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ORIGINAL

October 12, 2001

VIA HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, FL 32399-0850

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In re: Docket Number 001148-EI
Docket Number 000824-EI
Docket Number 010577-EI

Dear Ms. Bayo:

Enclosed for filing in the above referenced dockets are the original and fifteen (15) copies of Duke Energy North America's Post-Hearing Statement of Issues and Positions and Post-Hearing Brief.

Also enclosed is a diskette containing the above document in Word.

Please acknowledge receipt of the filing of the above by stamping the duplicate copy of the Post-Hearing Statement.

Thank you for your assistance.

Sincerely,

Leslie J. Paugh

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.	DOCKET NO. 000824-EI
In re: Review of Florida Power & Light Company's proposed merger with Entergy Corporation, the formation of a Florida transmission company ("Florida transco"), and their effect on FPL's retail rates.	DOCKET NO. 001148-EI
In re: Review of Tampa Electric Company and impact of its participation in GridFlorida, a Florida Transmission Company, on TECO's retail ratepayers.	DOCKET NO. 010577-EI Filed: October 12, 2001

DUKE ENERGY NORTH AMERICA'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF

Duke Energy North America ("DENA"), pursuant to the Prehearing Order in these dockets, Order No. PSC-01-1959-PHO-EI, issued October 1, 2001, and Uniform Rule 28-106.215, Florida Administrative Code, hereby files its Post-Hearing Statement of Issues and Post-Hearing Brief. DENA's Post-Hearing Statement of Issues and Positions lists the issues identified in the Prehearing Order and provides DENA's positions thereon.

Citations to the official hearing transcript are in the form "TR abc," where "abc" identifies the page(s) of the transcript cited. Similarly, citations to exhibits are in the form "Exh. def at ghi," where "def" represents the number of the exhibit as identified in the record and "ghi" identifies the page number(s) referenced.

DENA'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS

DENA herein addresses the issues identified for this case in the order and format listed in the prehearing order.

Issue 1: Is participation in a regional transmission organization (RTO) pursuant to FERC Order No. 2000 voluntary?

DENA: *Yes. Pursuant to FERC Order 2000, participation in an RTO is

voluntary. However, FERC acknowledged that it may use its regulatory authority in other areas such as market power analyses, market-based rate authority, and merger requests to mandate RTO participation. Notwithstanding voluntary participation, the filing requirements of FERC Order 2000 are mandatory. Public utilities were required to file either an RTO proposal or a report on the impediments to RTO participation.*

Issue 2: What are the benefits to Peninsular Florida associated with the utility's (FPC, FPL, or TECO) participation in GridFlorida?

DENA: *GridFlorida will facilitate achievement of the benefits of a competitive wholesale electricity market in Peninsular Florida thus ensuring that ratepayers will pay the lowest possible price for reliable service. GridFlorida will improve efficiencies in transmission grid management, improve reliability and remove opportunities for discriminatory practices. GridFlorida will also enhance access to, and use of, the grid by eliminating rate pancaking, establishing uniform interconnection procedures, coordinating planning functions, and enhancing transmission expansion and upgrade activities.*

Issue 3: What are the benefits to the utility's ratepayers of its participation in GridFlorida?

DENA: *An RTO will benefit ratepayers by enhancing grid reliability, reducing generation and transmission costs, and shifting investment risk away from ratepayers. Uniform transmission protocols and prices coupled with appropriate maintenance and planning regulations provided by an RTO will enable competitive wholesale transactions thus lowering consumers' generation costs because of increased supply options. Unified transmission system operation, planning and maintenance will lower transmission costs through economies of scale and the elimination of duplicative, parochial practices.*

Issue 4: What are the estimated costs to the utility's ratepayers of its participation in GridFlorida?

DENA: *No position.*

Issue 5: Is TECO's/FPL's decision to transfer ownership and control of its transmission facilities of 69 kV and above to GridFlorida appropriate?

and

Is FPC's decision to transfer operational control of its transmission facilities of 69 kV and above to GridFlorida while retaining ownership appropriate?

DENA: *Yes. An effective RTO structure should be able to accommodate different business decisions while at the same time providing the centralized, nondiscriminatory control that is the hallmark of reliable, regionally operated transmission systems. Assuming the GridFlorida governance is properly organized and independent, it is appropriate for the entity that possesses responsibility for operating and maintaining the transmission facilities to also own them. Likewise, such an entity can effectively operate assets owned by the utility.*

Issue 6: Is the utility's decision to participate in GridFlorida prudent?

DENA: *Yes. The decision to participate in GridFlorida was prudent. While Order 2000 is voluntary, FERC indicated a willingness to leverage its regulatory authority. As such, the utilities were forced to decide whether to create a regional transmission organization or possibly be ordered to join that of another region. The utilities' decision to take control of the RTO process on behalf of Florida ratepayers and shareholders was reasonable and prudent.*

Issue 7: What policy position should the Commission adopt regarding the formation of GridFlorida?

DENA: The Commission should memorialize a position that recognizes the benefits of a competitive wholesale power market for Florida. The Commission should also acknowledge that there remain important transmission-related impediments to a competitive market such as the engineering and economic inefficiencies and continuing opportunities for undue discrimination in the operation of the grid. Finally, the Commission should seek to immediately establish an independent grid management structure that will ensure the development of competitive wholesale generation markets.*

Issue 8: Is Commission authorization required before the utility can unbundle its retail electric service?

DENA: *This issue is moot insofar as FPL, FPC and TECO will continue to provide bundled retail electric service to their retail customers.*

Issue 9: Is Commission authorization required before the utility can stop providing retail transmission service?

DENA: *This issue is moot.*

Issue 10: Is Commission authorization required before the FPC can transfer operational control of its retail transmission assets?

and

Is Commission authorization required before FPL/TECO can sell its retail transmission assets?

DENA: *No position. *

Issue 11: Is a Regional Transmission Organization for the Southeast region of the United States a better alternative for Florida than the GridFlorida RTO?

DENA: A southeastern RTO is critical to the development of a Florida wholesale market. Centralization of transmission functions will enhance economies of scale, correctly reflect natural markets, ensure truly non-discriminatory transmission service and instill confidence in the market that will support needed capital investment. Smaller RTO's may develop incompatible structures and systems which do not reflect wholesale market trading patterns. However, the Commission could approve GridFlorida as a phase in the development of a Southeastern RTO.*

DENA'S POST-HEARING BRIEF

INTRODUCTION

Duke Energy North America ("DENA") hereby submits its Brief and Post-Hearing Statement which shows that there is competent, substantial evidence establishing the reasonableness and prudence of the GridFlorida participants' (Tampa Electric Company, Florida Power & Light Company, and Florida Power Corporation) decisions to participate in a Regional Transmission Organization ("RTO") as mandated by the Federal Energy Regulatory Commission's ("FERC") Order 2000. Participation in an RTO will provide significant benefits to Peninsular Florida and Florida ratepayers. As a matter of policy, the Florida Public Service Commission ("FPSC") should recognize the benefits of

a robust, competitive wholesale power market and encourage the establishment of such a market through the formation of an RTO. Finally, greater RTO scope can provide benefits through expanded access to supply alternatives, increased reliability and efficiency, and increased economies of scale; and RTOs with scopes smaller than the natural markets they fall within may diminish the full market efficiencies that would otherwise be available. Therefore the FPSC should approve implementation of an RTO for Florida as expeditiously as possible. Notwithstanding the long-term advantages of a Southeastern RTO, the Commission may wish to develop an RTO in a phased approach initially utilizing a Peninsular Florida model that is compatible with and will eventually merge with a larger Southeastern RTO.

No party has testified that Order 2000, while nominally voluntary, does not require all transmission-owning entities to participate in an RTO or be subjected to FERC incentives and penalties. Each transmission-owning public utility was required to file an RTO proposal that complied with the minimum characteristics and functions and other specific RTO requirements of Order 2000. The GridFlorida participants complied with these requirements and that compliance was prudent.

The record in this proceeding is replete with uncontroverted evidence that Peninsular Florida and Florida ratepayers will benefit from participation in an RTO. By contrast, there is no evidence of detriments associated with participation in an RTO, only costs which were fairly characterized by various witnesses as *de minimis*. Participation in an RTO will facilitate development of a robust, competitive wholesale electricity market in Florida. A robust, competitive wholesale electricity market will, in turn, ensure that retail ratepayers pay the lowest possible price for reliable electricity service. Generally,

an RTO will improve efficiencies in transmission grid management, improve grid reliability, and remove remaining opportunities for discriminatory transmission practices. An RTO will enhance access to, and use of, the transmission system by eliminating rate pancaking, providing efficiencies inherent in uniform interconnection procedures, coordinating planning functions and enhancing transmission expansion and upgrade activities.

The totality of the evidence also shows that participation in an RTO in general and in GridFlorida in particular is reasonable, appropriate and prudent. The GridFlorida participants' decisions in response to the circumstances before them and to Order 2000 were reasonable and must be deemed prudent.

The Commission should memorialize a policy position that recognizes the benefits of a robust, competitive wholesale power market. The Commission should also acknowledge that there remain transmission-related impediments to competitive markets such as the engineering and economic inefficiencies and continuing opportunities for undue discrimination in the operation of the transmission grid. Then, the Commission should seek to establish an independent grid management structure that will ensure the development of competitive wholesale generation markets. The primary function of such an RTO should be to operate the transmission system in a fair manner that facilitates growth, equal transmission access, just and reasonable transmission rates and comparability in the emergence of competitive, wholesale power markets.

I. ONLY WHEN CONSIDERED IN A REGULATORY VACUUM IS PARTICIPATION IN AN RTO PURSUANT TO ORDER 2000 VOLUNTARY.

Pursuant to the express terms of Order 2000, it is agreed that participation in an RTO is to be voluntary. However, FERC has made it abundantly clear that it can and will use a number of mechanisms to ensure that all transmission-owning utilities participate in an RTO. Thus, it is only if one considers the use of the word "voluntary" in Order 2000 in a regulatory vacuum that one can conclude that participation in an RTO is truly voluntary.

Order 2000, while nominally voluntary, makes clear FERC's intent that all transmission-owning entities will place their transmission assets in an RTO and they will do so in a timely manner. (Exh. 4 at 124) At various points in Order 2000, FERC clearly states the federal policy that all transmission owners join an RTO. At other places in the order, FERC enunciates its objective and its goal that all transmission-owning public utilities participate in an RTO. Consistent with the approach proposed in the NOPR, FERC concluded as follows:

> Based on the record before us . . . it is clear that RTOs are needed to resolve impediments to fully competitive markets. However, we continue to believe . . . that at this time we should pursue a voluntary approach to participation in RTOs.

Exh. 4 at 124. Additionally, FERC believes the voluntary approach that it structured would be sufficient to achieve its goal that all transmission-owning utilities join an RTO or else FERC would use "guidance and encouragement" to motivate recalcitrant utilities to do so. (Exh. 4 at 124)

According to James J. Hoecker, who was the Chairman of FERC at the time of the issuance of Order 2000, it is FERC's clearly stated policy that all transmission-owning utilities should join an RTO and FERC is prepared to take significant actions to enforce that policy. (TR 242)

This voluntary approach by FERC in a significant policy initiative is not unusual. On numerous occasions, FERC has announced major policies in which participation was voluntary, but FERC has also provided strong incentives to participate. In virtually all of those instances, FERC has eventually increased the incentives, then increased the penalties for non-compliance, and finally has made participation mandatory. (TR 155, 828)

While the approach in Order 2000 is voluntary, the filing requirements of FERC Order 2000 are mandatory. FERC concluded on the record before them "that it is in the public interest to provide for a voluntary approach to RTO formation that relies upon encouragement, guidance, and support from the Commission," but "this does not mean that all aspects of this Rule are voluntary. The filing requirements . . . are mandatory." (Exh. 4 at 126) All public utilities were required to file either an RTO proposal or a report on the impediments to RTO participation and their plan for overcoming those obstacles. In fact, compliance by public utilities with these filing requirements was essentially one hundred percent. (TR 261) Additionally, each transmission-owning public utility was required to file an RTO proposal that complied with the minimum characteristics and functions and other specific RTO requirements of Order 2000. Those filings were made and in the case of GridFlorida, FERC accepted the RTO proposal and required additional compliance filings to further define and refine the proposal. The

GridFlorida participants correctly believed that if they did not file their own proposal, FERC would eventually force RTO participation. (TR 102, 134, 135)

FERC has extensive experience in regulating wholesale markets using both voluntary and mandatory approaches. This experience led FERC to make participation in an RTO voluntary so that the affected entities would spend less effort challenging a mandate and more effort proposing a well-crafted RTO. In denying rehearing in Order 2000-A, FERC again reiterated its objective "to have all transmission-owning entities place their transmission facilities under the control of RTOs in a timely manner." (Exh. 4 at 750) FERC further restated its explanation "in the Final Rule that the voluntary approach as [FERC] structured it will allow the industry the opportunity and the flexibility to develop mutually agreeable regional arrangements, and will permit the industry to focus its efforts on the potential benefits of RTO formation rather than on a non-productive challenge to [FERC's] legal authority to mandate RTO participation." (Exh. 4 at 750-51)

As FERC learned in prior regulatory initiatives in the energy sector, such as Orders 436, 636, and 888, the voluntary approach did not achieve the FERC objectives as quickly and as responsively as FERC intended. Having learned that lesson, FERC is not hesitant and has not been reluctant to use its regulatory authority to motivate recalcitrant utilities to comply with FERC's other "voluntary" orders. However, FERC believes that things may be different under Order 2000. The reasons for FERC's belief are detailed in Order 2000:

> We believe the voluntary approach to RTO formation can be more successful now than in the past for several reasons. The pace of industry restructuring is accelerating. Many formerly vertically integrated utilities have recently

> recognized the strategic benefits to them of concentrating solely in one of the traditional utility areas (generation, transmission, or distribution). Moreover, the NOPR has focused industry attention on RTOs and their benefits. Further, this Final Rule is providing clear rules and guidance on what is necessary to form an RTO. Through this final Rule, we are also committing the Commission to act as a catalyst in RTO discussions by initiating and encouraging a collaborative process. Finally, we have provided in this Final Rule for certain favorable ratemaking treatments for those who assume the risks of the transition to a new structure, which should, at a minimum, eliminate any rate disincentives to RTO formation.

(Exh. 4 at 125) FERC expressed anticipation that all transmission owners would participate in good faith in the collaborative process established in Order 2000. FERC further reiterated the same reasons for believing that the voluntary approach would be successful in the Order on Rehearing, Order 2000-A. (Exh. 4 at 751) However, FERC acknowledged that it would consider conditioning market-based rates and mergers on RTO participation on a case-by-case basis.

Historically, FERC used the same kind of "voluntary" approach to implementing open access and competition in the natural gas pipeline industry. Order 436, issued in 1985, established an open access regime that allowed each interstate natural gas pipeline to develop its own open access tariff. Compliance was voluntary, but the industry recognized the FERC's direction and moved expeditiously to implement the Order. However, because compliance was voluntary, the tariffs developed by the separate pipelines were inconsistent and failed to enhance the ability to move gas over multiple pipelines. Additionally, while compliance was voluntary, FERC included a number of terms and requirements that posed a significant threat to entities that did not comply.

In considering the "voluntary" nature of Order 436, the United States Court of

Appeals for the District of Columbia, in Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), recognized that the FERC's assertion that Order 436 was voluntary was flawed as it related to FERC's failure to take direct action on uneconomic take-or-pay contracts. Specifically, FERC conditioned a pipeline's ability to take advantage of a blanket certification for transportation service and the accompanying benefits such as rate flexibility, upon its commitment to provide transportation on a non-discriminatory basis under the new, voluntary rules. As the court noted, any pipeline company not receiving the blanket certificate would soon be uncompetitive and a candidate for bankruptcy. The court doubted whether this scheme was indeed voluntary when the pipeline company was given the option between compliance and bankruptcy. It highlighted this doubt by saying "[W]hen a condemned man is given the choice between the noose and the firing squad, we do not ordinarily say that he has 'voluntarily' chosen to be hanged." Id. at 1024.

Because the results of the voluntary initiative in Order 436 were not consistent and because Order 436 was overturned and remanded repeatedly, FERC was forced to issue a series of subsequent orders that established standard practices across multiple systems to make transactions more competitive and drive down prices of the commodity. Orders 500 and 636 are two of those orders and show the progression followed by FERC in moving from the voluntary to the mandatory approach.

Similarly, FERC has begun a move toward stronger "incentives" to prompt transmission-owing utilities to participate in an RTO. Even though virtually all public utilities met the initial filing requirements of Order 2000, FERC has since made clear that its goals and objectives are not being achieved on the timetable that FERC intended. In

the RTO orders issued on July 12, 2001, after considering the mandatory filings by all the jurisdictional utilities, FERC reiterated its goal of establishing RTOs and decided that there should only be a few large regional RTOs in the country. (TR 254) The July orders also suggest a more prescriptive attitude toward RTO formation and less willingness to defer to stakeholders and RTO proponents with regard to structure, organization, or geographic scope. (TR 256) FERC has clearly signaled that the flexibility associated with Order 2000 is diminishing, that rate incentives may be coolly received, and that existing RTOs must get independent boards in place more quickly. (TR 256)

The Florida Public Service Commission staff correctly characterized FERC's intention in Staff's September 2000 Policy Analysis Briefing Paper: The Viability of an RTO in Florida, when, at page 16, Staff states:

> While Order No. 2000 stated that RTO development is voluntary in nature, in reality FERC has made it clear that it expects all transmission-owning utilities to comply. Although the FERC lacks direct legal authority to mandate participation in RTOs, it has stated its intent to use its regulatory authority in other areas . . . to force compliance with Order No. 2000.

(TR 256) While former Chairman Hoecker disagrees with Staff regarding FERC's direct legal authority, he does believe that consequences of failure to participate in an RTO will go well beyond loss of promised incentive rates or reduction of the flexibility and deference suggested in Order 2000. FERC has telegraphed its intention to use its authority to consider and approve strategic transactions as a tool to encourage RTO participation. In Order 2000, FERC indicated that it might resort to penalties on non-compliant utilities, including denial of Section 203 approval for dispositions of assets or revocation of market-based rate authority. (TR 257)

Most recently, FERC Chairman Pat Wood III, issued a memorandum dated September 26, 2001, that was discussed at the open FERC meeting that same date. (Exh. 5) The movement of FERC away from a voluntary approach and to penalties for non-compliance is explicit. Chairman Wood, with the support of the other FERC Commissioners, states that it is time to bring the transition period to an end. (Exh. 5 at 1) To that end, Chairman Wood proposed that FERC initiate, under Section 206, a rulemaking on market design and market structure to translate the RTO functions in Order 2000 into concrete protocols for RTO organizations. (Exh. 5 at 2) He said: "This Section 206 proceeding will yield a new *pro forma* tariff to replace the Order No. 888 OATT, and will be **required** of all public utilities and of all RTOs." (Emphasis supplied). (Exh. 5 at 2) Then to emphasize the shift toward mandatory compliance, Chairman Wood recommended as follows:

> What to do about the December 15, 2001 date in Order No. 2000? I recommend that this be changed to be the date by which all jurisdictional utilities must either elect to join an approved RTO organization or have all market based rate privileges by any corporate affiliate be prospectively revoked, following a Section 206 investigation. I would also recommend that no mergers be approved relating to entities who do not become part of an operational RTO. And for an [sic] public utility that chooses not to be part of an RTO, I believe we would need to take a hard look at the transmission rates they are permitted to charge to ensure that they are just and reasonable and recognize the interdependence of the power grid.

(Exh. 5 at 2) By proposing that the flexibility to join RTOs be narrowed and that FERC impose increasingly severe penalties on companies that do not participate, FERC has effectively removed any further pretense that Order 2000 is voluntary. FERC has also effectively compelled compliance while avoiding the time consuming proposition of

amending Order 2000. The fastest way to achieve compliance is to make it unbearable for the companies not to participate, just as FERC did under Order 436. (TR 137)

For the forgoing reasons and based on the most recent statements by FERC, it is clear that Order 2000 is voluntary in name only and that FERC fully intends to force compliance through all avenues available to it. Thus, Order 2000 should not be treated as voluntary for the purposes of this proceeding.

II. PENINSULAR FLORIDA AND FLORIDA RATEPAYERS WILL BENEFIT FROM THE UTILITIES' PARTICIPATION IN AN RTO.

A. Introduction and Background.

The record in this proceeding is replete with uncontroverted evidence that Peninsular Florida and Florida ratepayers will benefit from participation in an RTO.[1] By contrast, there is no evidence of detriments associated with participation in an RTO, only costs which were fairly characterized by various witnesses as *de minimis*. National policy pronouncements have long borne witness to the benefits of open, nondiscriminatory access to the nation's transmission system. Now, as a result of these proceedings, the Florida Public Service Commission also has substantial, competent data and analyses before it which can lead to only one logical conclusion – that an RTO is in the best interests of Florida and its citizens. As such, this Commission should issue an order approving establishment of a regional transmission organization for Florida that integrates the characteristics and performs the functions of an RTO set forth in Order No. 2000.

At the core of this inquiry is the knowledge that participation in an RTO will facilitate development of a robust, competitive wholesale electricity market in Florida.

[1] Indeed, seven of the eight witnesses presented testimony on the benefits of an RTO.

(Exh. 4 at 12) A robust, competitive wholesale electricity market will, in turn, ensure that retail ratepayers pay the lowest possible price for reliable electricity service. This is about reducing ratepayers costs and enhancing the reliability of electric service in this state. An appropriate RTO is a necessary condition to achieving these goals. (TR 111) Put another way, the inquiry is not "if it isn't broken, don't fix it." The inquiry is whether we as market participants and policymakers are doing everything possible to improve the quality and cost of this enormously critical service.

National policymakers have long recognized and sought to advance the price suppression benefits of competitive generation markets. After implementing standardized terms of wholesale transmission service under Order 888, FERC then continued its quest for wholesale competition through Order 2000. Specifically, Order 2000 is intended to eliminate the numerous impediments to the development of wholesale markets such as engineering and economic inefficiencies extant in the current operation and expansion of the grid and continuing opportunities for undue discrimination. (Exh. 4 at 71-75) Under Order 2000, FERC recognized that the elimination of these barriers to wholesale market development would require vesting control of transmission planning and operations with an independent entity. An RTO that integrates the characteristics and performs the functions set forth in Order 2000 will successfully (1) enhance access to and management of the grid and eliminate discriminatory practices, (2) improve reliability and planning functions, and (3) improve market performance. (TR 246) These are the keystones of a robust, competitive wholesale marketplace.

B. Improved Grid Access and Grid Management and Elimination of Discriminatory Practices.

With an effective, independent RTO, access to and use of the grid will be

dramatically improved, thereby facilitating achievement of the goal of encouraging wholesale competition. The evidence in these proceedings amply demonstrates mechanisms through which an RTO will improve grid access. Two of those mechanisms are: (1) the elimination of pancaked rates, and (2) implementation of uniform interconnection procedures.

The elimination of pancaked transmission rates is an important element of grid access. Pancaked rates are duplicative, unnecessary charges. Rate pancaking occurs when a transmission customer is charged a separate charge for each utility's service territory the customer's transaction crosses. (TR 555) As a consequence, a regional transaction that would otherwise be economic is rendered uneconomic. Under Order 2000, RTOs are required to eliminate rate pancaking thereby increasing the opportunities for economical purchases and sales. (TR 555) A single transmission rate for the region will provide immediate benefits in the form of lower transaction costs and increased number and source of generation supply options. (TR 249, 762, 830, 859) A functioning RTO is a condition precedent to achieving these highly desirable cost reduction benefits.

Access to the grid will also be greatly enhanced through the implementation of unified interconnection procedures. Interconnection procedures are the keys to the doors of the electrical kingdom. The procedures of individual utilities are highly variable, difficult to effectuate, and subject to long delays. Interconnection procedures apply to customers seeking to add or modify capacity to the transmission system and generally involve feasibility and facilities studies performed in order of queue priority dates. The queue determines the sequence of the interconnection studies, the study scopes, and the priority of interconnection of two or more generators at a given location. In addition, the

queue determines the cost responsibility for construction of interconnection facilities or system upgrades. At any given time, there are numerous interconnection and transmission service requests pending before the utilities. (TR 111) Many interconnection requests impact multiple systems and thus must be studied by a concomitant number of companies. Thus, the use of separate queues seriously impedes new supplier access to the grid because, as a practical matter, transmission requestors must go through multiple transmission providers and OASIS nodes, sign multiple agreements with each provider and pay separate and cumulative transmission fees. Obviously, these duplicative procedures create inefficiencies that negatively impact access to and cost of access to the grid and inhibit wholesale market entrants. Unified interconnection procedures performed on a regional basis will expedite the study process, facilitate access to the grid and encourage new generation, and reduce interconnection costs. (TR 111-12, 197, 825-26) Like depancaking, uniform interconnection procedures will provide immediate benefits in the form of lower transaction costs and increased number and source of generation supply options. A functioning RTO is a condition precedent to achieving these highly desirable cost reduction benefits.

In addition to the grid access enhancement effects of depancaking and uniform interconnection procedures, an RTO will generally improve the management of Florida's grid. Enhanced grid management is a fundamental, if less visible, benefit of an RTO. When generation is dispatched more efficiently under the RTO's operating, maintenance and congestion management protocols, there is a much higher degree of certainty that units will be dispatched economically. Economic dispatch yields lower overall generation costs to the consumer. (TR 186-88) Likewise, an RTO will provide access to

multiple sources of capacity and energy resulting in a range of savings to consumers. (TR 859) Finally, an approved, independent RTO is also more likely to be able to take advantage of innovation in the industry than the current patchwork system of grid management. FERC has stated that it will be much more receptive to special rate and service innovation from RTOs than it has been under the Order 888 *pro forma* tariffs. (TR 112, 267) Opportunities created by new technologies or new industry requirements will be much more visible to a unified control entity and will surely increase service options and lead to cost reductions.

In sum, an RTO will produce immediate direct and indirect benefits for Florida's ratepayers. An RTO will enhance access to the grid and eliminate protectionist practices thereby lowering transaction costs, increasing the number of generation supply options and reducing overall ratepayer transmission costs. As Tampa Electric Company Witness Hernandez succinctly avowed: "any mechanism that is likely to improve the efficiency of and access to the Florida transmission grid holds the promise of significant, long-term benefits to the company's ratepayers, which exceed the incremental cost of taking transmission service from an RTO." (TR 841)

C. Improved Reliability and Planning Functions.

In conjunction with the grid access benefits detailed above, an RTO will also improve grid reliability and grid planning functions, which will result in additional efficiencies and ratepayer savings. Currently, system planning is performed by individual utilities with limited inter-regional coordination. These disparate processes yield a jumble of asset additions optimized only on a sub-regional basis. Integrated, as opposed to individual utility, planning and expansion for the regional grid will eliminate

duplication, target least cost outcomes, and optimize all regional assets. So, for example, whereas an individual utility may plan to add additional generation to accommodate local growth, an RTO with a broader context and more complete information may conclude that it is more cost-effective to build transmission to link an area with a surplus of generation than to construct new. (TR 262) According to Witness Mechler:

> With an RTO, the full region would be part of a completely integrated and coordinated planning process. This would provide not only for a system that is planned more efficiently, but one that also is more flexible to new opportunities for energy transactions. Planning that is conducted from a regional perspective tends to optimize local needs and bulk wholesale transactions better.

(TR 764-65) Clearly, economies will develop when a single entity evaluates expansion plans on a statewide, integrated basis. (TR 451) These integration efficiencies will produce savings associated with capital addition deferrals and maximization of the best resource addition for the infrastructure as a whole. (TR 851-52)

Short-term reliability will also be enhanced by integration of several transmission functions. Order 2000 requires that an RTO have the authority to do the following in order to ensure short-term reliability of facilities under its operation and control: (1) Interchange Scheduling; (2) Redispatch Authority; and (3) Transmission Maintenance Approval. In addition an RTO must evaluate reliability council reliability standards for conflicts in order to ensure that the RTO is not prevented from meeting its obligations. (Exh. 1 at 935) As such, the RTO will have exclusive authority for receiving, confirming and implementing interchange schedules, ordering redispatch to manage congestion, or as necessary for reliability purposes, and approving scheduled outages for all transmission under its operational control. (TR 262-63) Coordination of scheduled outages is critical,

especially in shoulder periods. (TR 413) Integrating these functions will improve reliability of the transmission system and lower transaction costs. Witness Hoecker clearly encapsulated the short-term reliability benefits of an RTO:

> Short-term reliability will also benefit from an RTO's ability to move transmission anywhere on its system with greater ease and at a lower transaction cost than if several entities were involved. . . . [I]f one area of the state is experiencing an energy deficit, an RTO will in the short-term, more efficiently provide that load with energy. In the long-term, such loads will benefit from the greater scope of the RTO's transmission planning.

(TR 263)

Integrated planning and short-term reliability are but two of the many grid functions that will be improved by the addition of an RTO. An RTO will also improve emergency response, alleviate parallel path flow problems, provide an accurate basis for calculation of available transmission capacity, and reduce the frequency and duration of curtailments. An RTO is better suited to handle emergency outages because of its short-term reliability and long-term planning responsibilities. (TR 263) In addition, because the RTO is responsible for congestion management and is the provider of last resort for ancillary services, it possesses complete information to more effectively anticipate and respond to potential outages. (TR 263) Likewise, to maximize reliability, it is necessary to manage parallel path flows in a manner that optimizes all resources in the region. Presently, parallel path flows are managed through redispatch or curtailments. Because an RTO will possess broader, system-wide knowledge, it will be able to identify additional transaction opportunities to maintain the transaction while also preserving reliability. (TR 763-64) In short, planning that occurs on a regional basis is both more efficient and more reliable and will encourage additional, economic wholesale

transactions.

D. Wholesale Market Performance.

Pursuant to Order 2000, RTOs are required to ensure the development and operation of market mechanisms to manage congestion that provide transmission customers with price signals regarding the consequences of their transmission use decisions. (Exh. 1 at 940) This will be a dramatic and welcome departure from the manner in which congestion is presently handled in Florida. Presently, any energy transaction schedule that would cause congestion under normal conditions is rejected. (TR 764) As such, least cost trading opportunities are summarily disallowed and savings are routinely foregone. Congestion management protocols allocate capacity and manage real time congestion, thus permitting alternative transactions that will relieve congestion and maintain reliability while enabling market participants to proceed with their transactions. (TR 764) Congestion management protocols create liquidity in the market and produce more efficient allocation of capacity. Likewise, the real time balancing and ancillary services will create a more efficient wholesale market and enhanced products and services. (TR 109, 239) These changes to the management of the Florida wholesale market will translate into immediate benefits in the form of more efficient allocation of transmission capacity. (TR 109)

The expansion of the size and scope of the wholesale market fostered by an RTO should also have a positive impact on the availability of imports and increase the number of intrastate suppliers. (TR 111) Uniform transmission access will provide Florida consumers with greater access to economical out-of-state generation sources. (TR 111) In addition, the transactional liquidity created by an RTO will encourage more suppliers

to enter the market thereby reducing the market power of individual participants. (TR 762) Witness Mechler fittingly summarized the market advantages of an RTO: "The RTO will create a larger, regional market for wholesale power. It will reduce per unit transaction costs at the same time that it increases transaction revenues. All of these attributes will translate into better service and lower costs for end use customers." (TR 762) The benefits of establishing congestion management protocols for Florida are compelling.

E. Conclusion

The Commission should not be dissuaded from making an affirmative decision regarding the establishment of an RTO by the fact that benefits have not yet been quantified. (TR 113) Quantification necessarily will occur subsequent to the establishment of an RTO. Notwithstanding, this Commission is uniquely qualified to evaluate Florida's current system of grid operation, maintenance and planning and juxtapose the benefits demonstrated in these proceedings to reach a decision approving an RTO. The Commission is routinely asked to answer similar policy questions, the benefits from which are realized only after its order is implemented. (TR 857) Such is the nature of need determination cases, for instance, where the Commission must decide if a project is the most cost effective alternative available in advance of its construction. The Commission has substantial, competent evidence before it demonstrating the benefits of an RTO and is urged to act affirmatively on the evidence and approve an RTO for Florida.

In sum, an RTO will facilitate achievement of the benefits of a competitive wholesale electricity market in Peninsular Florida thus ensuring that retail ratepayers will

pay the lowest price possible for reliable service. Generally, an RTO will improve efficiencies in transmission grid management, improve grid reliability, and remove remaining opportunities for discriminatory transmission practices. An RTO will enhance access to, and use of, the transmission system by eliminating rate pancaking, providing efficiencies inherent in uniform interconnection procedures, coordinating planning functions and enhancing transmission expansion and upgrade activities. The Florida Public Service Commission is urged to embrace these benefits on behalf of all users of the grid.

III. THE UTILITIES' DECISIONS TO PARTICIPATE IN GRIDFLORIDA ARE PRUDENT.

The question of whether the utilities' decisions to participate in GridFlorida are prudent can only be answered after reaching an understanding of what prudence means within the regulatory framework. The Florida Public Service Commission has not directly defined prudence, but has alluded to the meaning by identifying, on a case-by-case basis, those utility actions or expenditures that were and were not prudent. Other state commissions have defined prudence and their respective definitions have been remarkably similar. For example, prudence has been defined as follows:

> Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight view is impermissible.

Illinois Power Co. v. Illinois Commerce Commission, 612 N.E. 2d 925, 929 (Ill. App. 3d 1993).

The Pennsylvania Public Service Commission interpreted construction prudence by saying:

> Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.
>
> Imprudence cannot be sustained by substituting one's judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.[2]

The Massachusetts Department of Public Utilities has established a similar review standard for prudence:

> A prudence review must determine whether the utility's actions, based on all that it knew or should have known at the time, were reasonable and prudent in light of the circumstances which then existed. Such a determination may not properly be made on the basis of hindsight judgments, nor is it appropriate for the Department merely to substitute its best judgment for the judgments made by the management of the utility.[3]

A regulatory body should not determine prudence by reference to what it would have done if it had been exercising power of management.[4] The Florida Public Service Commission (FPSC) has recognized the inappropriateness of substituting its judgment in

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[2]In re: Salem Nuclear Generating Station, 70 P.U.R. 4th 568, 574 (Pa. P.U.C. 1985); see also Pennsylvania Public Utility Commission v. Pennsylvania Power Company, 93 P.U.R. 4th 189, 201 (Pa. P.U.C. 1988) (applying the same definition).

[3]In re: Massachusetts Electric Company, 164 P.U.R. 4th 393 (Mass. D.P.U. 1995); see also In re: Boston Gas Company, 1993 WL 560277 (Mass. D.P.U. 1993).

[4]Pennsylvania Public Utility Commission v. Pennsylvania Power Company, 93 P.U.R. 4th at 201.

place of that of utility management. See, e.g., Order No. 19042, issued in Docket No. 880001-EI on March 25, 1988, In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor, 92 P.U.R. 4th 412, 417, where the Commission, in refusing to apply hindsight to a management decision, said:

> In short, we will not here substitute our judgment for that of FPC's management in conducting negotiations with the utility's gas supplier nor in evaluating the risks inherent in choosing the fuel supply for the Suwannee plant.

See also Gulf Power v. FPSC, 453 So.2d 799, 804 (Fla. 1984) (citing Order No. 11498, issued January 4, 1983).

Thus, the question before the Commission in this proceeding is whether there was a reasonable basis for the decisions made by the GridFlorida participants in light of the circumstances that existed at the time the decisions were made. The issue is not whether another person confronted with the same facts would have made different decisions. Imprudence cannot be sustained by substituting one's judgment for that of another. Reasonable persons can have honest differences of opinion without one or the other being imprudent.[5]

In appraising whether there is a reasonable basis for a utility's actions, the Commission's role is to review a utility's decision solely in light of the facts known or which should have been known at the time the decision was made, and not through an application of the twenty-twenty vision of hindsight.[6] Similarly, in Florida Power Corporation v. Public Service Commission, 456 So.2d 451, 452 (Fla. 1984), the court

[5]In re: Salem Nuclear Generating Station, 70 P.U.R. 4th at 574.

[6]In re: Investigation of Fuel Adjustment of Electric Utilities, (Order No. 12645, November 3, 1983) Docket No. 830001-EU, at page 9, where the Commission stated:

> . . . We fully intend to review a utility's procurement decisions based solely in light of the facts known or knowable at the time a decision was made.

refused to condone an application of the twenty-twenty vision of hindsight to support a determination that management acted unreasonably at the time.

Additionally, the Commission's position has been that a finding of prudence will not be subjected to hindsight "absent some extraordinary circumstances relating to the finding of prudence, such as where our finding of prudence was induced through perjury, fraud or the intentional withholding of key information." Florida Power & Light Company v. Beard, 626 So.2d 660, 662 (Fla. 1993).

Accordingly, the decisions of the utilities regarding participation in GridFlorida must be considered solely in light of the facts known or knowable at the time the decision was made. If there was a reasonable basis for those decisions, the decisions must be found to be prudent. It has been characterized by the Office of Public Counsel and some Intervenors in this proceeding that prudence should be judged strictly on costs versus benefits using narrow quantitative standards. This narrow construction should be rejected. While the relationship of costs to benefits is an important element to consider in determining prudence, an appropriate consideration of prudence in these cases requires a broader interpretation of prudence. That broader consideration should look at the decisions made by the GridFlorida participants and should determine whether those decisions were reasonable in light of the facts known to the utilities at the time they made each relevant decision.

The facts known to the utilities, at various relevant decision points, can be broken down into three categories:

1) The actual terms of Orders 2000 and 2000-A,

2) FERC's history regarding nominally voluntary mandates, and

3) FERC's actions since entry of Order 2000.

The actual terms of Orders 2000 and 2000-A are discussed in detail in response to Section I herein. It cannot reasonably be argued that compliance with Order 2000 is voluntary and that the utilities were not required to file an RTO proposal. The

GridFlorida participants were mandated to file an RTO proposal or to file a statement of the impediments to RTO development and their plan to overcome those impediments. (TR 965, 986) In order to make those filings, the RTO participants had to engage in the extensive collaborative process by which GridFlorida was developed. Also, FERC's history of making voluntary initiatives mandatory by using incentives and penalties is well known to the GridFlorida participants. No reasonable person could doubt that FERC intended that all transmission-owning entities in the country would participate in an RTO. Accordingly, as a general principle, the utilities' reasonable efforts to comply with the mandatory provisions of Order 2000 should be deemed prudent.

Additionally, the utilities had a reasonable belief that if they failed to propose an RTO, then FERC would eventually force them to join an RTO that was not of their choosing or design. (TR 135, 965, 986, 987) Based on that reasonable belief, the GridFlorida participants made a number of decisions regarding formation of and participation in GridFlorida that must be analyzed to see if each decision was prudent. If each essential decision was prudent, then the ultimate decision to participate in GridFlorida must be prudent.

The first decision that the GridFlorida utilities made was to engage in a collaborative process with all of the stakeholders aimed at reaching agreement, to the maximum extent possible, on the form and function of the proposed RTO that became GridFlorida. The stakeholders used this collaborative process to address problems in transmission that existed prior to issuance of Order 2000. For example, Tampa Electric Company's (TECO) impetus to participate in the development of GridFlorida was not based solely on the FERC requirements. (TR 822, 831) TECO owns and operates only about 9 percent of the transmission lines in Peninsular Florida, most of which are concentrated within TECO's West Central Florida service territory. (TR 821) Therefore, TECO's ability to capture the benefits of a competitive wholesale market for its ratepayers is heavily dependent on its ability to gain access to the transmission systems of

other utilities on a comparable basis with those utilities. (TR 823, 832, 841) TECO had been actively pursuing an agenda to address these issues and had brought these concerns to the Commission at every opportunity. (TR 827, 866) For instance, TECO supported the concept of development of a regional RTO before this Commission as part of the workshops on the NOPR which produced Order 2000. (TR 827; Exh. 20) Clearly, TECO had no practical alternative other than participation in an RTO. (TR 820, 828-31, 866)

Similarly, the decisions by the other GridFlorida participants to participate in the development of GridFlorida were reasonable in light of Orders 2000 and 2000-A. (TR 667, 965) The GridFlorida utilities made a number of other reasonable decisions, including the decisions to respond to FERC's Order 2000 requirements, to enter into a collaborative process, to develop GridFlorida as a Transco, to divest ownership or control of their transmission assets to GridFlorida, to make the compliance filing, and to do all others things necessary to fully participate in GridFlorida. (TR 591, 593, 596, 831, 836, 837, 965, 966, 976) There is ample evidence that each of these decisions, considered in light of the facts and circumstances known by the participants at the time the decision was made, was prudent. The GridFlorida participants were prudent in the structure they proposed for GridFlorida. They reasonably established a process and structure for managing the development of GridFlorida in a prudent manner. (TR 661) The creation of GridFlorida LLC as the financial manager included a structure that insures that only prudent expenditures of funds are made. (TR 669, 839) Participation in an RTO in general and in GridFlorida in particular is the most prudent option for any FERC jurisdictional utility given the reality of Order 2000 and the situation in Peninsular Florida. (TR 830, 840, 841, 842)

By fully participating in the development of GridFlorida, the participants were able to take control of the RTO formation process on behalf of Florida ratepayers and shareholders. (TR 832, 965, 986) The GridFlorida participants were able to avoid being

forced into an RTO not of their own making by taking control of the process. (TR 135, 833, 842, 976, 987) They controlled their own destiny and apparently they were successful in shaping their own futures because GridFlorida was in fact conditionally approved by FERC, pending compliance filings and finalization of documents.

In formulating their own RTO proposal, the GridFlorida participants were also attempting to be responsive to concerns of the FPSC. FPSC staff was involved with the collaborative process on an open and active basis. The participants attempted to address the FPSC's concerns as well by developing an RTO proposal that was on a sub-state region, that included cost shifting mitigation limited to in-state ratepayers, that addressed maintaining reliability, and that contained good cost controls. (TR 593) These were all issues that the FPSC wanted in any RTO proposal. GridFlorida responds to all of these FPSC concerns.

A reasonable analysis of the costs and the benefits of participation in GridFlorida is part of the prudence consideration. It is acknowledged that a calculation of the benefits cannot yet be accomplished, while the costs are reasonably defined and quantified by the GridFlorida participants. However, the broad experience of all three GridFlorida companies (with each having more than 100 years of experience in the business) suggests quite persuasively that the benefits will be significant. (TR 857) The GridFlorida participants made their decisions in regard to development of and participation in GridFlorida based on all the facts known to them, together with their extensive experience. They believed it was good policy to comply with Order 2000, to address existing transmission concerns in Florida, to consider the concerns of the Commission, to made decisions as part of a collaborative process and to build in multiple safeguards for protection of the ratepayers and the shareholders. Their beliefs were well founded. Even though other decisions could have been reached, the actions of the GridFlorida participants were reasonable and were premised on the facts and circumstances as they existed at the time. Certainly recent events (Exh. 5) have shown that the GridFlorida

participants were correct in their interpretations of the facts before them. Their actions in developing GridFlorida have been prudent.

In summary, it must be concluded that participation in an RTO in general and in GridFlorida in particular is reasonable, appropriate and prudent. (TR 535, 843) The participants' decisions in response to the circumstances before them and to Order 2000 were reasonable and must be deemed prudent.

IV. AS A MATTER OF POLICY, THE COMMISSION SHOULD RECOGNIZE THE BENEFITS OF A ROBUST COMPETITIVE WHOLESALE POWER MARKET AND ENCOURAGE THE ESTABLISHMENT OF SUCH A MARKET THROUGH THE FORMATION OF AN RTO.

This Commission is urged to approve the formation of an RTO in order to foster the establishment of a robust, competitive wholesale power market in Florida. The FERC and Florida Public Service Commission Staff have embraced the importance of an RTO to the development of a competitive market. In his prefiled testimony in this proceeding, former FERC Chairman James J. Hoecker encapsulated the federal agency's policy:

> In my view, FERC's policy is that the increased competition fostered by establishing RTOs will serve consumer interests everywhere, if these new institutions are properly implemented consistent with FERC guidelines. I have always viewed RTOs as a necessary basis for increasing wholesale electricity competition as well as an important contributor to efficient system operations. I think that the FERC still shares this view. The Commission is therefore likely to view any unnecessary delays in RTO formation as actually denying consumers the associated net benefits.

(TR 260) The benefits alluded to by the former Chairman are the cost reduction effects, increased products and services, and enhanced reliability attendant healthy wholesale electricity supply competition.

PSC Staff has also acknowledged that RTOs are an element of the development of wholesale competition. In his prefiled testimony, former FERC Commissioner Mike Naeve quotes a portion of a PSC Staff Division of Policy Analysis & Intergovernmental Liaison briefing paper entitled Regional Transmission Organizations: Policy Analysis Briefing Paper: The Viability of an RTO in Florida dated September 2000 which states at page 28: "An effective RTO is a necessary, but insufficient condition towards the development of this goal." (TR 111, omitted language included) The goal referred to by the PAI Staff is that of a robust, competitive wholesale generation market in Peninsular Florida. With this statement, Staff acknowledges that an RTO is a condition precedent to a truly robust wholesale market. This Commission should adopt the policy position enunciated by the FERC and acknowledged by Staff and approve an appropriate RTO for Florida that integrates the characteristics and performs the functions of an RTO as set forth in Order No. 2000.

The record in these proceedings demonstrates that there is much to be gained at a *de minimis* cost from the establishment of an RTO. Important transmission-related impediments to a competitive wholesale electricity market remain strong in this state. An independent grid management structure will mitigate those impediments and ensure the development of a competitive generation market, with all its attendant benefits, with little or no net ratepayer costs. The record contains uncontested testimony that the costs of an RTO are significantly outweighed by the generation savings. Witness Mechler clearly establishes the principle:

> [F]or purposes of the Commission's policy formulation, the costs of generation for which an end use customer pays are *orders of magnitude* greater than the costs of transmission incurred to transmit the generated energy. An RTO will

> operate the transmission system in a fair manner that facilitates growth, equal transmission access, just and reasonable transmission rates and comparability in the emergence of competitive, wholesale power markets. Accordingly, even a very small percentage decrease in the cost of generation made possible by a more efficient and more competitive market easily can exceed the increase in the transmission portion of the overall costs of electricity needed to form and operate the RTO.

(TR 766 emphasis in original) Mr. Mechler estimates that the cost of generation is almost 18 times that of transmission, leading him to the conclusion that even under very conservative assumptions, the reduction in costs of generation would exceed increases incurred from the establishment of an RTO by a factor of 4 to 1. And, the net gains are further enhanced by the fact that new generation will replace a fleet of aging, inefficient, environmentally undesirable plants with facilities that are cleaner, cheaper and more efficient. (TR 766) The Commission should embrace and approve an appropriate RTO for Florida in order that the ratepayers of the state may immediately start to realize the numerous benefits attendant a competitive market.

In sum, consistent with FERC and Staff assessments, the Commission should memorialize a policy position that recognizes the benefits of a robust, competitive wholesale power market. The Commission should also acknowledge that there remain transmission-related impediments to competitive markets such as the engineering and economic inefficiencies and continuing opportunities for undue discrimination in the operation of the transmission grid. Then, the Commission should seek to establish an independent grid management structure that will ensure the development of competitive wholesale generation markets. The primary function of such an RTO should be to operate the transmission system in a fair manner that facilitates growth, equal

transmission access, just and reasonable transmission rates and comparability in the emergence of competitive, wholesale power markets.

V. BECAUSE THE UTILITIES WILL NOT BE UNBUNDLING THEIR RETAIL ELECTRIC SERVICE AND WILL NOT STOP PROVIDING RETAIL TRANSMISSION SERVICE, NO COMMISSION AUTHORIZATION IS REQUIRED.

Prehearing Order Issues 8 and 9 are based on the incorrect premise that the utilities are unbundling their retail electric service and that they are going to stop providing retail transmission service. The argument of the Office of Public Counsel ("OPC") to the contrary misapprehends the facts and misunderstands the legal precedent. The uncontroverted evidence is that the utilities will continue to provide bundled retail electric service, including transmission service, to their respective retail ratepayer groups subsequent to the commercial operation of the proposed GridFlorida RTO. (TR 141,158, 159, 160) Additionally, the Florida Public Service Commission will continue to have full jurisdiction over the bundled retail services and rates. (TR 141, 158, 159, 160, 189, 219, 220, 223, 226, 227, 1000) Also, contrary to the position taken by OPC in its Prehearing Statement transmission can be under FERC jurisdiction and continue to be reflected as part of the price of bundled retail service. While unbundling may give FERC jurisdiction under the Federal Power Act over the transmission component and over the rate to be charged for that transmission component, that rate is rolled into the total retail rate and continues to be part of bundled retail service.

OPC also misunderstands the import of Transmission Access Policy Study Group v. FERC , 225 F. 3d 667 (D.C. Cir. 2000), (hereinafter referred to as TAPS). The Court makes it clear that "FERC left the regulation of bundled retail transmission to the states, concluding that 'when transmission is sold at retail as part and parcel of the delivered

product called electric energy, the transaction is a sale of electric energy at retail.' Order 888, ¶ 31,036 at 31,781." TAPS, 225 F. 3d at 691. In fact, FERC maintained in that case that, although it asserts broad jurisdiction over all transmission activities in interstate commerce, as for bundled retail sales:

> . . . once the transmission service is bundled with generation and local distribution, it becomes merely a component of the retail sale itself, over which FERC has no jurisdiction.

Id. at 692.

Under Order 888, which was at issue in TAPS, when a public utility is engaged in wholesale transmission, FERC has jurisdiction regardless of the nature of the facility; but "when the public utility is engaged in unbundled retail transmission, the facts and circumstances will determine whether the facilities are subject to FERC or state jurisdiction." Id. at 695. In the present case, there is no evidence that these companies intend to engage in unbundled retail transmission. The Court further clarified that stranded costs (the issue in the case) may result from **state** unbundling of retail sales, where retail customers take advantage of **state-ordered** retail wheeling to reach new generation suppliers. However in this case, there is no state-ordered unbundling of retail sales and, in fact, no unbundling of retail sales at all. Finally, the Court agreed with FERC that the petitioners were confusing costs and rates. "Rates are jurisdictional; costs are not." Id. at 718. FERC will consider the costs of wholesale transmission service when it sets the rates for that service. Those rates, once set by FERC, will be rolled into the price of bundled retail service. The price of bundled retail service will still be within the jurisdiction of the Florida Public Service Commission. Finally, the Court rejected the states' arguments that "FERC usurped their role as protectors of retail customers by

potentially undermining their rate treatment of retail costs." Id. at 722. Instead the Court found no basis for the states' claim that by the terms of Order 888 regarding stranded costs FERC would override the states' jurisdiction to protect retail customers. Id. at 723.

Retail electric service is not being removed from state control by the companies' compliance with Order 2000. Retail electric service will continue to be provided as part of a bundled retail service. OPC requests that the final order in this docket direct the companies to continue providing bundled retail electric service to their customers. Such a directive is unnecessary because that is exactly what these companies are doing and will continue to do. Accordingly, Issues 8 and 9 are moot.

VI. THE COMMISSION SHOULD APPROVE THE GRIDFLORIDA PROPOSAL WHILE CONTINUING ITS EVALUATION OF A LARGER SOUTHEASTERN RTO.

A large southeastern RTO will ultimately be critical to the development of a vibrant, competitive wholesale electric generation market in Florida with long-term benefits of reliability, lower prices and innovative services. Centralization of transmission functions in a larger area will lead to greater economies of scale. Larger RTOs better reflect the natural markets, can ensure truly non-discriminatory transmission service, and will instill confidence in the market that will support the billions of dollars of capital investment in generation and transmission that are required. Large RTOs foster market development, increased reliability, and lower wholesale electricity prices while smaller RTOs may develop incompatible structures and systems which do not fully reflect wholesale market trading patterns. Notwithstanding the long-term advantages of a Southeastern RTO, the Commission may wish to develop an RTO in a phased approach initially utilizing a Peninsular Florida model that is compatible with and will eventually

merge with a larger Southeastern RTO.

VII. FERC AUTHORITY TO MANDATE PARTICIPATION IN RTOS AND FPSC JURISDICTION OVER GRIDFLORIDA

While not taking any position on the issue of jurisdiction, Intervenor briefs this issue at the request of the FPSC. The Federal Energy Regulatory Commission (FERC) has broad authority pursuant to the Federal Power Act (FPA), 16 U.S.C.A §§ 791a-825r. Specifically, Sections 205 and 206 of the FPA give FERC the authority to enter orders as a generic remedy for systemic anticompetitive behavior. FPA, §§ 205, 206, 16 U.S.C.A §§ 824d, 824e. The United States Court of Appeals for the District of Columbia recently analyzed these issues and reached conclusions that recognized FERC's broad authority to remedy anticompetitive behavior through a generic rulemaking proceeding. Transmission Access Policy Study Group v. Federal Energy Regulatory Commission, 225 F. 3d 667 (D.C. Cir. 2000) (hereinafter referred to as TAPS), cert. granted in part sub nom., New York v. FERC, 121 S.Ct. 1185, 149 L.Ed.2d 102 (2001), and cert. granted sub nom., Enron Power Marketing, Inc. v. FERC, 121 S.Ct. 1188, 149 L.Ed.2d 105 (2001).

The TAPS case dealt with multiple challenges to FERC's Orders 888 and 889, which reflected FERC's "effort to end discriminatory and anticompetitive practices in the national electricity market and to ensure that electricity customers pay the lowest prices possible . . . ." TAPS, 225 F. 3d at 681. The specific FERC intent was identified by the Court as follows:

> Invoking its authority under sections 205 and 206 of the FPA to remedy unduly discriminatory or preferential . . . practices, or contracts affecting public utility rates for transmission in interstate commerce, . . . and building on its experience in restructuring the natural gas industry, . . . the Commission issued Orders 888 and 889 to "prevent this discrimination by requiring all public utilities owning

> and/or controlling transmission facilities to offer non-discriminatory open access transmission service."

Id. at 682 (citations omitted). FERC took this action based on findings:

> . . . that "utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices."

Id. (citations omitted). Therefore, the requirements of Order 888 were "premised not on individualized findings of discrimination by specific transmission providers, but on FERC's identification of a fundamental systemic problem in the industry." Id. at 683. In the face of challenges by every stakeholder group in the electricity industry, including several state commissions, the Court held that "Order 888's open access requirement is authorized by and consistent with the FPA and the Takings Clause." Id. at 685. The Court further found that Sections 205 and 206 of the FPA gave FERC the authority to order a generic remedy for systemic anticompetitive behavior. Id.

Relying heavily on the case of Associated Gas Distributors v. FERC, 824 F. 2d 981 (D.C. Cir. 1987) (hereinafter AGD), where the Court upheld a similar open access transportation requirement imposed by FERC on natural gas transmission, the Court found that FERC "has the authority under FPA §§ 205 and 206 to require open access as a generic remedy to prevent undue discrimination." TAPS, 225 F. 3d at 687. "Although AGD addressed open access under the antidiscrimination provisions of the Natural Gas Act (NGA) rather than FPA §§ 205 and 206," the Court has "repeatedly recognized the similarity of the two statutes and held that they should be interpreted consistently." Id. at

686. In comparing the order at issue in AGD with Order 888, the Court found that FERC had been more thorough in documenting the reasons for its actions in Order 888 than in the earlier natural gas order. Id. at 688. Based thereon, the Court concluded that FERC had satisfied the requirements for invoking its authority under FPA § 206 when it entered Order 888. Id.

The Court in TAPS also analyzed federal versus state jurisdiction over transmission services and described the distinction in services as follows:

> Traditionally, the customer paid one combined rate for both the power and its delivery, thus the industry refers to such sales as "bundled." To the extent that bundled sales are made directly to the end user of the electricity, they are also recognized as retail sales. Utilities may also sell the electricity they generate at wholesale to other utilities or other resellers of power, which then resell that power to their own customers. Thus the same utility may use its facilities to serve both retail and wholesale customers. Vertically integrated utilities use their transmission facilities to move electricity over long distances, and use local distribution lines to deliver the electricity to the end user.

Id. at 690-91. Historically, FERC had authority to regulate the sale of electricity at wholesale, while the states had "jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce . . . ." Id. at 691. The Court found that traditionally,

> FERC has regulated wholesale power sales and interstate transmission, and state agencies have retained jurisdiction over bundled retail transactions, including service issues and the intrastate sale and distribution of electricity through local distribution facilities.

Id.

However, as a result of changes in the industry that included unbundling of services by utilities and state-mandated unbundling of retail services, facilities once used solely for local distribution of bundled retail sales were engaging in both unbundled wholesale transmission and retail delivery. The Court recognized that in Order 888, "FERC left the regulation of bundled retail transmission to the sates, concluding that 'when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail." Id. Using a seven factor jurisdictional test for determining which facilities qualify as local distribution facilities and which do not, FERC claimed exclusive authority over those facilities that are not local distribution facilities. Id.

Several state regulatory commissions challenged FERC's actions and argued that "FERC exceeded the boundaries of its statutory authority by asserting jurisdiction over unbundled retail transmissions." Id. at 692. The Court concluded that the FPA gives FERC the authority to regulate the transmission at issue, whether retail or wholesale, but was not as easily persuaded that FERC could mandate unbundling and assert jurisdiction over all retail transmission. Recognizing that FPA § 201 gives FERC jurisdiction over transmission in interstate commerce and sales at wholesale, while clearly contemplating state jurisdiction over local distribution facilities and retail sales, the Court affirmed FERC's decision to characterize bundled transmissions as part of retail sales subject to state jurisdiction and to assert jurisdiction over unbundled retail transmissions. Id. at 694-95. However, in applying that distinction, the Court again looked to FERC's seven factor test and concluded:

> In short, under Order 888, when a public utility is engaged in wholesale transmission, FERC has jurisdiction

> regardless of the nature of the facility; but when the public utility is engaged in unbundled retail transmission, the facts and circumstances will determine whether the facilities are subject to FERC or state jurisdiction.

Id. at 695. The states argued that FERC was radically expanding its jurisdiction, but the Court rejected that argument, finding that FERC's assertion of jurisdiction over all wholesale transmissions is clearly within the scope of its statutory authority. Id. at 696.

In analyzing the treatment of stranded costs under Order 888-A, the TAPS Court further found that FERC may exercise jurisdiction over generation facilities to the extent necessary to regulate interstate transmission. Id. at 718. Additionally, the states argued that FERC usurped their role as protectors of retail customers by potentially undermining their rate treatment of retail costs; but the Court rejected that argument.

Pursuant to the rationale and result in TAPS, it is clear that FERC has the authority to enter Orders 2000 and 2000-A and to mandate that all transmission-owning utilities participate in an RTO that meets FERC's requirements. FERC also has jurisdiction over both wholesale and retail transmissions, but has decided to assert jurisdiction over unbundled retail transmissions while leaving regulation of bundled retail transmission to the states. In the face of the opinion of the Court in TAPS, it is difficult to sort out the division between federal and state authority, but certain jurisdiction is expressly reserved to the states. The states have authority to regulate bundled retail transmission when transmission is part of the delivered product sold at retail, however the states only regulate the sales portion of unbundled retail transactions. Id. at 691. At Additionally, the states have jurisdiction over local distribution facilities and retail sales, including bundled transmission that is part of retail sales. There is an area where the lines between jurisdiction are not so clear. That area is whether a facility is a local

distribution facility subject to state jurisdiction or a facility engaged in interstate transmission subject to FERC jurisdiction. How FERC will apply its seven factor test in resolving these jurisdictional questions will only be explicated on a case-by-case basis. It must also be recognized that the TAPS decision is on appeal to the United States Supreme Court. While it is not anticipated that the decision will be reversed or changed, the possibility exists. Therefore, this area of the law is in flux and is subject to change which cannot be predicted.

Finally, it is not clear that the FPSC will play any direct role in regulating GridFlorida. FERC will have the authority to set the rates to be charged for transmission by GridFlorida. FERC will have direct authority over the form, function and structure of the RTOs approved pursuant to Order 2000. The state will continue to have jurisdiction over siting of transmission facilities in the State of Florida. FPSC will continue to have responsibilities related to reliability of the grid within Florida, concurrently with the FRCC. Beyond these clear distinctions, there are no definitive answers regarding FPSC's jurisdiction over GridFlorida.

CONCLUSION

The Commission should find the GridFlorida Participants' decisions to participate in GridFlorida reasonable, appropriate, and prudent. It should further conclude that participation in an RTO will provide significant benefits to Peninsular Florida and Florida ratepayers. Those long-term benefits far outweigh the costs of participation in an RTO. Participation in an RTO will facilitate development of a robust, competitive wholesale electricity market in Florida. A robust, competitive wholesale electricity market will, in turn, ensure that retail ratepayers pay the lowest possible price for reliable electricity

service. Generally, an RTO will improve efficiencies in transmission grid management, improve grid reliability, and remove remaining opportunities for discriminatory transmission practices. An RTO will enhance access to, and use of, the transmission system by eliminating rate pancaking, providing efficiencies inherent in uniform interconnection procedures, coordinating planning functions and enhancing transmission expansion and upgrade activities.

The Commission should memorialize a policy position that recognizes the benefits of a robust, competitive wholesale power market. The Commission should also acknowledge that there remain transmission-related impediments to competitive markets such as the engineering and economic inefficiencies and continuing opportunities for undue discrimination in the operation of the transmission grid. These impediments will be addressed through an RTO.

The Commission should approve implementation of an RTO for Florida as expeditiously as possible. Notwithstanding the long-term advantages of a Southeastern RTO, the Commission may wish to develop an RTO in a phased approach initially utilizing a Peninsular Florida model that is compatible with and will eventually merge with a larger Southeastern RTO.

Respectfully submitted this 12th day of October, 2001.

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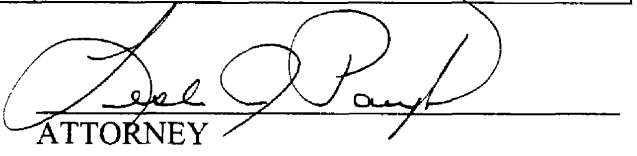

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