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May 8, 2002

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VIA HAND DELIVERY

Ms. Blanca S. Bayó, Director
Division of Commission Clerk and
Administrative Services
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 020233-EI; Pre-Workshop Comments of Florida Municipal Power Agency Pursuant to Order No. PSC-02-0548-PCO-EI revising Order No. PSC-02-0459-PCO-EI Establishing Procedure

Dear Ms. Bayó:

Enclosed please find one (1) original and fifteen (15) copies of the Pre-Workshop Comments of Florida Municipal Power Agency (the Filing), submitted for filing in the above referenced docket. Please also find the enclosed diskette, containing an electronic version of the Filing in Word format.

Please acknowledge receipt of these documents by time/date stamping the enclosed additional copy of the Filing, as indicated.

Very truly yours,

Jody Lamar Finklea, Esq.

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Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of GridFlorida Regional Transmission Organization (RTO) Proposal	)))	**DOCKET NO. 020233-EI**

PRE-WORKSHOP COMMENTS OF FLORIDA MUNICIPAL POWER AGENCY

Pursuant to the Commission's April 3, 2002 "Order Establishing Procedure" in the above-captioned docket,[1] the Florida Municipal Power Agency ("FMPA") submits its pre-workshop comments on the compliance filing submitted by the Applicants[2] in response to this Commission's December 20, 2001 order regarding GridFlorida.[3] FMPA appreciates the opportunity to comment on the GridFlorida proposal and urges the Commission to ensure that the Applicants' compliance filing does not undermine the benefits that the Commission expects an RTO to provide the citizens and ratepayers of Florida.

I. INTRODUCTION

In the GridFlorida Order, the Commission addressed the "Phase 1" issues regarding GridFlorida formation and found (at 8) that the GridFlorida Companies were prudent in proactively seeking to form GridFlorida and would be permitted, subject to audit, to recover start-up costs to date. The Commission deferred consideration of specific ratemaking issues regarding GridFlorida to later Phase 2 proceedings. Although the Commission found Applicants prudent in seeking to form GridFlorida, it concluded that aspects of the proposal were not in the

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[1] Order No. PSC-02-0459-PCO-EI, *In Re: Review of GridFlorida Regional Transmission Organization (RTO) Proposal*, Docket No. 020233-EI (April 3, 2002).

[2] The GridFlorida Companies are Florida Power & Light Company ("FPL"), Florida Power Corporation ("FPC"), and Tampa Electric Company ("Tampa Electric") (collectively, "Applicants" or "GridFlorida Companies").

[3] Order No. PSC-01-2489-FOF-EI, *In re: Review of Florida Power Corp.'s earnings, including effects of proposed acquisition of Florida Power Corp. by Carolina Power & Light*, Docket Nos. 000824-EI *et al.* (December 20, 2001) (hereafter "GridFlorida Order").

best interest of retail ratepayers. The Commission required Applicants to revise their proposal to provide for an independent system operator, rather than a transco (GridFlorida Order at 11); required them to use a "get what you bid" market design (*id.* at 23); expressed the Commission's views on various other matters regarding GridFlorida's scope, governance and operations, including the benefits it expected an RTO to provide (*id.* at 8-10, 12-14); and required Applicants to submit a compliance filing consistent with the Order (*id.* at 4, 11, 27).

Applicants submitted their compliance filing on March 20, 2002, and these comments respond to that filing. This procedural context determined the content of FMPA's comments. These comments do not consider whether the filing comports with the requirements of the Federal Energy Regulatory Commission's ("FERC") Order No. 2000,[4] or other FERC requirements. Instead, FMPA focuses its comments on the extent to which the compliance filing fulfills the letter and spirit of the Commission's Order — specifically, whether the revised proposal will allow GridFlorida to achieve the benefits that the Order indicated that an RTO would bring to the state of Florida and whether it will allow the Commission to fulfill its responsibilities under Chapter 366 of the Florida Statutes as interpreted by the Commission. FMPA's decision to discuss particular issues here, or to omit discussion in the interest of brevity and maintaining focus on issues of special interest to the Commission, does not constitute a waiver of any of the numerous issues currently pending before FERC or that may be raised at FERC in the future.[5]

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[4] *Regional Transmission Organizations,* Order No. 2000, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,089 (1999), *order on reh'g,* Order No. 2000-A, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,092 (2000), *appeal dismissed, Pub. Util. Dist. 1 v. FERC,* No. 00-1174 (D.C. Cir. Dec. 11, 2001).

[5] FMPA recognizes that RTO formation raises jurisdictional issues that will need to be resolved between the Commission and FERC. These comments take no position, either explicitly or implicitly, on the appropriate

The following comments are organized to track the subject headings in Commission's Staff's April 12, 2002 memo:[6] (1) structure and governance, (2) planning and operations, (3) market design, and (4) pricing protocol and rate design. To summarize FMPA's comments, we are concerned that the Applicants' revisions to the GridFlorida proposal (and, in some cases, their failure to revise problematic provisions) may unnecessarily impair GridFlorida's ability to realize the benefits that the Commission expects an RTO to provide. As legal and other restrictions may limit the extent to which Florida can realize the "central benefit" of RTO formation, a more vigorous wholesale electricity market in Florida (GridFlorida Order at 13), it is especially important not to squander the opportunity to achieve those benefits that are more readily obtainable: namely, those resulting from planning and operating Florida's transmission system on an integrated, transparent, statewide (or region-wide) basis, vesting those functions in an RTO that is independent of market participants, and fostering wholesale competition among existing market participants.

II. DESCRIPTION OF FMPA

FMPA is a governmental wholesale-level joint action agency, created in 1978, which supplies power and other project services to 29 municipal members located throughout Florida. FMPA and its members purchase power and/or transmission services from Florida Power & Light ("FPL"), Florida Power Corp. ("FPC"), and Tampa Electric Co. ("TECO") and, at the same time, compete with them to serve retail and/or wholesale load.

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resolution of such jurisdictional issues.

[6] Memorandum from Cochran Keating, Senior Attorney, Office of General Counsel, FPSC to All Parties of Record Re: Docket No. 020233-EI--Review of GridFlorida Regional Transmission Organization (RTO) Proposal (April 12, 2002).

FMPA's All-Requirements Project has been growing steadily, and currently supplies full requirements power to 13 of FMPA's members.[7] FMPA and its current All-Requirements Members serve 1,030 MW of load, have 1,235 MW of generation resources, and own approximately 350 miles of 230 kV, 138 kV, and 69 kV transmission (predominantly 138 kV), with original costs (before depreciation) totaling approximately $188 million.[8]

FMPA's All-Requirements load is located in both the FPL and FPC transmission areas. In order to integrate its generation resources and serve that load efficiently, FMPA requires a transmission grid that is planned and operated effectively and impartially. FMPA strongly supports the development of a robust and independent RTO in the state of Florida and was one of the originating sponsors of the Florida ISA proposal that catalyzed serious statewide discussion of establishing an independent transmission organization. FMPA has participated extensively in FERC proceedings regarding the Applicants' GridFlorida proposals and FERC-directed mediation regarding a potential Southeast RTO.

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[7] FMPA's current All-Requirements members, for which FMPA supplies full requirements power, are: Bushnell, Clewiston, Fort Meade, Fort Pierce,, Green Cove Springs, Havana, Jacksonville Beach, Key West, Leesburg, Newberry, Ocala, Starke, and Vero Beach.

[8] All figures given above are rounded, and the transmission cost figures are preliminary estimates subject to considerable refinement as FMPA applies Uniform System of Accounts and related standards to facilities for which accounting was not previously required to be done on that basis.

III. COMMUNICATIONS

FMPA requests that all pleadings, notices, correspondences, or documents of any kind pertaining to this matter be furnished to:

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IV. COMMENTS

A. STRUCTURE AND GOVERNANCE

"The business and affairs of [GridFlorida] shall be managed or under the direction of the Board of Directors, which may exercise all such powers of the [RTO] and do all such lawful acts and things as are permitted by statute, the Articles of Incorporation, and these By-Laws." By Laws Art. III § 3. Because GridFlorida acts by and through its Board and because the business of GridFlorida is one invested with the public interest, it is critical that GridFlorida's Board be well-informed and responsive to the needs and concerns of stakeholders, that it be independent of market participants and able to act effectively and impartially, and that its actions be transparent to regulators, stakeholders, and the public.[9] However, Applicants' compliance filing adopts inappropriate procedures for selecting and removing Board directors. The compliance filing also fails to ensure that, once the Board is seated, its decisions will be

[9] *See* GridFlorida Order at 19 (noting that an independent Board is necessary to "(1) dispel any notions of discrimination, (2) ensure that the transmission services provided by the RTO are fair and equitable; and (3) meet the needs of Florida's electric ratepayers in safe, adequate, reliable and cost effective manner.").

adequately informed by stakeholder views, yet free of ex parte contacts, and subject to effective public meeting requirements.

1. Director Selection and Removal

As proposed, the selection of GridFlorida's initial directors, the removal of directors, and the filling of Board vacancies all are performed by a Board Selection Committee ("BSC").[10] While the ostensible reason for forming a Board Selection Committee is to allow different stakeholder groups to provide input into Board composition decisions, stakeholder representation on the BSC is less balanced than it is on the Advisory Committee. On both committees, the Applicants (*i.e.*, transmission-owning IOUs) have three representatives; but on the Board Selection Committee the other stakeholder groups (including a governmental-or-non-profit sector speaking for consumers) have half the representation that they have on the Advisory Committee.[11] Further, the process by which the BSC selects and removes directors is shrouded in secrecy. The BSC is subject to no public meeting requirements, and significant aspects of its

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[10] Under the RTO Formation Plan (§ 3.3), the selection of an initial Board begins with the BSC's retention of a search firm to recommend a pool of 12 to 15 candidates. By majority vote, the BSC selects 7 individuals from the pool to serve as GridFlorida's initial directors. RTO Formation Plan § 3.4. Subsequently, at annual meetings, the BSC votes either to retain directors whose terms expire or to replace them with individuals selected from a pool developed by a search firm. *Id.* § 3.7. Directors may be removed by two-thirds vote of the BSC, *id.* § 3.8, in which case the vacancy (like vacancies arising from other causes) may be filled only by majority vote of the BSC, Articles of Incorporation VII.C. Applicants have taken steps to prevent GridFlorida's remaining directors from filling vacancies. *Id* at VII.E. (providing that "that if, and to the extent that, Section 617.0809 of the Florida Not For Profit Corporation Act is deemed to confer on the remaining directors the ability to fill any such vacancy, the term of office of any director appointed by such remaining directors to fill any such vacancy shall expire as soon as the Board Selection Committee acts to replace such director with another director selected by a majority of the entire Board Selection Committee"). *See also* Articles of Incorporation IX; By-Laws Art. II § 3 and Art. III § 2.

[11] On the Board Selection Committee, the other five sectors have one representative each, and there is a ninth representative to be selected by the Advisory Committee. RTO Formation Plan § 3.1; Executive Summary at 2. On the Advisory Committee, however, the other sectors have *two* representatives each, for a total of 13, and the Florida Office of Public Counsel must have the option to populate one of the two seats in the governmental / non-profit sector. RTO Formation Plan § 4.2.

activity will be shielded from disclosure by confidentiality provisions.[12] No provision is made for the BSC to consult with the Advisory Committee before making its decisions.

FMPA believes that it would be both feasible and appropriate for the more-balanced Advisory Committee to select GridFlorida's directors.[13] *See, e.g.*, the Board selection procedures for both PJM[14] and Midwest ISO.[15] However, if the BSC is retained, the director selection process should be modified to create "checks and balances" ensuring that the BSC's selections are good ones. First, once the BSC tentatively chooses directors from the pool of candidates identified by the search firm, the BSC should be required to inform the Advisory Committee of the names of the tentatively-chosen directors (subject to confidentially restrictions on further disclosure of the names) and to seek the Advisory Committee's "advice and consent."

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[12] *See, e.g.*, RTO Formation Plan § 3.3 ("Except for such disclosure as may be necessary for customary reference checks and for advising individuals proposed by the Search Firm of the names of other individuals so proposed, the identities of those individuals proposed by the Search Firm to the Board Selection Committee shall be kept in the strictest confidence by both the Search Firm and the Board Selection Committee."). Director removal decisions are likewise secret because the Board Selection Committee is subject to no public meeting requirement.

[13] While Applicants have argued that it would be inappropriate to have director candidates interviewed by a cast of thousands, the size difference between the nine-member BSC and the thirteen-member Advisory Committee would not significantly affect the interview process. Second, Applicants have argued that director candidates should be interviewed by stakeholder representatives with "senior-level management experience" (RTO Formation Plan § 3.1) and that the Advisory Committee representatives may not necessarily have such experience. However, once selected, the GridFlorida Board will be required to meet with and receive advice from the Advisory Committee on a regular basis. FMPA submits that it would be fully appropriate for GridFlorida's directors to be selected by the Advisory Committee representatives with whom they will be working and who collectively represent GridFlorida's constituency.

[14] The PJM Operating Agreement (available at http://www.pjm.com/documents/agreements/oa.pdf) provides that PJM's Board Members shall be selected by the Members Committee (OA § 7.1), which is composed of five sectors: Generation Owners, Other Suppliers, Transmission Owners, Electric Distributors, and End-Use Customers (OA §§ 8.1.1, 11.6).

[15] The Midwest ISO Agreement (available at < http://www.midwestiso.org/documents/to_miso_agreement.pdf>) provides for the Midwest ISO's Members, consisting of both Eligible Customers and Owners (*see* Article One § I.F [Original Sheet No. 14]), to select the Midwest ISO's initial Board (*see* Article Two § III.A.1 [Original Sheet No. 22]) and succeeding Boards (*id.* § III.A.3 [Original Sheet No. 24]).

If the Advisory Committee rejects a proposed director by two-thirds vote, the BSC would be required to choose another candidate from the search firm's pool of candidates.[16]

Second, the Advisory Committee should be the entity vested with the power to remove sitting directors.[17] Director removal is a very serious business which should only be considered if there is broad consensus that removal is justified, as Applicants' decision to require a two-thirds vote for removal (as opposed to majority vote for selection) seems to acknowledge. The Advisory Committee — with its more balanced stakeholder representation — is the more appropriate entity to gauge that consensus and to provide director removal decisions with the legitimacy and the credibility they need.[18]

Indeed, placing director removal responsibility in the Advisory Committee is all the more important if the BSC is to select directors using the procedures currently proposed. If the BSC controls both director selection and removal as proposed, a single, small committee, operating in secret, with disproportionate representation of a single stakeholder sector (*i.e.* the Applicants), will maintain all control over all decisions affecting the Board's composition; and there will be no way to ensure that the GridFlorida Board performs in a manner satisfactory to anyone but the Board Selection Committee. Vesting director removal responsibility in the Advisory Committee

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[16] At an absolute minimum, the Advisory Committee should be permitted to provide "advice" if not "consent" to the BSC in the director selection process. In any event, regardless of which Committee selects the Board, the GridFlorida documents should be revised to prohibit such Committee representatives and stakeholders from having *ex parte* contacts with Board candidates outside the context of formal Committee communications.

[17] *See, e.g.*, Midwest ISO Agreement, Article Two § III.A.7.a (Original Sheet No. 26) ("The Members may remove a Director by a vote of a majority of the Members"); PJM Operating Agreement § 7.3(c) ("Removal of a Board Member shall require the approval of the Members Committee."). *See* nn.14-15 above for a description of the composition of the PJM Members Committee and the Midwest ISO Members.

[18] At the same time, neither of the arguments supporting use of a Board Selection Committee to *select* directors — *i.e.*, minimizing the number of committee members interviewing applicants and ensuring that candidates are interviewed by CEO-level representatives — is relevant in the context of director removal.

would establish a "check" on the power of the BSC, would diffuse responsibility for determining Board composition among a larger and more representative group, and would help to ensure that the GridFlorida Board fulfills its duties consistent with the public interest.

2. Meetings Between the Board and Advisory Committee Should Be Open to the Public and Should Afford All Advisory Committee Representatives an Opportunity to Speak Without Undue Procedural Restriction

As noted above, the Advisory Committee will consist of thirteen representatives including a representative from the Florida Office of Public Counsel (unless it declines to serve). The purpose of the Advisory Committee is "to give stakeholders a formal avenue for providing their advice to the board." GridFlorida Order at 19. However, the RTO Formation Plan currently authorizes the Advisory Committee to present to the Board the Committee's majority opinion and one minority opinion. RTO Formation Plan § 4.1. Except for the single minority opinion, all other contacts between the Advisory Committee and the Board are funneled through a single "designated representative of the Advisory Committee." *Id.* The Board, "in its discretion," may invite other Advisory Committee representatives to present additional minority views on a matter, but need not do so. *Id.* Under such an arrangement, small but significant minorities (*e.g.*, consumer representatives) may never have their voices heard. Moreover, if all majority communications are funneled through a single designated representative, the Board may never hear nuances in the majority position or receive the benefit of wisdom that other Advisory Committee representatives might provide in a more open discussion.

Fundamentally, the current formulation of the interaction between the Advisory Committee and the Board is unduly constrained and appears to be inconsistent with what the Commission envisioned. In the GridFlorida Order (at 19), the Commission shared its belief "that

any interaction between the board and the advisory committee should be conducted in full public view with appropriate opportunity for public input." Further, Commission Staff recently observed that "[u]nder the description of the Advisory Committee activities," as currently drafted, "it appears that the only time a presentation would be made by the Advisory Committee to the Board of Directors is when the Advisory Committee is disgruntled."[19] In response, Commission Staff asked whether it was "contemplated that the Advisory Committee would be permitted to make informative presentations or demonstrate new innovative ways to accomplish RTO tasks." Taking these comments together, it appears that Commission Staff envisions meetings between the Advisory Committee and the Board that are open to the public, that provide for a diversity of interests to be heard, and that provide Advisory Committee representatives with an opportunity to speak without undue procedural restriction about matters they deem it important to address to GridFlorida's Board.[20] FMPA supports that vision and submits that all Advisory Committee representatives should be permitted to make presentations to the Board at their own discretion, subject to any reasonable time limits and rules of order that the Board may adopt. Such provisions will bolster GridFlorida's governance by ensuring that GridFlorida Board decisions are well-informed by a diversity of views.

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[19] *See* Commission Staff's Informal Data Request to GridFlorida Companies, Docket No. 020233-EI (April 22, 2002).

[20] In essence, that is the model that has been implemented for Midwest ISO Board meetings. *See* Midwest ISO Agreement Article Two § VII.A (Original Sheet No. 47) ("The procedures adopted by the Board for the conduct of such meetings shall allow interested members of the public, including those stakeholders represented on the Advisory Committee, to provide oral and written comments at such meetings concerning any matter that may come before the Board, Board Committees and working groups, Advisory Committee, or Members, whichever is applicable, during the open portion of such meetings.").

3. Stronger Public Meeting Requirements and Provisions Regarding Ex Parte Contacts Are Needed to Preserve the Integrity and Independence of GridFlorida's Decision Making

a) Public Meeting Requirements

The Commission's requirement that interactions between the Advisory Committee and the Board "be conducted in full public view with appropriate opportunity for public input" demonstrates a recognition (a) that the Board's decisions should be informed by a diversity of views, (b) that no stakeholder or group of stakeholders should have preferential access to the Board, and (c) that the Board's decision-making processes should be as transparent as possible. Motivated by such considerations, stakeholders urged the Applicants to provide for GridFlorida's Board meetings to be open to the public. "[I]n response to [such] requests from various stakeholders," Applicants added provisions that "require that regular and special meetings of GridFlorida's board be open to the public, but [that] permit the board to discuss confidential matters in closed, non-public sessions." Executive Summary at 2-3. Unfortunately, serious loopholes appear to allow GridFlorida's directors effectively to evade the open meeting requirement by (a) taking action through committees, (b) conferring among themselves outside of regular or special meetings and taking action by notational voting without a meeting, or (c) making too liberal use of closed, executive sessions. The Commission must close these loopholes in order to protect the integrity of, and maintain the transparency of, GridFlorida's decision-making.[21] In addition, to guard against improper *ex parte* contacts, the Commission should require GridFlorida to maintain a publicly-available log of all contacts that each Board

[21] In Commission Staff's Informal Data Request to the GridFlorida Companies, Commission Staff asks "why Stakeholder Advisory Committee meetings are not made open to the public." Consistent with its belief that openness and transparency are conducive to the public good, FMPA would agree to a requirement that Advisory

member has with stakeholders outside of formal Board meetings regarding matters before the Board or reasonably likely to come before the Board.

With respect to open Board meetings, Article III Section 4 of the By-Laws appears clear. That section provides that "[a]ll actions of the Board of Directors shall be taken at a regular or special meeting of the Board of Directors" and that "[e]xcept as otherwise provided herein, regular and special meetings of the Board of Directors (including regular and special meetings held by means of conference telephone) shall be open to the public." However, that section goes on to provide, "[f]or the avoidance of doubt, [that] directors are free to confer and meet outside of regular and special meetings without being subject to the public meeting, notice and related requirements." *Id.* Further, By-Laws Article III Section 6 provides that "[a]ny action required or permitted to be taken at any meeting of the Board of Directors or of any committee thereof may be taken without a meeting, if all the members of the Board of Directors ... consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board of Directors or committee."

These exceptions to the public meeting requirement are so broad that they threaten to swallow the rule. While FMPA has no wish to foreclose GridFlorida's directors from meeting in small groups to discuss GridFlorida business, or in forbidding the use of notational voting for ministerial matters, these provisions as drafted would allow GridFlorida's Board to conduct essentially all of its business outside the public eye. Under these provisions, the entire GridFlorida Board could meet informally, discuss important GridFlorida business, and take significant action in GridFlorida's name, without ever holding a public meeting.

Committee meetings be open to the public.

In addition, the By Laws also allow the Board to avoid its public meeting obligations by delegating an extraordinary degree of authority to committees without public meeting requirements. Under the By Laws, the Board may designate one or more committees, each of which consists of two or more directors. By-Laws Article III § 8. "Any committee, to the extent permitted by law and provided in the resolution establishing such committee, *shall have and may exercise all the powers and authority of the Board of Directors* in the management of the business and affairs of the Corporation, *and may authorize the seal of the Corporation to be affixed to all papers which may require it.*" *Id.* (emphasis added). Although each Committee must keep regular minutes and report to the Board when required (*id.*), there appears to be no public meeting requirement for committee meetings and no provision that committee minutes be made public.[22]

Finally, the Board may avoid public scrutiny by abusing its discretion to go into closed, executive session and to treat minutes and other materials confidentially. Article III Section 4 of the By-Laws provides that "[d]uring any regular or special meeting of the Board of Directors, the Chairman, or other presiding officer, may declare an executive session, which shall be closed to the public, as necessary to safeguard the confidentiality of 'Confidential Information.'" FMPA recognizes that there will be times when it is necessary and appropriate for the Board to go into closed session to consider confidential material. However, FMPA is concerned about the scope

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[22] *Compare* Midwest ISO Agreement, Article Two §§ III.B.7 (Original Sheet No. 30) (providing that "final responsibility for any action recommended by any such committee remains with the Board") and VII.A (Original Sheet No. 47) (adopting a public meeting requirement for "all meetings of the Board, all meetings of committees ... and working groups of the Board ..., all meetings of the Advisory Committee and all Members' meetings convened under Article Two, Section V, Paragraph B").

of discretion granted to the GridFlorida Board to determine whether a particular matter should be treated confidentially.

In its Informal Data Request, Commission Staff asks "Who determines when the Board of Directors holds a closed meeting, *i.e.*, when a matter for discussion requires confidential treatment? Are any guidelines established for that entity to make such a determination?" The answer can be found in Article III Section 4 of the By-Laws. That provision contains not only a comprehensive list of specific subjects to be treated confidentially, which includes all categories where confidential treatment typically is deemed to be justified,[23] but also a catch-all category consisting of "information or discussions relating to any other matter that the Chairman, or other presiding officer, in his or her discretion, or the Board of Directors by majority vote, determines to be of a confidential nature." With respect to that discretionary, catch-all category, no "guidelines" are provided, and there appears to be no effective way to obtain review of exercises of that discretion. In order to prevent this confidentiality provision from becoming a mechanism to end-run public meeting requirements, the Commission should require that the agenda for each Board meeting list the issues to be discussed during closed session and should require GridFlorida to establish a mechanism by which confidentiality determinations may be challenged.[24]

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[23] Subjects to be treated confidentially include: (a) personnel related information, (b) information subject to the attorney-client, privilege or to confidential treatment under the attorney-work product doctrine or concerning pending or threatened litigation, (c) information relating to strategy and negotiation sessions in connection with any material agreement or arrangement, (d) discussions of emergency or security procedures, and (e) information regarding trade secrets, proprietary information, specifications for competitive bidding, or information regarding a specific proposal if open discussion would jeopardize the cost or siting thereof or give an unfair competitive bargaining advantage to any person.

[24] It may be difficult logistically to resolve confidentiality disputes before the Board meeting is held, but it would appear feasible to implement a mechanism like that provided in Florida Admin. Code § 25-22.006 for determining, after the fact, whether the minutes of executive sessions should be treated confidentially or made public.

b) Ex parte contacts with stakeholders

To secure GridFlorida's impartiality, GridFlorida's directors must not only have no financial interest in any market participant; they also must not afford any market participant preferential access to information or preferential opportunity to provide information or opinions.[25] The GridFlorida RTO proposal addresses the first two issues but does not explicitly address the third. The Commission should therefore require Applicants to incorporate provisions regarding *ex parte* contacts among market participants and GridFlorida directors.

As drafted, GridFlorida's Code of Conduct prohibits GridFlorida from providing non-public transmission or reliability information to anyone outside GridFlorida, except for such disclosure to transmission and reliability personnel of transmission owners (who are subject to standards of conduct promulgated under FERC Order No. 889) as may be necessary to transact GridFlorida business. GridFlorida Code of Conduct § II.C. The Code of Conduct also prohibits GridFlorida's officers, directors, employees and agents from providing preferential access to transmission information, or any other information, to any Market Participant. *Id.* § II.J. The Code of Conduct also prohibits GridFlorida's officers, directors, employees, and agents from *receiving* "any form of gratuity that would tend to affect, or give the appearance of affecting, their judgment in the performance of their duties." *Id.* § II.F. What is *not* covered, however, are *ex parte* contacts in which market participants provide information or opinions *to*, or otherwise lobby, GridFlorida's directors.

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[25] As discussed above, the Commission's comment that "any interaction between the board and the advisory committee should be conducted in full public view with appropriate opportunity for public input" (GridFlorida Order at 19) seems to reflect a conviction that all stakeholders should have equal access to the GridFlorida Board.

To be clear, FMPA is not suggesting that GridFlorida's directors be insulated from all contact, including general business and social contact, with officers, directors and employees of market participants. However, such contacts should not be used as an opportunity for individual market participants to seek to influence, or obtain information about, GridFlorida's business decisions. In order to guard against such efforts, GridFlorida should be required to post on the internet a log of all ex parte contacts between market participants and GridFlorida directors regarding matters before the Board or reasonably likely to come before the Board, which log should identify the date, time and place of any such contact and the substance of any communication regarding such matter. *See* Florida Stats., Chapter 350 § 42(4) (requiring Florida Public Service Commissioners to place on record copies of all written *ex parte* communications received and responses made, as well as a memorandum of oral *ex parte* communications received and responses made); *see also* PJM Interconnection LLC Board of Managers Code of Conduct, available at < http://www.pjm.com/about/corporate/bom_cod.html> (providing for all stakeholder communications with the Board, except with the President and CEO in the normal course of business, to be conducted through mechanisms established by PJM's tariff and organic documents and providing for *ex parte* communications about matters before the Board or reasonably likely to come before the Board to be disclosed in writing to the full Board and to all of the PJM Members).

4. Information Policy

A strong and comprehensive information policy is critical to secure the transparency that is necessary to achieve market participants' confidence in GridFlorida's operations and the wholesale market within Florida. Thus, certain revisions made by the Applicants in their

compliance filing need to be clarified or modified, and at least one provision that remained unchanged should be modified because it is less appropriate in the new non-profit ISO context.

For example, Applicants have narrowed the scope of "Open Public Information" by amending paragraph 2.1.1(i) to require disclosure only of "significant" actions taken by GridFlorida as security coordinator (*see also* paragraph 2.1.2(e), to which an identical revision was made) and by eliminating the language requiring disclosure of actions taken as congestion manager. No standard is provided for determining what constitutes significant action, and no explanation for eliminating the reference to actions taken as congestion manager. While paragraph 2.1.1(g) was amended to require the disclosure of "other market information related to ... the management of congestion on GridFlorida's transmission system or the allocation of transmission rights," the phrase "other market information" is too vague to give any real indication of what information about the subject will be provided.

Second, as discussed below with respect to transmission planning and expansion information, it appears that much of the information currently classified as "Available Public Information," which is available upon request, would more sensibly be classified as "Open Public Information" to be posted on the internet. Clearly, it would be impractical to post on the internet information that would vary from customer to customer or request to request, such as "information necessary to verify the correctness of [a] formulaic charge" (§ 2.1.2(g)). However, there appears to be little reason why completed studies, plans and analyses — and the data underlying them to the extent they are non-confidential — and other static information (such as the structure of GridFlorida management's incentive compensation plan (§ 2.1.2(i)) should not be Open Public Information posted on the internet. One would expect it to be less costly, and

more conducive to transparency, to post such information to the internet once than to respond to multiple separate requests for information.

Finally, Applicants should change the default information category from non-public to public. Currently, Section 2.2 establishes "Non-Public Information" as the default category, defining it to include all information that is not "Public Information." While that provision might arguably have been appropriate in the context of a for-profit transco, it is unnecessary and inappropriate in the context of a non-profit ISO. Thus, the default categories should be reversed. The information policy should be revised to list specific categories of Non-Public Information and to provide that any information that is not Non-Public Information or Open Public Information shall be Available Public Information.

B. PLANNING AND OPERATIONS

As explained in the GridFlorida Order, the Commission expects an RTO to benefit Florida's retail ratepayers by consolidating planning, maintenance and operations in a single, independent, state-wide entity that can perform those functions in a way that is more efficient and more effective for the state as a whole. For example, during an October 2001 evidentiary hearing, Witness Hoecker told the Commission that RTO benefits would include (among other things) "more efficient planning on a regional basis" and "the ability to improve regional reliability through regional operations." GridFlorida Order at 8. The Commission agreed, noting that "additional operational efficiencies among utilities and the consolidation of planning and maintenance can be achieved by participation in GridFlorida." *Id.* at 9-10. Furthermore, the Commission found that an ISO could achieve the same benefits associated with "integrated transmission planning, operations, and pricing" as a transco. *Id.* at 14; *see also id.* at 12.

Unfortunately, the new GridFlorida proposal threatens to squander many of those benefits by adopting a new transmission planning protocol that provides for less integrated transmission planning, less assurance that needed facilities will be built, and greater balkanization for a longer period of time than the protocol it replaces. In addition, the Participating Owners' Management Agreement ("POMA") and Agency Agreement contain provisions that may undermine the benefits of integrated operations by subordinating GridFlorida's operational authority to the terms of agreements between Participating Owners and third parties.[26]

1. GridFlorida's New Planning Protocol Unnecessarily Adopts a More Balkanized and Less Transparent Process that Relies Too Heavily on Participating Owners

As noted above, the GridFlorida Order indicated the Commission's understanding that the benefits of integrated, statewide transmission planning could be obtained by either an ISO or a transco. Thus, while the Commission required the GridFlorida Companies to adopt an ISO structure, it gave no indication that the change would require a wholesale reworking on the transmission planning protocol currently on file with FERC.[27] Yet that is what the Applicants have done, and the changes are not an improvement.

Clearly, certain limited changes were in order to reflect the mandated shift from transco to ISO. For example, it was appropriate to amend GridFlorida's planning protocol to reflect the fact that GridFlorida would not construct and own facilities itself. However, Applicants went far beyond the relatively minimal changes needed to make the FERC-filed, and already FERC-reviewed, planning protocol consistent with an ISO structure. Instead, they re-worked the

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[26] As discussed in subsection (3) below, the POMA also contains other problematic provisions that should be clarified or modified.

[27] The GridFlorida planning protocol is Attachment N to the Open Access Transmission Tariff ("OATT").

protocol significantly using an entirely different model. *See* Executive Summary at 7. According to Applicants, the new planning protocol "provides for more of a collaborative process among the ISO, transmission owners, and other market participants, allowing the ISO to better utilize the expertise of the transmission owners and other market participants for planning." *Id.* In fact, the new planning protocol takes much of the responsibility and authority for transmission planning and expansion out of GridFlorida's hands and gives them back to the Participating Owners — effectively perpetuating the current balkanization and impediments to transmission expansion that RTOs are intended to cure. At the same time, the new protocol appears to eliminate (perhaps inadvertently) various information provisions that would have helped to make transmission planning under the prior protocol more transparent, and it drops (again perhaps inadvertently) significant provisions regarding, for example, the procedures to be followed when customers wish to build facilities themselves on an expedited basis,[28] customers' ability to obtain facilities designed and constructed to more stringent specifications than those provided for by GridFlorida or PO standards,[29] and customers' ability to obtain "enhanced or special facilities."[30]

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[28] For example, the FERC-filed planning protocol provided for the Transmission Provider to review proposed Expedited Facilities for the limited purpose of determining whether they would adversely affect system reliability, and, if GridFlorida failed to act within 30 days of receiving detailed plans, it provided for the matter to be submitted to an Independent Engineer. *See* Redlined Tariff, Attachment N, sheets 226-28. In contrast, the current proposal merely provides that "plans [submitted by a customer for Expedited Facilities] will be reviewed for the purpose of determining whether the facilities adversely affect reliability." Tariff, Attachment N, sheet 210. The current proposal does not indicate whether it will be GridFlorida (as it should be) or a PO making the reliability determination. Nor does it provide any timeline for that review or any mechanism for the customer to obtain a determination from an Independent Engineer in the face of undue delay.

[29] *Compare* Redlined Tariff, Attachment N, Sheets 230, 232-33 (stating that requests to apply design and construction standards higher than those established by the Transmission Provider "shall be granted" provided certain conditions are met) *with* Tariff, Attachment N, Sheet 209 (providing that customers may request the application of higher standards for any reason, but failing to provide that such requests shall be granted).

[30] The issue of enhanced or special facilities is distinct from the issue regarding application of higher design and

Many of the more basic problems with the changes to GridFlorida's planning protocol may be seen, without delving into the details of Attachment N, by examining the changes made to POMA Section 6.4. That provision previously gave GridFlorida "the obligation and sole responsibility to engage in planning for and to direct the expansion of the Controlled Facilities." The new provision merely provides GridFlorida with "the responsibility and ultimate authority to develop, approve and implement a comprehensive GridFlorida-wide plan, through an annual planning process ... in collaboration with POs, among others." The revisions drop altogether any reference to GridFlorida "direct[ing] the expansion of Controlled Facilities"; and, even as to planning, GridFlorida's role is reduced from "sole responsibility" to shared responsibility "in collaboration with POs."

The new planning protocol's heavy reliance on POs for transmission planning and the calculation of ATC is manifest in several aspects of the revised Attachment N. For example:

- Studies and analyses previously to be performed by GridFlorida now are to be performed by *ad hoc* committees, of uncertain composition, but required to include affected POs.[31]

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construction standards. GridFlorida's previous planning protocol explained that "enhanced or special facilities" included, but were not limited to, "(1) facilities requested for meeting retail customer needs, (2) facilities, including substations, switching stations, line segments, towers, poles and other facilities which the Transmission Customer determines are necessary or appropriate to support its provision of distribution services, (3) facilities to be constructed pursuant to governmental orders, (4) facilities which, although identified as necessary by Transmission Provider, are not scheduled to be in-service at the time requested by the Transmission Customer, and (5) an alternative Point of Delivery on the Transmission System." Redlined Tariff, Attachment N, Sheet 225. The previous protocol provided that GridFlorida would be obligated "to provide," as well as "to interconnect," such enhanced or special facilities. *Id.* In contrast, the new protocol creates no obligation "to provide" such facilities and merely requires GridFlorida and the PO "to interconnect" them. Tariff, Attachment N, Sheet 209. The language establishing GridFlorida's obligation to provide such enhanced or special facilities was inserted as part of GridFlorida's May 29, 2001 compliance filing at FERC in response to public power concerns. *See* Compliance Filing, *GridFlorida, LLC*, FERC Docket No. RT01-67-001, at 18-19 (May 29, 2001) ("FERC Compliance Filing") and the corresponding redlined tariff (at Original Sheet No. 225), both of which are available at http://www.gridflorida.com/ferc_docs.htm.

[31] *Compare* Redlined Tariff, Attachment N, Sheet 210 (stricken material that had provided that "The Transmission Provider shall perform planning analysis for the specifics ... of the requested transaction using as input all

- POs calculate available transmission capacity at points of delivery to or receipt from distribution facilities, as required by the Transmission Provider. Tariff, Attachment N, Sheet 208.

- GridFlorida is required to use PO reliability requirements and operating guidelines pending resolution of any dispute between GridFlorida and a PO, POMA § 6.3. GridFlorida is also required, in calculating ATC, to use the equipment capability ratings provided by the POs for their respective Transmission System facilities pending resolution of disputes. Tariff, Attachment N, Sheets 201, 202-03.

- The new planning protocol omits prior language which (a) provided for GridFlorida to perform the Local Area Planning Processes, in coordination with both LSEs and POs; (b) allowed GridFlorida to delegate the Local Area Planning function to POs for a three-year transition period; but (c) provided that the results and recommendations of such Local Area Planning performed by POs would be subject to review and approval, or modification, by GridFlorida, and (d) provided for GridFlorida to assume the Local Area Planning Function for itself as soon as it is capable of performing the function; and

- GridFlorida's current proposal omits the delivery point interconnection standards that were previously included in Attachment R. Applicants contend that the standards previously contained in Attachment R were drafted with a transco structure in mind and that the shift to an ISO structure raises additional issues that should be addressed by GridFlorida in the first instance. Executive Summary at 9. While this is couched in terms of ceding authority to GridFlorida, the actual effect is to leave the *status quo* — under which each transmission owner determines its own interconnection standards — in place for a longer period of time.

The new planning protocol's heavy reliance on POs in the transmission planning and expansion process raises two distinct issues. First, leaving such functions in the hands of transmission-owning market participants perpetuates incentives and opportunities for them to discriminate against their competitors. Second, to lean too heavily on the POs is to forego the benefits of standardization and integrated planning that RTOs are supposed to provide.

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confirmed existing long-term firm transmission obligations, the Local Area Planning Process discussed in Section I.B, the Generation Interconnection Planning Process discussed in Section I.C and the data bases discussed in Section I.D") *with* Tariff, Attachment N, Sheet 202 ("Upon receipt of an executed study agreement, the Transmission Provider shall form, chair, and direct the activities of an Ad Hoc Working Group that includes representatives of all affected POs, [which] Ad Hoc Working Group shall develop expansion alternatives, perform the described studies, and develop the resulting options and costs.").

In addition, the new planning protocol appears unnecessarily to impair GridFlorida's ability to direct the expansion of Controlled Facilities and its ability to oversee construction by POs. As noted above, the revisions to POMA § 6.4 drop the reference to directing the expansion of Controlled Facilities altogether. While Attachment N does include a mechanism to obtain construction of facilities that GridFlorida identifies as needed, GridFlorida's authority is watered down. For example, the new planning protocol contains what seems to be a hidden veto right for the POs: Attachment N, Sheet 205 provides that GridFlorida "shall not require that projects be undertaken where it is reasonably expected that the necessary regulatory approvals for construction and cost recovery will not be obtained." That provision might be acceptable, as long as it clarified that GridFlorida is the entity that determines whether regulatory approval and cost recovery may be "reasonably expected." However, as the provision is currently drafted, there is a significant risk that POs will use it to subvert GridFlorida's authority to direct the expansion of facilities. Whenever they are asked to build facilities that they do not want to build, POs may claim that that they have no reasonable expectation of obtaining regulatory approval or cost recovery. In effect, POs may place GridFlorida in the position of having to obtain advance regulatory guarantees of cost recovery before it may require POs to construct needed facilities.

In the new planning protocol, GridFlorida also maintains less control over the design and construction standards, costs, and construction schedules of projects undertaken by POs. Under the old planning protocol, GridFlorida had the "the right to review all aspects of a construction project undertaken by a PO pursuant to this Planning Protocol, including design standards, costs, and construction schedules." Redlined Tariff, Attachment N, Sheet 237. Under the new protocol, however, "questions [regarding] the appropriateness of a PO's planning, design, or

construction criteria, ... may be resolved through the Dispute Resolution Procedures set forth in this Tariff[,] [but,] [u]ntil any such dispute is resolved, the PO's criteria shall govern." Tariff, Attachment N, Sheet 209.

Finally, the new planning protocol appears to omit provisions in the prior protocol regarding the availability of Local Area Planning analyses (*see* Redlined Tariff, Attachment N, Sheet 222-23), of GIS analyses (*id.* at 223), and of databases used in the planning process (*id.* at 224). While Attachment N does contain a general provision requiring "regular and complete public disclosure, consistent with confidentiality requirements and information disclosure policies," of assumptions, data, analyses and documents used in the planning process,[32] Applicants should clarify that the analyses and databases mentioned in the specific omitted provisions fall within the more general disclosure provisions of Attachment N and the Information Policy and will be made available. Applicants also should explain why they have opted to post on OASIS only the "five-to-ten-year (5-to-10-year) planning report representing the GridFlorida Plan" and to make other "[a]nnual reports and planning reports ... available ... upon request." Tariff, Attachment N, Sheet 206. Making all such reports available on OASIS likely would involve less work — and would better foster transparency — than one requiring GridFlorida to process multiple individual requests for information.

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[32] The pertinent provision in Attachment N (Sheet 198) picks up language deleted from Article VII of the RTO Formation Plan, but does not do so verbatim. In Attachment N, the underlined words are omitted and should be replaced: "[T]he GridFlorida planning process shall include, at a minimum, timely, regular and complete public disclosure ... of: any transmission projects proposed or endorsed; the underlying assumptions and data on which the proposal is based; any analysis relied upon by the Transmission Provider concerning its proposed transmission plan or proposed generation alternatives offered by users of the Transmission System; and all documents supporting assumptions underlying the proposed transmission expansion plan that are challenged by users of the Transmission System in the GridFlorida planning process."

In short, the new transmission planning protocol provides GridFlorida with less authority and responsibility for transmission planning than the protocol it replaced, and it thus threatens to squander many of the benefits of integrated transmission planning that the Commission expects an RTO to provide. Commission Staff's Informal Data Request quotes the new planning protocol's statement that "'[t]he process for carrying out the planning of the Transmission Provider shall be collaborative with the Transmission Provider, POs, LSEs, generators, Transmission Customers, the FRCC, the FPSC and other market participants," and it asks whether the FPSC is expected to play a "collaborative" role or to have a "'review and approval'" role in the planning process. FMPA submits that the Commission should serve in both roles. Commission Staff should collaborate with GridFlorida during the planning process to help ensure that the process produces appropriate results. In addition, the Commission should consider establishing a formal annual proceeding in which it considers the plan resulting from GridFlorida's planning process and determines whether the plan is suitable and likely to achieve its intended purposes.

2. The POMA and Agency Agreement Provisions Regarding Third Party Agreements Threaten to Undermine GridFlorida's Operational Control

The new planning protocol threatens to erode the potential benefits of integrated planning by an independent RTO by giving GridFlorida too little authority and relying too heavily on POs to perform studies, apply their own guidelines, equipment ratings, and procedures, calculate ATC at delivery points, and generally to continue with business as usual in many respects. The POMA and the Agency Agreement similarly threaten to undermine GridFlorida's operational authority through vague and troubling provisions regarding "Third Party Agreements." According to the POMA preamble, "each PO has rights and obligations with respect to third

parties pursuant to Third Party Agreements that relate to the Controlled Facilities." The preamble further provides that "GridFlorida must exercise Operational Control over the Controlled Facilities in a manner so as to allow each PO to exercise such rights and fulfill such obligations." Section 6.16.3 thus provides that, except for actions necessary to fulfill GridFlorida's role as security provider, "GridFlorida shall not take any action which would interfere with a PO's ability to fulfill its obligations under a Third Party Agreement." And Section 1.1.5 makes "[c]arry[ing] out ... the [POMA] provisions concerning Third Party Agreements" a material purpose of the agreement.[33]

The fundamental problem with these provisions is that the definition of "Third Party Agreement" is extremely broad, and neither the Commission nor anyone else can know at this stage to what obligations such agreements would bind GridFlorida. Under POMA Section 2.31, the term "Third Party Agreement":

> Means any contractual agreement between a PO and a third party, other than an Existing Transmission Agreement, which relates to a PO's Controlled Facilities or the real property on which such Controlled Facilities are located, and copies of which have been provided to GridFlorida by such PO. Third Party Agreements may include, but are not limited to, indentures, mortgages, deeds of trust, joint ownership, operation, or maintenance agreements, franchise agreements, pole attachment agreements, right of way agreements, easements, and use permits.

See also Agency Agreement § 1 ("Capitalized terms not otherwise defined herein have the meanings ascribed thereto in the GridFlorida OATT or the POMA."). Given the breadth of this definition, some Applicants' representatives have estimated the number of Third Party

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[33] *See also* Agency Agreement § 11.15 ("To the extent that a TO is a party to any contracts with third parties that materially affect non-Controlled Facilities under this Agreement such agreements shall be treated in accordance with the provisions in the POMA governing Third Party Agreements.").

Agreements to be in the "thousands." Moreover, POs are free to enter into *new* Third Party Agreements as long as they do not "materially impair[] GridFlorida's ability to perform its obligations under this Agreement." POMA § 6.16.2. Whether that qualification will limit the number or nature of Third Party Agreements entered into after the Transfer Date is unclear, for there is a degree of circularity inherent in the whole scheme: how can a Third Party Agreement "materially impair[]" GridFlorida's ability to perform under the POMA when one of the POMA's material purposes is to ensure that GridFlorida respects Third Party Agreements entered into by a PO?

While most Third Party Agreements are likely to be innocuous (*e.g.,* franchise agreements, pole attachment agreements, rights of way), the definition is broad enough to encompass many agreements "relate[d] to" to the Controlled Facilities that may not be so innocent. For example, joint ownership agreements, contracts between POs and unregulated affiliates, and other operating and maintenance agreements may contain provisions that lock in the timing of maintenance procedures in a way that interferes with GridFlorida's ability to operate the transmission system efficiently and that will cause excessive transmission congestion. (Such provisions may be especially likely to arise, and would be especially pernicious, if the PO owns generation that would be advantaged by transmission congestion.). POMA Section 6.16.4 provides for GridFlorida and the relevant PO to negotiate between themselves, and with applicable third parties, to effectuate any arrangements necessary to allow the PO and GridFlorida to perform their obligations under the POMA (*but see* the previous paragraph's circularity discussion). However, Section 6.16.4 — unlike its predecessor, section

16.17.1 of the redlined POMA — contains no mandatory dispute resolution provision to effectuate such arrangements should negotiations fail.[34]

The bottom line is that, without reviewing the Third Party Agreements, it is impossible to know how these provisions will affect GridFlorida. The Commission and others must be able to assure themselves that these Third Party Agreements will not impair GridFlorida's ability to fulfill its purposes. Section 6.16.1 does provide for a list of Third Party Agreements to be made public and for the contracts to be available for public inspection at GridFlorida's offices "consistent with reasonable confidentiality requirements requested by the applicable PO." But once the POMA is finalized and signed, it may be too late. Now is when Applicants should either make their Third Party Agreements public or submit them as information to this Commission or to FERC.[35] At minimum, the POMA should be revised to include a limited re-opener such that if after the POMA is signed it comes to light that a Third Party Agreement is inconsistent with GridFlorida's purposes, all practicable adjustments will be made to make the POMA function notwithstanding the Third Party Agreement rather than simply subordinating the POMA to the Third Party Agreement.

In addition, we note that the POMA provisions regarding Third Party Agreements require clarification. For example, Section 6.16.2 prohibits POs from entering into new Third Party Agreements that "materially impair[]" GridFlorida's ability to perform, while Section 6.16.4 creates an obligation to negotiate changes to provisions that "materially affect" the operations

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[34] While it may not be possible to compel third parties' participation in GridFlorida's dispute resolution procedures in all cases, mandatory dispute resolution should at least be required of the PO and GridFlorida to address any aspect of the problem that may be resolved between them.

[35] For such informational submissions, the applicable Commission's procedures for assessing confidentiality claims should apply. We also note that a significant number of Third Party Agreements, such as franchise agreements, will

and maintenance of Controlled Facilities. Is the difference intentional, and what is its import? Who determines whether there is a material impairment or material effect? (It should be GridFlorida, subject to dispute resolution procedures.) And what is meant by the term(s) material impairment or effect? For example, would it constitute a material impairment to restrict GridFlorida's ability to alter maintenance schedules or standards? Without such clarification and without reviewing the actual agreements, the POMA provisions regarding Third Party Agreements merely create an open-ended, potentially unreasonable limitation of GridFlorida's authority that will impair GridFlorida's ability to achieve its goals.

3. Other POMA Issues

Other POMA provisions likewise raise concerns or require clarification. For example, Section 10.6.5 requires each PO to acquire various types of insurance — including Umbrella or Excess Liability coverage with minimum limits of $20 million in excess of other coverage required (*see* § 10.6.5.4) — without differentiating POs based on relative size or amount of Controlled Facilities owned. FMPA submits that these provisions may prove unduly burdensome to smaller systems, with fewer assets and a smaller customer base over which to spread the costs, and may discourage municipal participation — which would undermine one of the benefits the Commission sought to achieve through an ISO structure (*see* GridFlorida Order at 14). FMPA further notes that it is unjust to phase-in rate structures that do justice to smaller systems (such as the TDU facility phase-in) but not phase-in costly insurance obligations.

Second, POMA § 10.7 provides that "for purposes of Sections 10.1 through 10.6, ... no Party shall be deemed to be an agent of, or owe any fiduciary duty to any other Party and that the

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already be public records for which confidentiality could not reasonably be claimed.

liabilities of the Parties, or any of them, arising out of or in connection with this Agreement or the transactions contemplated by this Agreement, shall be several and not joint." Applicants should clarify whether this provision implies that other POMA provisions do give rise to an agency relationship or joint and several liability.

Third, the POMA provisions regarding liability and indemnification (§§ 10.1 and 10.2) are confusing and should be either clarified or modified. An example of the apparent confusion is the fact that the headings of those sections do not seem to match their substance. For instance, Section 10.1's heading refers to "liability for acts or omissions of GridFlorida," but the acts or omissions referred to in the body of that section are those of a PO (albeit a PO carrying out GF's directions and protocols). A similar disconnect between heading and substance occurs in Section 10.2. Also, Sections 10.1 and 10.2 do not clearly distinguish between liability and indemnification. The general heading for Section 10 references both; the specific headings for Sections 10.1 through 10.5 refer only to liability; and the substantive provisions are less than clear. For example, Section 10.1 provides for GridFlorida to "indemnify and hold harmless each PO from and against all liabilities, damages, losses, claims ... and all other obligations by or to third parties, arising from the acts or omissions of a PO in carrying out the directions, procedures, or protocols of GridFlorida, except ... to the extent that [] the gross negligence or intentional wrongdoing of the PO contributes to the claimed injury or damage." Is this — as it appears — strictly an indemnification provision, applicable only when a third party sues a PO? Or is it also intended to set forth limitations on a PO's liability to GridFlorida?[36] If Section 10.1

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[36] *Compare* POMA §10.2, which addresses the relationship between GridFlorida and the POs more straightforwardly and provides for each PO to "release[]" GridFlorida from claims for damages to the PO's Controlled Facilities, except to the extent that GridFlorida's gross negligence or intentional wrongdoing contributes

does *not* address the issue of PO liability to GridFlorida, then where in the POMA is that issue addressed?

C. MARKET DESIGN AND MARKET POWER

In the GridFlorida Order (at 24), the Commission finds that a physical transmission rights regimen should remain fixed until GridFlorida petitions this Commission and justifies a different result. It also (at 22) directs Applicants to adopt a "get what you bid" mechanism for the balancing market, in part because of concerns about market power.

As the Commission is aware, FERC is in the midst of a standard market design rulemaking process, which is currently anticipated to result in a formal notice of rulemaking in July, with a final rule to be issued by the end of the year. In that rulemaking, FERC is considering whether there should be a standardized market design for all RTOs and, if so, what it should look like. From the numerous working papers that have emerged thus far, FERC appears to be heading towards a market design different from the one envisioned in the FPSC's Order. For example, the March 15 Working Paper on Standardized Transmission Service and Wholesale Electric Market Design, in Docket No. RM01-12, seems to contemplate reliance to a great degree on financial transmission rights, in combination with a locational marginal pricing-based congestion management system.

Particularly if GridFlorida is to remain a Florida-only RTO (as the FPSC concludes (Order at 18) is appropriate at this time), coordination and consistency of its wholesale market design with that of the remainder of the Eastern Interconnection is essential to avoid walling off Florida from the benefits of a broader competitive market. In light of the need for a market

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to the damage.

design that spans the ties with Georgia, and the activity on this issue on a nation-wide basis, FMPA urges the FPSC to closely coordinate with FERC, and to participate in the FERC rulemaking process. Under these circumstances, it would not appear productive to devote significant attention in this proceeding to market design issues, much less to lock into any particular market design.[37]

FMPA shares the FPSC's concerns about the critical importance of mitigating market power if any market design is to produce benefits to Florida consumers. Expectations of consumer savings from greater reliance on competitive markets are predicated on electricity prices being disciplined by competition among many suppliers who are "price takers" — whose production decisions do not affect the market price. Consumers will not benefit from restructuring if competitive forces are squelched by market participants that have the ability to be "price makers" — to exercise market power by raising prices above the level that would be achieved in a truly competitive market with many suppliers. Because of electricity's essential role in our economy and standard of living, as well as the enormous quantities and sums involved, the potential for significant harm to consumers as a result of the exercise of market power needs to be addressed.

Market power is of particular concern in Florida, where FPL owns over 43% of the generation in the FRCC region, FPC owns another 20% and the three largest utilities together control more than 72%. Florida's limited ties to Georgia isolate the Florida market, severely restricting the ability of suppliers to compete within Florida. With only 3600 MW of import

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[37] FMPA has raised numerous issues which are still pending at FERC about the operation of Applicants' market design, and expressly preserves them. FMPA notes, however, that it is not at all clear that the "get what you bid" process outlined in Applicants' compliance filing (Attachment P, Redlined Sheet 314) operates in a rational manner

capability for a total peninsular Florida load of over 37,700 MW, FRCC is largely cut off from power sources in SERC and elsewhere. Further, all but 1,164 MW of that import capacity is tied up with the import of long term unit power purchases or ownership interests. The resulting off-the-charts level of market concentration within Peninsula Florida[38] invites abuse of overwhelming market power and excessive electric rates. An example of how bid-based markets can be abused, even if they are less concentrated than Florida's, became public this week. *See Enron Rigged Power Market In California, Documents Say,* WALL ST. J., May 7, 2002, at A1.

The potential for exercise of market power in GridFlorida's new markets has not gone unnoticed by FERC, which required Applicants to provide more information to support their proposed reliance on a bid-based balancing market (in combination with a mitigation proposal which restricted those without market-rate authority to cost-based bids):

> The Applicants are proposing that we approve their market design proposal in concept. However, at this time we do not have sufficient information about their proposal to do so. For example, we do not have information about market shares of the various sellers of ancillary services, whether sellers will be required to bid into the ancillary services markets, whether sellers will have market-based rate authority and the location of congestion within peninsular Florida. Therefore, we will require GridFlorida to fully support its market design proposal in its compliance filing.

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or how it interacts, if at all, with market power mitigation.

[38] The Herfindahl-Herschman Index ("HHI"), which is used to measure market concentration, yields figures in excess of 7000, especially in peak conditions, as shown by exhibits submitted by FPL in connection with its now-abandoned proposal to merge with Entergy. *See* FPL Group, Inc. and Entergy Corp., FERC Docket No. EC01-33, Joint Application of FPL Group, Inc. and Entergy Corporation for Approval of Merger, Volume II, Exh. No. FE-202 at 1 (Nov. 30, 2000) (a copy of which is attached to these comments as Exhibit "A") (showing HHIs in the FPL destination market for economic capacity ranging from 4751 to 7689, with the highest values at peak and superpeak periods). By comparison, the Department of Justice's horizontal merger guidelines consider markets with HHIs above 1800 to be "highly concentrated." *See* U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 1.5 (as revised April 8, 1997) (available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/15.html).

GridFlorida LLC, 94 F.E.R.C. ¶ 61,363, at 62,359 (2001). Events in California confirm the need to refrain from cutting corners and from accepting on faith, instead of proof, that a market is competitive, rather than distorted by the market power. [39]

We further discuss market power below, in connection with particular product markets and mitigation measures.

1. Congestion Management and Balancing Energy

Bid-based congestion management is particularly susceptible to the exercise of market power. The distribution of generation in Florida, with each large utility owning most of the generation in its service territory, means that it would not be surprising that most, if not all, of the generators positioned to relieve a constraint are owned by the same utility. In the absence of effective market power mitigation, that utility would be in a position to name its price if GridFlorida needed to redispatch those units to maintain reliability. Indeed, by its bid and dispatch decisions, that utility may be able to create congestion it will be paid to relieve.

For example, the April 2, 2002 report by the Midwest ISO's market monitor, "Competitive Analysis of Redispatch Service in the Midwest ISO"[40] "evaluates whether individual suppliers may be 'pivotal' with respect to creating or relieving transmission congestion on the MISO system. A pivotal supplier has the ability to create transmission congestion that only it could alleviate without curtailing firm transmission service." Report at 4.

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[39] *See, e.g., San Diego Gas & Elec. Co.*, 93 F.E.R.C. ¶ 61,121 (2000), *reh'g pending*; and *San Diego Gas & Elec. Co.*, 93 F.E.R.C. ¶ 61,294 (2000), finding rates produced by the seriously flawed California markets to be unjust and unreasonable, and to create the opportunity to exercise market power. *See also San Diego Gas & Elec Co.*, 95 F.E.R.C. ¶ 61,115 (2001), *reh'g pending*; 95 F.E.R.C. ¶ 61,418 (2001), *reh'g pending*. The entity with the highest share of generation in California had only a 13% share, as compared with FPL's 43% and FPC 20% shares.

[40] Filed by Midwest Independent System Operator on April 4, 2002 in FERC Docket No. ER01-3142-007 (available at http://rimsweb1.ferc.fed.us/rims.q?rp2~getImagePages~2263755~44~26~1~50).

By simulation, the market monitor showed that a pivotal supplier in Eastern Wisconsin would be able to force MISO into accepting almost 350 MW at $1000/MWh to resolve a constraint. *See* Report at 14. It would not take too many hours for such exercise of market power of that nature to place a heavy burden on Florida's economy and residents.

2. Installed Capacity and Energy Specification

Applicants have included as Attachment W of the proposed GridFlorida tariff the outlines of a proposed Installed Capacity and Energy ("ICE") mechanism, while leaving it to GridFlorida to later propose to FERC the specific terms of the mandatory ICE requirement that it will enforce through mechanisms such as a deficiency auction or charge. Applicants characterized this provision to FERC as a "placeholder" which "restate[s] the four principles that underlie the ICE proposal."[43] While appearing to be a non-proposal, Applicants' proposed ICE "principles" apparently predetermine that some mechanism is necessary beyond this Commission's current review process for Ten Year Site Plans.

FERC is considering whether long term generation adequacy should be a component of its Standard Market Design. As FERC's issuances on the subject confirm, there is "wide support for some type of program either administered at a state regional, or federal level" to ensure generation adequacy, but there are "significant disagreements over what the mechanisms should

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[41] *See* Affidavit of Francis P. Gaffney on Behalf of Florida Municipal Power Agency, ¶ 69, (attached as Exhibit A to FMPA's July 2, 2001 protest of Applicants' May 29, 2001 compliance filing at the FERC in *GridFlorida, LLC*, FERC Docket No. RT01-67-001, and available at http://ferris.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=21116:0).

[42] In a "Pay-as-Bid" market, "[i]f suppliers know that they are going to receive only what they bid, they will attempt to bid the market clearing price." *San Diego Gas & Elec. Co.*, 95 F.E.R.C. ¶ 61,115, at 61,362 (2001). *See also* Alfred E. Kahn, *et al.*, Pricing in the California Power Exchange Electricity Market: Should California Switch from Uniform Pricing to Pay-as-Bid Pricing? A Study by the Blue Ribbon Panel Commissioned by the California Power Exchange, at 4-5 (Jan. 23, 2001).

[43] FERC Compliance Filing at 58-59.

be ..., as well as who should administer the program."[44] Chairman Wood has made clear that he is not convinced that an RTO-administered, FERC jurisdictional installed capacity mechanism is a good idea, or just adds costs to consumers.[45]

FMPA believes that a capacity reserve requirement *is* needed, rather than simply trusting that the market will provide for adequacy. However, as we have told FERC,[46] FERC may not be the appropriate agency to set reserve requirements, which fall within the traditional state domain of adequacy. The absence of need for FERC action is strongest where, as in Florida, the state has exercised its authority to establish reserve requirements.

Through its Grid Bill authority, the FPSC retains a firm grip over the reserves adequacy of both investor-owned utilities and other load-serving entities, which annually submit ten-year site plans for FPSC review to ensure prudent planning. Florida load serving entities have an obligation to maintain adequate reserves; the three investor-owned utilities (which account for some 80% of Peninsular Florida's load) have stipulated to increase their reserve levels to 20% by 2004,[47] above the 15% minimum installed reserves threshold established by the FPSC for all Florida load serving entities. [48]

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[44] Options for Resolving Rate and Transition Issues in Standardized Transmission Service and Wholesale Electric Market Design, issued April 10, 2002 in Docket No. RM01-12, at 13 (available at http://www.ferc.gov/Electric/RTO/mrkt-strct-comments/discussion_paper.htm#option). *See also* Commission Staff's September 26, 2001 Capacity Reserves Discussion Paper (available at http://www.ferc.gov/calendar/commissionmeetings/discussion_papers.htm), and FERC Staff's discussion paper, "Ensuring Adequate Capacity Reserves," prepared for the joint NARUC-FERC conference held February 11, 2002 (available at http://www.ferc.gov/Electric/RTO/mrkt-strct-comments/naruc-02-11-02.pdf).

[45] *See In the Matter of: Regional Transmission Organizations (RTO) Electricity Market Design and Structure*, FERC Docket No. RM01-12-000, Transcript at 343 (Feb. 6, 2002) ("There are a number of markets that don't have ICAP, never did, that seem to be in a pretty big overbuilt situation.")(available at http://rimsweb1.ferc.fed.us/rims.q?rp2~getImagePages~2247518~44~388~1~50).

[46] October 17, 2001 Comments of Florida Municipal Power Agency, in *Ensuring Sufficient Capacity Reserves in Today's Energy Market,* FERC Docket No. EX01-1-000.

[47] *See* December 22, 1999 Order Approving Stipulation, Order No. PSC-99-2507-S-EU, *In re: Generic Investigation*

The FPSC's authority over reserves carried by load serving entities effectively covers the waterfront. Florida's generation construction business remains almost exclusively the domain of three vertically-integrated investor-owned utilities, plus municipal and cooperative electric systems, with merchant plants playing a limited role. Because of Florida's limited import capability, generation outside Florida cannot play much of a role in meeting Florida reserve needs. Florida load-serving entities are all too aware of their isolation and the necessity of constructing plants within Florida.

As recognized in the GridFlorida Order at 12, GridFlorida will not change Florida's fundamental industry and regulatory structure governing the provision of electric service, or the obligation and opportunity to construct plants. While GridFlorida should enhance the ability of Florida utilities to engage in wholesale transactions among themselves and to operate efficiently, it will not alter Florida law or introduce new market participants. Under current circumstances, Florida consumers are well served by keeping responsibility for reserves adequacy, including determining and enforcing adequacy standards, within the FPSC's domain (in coordination with FRCC), rather than transferring such responsibility to GridFlorida or FERC.

In any event, regional characteristics (such as Florida's highly concentrated and isolated market, as well as Florida law limitations on merchant generation) need to be carefully considered in crafting both reserves standards and any enforcement mechanism. The mechanics

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into the Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida, Docket No. 981890-EU.. As noted in the Order at 4, § 9 of the Stipulation preserves the FPSC's authority with regard to evaluating the adequacy of reserves in peninsular Florida.

[48] *See Generic Investigation into Planning and Operating Reserve Practices of Peninsular Florida Generating Electric Utilities*, FPSC Docket No. 940345-EU, Order No. PSC-94-1256-FOF-EU, 1994 Fla. PUC LEXIS 1278, 94 FPSC 10:203 (Oct. 11, 1994), slip op. at 6, *clarification or reconsideration denied*, Order No. PSC-94-1531-FOF-EU, 1994 Fla. PUC LEXIS 1567, 94 FPSC 12:266 (Dec. 12, 1994).

of any reserve regimen need to be carefully evaluated for unintended consequences that needlessly raise costs or constrict the market. Capacity markets or auctions should not be depended on in situations, such as Florida, that are highly susceptible to the exercise of market power.[49]

Finally, in developing a capacity reserves regimen, the Commission should preserve and build upon existing reserve-sharing arrangements. Reserve sharing is an important means for Florida utilities to provide reliable service at reasonable cost, by addressing the needs of all Florida utilities to perform maintenance while meeting the demands of their load. In Florida, reserve sharing is effectuated by bilateral interchange contracts providing for sale and reciprocal availability of maintenance power and emergency energy. Among other things, interchange agreements provide for maintenance power sales when a load serving entity's capacity resources are unavailable because of the need to perform maintenance. Under today's practices, it would be acceptable for a Florida utility to rely on reserve sharing from its neighbors if it planned to perform maintenance on its generating units. Such maintenance purchases are "second call," *i.e.*, subordinate to the seller's need to maintain reliability and to serve its firm customers. Today's interchange agreements obligate a utility requested to provide maintenance power to provide such power if it is available.

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[49] *See ISO New England, Inc.*, 91 F.E.R.C. ¶ 61,311, at 62,080 (2000) (describing ISO New England's proposal to eliminate the ICAP market because it "serves no useful purpose and [because]... prices in the market reflect an exercise of market power"), *order on clarification,* 92 F.E.R.C. ¶ 61,254 (2000), *order on reh'g*, 96 F.E.R.C. ¶ 61,361 (2001), *reh'g denied*, 98 F.E.R.C. ¶ 61,036 (2002). *See also* Investigation Order, *Investigation Upon the Commission's Own Motion with Regard to PJM Installed Capacity Credit Markets*, Pennsylvania Public Utils. Comm'n Docket No. I-00010090, 31 Pa. B. 6873 (Nov. 30, 2001) (available at http://www.pabulletin.com/secure/data/vol31/31-50/2249.html) (commencing an investigation into PJM's capacity market based upon a report by the PJM market monitor finding that a market participant had "'successfully raise[d] the market price in the daily capacity credit market above the competitive level for a portion of the period from January 1 to April 30, 2001'").

In considering any capacity-reserves mechanism, the Commission needs to ensure that the enhanced economics and reliability that consumers enjoy as a result of reserve sharing are not needlessly forfeited.[50] The Commission should be concerned about regimens where a unit is deemed unavailable to "count" as reserves if it is forecast to be on scheduled or unscheduled maintenance, but second-call reserve sharing does not "count" as replacement capacity. Such a regime essentially destroys the value of reserve sharing, needlessly raising costs to consumers without increasing reliability. To maintain the savings to Florida consumers from reserve sharing, reserve sharing must "count" in any capacity reserve mechanism.

D. RATE ISSUES

The GridFlorida Order (at 15) expressed concern that the Commission "retain ratemaking and cost control jurisdiction over the retail component of transmission." In response, Applicants propose to "maintain the *status quo* with regard to jurisdiction over the Applicants' existing transmission facilities during [a] five year transition period" by exempting bundled retail load from zonal charges for existing transmission facilities. Executive Summary at 4. Although FMPA preferred Applicants' original approach of placing all load under GridFlorida's rates, we do not object to the proposed rate exemption unless it becomes a platform for discriminating against the wholesale "component of transmission." (We assume that consistent with the Applicants' Executive Summary, the POMA will be revised to recognize that initially most of

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[50] Reserve sharing in Florida is also required under the Nuclear Regulatory Commission's Antitrust Conditions of FPL and FPC. FPL's NRC license conditions, among other things, require it to provide maintenance service "to the fullest extent practicable" and "in accordance with generally accepted industry practice for maintenance power." Article IV of FPL's NRC License Conditions in NRC Docket No. 50-389, *St. Lucie Plant Unit No. 2. See also* Article III (Reserve Coordination and Maintenance). FPC's NRC license conditions similarly provide that it will "interconnect with and coordinate reserves ... on terms that will provide for FPC costs (including a reasonable return) in connection therewith and allow other participant(s) full access to the benefits of reserve coordination."

the transmission revenue requirement will be collected by Participating Owners from their bundled retail loads.)[51] Accordingly, FMPA supports the Applicants' proposals to pass through at retail whatever FERC approves as the new or restructured wholesale-level inputs to GridFlorida's rates, and views them as essential complements to the bundled retail load exemption.

Four such inputs warrant specific discussion. (In addition, there are several technical ambiguities and errors in the filing's provisions for collecting and distributing transmission revenue requirements, which FMPA will be prepared to address during the May 29 Workshop.)

First, as Applicants propose, the grid management costs that are collected through GridFlorida OATT Schedule 10 should be charged to all load, on the same allocation and timing basis. The simplest way to accomplish this is to apply Schedule 10 to retail load, as federal policy requires.[52] GridFlorida will be an independent third-party supplier of grid management RTO services to Applicants and other Participating Owners. Accordingly, if is prudent for Applicants to secure those services from GridFlorida (which the Commission has preliminarily found to be the case and is further investigating here), there should be no question that

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See Section E(1) of FPC's NRC License Conditions in NRC Docket No. 50-302, *Crystal River Unit 3 Nuclear Generating Plant,* 37 Fed. Reg. 3782 (1972).

[51] Under the Applicants' revised proposal, the costs of transmission for Applicants' bundled retail load will initially be recovered directly from retail customers through FPSC-jurisdictional rates. Accordingly, Applicants' Executive Summary states (at 4) that after "each transmission owner ... submit[s] its total revenue requirement for existing facilities, ...the RTO will collect only a portion of that total revenue requirement under the RTO tariff — from wholesale customers and from customers with bundled retail load voluntarily placed under the tariff." But POMA § 8.1 fails to implement this intent. It should be changed to provide that GridFlorida's FERC-jurisdictional rates will be "calculated and designed to recover (A) the fully-allocated share of the then-effective annual transmission revenue requirement of each PO, after allocating an appropriate share of that revenue requirement to any bundled retail load that is exempted from the Zonal Rate in accordance with the GridFlorida OATT ... ." A corresponding change should be made to POMA § 1.1.2.

[52] *See Midwest Independent Transmission System Operator, Inc.,* Opinion 453-A, 98 F.E.R.C. ¶ 61,141, at 61,412-13 (2002).

Applicants are obliged to bear their share of Schedule 10 costs on behalf of their retail load. Therefore, they should face no impediments to their recovery of that share from retail load. Of course, the Commission can and should have an important ongoing role in the processes that will set GridFlorida's operating budget.

Second, as Applicants propose, the prudently-incurred costs of new grid transmission facilities should be allocated to all RTO-area load.[53] All peninsular Florida load benefits from improved reliability and market opportunities when the peninsular Florida grid is strengthened or expanded. Moreover, since GridFlorida will qualify as an RTO only if it has the ultimate authority (as among regulated entities, subordinated to this Commission's siting jurisdiction) to determine GridFlorida's facility siting plan, new facilities will be planned for regionally, and should be paid for regionally.

Third, the transmission revenue credit input to bundled retail rates should not assume the continuation of "pancaked" charges — charges for delivering resources across pre-GridFlorida corporate boundaries that will be internal to GridFlorida's system, even though the receiving load is already bearing a full share of grid costs. At FERC, Applicants are seeking to eliminate pancaking prospectively but maintain existing pancakes for a decade-long transition, whereas FMPA is seeking more rapid institution of rational grid cost allocation. Whatever the result at FERC, it should be applied in setting revenue credits at retail. Although ending pancaked charges may reduce some Participants' revenues, it will reduce other Participants' costs by the same amount. The net effect on Florida consumers as a whole — *i.e.,* on this Commission's

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[53] FMPA reserves its rights to dispute at FERC what date should apply in defining new facilities.

wards, the "overall general public interest"[54] and "the overall efficiency and cost-effectiveness of electricity and natural gas production and use"[55] — will be to remove a transmission rate distortion that reduces market efficiency. Because FPL and FPC have long territories running down Florida's coasts, their deliveries have been able to traverse hundreds of miles without crossing a corporate boundary (*e.g.*, over 400 miles from the Georgia border to points beyond Miami, all on FPL-owned facilities), whereas transactions among smaller entities have been subject to multiple access charges (*e.g.*, two boundary crossings for a Reedy Creek-to-FPC-to-Kissimmee path of about 2 miles). To assume the continuation of past transmission revenue levels in setting future revenue credits, and thereby constrain FPL and FPC to seek to retain pancaking, would be to retain artificially higher charges for delivering generation laterally across Florida or to/from smaller zones.

Fourth, the costs of grid facilities that "TDUs"[56] contribute to GridFlorida should be rolled into GridFlorida's rate base as rapidly as FERC deems appropriate[57] and flowed through to Applicants' bundled retail loads under the Applicants' proposed "TDU Adder."[58] This

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[54] The Commission is obliged to consider "the overall general public interest and impact of the pending proceeding, including but not limited to ... regulatory policies, conservation, economy [and] competition." Fla. Stats. 350.01(6).

[55] Fla. Stat. § 366.81.

[56] Applicants arbitrarily affix the costly "TDU" brand to any interconnected distribution system that relied, as of October 16, 2000 and for 75% or more of its load, on network service over transmission facilities that were then owned by another GridFlorida participant. GridFlorida OATT § 1.45C. Thus, "TDU" is synonymous with FMPA, its existing All-Requirements members, and Seminole.

[57] Although FMPA strongly disagrees with numerous aspects of the GridFlorida rate design as it affects FMPA, FMPA believes that those disagreements should be and will be resolved at FERC, where they remain under consideration in Docket No. RT01-67. FMPA's purchases of transmission service from GridFlorida will be unbundled, wholesale-level transactions, and therefore will fall within the area that traditionally has been rate-regulated by FERC alone. *See New York v. FERC*, 122 S. Ct. 1012, 1022 (2002).Accordingly, the Applicants' goal of preserving the "jurisdictional *status quo*" entails leaving the rate regulation of terms for FMPA's transmission service purchases to FERC.

[58] *See* the conforming change proposed by Applicants in the third bullet on page 5 of the Executive Summary and

mechanism allows the costs associated with "TDU" facilities that are physically located within the FPL and FPC zones, and turned over to GridFlorida's operational control, to be recovered from all customers in those zones. The TDU Adder recognizes that customers other than TDUs will benefit from TDU-owned facilities that are placed under regional control. For example:

- GridFlorida will be able to use TDUs' facilities both to deliver ancillary services and to provide transmission service to any requesting Eligible Customer[59] — including any wholesale or retail load served under other authorized sales arrangements, and any generator that interconnects to TDU facilities under OATT Part IV.

- Deliveries from merchant plants that interconnect through TDU-owned transmission to any load within GridFlorida will pay GridFlorida's zonal rates, and thus avoiding paying the TDU directly for the use of its transmission facilities.

- GridFlorida will have the right to have new facilities, including radials to non-TDU generation or non-TDU eligible load, attached to TDU facilities. *See* OATT Attachment N Section II. For example, suppose the most transmission-efficient way to serve growing FPL load near the St. Lucie County International Airport is to tap the 138 kV lines connecting Fort Pierce to Vero Beach. GridFlorida could authorize that tap, without having to duplicate existing facilities and without Fort Pierce or Vero Beach holding a veto as the incumbent transmission owner.

- GridFlorida will be able to use the line that FMPA and KUA recently constructed at Cane Island to make deliveries to and from FPC's Intercession City substation. Consistent with the grid functionality of that line, under every pricing protocol filed for GridFlorida until now, it was treated as new transmission investment and rolled into GridFlorida's grid-wide charge under OATT Attachment I. However, the current filing wrongly slips the date for

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OATT §34.1.

[59] The proposal for differential rates to TDUs in the GridFlorida context contrasts sharply with *Florida Municipal Power Agency v. Florida Power & Light Co.*, 74 F.E.R.C. ¶ 61,006 (1996), *reh'g denied*, 96 F.E.R.C. ¶ 61,130 (2001), *petition for review pending sub nom. FMPA v. FERC*, D.C. Cir. Case No. 01-1381. In that case, FMPA was denied facility investment credits against charges for network service provided by FPL ("Florida Power") on the ground that "[w]hile the FMPA facilities may serve a transmission function on the FMPA side of the interconnection point between FMPA and the Florida Power system, they are not used by Florida Power to provide transmission service to FMPA or any other party." *Id.* at 61,010 (emphasis added). Under the GridFlorida arrangements, as soon as FMPA transfers ownership or control of its transmission facilities to GridFlorida, those facilities will be used by GridFlorida to provide transmission service, both to FMPA and to other requesting eligible customers, and will fall on the GridFlorida side of the interconnection point between FMPA load centers and the GridFlorida Transmission System. GridFlorida will be unable to serve its customers without using those facilities. In short, FMPA's transmission facilities will become integral parts of the GridFlorida grid, whether or not they have heretofore been considered part of the pre-RTO FPL, FPC, and TECO grids.

delineating new from existing TDU investment, making FMPA's share of that line subject to several years of incomplete cost recognition. (KUA's share of the same facility is treated correctly as a grid facility.)

- TDU network resources throughout the region, including those accessible only through TDU facilities, will become redispatchable by GridFlorida to facilitate deliveries anywhere in the region. For example, if redispatching FMPA generation at Cane Island that is now a Network Resource for FMPA's FPL-area Network Load facilitated a delivery to FPC's native load, the GridFlorida OATT would give GridFlorida rights to direct such redispatch.

- GridFlorida will be able to require upgrades and expansion of its system through development of what are now TDU facilities, *e.g.*, to arrange for new or upgraded lines to be built on the valuable land corridors now owned by TDUs.

- Under POMA § 7.2, GridFlorida will have the right to control maintenance scheduling on TDU facilities, so as to integrate the timing of maintenance outages with regional needs. For example, if it is regionally desirable to defer scheduled maintenance on the 138 kV facilities connecting Fort Pierce to Vero Beach in order to expedite maintenance on the parallel facilities owned by FPL, GridFlorida will have authority to mandate such revised scheduling.

- Extra capacity for growth and expansion potential that have been built into TDU facilities at TDU expense are made available to others. Others' usage may then impose congestion costs on the TDU.

- Revenues for non-transmission uses of facilities placed under GridFlorida ownership or control (for example, pole attachments to TDU transmission facilities) may have to be credited to GridFlorida's statewide revenue requirement, rather than being retained by the TDU.[60] Thus, it appears that TDUs must turn over to GridFlorida for Applicants' free use not only their facilities, but the revenues they have been receiving for non-transmission use of those facilities.

The timing of wholesale-level roll-in of TDU transmission is being litigated at FERC. There, FMPA is contending that when all Applicant facilities rated 69 kV+ are recognized as transmission and charged to TDUs every year at fully allocated cost,[61] a lengthy delay in

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[60] Specifically, if clause (b) of the "TCS" definition in OATT Attachment I ¶ C ("revenues received for services over transmission facilities that are not from transmission service") is applied to include revenues for services over directly assigned transmission facilities, then those revenues would appear to be diverted from their TDU existing recipient to all GridFlorida customers.

[61] *See* OATT Attachment H § A.1.

reciprocal cost coverage for TDU transmission is unduly discriminatory,[62] and that this discrimination is not remedied by the option to litigate for partial compensation under a standard that Applicants need not meet.[63] In short, TDUs should not have to cover both their own facilities' costs and those of Applicants, when Applicants cover only their own.

While the decision regarding the timing of reciprocal cost coverage is before FERC, and not this Commission, we stress that recovery of the cost of TDU transmission facilities through the TDU Adder is (a) consistent with the GridFlorida Order's finding that to avoid unfairness, subsidization, and unequal access, the same 69 kV voltage demarcation point should apply to each GridFlorida participant,[64] and (b) essential to fulfillment of this Commission's Grid Bill responsibility. Under the Grid Bill, "Any utility which provides a portion of those transmission facilities involved in the transfer of energy from a producing utility to a recipient utility or utilities shall be entitled to receive an appropriate reimbursement commensurate with the

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[62] FMPA has demonstrated to FERC that the Applicants' proposed OATT would make TDUs uniquely subject to bearing both their full share of zone-wide and RTO-wide transmission costs and facility costs associated with the integrated grid transmission that they contribute to GridFlorida's system. Large and small transmission-owning utilities who have not relied on unbundled network service would constitute their own "zone," and therefore pay for their customers' use of GridFlorida's system by owning facilities. TDUs would be singled out as ineligible to be a "zone," and their facilities would be singled out for "phase in" over a five year period, amounting to confiscation of those facilities (use without compensation, on pain of penalty) for two years. (During years 1-4, TDU would have to forego 80%, then 60%, then 40%, and then 20% of the revenue requirements associated with existing transmission. That adds up to foregoing 200% of their annual revenue requirement during years 1-4, which is arithmetically equivalent, pre-interest, to two years of zero compensation.)

[63] Under the high-risk litigation option of OATT Attachment H § A.2, the TDU would have to subject all of its relevant facilities to an inquiry from which Applicants are exempt (with no option to phase-in some facilities and litigate over others), and receive cost coverage only upon proving that each facility is integrated with all three Applicants' 69 kV+ facilities. If it did not meet that heightened standard, it would have to donate control of that facilities without ever receiving any compensation. Even if it did succeed, it might receive equal compensation only prospectively, and therefore do worse than it would without litigation. *See id.*, subpart a.ii (TDU facilities enter the Annual Zonal Transmission Cost rate base only "at such time" as they meet the TDU-only integration test).

[64] GridFlorida Order at 18; *see also* Fla. Stat. § 366.03 (prohibiting discrimination as among localities); Federal Power Act § 205(b) (same).

transmission facilities and services provided."[65] The transfer of TDUs' 230 kV, 138 kV, and 69 kV transmission facilities to GridFlorida control will place those facilities under integrated control, and impose substantial new costs on TDUs, in order to enable GridFlorida to provide better service than today's service providers.

Retail pass-through of these four wholesale-level inputs, to the extent they are allocated to Applicants under FERC-approved pricing for GridFlorida service, is essential both in principle and in practice to achieving GridFlorida's benefits. In principle, the core purpose of forming a Florida RTO is to "facilitate the development of a competitive wholesale energy market in Florida," in order to "put downward pressure on transmission and wholesale generation rates and, in turn, on retail rates." GridFlorida Order at 5. For such a market to work, deliveries in that market from any generator to any load must share comparably in bearing the grid's fixed costs and GridFlorida's grid management costs. Wholesale-market participants — including utilities which have relied on purchased power delivered under "Existing Transmission Agreements" rather than owned power plants, and "TDUs" which have purchased unbundled network service rather than requirements power — must not be subject to disproportionate burdens for a lengthy "transition." A fair and robust wholesale market requires fair treatment of all wholesale-market deliveries.

In practice, the wholesale-level loads that will be subject to GridFlorida's zonal rates from the outset simply represent too small a share of Peninsular Florida load to shoulder GridFlorida's grid management and grid facilities costs without bundled retail load bearing its full allocated share. And GridFlorida pricing structured to skew cost responsibility in that

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[65] Fla. Stat. § 366.055(2)(b) (emphasis added).

direction would not sustainable. FERC has previously called for a single RTO for the entire Southeast,[66] and need not accept substituting a separate Florida-only RTO whose rate structure tilts against wholesale-market deliveries. The "SeTrans" proposal for a Southeastern RTO includes a commitment to full cost coverage for all TDU facilities,[67] offering TDUs a credible alternative to participating in and supporting a Florida-only RTO that was tilted against them. Finally, TDUs may well be unable to persuade the necessary democratic decisionmakers — elected officials, and in some instances direct-referendum voters — to contribute publicly-owned infrastructure to GridFlorida's private-entity control if the result is a rate structure severely tilted against TDUs, *e.g.*, if the net book value of facilities contributed by TDUs is singled out for non-recognition.

Such retail pass-through is appropriate even if it increases the proportional allocation to Applicants' retail load of certain elements of regional grid costs. The fact is that TDUs' retail customers have, to date, been bearing a much larger share of Peninsular Florida's transmission facility and transmission management costs than have Applicants' retail customers. Perpetuating such disparate treatment merely because it existed before GridFlorida would retard the development of a competitive wholesale energy market — and relieve the downward pressure on Applicants' retail rates (and upward pressure on Applicants' service quality) that competition from wholesale market participants like FMPA can bring. When all of the changes that GridFlorida will bring are taken into account,[68] Applicants' bundled retail loads will be better

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[66] *See Regional Transmission Organizations*, 96 F.E.R.C. ¶ 61,066 (2001).

[67] *See Regional Transmission Organizations,* 96 F.E.R.C. ¶ 63,036, at 65,208 (2001).

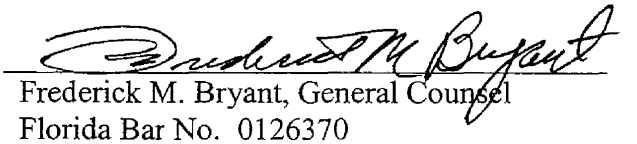
[68] For example, GridFlorida will soon radically rework the allocation of congestion costs, potentially causing cost shifts larger than the entire transmission revenue requirement. A recent FERC working paper estimates that in 2000, the New York ISO's congestion costs exceeded its entire transmission revenue requirement. *Working Paper on*

off than they are today, because they will benefit from the improved grid planning, grid management, and power markets that regionalization should bring.

V. CONCLUSION

A properly constituted regional transmission organization for Florida can provide benefits for all Florida loads, aiding this Commission in its responsibilities to protect all Floridians. And the Applicants' compliance filing is, in general, a useful step towards establishing such an RTO. However, as shown above, substantial revisions remain necessary, particularly as to structure and governance, planning and operations, market design and market power, and rates. FMPA hopes that further progress can be made at the May 29 Workshop.

Respectfully submitted this 8th day of May, 2002,



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Standardized Transmission Service and Wholesale Electric Market Design, FERC Docket No. RM01-12-000 (Mar. 15, 2002), available at http://www.ferc.gov/electric/rto/mrkt-strct-comments/discussion_paper.htm.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PRE-WORKSHOP COMMENTS OF FLORIDA MUNICIPAL POWER AGENCY has been furnished via regular United States Mail, first class, postage pre-paid, this Eighth (8th) day of May 2002, to:

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Exhibit "A"

FPL Group, Inc. and Entergy Corp.
FERC Docket No. EC01-33

Joint Application of FPL Group, Inc. and Entergy Corporation for Approval of Merger

Volume II, Exhibit No. FE-202 at 1

Economic Capacity Analysis
Base Case

Exhibit No. FE-202

			Pre-Merger					2ab Analysis				Post-Merger without Mitigation, with 150 MW Path				Post-Merger without Mitigation, with Path as Appropriate			
			Entergy		FPL			FPL+ENT		HHI		FPL+ENT			HHI				
Market	Period	Price	MW	Mkt Share	MW	Mkt Share	HHI Pre-Merger	MW	Comb. Market Share	Post-Merger	HHI Change	MW	Mkt Share	Post-Merger	Change	FPL+ENT MW	Comb. Market Share	HHI Post-Merger	HHI Change
ENT	S_SP1	$ 100	20,565	61.4%	10	0.0%	3,852	20,575	61.4%	3,856	4	20,723	61.8%	3,906	54	20,723	61.8%	3,906	54
ENT	S_SP2	$ 75	20,554	61.4%	10	0.0%	3,851	20,564	61.4%	3,855	4	20,712	61.8%	3,905	54	20,712	61.8%	3,905	54
ENT	S_P	$ 35	18,649	57.5%	11	0.0%	3,405	18,660	57.5%	3,410	5	18,607	58.0%	3,463	59	18,607	58.0%	3,463	59
ENT	S_OP	$ 26	6,671	35.9%	14	0.1%	1,522	6,685	35.9%	1,528	6					6,685	35.9%	1,528	6
ENT	W_SP	$ 33	10,394	45.4%	9	0.0%	2,224	10,403	45.4%	2,228	4	10,552	46.1%	2,290	66	10,552	46.1%	2,290	66
ENT	W_P	$ 24	6,781	46.6%	15	0.1%	2,369	6,796	46.7%	2,379	10					6,796	46.7%	2,379	10
ENT	W_OP	$ 18	6,508	58.9%	48	0.4%	3,654	6,556	59.4%	3,706	52					6,556	59.4%	3,706	52
ENT	SH_SP	$ 35	14,791	58.4%	6	0.0%	3,514	14,797	58.4%	3,516	2	14,946	59.0%	3,586	72	14,946	59.0%	3,586	72
ENT	SH_P	$ 33	9,005	46.4%	6	0.0%	2,329	9,011	46.4%	2,332	3	9,160	47.2%	2,404	75	9,160	47.2%	2,404	75
ENT	SH_OP	$ 20	5,664	63.9%	15	0.2%	4,272	5,679	64.1%	4,294	22					5,679	64.1%	4,294	22
FPL	S_SP1	$ 100	0	0.0%	20,286	84.3%	7,129	20,286	84.3%	7,129	0	20,136	83.5%	7,000	-128	20,136	83.5%	7,000	-128
FPL	S_SP2	$ 75	0	0.0%	20,286	84.3%	7,129	20,286	84.3%	7,129	0	20,136	83.5%	7,000	-128	20,136	83.5%	7,000	-128
FPL	S_P	$ 35	0	0.0%	16,444	87.5%	7,689	16,444	87.5%	7,689	0	16,294	86.5%	7,517	-172	16,294	86.5%	7,517	-172
FPL	S_OP	$ 26	0	0.0%	5,486	70.9%	5,190	5,486	70.9%	5,190	0					5,486	70.9%	5,190	0
FPL	W_SP	$ 33	0	0.0%	15,655	87.2%	7,632	15,655	87.2%	7,632	0	15,506	86.3%	7,483	-149	15,506	86.3%	7,483	-149
FPL	W_P	$ 24	1	0.0%	5,556	70.7%	5,135	5,557	70.7%	5,136	1					5,557	70.7%	5,136	1
FPL	W_OP	$ 20	3	0.1%	5,556	72.5%	5,382	5,559	72.5%	5,389	7					5,559	72.5%	5,389	7
FPL	SH_SP	$ 35	0	0.0%	14,938	85.0%	7,263	14,938	85.0%	7,263	0	14,789	83.9%	7,087	-176	14,789	83.9%	7,087	-176
FPL	SH_P	$ 33	0	0.0%	13,795	84.5%	7,179	13,795	84.5%	7,179	0	13,645	83.4%	6,996	-183	13,645	83.4%	6,996	-183
FPL	SH_OP	$ 20	2	0.0%	4,933	87.6%	4,751	4,935	87.6%	4,755	4					4,935	87.6%	4,755	4
AECI	S_SP1	$ 100	0	0.0%	0	0.0%	1,382	0	0.0%	1,382	0	43	0.4%	1,372	-10	43	0.4%	1,372	-10
AECI	S_SP2	$ 75	0	0.0%	0	0.0%	1,383	0	0.0%	1,383	0	42	0.4%	1,373	-10	42	0.4%	1,373	-10
AECI	S_P	$ 35	0	0.0%	0	0.0%	1,279	0	0.0%	1,279	0	32	0.3%	1,268	-10	32	0.3%	1,268	-10
AECI	S_OP	$ 26	0	0.0%	1	0.0%	1,495	1	0.0%	1,495	0					1	0.0%	1,495	0
AECI	W_SP	$ 33	530	3.5%	9	0.1%	833	539	3.6%	833	0	635	4.2%	822	-11	635	4.2%	822	-11
AECI	W_P	$ 24	803	5.6%	18	0.1%	789	821	5.7%	790	1					821	5.7%	790	1
AECI	W_OP	$ 18	831	6.3%	68	0.5%	755	899	6.8%	762	7					899	6.8%	762	7
AECI	SH_SP	$ 35	306	2.2%	6	0.0%	847	312	2.3%	847	0	442	3.2%	818	-29	442	3.2%	818	-29
AECI	SH_P	$ 33	281	2.0%	8	0.1%	836	287	2.1%	836	0	404	2.8%	808	-28	404	2.8%	808	-28
AECI	SH_OP	$ 20	556	4.5%	44	0.4%	744	600	4.9%	747	3					600	4.9%	747	3
AMEREN	S_SP1	$ 100	0	0.0%	1	0.0%	1,821	1	0.0%	1,821	0	16	0.1%	1,830	9	16	0.1%	1,830	9
AMEREN	S_SP2	$ 75	0	0.0%	1	0.0%	1,785	1	0.0%	1,785	0	16	0.1%	1,792	7	16	0.1%	1,792	7
AMEREN	S_P	$ 35	0	0.0%	1	0.0%	1,861	1	0.0%	1,861	0	11	0.1%	1,873	12	11	0.1%	1,873	12
AMEREN	S_OP	$ 26	0	0.0%	3	0.0%	1,775	3	0.0%	1,775	0					3	0.0%	1,775	0
AMEREN	W_SP	$ 33	307	1.1%	7	0.0%	1,346	314	1.2%	1,346	0	362	1.3%	1,339	-7	362	1.3%	1,339	-7
AMEREN	W_P	$ 24	494	1.9%	14	0.1%	1,356	508	1.9%	1,356	0					508	1.9%	1,356	0
AMEREN	W_OP	$ 18	719	3.0%	68	0.3%	1,485	787	3.2%	1,487	2					787	3.2%	1,487	2
AMEREN	SH_SP	$ 35	203	0.8%	6	0.0%	1,335	209	0.9%	1,335	0	295	1.2%	1,321	-14	295	1.2%	1,321	-14
AMEREN	SH_P	$ 33	193	0.8%	6	0.0%	1,304	199	0.8%	1,304	0	278	1.1%	1,288	-16	278	1.1%	1,288	-16
AMEREN	SH_OP	$ 20	372	1.7%	50	0.2%	1,397	422	1.9%	1,398	1					422	1.9%	1,398	1