

AUSLEY & MCMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

ORIGINAL

RECEIVED-FPSC
01 OCT 12 PM 2:59
COMMISSION
CLERK

October 12, 2001

HAND DELIVERED

Ms. Blanca S. Bayo, Director
Division of Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket Nos. 000824-EI, 001148-EI and 010577-EI

Dear Ms. Bayo:

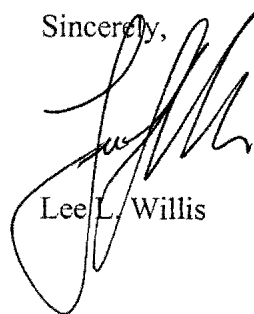
Enclosed for filing in the above dockets are the original and fifteen (15) copies of Joint Post-Hearing Statement and Brief of Florida Power Corporation, Florida Power & Light Company and Tampa Electric Company.

Also enclosed is a diskette containing the above document generated in Word and saved in Rich Text format for use with WordPerfect.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,



Lee L. Willis

APP _____
CAF _____
CMP _____
COM 5 LLW/pp
CTR _____ Enclosures
ECR _____
LEG I
OPC _____ cc: All Parties of Record (w/encl.)
PAI _____
RGO _____
SEC I
SER _____
OTH cc: [signature]

RECEIVED & FILED
[signature]
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

13000 OCT 12 01

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.

DOCKET NO. 000824-EI

In re: Review of Florida Power & Light Company's proposed merger with Entergy Corporation, the formation of a Florida transmission company ("Florida transco"), and their effect on FPL's retail rates.

DOCKET NO. 001148-EI

In re: Review of Tampa Electric Company and impact of its participation in GridFlorida, a Florida Transmission Company, on TECO's retail ratepayers.

DOCKET NO. 010577-EI
FILED: October 12, 2001

**JOINT POST-HEARING STATEMENT AND BRIEF OF
FLORIDA POWER CORPORATION, FLORIDA POWER & LIGHT COMPANY AND
TAMPA ELECTRIC COMPANY**

Pursuant to Rule 28-106.215 of the Florida Administrative Code and the October 1, 2001 Pre-hearing Order issued by the Florida Public Service Commission ("Commission"), Florida Power Corporation ("FPC"), Florida Power and Light Company ("FPL") and Tampa Electric Company ("Tampa Electric") (referred to hereafter collectively as the "GridFlorida Companies") hereby submit this Joint Post-hearing Statement and Brief and state as follows:

STATEMENT OF BASIC POSITION

The Commission should determine in this case that development of the GridFlorida RTO and participation of each of the GridFlorida Companies in this RTO has been and will continue to be prudent and in the best interests of Florida ratepayers. The Commission should specifically determine that participation by divestiture of transmission facilities or by transfer of control of transmission facilities is prudent.

Order No. 2000 and more recent Federal Energy Regulatory Commission ("FERC") actions leave no doubt that development of RTOs is part of a nationwide, federal initiative. Ultimately, participation by all FERC jurisdictional utilities will be mandatory, not voluntary. It

is clear that the GridFlorida Companies were prudent to develop and participate in a Peninsular Florida RTO, rather than attempt to resist this federal policy and risk being forced to join an RTO that the GridFlorida Companies did not participate in developing. The public policy issues to be weighed and compared by the Commission in this case do not involve a consideration of the costs and benefits of an RTO versus the status quo. The status quo is not a viable option. Instead, the correct comparison is development and implementation of a Peninsular Florida RTO that is beneficial to Florida and Florida ratepayers, as opposed to doing nothing and being forced to join an another RTO.

To be sure, consideration of the costs and benefits associated with development of GridFlorida is one of the issues which the Commission should examine in this case. There is no question that the costs of developing GridFlorida will be significant. However, these costs will not cause retail rates to increase significantly, even without taking into account offsetting benefits. While difficult to quantify, benefits certainly will result from development of an improved wholesale market, made possible in part through the operation of GridFlorida.

The GridFlorida Companies have been mindful of the fact that the Commission will continue to have statutory responsibility for reliability and adequacy of transmission service in Florida, but may not have jurisdiction over GridFlorida. In light of this circumstance, the GridFlorida Companies have developed features in the tariff and protocols governing GridFlorida, and in the contracts that will govern the relationship between the GridFlorida Companies and GridFlorida, which assure that reliable and adequate transmission service will continue in the future.

There is no question that a Southeast RTO will be developed. FERC has made this goal a key part of its national energy initiative. As matters stand right now, however, it is not clear whether a Southeast RTO would be superior to GridFlorida or whether FERC will order the

GridFlorida Companies to participate in the Southeast RTO. What is clear, however, is that if this Commission fails to rule expeditiously that GridFlorida is prudent and in the best interest of ratepayers, FERC will consider GridFlorida no longer to be an option and will order the GridFlorida Companies to participate in a Southeast RTO.

The ultimate structure and features of the Southeast RTO remain to be seen, and it is not possible at this time to determine whether GridFlorida is a better alternative than the Southeast RTO. It is clear, however, that the development of the Southeast RTO will involve hard bargaining among large transmission owners whose interests may diverge significantly from the interests of the GridFlorida Companies and their ratepayers. The GridFlorida Companies' leverage in these negotiations will decline significantly if the perception among other parties is that GridFlorida is not supported by this Commission.

The GridFlorida Companies believe that the best approach for the Commission going forward would be to expeditiously rule that the GridFlorida Companies' activities with respect to GridFlorida have been prudent, and that it would be prudent for the GridFlorida Companies to form and participate in GridFlorida. At the same time, however, the Commission and the GridFlorida Companies need to evaluate the costs and benefits of the Southeast RTO as compared to GridFlorida, and to gain a better understanding of whether FERC might order the GridFlorida Companies to participate in a Southeast RTO regardless of the Commission's finding in this case. Therefore, the Commission should not require the GridFlorida Companies to expend significant additional resources on GridFlorida development until more information is available regarding the Southeast RTO.

In addition, all three of the GridFlorida Companies seek a ruling in this case providing for assured recovery of GridFlorida costs through retail rates in a reasonable and timely manner. FPL seeks a determination at this time of a specified cost recovery clause mechanism in order to

allow FPL to proceed with further development of GridFlorida. Such rulings are a prerequisite for the GridFlorida Companies' agreement to move forward with GridFlorida development under any circumstances.

STATEMENT OF ISSUES AND POSITIONS

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

POST-HEARING STATEMENT OF POSITION:

While Order No. 2000 does not include a generic finding requiring all utilities to join an RTO, that order does establish a federal policy that all transmission owners join an RTO. More recently, FERC has signaled that it intends to force all utilities to participate in an RTO. The question therefore is not whether the GridFlorida Companies were required to join an RTO but when they would be required to do so.

DISCUSSION:

Those parties asserting that RTO participation is voluntary focus on the fact that Order No. 2000 does not include a generic finding requiring all utilities to join an RTO. They conclude from this that the GridFlorida Companies were completely free to choose whether or not to join an RTO and that their decision to form GridFlorida cannot be found to be prudent unless the GridFlorida Companies submit a cost/benefit analysis showing that the benefits of joining an RTO as compared to the status quo outweigh the costs. This is an overly simplistic view of Order No. 2000 that is wrong on several levels.

First, Mr. Hoecker, who was Chairman of FERC at the time of the issuance of Order No. 2000, explains that Order No. 2000 established a federal policy that all transmission owners join an RTO. Tr. at 252. This policy was expressed in a number of places in Order No. 2000, but perhaps the clearest expression occurs in Order No. 2000-A, FERC's order on rehearing of Order

No. 2000, where FERC stated that its "objective in promulgating Order No. 2000 was to have all transmission-owning entities in the Nation, including non-public utilities, place their facilities under the control of appropriate RTOs in a timely manner." Id. (quoting Order No. 2000-A, Ex. 4 at 743) (emphasis added).

FERC established in Order No. 2000 a mandatory process that all jurisdictional utilities were required to follow. Under 18 CFR Section 35.34(c), all utilities were required to make a filing on October 16, 2000, in which they either submitted a proposal to join an RTO or else had to make an "alternative filing" pursuant to 18 CFR Section 35.34(g), which requires the utility to provide:

(1) A description of any efforts made by that public utility to participate in a Regional Transmission Organization;

(2) A detailed explanation of the economic, operational, commercial, regulatory or other reasons the public utility has not made a filing to participate in a Regional Transmission Organization, including identification of any existing obstacles to participation in a Regional Transmission Organization; and

(3) The specific plans, if any, the public utility has for further work toward participation in a Regional Transmission Organization, a proposed timetable for such activity, an explanation of efforts made to include public power entities in the proposed Regional Transmission Organization, and any factors (including any law, rule or regulation) that may affect the public utility's ability or decision to participate in a Regional Transmission Organization.

As the above requirement makes clear, FERC did not intend for utilities simply to be able to decide to opt out of RTO participation. Instead, all utilities were required to describe the specific obstacles to their participation and their plans for overcoming those obstacles. This mandatory requirement was clearly intended to further FERC's policy goal that all transmission owners participate in an RTO, and it was pursuant to this mandatory requirement that the GridFlorida Companies made their GridFlorida RTO filing.

In Order No. 2000, FERC explained why, notwithstanding its clear intent that all utilities

participate in RTOs, it was not making a generic finding that such participation was required. FERC knew that any such finding would be challenged on appeal. In light of the inevitable challenge to its authority that would result from a generic requirement to join an RTO, FERC stated that "we want the industry to focus its efforts on the potential benefits of RTO formation and how best to achieve them, rather than on a non-productive challenge to our legal authority to mandate RTO participation." Tr. at 255 (quoting Order No. 2000, Ex. 4 at 116). In Order No. 2000-A, FERC explained "[t]hat we have not chosen to mandate RTO participation does not mean that we have avoided our obligation to address the impediments to competition that we have identified; it merely means that we have chosen a method to address those impediments that we believe will efficiently achieve the results we desire." *Id.* (quoting Order No. 2000-A, Ex. 4 at 750 (emphasis added)).

As Mr. Hoecker also explained, FERC has made it increasingly clear since the issuance of Order No. 2000 that it is going to take steps to force all utilities subject to its jurisdiction to join an RTO. First, FERC issued a series of orders on July 12, 2001 regarding RTOs, including an order requiring all utilities in the Southeastern United States (but not in Florida) to participate in a mediation intended to develop an outline for the establishment of a Southeast-wide RTO. Tr. at 254 (citing Regional Transmission Organizations, 96 FERC ¶ 61,066 (2001)).¹ A similar order was issued requiring mediation for the establishment of a Northeastern RTO. Regional Transmission Organizations, 96 FERC ¶ 61,065 (2001). As Mr. Hoecker explains, FERC's July 12 orders "clearly suggest a more prescriptive attitude toward RTO formation and less willingness to defer to stakeholders and RTO proponents with regard to the structure, organization, or geographic scope of RTOs." Tr. at 256.

More recently, in its September 26, 2001 meeting, FERC again addressed RTO

¹ The GridFlorida Companies were not required to participate in this mediation – at least in part because they already had submitted a well-developed RTO proposal of their own – but they were invited to participate.

participation. Newly-appointed FERC Chairman Pat Wood made public a memorandum (entered into evidence as Ex. 5) describing his proposal as to how to deal with utilities that do not participate in an RTO:

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

Ex. 5 at 2 (emphasis added). Mr. Hoecker and Mr. Naeve both testified that this memo shows that FERC is signaling even more clearly today that it intends to force RTO participation. Tr. at 136-37; 281.

Mr. Naeve, a former FERC Commissioner, explained how the GridFlorida Companies analyzed Order No. 2000 and FERC's other statements regarding its policy that all utilities join an RTO. He explained that the GridFlorida Companies "did not believe that RTO participation was voluntary in the long run, notwithstanding that FERC declined to make a generic finding in Order No. 2000 that every utility was required to join an RTO." Tr. 103. This is because:

The GridFlorida Companies read Order No. 2000 as raising the very strong likelihood that, if the GridFlorida Companies did not file their own RTO proposal, FERC eventually would force RTO participation, either through a direct order or through the imposition of a number of ever increasing penalties – "guidance and encouragement" – as FERC put it in Order No. 2000.

Tr. at 102.

FERC Chairman Wood's memo cited above proves the validity of the GridFlorida Companies' concern. The list in that memo of the numerous penalties that FERC is considering imposing on utilities that do not agree to join an approved RTO brings to mind the opinion of DC Court of Appeals Judge Williams regarding FERC's claim that participation in its natural gas

restructuring program was voluntary: "[W]hen a condemned man is given the choice between the noose and the firing squad, we do not ordinarily say that he has 'volunteered' to be hanged." Tr. at 103 (quoting Associated Gas Distributors v. FERC, 824 F.2d 981 at 1024 (D.C. Cir. 1987)).

Mr. Naeve explained at the hearing that these penalties would not necessary affect only the shareholders of the GridFlorida Companies but also could cause retail ratepayers to pay higher rates. For example, to the extent that the GridFlorida Companies make off-system market power sales, the benefits of those sales are shared with retail customers. If off-system market-based sales cannot be made, the resulting credits to retail rates would be reduced to cost-based levels. Tr. at 151. Ex.11-13 set forth the amount of market-based rate sales by each of the GridFlorida Companies, and show that significant amounts of such sales have been made. Although it is not possible to determine the reduction in revenues that would result if these sales had been made at cost-based rates, Ex. 11-13 show that the potential harm to ratepayers could be significant.

The question therefore is not whether the GridFlorida Companies would be forced to join an RTO. All evidence at hearing shows that FERC has every intent of requiring RTO participation in one way or another. Instead the question is when would RTO participation be required. The GridFlorida Companies faced the choice of either proactively developing a proposal in accordance with the time frames established by Order No. 2000 or else being forced to join an RTO developed by someone else at some point in the future.

The appropriate analysis for reviewing the GridFlorida Companies' decision therefore is not to compare the costs and benefits of RTO participation versus the status quo, but instead to compare the costs and benefits of proactively filing the GridFlorida RTO proposal versus waiting to be forced to participate in an RTO developed by others.

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

POST-HEARING STATEMENT OF POSITION:

By proactively participating in the development of GridFlorida instead of waiting to be ordered to join an RTO, the GridFlorida Companies achieved the following benefits: (1) a Florida collaborative process; (2) a Peninsular Florida scope; (3) a Florida focus; (4) a cost-shift mitigation plan attuned to Florida's needs; and (5) the ability to influence the incurrence of costs. Participation in GridFlorida also will provide the market enhancement and other benefits FERC found would result from RTO participation.

DISCUSSION:

A. BENEFITS OF PROACTIVELY DEVELOPING AN RTO PROPOSAL

As noted above, the proper focus for evaluating the decision to propose GridFlorida should be on the benefits of proactively developing an RTO proposal versus waiting to be forced into joining an RTO developed by others. These benefits, which are described in detail in the testimony of Mr. Naeve, Tr. at 104-06, are summarized as follows:

- **Florida Collaborative Process:** One of the chief benefits of the GridFlorida Companies' decision to form their own RTO is that they established a substantial collaborative process in which all Florida stakeholders, including representatives of the Commission, were able to provide guidance and advice on the content of the GridFlorida Companies' RTO proposal. The comments that the Florida stakeholders provided materially shaped the ultimate contents of the GridFlorida proposal. By contrast, if the GridFlorida Companies had not filed their own proposal, but later were required to join an RTO formed without the benefit of the Florida collaborative process, the Florida stakeholders (including the Commission and the GridFlorida Companies) would have been completely shut out of the development process.
- **Peninsular Florida Scope:** The Commission has expressed on numerous occasions its strong preference that any RTO joined by the GridFlorida Companies be limited to Peninsular Florida. Because the GridFlorida Companies submitted their own proposal, they were able to achieve this goal. By contrast, if the GridFlorida Companies had declined to develop their own proposal and later were forced to join an existing RTO, the only existing RTOs would be located outside of Florida.
- **Florida Focus:** A closely related benefit to the Peninsular Florida scope of the RTO is that such an RTO would have a Florida focus in the way that it operates. The RTO would be headquartered in Florida, would focus its operational and planning efforts on Florida,

and would not be put in the position where it would have to balance the impacts of its actions between Florida and other regions and thereby benefit another state at the expense of Florida.

- **Cost Shifts and Mitigation:** The GridFlorida Companies developed, through the Florida collaborative process, a cost-shift mitigation plan designed to mitigate the impacts of any cost shifts resulting from the GridFlorida proposal. While the GridFlorida proposal, as a consequence of implementing FERC's requirement that rate pancakes be eliminated, still results in some cost shifts among various Florida customers, participation in an out-of-state RTO could result in Florida customers being required to bear costs previously borne by out-of-state customers (the exact impact of which cannot be determined without knowing the specifics of the RTO proposal). Furthermore, The GridFlorida Companies would be required, of course, to accept whatever cost shifts that were inherent in an existing RTO if they were forced to join such an RTO in the future.
- **Cost Control:** Finally, because the GridFlorida Companies have been responsible for developing the GridFlorida proposal, they have been able to shape that proposal in ways intended to limit cost incurrence. For example, the GridFlorida Companies have decided to use the existing FPL control center initially on an interim basis, which will allow significant cost savings when compared to the construction of an entirely new control center.

Not a single witness was submitted to challenge any of these benefits identified by Mr. Naeve. Nor was there any real effort to attack these benefits on cross-examination. The existence of these benefits therefore is uncontroverted.

B. BENEFITS OF RTO PARTICIPATION

Notwithstanding their belief that the proper analysis focuses on the costs and benefits of proactively developing an RTO versus being forced to join an RTO developed by others, the GridFlorida Companies also presented evidence regarding the general benefits that should result from participation in an RTO versus the status quo.

Mr. Hoecker described seven categories of benefits that FERC believed would result from participation in RTOs. These consisted of the following: (1) eliminating pancaked rates, (2) more efficient planning on a regional basis; (3) the ability to improve regional reliability through regional operations; (4) the creation of a real-time balancing market and ancillary services markets that are market based; (5) a congestion management proposal that leads to more

efficient allocation of transmission capacity; (6) improved emergency response; and (7) more efficient treatment of loop flows. Tr. at 249-50; 261-66.

Mr. Ashburn explains how the GridFlorida RTO proposal is designed to eliminate rate pancakes, Tr. at 571-74, and Mr. Naeve addresses how GridFlorida can achieve the other anticipated RTO benefits. Tr. at 108-13. Mr. Naeve focused in particular on the issue of whether all of the anticipated benefits relating to the improvement of wholesale competition could be achieved given the requirements of Florida's Siting Act. Tr. at 109-11. Mr. Naeve explained that such benefits could be achieved, for several reasons.

First, the Supreme Court's ruling does not prevent non-utility generation owners from building plants in Florida. For example, a nonutility generation owner can execute a contract with a load-serving entity to supply all or a significant portion of its entire output. In addition, plants with a steam cycle below 75 MW in size and any plant that does not have a steam cycle, such as a simple cycle peaking plant, are exempt from the Siting Act and therefore do not need to be owned by or dedicated to a load serving entity. Such plants provide competition for existing wholesale sellers of power to load-serving entities. Changes that eliminate rate pancaking and ensure nondiscriminatory open access will benefit these plants and increase wholesale competition. Tr. at 110.

The argument that non-utility generation facilities can still be developed in Florida is not just a theoretical argument. As described in the Panel Testimony, the GridFlorida Companies currently have pending requests for interconnection at over 50 sites representing over 26,000 MW of non-utility owned generation to be placed in service in the next five years. Tr. at 355-56. While not all of these plants will be placed into service (and indeed some of the requests have been filed in anticipation of a revision to the Siting Act), the magnitude of the requests shows that a significant amount of non-utility plants likely will be built in Florida notwithstanding the

Florida Supreme Court's ruling. Id.

Second, the Governor has appointed a committee to study steps that can be taken to foster increased wholesale competition in Florida. Whatever form any restructuring of the Florida utility industry might ultimately take, having an RTO in place is an important predicate for wholesale competition. It is appropriate to establish GridFlorida soon so that the infrastructure will be in place at such time as the Florida legislature acts. Tr. at 111.

Third, there are many merchant plants and other generation facilities located outside of Florida. Improving wholesale competition should at the very least have a positive impact on the availability and price of power imported into Florida. Id.

Finally, it is significant that there are a number of independent power producers and power marketers involved in this proceeding. Without exception, these parties all support the formation of an RTO and state that they believe that an RTO will improve their ability to compete in Florida. This support from the parties who would be expected to participate in the competitive Florida wholesale market is in itself convincing evidence that an RTO should improve wholesale competition notwithstanding the restrictions of the Florida Siting Act.

C. QUANTIFICATION OF BENEFITS

One of the issues at hearing was exactly what benefits will result from the GridFlorida Companies' participation in GridFlorida. The suggestion was made in one opening statement that the GridFlorida Companies had not shown that there would be one penny of benefits. Tr. at 82. Questions asked at various times by the Commissioners showed a general concern with not knowing exactly what the benefits of RTO participation would be.

The problem with attempting to quantify benefits is that it simply is not possible in advance of RTO operations to derive a quantification that has any real meaning. As noted above, since the GridFlorida Companies likely would have been forced to join some RTO at some point,

they benefited from proactively developing a Florida RTO with a Florida focus. But what is the dollar value of a Florida focus? Furthermore, how can any comparison be performed when no one knows exactly what RTO the GridFlorida Companies would have been forced to join?

Even the benefits of joining an RTO versus the status quo are difficult to quantify. The principle benefit will be an improved wholesale electricity market. At this point, however, it is impossible to predict exactly what the new market will look like or exactly what reductions in power costs might result. The problem is exacerbated by the potential formation of the Southeast RTO.

The fact that meaningful quantification is not possible does not mean that there will not be any benefits from RTO operation. Improved wholesale competition should permit a reduction in wholesale power costs, which in turn will be passed on to retail customers as a reduction in their bundled retail rates. Furthermore, as Mr. Mechler testified, it takes only a relatively small reduction in power costs to translate into significant savings that easily outweigh the increase in transmission costs that will result from the start up of GridFlorida since, as discussed below, these costs would result in increased retail rates of less than one percent. Tr. at 766-67. This testimony, and the testimony of the GridFlorida Companies with respect to the impact of incremental costs on retail rates discussed in Issue 4 below, should give the Commission some measure of comfort that the benefits of RTO participation are likely to outweigh the costs.

The lack of a quantifiable benefits number at this time should not cause the Commission to reject the GridFlorida proposal, however. As Mr. Hoecker put it: "I think that that's an exercise in reason[ed] decisionmaking, not necessarily number crunching." Tr. at 283.

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

POST-HEARING STATEMENT OF POSITION:

The benefits described in Issue 2 above should help to establish a more efficient wholesale market, which should in turn lead to lower wholesale power costs that will flow through to retail ratepayers. It is impossible to determine, however, the amount by which power costs will be reduced, either prospectively or after the fact.

DISCUSSION:

A. ESTABLISHMENT OF A MORE EFFICIENT WHOLESALE POWER MARKET SHOULD LEAD TO LOWER POWER COSTS PAID BY RATEPAYERS

The suggestion was made at hearing that the benefits of RTO participation described above would accrue to generators and other wholesale market participants, not to ratepayers. Tr. at 186-87. This suggestion misapprehends the whole theory underlying RTO creation.

The RTO formation is not intended to put money in the pockets of generators, but to create more efficient wholesale markets. These efficiencies are intended to increase the amount of competition in the wholesale markets, while maintaining an appropriate balance between supply and demand. Under such circumstances, increased competition should lead to a reduction in the cost of wholesale power. Tr. 187-88. Reductions in wholesale power costs will directly benefit ratepayers. That is because reductions in wholesale power costs are passed-on to ratepayers.

Furthermore, to the extent that more efficient wholesale markets cause the GridFlorida Companies to make more off-system wholesale sales, that too will benefit ratepayers. As noted above, profits from off-system sales are shared with ratepayers.

B. IT IS NOT POSSIBLE TO QUANTIFY THE REDUCTION IN WHOLESALE POWER COSTS, EITHER PROSPECTIVELY OR AFTER THE FACT

While the GridFlorida Companies anticipate that RTO creation will result in benefits to ratepayers, it is not really possible to quantify those benefits. As explained above, it is too

difficult to predict how prices will change in the future and which new generators will enter the market to develop any kind of reasonably accurate prospective estimate.

An after the fact calculation is difficult for the opposite reason. It would be too difficult to determine what wholesale prices would have been if the RTO had not been in place, or what entry into the market resulted from the RTO. Nor is it possible to simply use a benchmark price. A major variable in energy prices is the cost of fuel, and fuel costs will vary completely independently of the competitive situation in Florida.

C. AVOIDANCE OF FERC'S PENALTIES WILL BENEFIT RATEPAYERS

As described above, FERC is considering imposing certain penalties on utilities that do not participate in RTOs, including revocation of wholesale market-based rate authority. Participation by the GridFlorida Companies in GridFlorida, and the resulting preservation of market-based rate authority, will benefit retail ratepayers as well. This is because a portion of profits from off-system sales are shared with retail customers through a crediting mechanism. To the extent that market-based rates are higher than the cost-based rate that the GridFlorida Companies otherwise would charge, this difference will result in a credit to retail ratepayers, which would provide them with the benefit of lower rates.

Ex. 11-13 include information on past market-based rate sales made by the GridFlorida Companies. The information on these exhibits does not directly correspond to the amount of ratepayer benefits that would result from GridFlorida participation because it is not possible for the GridFlorida Companies to determine the amount of revenues that they would have received if they did not have market-based rate sales. However, Ex. 11-13 do show that the GridFlorida Companies have made significant market-based rate sales in the past several years. The potential benefit to ratepayers resulting from participation in GridFlorida therefore could be significant.

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

POST-HEARING STATEMENT OF POSITION:

The total incremental start-up costs are estimated to be \$136 million. The amounts allocated to GridFlorida Companies' retail customers are:

FPL: approximately \$70 million

FPC: approximately \$32.7 million

TECO: approximately \$16.9 million

Incremental annual operating costs are estimated to be \$52 million for the first full year of operation in the End State mode allocated to GridFlorida Companies' retail customers as follows:

FPL: approximately \$26.8 million

FPC: approximately \$11 million

TECO: approximately \$7.5 million

DISCUSSION:

A. THE GRIDFLORIDA COMPANIES' APPROACH IN ESTIMATING COSTS IS REASONABLE AND PRUDENT

The GridFlorida Companies have adopted a reasonable and prudent approach in estimating the costs associated with the start up and first year of end state operation of the proposed GridFlorida RTO. In recognition of the fact that cost estimates had to be based on a specific set of organizational functions and the organizational structure needed to carry out the identified functions, the GridFlorida Companies issued a Request for Information Regarding Program Management Services and Business Systems ("RFI") on January 24, 2001. Tr. at 671-72; Ex. 17. The purpose of the RFI was to identify an experienced consultant who could help define the proposed GridFlorida organization in terms of the resources and organizational structure needed to carry out the key business functions outlined in the GridFlorida proposal.

Several firms responded to the RFI, including Cap Gemini, Ernst & Young, R.J. Rudden Associates, Accenture, PriceWaterhouseCoopers and Arthur Anderson. Tr. at 672; Ex. 17. After carefully reviewing each of the proposals submitted, the GridFlorida Companies awarded the

contract to Accenture on April 4, 2001. Tr. at 672. In addition to submitting the lowest cost proposal, Accenture had substantial experience in managing similar RTO projects, including experience with GridSouth, the Electric Reliability Council of Texas, ISO New England, PJM, British Columbia Hydro, Power Pool of Alberta and the Southwest Power Pool. Tr. at 626-27; 672.

Specifically, Accenture was charged with developing a “Business Blueprint” that would identify the key GridFlorida operating functions that were to be put into place, the resources and scheduling to put these functions into place by an agreed upon date, and a preliminary estimate of start up and annual operating cost for the first year of operation. Tr. at 625; 672-73. The Business Blueprint consists of several models that are developed on an iterative basis, in the following sequence: (1) the End State Operating Model, (2) the End State Capability Model, (3) the End State Organization Model, (4) the End State Application Architecture, and (5) the Cost Estimates. Tr. at 627; see also Ex. 15.

The process of developing the Business Blueprint for GridFlorida started with the Capability Model. Tr. at 627-28. Accenture worked closely with the GridFlorida Companies to define and catalogue the various functions and capabilities such as system planning and facilities maintenance that GridFlorida had to demonstrate in order to comply with Order No. 2000 and meet the specifications set forth in the GridFlorida Open Access Transmission Tariff (“OATT”). Tr. at 627-28. The next step in the process was to define, through the Operating Model, how the identified functions would be expected to interrelate. Tr. at 628; Ex. 15. For example, the Operating Model shows the interrelationship of the transmission operation, security coordination, generation control and market operations functions.

Once the Operating Model was established, Accenture was able to develop an Organizational Model. Tr. at 629, Ex. 15. Based on its experience with similar projects,

Accenture was able to project the types of positions and number of individuals required to support the capabilities and functions identified in the Operating Model. Tr. at 629. With the organizational structure and functions clearly established, Accenture then turned its attention to the question of Application Architecture. Based on its experience on similar projects and detailed discussions with the GridFlorida Companies, Accenture identified the kinds of hardware and software that would be necessary to carry out the identified functions. Tr. at 630, Ex. 15.

Armed with the information developed from the models discussed above, Accenture estimated the cost of the various components based on its experience on other projects with regard to the cost of similar components. Tr. at 631-32. In other words, Accenture knew the cost of various pieces of hardware and software needed for the GridFlorida project since it had experience procuring the same or similar software and hardware on other projects. Likewise, Accenture had a good and current sense of the cost associated with various categories of human resources from its experience on similar projects. Tr. at 632. In arriving at its cost estimates, Accenture worked closely with the GridFlorida Companies to identify specific areas where GridFlorida had had unique or different requirements than its other clients in order to customize the cost estimates for the GridFlorida project. Tr. at 631.

Through this process, Accenture estimated the start up cost for GridFlorida to be \$150 million. Tr. at 633. This estimate was composed of several elements. First, the estimate included \$9 million in actual start up costs incurred by the GridFlorida Companies as of May 31, 2001. Tr. at 634. These costs included expenses incurred in underwriting the collaborative process that resulted in the GridFlorida proposal, regulatory expense associated with the RTO development process and the cost of consultants and other outside resources used to develop the GridFlorida Proposal. Tr. at 633.

The second component consisted of additional startup costs to be incurred by GridFlorida

LLC associated with the development and build out of the operational capabilities that are prerequisite to RTO commercial operation. More detail with regard to the types of start up cost projected by Accenture is set forth in Ex.16. This component was estimated to be \$118 million. Finally, a 20 percent contingency was added to the \$118 million, for a total of \$150 million. Tr. at 634. However, not all of this cost is expected to be incremental. Since some existing facilities, FPL's control center in particular, are expected to be used initially by GridFlorida, the resulting incremental start up cost is estimated to be \$136 million, as shown on Ex. 16. Tr. at 634-35. Of this amount, \$16.3 million would not be allocated to the retail jurisdiction. The remaining \$120 million would be allocated to the GridFlorida Companies based on their respective load ratio shares, as set forth on Table 1 of Ex. 16. These amounts represent lump sums to be amortized over a five-year period. The estimate of the amortization of each company's retail amount is set forth in Ex. 14.

Accenture also estimated, through the process described above, that the cost of operation for GridFlorida during the first full year that it is fully functional would be \$182 million. Tr. at 635. As in the case of the estimated start up cost, this amount also contains a 20 percent contingency. Tr. at 635. However, much of the projected operating expense is currently being incurred by the companies currently operating the transmission facilities in question. For instance, GridFlorida's proposed operating budget contains \$77 million of expenses for operating and maintaining facilities that would be acquired from FPL and Tampa Electric. Therefore, the resulting incremental annual operating expense is estimated to be only \$52 million. Tr. at 636. Of the \$52 million, about \$5.8 million would not be retail jurisdictional and would not be recovered from retail customers. The remaining \$46 million would be allocated to the GridFlorida Companies based on their respective load ratio shares, as set forth on Table 2 of Ex. 16.

The estimate of GridFlorida start up and annual operating cost was developed in a reasonable manner and is consistent with the costs incurred for similar projects.

B. THE IMPACT OF INCREMENTAL COSTS ON RETAIL RATES IS MINIMAL

The impact of the incremental costs described herein on the GridFlorida Companies' retail rates is minimal. Mr. Southwick testified that the estimated increase in transmission costs for a FPC retail customer as a result of FPC's obtaining transmission service from GridFlorida is likely to be in the range of \$0.50 to \$0.75 per 1000 kWh of usage. Tr. at 1000. This is a percentage increase on a residential customer's total electric bill of less than 1%. Id. Similarly, Mr. Ashburn testified that the estimated increase in transmission costs applicable to TECO retail customers as a result of TECO's obtaining service from GridFlorida represents less than a 1% increase in total retail revenue requirements. Tr. at 883. Finally, Ms. Dubin testified that the impact of the RTO on FPL's typical residential bill would be \$0.69 cents for 1000 kWh and that a typical residential bill is \$81.66. Thus, the impact on FPL's typical residential bill also would be less than 1%. Tr. at 724-25.

FPL POST-HEARING STATEMENT OF POSITION:

FPL maintains that such incremental GridFlorida transmission charges are properly recoverable through the Capacity Cost Recovery Clause. Explicit approval of recovery of the incremental transmission costs through a recovery clause is required for FPL to proceed with RTO development.

DISCUSSION:

In support of its statement of position on Issue 4 set forth in its July 12, 2001, Comments and Suggestions Regarding Identification of Issues and as authorized by PSC Order No. PSC-01-

1485-PCO-EI, FPL prefiled the testimony and exhibit of Korel M. Dubin on August 15, 2001. Ms. Dubin's testimony addresses a procedure (the existing Capacity Cost Recovery Clause Mechanism) to recover the incremental costs (that is above those reflected in base rates) for transmission service after formation of GridFlorida. Ms. Dubin's testimony did not propose to set rates now for cost recovery or to present costs information to establish the level of charges to be applied. Instead, Ms. Dubin's testimony was confined to a discussion of the methodology for cost recovery. Tr. at 711.

Ms. Dubin explained that the Capacity Costs Recovery Clause methodology proposed by FPL would avoid double recovery of costs, would prevent the overrecovery or underrecovery of costs, and also would be administratively efficient. Tr. at 718. Ms. Dubin further explained that the incremental transmission costs "are volatile" and as such are more appropriately reflected in a cost recovery clause that would avoid overrecovery or underrecovery of these volatile incremental costs. Id.

Mr. Naeve addressed the structure of the GridFlorida tariff as it related to volatility and variability of rates. He explained that the tariff charge for new facilities is a separate charge that covers the addition of new facilities and that the magnitude of the charge would depend upon the magnitude of the new facilities constructed. Tr. at 934. He further pointed out that the magnitude of the charge would depend upon the new interconnections that might be requested of GridFlorida from one year to the next and that there is no way for GridFlorida to control those interconnection requests. Tr. at 934-35. The costs charged by GridFlorida associated with the necessary integration activities resulting from the interconnections to the GridFlorida system would be reflected in a specific rate charge that is subject to change from time to time depending upon the level of integration or new facilities costs. The potential volatility of these costs is demonstrated in Ex. 19.

FPL submits that under the circumstances the methodology it proposes is appropriate for the recovery of the costs associated with GridFlorida. This is because the standard base rate methodology would not be able to reflect changing cost levels from one period to the next imposed by GridFlorida due to circumstances beyond GridFlorida's control. The proposed methodology ensures that FPL will neither overrecover nor underrecover its transmission costs.

FPL is open to other recovery clause methodologies that similarly ensure recovery of costs in a way that base rate treatment alone cannot satisfy. The bottom line, however, is that some such methodology needs to be approved in this phase of the proceeding. The methodology proposed by FPL achieves this goal, and either it or some other recovery clause methodology that ensures recovery of costs without under or over recovery should be approved. Unless the Commission grants such approval, FPL cannot commit to the expenditure of further funds in the development of GridFlorida.

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

and

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

POST-HEARING STATEMENT OF POSITION:

Tampa Electric and FPL have provisionally decided to transfer their transmission assets to GridFlorida while FPC has determined to remain the owner of its transmission facilities for the time being. Both courses of action are reasonable and prudent. The facilities operated by GridFlorida will be operated at the same level of efficiency, reliability and safety, and the GridFlorida Companies will receive the same level of high quality transmission service.

DISCUSSION:

The GridFlorida RTO proposal is structured to permit two different types of transmission owner participation: (1) divestiture of the ownership of transmission facilities to GridFlorida; or (2) retention of ownership of transmission facilities and transfer of operational control over those facilities through the Participating Owners' Management Agreement ("POMA"). As explained below, the choice by FPL and TECO to choose the divestiture option was prudent and appropriate, as was the choice by FPC to retain ownership. Furthermore, regardless of how control over transmission facilities is transferred, the GridFlorida proposal is structured to ensure that the transmission system will be operated in a safe, reliable, efficient manner.

A. THE FPL/TECO DECISION TO DIVEST THEIR TRANSMISSION FACILITIES WAS APPROPRIATE

1. Use of a Transco Structure is Appropriate

The decision by FPL and TECO to divest their transmission facilities results from their decision to adopt a "Transco" structure where GridFlorida will be a for-profit transmission company, as opposed to a non-profit Independent System Operator ("ISO"). As a consequence, in order to understand why FPL and TECO decided to divest their transmission facilities, it is first necessary to understand why use of a Transco structure is appropriate. This issue was addressed at length in Mr. Naeve's direct testimony. Tr. at 116-20.

Proper Incentives

As Mr. Naeve explained, the GridFlorida Companies were concerned that the existing ISOs did not appear to have the proper incentives to operate efficiently or to attempt to reduce costs. For example, the California ISO built a redundant and expensive control center and hired a large staff. The problem is that a non-profit ISO is not directly accountable to anyone or to any entity that has an interest in ensuring that costs are incurred efficiently. So long as the ISO is able to recover its costs in its rates and at the same time sees no benefit from reducing those

costs, it has no real incentive to keep costs down.

By contrast, a for-profit Transco is accountable to its owners for the way that it incurs costs, which adds an additional incentive for efficiency. The GridFlorida Companies recognize that there are significant start-up and staffing costs that will be incurred in forming an RTO under either a Transco or an ISO proposal. However, they believe that these costs could be kept under better control with a Transco. Tr. at 117.

Accountability

Another problem with ISOs is that an ISO Board of Directors does not have to answer to shareholders. Such a Board can become entrenched and less responsive to the needs of customers and other stakeholders. It is very difficult for any outside party to remove an Independent Director of an ISO without compromising the ISO's independence, even when the ISO is not performing satisfactorily. By contrast, the Directors of a Transco are responsible to their shareholders. If the Transco is not operating efficiently and providing good service, then the Directors can be replaced. Tr. at 117-18.

Financial Strength

A non-profit ISO generally owns relatively few assets. This means that the ISO is not financially strong, and as a consequence must be extremely risk-averse. When faced with a decision that could require it to take on some risk, an ISO must avoid such risk, and instead must shift the risk to others even at the expense of not providing better service or failing to improve the workings of the market. For example, an ISO could not make an incentive rate proposal that provides for lower rates to customers if that proposal leaves open the possibility that the ISO might under recover its revenues. This is because the ISO would not have the financial strength to bear the consequences of the revenue underrecovery. Not only would an ISO not have the financial strength to accept this kind of risk, but it has no incentive to do so even if it had the

financial strength. Since the ISO is a non-profit organization, there is no incentive for an ISO to propose more efficient tariff structures or services if those tariffs or services expose the ISO to both greater risk and greater opportunity, since the ISO would not retain the upside of the opportunity. Tr. at 118-19.²

Another advantage to a Transco that owns assets is that it has greater financial strength and access to capital necessary to fund construction and maintenance at a lower cost. Tr. at 119. By definition an ISO does not own transmission assets, so an ISO must be able to require the transmission owning utilities or another entity to fund and construct the needed facilities. At the same time, because the existing utilities do not have control over transmission rate design, they lack control over the recovery through transmission rates of the capital they invest in facility upgrades. This disconnect between control over capital investment and rate recovery will make it difficult for transmission owners operating under a non-asset owning ISO to raise capital at reasonable rates. By contrast, since GridFlorida both has rate design authority and will own significant assets, it does not face the same disconnect.

Furthermore, unlike the case for transmission owners in ISO structures, the GridFlorida Tariff requires GridFlorida to pay participating owners their revenue requirements at the level approved by FERC. See Ex. 4 at 3877-80 (GridFlorida Open Access Transmission Tariff, § 12A). This means that GridFlorida, which has all the rate design authority, also bears all of the risk for revenue requirement recovery. By contrast, ISOs, which do not have significant assets, must transfer the risk of revenue underrecovery back to the transmission owner, which is why the disconnect between ownership and rate design is a problem for ISOs and not GridFlorida.

Again, no testimony was introduced to contradict Mr. Naeve's testimony regarding the

² Mr. Naeve clarified that he was referring to business risk, such as a decision to install equipment that allows service to be provided more efficiently in the expectation that the resulting cost savings will offset the cost of equipment, and not to operational risks that could threaten the reliability of the grid. Tr. at 118-19.

desirability of a Transco structure.

2. Divestiture to GridFlorida is Appropriate

Given that it was appropriate to use a Transco structure for GridFlorida, Mr. Naeve next addressed the question of FPL's and TECO's decision to divest their transmission assets to GridFlorida. Tr. at 120-22. This issue also was addressed on a company-specific level by Mr. Mennes (FPL) and Mr. Hernandez (TECO). Tr. at 833-37; 965-68. There are two general categories of benefits resulting from divestiture.

Alignment of Ownership and Operational Responsibility

There is a benefit to aligning the ownership of the transmission facilities with the responsibility for operating and maintaining those facilities. The GridFlorida Companies believe that a Transco that owns its own assets is more likely to focus carefully on prudent asset operation and maintenance policies. These prudent policies will be applied not only to the assets owned by the Transco, but to all other assets under its long-term control. This alignment also results in the entity that is responsible for decisions regarding expansion and other capital expenditures also being an owner of facilities with the responsibility for obtaining the necessary financing, which should lead to more efficient financing decisions. Tr. at 120-21; 834.

Alignment of interests alone is not enough to compel a decision to divest. As explained below, FPC had good reasons for transferring operational control while retaining ownership of its transmission facilities. The ability to align ownership and operation in the same entity, however, was an important factor in FPL's and TECO's decision.

Financial Strength

The primary reason for divesting assets to GridFlorida was to ensure that it has the necessary financial wherewithal to perform its functions. As noted above, a Transco will tend to have a greater financial strength than an ISO with several resulting benefits. However, in order

to achieve those benefits, the Transco must own significant assets. If a Transco were to be formed but no assets were transferred, the Transco would not be substantially different from an ISO.

The need for financial strength strongly supports FPL's and TECO's decision to divest. Those decisions, however, are adequate to ensure this strength. Given FPL's and TECO's decisions, it was not also necessary for FPC to divest. Tr. at 121.

Again, the testimony on this issue is uncontraverted. No witness testified that the identified benefits would not accrue or that there were unidentified downsides to divestiture. Nor was this decision seriously questioned on cross-examination.

Foundation for FPL Divestiture Decision

Mr. Mennes testified that FPL's commitment to divest to GridFlorida was based on the premise that its facilities would be owned by "a Transco in Florida that will be the RTO." Tr. at 968. Mr. Mennes explained that if a different structure is adopted "and FPL is encouraged or required to participate, FPL will need to re-analyze whether transferring ownership of its facilities continues to be appropriate." Id.

One of the reasons for FPL's submission of this testimony was FPL's concern about the potential that it might ultimately be required to join the Southeast RTO, the possibility of which is discussed later in this brief. The determination of whether it would be appropriate for FPL to divest facilities to GridFlorida changes if GridFlorida were to operate for only a short period of time and then be merged into a Southeast RTO.

FPL has serious concerns with the recommended Southeast RTO structure insofar as it calls for the assignment of certain RTO functions to an Independent Market Administrator ("IMA"). While this split of functions might not affect the ability of the RTO to perform its required functions, it could have a significant impact on the benefits of the divestiture of

transmission facilities to the Southeast RTO Transco. In particular, FPL believes that the recommended split of functions between the Transco and the IMA could negate the benefits of aligning ownership and operation in a Transco as described above, benefits that accrue both to FPL and its customers. The recommended split of functions therefore could lead FPL to decide that would be is more appropriate to transfer operational control, but not ownership, of its transmission facilities to the Southeast RTO. As a consequence, FPL would need to reevaluate its commitment to divest its assets to GridFlorida if it appears that ultimately GridFlorida would be merged into the Southeast RTO.

FPL recognizes the significant benefits of divestiture described above, and FPL continues to believe that it is appropriate for GridFlorida to own significant transmission assets. However, to the extent that GridFlorida ends up being a short-lived interim RTO, those benefits would appear to be much less important. It is entirely possible that it would be more beneficial for FPL and its customers if FPL were to retain its transmission assets than it would be to give those assets to GridFlorida for the short period of time that GridFlorida is in existence.

For this reason, FPL cannot commit to divest its transmission assets to GridFlorida if, at the time that GridFlorida commences operations, there is a significant possibility that GridFlorida would be in existence for only a short time and that control over GridFlorida's transmission facilities ultimately would be transferred to a Southeast RTO. In such event, FPL reserves the right instead to transfer operational control of its transmission facilities to GridFlorida through executing a POMA while retaining ownership, just as FPC proposes to do. GridFlorida would continue to operate as a Transco with the authority to own transmission assets, but there would not be a commitment that FPL divest its assets to GridFlorida.

B. THE FPC DECISION TO RETAIN OWNERSHIP OF ITS TRANSMISSION FACILITIES WAS APPROPRIATE

FPC believes that the GridFlorida model will result in a sound RTO which will provide efficient and reliable service to all of its transmission customers, including FPC. Accordingly, FPC views the decision of whether to divest or retain ownership of its transmission facilities as a business issue, not a matter of utility operations. Tr. at 987-88. FPC has been successfully engaged in the transmission business for many years and sees no compelling business reason to exit the transmission business at this time. Therefore, FPC has elected to retain ownership of its transmission facilities. Tr. at 987-88. Nothing in the GridFlorida proposal prevents FPC from divesting its transmission assets to GridFlorida in the future just as nothing obligates FPC to doing so within any specified timeframe. Tr. at 987-88.

As discussed in Mr. Southwick's testimony, FPC and GridFlorida will execute the POMA. Tr. at 988. A copy of the POMA can be found at Ex. 4 at 3755-3820. The POMA governs the relationship between GridFlorida and FPC and any other Participating Owner ("PO"), and their respective obligations arising in connection with the transfer of operational control of certain transmission facilities ("Controlled Facilities") to GridFlorida. The POMA contains specific provisions that ensure that GridFlorida's operations and practices will meet a high standard of safety, reliability, and efficiency. Ex. 4 at 3769. The POMA also ensures that FPC and other POs will be afforded an opportunity to collect the revenue requirement and other costs associated with their ownership of Controlled Facilities. Finally, the POMA is designed to adequately protect FPC's (and other POs') investors or members from liability arising from the operation of Controlled Facilities by GridFlorida. Tr. at 988-89.

Finally, as explained below, FPC will have the opportunity to assess GridFlorida's ability to perform under the POMA prior to executing the agreement. Tr. at 389, Ex. 4 at 3760.

C. THE GRIDFLORIDA COMPANIES' CHOICE OF 69 KV AS THE LINE OF DEMARCATION WAS APPROPRIATE

The GridFlorida Companies submit that their proposal to designate as transmission and transfer control of all facilities rated 69kV and above is reasonable and prudent for the following reasons. The decision to set the demarcation point for transmission facilities is consistent with the GridFlorida Companies historic treatment. As set out in the Panel testimony, facilities 69kV and above have been considered by the GridFlorida Companies to be transmission facilities from a planning/operations and ratemaking perspective. Tr. at 335. The primary function of the vast majority of such facilities is to transmit power for delivery and transformation to distribution voltage levels for further delivery to end users. Id.

Second, the GridFlorida Companies set the demarcation point at 69kV based on the concerns expressed by the stakeholders in the collaborative process of developing the GridFlorida proposal. Specifically, a number of stakeholders expressed the need for open access to all 69 kV and above transmission facilities in Florida. These transmission facilities, which belong to the initial GridFlorida participants and include radial lines in some instances, are currently used to serve a large number of wholesale delivery points. Id. These stakeholders generally were insistent that in order to provide adequate wholesale transmission access, such service would need to be provided exclusively under the RTO's open access tariff, without having to also deal directly with the incumbent utility for such access. Tr. at 335-36; 524. In fact, the stakeholders requested that service over all 69kV and above transmission facilities be made available through the RTO's tariff, regardless of whether or not such facilities currently serve wholesale delivery points. Accordingly, the decision to set 69kV as the demarcation point is very much a product of the collaborative stakeholder process that was utilized to develop the GridFlorida RTO proposal.

Third, the GridFlorida Companies submit that a fixed demarcation point at 69kV will

eliminate potential complications to transmission access. As set forth in the Panel Testimony, classification of radial facilities as distribution instead of transmission could cause unnecessary complications. Tr. at 336. For example, if a radial 69 kV line were initially left under the control of an incumbent utility and it later became looped (i.e., extended to interconnect to the transmission system at both ends such that power may flow in either direction), control over that facility would then need to be transferred to the RTO. Id. This potential serial change in control of facilities between the RTO and utilities would be burdensome and complicated and could lead to substantial confusion. Thus, there is a significant administrative efficiency in maintaining all 69kV and above facilities as transmission facilities under the operational control of the RTO.

Finally, setting a consistent demarcation point at 69kV eliminates the potential for cross-utility subsidies that could arise given the rate structure proposed for GridFlorida. Tr. at 527-28. As explained in the Panel Testimony, if each of the GridFlorida Companies were to chose a different demarcation point for facilities to turn over to the RTO, substantial cost allocation issues could arise. Tr. at 336-37; see also 527-28. For example, if FPL and FPC were to elect to turn over control of their 69 kV facilities to the RTO and TECO were to elect not to, TECO ratepayers' rates would recover the costs of TECO's 69 kV facilities and a load ratio share of the costs of FPL's and FPC's 69 kV facilities. Tr. at 336-337. In contrast, FPL's and FPC's ratepayers would pay only their load ratio share of the costs of FPL's and FPC's 69 kV facilities, since TECO's facilities would not be included in GridFlorida's rate base. Thus, the failure to use a standard demarcation point could cause certain of the GridFlorida Companies' ratepayers to pay rates that effectively require them to subsidize the costs for use of 69 kV facilities by other ratepayers within the region.

As part of the collaborative development of the GridFlorida RTO proposal, the GridFlorida Companies concluded that it would be in the best interest of the GridFlorida

Companies and their ratepayers to give control over all of their 69 kV and above transmission facilities to the RTO. Tr. at 337. The GridFlorida Companies submit that a uniform demarcation point is a reasonable approach to achieve fairness and equal access to the transmission system of the RTO and therefore believe that this decision is reasonable and prudent.

D. GRIDFLORIDA WILL BE ABLE TO OPERATE TRANSMISSION FACILITIES AT THE SAME LEVEL OF EFFICIENCY, RELIABILITY AND SAFETY

As the principal future customers of GridFlorida, the GridFlorida Companies have a strong interest in ensuring that GridFlorida will be able to operate the transmission facilities under its control safely, reliably and efficiently, and that it will provide a quality of transmission service that is the same or better than the quality of service provided today by the GridFlorida Companies. The GridFlorida Companies have structured the GridFlorida RTO proposal to achieve this goal in three ways, described in the Panel Testimony and more fully below. These provisions apply universally to all three GridFlorida Companies and do not depend on whether transmission facilities have been divested to GridFlorida.

1. Planning and Operating Protocols

The Panel presented extensive testimony describing the Planning and Operating Protocols included with the GridFlorida filing. Tr. at 327-44.³ This testimony, which was uncontraverted, explained how the Protocols are designed to ensure that GridFlorida is obligated to provide safe, reliable, efficient transmission service.

In addition, the GridFlorida Companies built in safeguards that would allow them to take steps to obtain higher quality service than GridFlorida otherwise would provide. This includes the ability to require enhanced facilities, to initiate construction themselves, and to require higher design, construction and operating standards. Tr. 342-33.

2. Transition Mechanisms

The GridFlorida Companies recognized and share the concern that GridFlorida may have difficulties in performing its planning and operating functions immediately upon the commencement of operations. They therefore provided for two different types of transition mechanisms.

First, the GridFlorida Companies will require a demonstration by GridFlorida that it can perform its functions before transferring control over their transmission facilities to GridFlorida. This is spelled out in the POMA that will apply to FPC's transfer of operational control to GridFlorida. Tr. at 332. FPL and TECO intend to include similar provisions in any asset transfer agreements that they enter into with GridFlorida governing the divestiture of their assets to GridFlorida. Id.

Second, the GridFlorida Companies included provisions in the GridFlorida Planning and Operating Protocols allowing GridFlorida to assign certain functions to the GridFlorida Companies on a transitional basis. For example, the Planning Protocol allows GridFlorida to assign the local area planning function to the GridFlorida Companies for up to three years. Tr. at 343-44. Similarly, the Operating Protocol permits GridFlorida to contract with divesting owners to perform O&M on divested facilities. Id. at 332-33.

E. GRIDFLORIDA WILL CONTROL THE SIGNIFICANT MAJORITY OF THE TRANSMISSION FACILITIES IN THE FRCC REGION

An issue that came up at hearing was the extent to which GridFlorida would control transmission facilities in the FRCC region. Commissioner Jaber expressed the concern that if GridFlorida did not control sufficient transmission facilities due to the failure of nonjurisdictional entities to participate, that the benefits of RTO participation might not be able to be achieved. Tr. at 455-57.

As an initial matter, as Mr. Naeve testified, it will be in the financial best interests of the

³ The Planning and Operating Protocols were submitted as part of Ex. 4 at pages 4039-91.

coops and municipal utilities to join GridFlorida, so that it is likely that there will be significant nonjurisdictional transmission owner participation in GridFlorida. See Tr. at 464-66. The incentives given to these entities provide substantial assurance that most, if not all, transmission facilities in the region will be included in GridFlorida's control.

However, even if the GridFlorida Companies were the sole participants, GridFlorida still would own the significant majority of the transmission facilities in the FRCC. Ex. 8 shows that over 12,000 out of the almost 14,500 circuit miles of transmission facilities in the FRCC are owned by the GridFlorida Companies and therefore will be under the operational control of GridFlorida. This is 84% of the total, which is a significant majority and well above the 67% figure Mr. Hoecker mentioned as being a minimum necessary level of control.

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

POST-HEARING STATEMENT OF POSITION:

Yes. It was prudent for the GridFlorida Companies to submit their own proposal rather than risk being forced to join an existing RTO which they did not develop. If the GridFlorida Companies later were forced to join an existing RTO, they would have minimal input into its essential features. By contrast, there have been considerable benefits to Florida ratepayers resulting from the GridFlorida Companies' decision to form GridFlorida.

DISCUSSION:

The respective decisions made by the GridFlorida Companies to participate in an RTO and their specific decisions to participate in the GridFlorida RTO were and continue to be prudent. It was also prudent to suspend the development of GridFlorida while this Commission considers the prudence of the GridFlorida Companies' actions before additional costs of forming and operating GridFlorida are incurred.

A. STANDARD OF REVIEW

In reviewing the question of whether the GridFlorida Companies' actions with respect to GridFlorida formation have been prudent, the Commission's analysis must focus on what a reasonable public utility operating under the jurisdiction of FERC and this Commission would have done under the facts and circumstances known at the time the decisions were made. Under this often-utilized formulation of the prudence standard,⁴ the GridFlorida Companies' conduct:

should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to address the matters before it prospectively rather than reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed under the situation that confronted these companies.

Long Island Lighting Co., 71 P.U.R.4th 262, 265-66 (N.Y.P.S.C. 1987).

In evaluating any management decision, care must be taken to view the decision on the basis of the facts known at the time, not on the basis of hindsight and a knowledge of subsequent events. A judgment based on hindsight is neither appropriate, fair or legally sound. See Florida Power Corp. v. Public Service Comm'n, 424 So.2d 745 (Fla. 1982). While using hindsight as a guide, it is infinitely easier to see what the better course might have been. However, such knowledge is not available at the time the decision must be made and should not be the basis for judging management decisions. The Wisconsin Supreme Court held in Wisconsin Telephone Co. v. Public Service Comm'n, 287 N.W. 122, 167 (Wisc. 1939), cert. denied, 309 U.S. 657 (1940):

It is much easier to point out past errors in management than it is to avoid future mistakes . . . [t]he commission may not ignore actual expenses because in the light of experience and present conditions, it is possible to say that some part of the expense might have been avoided.

⁴ See, e.g., Public Service Co. of New Hampshire, 2000 N.H. PUC LEXIS 184 (N.H.P.U.C. 2000) ("The standard of care which qualified utility management would be expected to exercise under the circumstances that at the time the decision in question had to be made . . . [utilizing] only those facts known or knowable at the time of the decision . . .").

The GridFlorida Companies' decisions must be viewed in the context in which they were made. The Commission should review the numerous factors that the GridFlorida Companies had to consider in making its decisions and whether there was a rationale basis for the actions taken. The prudence standard requires neither perfection nor the best achievable result but rather calls for inquiry into the reasonableness of management's judgment at the time the decision were made.

B. THE GRIDFLORIDA COMPANIES' DECISIONS WERE PRUDENT

1. Prudence of Decision to Develop GridFlorida

Mr. Naeve addressed at hearing the prudence of the GridFlorida Companies' decisions regarding the development of the GridFlorida proposal. Tr. at 103-08; 134-35. As Mr. Naeve explains, the essence of the decisions were to proceed with the development of the GridFlorida proposal tailored to Florida's needs in compliance with FERC's policies following the issuance of Order No. 2000. Tr. at 104-06.

The GridFlorida Companies, all of the intervenors and this Commission were faced with a fast-moving process established by FERC. The timing of that basic process was and is outside the control of this Commission or any of the parties to these dockets. Following the issuance of Order No. 2000, it was imperative for the GridFlorida Companies to develop an RTO that considers the specific interests of Florida. The process before FERC demanded the immediate and sustained attention of the GridFlorida Companies, this Commission and all interested parties. The result of this process was an RTO proposal with a Florida focus that meets the requirements of Order No. 2000 and creates significant benefits for Florida ratepayers.

Although, as noted above, the Commission may not second-guess the GridFlorida Companies in a prudence review based on hindsight, here the GridFlorida Companies' actions reinforce the prudence with which the GridFlorida Companies undertook formation of

GridFlorida. FERC's July 12 Orders and the Pat Wood memo included in Ex. 5 substantiate the prudence of the GridFlorida Companies' determination that they ultimately would be forced to join an RTO and that proactively developing the GridFlorida proposal would preserve the possibility of a Florida-only RTO. Mr. Hoecker and Mr. Naeve both testified that the well-developed status of the GridFlorida proposal likely was a significant factor in FERC's decision not to require the GridFlorida Companies to participate in the Southeast RTO mediation.

2. Prudence of Decision to Suspend GridFlorida Development

Following the actions of this Commission's Staff on May 3, 2001 in questioning the prudence of the GridFlorida proposals and this Commission's decision to proceed with a review of the prudence of the implementation of GridFlorida, GridFlorida suspended further expenditure of funds in the implementation of the GridFlorida proposal pending a clear and decisive decision finding that the GridFlorida Companies' actions in participating in the formation of an RTO were reasonable and prudent. Clearly it would have been imprudent to continue to proceed with the development of a Florida-based RTO designed to benefit Florida ratepayers without seeking the concurrence and support of the Commission charged with protecting the interests of Florida ratepayers.

Furthermore, as explained in the discussion of Issue 11, currently there is a great deal of uncertainty as to whether a Southeast RTO might be superior to GridFlorida or whether the GridFlorida Companies might be ordered by FERC to join a Southeast RTO regardless of this Commission's rulings. By suspending GridFlorida development activity, the GridFlorida Companies have increased the flexibility of the Commission and the parties to consider how best to deal with the Southeast RTO issues without developing GridFlorida capabilities that may later need to be transitioned to t Southeast RTO.

3. Conclusion

No public utility under FERC's jurisdiction faced with the circumstances described in the record of this proceeding would have failed to actively participate in the development of an RTO. Moreover, the features and estimated costs of the GridFlorida proposal have not been challenged by any party in this proceeding. It is without question that the costs incurred in this process have been reasonable and prudent. It is also reasonable and prudent for the GridFlorida Companies to refrain from further expenditures pending a clear and unequivocal ruling of this Commission finding that the implementation of the GridFlorida proposal would be prudent.

Without such a ruling the Florida companies cannot and will not go forward with the significant additional expenditures which would expose its stockholders and its ratepayers to disallowance of those costs for timely recovery by this Commission. These costs are too significant for any of the GridFlorida Companies to incur without a finding of prudence once that issue has been seriously raised. Furthermore, this Commission's quick and decisive finding of prudence is necessary to preserve GridFlorida as an option for Florida.

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

POST-HEARING STATEMENT OF POSITION:

The Commission should adopt the policy position that the GridFlorida Companies' proactive development of and participation in an RTO is in the best interest of Florida ratepayers. Furthermore, in order to preserve the ability of the GridFlorida Companies to participate in a Florida-only RTO, the Commission should make a swift and unequivocal finding that the formation and operation of GridFlorida is prudent. However, the Commission should also preserve the option of Southeast RTO participation.

DISCUSSION:

As was explained at the hearing, FERC currently is in a critical stage of its thinking about

RTO formation. FERC's Orders of July 12, 2001 and statements made at its open meeting of September 26, 2001 make it clear that FERC is envisioning the formation of four large RTOs, including one in the Southeast, and that FERC will act forcefully to require participation in these RTOs. However, to date FERC has not definitively stated whether it will require the GridFlorida Companies to participate in a Southeastern RTO. FERC suggested in its July 12 Orders that it may permit the GridFlorida Companies to participate in GridFlorida instead of the Southeast RTO. However, more recent FERC pronouncements indicate that FERC ultimately may require the GridFlorida Companies to participate in the Southeast RTO. Tr. at 136; 304-05; 310-11.

As both Mr. Naeve and Mr. Hoecker testified, there is only one way for the Commission to preserve the possibility of a Florida-only RTO. That is to act quickly to approve the GridFlorida Companies' participation in GridFlorida and then use this approval to convince FERC to approve the formation of GridFlorida as a Florida-only RTO that operates separate and apart from the Southeast RTO. Tr. at 137-38; 191-94; 304-05; 310-11.

At the same time, Mr. Naeve and Mr. Hoecker both agreed that, ultimately, the GridFlorida Companies' participation in a Southeast RTO might be more appropriate and better for Florida ratepayers. The problem is that the Southeast RTO proposal is not well-developed enough to make a judgment at this time. Tr. at 196-202; 298-99. Furthermore, as Mr. Naeve testified, FERC is moving towards mandating a four-RTO national solution that could include the GridFlorida Companies in a Southeast RTO. Tr. at 191. As a result, the Commission should not act in such a way as to prevent the GridFlorida Companies from participating in a Southeast RTO if that would be more appropriate. Nor should the Commission compel the GridFlorida Companies to proceed too quickly with the development of the GridFlorida proposal, given the possibility that the GridFlorida Companies will be required to join the Southeast RTO.

The GridFlorida Companies believe that the Commission should adopt expeditiously, as a

matter of policy, the position that it is prudent and in the best interests of ratepayers for the GridFlorida Companies to proactively develop and participate in an RTO, whether that RTO is GridFlorida or the Southeast RTO. The evidence in this proceeding overwhelmingly supports the conclusion that, given FERC's current RTO policy, it would not be appropriate for the GridFlorida Companies to resist RTO participation altogether.

The Commission also should find expeditiously that, as a matter of policy, the actions taken by the GridFlorida Companies to proactively develop and participate in the GridFlorida RTO were prudent and in the best interests of ratepayers. It is clear that the failure by this Commission to support GridFlorida, either by delaying its decision or by holding that participation in GridFlorida is imprudent, will not preserve the status quo but instead will result in a FERC requirement that the GridFlorida Companies join the Southeast RTO. An expeditious ruling in favor of GridFlorida is the only way to preserve the possibility of a Florida-only RTO.

Finally, in approving the prudence of GridFlorida participation, the Commission should not close the door on participation in the Southeast RTO. Nor should the Commission require the GridFlorida Companies to expend significant additional resources in GridFlorida development pending a determination of whether Southeast RTO participation is superior or will be required by FERC. It is in no one's interest to close the door on this possibility or to unnecessarily increase the costs borne by Florida ratepayers by requiring the GridFlorida Companies to incur significant costs in developing GridFlorida for tasks or acquiring assets that ultimately may not be used in a Southeast RTO.

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

POST-HEARING STATEMENT OF POSITION:

The GridFlorida Companies intend to continue providing bundled retail electric

service to their respective retail ratepayer groups subsequent to the commercial operation of the proposed GridFlorida RTO. The GridFlorida Companies will be customers of GridFlorida under the RTO tariff, not their retail customers. Therefore, the question of whether Commission authorization is required before retail electric rates can be unbundled is not raised under the factual circumstances presented in this proceeding.

DISCUSSION:

As Mr. Naeve explained in both his direct testimony and on cross-examination, the GridFlorida Companies do not intend to stop providing bundled retail service to their respective retail ratepayer groups. Tr. at 124-26; 139-42. As a result, there is no need at this time to determine whether Commission approval is required to stop providing bundled retail service.

In order to understand why this is so, it is helpful to first define bundled retail service. In order to deliver electric energy to a retail customer, the GridFlorida Companies are required to purchase or provide themselves several separate services, including generation, transmission, distribution, and ancillary services such as reserves, scheduling, losses, etc. The sale and delivery of electric energy to the retail customer is said to be bundled retail service because all of the separate services are "bundled" into a single service for the retail customer, *i.e.*, the delivery of the electric energy to the retail customer at the point where the retail customer takes title. The retail customer deals with a single utility to provide this single bundled service – the customer does not have to contract separately for each service included in the bundled delivery of electric energy.

After GridFlorida commences operations, nothing about the service being provided by the GridFlorida Companies will change from the retail customer's perspective. Both before and after GridFlorida operations the retail customer will receive electric energy from its current retail supplier and will not be obligated to contract separately for the different services that make up the bundled delivery of electric energy. The price paid by the retail customer may change –

indeed the whole point of forming RTOs is to cause power costs to go down by an amount greater than the increase in infrastructure costs for the RTO – but the service being provided will not change. It will continue to be the delivery to the retail customer of electric energy at the point where the customer takes title of the electric energy.

What does change is the way in which the GridFlorida Companies will obtain the transmission service that is needed for them to provide bundled retail service. Today, the GridFlorida Companies obtain this service through a combination of payments to third parties and providing service over their own transmission facilities. Third parties must be paid for transmission associated with generation purchased that is not directly interconnected with the GridFlorida Companies' own transmission systems – the transmission of FPL's purchases of power from the Georgia units to Florida for example. Once that power is transmitted to the GridFlorida Companies' own transmission facilities, it is then transmitted over those facilities to the distribution systems used to serve retail customers, along with power delivered from generation facilities directly interconnected with the GridFlorida Companies' transmission systems.

After GridFlorida operations commence, the GridFlorida Companies no longer will self-provide any transmission service. Instead, all transmission service will be purchased from GridFlorida and from other transmission providers located outside of GridFlorida. However, the transmission service so purchased will continue to be used to provide bundled retail service, just as the transmission service currently purchased from third parties and generation currently purchased from third parties is used to provide bundled retail service today. It is the GridFlorida Companies, not their retail customers, who will be the customers under the GridFlorida transmission tariff.

Counsel for Office of Public Counsel argued that FERC has asserted jurisdiction over

transmission if a separate rate is stated by a utility for the bundled retail service that it is providing. Tr. at 62-63. That assertion is incorrect. FERC discussed at length in Order No. 888 when it would assert jurisdiction over transmission to retail customers and when it would not. FERC stated that it was asserting jurisdiction only over "unbundled retail transmission service," which FERC explains is provided only "when a retail transaction is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier)." FERC Stats & Regs. ¶ 31,036 at 31,781 (1999). Otherwise, "when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of energy at retail," and is outside of FERC's jurisdiction." Id.

It is true that FPL and FPC have proposed a rate recovery mechanism that will result in the costs incurred to procure transmission service from GridFlorida to be separately stated. However, that proposal results from the need to make sure that the costs of procuring transmission service from GridFlorida are properly recovered, and does not constitute a the service being provided into two products that are sold separately. No one would be entitled to purchase retail transmission service only from the GridFlorida Companies, nor could they purchase electric energy without the transmission service. The GridFlorida Companies intend to continue including the transmission service as part and parcel of the bundled sale of electric energy. The proposed cost recovery mechanism does not convert the bundled service being provided by FPL and FPC into an unbundled transmission service being provided directly to retail customers by GridFlorida that would be subject to FERC's jurisdiction.

The bottom line is that the GridFlorida Companies will continue to provide bundled retail service after GridFlorida commences operations, just as they do today. There will be a change in the way that the individual services that make up the bundled retail service is procured, but no change in the bundled service provided. Thus, the issue of whether approval is required to stop

providing bundled retail service is not raised by the GridFlorida Companies' participation in GridFlorida or any other RTO.

The GridFlorida Companies do not mean to suggest that there will be no change in the Commission's ability to review the costs that they incur in acquiring the transmission service that they include in their bundled retail rates. FERC will have exclusive jurisdiction over the transmission rates charged by GridFlorida. Once FERC approves those rates, this Commission can approve the mechanism by which the GridFlorida Companies recover those costs from retail ratepayers, but the Commission cannot prevent the GridFlorida Companies from passing those costs through in their retail rates.

This change in the Commission's authority to review transmission costs does not result from any change in service offered by the GridFlorida Companies, however. It merely results from a change in the way in which the GridFlorida Companies procure the transmission service needed to provide bundled retail service to their retail customers.

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

POST-HEARING STATEMENT OF POSITION:

This issue is inapposite because the GridFlorida Companies intend to continue providing bundled retail electric service to their respective retail ratepayer groups subsequent to the commercial operation of the proposed GridFlorida RTO. The way that the transmission component will be procured by the GridFlorida Companies will change, but the GridFlorida Companies will continue to include transmission service in the bundled retail service that they provide.

DISCUSSION:

This issue is closely related to Issue No. 8. The question of whether any Commission

authorization is required to stop providing retail transmission service is not raised by the GridFlorida proposal for the same reason that the question whether authorization to stop providing bundled retail service is not raised. The GridFlorida Companies will be providing the same bundled retail service, which includes retail transmission service, both before and after GridFlorida commences operations.

As an initial matter, none of the GridFlorida Companies currently provides retail transmission service as a separate service. Instead, the GridFlorida Companies all provide bundled retail service that includes within it a transmission element. As explained above, the GridFlorida Companies will provide the same bundled retail service both before and after GridFlorida operations, and there is no issue of them ceasing to provide a service they previously provided.

Second, as is also explained above, the GridFlorida Companies will continue to include transmission service in the bundled retail service that they provide. There will be a difference in how the GridFlorida Companies will procure that transmission service, since they will be purchasing from GridFlorida that portion of the transmission component that they now self provide. The bottom line, however, is that there is no need to address whether Commission authorization is required to cease providing retail transmission service because the GridFlorida Companies are not proposing to do so.

ISSUE 10: Is Commission authorization required before FPL/TECO can sell its transmission assets? Is Commission authorization required before FPC can transfer operational control of its retail transmission assets?

POST-HEARING STATEMENT OF POSITION:

No. There is no provision in chapter 366, Florida Statutes or elsewhere in the Florida Statutes that requires Commission approval of the transfer of ownership or control of transmission facilities by a public utility or an electric utility.

DISCUSSION:

Chapter 366 of the Florida Statutes defines the Commission's powers in regulating public utilities and electric utilities in Florida. It contains no provision that would give the Commission jurisdiction over the approval of a decision by any one of the GridFlorida Companies to sell or transfer operational control of transmission assets to GridFlorida. For example, Section 366.04 of the Florida Statutes sets out the scope of the Commission's regulatory jurisdiction over public utilities and electric utilities but contains no provision that governs the sale or transfer of a public utility or electric utility's assets. Likewise, Section 366.05 of the Florida Statutes, which defines the regulatory powers of the Commission, contains no provision that would provide the Commission with the power to review a public utility or electric utility's decision to sell or transfer operational control of its transmission assets. The GridFlorida Companies have not identified any other statute, regulation or decision under Florida law that would suggest that the Commission has this jurisdiction over the GridFlorida Companies' decision to sell or transfer operational control of their transmission assets to GridFlorida.⁵ Accordingly, the Commission does not have the authority to review the decision of a public utility or electric utility to sell or transfer operational control of its transmission assets.

Moreover, the decision to authorize the sale or transfer of operational control of the GridFlorida Companies transmission assets is arguably subject to the exclusive jurisdiction of the FERC. Section 203 of the Federal Power Act states, in pertinent part:

⁵ Though it is not entirely clear, OPC apparently relies upon City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965) to support the proposition that (1) the Commission has certain implied powers implicated by a sale or transfer of operational control of jurisdictional assets or (2) outright transfer or a transfer of operational control of transmission facilities would somehow divest the Commission of its jurisdiction. Neither interpretation is appropriate. The Commission's jurisdiction is expressly set out in Chapter 366 and contains no provision from which this type of jurisdiction could be implied. Second, the Commission's jurisdiction can only be changed by a change in Florida Statutes or another change in the law. The actions of jurisdictional utilities such as the GridFlorida Companies cannot alter the Commission's jurisdiction.

No public utility shall sell, lease or otherwise dispose of the whole of its facilities subject to the jurisdiction of the [FERC] . . . or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person . . . without first having secured an order of the [FERC] authorizing it to do so.

16 U.S.C. § 824b(a). The Federal Power Act provides the FERC with jurisdiction over, among other things, "the transmission of electric energy in interstate commerce." 16 U.S.C. § 824(a).

Section 203 of the Federal Power Act has been interpreted to apply to the disposition of jurisdictional facilities as would occur if an entity were to transfer operational control of, or sell, its transmission assets. See Order No. 2000-A, Regional Transmission Organizations, III FERC Stats. and Regs. [Regs. Preambles] ¶ 31,092 at 31,360 (2000). See also Southwest Power Pool, Inc., 91 FERC ¶ 61,137 at 61,525-26 (2000) and Alliance Companies, et al., 96 FERC ¶ 61,052 at 61,146-47 (2001). The facilities that the GridFlorida Companies intend to sell or transfer control over are transmission facilities of 69kV and above and are utilized in interstate commerce. Thus, the transfer of operational control or sale of the GridFlorida Companies' transmission assets is subject to federal jurisdiction pursuant to Section 203 of the Federal Power Act. By contrast, the Florida Statutes contain no provision analogous to Section 203 that would provide the Commission with jurisdiction to approve of the sale or transfer of operational control over transmission assets.

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

POST-HEARING STATEMENT OF POSITION:

Whether a larger regional RTO is an appropriate alternative for Florida utilities will depend, in large measure, on how a larger regional RTO is structured. In the meantime, the expeditious approval of GridFlorida as a prudent alternative for electric utilities in Florida is necessary if the possibility of a Florida-only RTO is to be preserved.

DISCUSSION:

As Mr. Naeve testified, the GridFlorida Companies have been participating in the Southeast RTO mediation process at FERC in order to ensure that the Southeast RTO is as attractive an option as possible. The GridFlorida Companies have done so in order to protect themselves and Florida in the event that Southeast RTO participation is required by FERC. Tr. at 116.

It is not possible at this time, however, to determine whether or not participation in a larger Southeast RTO is superior to participation in GridFlorida. At present, all that is known about the Southeast RTO is that the FERC Mediation Judge has filed a report at FERC containing a proposed governance model and recommendations about some of the other issues involving the particulars of a Southeast RTO. This report has not yet been acted upon by FERC, so while it seems likely that FERC will require the establishment of a Southeast RTO, it is not possible to know at this point whether FERC will approve the recommendations contained in the report as to the specifics of such an RTO.

Furthermore, even if the FERC Mediation Judge's recommendations were to be approved, there are numerous details that are not covered in the recommendation that would have to be worked out. For example, it is impossible today to say what the rate impact of Southeast RTO participation would be on Florida ratepayers, how congestion management would affect Florida, or how a Southeast RTO would direct operations in Florida. Tr. at 192-93.

It also is impossible to say at this time whether the GridFlorida Companies will be ordered to join the Southeast RTO even if this Commission finds that the GridFlorida RTO proposal is prudent. Such a finding could occur either before or after GridFlorida commences operations.

The GridFlorida Companies therefore believe that the Commission should not at this time

rule on whether participation in a Southeast RTO would be appropriate or would be preferable to participation in GridFlorida. The GridFlorida Companies propose instead that the Commission reserve judgment on this issue until more details about the Southeast RTO can be made known.

At the same time, however, because the merits of participation in a Southeast RTO are not known, it is important to preserve the possibility of participation in a Florida-only RTO. To date, FERC has recognized the good work that has gone into the GridFlorida proposal and the unique circumstances regarding Florida, and as a consequence has not required the GridFlorida Companies to participate in a Southeast RTO. However, if FERC does not believe that participation in GridFlorida is an option for the GridFlorida Companies, then it is very likely that FERC will require participation in the Southeast RTO, as Mr. Naeve testified at hearing. Tr. at 138.

The best way to preserve the possibility of a Florida-only RTO is for FERC to see that this Commission continues to support GridFlorida as an option. Anything less will reinforce FERC's current predilection towards mandating Southeast RTO participation. It therefore is important for the Commission to approve GridFlorida participation as prudent and in the best interest of ratepayers in an expeditious fashion.

Approval of GridFlorida participation should be subject to further consideration of Southeast RTO participation when greater details regarding that RTO have been developed. The GridFlorida Companies also should be permitted to participate in the Southeast RTO if ordered to do so by FERC.

ADDITIONAL ISSUES RAISED AT HEARING

ISSUE: Does FERC have the legal authority to order the GridFlorida Companies to participate in an RTO?

POST-HEARING STATEMENT OF POSITION:

FERC has broad statutory authority to take action to correct discriminatory behavior or the potential for discriminatory behavior, including the authority to mandate participation in an RTO. FERC can make such a ruling on a generic basis and does not have to find specific discriminatory behavior by the GridFlorida Companies.

DISCUSSION:

Section 205 of the Federal Power Act ("FPA") applies to FERC's review of proposed rate and tariff changes filed by electric utilities and Section 206 of the FPA gives FERC general authority to issue orders to electric utilities. Section 205 precludes electric utilities from "mak[ing] or grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage." Section 206 authorizes FERC to act when "any rule, regulation, practice, or contract . . . is unjust, unreasonable, unduly discriminatory or preferential."

In tandem, Sections 205 and 206 of the FPA give FERC authorization to impose a broad range of remedies for discriminatory behavior. Included would be the types of penalties proposed by FERC Chairman Wood in the memo admitted as Ex. 5, such as the withdrawal of market rate authority or the reduction in transmission rates.

However, FERC is not limited under FPA Sections 205 and 206 to penalties applied to individual utilities as a result of specific discriminatory behavior. In Order No. 888, FERC also relied upon Sections 205 and 206 to issue a generic order requiring all jurisdictional transmission owners to file open access transmission tariffs providing for open access transmission service. This order was based upon a generic finding that open access was required to eliminate discrimination, not on specific findings of discriminatory behavior by all electric utilities. Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,669-673 (1996).

FERC's exercise of this authority was approved by the United States Court of Appeals for the District of Columbia Circuit in Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), cert. granted sub nom. New York v. FERC, 121 S.Ct. 1185 (2001) ("TAPS").⁶ In the TAPS decision, the Court addressed a claim that FERC was without authority to order utilities to provide open access transmission service. In rejecting this claim, the Court referred to FERC's "broad authority to remedy unduly discriminatory behavior through a generic open access requirement." 225 F.3d at 687 (emphasis added).

The Court in TAPS relied heavily upon the D.C. Circuit's previous ruling in Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987) ("AGD"). This decision upheld FERC's authority under similar provisions of the Natural Gas Act to issue a generic order requiring interstate natural gas pipelines to provide open access transportation. 824 F.2d at 998.⁷

The holdings in TAPS and AGD cannot be limited solely to the proposition that FERC can require open access transmission or transportation service. In neither case was there statutory language that specifically provides for open access service. Instead, in each case the Court upheld FERC's reliance on general statutory grants of authority to issue generic rules requiring electric utilities to take certain action. There is no reason to believe that the same general statutory grants of authority in Sections 205 and 206 of the FPA would not also justify FERC mandating RTO participation.

The TAPS and AGD cases have practical as well as legal implications for this proceeding. In each case, FERC started out with a "voluntary" open access program in which

⁶ Although the TAPS decision is currently on appeal to the United States Supreme Court, the issue of FERC's authority to order all utilities to provide open access transmission service is not one of the issues on appeal.

⁷ Contrary to the implication made during the examination of Mr. Hoecker at hearing, Tr. at 279-81, neither the TAPS nor the AGD cases involved specific findings of discrimination against specific companies ordered to provide open access electric transmission or natural gas transportation. In each case, FERC relied on generic findings of discrimination in the industry and its general authority to address discrimination to issue generic rules applicable to all jurisdictional companies.

FERC gave indirect incentives to provide open access rather than making a generic finding that open access was required. In each case, however, FERC ultimately gave up on the voluntary nature of its program and instead issued generic orders requiring that open access service be given. Tr. at 155-57.

There is nothing about those past actions that requires FERC as a matter of law to issue an order mandating RTO participation. However, FERC's past practice with respect to open access service in the natural gas and electric industries does provide useful insight as to FERC's likely future actions with respect to RTO participation. As was the case with open access, FERC seems likely to ultimately mandate RTO participation.

ISSUE: Commission Jurisdiction Over GridFlorida

POST-HEARING STATEMENT OF POSITION:

Although the Commission may not have jurisdiction over GridFlorida, the GridFlorida RTO proposal advanced by the GridFlorida Companies includes provisions that accommodate the Commission's jurisdictional concerns with respect to reliability and adequacy of service.

DISCUSSION:

The GridFlorida Companies submit that it is an open question of law as to whether the Commission would have jurisdiction over the GridFlorida RTO. Section 361.01(2) of the Florida Statutes defines an "electric utility" to mean "any municipal electric utility, investor-owned utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission or distribution system within the state." Under the recent decision of the Supreme Court of Florida in Tampa Electric Co. v. Garcia, it is possible to conclude that GridFlorida would not qualify as an "electric utility" under Florida law because the RTO would

provide only wholesale services. Tampa Electric Co. v. Garcia, 767 So.2d 428 (Fla. 2000). The GridFlorida Companies recognized that the Commission may lack regulatory authority over GridFlorida after transmission functions are transferred from the GridFlorida Companies to GridFlorida, and addressed this by developing the GridFlorida RTO proposal to be consistent with the requirements of Order No. 2000 while at the same time accommodating the Commission's jurisdictional concerns to the extent possible.

The Commission has authority over the long-term reliability of the electric grid such that it may "require electric power conservation and reliability with a coordinated grid, for operational as well as emergency purposes." Fla. Stat. § 366.02(2)(c); *see also* § 366.04(5) (commonly referred to as the "Grid Bill"). GridFlorida will assume a number of responsibilities over the grid. To accommodate the Commission's jurisdictional responsibility once certain functions are transferred to GridFlorida, the GridFlorida proposal provides that the Commission has the right to review transmission expansion studies (and supporting data) and to provide GridFlorida with input during the decision making process as the need for new transmission facilities is considered. See Ex. 4 at 4064 (Planning Protocol, Section II.C).

The Grid Bill provides the Commission with jurisdiction over the planning, development and maintenance of a coordinated electric grid throughout Florida to "assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission and distribution facilities." Fla. Stat. § 366.04(5). The GridFlorida proposal contains a number of provisions designed to accommodate these aspects of the Commission's jurisdiction.

The GridFlorida RTO proposal requires GridFlorida to enter into reliability agreements with each load serving entity or other applicable participant. Ex. 4 at 4076-80 (Operating Protocol Section I.F). These agreements will specify certain GridFlorida obligations to provide

reliable service. Id. In addition, GridFlorida and transmission owners will attempt to resolve any issues with respect to specific PO reliability requirements and operating guidelines prior to the transfer of operational control to GridFlorida. Under Section 6.3 of the POMA, Ex. 4 at 3761-62, a PO's specific reliability requirement and operating guidelines shall be used by GridFlorida with respect to the PO's facilities pending the resolution of a dispute regarding such specific reliability requirements and operating guidelines. Also, it is anticipated that, if at the time of commencement of GridFlorida operations, GridFlorida is not able to perform all of the functions then being performed by a divesting owner or participating owner, such owner may temporarily perform certain services on behalf of GridFlorida with respect to its facilities. One such example is the provision of Local Area Planning services, contemplated in Section I.B of the Planning Protocol. See Ex. 4 at 4045-50.

Finally, the GridFlorida proposal also gives the Commission an opportunity for input into various GridFlorida processes through the Commission's role with respect to the FRCC. Under the Planning and Operating protocols, the FRCC is assigned a variety of tasks, including responsibility for establishing reliability standards, reviewing proposed maintenance and being involved in the transmission planning process. See e.g., Ex. 4 at 4085-88 (Operating Protocol, Section III.D) and Ex. 4 at 4066 (Planning Protocol, Section IV.A).

The GridFlorida Companies recognize that the Commission may require an electric utility to construct transmission facilities. Fla. Stat. § 366.05(8). The GridFlorida Planning Protocol takes into account this aspect of the Commission's jurisdiction by providing that to the extent that the Commission lawfully orders a load serving entity or one of the GridFlorida Companies under its jurisdiction to construct facilities that are considered part of the GridFlorida transmission system, then GridFlorida would accept the responsibility to build such facilities if the entity that was ordered to do so cannot, or does not desire to, do so. Ex. 4 at 4065 (GridFlorida Planning

Protocol Section II.D). Similarly, the GridFlorida RTO proposal contains a provision that acknowledges the Commission's authority over siting, providing that to the extent that the proposed incremental facilities selected by GridFlorida include facilities that are subject to the Commission's siting jurisdiction, the proposed expansion shall be submitted to the Commission for its review and approval in accordance with the relevant statutory standards. Ex. 4 at 4064 (GridFlorida Planning Protocol Section II.C).

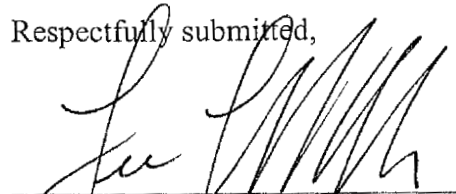
The Commission also has certain authority with respect to determination of the need to construct new transmission facilities. Fla. Stats. § 403.537(b). The GridFlorida RTO proposal contains provisions designed to address the fact that GridFlorida may not qualify as an applicant for a need certificate and may not have the power of eminent domain. Specifically, the Planning Protocol provides that GridFlorida may require a divesting utility or participant, "to the extent necessary, to apply for all necessary certificates of public convenience and necessity and permits for the construction of transmission facilities that will become part of the GridFlorida Transmission System, and to use their power of eminent domain to assist GridFlorida in the acquisition of any necessary property rights, including rights of way, for the construction of such transmission facilities." Ex. 4 at 4065 (GridFlorida Planning Protocol Section II.F); see also Ex. 4 at 4067 (GridFlorida Planning Protocol Section IV.B.3).

With respect to reporting requirements, the Commission has the power to require reports from all electric utilities to assure the development of adequate and reliable energy grids. Fla. Stats. § 366.05(7). GridFlorida obviously would play a role in this regard. To account for this, the GridFlorida Planning Protocol sets out a planning process that requires, at a minimum timely, regular and complete public disclosure, consistent with confidentiality requirements and information disclosure policies, of transmission projects planned or endorsed, related data and analysis. Ex. 4 at 4040-41 (GridFlorida Planning Protocol Section I.A.3). With respect to market

power mitigation and market monitoring, matters not directly under this Commission's jurisdiction, the GridFlorida proposal contains a Market Monitoring Tariff that provides, in pertinent part, the designated "Market Monitor" will have the authority to submit market performance reports and recommendations to FERC and the Commission, and, if appropriate, other state and federal agencies. Ex. 4 at 3738 (Market Monitoring Tariff Section 3.2.3). It also provides that the Market Monitor will be obligated to file any reports requested by FERC or the Commission. Id.

DATED this 12th day of October 2001.

Respectfully submitted,



HARRY W. LONG, JR., Esq.
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601
Telephone: (813) 228-1702
Fax: (813) 228-1770

LEE L. WILLIS, Esq.
JAMES D. BEASLEY, Esq.
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302
Telephone: (850) 224-9115
Fax: (850) 222-7952
On behalf of Tampa Electric Company

JAMES A. MCGEE, Esq.
Florida Power Corporation
Post Office Box 14042
St. Petersburg, FL 33733
Telephone: (727) 820-5185
Fax: (727) 820-5519

JAMES P. FAMA, Esq.
LeBoeuf, Lamb, Greene & MacRae, LLP
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20009
Telephone: (202) 986-8053
Fax: (202) 986-8102
On behalf of Florida Power Corporation

R. W. LITCHFIELD, Esq.
Office of General Counsel
Florida Power & Light Company
P.O. Box 14000
Juno Beach, Florida 33408

MATTHEW M. CHILDS, P.A.
Steel Hector & Davis
215 South Monroe, Suite 601
Tallahassee, FL 32301
Telephone: (850) 222-2300
Fax: (850) 222-8410
On behalf of Florida Power & Light Co.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Joint Post-hearing Statement, filed on behalf of Florida Power & Light Company, Tampa Electric Company and Florida Power Corporation has been furnished by hand delivery (*), overnight delivery (**) or U. S. Mail on this 12th day of October, 2001 to the following:

Cochran Keating*
Robert V. Elias
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd., Room 370
Tallahassee, FL 32399-0850

J. Roger Howe*
Office of Public Counsel
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400

John McWhirter, Jr.**
Florida Industrial Power Users Group
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
400 North Tampa St., Suite 2450 (33602)
Tampa, FL 33601-3350

Joseph McGlothlin*
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

Jon C. Moyle, Jr.*
Cathy M. Sellers
Dan Doorakian
Moyle, Flanigan, Katz, Raymond
& Sheehan, P.A.
118 North Gadsden Street
Tallahassee, FL 32301

Diane K. Kiesling*
Leslie Paugh
Landers & Parsons, P.A.
310 W. College Avenue

Tallahassee, FL 32301

William L. Bryant, Jr.*
Natalie B. Futch
Katz, Kutter, Haigler, Alderman,
Bryant & Yon
106 East College Avenue, 12th Floor
Tallahassee, FL 32301

Michael Twomey, Esq.
Post Office Box 5256
Tallahassee, FL 32314-5256

Thomas A. Cloud**
Dynergy Midstream Services, L.P.
Gray, Harris & Robinson
301 E. Pines Street, Suite 1400 (32801)
Post Office Box 3068
Orlando, FL 32802-3068

Frederick M. Bryant*
Florida Municipal Power Agency
2061-2 Delta Way
Tallahassee, FL 32303

Matthew M. Childs, P.A.*
Steel Hector & Davis
215 South Monroe, Suite 601
Tallahassee, FL 32301-1804

James A. McGee**
Senior Counsel
Florida Power Corporation
One Progress Plaza – Suite 1500 (33701)
Post Office Box 14042
St. Petersburg, FL 33733

Mark F. Sundback**
Kenneth L. Wiseman
Andrews & Kurth L.L.P.
1701 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006

Harry W. Long, Jr.**
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601

Robert C. Williams, P.E.**
Director of Engineering
Florida Municipal Power Agency
8553 Commodity Circle
Orlando, FL 32819-9002

Paul Lewis, Jr.*
Florida Power Corporation
106 East College Avenue, Suite 800
Tallahassee, FL 32301

James P. Fama**
LeBoeuf, Lamb, Greene & MacRae, LLP
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20009-5728

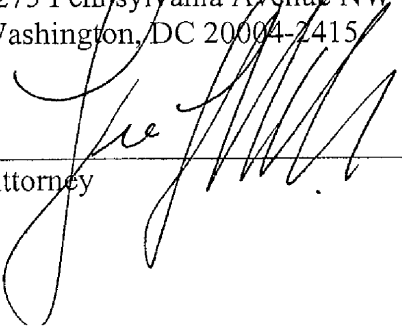
Lee L. Willis*
James D. Beasley
Ausley Law Firm
Post Office Box 391
Tallahassee, FL 32302

N. Wes Strickland*
Foley & Lardner
Seminole Electric Cooperative, Inc.
106 East College Avenue, Suite 900
Tallahassee, FL 32301-1514

Peter Antonacci*
Gray, Harris & Robinson, P.A.
225 South Adams Street
Tallahassee, FL 32301

Seann Frazier*
Greenberg Traurig
101 E. College Avenue
Tallahassee, FL 32301

Daniel Frank**
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue NW
Washington, DC 20004-2415



Attorney