BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of GridFlorida Regional Transmission Organization (RTO) Proposal	)))	Docket No. 020233-EI

MOTION FOR RECONSIDERATION OF CALPINE CORPORATION AND SEMINOLE ELECTRIC COOPERATIVE, INC.

Pursuant to Rule 25-22.060, Seminole Electric Cooperative, Inc. ("Seminole") and Calpine Corporation ("Calpine") jointly file this motion for reconsideration of Order No. PSC-02-1199-PAA-EI issued by the Florida Public Service Commission ("FPSC" or "Commission") in this docket on September 3, 2002 ("September 3 Order") as it relates to the first issue discussed below. Seminole is also seeking rehearing as to the second issue discussed below.

I. The Commission erred in ruling that the "Attachment T" decision in the September 3 Order constitutes preliminary agency action.

With one exception, the Commission consistently ruled that its decisions as to whether changes proposed by the applicants were consistent or inconsistent with its December 20, 2001 Order No. PSC-01-2489-FOF-EI in Docket Nos. 000824-EI, *et al.* ("December 20 Order") were final agency action; the items designated proposed agency action were either changes being made to the applicants's compliance filing by the Commission (either *sua sponte* or at the behest of an intervenor) or rate issues (which had been deferred in the December 20 Order). Thus, there are countless instances where the Commission ruled that a particular change proposed was either consistent or inconsistent with the December 20 Order,1/ and on the basis of that ruling disposed of the matter as final agency action. Seminole and Calpine concur with the Commission's

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1/ *See, e.g.*, Structure and Governance, items A-k; Planning and Operations, items A-J, L, N, P-Q, and S.

approach (even though they do not in all instances concur with the particular ruling itself).

The one glaring exception to the above test used for separating final from proposed agency action relates to the "Attachment T" issue (addressed at pages 51-54 of the September 3 Order). There the Commission, on the basis of substantial record evidence from all interested parties, correctly ruled that the change proposed by the applicants was inconsistent with the December 20 Order. There was no equivocation in the Commission's ruling; in fact, it dealt in detail with the arguments made by the applicants and the affected intervenors and concluded that "For all these reasons, we find that the change in the Attachment T cutoff date is not in compliance with our December 20 Order, ..." (September 3 Order, p. 54.) Nevertheless, in defiance of the test applied to all other issues, the Commission inexplicably labeled this ruling as proposed agency action.

Seminole and Calpine submit that in so labeling this issue, the Commission acted arbitrarily and capriciously and abused its discretion. The Commission has an obligation to treat litigants in a fair, non-discriminatory manner. It failed to do so as to this ruling since it violated the standard used to label all other issues as either "final" or "proposed." There is no basis for such discriminatory action as to this issue, nor does the Commission provide any rationale for distinguishing this one issue from all the rest in which the sole issue before the Commission was whether the applicants' March 20 filing was or was not consistent with the December 20 Order.2/

It is telling that the FPSC staff fully understood that there was no basis for such discriminatory treatment, and hence did not recommend that this item be classified as proposed agency action.3/ This is the sole instance in which the staff recommendation as what constitutes

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2/ Seminole and Calpine note that they are not seeking reconsideration of a Notice of Proposed Agency Action, which is precluded by Rule 25.22.060(1)(a); rather, they are seeking reconsideration of the FPSC's final decision to treat an issue that it decided on the merits as being inconsistent with the December 20 Order as proposed agency action rather than final agency action.

3/ *See* FPSC Staff Recommended Order dated August 8, 2002.

final versus proposed agency action was ignored; and it was ignored with no explanation by the Commission. Clearly, given the clear dividing line established in the September 3 Order between final and proposed agency action, no legally satisfactory explanation exists.

In brief, the Commission's action in singling out the Attachment T issue as proposed agency action when all other comparable issues were handled as final agency action was arbitrary and capricious and constituted an abuse of discretion by the Commission. That abuse will injure Seminole and Calpine since the applicants have already made clear that they intend to litigate that issue in the upcoming hearing, which means that Seminole and Calpine will now have to commit additional resources to once again demonstrate that the applicants are wrong in their attempt to use the December 20 Order as the basis for changing the Attachment T cut-off date from December 15, 2000, to a later date. The Commission has already found against the applicants on the merits, and that finding should be labeled as final agency action like all similar findings of (in)consistency with the FPSC's December 20 Order. Seminole and Calpine respectfully request that the Commission on reconsideration amend the September 3 Order to correct this error.

II. The Commission's decision to set the market design issues for hearing at this time should be reconsidered and the hearing date deferred until after conclusion of the FERC's SMD rulemaking.

The Commission has determined correctly that the proposed market design principles set forth in the applicants' July 2, 2002 filing in this docket are inconsistent with the FPSC's December 20 Order (September 3 Order, p. 73). The Commission noted that the applicants "have not petitioned us for approval of these changes, as suggested in Order No. PSC-01-2489-FOF-EI, nor have they filed with us an amended OATT including the changed market design to allow a thorough review in this docket." (*Id* .) The Commission then proceeds to note a number of significant market design issues that the applicants have not addressed (*e.g.*, "The GridFlorida Companies have not met the requirements of our December 20 Order to demonstrate that localized market power has been adequately addressed"; p. 75).

On the basis of the above and "in order for the GridFlorida Companies to adequately justify the new market design provisions,"4/ the Commission directed the GridFlorida Companies "to file petitions and testimony addressing these changes no later than 30 days from the date of our vote at the August 20, 2002, Agenda Conference."5/ The Commission noted its intent to conduct an expedited hearing on market design as well as any protested PAA issues.

Seminole suggests that the course of action set forth above for handling market design is not efficient and in the long run will not be productive for the adoption of a proper market design for Florida. In addition, it raises serious due process concerns.

Regarding the first point, efficiency and productivity, presumably the goal is to arrive at a market design that is best suited for Florida. The subject of market design is complex and multi-faceted. The Federal Energy Regulatory Commission ("FERC") has been trying to come to grips with this subject for *many* months - collecting data, holding workshops, issuing options papers for comment, and finally issuing a proposed rule of many hundreds of pages for comment by the public.6/ The question that the Commission should ask itself is what does it hope to achieve by holding an expedited (and necessarily abbreviated) hearing on a subject as broad and deep as market design. Seminole submits that given the impossibility in this proceeding as presently formulated of treating this subject in the depth it warrants and given the obvious jurisdictional pitfalls, the better course of action is for the Commission to defer a hearing until *after* the FERC acts in the SMD NOPR proceeding now pending before it. At that time, the FPSC would be in position to determine what aspects, if any of the SMD are not a good fit for Florida. Such a proceeding would be focused and meaningful from the standpoint of benefitting retail consumers in the State.

4/ September 3 Order, p. 76.
5/ *Id.*
6/ The Standard Market Design NOPR was issued on July 31, 2002, in Docket No. RM01-12, with comments now due November 15, 2002.

If the subject proceeding goes forward, what can realistically be achieved? Does the FPSC really believe that on the basis of an abbreviated record and a shortened hearing, it can develop a full-fledged market design? Or is the FPSC simply going to focus on whatever limited and discrete issues the applicants bring before it in their September 19 evidentiary filing (which will probably not even include a draft OATT)? Is the Commission spoiling for a jurisdictional war with the FERC on a subject on which FERC has spent untold hours and dollars or does the FPSC wish to meld what the FERC does with what is best for Florida? In short, what is the Commission's goal in this proceeding?

Seminole believes that the answer to the above questions should be that the FPSC wants to ensure that the standard market design adopted by the FERC makes sense for Florida. That goal can only be realistically achieved by first reviewing the FERC final rule in the SMD proceeding and then assessing what aspects of it do not work for Florida due to Florida's unique facts and circumstances. Trying to make that decision at this time is futile and a waste of all parties' and the Commission's resources.

In addition to the futility factor noted above, there is the further fact that the Commission apparently anticipates a one-day hearing to cover not only all market design issues but also all protested PAA issues. A one-day hearing to cover a subject as broad and multi-faceted as rate design is equivalent to no hearing at all; frankly Seminole doubts that a one-day hearing would provide enough time to permit meaningful cross-examination on the protested PAA issues. But additional hearing days is not a cure for the real flaw in the current procedure, which is prematurely addressing the very complex subject of market design. Seminole implores the Commission to reconsider its decision to proceed into the market design quagmire at this time, versus waiting until after the FERC has had an opportunity to winnow through the huge record before it and issue a final rule, on the basis of which the FPSC will be in a far superior position to opine on the proper market design for Florida.

III. Conclusion

Seminole and Calpine respectfully request that on reconsideration the Commission determine that its findings on the Attachment T issue constituted final agency action; Seminole respectfully requests that on reconsideration the Commission defer the hearing on market design until after the FERC has issued its final rule in the SMD proceeding.

Respectfully submitted,

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Docket 020233

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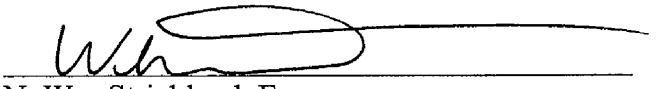

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