC believes that more aggressive market monitoring is necessary in the early years of RTO formation, it should perform this function together with responsible state regulators, each acting within the scope of its regulatory jurisdiction.

108. Some argue that RTOs should not be charged with any monitoring responsibilities particularly with respect to market power abuses. They argue that the antitrust laws and the FERC offer sufficient protection against competitive abuses. Others have argued that RTOs are somewhat akin to organized stock exchanges and the FERC should follow the SEC precedent of requiring extensive and sophisticated market monitoring by all of the organized exchanges. Are there features of electricity and transmission markets that argue for imposing similar market monitoring responsibilities on RTOs? (page 184)

109. Should the FERC rely on RTOs as the "first line of defense" for detecting both design flaws and market power abuses? (page 184)

110. If this were the FERC's approach, what would be an appropriate role for the FERC in market monitoring? (page 185)

111. If the RTO is operating one or more markets (e.g., ancillary services), is it reasonable to expect that it can perform an objective self-assessment? (page 185)

112. Is there a difference in the market monitoring that the FERC can expect from RTOs? For example, if the RTO proposes to take a market position in secondary transmission rights, is it plausible to expect that the RTO can perform an objective assessment of this market? (page 185)

RTOs should not be involved in routine anti-trust type investigations of market behavior. RTOs are private entities, run by individuals appointed by a private board, and not by officials elected by the public or appointed by elected officials in

accordance with law. As such, RTOs do not have the necessary authority or accountability to determine what is acceptable behavior in a competitive market. Moreover, as there are no concrete or understandable standards of conduct by which RTOs are to review the day-to-day business judgments of market participants, granting RTOs a roving commission to identify and root out bad conduct raises serious due process concerns. In addition, RTOs, including for-profit Transcos, should be permitted to take market positions in secondary transmission rights, which suggests that they should not have a substantial market monitoring role.

It should be pointed out that stock exchanges under SEC jurisdiction are private for-profit businesses, whose employees and directors are not precluded from having a financial interest in market participants. If FERC is comfortable with emulating the SEC regime, it should not have any objections to a for-profit Transco whose employees and board members have financial interests in electric power market participants.

113. Since the success of retail competition will often depend critically on the actions of RTOs, what should be the role of state commissions in market monitoring? (page 185)

The role of state commissions in market monitoring should be largely dependent on the type of regional structure adopted. Under the Peninsular Florida RTS, the role of the FPSC includes monitoring of certain transmission functions. What is

different from that contemplated in the NOPR is that the individual entities in Peninsular Florida will continue to do their own transmission planning and control area operations through a highly coordinated process, with on-site oversight by the FPSC or its independent contractor. FPL believes that this is a cost effective solution, one where the FPSC will serve as the body that assures that efficient and non-discriminatory transmission service is provided to all transmission customers in Peninsular Florida.

114. The FERC welcomes estimates of the amount of money spent by ISOs to monitor markets and their assessments as to whether they will need to spend more or less money in the future. (page 186)

A document recently filed at FERC shows that the California ISO estimates that $1,780,000 will be spent on market surveillance in California in 1999.[10/] FPL is concerned that FERC expects RTOs to become regulators and the costs expended on RTO monitoring functions will spiral upward such that RTO members will be paying the ISO millions of dollars to regulate it in addition to the millions they pay FERC through the annual charge. Under the RTS proposal, with the FPSC having a monitoring role, FPL would expect that costs would be significantly lower than under an RTO structure.

115. For abuses that arise from market power, should the RTO's role be limited to detecting and describing the abuses? (page (186)

10/ *Analytical Support for California ISO Grid Management Charge* at 63, Dkt. No. ER99-2730, (filed April 30, 1999).

117. If the market power has structural causes, what role should the RTO have in developing structural solutions? (page 186)

118. Should RTOs that are ISOs be required to make regular assessments as to whether they have sufficient operational authority? (Pages 186-187)

119. The FERC seeks comment on whether RTOs should be allowed to impose penalties and sanctions. (page 187)

120. Should the penalties be limited to violations of RTO rules and procedures? (page 187)

121. Should the RTO be allowed to impose penalties for the exercise of market power? For example, should the RTO's penalty authority be limited to collecting liquidated damages? (page 187)

If an RTO is created, its market monitoring should be limited to (1) making assessments as to whether it has sufficient operational authority to maintain reliability, and (2) reporting on market structure problems that it identifies in the course of its operations. RTOs should not be involved in conducting routine investigations of market participants' behavior or in the imposition of sanctions and penalties. RTOs are private entities, not governmental regulatory bodies.

116. In the case of localized market power (e.g., generating units that must run for reliability reasons), should the RTO have the authority to take corrective actions? (page 186)

FPL believes that localized market power issues are likely to arise only where there is retail competition. Where a utility such as FPL is scheduling its own generating resources to serve native load under traditional cost-based rates, there is little chance that

any generator(s) will be declared must-run. In any event, it is *FERC's* role to ensure that local market power is mitigated. The RTO should not have the authority to dictate the manner in which local market power issues are dealt with. Neither should the RTO be authorized to dictate the rates, terms, or conditions of contracts for must-run generation. These matters should be handled through FERC review of jurisdictional contracts under Section 205 of the FPA.

122. Should this reporting requirement be limited to producing reports only when a specific problem is encountered? Or should RTO's be required to make periodic reports that assess the state of competition and transmission access even in the absence of specific problems? (page 187)

Any RTO reporting of market power abuses and market design flaws should be limited to notifying the FERC and affected regulatory authorities of specific problems that the RTO has encountered in performing its functions. As noted above, if FERC believes that it is necessary in the initial stages of RTO formation to initiate a more comprehensive monitoring regime, it should create a separate entity and delegate to that entity specific authority and specific standards for performing such monitoring responsibilities.

123. The FERC seeks comment on whether three years is an appropriate amount of time for implementation of this function. (page 192)

Three years is an appropriate amount of time in which to implement this function.

124. The FERC is interested in receiving comments regarding an open architecture policy to ensure that initial RTOs can develop. What flexibility needs to be built into RTO contracts? (page 194)

It is essential that utilities retain the right to terminate participation in a non-profit RTO in order to form a Transco.

125. What regulatory flexibility is needed from the FERC as part of an open architecture policy? (page 194)

The FERC should encourage flexibility and innovation in developing structures for the transmission business rather than trying to prescribe particular preconceived preferable alternatives. There is insufficient experience with ISOs for FERC to be overly prescriptive in defining these entities.

126. In which areas of RTO organization or operations is it especially important for the FERC to expect improvement? (page 194)

127. The FERC proposes to continue its flexibility in allowing the recovery of current sunk transmission costs as transition mechanisms to single rates if proposed by RTOs, including the license plate approach as well as other. The FERC requests comment regarding whether the license plate approach to fixed cost recovery is an appropriate long-term measure. (page 196)

The RTS contains an alternative pricing mechanism that achieves the benefits of RTOs at substantially lower cost and without requiring a significant restructuring of the transmission business and transfer of authority from the States to the FERC. FPL believes that the RTS provides a superior benefit as compared to the RTO structure envisioned in the NOPR. The latter is appropriate for those regions that already have or

have committed to form a centralized power pool.

128. **The FERC intends to be flexible in reviewing pricing innovations, and ask for comments as to what specific requirements, if any, may best suit its RTO goals. (page 197)**

129. **The FERC seeks comments on applying PBR (performance based ratemaking) to RTOs. Should PBR be voluntary or applied to all RTOs? (page 198)**

130. **What degree of regulatory scrutiny would a PBR regime require? (page 198)**

131. **In addition, the FERC seeks comment on the specifics of how PBR would be applied effectively to an RTO. For productivity incentives, what productivity objectives should be adopted and how should productivity be measured? (page 198)**

132. **How would a revenue cap or a price cap be set? (page 198)**

133. **What intermediate adjustments to the cap should be allowed? (page 198)**

134. **How often should base costs be examined? (page 198)**

135. **Is it appropriate to allow a higher ROE as a means of sharing the benefits created by RTOs or should higher ROEs be limited only to increases in risk? (page 199)**

136. **Is the risk of transmission capital recovery increased or decreased by transferring transmission facilities to an RTO from a vertically integrated firm? (page 199)**

137. **Another incentive that could be considered would be to keep transmission rates at current levels and allow participating RTO transmission owners to keep the benefits from cost savings over time or to lower transmission rates partly while owners keep part of the benefits. Would such treatment encourage better performance? (page 199)**

138. **Similarly, the recovery of capital start-up costs of RTO participation could**

be accelerated as well. Is it appropriate to allow such accelerated recovery as an incentive to transfer transmission facilities to an RTO or should capital recovery periods continue to be based on the useful life of transmission facilities? (page 200)

139. Is industry restructuring and the potential introduction of distributed generation technology likely to affect the risk associated with transmission investment recovery periods? (page 200)

140. The FERC seeks comments on whether to entertain case-by-case proposals of rate incentive treatments for RTO participants. Will transmission owners respond to incentives, and will incentives be sufficient to achieve our objective of RTO formation? (page 201)

141. Which incentives are most likely to be successful in so doing? (page 201)

142. Are there specific forms of incentive pricing that are inappropriate and problematic? (page 201)

143. Are safeguards needed if the FERC decides to allow incentive treatments? (page 201)

144. In justifying a proposed rate treatment, should an RTO be required to demonstrate that its benefits are likely to outweigh the pecuniary "costs" of the proposal? (page 201)

145. Would certain incentive pricing encourage RTOs to favor capital-based resource decisions (at the expense of more efficient alternatives) or to favor transmission solutions over alternative ways of relieving particular transmission constraints? (page 201-202)

FERC needs to recognize that virtually no new transmission is being built in the U.S. to support increased regional and interregional trade and the interconnection of new generators. Incentive rates of various kinds should be used to encourage the efficient and cost effective operation, planning, and expansion of a region's transmission

system. Pricing incentives will be most effective if the party being targeted is the party responsible for the operation, maintenance, planning, and expansion of transmission facilities. Thus incentives will have the greatest impact for Transcos or under alternative solutions such as the Peninsular Florida RTS. It is inconsistent for FERC to offer incentive pricing and then propose to take away from transmission owners the right to make Section 205 filings to change their rates, which is necessary to put in place incentive rates.

The FERC should be innovative in the use of combinations of incentives. By allowing rates that incorporate multiple incentives, the FERC can promote development of the most efficient system rather than favoring any single solution. The FERC needs incentives that respect and promote the cost-effective expansion of the transmission infrastructure so that required transmission facilities are planned and built. Incentive rates of return and accelerated depreciation cost recovery periods are two types of incentives that will help attract capital investment – especially in cases where the investment and liability for resources are decoupled from the operational control of those resources.

146. The FERC also seeks comment on whether and how public power transmission owners that participate in RTOs could benefit from flexible ratemaking and incentive pricing treatments. (page 202)

147. The FERC requests comments that identify issues that public power entities

and others face regarding RTO participation and that suggest ways the FERC might facilitate their resolution. (page 203)

148. The FERC solicits comments on the extent to which IRS Code restrictions may limit the transfer of operational control or other forms of control, or ownership, of public power transmission facilities to a for-profit Transco. (page 204)

149. What impact would IRS Code restrictions have on public power participation in other forms of an RTO? (page 204)

150. While IRS Code restrictions might prevent issue of additional tax-exempt bonds for transmission expansions made in accordance with RTO participation, are non-tax exempt forms of financing a viable option for public power participation in selected transmission additions? (page 204)

151. In addition to private use restrictions, are there other restrictions on public power institutions that may limit their participation in RTOs? For example, to what extent would state or local charter limitations, prohibitions on participating in stock-owning entities, or the current policies of various local regulatory entities affect or impede full public power participation in RTOs? (page 204)

152. Are there some forms of associate membership or participation in RTOs, or other special accommodations, that the FERC should consider to make it more feasible for public power entities to overcome obstacles to participation in RTOs? (page 204)

153. The FERC seeks comment on legal restrictions or other considerations regarding the PMAs that prevent their participation in RTOs. For example, Bonneville Power Administration and other entities in the Pacific Northwest may face unique circumstances that may affect RTO formation in that area. (page 204-205)

154. How can the FERC help overcome any such limiting factors to full RTO formation? (page 205)

Participation by public power is crucial to the success of the RTS proposal.

Because Florida does not have retail competition, the primary beneficiaries of the RTS proposal will be public power entities. Those entities and their suppliers will be able to wheel power over multiple systems at a significantly cheaper rate, there will be more coordination in transmission planning, and there will be additional oversight to eliminate any lingering appearance of discrimination.

FPL questions whether the alleged threat of the loss of tax exempt financing is credible. Temporary Treasury Regulations on public versus private use already provide a broad exemption for transmission facilities providing open access service.[11/] In any case, the loss of tax-exempt status, if it were to occur, would have to be weighed against the benefits of improved transmission access, which public power entities claim to be substantial. Generally, if public power entities wish to participate in robust, competitive generation markets, they must be willing to participate fully and on a level playing field.

155. What is the appropriate treatment of existing transmission agreements when an RTO is formed? (page 205)

156. In the ISO filings that the FERC has acted on to date, it has evaluated various "transition plans" regarding existing contracts on a case-by-case basis. At this juncture, the FERC does not intend to resolve this issue generically but instead propose to confine its policy to addressing this issue on an RTO-by-RTO basis. The FERC solicits comments on this approach.

11/ 63 Fed. Reg. 3259 (Jan. 22, 1998).

(page 206)

157. How critical is this concern to transmission owners' and others' decisions on whether to support RTO formation? (page 206)

158. Is the financial impact of giving up an advantageous transmission arrangement significant enough to act as a disincentive to RTO membership? (page 206)

The FERC has expressed a policy in favor of the retention of existing contracts, but then, in contravention of that very policy, has stated that all contracts which result in rate pancaking should be terminated. Of course, because pre-existing contracts were entered into during a period when rate pancaking was accepted policy, the FERC's rulings have meant that most pre-existing contracts must be terminated. In addition, the termination of pre-existing contracts often means that the transmitting utility will not recover its full cost of service because the revenues from third party transmission agreements are typically included in the calculation of revenue requirements used to establish rates. Finally, FERC needs to be consistent in its policy. Any time a contractual relationship is terminated in favor of service under an RTO tariff, one party will benefit and the other will be harmed.

159. The FERC is also concerned about impediments to transactions between existing transmission entities, as well as any future RTOs. It therefore encourages existing transmission entities to consider ways to reduce any impediments to transactions among them and direct them to provide the FERC with a progress report by January 15, 2001. The FERC seeks comment on this issue. (page 208)

160. The FERC invites the comments of Canadian and Mexican authorities on these and other issues. (page 209)

N/A

161. To what extent should transmission owners who do not participate in their region's RTO share in those benefits? (page 209)

162. Would it be appropriate to allow RTO members to provide transmission service at individual system rates to non-participating transmission owners located in the RTO region, thereby denying non-participants the benefits of non-pancaked transmission rates? (page 209)

163. The FERC seeks comment on the treatment by an RTO of non-participating transmission owners in the RTO region. (page 209)

FPL agrees that, where an RTO or other transmission structure such as the RTS has been created in a region, those transmission owners in the region that have chosen not to participate in the RTO or other structure should not be permitted to obtain the benefits that the RTO or other structure provides. FERC should not allow some entities to escape this requirement because they are not public utilities under the FPA or based on allegations of adverse financial impacts, such as the loss of tax-exempt financing. The use of tax-exempt financing to lower costs represents a choice (available to some entities but not others) that can and should be weighed against the benefits of participation in the RTO. Entities should not have the choice of having it both ways by avoiding participation in the RTO while taking advantage of the benefits of that RTO.

164. The FERC requests comments on whether it should provide for expedited or

streamlined processing procedures for Section 203 transfers of jurisdictional facilities to RTOs that meet the characteristics and functions of the Final Rule, and for the related Section 205 transmission rates, terms, and conditions. (page 210)

165. The FERC also welcome specific suggestions regarding how it can further expedite or streamline its procedures. (page 210)

The FERC should provide for expedited or streamlined procedures for approval of any regional transmission arrangement that resolves the problems listed in response to Questions 13-20 above, whether or not those arrangements involve the formation of an ISO or Transco.

166. Given that a power exchange is useful, should it be part of an RTO or otherwise associated with an RTO? (page 213)

167. If an area has more than one PX, should the PXs have equal standing before the RTO? (page 213)

170. Is it feasible for an RTO to operate a spot energy market without compromising its ability to provide non-discriminatory transmission service to all market participants? (page 213)

171. If a PX is operated by a non-RTO entity, is there a need to require certain specified forms of coordination between the two organizations? (page 213)

Although PXs may be a useful market device, they should not be required as part of an RTO. First, when a PX takes a non-profit form or has a special status (i.e., captive customers), the costs are likely to spiral. This is the case in California, where the

start-up costs for the PX were approximately $100 million.[12] Several competitive PXs, none of which is subsidized by the RTO or by ratepayers, provide a better model. However, if the RTO includes operating functions, it should be permitted to acquire energy as and to the extent necessary to maintain the reliability of the electric system.

168. Is an organized PX necessary for successful retail competition? (page 213)

No, not necessarily. While a level playing field for all participants is necessary for successful retail competition, FPL is not convinced that an organized PX is the only way to accomplish this. In any case, it is up to the Florida legislature to decide the structure of any retail competition initiative for the state of Florida.

169. If an RTO operates congestion markets and balancing markets, are there efficiencies to be gained by allowing or encouraging the RTO to operate day ahead or hour ahead energy markets? (page 213)

FPL does not support an RTO model under which the RTO is responsible for system operations and runs a congestion market.

172. Would regional workshops advance RTO formation? (page 215)

173. Under whose auspices should regional workshops be held? (page 215)

FPL does not perceive the need for new FERC-sponsored workshops. The FPSC has already convened a process for reviewing the need for new transmission

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[12] *See* Direct Testimony of L.M. Miller at 3, FERC Dkt. No. ER98-210 (filed January 30, 1998), (explaining that PX startup and development costs were $96,277,000).

structures in Florida beyond the requirements of Order 888, and this process should be allowed to go forward without FERC intervention.

174. Would it be beneficial to have the FERC's Dispute Resolution Service staff facilitate discussions regarding RTO formation? (page 215)

On a purely voluntary basis, the assistance of FERC Dispute Resolution staff may be helpful in a particular region and with respect to particular issues.

175. Should the FERC staff be made available to attend meeting convened by others? (page 215)

If a meeting to discuss an RTO or other proposal is open to the public, FERC Staff should be free to attend.

176. If the FERC staff convenes workshops, in how many cities should meetings be convened and how should the cities be chosen? (page 215)

177. Would the three U.S. interconnections be appropriate starting points? (page 215)

FPL supports a Florida solution to remaining transmission issues and does not support the formation of broader regional workshops or meetings.

178. Would participation by the FERC staff aid or stifle negotiations on RTO development? (page 215)

FPL is concerned that FERC Staff might not be open to alternatives like the RTS because it does not coincide with the RTO model set forth in the NOPR.

179. The FERC seeks comment on whether the filing requirements discussed above are inconsistent with or otherwise would inhibit voluntary

participation in RTOs.

180. The FERC also seeks comment on whether it needs to generically mandate RTO participation by all public utilities to remedy undue discrimination under sections 205 and 206 of the FPA. (page 218)

As discussed in the response to Questions 3and 4 above, FERC does not have authority to mandate RTO participation.

182. In considering what actions might be appropriate if a utility fails to voluntarily join an RTO, the FERC seeks comment on whether market-based rates for generation services could continue to be justified for a public utility that does not participate in an RTO, whether a merger involving a public utility that is not a member of an RTO would be consistent with the public interest, whether non-participants that own transmission facilities should be allowed to use the non-pancaked transmission rates of the RTO participants in that region, whether transmission service provided by a transmitting utility need to be under RTO control to satisfy the discrimination standards of sections 211 and 212 of the FPA, and whether a public utility's lack of participation would otherwise be in violation of the FPA. (page 219)

In essence, this question asks what sanctions the FERC ought to levy against utilities that choose not to participate in "voluntary" RTOs. As is discussed in Question 3 above, the FERC does not have the authority to require utilities to join RTOs; accordingly, it would be inappropriate for the FERC to levy sanctions against a non-participating utility, other than to deny it the benefits of an RTO established in its own region. Moreover, this question assumes that the formation of RTOs is necessarily the best result for a particular region. FPL believes that its RTS proposal is a superior option that will eliminate perceived remaining problems while avoiding the expense and

bureaucracy associated with forming an RTO. In short, rather than fashioning sanctions for utilities that decline to participate in a one-size-fits-all RTO solution, the FERC should be examining whether a utility is participating in a region-wide solution to the problems the FERC has identified. The Peninsular Florida RTS proposal, detailed above, is one example of a non-RTO approach that addresses and resolves those problems.

183. How should the FERC consider the efficiency, reliability, and discrimination implications of RTO non-participation?

184. How should the FERC consider non-participation by utilities that constitute "holes" in an RTO region?

See response to Questions 146-154.