State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: OCTOBER 7, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BRUBAKER, KEATING)
OFFICE OF MARKET MONITORING & STRATEGIC ANALYSIS (R. BASS, BUCHAN, BUTLER, COLLINS, GROOM, LOWE, NORIEGA)
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (FUTRELL)
DIVISION OF ECONOMIC REGULATION (BALLINGER, BOHRMANN, BREMAN, FLOYD, HARLOW, HEWITT, KUMMER, BAXTER, SPRINGER, WHEELER, E. DRAPER)

RE: DOCKET NO. 020233-EI - REVIEW OF GRIDFLORIDA REGIONAL TRANSMISSION ORGANIZATION (RTO) PROPOSAL.

AGENDA: 10/01/02 - REGULAR AGENDA - POST HEARING DECISION - ISSUE A IS PROCEDURAL IN NATURE - PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF - MOTIONS FOR RECONSIDERATION - ORAL ARGUMENT REQUESTED WITH RESPECT TO ISSUE 2, MAY BE HEARD AT THE COMMISSION'S DISCRETION PURSUANT TO RULE 25-22.060(1)(F), F.A.C.; STAFF RECOMMENDS THAT ORAL ARGUMENT SHOULD BE LIMITED TO TEN MINUTES FOR EACH SIDE - ALTHOUGH NOT REQUESTED WITH RESPECT TO ISSUES 3 - 7, ORAL ARGUMENT MAY BE HEARD AT THE COMMISSION'S DISCRETION; STAFF BELIEVES, HOWEVER, THAT THE PLEADINGS ARE SUFFICIENT FOR A FULLY INFORMED EVALUATION OF THE ISSUES AND THAT ORAL ARGUMENT WILL NOT AID THE COMMISSION AND THUS SHOULD NOT BE GRANTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020233.RCM

CASE BACKGROUND

In December 1999, the Federal Energy Regulatory Commission (FERC) issued Order No. 2000, which required all public utilities that own, operate, or control interstate transmission facilities to file by October 16, 2000, a proposal to participate in a regional transmission organization (RTO). In response to Order No. 2000, Florida Power Corporation (FPC), Florida Power & Light Company (FPL), and Tampa Electric Company (TECO) (collectively, the Applicants or GridFlorida Companies) developed a Peninsular Florida RTO proposal referred to as GridFlorida (the Transco filing).

On October 3-5, 2001, the Commission held an evidentiary hearing in Docket Nos. 000824-EI, 001148-EI, and 010577-EI to determine the prudence of the formation of and the participation in the proposed GridFlorida RTO by the Applicants. As a result of the hearing, the Commission issued Order No. PSC-01-2489-FOF-EI on December 20, 2001 (Order No. PSC-01-2489-FOF-EI or December 20 Order). Based on the evidence in the record, the Commission found that a Peninsular Florida RTO was more appropriate for Florida's utilities and ratepayers than a larger, regional RTO at this time. Further, as a policy matter, the Commission noted its support for the formation of an RTO to facilitate the development of a competitive wholesale energy market in Florida. The Commission found, in part, that the Applicants were prudent in proactively forming GridFlorida. The Applicants were ordered to file a modified RTO proposal that conformed the GridFlorida proposal to the findings of the Order and used an independent system operator (ISO) structure in which each utility maintains ownership of its transmission facilities. The modified proposal was due 90 days following the issuance of the Order. A new generic docket, Docket No. 020233-EI, was opened to address the modified proposal.

The Applicants filed a modified proposal (compliance filing) on March 20, 2002. The Commission held a workshop to discuss the compliance filing on May 29, 2002. Parties to this docket were provided the opportunity to file Pre-Workshop and Post-Workshop Comments and to participate in meetings and conference calls regarding the compliance filing. As a result of comments at the workshop, the GridFlorida Companies modified certain aspects of the compliance filing. These changes (modified compliance filing) were filed on June 21, 2002. The following persons intervened in this docket and provided comments: Florida Municipal Group (FMG) which is comprised of Lakeland Electric, Kissimmee Utility Authority,

Gainesville Regional Utilities, and the City of Tallahassee, Florida; Florida Municipal Power Agency (FMPA); JEA; Mirant Americas Development, Inc., Duke Energy North America, LLC, Calpine Corporation, and Reliant Energy Power Generation, Inc. (Joint Commenters); Reedy Creek Improvement District (Reedy Creek); Seminole Electric Cooperative, Inc. (Seminole); Seminole Member Cooperatives (Seminole Members); Trans-Elect, Inc. (Trans-Elect); Florida Industrial Power Users Group (FIPUG); and Office of Public Counsel (OPC).

On September 3, 2002, the Commission issued Order No. PSC-02-1199-PAA-EI (Order No. PSC-02-1199-PAA-EI or September 3 Order), which determined by final agency action GridFlorida's compliance with Order No. PSC-01-2489-FOF-EI, and directed the GridFlorida Companies to file petitions and testimony addressing market design no later than 30 days from the Commission's vote at the August 20, 2002, Agenda Conference. Order No. PSC-02-1199-PAA-EI also issued as proposed agency action specific changes to the GridFlorida compliance filing.

On September 13, 2002, a motion for reconsideration of Order No. PSC-02-1199-PAA-EI was filed by the Seminole Electric Cooperative and Calpine Corporation (Seminole and Calpine). On September 18, 2002, respective motions for reconsideration were filed by FPC, FMG, Reedy Creek, and FMPA. Also on September 18, OPC filed a motion for reconsideration and stay of proceedings, simultaneously with a request for oral argument with respect to its request for reconsideration.

On September 20, 2002, the Applicants filed a response to Seminole and Calpine's motion. On September 23, 2002, OPC filed respective responses to FMPA and FPC's motions. On September 25, 2002, TECO and FPL filed a joint response to FPC and FMPA's respective motions; and the Applicants filed a response to OPC's motion for stay and reconsideration, and a response to the motions for reconsideration filed by FMG and Reedy Creek.

On October 3, 2002, OPC filed a notice of administrative appeal of Order No. PSC-02-1199-PAA-EI to the Florida Supreme Court. Staff's recommendation with respect to the appeal and its effect on the instant docket is addressed in Issue A. If the Commission approves staff's recommendation with respect to Issue A, no ruling is necessary with respect to Issues 1 through 8.

If the Commission denies staff's recommendation in Issue A, Issue 1 of this recommendation addresses OPC's request for oral argument with respect to its request for reconsideration. Issues 2 through 7 address the motions filed respectively by OPC, FMG, Reedy Creek, Seminole and Calpine, FMPA, and FPC.

Staff notes that although oral argument has not been requested with respect to Issues 3 through 7. Pursuant to Rule 25-22.060(1)(f), Florida Administrative Code, oral argument on a motion for reconsideration shall be granted solely at the discretion of the Commission. Staff believes that the pleadings are sufficient for a fully informed evaluation of the issues and that oral argument will not aid the Commission and thus should not be granted.

The Commission is vested with jurisdiction over the subject matter addressed herein through the provisions of Chapter 366, Florida Statutes, including, but not limited to, Sections 366.04, 366.05, 366.06, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE A: Should the Commission abate further proceedings in this docket, in light of the automatic stay which is effected by operation of law pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure?

RECOMMENDATION: Yes. The Commission should abate the October 31, 2002 administrative hearing, pending disposition of OPC's appeal of Order No. PSC-02-1199-PAA-EI. No ruling should be made with respect to Issues 1 through 8 of the recommendation, and this docket should remain open pending disposition of the appeal and any other further proceedings that may be deemed necessary. (BRUBAKER)

STAFF ANALYSIS: OPC's notice of appeal of Order No. PSC-02-1199-PAA-EI was filed on October 3, 2002. Rule 9.310(b)(2), Florida Rules of Appellate Procedure, provides that the timely filing of a

notice of appeal shall automatically operate as a stay pending review when the state, any public officer in an official capacity, board, commission or other body seeks review. Pursuant to Orders Nos. PSC-02-1177-PCO-EI and PSC-02-1251-PCO-EI, respectively filed on August 29, 2002 and September 11, 2002, the market design and protested PAA issues in this docket are currently scheduled for an expedited administrative hearing on October 31, 2002. The Orders also set forth a procedural schedule with a number of dates controlling the filing of testimony, exhibits, prehearing statements, etc.

The outcome of the appeal may profoundly impact the design and import of the issues which can and should be considered at hearing. If the present hearing scheduled were to be followed, it would be at the risk of prematurely and inefficiently utilizing the resources of the parties and this Commission. In other words, should the Commission proceed to hearing at this time, it is possible that the outcome of that hearing would be rendered moot or need to be revisited depending upon the outcome of the appeal. In light of these concerns, staff believes that the Commission should abate the instant proceedings in their entirety, pending disposition of OPC's appeal of Order No. PSC-02-1199-PAA-EI.

If the Commission approves staff's recommendation herein, staff recommends that no ruling should be made with respect to Issues 1 through 8 of the recommendation, and this docket should remain open pending disposition of the appeal and any other further proceedings that may be deemed necessary. In conjunction with the stay, staff expects that the Prehearing Officer may issue an Order revisiting and revising the current procedural dates in this docket.

ISSUE 1: Should the Commission grant the Office of Public Counsel's request for oral argument on its Motion for Stay of Proceedings and Motion for Reconsideration of Order No. PSC-02-1199-PAA-EI?

RECOMMENDATION: Yes. Oral argument would aid the Commission in comprehending and evaluating the issues before it, due to the complexity of this matter. Accordingly, for purposes of this recommendation, Staff recommends that oral argument should be limited to ten minutes for each side. (C. KEATING)

STAFF ANALYSIS: In its request for oral argument, OPC states that this docket is at a cross-roads. OPC notes that the parties are preparing for hearing on market design issues and those portions of the Commission's September 3 Order that were issued as proposed agency action and protested. OPC further notes that the September 3 Order requires the GridFlorida Companies to modify the GridFlorida compliance filing to recognize the Commission's continuing jurisdiction over the total cost of transmission service to retail customers. OPC states that the Commission's approval of GridFlorida, and the relevance of going forward in this docket, is contingent upon the GridFlorida Companies' ability to fashion a proposal under which the Commission would retain that jurisdiction. OPC concludes that "[o]ral argument would facilitate understanding of the intersection of these disparate matters and their effects upon the Commission's ability to proceed in the docket." OPC also asserts that approval of GridFlorida can change the Commission's jurisdiction with respect to retail rates for transmission, the Grid Bill, and native load retail customers' priority of transmission service. Therefore, OPC argues, oral argument would facilitate the Commission's understanding of these impacts. No party filed a response in opposition to OPC's request.

Staff believes that oral argument would aid the Commission in comprehending and evaluating the issues before it, due to the importance and complexity of this matter. Accordingly, for purposes of this recommendation, Staff recommends that oral argument should be limited to ten minutes for each side.

ISSUE 2: Should the Commission grant the Office of Public Counsel's Motion for Stay of Proceedings and Motion for Reconsideration of Order No. PSC-02-1199-PAA-EI?

RECOMMENDATION: No. OPC's motion for reconsideration of Order No. PSC-02-1199-PAA-EI does not identify a point of fact or law that the Commission overlooked or failed to consider in rendering the Order. OPC's motion for reconsideration is an untimely motion for reconsideration of the Commission's December 20 Order concerning the GridFlorida RTO. OPC's motion for stay should be denied. (C. KEATING)

STAFF ANALYSIS: Staff's analysis first addresses OPC's motion for reconsideration, then OPC's motion for stay of proceedings.

OPC'S Motion for Reconsideration

In its motion for reconsideration, OPC contends that the Commission, in rendering final agency action in portions of Order No. PSC-02-1199-PAA-EI, made several mistakes of fact or law that would necessarily lead the Commission to conclude that it cannot approve GridFlorida while simultaneously retaining its traditional jurisdiction. OPC asserts that because the Commission is powerless to relinquish any of its jurisdiction, it cannot grant approval for formation of GridFlorida or for recovery of costs associated with GridFlorida's formation or operation. In their response, the GridFlorida Companies argue that OPC's motion be denied. Staff addresses OPC's motion in two parts: (1) as it relates specifically to Commission approval of cost recovery and a cost recovery mechanism; and (2) as it relates to the manner in which approval of GridFlorida may impact the Commission's jurisdiction.

Cost Recovery Mechanism

OPC asserts that the Commission, in its September 3, 2002, Order, concluded that it would be reasonable to permit Florida Power Corporation, Florida Power & Light Company, and Tampa Electric Company, collectively, to charge their customers over $1.1 billion dollars between 2004 and 2008 for costs associated with RTO operation and formation. OPC states that the purpose of the RTO, as recognized by the Commission, is to facilitate the development of a wholesale energy market in Florida. OPC further states that the Florida Supreme Court's decision in Tampa Electric Co. v. Garcia, 767, So. 2d 428 (Fla. 2000) prevents a competitive

wholesale market from fully developing unless and until the Legislature amends Florida law. OPC argues that the GridFlorida Companies should not be allowed to recover costs that they will voluntarily incur in forming and operating an RTO when the RTO cannot achieve its purpose of furthering a competitive wholesale energy market due to the GridFlorida Companies' own efforts to keep large merchant plants out of Florida. OPC concludes that the Commission erred and should disallow cost recovery.

OPC further asserts that the Commission mistakenly found that OPC's arguments against cost recovery represented an untimely challenge to the Commission's December 20 Order. OPC states that the Commission, in its December 20 Order, rejected the GridFlorida filing as a transco and required the GridFlorida Companies to modify their proposal to an ISO model which retained the Commission's jurisdiction. OPC argues that the Commission could not possibly have accepted the prudence of RTO costs in the process of rejecting the original filing and without knowing whether the GridFlorida Companies could successfully offer an ISO proposal in conformance with the December 20 Order.

In their response, the GridFlorida Companies assert that OPC is speculating as to the effect of Tampa Electric Co. v. Garcia on the development of a competitive wholesale market and that such speculation fails to meet the legal standard for reconsideration. The GridFlorida Companies also assert that OPC is attempting to relitigate the issue of recovery of incremental transmission costs. The GridFlorida Companies state that this issue was raised and resolved in the Commission December 20 Order. The GridFlorida Companies assert that OPC had the right to seek reconsideration, file an appeal, or do both to challenge the Commission's determination that the costs of formation and operation of GridFlorida were prudent. The GridFlorida Companies conclude that because OPC did not exercise those remedies at that time, it is barred from seeking reconsideration of the Commission's finding on this issue in this docket.

In addressing OPC's motion for reconsideration on the issue of cost recovery, it should first be made clear what action the Commission took in its December 20 Order and its September 3 Order. In its December 20 Order, the Commission, by final agency action, found that the GridFlorida Companies were prudent in proactively developing an RTO in response to FERC's Order No. 2000. In

reaching this finding, the Commission stated at page 7 of the December 20 Order:

> Although participation in an RTO is voluntary under Order No. 2000, FERC has acknowledged that it may use its regulatory authority in other areas to compel RTO participation. Further, formation of an RTO should provide benefits for Peninsular Florida and its ratepayers, most importantly by facilitating an improved wholesale electricity market, encouraging competition by removing access impediments and restrictions.

Based on its finding that the GridFlorida Companies were prudent in proactively developing an RTO, the Commission approved recovery, subject to audit, of actual jurisdictional RTO start-up expenses incurred through May 31, 2001. The Order noted that those costs were estimated at approximately $8 million for the GridFlorida Companies combined.

In its September 3 Order, the Commission established, by proposed agency action, the capacity cost recovery clause as the appropriate cost recovery mechanism for incremental transmission costs associated with obtaining transmission service from GridFlorida. The Commission did not approve recovery of any costs in that Order; it only approved a cost recovery mechanism. At page 70 of the September 3 Order, the Commission stated:

> We would retain jurisdiction to review all charges proposed for recovery, just as is currently done. By authorizing recovery through the capacity clause, we would ascertain that each applicant is fairly compensated for prudent transmission costs incurred to provide its ratepayers with safe, reliable electric service. Also, we would scrutinize these incremental transmission costs to the same degree of any other cost recovered through a recovery clause to determine whether any incremental costs are prudent, reasonable, and consistent with the RTO's goal.

In that Order, the Commission also addressed OPC's concerns regarding allowance of cost recovery for costs incurred due to voluntary participation in GridFlorida:

> . . . OPC asserts that any incremental costs, i.e., costs beyond those reflected in base rates, associated with charges paid by the Applicants to GridFlorida, cannot be considered prudent for purposes of cost recovery because the Applicants voluntarily incurred these costs by choosing to form and participate in an RTO. We note that our December 20 Order directly addressed the issues of whether the Applicant's formation of GridFlorida was truly voluntary and whether formation of GridFlorida was prudent.

Thus, the Commission concluded that OPC's arguments appeared to represent an untimely challenge to the December 20 Order..

Given this history, OPC's motion for reconsideration must be denied. First, to the extent OPC's motion seeks reconsideration of findings in the Commission's December 20 Order - specifically the findings that the GridFlorida Companies' proactive development of an RTO was prudent and that recovery of GridFlorida start-up expenditures incurred through May 31, 2001, was authorized - it is an untimely motion for reconsideration. Rule 25-22.060, Florida Administrative Code, provides that a motion for reconsideration of a final order shall be filed within 15 days of issuance of the order. OPC's motion was filed nine months after issuance of the December 20 Order. Further, the courts have not permitted extensions of time to request reconsideration of final agency action. See, e.g., City of Hollywood v. Public Employees Relations Commission, 432 So. 2d 79 (Fla. 4th DCA 1983). Even if the motion were timely, it fails to raise any point of fact or law that the Commission overlooked or failed to consider. The Commission expressly considered the voluntary nature of FERC Order No. 2000 in its Order.

Second, to the extent OPC's motion seeks reconsideration of the Commission's approval of a cost recovery mechanism in its September 3 Order, it is an improper motion for reconsideration of proposed agency action. Rule 25-22.060, Florida Administrative Code, provides that the Commission will not entertain a motion for reconsideration of proposed agency action. Further, it should be clear that the Commission did not approve recovery of any RTO-related cost in its September 3 Order. It simply approved a cost recovery mechanism for such costs that are later deemed prudent.

Continuing Commission Jurisdiction

The remainder of OPC's motion for reconsideration asks the Commission to consider whether it can approve the GridFlorida Companies' participation in an RTO while retaining its jurisdiction over their transmission assets. OPC asserts that there is a "fundamental disconnect" between these two concepts, and that the record is "inadequate to support the Commission's implicit conclusion that one concept is not inherently antithetical to the other." Referring back to the proceedings which led to the Commission's December 20 Order, OPC states that the GridFlorida Companies did not provide factual evidence or legal argument to show that the Commission's Grid Bill jurisdiction would not be altered, that its ratemaking jurisdiction over retail assets would remain intact, that retail customers would retain priority for transmission service, or that retail customers would receive discernible benefits in return for the costs of GridFlorida.

OPC asserts that while the Commission has stated its intent to retain its traditional jurisdiction, FERC's jurisdiction rests on the action taken at the state level. As an example, OPC asserts that officials in states that adopted retail competition said they intended to retain their jurisdiction over the unbundled transmission component of retail service, but FERC concluded that the act of unbundling electric service (via retail competition) effected a transfer of jurisdiction to FERC. Thus, OPC argues that it is a mistake of law for the Commission to permit utilities subject to its jurisdiction to lessen that jurisdiction without first receiving directions from the Legislature.

Finally, OPC asserts that the Commission is mistaken in its assertions that GridFlorida will be subject to its jurisdiction under the Grid Bill. OPC asserts that GridFlorida, under its currently proposed ISO structure, will not be an "electric utility" as the term is defined in Section 366.02(2), Florida Statutes. Thus, OPC concludes that the Commission will have no statutory jurisdiction over GridFlorida as an ISO.

In their response, the GridFlorida Companies assert that in the Commission's proceedings leading to the December 20 Order, they presented testimony concerning the impact of GridFlorida on the Commission's traditional jurisdiction. The GridFlorida Companies contend that where OPC has pointed to alleged deficiencies in the record of that proceeding that purport to undermine the finding

that the formation of GridFlorida was prudent, OPC's arguments fail to provide a basis for reconsideration. The GridFlorida Companies argue that OPC had the opportunity to raise these arguments on reconsideration or appeal of the December 20 Order but did not, and therefore, may not now relitigate the issues through a motion for reconsideration in this docket.

The GridFlorida Companies also address the "disconnect" OPC alleges to exist between the Commission's desire to retain its traditional jurisdiction and its approval of components of the GridFlorida proposal that OPC believes will diminish Commission jurisdiction. The GridFlorida Companies state that OPC's concerns do not support reconsideration of the September 3 Order. The GridFlorida Companies further state that they have no power to unilaterally change the Commission's statutory Grid Bill jurisdiction under Chapter 366, Florida Statutes.

In addressing OPC's motion for reconsideration on these points, it is important to look at the action the Commission took in its December 20 Order and its September 3 Order. In its December 20 Order, as stated above, the Commission found that the GridFlorida Companies were prudent in proactively developing an RTO in response to FERC's Order No. 2000, but found that the RTO should be structured as an independent system operator rather than a transco. In determining that the RTO should be structured as an ISO, the Commission specifically discussed at page 15 of the Order the relative impacts of both the transco proposal and an ISO on the Commission's ratemaking jurisdiction for transmission assets:

> Under several provisions of Chapter 366, Florida Statutes, this Commission is charged with the responsibility of establishing fair and reasonable retail rates for Florida's investor-owned electric utilities, which include the GridFlorida Companies. We believe that under the transco model proposed for GridFlorida, it would be difficult for this Commission to retain ratemaking and cost control jurisdiction over the retail component of transmission. In essence, our approval of the transco model could be viewed as a voluntary unbundling, because ownership of transmission assets would be transferred away from the retail-serving utility. However, under an ISO model, where the ownership of transmission assets is retained by the individual retail-serving utilities, we believe this

> Commission would continue to set the revenue requirements needed to support retail transmission service and retain oversight over cost control and cost recovery. The retail transmission revenue requirement set by this Commission would then be an input into the FERC ratemaking process, to which would be added the appropriate and prudently incurred management and operating costs of the ISO.

In the Order, the Commission addressed its Grid Bill jurisdiction over GridFlorida as a transco, although it did not address its Grid Bill jurisdiction over GridFlorida as an ISO.

In its September 3 Order, the Commission, by final agency action, made determinations as to whether modifications made to the initial GridFlorida transco proposal complied with the requirements of the Commission's December 20 Order. Based on its finding that the GridFlorida Companies' proposed market design principles were not in compliance with its December 20 Order, the Commission established an expedited proceeding to address market design and any protests of proposed agency action findings made in the Order. As noted above, proposed agency action findings are not subject to motions for reconsideration. The Order did not make any new findings with respect to the impact of an ISO on the Commission's jurisdiction. Using language almost identical to that used in the Commission's December 20 Order, the Commission stated:

> Those sections of Chapter 366, Florida Statutes, that comprise the Grid Bill, provides this Commission with jurisdiction over, among other things, the planning, development, and maintenance of a coordinated electric power grid throughout Florida. As such, this Commission, as guided by the Florida Legislature, will determine how it will discharge its regulatory responsibilities over a new wholesale provider just as we have for the existing wholesale providers in Florida, such as Seminole Electric Cooperative and the Florida Municipal Power Authority. While we generally agree with the processes that provide for our input into the planning and reliability aspects of GridFlorida, this in no way affects our ability to regulate GridFlorida in a manner consistent with Florida law.

Given this history, OPC's motion for reconsideration must be denied. OPC attacks the notions that the Commission can approve GridFlorida as an ISO and, to some degree, that the Commission can approve any RTO whatsoever. Thus, OPC is asking the Commission to reconsider findings made in its December 20 Order, i.e., the finding that the GridFlorida Companies were prudent in proactively forming an RTO and the finding that a Peninsular Florida RTO should be structured as an ISO. OPC does not seek reconsideration of any specific finding as to the compliance of the modified GridFlorida proposal with the December 20 Order. As noted above, Rule 25-22.060, Florida Administrative Code, provides that a motion for reconsideration of a final order shall be filed within 15 days of issuance of the order. OPC's motion was filed nine months after issuance of the December 20 Order. Further, as noted above, the courts have not permitted extensions of time to request reconsideration of final agency action. Accordingly, OPC's motion for reconsideration is untimely and should be denied.

OPC's Motion for Stay

In its motion for stay, OPC asks the Commission to stay its current proceeding addressing GridFlorida's proposed market design and the requests for hearing on those portions of the Commission's September 3 Order that were issued as proposed agency action. OPC argues that this proceeding may become irrelevant if the GridFlorida Companies are unable to fashion a proposal which allows the Commission to retain its ratemaking jurisdiction, as required by the September 3 Order, "because, in such a circumstance, the Commission could not approve the formation of GridFlorida in the first place." OPC asks that these proceedings be stayed until the GridFlorida Companies offer a proposal which clearly demonstrates that the Commission's traditional jurisdiction over transmission assets will be unaffected by participation in GridFlorida.

In their response, the GridFlorida Companies take no position on OPC's motion for stay. However, the GridFlorida Companies go on to assert that, as a matter of law, a filing by the GridFlorida Companies cannot expand or diminish any jurisdiction the Commission may ultimately be determined to have over the total cost of transmission service to retail customers. Citing the Federal Energy Regulatory Commission's July 31, 2002, Notice of Proposed Rulemaking concerning standard market design, the GridFlorida Companies state that FERC may eventually decide to exercise jurisdiction over the GridFlorida Companies' bundled retail

transmission service. The GridFlorida Companies' conclude that however these jurisdictional issues are sorted out, the GridFlorida Companies cannot unilaterally expand or diminish the Commission's jurisdiction.

Besides administrative efficiency, OPC's motion offers no basis for a stay of the Commission's continued proceedings in this docket. Therefore, consistent with the Commission's stated desire to conduct an expedited proceeding in this docket for the purpose of providing input to FERC concerning GridFlorida, OPC's motion for stay should be denied. Staff notes that OPC's motion for stay is independent from, and based on different grounds than, the automatic stay discussed in Issue A, above.

ISSUE 3: Should the Motion for Reconsideration filed by the Florida Municipal Group (collectively, Lakeland Electric, Kissimmee Utility Authority, Gainesville Regional Utilities, and the City of Tallahassee) be granted?

RECOMMENDATION: No. FMG has not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, the motion for reconsideration should be denied. (BRUBAKER)

STAFF ANALYSIS:

FMG's Motion for Reconsideration

FMG's first point for reconsideration concerns the Commission's decision to convene a hearing on market design issues. Order No. PSC-02-1199-PAA-EI found certain GridFlorida market design proposals to be non-compliant with the December 20 Order, including proposals to adopt locational marginal pricing, financial transmission rights, market clearing prices, and unbalanced schedules. Nonetheless, the Commission recognized that such proposals "may be of benefit to retail ratepayers" and initiated a hearing process to review the proposals further. FMG urges the Commission to reconsider its decision to convene a hearing on these issues at this time.

FMG notes that on July 31, 2002, FERC issued a Notice of Proposed Rulemaking (NOPR) on Standard Electricity Market Design (SMD) in FERC Docket No. RM01-12-000. FERC has since modified the comment schedule for the NOPR, included dates for both initial and reply comments, and scheduled at least three technical conferences. The FMG members see no practical value in addressing the same issues, at the same time, in two parallel and interrelated proceedings. Instead, FMG urges the Commission to defer the hearing at this time pending FERC's completion of the SMD rulemaking. FMG states that once a final SMD is available, this Commission will have a model against which it can analyze GridFlorida's market design proposals. Because GridFlorida will ultimately be required to justify any deviations from the SMD that is adopted by FERC, deferring a hearing until after a final SMD is available will enable the Commission to develop a more sustainable record for any SMD variations that are adopted.

For largely the same reasons, FMG argues that the Commission should also reconsider its decision to accept GridFlorida's proposed bright-line, 69kV standard for determining which facilities a participating owner (PO) must turn over to the RTO for operational purposes. FMG contends that Order PSC-02-1199-PAA-EI accepted the bright-line standard on the sole basis that it was found to comply with the December 20 Order, did not violate federal law, and in any event was a matter for determination by the FERC. FMG further contends that the December 20 Order was "similarly brief", finding that the proposed bright-line standard was not contested, and that there was no evidence in the record suggesting that the demarcation point should be something other than 69kV. FMG contends that Order No. PSC-02-1199-PAA-EI and the December 20 Order fail to address the fundamental issue of whether it is appropriate for the RTO to assume operational control of facilities that distribute power locally where the owner of the such facilities desires to retain that control.

FMG contends that FERC's proposed SMD does not reflect a bright-line test. Instead, it proposes to retain the seven-factor test adopted by Order No. 888 for demarcating transmission and distribution facilities on a functional basis. FMG notes that the NOPR requests comments on several issues, including whether regional variations on this issue should be accommodated and whether a bright-line test should be used "either in addition to or in lieu of the seven factor test." FMG argues that the bright-line standard approved by Order No. PSC-02-1199-PAA-EI is at odds with the approach taken by FERC's proposed SMD, is not mandated by anything FERC has done in the GridFlorida RTO proceeding in Docket No. RT01-67-000, and that the record supporting the Commission's acceptance of the bright-line standard is virtually non-existent.

FMG requests that the Commission reconsider its decision to the extent that it accepted the bright-line, 69kV standard as a final order and defer resolution of this issue until after FERC has adopted an SMD. Alternatively, if the Commission elects to proceed to hearing on market design issues, the FMG members request that the bright-line, 69kV issue be reserved for hearing as well, and that they be permitted to file testimony on the issue. Otherwise, FMG contends that no meaningful opportunity to do so before this Commission will have been provided with the result being that the FMG members' rights to procedural due process before this Commission will have been abridged.

Applicants' Response

In their Response to FMG's Motion for Reconsideration, the Applicants state that:

> [t]he purpose of a motion for reconsideration is to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 162 (Fla. 1st DCA 1981). A motion for reconsideration is not an appropriate vehicle to reargue matters that have already been considered by the Commission. Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959) citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). Nor should a motion for reconsideration be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, 294 So.2d at 317.

In Order No. PSC-02-1199-PAA-EI, the Commission reiterated its determination in the December 20 Order that the GridFlorida Companies' use of a uniform demarcation point of 69kV for the identification of transmission facilities subject to GridFlorida planning and operations was appropriate. The Commission held:

> A uniform demarcation point is necessary to ensure equal access for all participating companies and to ensure that subsidies resulting from different demarcation points do not occur. There is no evidence in the record suggesting that the demarcation point should be something other than 69kV. In addition, this demarcation point has been consistently used by this Commission when determining appropriate cost allocations to distribution, transmission, and generation facilities.

Further, the December 20 Order was clear in its warning that the determinations of the Commission reflected therein would not be relitigated. The Applicants contend that FMG's motion reargues matters that have already been considered by the Commission.

The Applicants note that the motion references FMG's repeated participation and comments on the 69kV issue during the workshop process. The fact that FMG disagrees with the Commission's determination provides no basis for reconsideration. Further, the Applicants contend that FMG had the opportunity to intervene and present testimony on this issue in the initial GridFlorida proceedings; however, they chose not to do so. Therefore, contrary to the assertions in the motion, FMG's due process rights were not abridged; rather, they were simply not exercised.

Based on these arguments, the Applicants contend that FMG's request for reconsideration, as well as its alternative request to present testimony on this issue in the hearing scheduled in the instant docket, should be denied. The Applicants took no position on FMG's request for a postponement of the hearing on market design issues, pending completion of FERC's SMD rule development proceeding.

Staff Analysis

The Commission's decision to convene a hearing on the GridFlorida market design issues was a procedural decision and well within its discretion. The hearing process should help explain and amplify the Applicants' proposal regarding market design, and will provide for additional input from substantially affected parties. While the pending FERC SMD NOPR does address related issues, it is unlikely to focus on regional, Florida-specific issues which can be explored more fully at a hearing before this Commission. Although FMG expresses a procedural preference to allow FERC to complete its rulemaking process, it fails to demonstrate that in convening a hearing on market design issues, the Commission has committed an error of fact or law which warrants reconsideration.

Staff agrees that FMG's motion reargues positions it has raised throughout the workshop process. FMG was afforded an opportunity to file testimony with respect to the bright-line, 69kV issue in the initial GridFlorida proceedings. FMG might also have filed for reconsideration or appeal from the December 20 Order, in which the 69kV issue was determined, but chose not to do so. Reargument of an issue is an inappropriate basis for reconsideration; further, no error of fact or law has been demonstrated. Therefore, FMG's request for reconsideration, as well as its alternative request to present testimony on this issue in the hearing scheduled in the instant docket, should be denied.

ISSUE 4: Should the motion for reconsideration filed by Reedy Creek Improvement District be granted?

RECOMMENDATION: No. Reedy Creek has not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, the motion for reconsideration should be denied. (BRUBAKER)

STAFF ANALYSIS:

Reedy Creek's Motion for Reconsideration

In Order No. PSC-02-1199-PAA-EI, the Commission found that the GridFlorida Applicants' proposed changes to the Participating Owners Management Agreement ("POMA") with respect to the demarcation point for transmission facilities were consistent with the Commission's December 20 Order requiring the adoption of an ISO structure for the GridFlorida RTO. Reedy Creek contends that such changes (1) were not required by the December 20 Order, and (2) ignore and are inconsistent with federal law.

In Order No. PSC-02-1199-PAA-EI, the Commission cited to its discussion in the December 20 Order of the demarcation point issue. In the December 20 Order, the Commission noted the Applicants' explanation that (i) facilities of a rating of 69kV and above "historically" had been considered to be transmission facilities in Florida, (ii) stakeholders generally expressed the need for open access to "all 69kV and above transmission facilities in Florida," (iii) classification of radial facilities as distribution would make access "more complicated than it needs to be," and (iv) different demarcation points for each utility could result in "subsidies across utilities." The Commission approved the Applicants' proposal in the December 20 Order, but ordered no specific changes to the POMA or other documentation on this issue.

In their March 20 compliance filing, the Applicants nonetheless modified the definition of "Controlled Facilities" in the POMA, purportedly to comply with the Commission's requirement that the Applicants propose an ISO structure. Reedy Creek argues that these modifications went far beyond simply deleting the "Transco" provisions in that definition. They also deleted any reference to "transmission" in the definition. As a result of this new definition, any facility in Florida rated at 69kV or higher,

regardless of actual function, is deemed to be subject to the RTO's control.

In Order No. PSC-02-1199-PAA-EI, the Commission considered the FMG's comments at the May 29, 2002 Workshop, in particular FMG's "preference for the opportunity to demonstrate that some 69kV facilities are local distribution." The Commission quoted FMG's remarks regarding the status of the 69kV issue at FERC, stating that the FERC had not spoken to the matter and that the matter was on rehearing before FERC. The Commission concluded that there was no reason to believe that its ruling in the December 20 Order was inconsistent with federal law because it was uncontested that the FERC has not directly addressed the question of 69kV as a bright line demarcation. Finally, the Commission concluded that retaining the 69kV demarcation point as a bright line clearly complies with the December 20 Order, and that the changes to the POMA are consistent with the Order's requirement to adopt an ISO structure.

Reedy Creek further contends that Order No. PSC-02-1199-PAA-EI is inconsistent with federal law, in that the Commission failed to take into account the FERC approach to determining whether facilities are "transmission" or "local distribution." The FERC's approach is functional, rather than a bright line test, based upon the nominal voltage rating of the facility in question. While Reedy Creek acknowledges the GridFlorida Applicants' proposal to use a bright line test of 69kV remains pending before FERC, it contends that the Commission "should not contravene federal law" by prematurely adopting a bright-line test that is contrary to FERC's approach.

Reedy Creek also contends that Order No. PSC-02-1199-PAA-EI ignores, and is indeed contrary to, FERC's long-standing approach to determining whether particular facilities are "transmission" or "local distribution." Reedy Creek believes FERC has addressed this issue, and that its approach has been and is a functional one. *See, e.g.*, Order No. 888, FERC Stats. & Regs., ¶ 31,036, at 31,980-81 (1996). Thus, if a particular facility serves a transmission function, then it is properly classified as "transmission;" in contrast, if a facility serves only local distribution purposes, then it properly should be classified as "local distribution," not "transmission." In distinguishing between "transmission" and "local distribution" facilities, the technical characteristics of the facilities also may be considered, but voltage level is but only one factor in that analysis. Reedy Creek contends that FERC

has never relied simply and solely upon the capacity rating of a facility to determine if it is transmission or local distribution.

Reedy Creek contends that, more recently, FERC confirmed in its SMD NOPR FERC's preference for the use of a functional approach. In the SMD NOPR, FERC proposed using its seven-factor test first adopted in Order No. 888 to determine the local distribution component of an unbundled retail sale. In the SMD NOPR, FERC also requested comment on whether, either in addition to or in lieu of the seven factor test, FERC should use a bright line voltage test (e.g., 69kV) to determine which facilities are placed under the control of the Independent Transmission Provider, and, if so, whether FERC should allow regional variation. While FERC has requested comments on the use of a 69kV bright-line test, Reedy Creek contends that the existing case law and FERC policies point toward use of a functional approach.

Reedy Creek's motion refers to the October 3-5, 2001 hearing before the Commission in Docket Nos. 000824-EI, et al., in which an Applicant witness testified that voltage level is but one factor that FERC considers and that FERC uses a functional approach to facility classification. Reedy Creek contends that Order No. PSC-02-1199-PAA-EI overlooks this evidence. Reedy Creek further claims that there is no evidence in the record to support the claim that different demarcation points would complicate the provision of transmission service under an RTO. Thus, the Commission can decide that the three IOUs' transfer to the RTO of operational control of their transmission facilities of 69kV and above is appropriate without upsetting FERC's test for other utilities.

Reedy Creek states that the December 20 Order never directed the Applicants to delete the reference to "transmission" from the definition of "Controlled Facilities" in the POMA. Nowhere in the December 20 Order does the Commission indicate that it intended to treat as "transmission" local distribution facilities that happen to be rated at 69kV. Thus, Reedy Creek concludes that the Commission erred in describing the changes proposed in the March 20 compliance filing as being a "response to our requirement that GridFlorida establish a transmission facilities demarcation at 69kV." While Reedy Creek urges that the 69kV demarcation point be replaced by a functional approach, it argues that at a bare minimum the POMA's definition of "Controlled Facilities" should be restored to its previous version so that it at least includes a reference to "transmission."

Reedy Creek contends that because the 69kV issue is pending on rehearing at FERC in Docket No. RT01-67 does not render FERC's approach moot or irrelevant. It argues that the Commission should at a minimum recognize that the bright-line approach is inconsistent with FERC's present approach to facility classification. Until FERC changes its policies, Reedy Creek believes that Order No. PSC-02-1199-PAA-EI is inconsistent with federal law and should be modified accordingly.

Applicants' Response

The Applicants argue that, similarly to FMG, Reedy Creek reargues points addressed by Reedy Creek concerning the 69kV demarcation point issue in Pre-Workshop Comments, at the May 29, 2002 workshop, and its Post-Workshop Comments. In its motion, Reedy Creek specifically requests that the Commission modify Order PSC-02-1199-PAA-EI on the 69kV issue to (1) allow Florida utilities the option of demonstrating that any particular facility serves a distribution function rather than a transmission function, regardless of nominal voltage levels; and (2) require the Applicants to reinsert the reference to "transmission" in Section 2.5 of the POMA.

Reedy Creek argues that FERC has applied a multi-factor functional test in determining whether a facility is a transmission or distribution facility. However, as acknowledged by Reedy Creek in its motion, and as indicated in Order No. PSC-02-1199-PAA-EI, the question concerning the appropriateness of the use of 69kV as a bright line demarcation point remains pending before FERC. Accordingly, the Commission correctly concluded in both the December 20 Order and Order No. PSC-02-1199-PAA-EI that the use of the 69kV voltage level as a bright line demarcation, without reference to the FERC's multi-factor test, is not inconsistent with federal law. The Applicants contend that Reedy Creek's attempt to relitigate the Commission's establishment of 69kV and above as a bright line demarcation point in the December 20 Order violates the Commission's admonition that it would not relitigate the determinations in the December 20 Order. The Applicants further contend that Reedy Creek's request that the Commission modify Order No. PSC-02-1199-PAA-EI to allow the option of demonstrating that any particular facility serves a distribution function rather than a transmission function defeats the purpose of establishing a uniform demarcation point outlined by the Commission in the December 20 Order.

The Applicants also contend that Reedy Creek's renewed opposition to the deletion of the word "transmission" from Section 2.5 of the POMA is similarly unavailing. The changes to the language in Section 2.5 of the POMA, including the deletion of the word "transmission," are consistent with the underlying rationale in the December 20 Order that all facilities with a voltage level of 69kV and above be defined as Controlled Facilities under Section 2.5 of the POMA. Reedy Creek's Motion fails to provide a justifiable basis for reconsideration of the Commission's conclusion that the changes in the language in Section 2.5 are consistent with the adoption of an ISO structure.

Staff Analysis

As stated previously, the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Furthermore, a motion for reconsideration should not be granted based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.

Reedy Creek's argument that the Commission approved the Applicants' proposal in the December 20 Order, but ordered no specific changes to the POMA or other documentation on this issue, is unpersuasive as a demonstration of error. Order No. PSC-01-2489-FOF-EI provides:

> If the GridFlorida Companies believe that certain terms should be included in the modified proposal, but those terms are inconsistent with the findings in this Order, the GridFlorida Companies may address the appropriateness of those terms in their proposal. However, the parties should note that this Commission will not relitigate the issues addressed in this Order.

Further, in Order No. PSC-02-1199-PAA-EI, the Commission found that the modifications made in the Applicant compliance filing were appropriate:

> In addressing the 69kV demarcation point issue, Reedy Creek questions whether the Applicants' proposal is

required by our December 20 Order. Reedy Creek objects to the omission of the word "transmission" in the revised definition. In addition, Reedy Creek asserts, in its Pre-Workshop Comments, that the section is not consistent with applicable federal law because the FERC has never used "such a mechanistic approach; rather FERC uses a functional approach to determining the appropriate classification of a facility."

In our December 20 Order, we noted that the GridFlorida Companies had considered that facilities 69kV and above have historically been considered to be transmission facilities. We also referenced that the GridFlorida Companies had discussed whether to classify radial facilities as distribution instead of transmission. We gave recognition to the GridFlorida Companies' conclusion that to do so would make access to transmission more complicated than it needs to be. Finally, we concluded that, among other things, a uniform demarcation point is necessary to ensure equal access for all participating companies.

The arguments raised in Reedy Creek's motion for reconsideration are the same as those it raised in the workshop process. Reedy Creek's motion consists largely of reargument of positions it supported throughout the workshop process, as well as to testimony which was given during the October 2001 hearing in the original RTO dockets. As such, it is in direct contravention to the December 20 Order's caution that the determinations of the Commission reflected therein would not be relitigated. Order No. PSC-02-1199-PAA-EI also addresses the matters raised by Reedy Creek regarding FERC's treatment of the demarcation point, concluding that there is no reason to believe that the Commission's ruling in Order No. PSC-01-2489-FOF-EI is inconsistent with federal law. While Reedy Creek may disagree with that assessment, it has failed to demonstrate that the Commission committed an error of fact or law in reaching its determination; accordingly, its motion for reconsideration should be denied.

ISSUE 5: Should the Motion for Reconsideration of Seminole Electric Cooperative, Inc. and Calpine Corporation be granted?

RECOMMENDATION: No. Seminole and Calpine's motion for reconsideration with respect to the Attachment T cutoff date should be denied pursuant to Rule 25-22.029, Florida Administrative Code. Furthermore, neither issue raised in the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, the motion for reconsideration should be denied in its entirety. (BRUBAKER)

STAFF ANALYSIS:

Seminole and Calpine's Motion for Reconsideration

Seminole and Calpine jointly move for reconsideration on the Commission's decision to render the Attachment T cutoff issue, found at pages 51-54 of Order No. PSC-02-1199-PAA-EI, as proposed agency action (PAA). Seminole also seeks reconsideration as to setting the market design issues for hearing at this time, in light of the pending SMD NOPR proceeding before FERC.

Seminole and Calpine contend that, with one exception, the Commission consistently ruled in Order No. PSC-02-1199-PAA-EI that its decisions as to whether changes proposed by the Applicants were consistent or inconsistent with its December 20 Order were final agency action. Items designated as PAA were either changes being made to the compliance filing or rate issues. However, with respect to the Attachment T cutoff issue, addressed at pages 51-54 of Order No. PSC-02-1199-PAA-EI, the Commission issued its ruling as PAA that the Attachment T cutoff date was not in compliance with the December 20 Order.

Seminole and Calpine contend that in doing so, the Commission acted arbitrarily and capriciously, and abused its discretion, since this ruling "violated the standard used to label all other issues as either 'final' or 'proposed'" without providing any basis or rationale. Because the Applicants intend to litigate this issue at the October 31 hearing, Seminole and Calpine argue that they 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. Seminole and

Calpine request that the Commission reconsider Order No. PSC-02-1199-PAA-EI to correct this error.

Seminole raises a second point on reconsideration, with respect to the Commission's decision to set the market design issues for hearing. Seminole contends that the hearing should be deferred until after the conclusion of the FERC's SMD rulemaking proceeding.

Order No. PSC-02-1199-PAA-EI requires the Applicants to file petitions and testimony on a number of market design issues that have not been previously addressed by the Applicants, to be heard at an expedited hearing in conjunction with any protested PAA issues. Seminole suggests that this course of action is not efficient and raises certain due process concerns. Seminole notes that the FERC is in the process of a rulemaking proceeding on market design, which involves issues of great complexity. Seminole contends that, given the impossibility in this proceeding as presently formulated of treating this subject with the depth it warrants and the attendant jurisdictional pitfalls, the better course of action is for the Commission to defer a hearing until after the FERC acts in the SMD NOPR now pending before it. At that time, the Commission would be in a better position to determine what aspects, if any, of the SMD are not a good fit for Florida. Seminole contends that trying to make that decision at this time is futile and a waste of all parties' and the Commission's resources.

FPL and TECO's Response

In their joint response, FPL and TECO note that the purpose of a petition for rehearing or reconsideration is to bring to the attention of the trier of fact some point which it overlooked or failed to consider when it rendered its order in the first instance. Motions for reconsideration are not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment or the order. FPL and TECO contend that both of the points raised in Seminole and Calpine's motion for reconsideration were carefully considered by the Commission during the course of this proceeding, and that no error of fact or law has been committed.

With respect to the Attachment T date decision, FPL and TECO note that Order No. PSC-02-1199-PAA-EI requires the applicants to change the proposed Attachment T cutoff date to be included in the

GridFlorida proposal back to the original date contained in the GridFlorida filing in Docket Nos. 000824-EI, 0001148-EI and 010577-EI.

The Applicants contend that the proposed change in the Attachment T cutoff date was in compliance with the December 20 Order; however, assuming arguendo that this change was not in compliance, FPL and TECO assert that they have the right to present a proposed change and to have that change considered by due process of law. Due process includes a right to hearing on the proposed change. Further, where Order No. PSC-02-1199-PAA-EI requires other changes to be made in the GridFlorida proposal and those changes were challenged by an intervener, the changes were designated as PAA. Also, an opportunity for hearing should also be afforded where the Applicants propose a change which is proposed to be rejected by the Commission. For example, with regard to the Applicants requesting a change in market design from physical rights to financial rights, the Commission is providing an opportunity for a hearing. Calpine and Seminole have not alleged that such action by the Commission was arbitrary and capricious or an abuse of agency discretion. Thus, FPL and TECO contend that the Commission's method for identifying PAA decisions is applied uniformly and fairly.

FPL and TECO state it is also important to note that the Commission's decision on this issue was procedural. The Commission simply found that the change in the Attachment T cutoff date is not in compliance with Order No. PSC-02-1199-PAA-EI. The Commission did not reach a final substantive decision on the appropriate Attachment T date; rather, the Commission appropriately allowed the Applicants to seek a hearing on the merits of its proposed change. FPL and TECO contend that the Commission's determination to allow further hearing on an issue can hardly be considered to deny Calpine or Seminole due process of law. The Commission is entitled to allow further illumination on an issue of critical importance to retail ratepayers, and Calpine and Seminole are afforded the opportunity to opine on the issue. The Commission made its determination to allow further hearing after much discussion at the August 20, 2002 Agenda Conference. FPL and TECO conclude that there is a sound basis for the action taken by the Commission with respect to this matter.

FPL and TECO take no position on Seminole's request for a postponement of the evidentiary hearing pending completion of FERC's SMD rule proceeding.

Staff Analysis

Rule 25-22.060(1), Florida Administrative Code, provides that any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order. The rule also provides that the Commission will not entertain a motion for reconsideration of a Notice of Proposed Agency Action issued pursuant to Rule 25-22.029, Florida Administrative Code, regardless of the form of the Notice and regardless of whether or not the proposed action has become effective under Rule 25-22.029(6). The decision to render an issue as final or proposed agency action is largely a matter of procedural discretion, dependent upon whether a point of entry has been afforded to affected persons and whether additional investigation or analysis is required for the Commission to render its decision. Staff believes that Seminole and Calpine's request with respect to the Attachment T cutoff date should be denied on the basis that it requests reconsideration of an action issued as PAA.

If the Commission wishes to entertain Seminole and Calpine's motion regardless of its apparent contravention of Rule 25-22.029, Florida Administrative Code, staff believes that the motion in its entirety should nevertheless be denied on the following grounds.

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

At the August 20, 2002 Agenda Conference, the Commission found that sufficient uncertainty existed regarding the Attachment T cutoff date to warrant changing the nature of its decision from final agency action, as initially proposed by staff, to PAA. As discussed above, the decision to do so is procedural in nature, and is well within the Commission's discretion. Seminole and Calpine contend that the Commission "acted arbitrarily and capriciously, and abused its discretion" in issuing the Attachment T cutoff date as PAA. While this may be an appropriate standard for the appeal of an administrative order, is not the standard for a motion for reconsideration. The Commission's decision does not deprive Seminole and Calpine of due process; rather, due process is afforded to allow amplification and clarification of an important issue. Calpine and Seminole are thereby left in no more advantaged or disadvantaged position than any other party to this proceeding.

Staff believes that Seminole and Calpine have failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision on the Attachment T cutoff date as PAA. Therefore, the portion of the motion for reconsideration pertaining to this issue should be denied.

With respect to Seminole's request for reconsideration on setting the market design issues for hearing at this time, staff reiterates its argument that this is a procedural decision which is well within the Commission's discretion. Seminole's request to defer the hearing on market design pending completion of FERC's SMD rulemaking fails to raise any point of fact or law which was not discussed or considered prior to the issuance of Order No. PSC-02-1199-PAA-EI. Besides concerns regarding the efficiency and expediency of setting the market design issues for hearing, Seminole offers no basis for deferring the evidentiary hearing contemplated by Order No. PSC-02-1199-PAA-EI. Having failed to demonstrate a mistake of fact or law, this portion of Seminole's request should also be denied.

ISSUE 6: Should the Motion for Clarification or Reconsideration filed by the Florida Municipal Power Agency be granted?

RECOMMENDATION: FMPA's motion should be granted, and the Commission should clarify that the new facilities demarcation date was intended to issue as proposed agency action in Order No. PSC-02-1199-PAA-EI, so that the date could be more fully discussed and examined at the October 31, 2002, expedited hearing in this docket. (BRUBAKER)

STAFF ANALYSIS:

FMPA's Motion for Clarification or Reconsideration

At issue in FMPA's motion for reconsideration or clarification is the in-service demarcation date that determines cost responsibility allocations for newer transmission facilities. Older facilities' costs are treated as if those facilities were useful only for loads in the zones where they are located, i.e., the statewide sharing of their costs is delayed until years 6 through 10 of GridFlorida operations. For newer facilities, it is recognized that they were completed with a view to GridFlorida operating them for statewide use, and their costs are therefore shared statewide as soon as GridFlorida begins operating. There is another demarcation date for defining new contracts, but FMPA's motion concerns the new facilities demarcation date.

Order No. PSC-02-1199-PAA-EI, at pages 51-54, begins by stating, "in their compliance filing, the Applicants modified language in Attachment T concerning the demarcation date for new facilities." FMPA contends that the Order proceeds to discuss that date change, and a related change to the date for defining new contracts, as if they represented a single date change. In fact, the Order accurately described the new contracts demarcation date as it stood before the Applicants' filing on compliance (that date was December 15, 2000, and located in OATT Attachment T in the Applicants' prior and still-pending FERC filings), but it did not accurately describe the pre-revision new facilities demarcation date (which was a date certain of January 1, 2001). The new facilities date was stated in several tariff locations other than Attachment T. In the compliance filing, that date was changed to a floating future date, defined as January 1 of the year during which GridFlorida begins operations.

Thus, FMPA contends that the Order treats the issue as if there were a single demarcation date, which was changed so as to alter the definition of both new facilities and new contracts. The Order proceeds to reject that date change in its entirety, and FMPA argues that this is most fairly read as rejecting both the new contracts date change and the new facilities date change. Furthermore, FMPA believes that the Commission's supporting reasoning is equally applicable to both changes (FMPA's motion cites at length the discussion from the August 20, 2002 Agenda Conference, which for purposes of brevity are not reproduced here).

FMPA indicates that additional error occurred during staff's oral comments at the August 20, 2002 Agenda Conference, in which staff stated that the interveners had not expressed any concern with respect to the change to the new facilities date. However, FMPA had indicated at pages 31-34 of its post-workshop comments, that the new facilities date was in fact problematic. FMPA contends that this factual error contributed to an unintentional but disparate treatment of the facilities and contract demarcation dates.

For the reasons stated above, FMPA concludes that disparate treatment of the new facilities and new contracts date changes are clear error. Given that the Commission has addressed GridFlorida's rate structure, FMPA believes that both of the demarcation date changes should have been treated alike. The proposed delay in the new facilities demarcation date should have been rejected clearly, just as the proposed delay in the new contracts demarcation date was rejected. FMPA requests that the Commission promptly clarify that that was its intent.

OPC's Response

In its response, OPC states that under the original Transco proposal for GridFlorida, all rates for transmission service, both wholesale and retail, were to be under FERC's jurisdiction. Even though the Commission in its December 20 Order rejected the transco in favor of an ISO and insisted upon retaining its traditional ratemaking jurisdiction, OPC argues that the GridFlorida Applicants put forth an alternative rate structure still designed to transfer jurisdiction to FERC. Under the companies' revised proposal, all new transmission assets were to be subject to a FERC-approved system-wide rate, and all existing transmission facilities were to be subject to a FERC-approved zonal rate. The demarcation date for

identifying new transmission assets would, OPC contends, only serve to distinguish between two categories of transmission assets, both of which would be removed from Commission jurisdiction in contravention of the Commission's December 20 Order.

In Order No. PSC-02-1199-PAA-EI at page 63, however, the Commission directed that the GridFlorida filing be modified so that the Commission retains its jurisdiction. OPC contends that a true compliance filing in response to Order No. PSC-02-1199-PAA-EI should not distinguish between new and existing transmission assets because the Commission has the same retail jurisdiction over both. OPC concludes that the demarcation date for new transmission assets under the rejected rate structure proposal is irrelevant.*

FPL and TECO's Response

FPL and TECO contend that Order No. PSC-02-1199-PAA-EI approves, as final agency action, the demarcation date for defining new facilities as January 1 of the year GridFlorida begins commercial operation, and rejects by PAA the proposed demarcation date for determining new contracts (new contract date or the Attachment T cutoff date). On September 24, 2002 protests were filed by FPC and by FPL and TECO with respect to this issue.

FPL and TECO contend that the Commission's approval of the Applicants' proposal to change the new facilities date is sound on the merits in that it ameliorates the impact of cost shifts among retail customers, and should not be reconsidered. FPL and TECO argue that it is likewise important that the new contract date should be set for January 1 of the year GridFlorida begins operation, as is requested in FPL and TECO's PAA protest.

FPL and TECO submit that FMPA's motion for reconsideration should be denied, because FMPA essentially contends that the Commission did not know what it was doing in approving the new facilities date. FPL and TECO urge that the Commission deny FMPA's motion to the extent that it seeks to reverse the Commission's approval of the new facilities date as proposed in the compliance filing and approved by Order No. PSC-02-1199-PAA-EI. However, in order to have a complete hearing on the merits of the appropriate demarcation dates, FPL and TECO suggest that it may be appropriate to set both the new facilities and the new contract dates for hearing and to thereafter approve both dates as proposed by the Applicants in their compliance filing.

Staff Analysis

As a preliminary matter, staff notes that OPC's filing is not so much a response to FMPA's motion than a supplemental argument for its own motion for reconsideration, which is addressed in Issue 2. OPC contends that a true compliance filing in response to Order No. PSC-02-1199-PAA-EI should not distinguish between new and existing transmission assets because the Commission has the same retail jurisdiction over both. OPC concludes that "the demarcation date for new transmission assets under the rejected rate structure proposal is irrelevant." OPC's response does not request that the Commission take any affirmative action with respect to FMPA's motion, and staff believes that no further analysis is necessary.

FPL and TECO contend that FMPA's motion for reconsideration should be denied, because FMPA essentially contends that the Commission did not know what it was doing in approving the new facilities date. FPL and TECO also urge that the Commission deny FMPA's motion to the extent that it seeks to reverse the Commission's approval of the new facilities date as proposed in the compliance filing and approved by Order No. PSC-02-1199-PAA-EI as final agency action. However, FPL and TECO also concede that it may be appropriate to set both the new facilities and the new contract dates for hearing, in which case they would request approval of both dates as proposed in the compliance filing.

The transcription of the August 20, 2002 Agenda conference, commencing at page 85, and again commencing at page 94, indicates that staff and the Commissioners were aware of the distinction between the new contract and new facilities demarcation dates. The transcript also indicates that staff believed the new facilities date to be consistent with the December 20 Order. However, FMPA is correct that it had in fact identified the new facilities demarcation date as being problematic in its post-workshop comments. This was inadvertently not identified at the Agenda Conference during the discussion regarding the new facilities and contract dates.

Furthermore, as is discussed in Issue 7, the transcription of the August 20 Agenda Conference indicates an intent on the part of the Commissioners to consign both demarcation dates as PAA so that both dates could be more fully addressed by the parties at hearing.

Section R of the Planning and Operations section of Order No. PSC-02-1199-PAA-EI does not provide a clear indication as to whether the Commission's ruling that the Attachment T cutoff date (new contracts date) is also applied to the new facilities date. Furthermore, it appears that a mistake of fact may have occurred in the indication that no intervener had expressed concern with regard to the facilities date. Regardless of whether this apparent mistake would rise to the level of material error, staff believes that, in light of the apparent ambiguity and the comments at the August 20 Agenda Conference, FMPA's motion should be granted. The Commission should clarify that the new facilities demarcation date was intended to issue as proposed agency action in Order No. PSC-02-1199-PAA-EI, so that the date could be more fully discussed and examined at the October 31, 2002 expedited hearing in this docket.

ISSUE 7: Should the motion for reconsideration filed by Florida Power Corporation be granted?

RECOMMENDATION: Consistent with staff's recommendation in issue 6, FPC's motion should be granted and the Commission should clarify that the new facilities demarcation date was intended to issue as proposed agency action in Order No. PSC-02-1199-PAA-EI, so that the date could be more fully discussed and examined at the October 31, 2002 expedited hearing in this docket. (BRUBAKER)

STAFF ANALYSIS:

FPC's Motion for Reconsideration

As discussed previously, at its August 20, 2002 Agenda Conference, the Commission considered a number of compliance issues identified in Staff's recommendation.

FPC notes that staff initially recommended that the Commission deny the proposed change to the new contract date through final agency action because Staff believed the change was not necessary to comply with the December 20 Order and no additional language was required by the denial. However, after a lengthy discussion regarding the effect of re-establishing the contract date as originally proposed, including the effect on another demarcation date between existing and new transmission facilities (the facilities date), the Commission found that sufficient uncertainty existed on the issue to warrant changing the nature of its decision from final agency action to PAA. This change was intended to provide the Commission an opportunity to hear the positions of the parties on the appropriate treatment of the contract date if a hearing on the issue was requested, thereby allowing the Commission to resolve the existing uncertainty and reach an informed decision.

On September 24, 2002, FPC requested a hearing on this PAA decision. FPC contends that its protest and supporting testimony will explain its position that, while FPC agrees with the decision requiring the contract date to remain as originally proposed, the Commission erred by not requiring that the facilities date also remain as originally proposed in order to maintain the important linkage between these two dates. FPC believes it is clear from the Agenda Conference discussion that the Commission intended to leave all aspects of its PAA decision open for consideration if a hearing

is requested, including the issue of linkage between the contract date and the facilities date that is central to FPC's position.

However, FPC recognizes the possibility that an argument could be asserted that Order No. PSC-02-1199-PAA-EI constitutes final agency approval of the revised facilities date. In the event such an argument were to be accepted, it would seriously compromise, if not completely preclude, FPC's opportunity to present testimony asserting its position that the linkage between the facilities date and the contract date must be maintained by re-establishing both dates as originally proposed. FPC believes that an argument to this effect would be without merit and contrary to the Commission's clear intent in reaching its PAA decision on the contract date. Nonetheless, out of an abundance of caution and in the interest of protecting FPC's testimony from a challenge to its admissibility based on such an argument, FPC has decided to seek reconsideration of Order No. PSC-02-1199-PAA-EI to the extent it is deemed to constitute final agency approval of the revised Facilities Date.

Florida Power submits any conclusion that Order No. PSC-02-1199-PAA-EI constitutes approval of the revised facilities date by final agency action is based on mistake, misunderstanding, or oversight in the application of the criteria used by staff and accepted by the Commission to identify those changes contained in the compliance filing that were not required by the December 20 Order. In its recommendation, staff described the Applicants' contention that the original contract date and facilities date needed to be revised to bring them in closer proximity to GridFlorida's actual commencement of operations, since the original commencement date was significantly delayed. Staff then discussed the reasons it found this contention to be unpersuasive as a basis for finding that these revisions were necessary to comply with the December 20 Order. However, staff concluded its analysis by recommending only that the revised contract date be found out of compliance with that Order; it was silent on the facilities date.

In response to questions from the Commission at the August 20, 2002, Agenda Conference, staff explained why the facilities date was not explicitly discussed in the issue. While neither date revision was required to comply with the December 20 Order, staff stated that the interveners had expressed a concern only about the change to the contract date. FPC contends that this is a mistake; that noncompliance of the revised facilities date had in fact been raised. On pages 31 through 34 of its post-workshop comments filed

on June 21, 2002, FMPA objected to the changes in both the contract and the facilities demarcation dates included in the March 20, 2002 compliance filing.

FPC argues that had staff been aware of FMPA's objection, staff would have included the revised facilities date in its noncompliance recommendation given its stated rationale for including the revised contract date. By the same token, had staff done so, FPC believes that the Commission would have approved staff's recommendation for the same reason it approved staff's recommendation on the revised contract date. FPC concludes that if Order No. PSC-02-1199-PAA-EI should be deemed to constitute final approval of the revised facilities date, such approval would be based on a mistake of material fact and would not be sustainable on reconsideration.

Given the limited purpose of its motion for reconsideration and the possibility that it will become moot if a challenge to the admissibility of the Company's testimony based on this argument is not made, FPC suggests that its motion be held in abeyance until the hearing. If such a challenge is not forthcoming at the time FPC's testimony is offered into evidence, the motion will be withdrawn.

OPC's Response

In its response, OPC states that under the original transco proposal for GridFlorida, all rates for transmission service, both wholesale and retail, were to be under FERC's jurisdiction. Even though the Commission in its December 20 Order rejected the transco in favor of an ISO and insisted upon retaining its traditional ratemaking jurisdiction, OPC argues that the GridFlorida Applicants put forth an alternative rate structure still designed to transfer jurisdiction to FERC. Under the companies' revised proposal, all new transmission assets were to be subject to a FERC-approved system-wide rate, and all existing transmission facilities were to be subject to a FERC-approved zonal rate. The demarcation date for identifying new transmission assets would, OPC contends, only serve to distinguish between two categories of transmission assets, both of which would be removed from Commission jurisdiction in contravention of the Commission's December 20 Order.

In Order No. PSC-02-1199-PAA-EI at page 63, however, the Commission directed that the GridFlorida filing be modified so that

the Commission retains its jurisdiction. OPC contends that a true compliance filing in response to Order No. PSC-02-1199-PAA-EI should not distinguish between new and existing transmission assets because the Commission has the same retail jurisdiction over both. OPC concludes that the demarcation date for new transmission assets under the rejected rate structure proposal is irrelevant.

FPL and TECO's Response

FPL and TECO contend that Order No. PSC-02-1199-PAA-EI approves, as final agency action, the demarcation date for defining new facilities as January 1 of the year GridFlorida begins commercial operation, and rejects by PAA the proposed demarcation date for determining new contracts (new contract date or the Attachment T cutoff date). On September 24, 2002 protests were filed by FPC, FPL and TECO with respect to this issue.

FPL and TECO contend that the Commission's approval of the Applicants' proposal to change the new facilities date is sound on the merits in that it ameliorates the impact of cost shifts among retail customers, and should not be reconsidered. FPL and TECO argue that it is likewise important that the new contract date should be set for January 1 of the year GridFlorida begins operation, as is requested in FPL and TECO's PAA protest.

FPL and TECO urge that the Commission deny FPC's motion to the extent that it seeks to reverse the Commission's approval of the new facilities date as proposed in the compliance filing and approved by Order No. PSC-02-1199-PAA-EI. However, in order to have a complete hearing on the merits of the appropriate demarcation dates, FPL and TECO suggest that it may be appropriate to set both the new facilities and the new contract dates for hearing and to thereafter approve both dates as proposed by the Applicants in their compliance filing.

Staff Analysis

As a preliminary matter, staff notes that OPC's filing is not so much a response to FPC's motion than a supplemental argument for its own motion for reconsideration, which is addressed in Issue 2. OPC contends that a true compliance filing in response to Order No. PSC-02-1199-PAA-EI should not distinguish between new and existing transmission assets because the Commission has the same retail jurisdiction over both. OPC concludes that "the demarcation date

for new transmission assets under the rejected rate structure proposal is irrelevant." OPC's response does not request that the Commission take any affirmative action with respect to FPC's motion, and staff believes that no further analysis is necessary.

FPC's motion for reconsideration is essentially a placeholder, by which FPC seeks to reserve its ability to address both the new contract and new facilities dates as protested issues at the October 1, 2002 hearing. Should Order No. PSC-02-1199-PAA-EI be deemed to constitute final approval of the revised facilities date, FPC is concerned that it would be precluded from presenting testimony at hearing that the new contract date should remain as originally proposed, and that there is a linkage between the new contract and new facilities demarcation dates. Hence, FPC suggests that its motion be held in abeyance until the hearing. If such a challenge is not forthcoming at the time FPC's testimony is offered into evidence, the motion will be withdrawn.

FPL and TECO contend that the Applicants' proposal to change the new facilities date has in fact been approved by final agency action and should not be reconsidered, and urge that the Commission deny FPC's motion to the extent that it seeks to reverse the Commission's approval of the new facilities date as proposed in the compliance filing. However, no express ruling to that effect is clearly made in the Order. Furthermore, FPL and TECO concede that it may be appropriate to set both the new facilities and the new contract dates for hearing, in which case they would request approval of both dates as proposed in the compliance filing.

Consistent with staff's recommendation in issue 6, Section R of the Planning and Operations section of Order No. PSC-02-1199-PAA-EI does not provide a clear indication as to whether the Commission's ruling that the Attachment T cutoff date (new contracts date) is also applied to the new facilities date. Furthermore, it appears that a mistake of fact may have occurred in the indication that no intervener had expressed concern with regard to the facilities date. Regardless of whether this apparent mistake would rise to the level of material error, staff believes that, in light of the apparent ambiguity and the comments at the August 20 Agenda Conference, FPC's motion should be granted. The Commission should clarify that the new facilities demarcation date was intended to issue as proposed agency action in Order No. PSC-02-1199-PAA-EI, so that the date could be more fully discussed and examined at the October 31, 2002 expedited hearing in this docket.

ISSUE 8: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open to conduct the administrative hearing scheduled for October 31, 2002. (BRUBAKER, KEATING)

STAFF ANALYSIS: This docket should remain open to conduct the administrative hearing scheduled for October 31, 2002.