ORAL ARGUMENT HAS NOT BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1060

FLORIDA MUNICIPAL POWER AGENCY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

HOLLY E. CAFER
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

AUGUST 3, 2009
FINAL BRIEF: SEPTEMBER 22, 2009

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici:

All parties appearing before the Court and the Commission are listed in Petitioner's Rule 28(a)(1) certificate. There are no *amici*.

B. Rulings Under Review:

1. *Florida Power & Light Co.*, 122 FERC ¶ 61,159 (Feb. 21, 2008) ("Reconsideration Order"), R. 79, JA 43; and

2. *Florida Power & Light Co.*, 125 FERC ¶ 61,344 (Dec. 22, 2008) ("Rehearing Order"), R. 87, JA 55.

C. Related Cases:

This appeal is the fourth brought by the Petitioner concerning Florida Power & Light Company's rates for network transmission service. As further explained on pages 4-8 of this brief, the prior related cases dealt with distinct issues no longer contested here, but also affirmed certain principles and findings that remain relevant in the instant case. The prior related decisions of this Court are:

1. *Florida Mun. Power Ag. v. FERC*, 315 F.3d 362 (D.C. Cir. 2003) (*Florida Municipal I*) (affirming FERC orders in separate, but related, FERC dockets);

2. *Florida Mun. Power Ag. v. FERC*, 411 F.3d 287 (D.C. Cir. 2005) (*Florida Municipal II*) (remanding FERC orders in these FERC dockets and requiring FERC to address an issue, no longer contested in these proceedings, raised by Petitioner); and

3. *Florida Municipal Power Ag. v. FERC*, 264 F. App'x 4 (D.C. Cir. 2008) ("*Florida Municipal III*") (affirming FERC orders following remand in these dockets in an unpublished opinion).

The Petitioner also filed a Petition for Writ of Mandamus with this Court concerning Commission action in the same dockets now on review. *In re Florida Mun. Power Ag.*, No. 03-1059 (D.C. Cir. dismissed May 14, 2004).

/s/ Holly E. Cafer
Holly E. Cafer
Attorney

August 3, 2009
FINAL BRIEF: September 22, 2009

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUE 1

STATEMENT REGARDING JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS 2

INTRODUCTION 2

STATEMENT OF THE FACTS 4

I. Statutory Framework 4

II. Background 4

III. The Commission's Proceedings And Orders 8

A. Reconsideration Order……...11

B. Rehearing Order……....13

SUMMARY OF ARGUMENT…….....16

ARGUMENT…….18

I. Standard Of Review…….18

II. The Commission Reasonably Explained That The 1994 "Unneeded Redundancy" Test, Applied To Florida Municipal's Facilities, Required A Facility To Be Needed By Florida Power To Serve Either Local *Or* Remote Load, Not Both…….20

A. Substantial Evidence Supports The Commission's Conclusion That The 1994 Test Required Florida Municipal's Facilities To Serve Only Local *Or* Remote Load…….20

TABLE OF CONTENTS

PAGE

1. The Commission Reexamined And Reasonably Relied Upon Florida Power Witness Adjemian's 1994 Testimony…….....21

2. The Commission's Interpretation of Witness Adjemian's 1994 Testimony Is Consistent With Commission And Court Precedent, As Well As Florida Municipal's Arguments Earlier In This Proceeding……25

B. The Commission Reasonably Explained Its Conclusion That It Had Previously Misinterpreted, And Therefore Misstated, The 1994 Test……..…….27

III. The Commission Reasonably Weighed The Evidence And Correctly Determined That The Test Applied To Florida Power's Facilities Satisfies The Comparability Principle…….28

A. Substantial Evidence Supports The Commission's Determination That Florida Power Properly Applied The 1994 Test To Its Facilities…….28

B. The Commission Reasonably Determined That The Test Applied To Florida Power's Facilities Satisfies The Comparability Principle And Is Therefore Fully Consistent With Commission Precedent…….34

IV. The Commission Reasonably Rejected Florida Municipal's Testimony Claiming That Its Own Facilities Satisfy The Test……..38

CONCLUSION……..41

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

**Alabama Power Co. v. FPC*,
511 F.2d 383 (D.C. Cir. 1974)…….23-24

Association of Oil Pipe Lines v. FERC,
83 F.3d 1424 (D.C. Cir. 1996)……..34

Blumenthal v. FERC,
552 F.3d 875 (D.C. Cir. 2009)……...18, 25

FCC v. Fox Television Stations, Inc.,
129 S. Ct. 1800 (2009)……...20, 28

**Florida Mun. Power Ag. v. FERC*,
315 F.3d 362 (D.C. Cir. 2003)…..…2, 4-6, 18-19, 25-26, 33-38, 40-41

Florida Mun. Power Ag. v. FERC,
411 F.3d 287 (D.C. Cir. 2005)…….2, 4, 7, 18

Florida Mun. Power Ag. v. FERC,
264 F. App'x 4 (D.C. Cir. 2008)……..3, 4, 8, 18, 33, 38

FPL Energy Me. Hydro LLC v. FERC,
287 F.3d 1151 (D.C. Cir. 2002)……..……19

Marsh v. Or. Natural Res. Council,
490 U.S. 360 (1989)……19

**Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*,
128 S. Ct. 2733 (2008)……..……18, 25

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983)……..18

Nantahala Power & Light Co. v. FERC,
727 F.2d 1342 (4th Cir. 1984)……23-25

New York v. FERC,
535 U.S. 1 (2002)……..4, 5

Northern States Power Co. v. FERC,
30 F.3d 177 (D.C. Cir. 1994)……..19

Transmission Access Policy Study Group v. FERC,
225 F.3d 667 (D.C. Cir. 2000)……...5, 6, 33, 34

Westar Energy, Inc. v. FERC,
568 F.3d 985 (D.C. Cir. 2009)……..20, 28

Wis. Power & Light Co. v. FERC,
363 F.3d 453 (D.C. Cir. 2004)…….24

Wisconsin Valley Improvement Co. v. FERC,
236 F.3d 738 (D.C. Cir. 2001)…….19

ADMINISTRATIVE CASES:

Florida Mun. Power Ag. v. Florida Power & Light Co.,
67 FERC ¶ 61,167 (1994), *order granting clarif. in part and denying reh'g*, 74 FERC ¶ 61,006 (1996), *order denying reh'g,*
96 FERC ¶ 61,130 (2001)……3, 25-27, 36

Florida Mun. Power Ag. v. Florida Power & Light Co.,
113 FERC ¶ 61,290 (2005), *reh'g denied*, 116 FERC
¶ 61,012 (2006)……..……8

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

Florida Power & Light Co.,
105 FERC ¶ 61,287 (2003), *reh'g denied*, 106 FERC ¶ 61,204 (2004)……7

Florida Power & Light Co.,
110 FERC ¶ 61,058 (2005)……..…7, 8, 36

Florida Power & Light Co.,
113 FERC ¶ 61,263 (2005)……..…9, 10, 31, 38

Florida Power & Light Co.,
116 FERC ¶ 61,013 (2006)…….….11

Florida Power & Light Co.,
122 FERC ¶ 61,159 (2008)…….3, 11-13, 20-22, 27, 36, 39, 40

Florida Power & Light Co.,
125 FERC ¶ 61,344 (2008)……3, 13-15, 20, 21, 23-33, 36, 38-40

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,
Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)……5-6, 37

Town of Highland v. Nantahala Power & Light Co.,
37 FERC ¶ 61,149, *on reh'g*, 38 FERC ¶ 61,052 (1987)……23-24

TABLE OF AUTHORITIES

STATUTES: **PAGE**

Administrative Procedure Act

5 U.S.C. § 706(2)(A) 18

Federal Power Act

Section 201(b)(1), 16 U.S.C. § 824(b)(1) 4

Section 205, 16 U.S.C. § 824d 4, 28

Section 206(a), 16 U.S.C. § 824e(a) 4

Section 313(b), 16 U.S.C. § 825*l*(b) 2, 23

GLOSSARY

Add.	Addendum
Br.	Petitioner's Brief
Commission or FERC	Federal Energy Regulatory Commission
December 15, 2005 Order	*Florida Power & Light Co.*, 113 FERC ¶ 61,263 (Dec. 15, 2005), R. 45, JA 23
Florida Municipal	Petitioner Florida Municipal Power Agency
Florida Municipal I	*Florida Mun. Power Ag. v. FERC*, 315 F.3d 362 (D.C. Cir. 2003)
Florida Municipal II	*Florida Mun. Power Ag. v. FERC*, 411 F.3d 287 (D.C. Cir. 2005)
Florida Municipal III	*Florida Mun. Power Ag. v. FERC*, 264 F. App'x 4 (D.C. Cir. 2008)
Florida Power	Florida Power and Light Company
FPA	Federal Power Act
JA	Joint Appendix
JAA	Joint Appendix Appendix (Volume III of III)
January 5, 1996 Order	*Florida Mun. Power Ag. v. Florida Power & Light Co.*, 74 FERC ¶ 61,006 (1996)
January 25, 2005 Order	*Florida Power & Light Co.*, 110 FERC ¶ 61,058 (2005), R. 26, JA 15
P	Paragraph number in a FERC order
R.	Record item number
Reconsideration Order	*Florida Power & Light Co.*, 122 FERC ¶ 61,159 (Feb. 21, 2008), R. 79, JA 43
Rehearing Order	*Florida Power & Light Co.*, 125 FERC ¶ 61,344 (Dec. 22, 2008), R. 87, JA 55

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1060

FLORIDA MUNICIPAL POWER AGENCY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC"), in a protracted ratemaking dispute now before this Court on appeal for the fourth time, reasonably interpreted and applied the correct integration standard to the transmission provider's and transmission customer's facilities, consistent with the comparability principle previously adopted by the Commission and affirmed by this Court.

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction pursuant to Federal Power Act ("FPA") section 313(b), 16 U.S.C. § 825*l*(b).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

This case presents, hopefully, the final chapter in lengthy proceedings, commenced in 1993, to establish lawful rates for network transmission service on Florida Power and Light Company's ("Florida Power") transmission system. In the proceedings leading to the orders on review, the Commission examined, modified and approved Florida Power's rate base. In earlier proceedings, previously reviewed by this Court and affirmed in all respects now relevant, the Commission addressed whether Florida Power's transmission customer, Florida Municipal Power Agency ("Florida Municipal"), should receive pricing credits for its own facilities, *Florida Mun. Power Ag. v. FERC*, 315 F.3d 362 (D.C. Cir. 2003) (*Florida Municipal I*), and whether there should be an exception to Florida Power's network service rates where service is "physically impossible." *Florida Mun. Power Ag. v. FERC*, 411 F.3d 287 (D.C. Cir. 2005) (remanding orders and requiring FERC to address the issue on review) (*Florida Municipal II*), *following*

remand, 264 F. App'x 4 (D.C. Cir. 2008) (affirming FERC's orders on remand) (*Florida Municipal III*).

The narrow issue now before this Court is resolved by the fundamental principle of comparability applied throughout this proceeding. In the orders on review, the Commission confirmed that this principle requires that "the same integration standard used to determine [Florida Municipal's] eligibility for pricing credits should also be used by [Florida Power] for rate-making purposes." *Florida Power & Light Co.*, 122 FERC ¶ 61,159 at P 11 (Feb. 21, 2008) ("Reconsideration Order"), R.[1] 79, JA 47, *reh'g denied*, 125 FERC ¶ 61,344 (Dec. 22, 2008) ("Rehearing Order"), R. 87, JA 55. Florida Municipal disputes the Commission's interpretation of the integration standard used in the earlier proceedings to examine Florida Municipal's facilities, and hence its application to Florida Power's facilities in the instant case. But the Commission's interpretation and application of the standard is supported by the testimony of two Florida Power expert witnesses and, perhaps more importantly, is consistent with both the Commission's and this Court's precedent.

[1] The Commission will be filing an amended Certified Index to the Record prior to the submission of final briefs. References to record item numbers will be inserted with the filing of final briefs.

STATEMENT OF THE FACTS

I. Statutory Framework

FPA section 201(b) confers on the Commission jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale." 16 U.S.C. § 824(b)(1). The Commission acts to ensure that rates for transmission and energy sales are "just and reasonable" and not unduly discriminatory or preferential. FPA §§ 205(a), (b), 16 U.S.C. §§ 824d(a), (b). The Commission is empowered under FPA sections 205 and 206, 16 U.S.C. §§ 824d, 824e(a), to correct utility rates and practices that are unjust, unreasonable, or unduly discriminatory or preferential. *See, e.g.*, *New York v. FERC*, 535 U.S. 1, 7 (2002).

II. Background

A detailed history of these proceedings is set forth in *Florida Municipal II*, 411 F.3d at 289-91. Briefly, in 1993, Florida Municipal filed the network transmission access request in the Transmission Case (referred to in Commission orders as the TX case) that led to *Florida Municipal I*. Florida Power subsequently filed the revised tariff in the Rate Case that led to *Florida Municipal II*, and, following the Commission's orders on remand, *Florida Municipal III*, as well as, finally, the instant petition for review. In 1995, while the Transmission Case and

Rate Case remained pending, FERC initiated the Order No. 888[2] rulemaking which addressed similar transmission access and pricing issues on an industry-wide basis.

In *Florida Municipal I*, this Court affirmed the Transmission Case orders[3] which held that Florida Municipal would be entitled to pricing credits for its own facilities that are "integrated" into Florida Power's network. 315 F.3d at 366-68. However, the Court also affirmed the Commission's finding that, while many of Florida Municipal's facilities are "interconnected" with Florida Power's system, none are "integrated" into Florida Power's system. *Florida Mun. Power Ag. v. Florida Power & Light Co.*, 74 FERC at 61,009-010. Of particular relevance here, the Commission found that Florida Municipal's facilities "are not used by Florida Power to provide transmission service to [Florida Municipal] or any other party. Nor are they used to transmit Florida Power's power to its non-[Florida Municipal] customers." *Id*. at 61,010 *quoted in Florida Municipal I*, 315 F.3d at 367. The

---

[2] *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[3] *Florida Mun. Power Ag. v. Florida Power & Light Co*., 67 FERC ¶ 61,167 (1994), *order granting clarif. in part and denying reh'g*, 74 FERC ¶ 61,006 (1996) ("January 5, 1996 Order"), *order denying reh'g*, 96 FERC ¶ 61,130 (2001).

Transmission Case orders affirmed in *Florida Municipal I* also accepted Florida Power's proposal to price network transmission service on a load ratio basis (*i.e.*, based on the ratio of the customer's load to the transmission provider's entire load on its system).

Proceeding in parallel with the Transmission Case, in the Order No. 888 rulemaking the Commission sought to end discriminatory and anticompetitive practices in energy markets by requiring each transmission-owning public utility to file tariffs providing for open-access transmission service, *i.e.*, access for all users on the same terms and conditions as those governing the utility's use of its own lines. Specifically, Order No. 888 required each utility to offer network service and point-to-point transmission service. Order No. 888 at 31,635-36; *see Transmission Access*, 225 F.3d at 681.

Network service, the type of service at issue in this proceeding, permits a transmission customer "to fully integrate load [(the total demand for service on a utility system)] and resources on an instantaneous basis in a manner similar to the transmission owner's integration of its own load and resources." *Florida Municipal I*, 315 F.3d at 363 (citation omitted); Order No. 888 at 31,951. Point-to-point service, by contrast, requires transmission customers to pay for service between designated points of receipt and delivery. *Florida Municipal I*, 315 F.3d at 363; *Transmission Access*, 225 F.3d at 725 n.12.

As noted above, Florida Power initiated the Rate Case in 1993 by filing a comprehensive restructuring of its tariff, including a new open access transmission tariff. On January 18, 1996, the Commission accepted for filing and suspended the tariff changes, "thus allowing [Florida Municipal] to start taking network transmission service from [Florida Power]" while proceedings continued. *Florida Power & Light Co*., 110 FERC ¶ 61,058 at P 2 (Jan. 25, 2005) ("January 25, 2005 Order"), R. 26, JA 16. On September 18, 2000, the Commission accepted a settlement agreement that resolved most of the Rate Case issues, except certain reserved issues raised by Florida Municipal. *Id*. at P 3, JA 16.

The Commission addressed the reserved issues in a December 16, 2003 order and, as relevant here, directed Florida Power "to make a compliance filing . . . of a proposed rate schedule which does not include those [Florida Power] facilities that fail to meet the same integration test applied to [Florida Municipal] facilities in the [Transmission Case]." *Florida Power & Light Co*, 105 FERC ¶ 61,287 at P 16 (Dec. 16, 2003), R. 2, JA 7, *reh'g denied*, 106 FERC ¶ 61,204 (Mar. 3, 2004), R. 8, JA 11, *remanded on other grounds*, *Florida Municipal II*.

Florida Municipal appealed the December 16, 2003 order and the March 3, 2004 rehearing order, arguing that the Commission was obligated to consider an exception to full load ratio pricing where it is physically impossible for Florida Power to serve Florida Municipal's load. In *Florida Municipal II*, this Court

remanded the Commission's orders, directing the Commission to consider Florida Municipal's argument. 411 F.3d at 292. The Commission did so, finding the exception unjustified,[4] and this Court, having "no reason to doubt the Commission's judgment," affirmed the Commission in *Florida Municipal III*. 264 F. App'x at 5. Thus, the physical impossibility exception is no longer at issue in these proceedings.

III. The Commission's Proceedings And Orders

Florida Municipal I, II and *III* each addressed the treatment of Florida Municipal's facilities for purposes of Florida Power's rates for network service. In the proceedings leading to the orders on review, the Commission addressed the rate treatment of Florida Power's own facilities, *i.e.* its rate base.

On May 14, 2004, Florida Power submitted the revised proposed rate schedule required by the Commission's December 16, 2003 order, explaining that it "distilled the network integration transmission test to four factors . . . and that a facility must pass each of these tests to be considered integrated." January 25, 2005 Order at P 4, JA 16. Florida Municipal protested, arguing that the filing did not achieve comparability, and the Commission, in the January 25, 2005 order, agreed. *Id*. at PP 12-13, JA 18-19. The Commission accepted, in concept, the four

[4] *Florida Mun. Power Ag. v. Florida Power & Light Co*., 113 FERC ¶ 61,290 (2005), *reh'g denied*, 116 FERC ¶ 61,012 (2006).

factor integration test "as a just and reasonable way to ensure rate treatment comparability between [Florida Power's] and [Florida Municipal's] facilities." *Id*. at P 11, JA 18. Of the four factors, the only one at issue in this proceeding states that "a facility that provides only unneeded redundancy is not eligible for cost recovery." *Id*. at P 13, JA 19.

The Commission concluded, however, that Florida Power had not properly applied the integration test, and specifically the "unneeded redundancy" factor, to its own facilities. *Id*. at P 11, JA 18. Although Florida Power had applied the test to two lines, it merely asserted that the rest of its facilities did more than provide unneeded redundancy. To remedy this, the Commission directed Florida Power to

> apply the test to each of its transmission facilities as they existed in the model used by [Florida Power] to analyze [Florida Municipal's] Vero Beach-to-Fort[] Pierce line's integration, and demonstrate, through modeling the system with and without the facility, that each facility included in its transmission rate base was needed to deliver power to customers in the area where the facility is located *and* to other [Florida Power] load centers.

Id. at P 13 (emphasis added), JA 19.

On April 25, 2005, Florida Power submitted a compliance filing (R. 29, JA 271) as directed by the January 25, 2005 order, proposing to remove approximately $29 million in costs from its network transmission service rates. *See Florida Power & Light Co.*, 113 FERC ¶ 61,263 at P 6 (2005) ("December 15, 2005 Order"), R. 45, JA 25. Florida Municipal again protested Florida Power's filing, arguing that it did not ensure comparability because Florida Power did not

demonstrate that each facility included in its transmission rate base is needed to deliver power both locally *and* to "other [Florida Power] load centers," as required by the January 25, 2005 order. Florida Municipal Protest at 12 (May 31, 2005), R. 34, JA 284.

The Commission accepted Florida Power's compliance filing in part, rejected it in part and ordered Florida Power to submit another compliance filing. December 15, 2005 Order at P 1, JA 23. The Commission once again faulted Florida Power's application of the "unneeded redundancy" factor, holding that "it is not clear whether [Florida Power] failed to test its non-radial [*i.e.*, looped] facilities in a manner comparable to the way it tested [Florida Municipal's] facilities." *Id*. at P 20, JA 29. "[W]ith regard to [Florida Municipal's] Fort Pierce-Vero Beach line, [Florida Power] had stated that, even without the line, [Florida Power] is able to deliver power to customers in that area and to other [Florida Power] load centers . . . ." *Id*. at P 24, JA 31. However, when testing its own facilities, Florida Power did "not indicate whether it is referring to load that is directly connected to or supplied by the faulted element [*i.e.*, the line being tested] and/or load in other [Florida Power] load centers . . . ." *Id*. at P 23, JA 31.

Florida Power sought rehearing of the December 15, 2005 order, challenging, as inconsistent with precedent, the Commission's finding that a facility provides "unneeded redundancy" only if it serves both local load *and* other

Florida Power load centers. *See, e.g.*, Florida Power Request for Rehearing of December 15, 2005 Order at 11-12 (Jan. 17, 2006), R. 47, JA 481-82. By order of July 6, 2006, the Commission denied Florida Power's request for rehearing, holding, as to the "unneeded redundancy" issue, that the request was untimely because the Commission first made the challenged ruling in the January 25, 2005 order. *Florida Power & Light Co.*, 116 FERC ¶ 61,013 at P 20 (July 6, 2006), R. 64, JA 40.

Florida Power sought rehearing, and reconsideration, of the July 6, 2006 order, leading to the orders now on review before this Court.

A. Reconsideration Order

By order of February 21, 2008, the Commission exercised its discretion to reconsider the July 6, 2006 Order. Reconsideration Order at P 9, JA 47. Taking the "unusual step of granting reconsideration," the Commission found that it had "erred," *id*. at P 9, JA 47, in its interpretation of the 1994 test applied to Florida Municipal's Fort Pierce-Vero Beach facilities, and that the test Florida Power applied to its own facilities to assess whether they provide "unneeded redundancy" is in fact comparable to the 1994 test. *Id*. at P 10, JA 47. The Commission recounted the 1994 testimony of Florida Power Witness Adjemian, explaining that the test applied to Florida Municipal's facilities examined

> whether [Florida Power] has sufficient transmission facilities in the area such that, even without the [Florida Municipal] line, [Florida Power] is able

> to deliver power to retail customers in that area *and* to transmit power to [Florida Power's] other load centers in South Florida.

Id. at P 12 (quoting Adjemian 1994 Testimony at 54, FERC Docket No. ER93-465 *et al*. (July 7, 1994) (excerpts attached as Addendum B, Add. B-9), R. 1, JAA 59), JA 48.

Upon reconsideration, the Commission determined that this language does not "signal that [Florida Power] had used a two-step threshold for integration." *Id*. at P 13, JA 48. Rather, "Adjemian focused on whether [Florida Power's] facilities could serve *all* loads absent [Florida Municipal's] . . . facilities." *Id*. Thus, the Commission determined that the 1994 test examined whether removing facilities "curtails either local or remote load, not whether it curtails both." *Id*. Turning to the test Florida Power's Witness Sanchez performed in support of the April 25, 2005 compliance filing, the Commission found that it also "considered the threshold question, whether a given facility provided *any* benefit to [Florida Power's] system . . . ." *Id*. at P 14 (citing Sanchez April 2005 Affidavit at 5-7 (attached to Florida Power April 25, 2005 Compliance Filing), JA 247-49), JA 48-49; *see also id*. nn.23-25, JA 48-49.

Finding comparability in the tests applied to Florida Municipal and Florida Power's facilities, the Commission accepted the April 25, 2005 compliance filing and rejected Florida Power's September 5, 2006 compliance filing, made in compliance with the 2005 orders and the July 6, 2006 order, as moot. *Id*. at P 1, JA

43. Commissioner Wellinghoff, now Chairman of the Commission, dissented from the Reconsideration Order, stating that while the Reconsideration Order "would provide a better basis for assessing 'unneeded redundancy,'" the record lacked sufficient evidence to support granting reconsideration. Reconsideration Order, Comm'r Wellinghoff Dissenting Statement, para. 4, JA 52.

B. Rehearing Order

Florida Municipal sought rehearing of the Reconsideration Order, disputing the adequacy of the evidentiary support for the Commission's comparability finding, asserting that the comparability principle had not been satisfied, and claiming that it can only be satisfied by reductions to Florida Power's rate base or by providing credits for Florida Municipal's facilities (the issue addressed in *Florida Municipal I*). Florida Municipal Request for Rehearing at 11-12, 43 (Mar. 21, 2008), R. 80, JA 703-04, 735.

In the final order on review in this proceeding, the Commission denied Florida Municipal's request for rehearing. Rehearing Order at P 20, JA 62. The Commission reiterated that, in the January 25, 2005 and December 15, 2005 orders, it had "misinterpreted" Florida Power Witness Adjemian's 1994 testimony, and therefore "misstated" the test. *Id*. at PP 7, 21, JA 58, 63. The Commission affirmed its finding that the "Florida Municipal facilities were 'unneeded' because they were not necessary to serve either local or – not 'and' – remote load," and that

the "Florida Power facilities that were similarly unneeded . . . were correctly eliminated from the transmission rate base." *Id*. at P 21, JA 63.

Additionally, the Commission found that Florida Power Witness Sanchez's testimony, recreating the 1994 test and applying it to Florida Power's own facilities, used base models and methodologies consistent with the 1994 test. *Id*. at PP 25-27 (citing testimony), JA 64-65. Florida Municipal brought its claims concerning the adequacy of Florida Power's evidence too late, the Commission held, noting that the 2005 orders had relied on the same testimony. *Id*. at P 30, JA 66. Indeed, in 1996 both the Commission and Florida Municipal had utilized the "same standard – i.e., whether the facility is needed to serve either local or remote load," *id*. at P 23, JA 63, when considering whether Florida Municipal's facilities qualified for credits. *Id*. at PP 22-23, JA 63-64. And, the Commission also found that Florida Municipal erred in relying on the "adverse inference" evidentiary principle, because Florida Power produced substantial evidence "from a record that stretches back to 1994," *id*. at P 32, JA 67-68, and the lack of a copy of the 1994 test is not a fatal evidentiary flaw. *Id*. at PP 31-32, JA 66-68. Finally, the Commission affirmed its conclusion that Florida Municipal's evidence purporting to recreate the 1994 test is unpersuasive, as Florida Municipal failed to follow the methodology employed by the 1994 test. *Id*. at PP 33-36, JA 68-69.

Commissioner Wellinghoff, now Chairman, again dissented from the Commission's order, agreeing "that the Commission is entitled to weigh a range of evidence in reaching a conclusion," but "continu[ing] to disagree" that the evidence justifies the comparability finding. Rehearing Order, Comm'r Wellinghoff Dissenting Statement, para. 3, JA 70.

Florida Municipal's petition for review before this Court followed.

SUMMARY OF ARGUMENT

The comparability principle that guided the Commission's and the Court's decisions in the earlier phases of this proceeding likewise controls the disposition of the instant case. In the earlier Transmission Case, the Commission considered whether Florida Municipal's facilities provide *any* benefit to Florida Power's transmission system, *i.e.*, whether Florida Power needs them to serve either local or remote load. Florida Municipal's facilities failed this broad standard because while Florida Municipal needs them, Florida Power does not.

Under the comparability principle, the Commission applies this same standard when determining whether Florida Power's facilities may be included in its rate base. Relying upon two expert Florida Power witnesses, the Commission reasonably concluded in the orders on review that applying this same standard to Florida Power's facilities reveals, perhaps unsurprisingly, that Florida Power in fact needs most of its facilities (*i.e.*, its looped transmission facilities) to provide transmission service to either local or remote load.

In the 2005 orders preceding the orders on review, the Commission misinterpreted the unneeded redundancy test. But the error of those earlier orders, candidly recognized in the orders on review, requiring that Florida Power show *both* a local *and* an area-wide benefit, contradicts the Commission's and this Court's decisions in the Transmission Case which only required the lesser showing

of *any* benefit. Florida Municipal seeks to exploit the Commission's correction of this error, but the Commission reasonably concluded that Florida Municipal's testimony does not accurately apply the unneeded redundancy test. In reaching its conclusions, the Commission drew upon the informed, credible testimony of Florida Power's witnesses concerning the 1994 test, and its weighing of the evidence before it, as in *Florida Municipal I*, warrants particular deference.

ARGUMENT

I. Standard Of Review

This Court's decisions in *Florida Municipal I*, *II*, and *III* apply the same standard of review that controls the resolution of the instant case. Generally, this Court "review[s] FERC's orders under the arbitrary and capricious standard and uphold[s] FERC's factual findings if supported by substantial evidence." *Florida Municipal I*, 315 F.3d at 365 (citing cases); 5 U.S.C. § 706(2)(A). *See also Florida Municipal II*, 411 F.3d at 291 (same); *Florida Municipal III*, 264 F. App'x at 5 (same). Under the arbitrary and capricious standard, "FERC must have 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted)) (affirming FERC's denial of complaint challenging the lawfulness of Connecticut's electricity market). In rate cases such as this, the Court recognizes that "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition," and therefore "afford[s] great deference to the Commission in its rate decisions." *Id*. (quoting *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2738 (2008)); *see also Florida Municipal III*, 264 F. App'x at 5 (the Court's "'review of

whether a particular rate design is 'just and reasonable' is highly deferential'") (quoting *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)).

In *Florida Municipal I*, the Court reiterated the familiar maxim that "[t]he 'substantial evidence standard' . . . 'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Florida Municipal I*, 315 F.3d at 365-66 (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002) (internal citation omitted)). Merely pointing to some contradictory evidence is insufficient, as "the question [the Court] must answer . . . is not whether record evidence supports [Florida Municipal's] version of events, but whether it supports FERC's." *Id*. at 368. Moreover, where, as here, "FERC decided between 'disputing expert witnesses,'" *id.* at 368 (quoting *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 746 (D.C. Cir. 2001)), this Court applies a "particularly deferential standard" of review. *Id*.; *see also Wisconsin Valley*, 236 F.3d at 746-47 ("the presence of disputing expert witnesses" is "'a factual dispute the resolution of which implicates substantial agency expertise,'" where the Court "must defer to 'the informed discretion of the responsible federal agencies'") (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989)).

Finally, Florida Municipal (*e.g.*, Br. 52) attacks the Commission's acknowledgment of its earlier error in these proceedings; however, the

Commission is not prohibited from correcting errors or even reversing course, so long as it satisfies the standards set forth above, requiring a reasoned explanation and the support of substantial evidence. *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009) ("The fact that FERC changed its approach required no additional or special explanation.") (citing *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.")).

II. The Commission Reasonably Explained That The 1994 "Unneeded Redundancy" Test, Applied To Florida Municipal's Facilities, Required A Facility To Be Needed By Florida Power To Serve Either Local *Or* Remote Load, Not Both

A. Substantial Evidence Supports The Commission's Conclusion That The 1994 Test Required Florida Municipal's Facilities To Serve Only Local *Or* Remote Load

The Commission carefully examined and reasonably weighed the evidence before it in determining that the 1994 test applied to Florida Municipal's facilities required only that those facilities be useful to Florida Power in serving either local *or* remote load. Reconsideration Order at PP 12-13, JA 47-48. The Commission reasonably relied upon the testimony of Florida Power Witness Adjemian explaining the 1994 test. *Id*.; Rehearing Order at P 21, JA 63. And, the Commission's decision, while acknowledging the error in the 2005 orders, is consistent with both Florida Municipal's arguments and the Commission's

findings, as affirmed by this Court, in the Transmission Case. Rehearing Order at PP 22-23, JA 63-64.

1. The Commission Reexamined And Reasonably Relied Upon Florida Power Witness Adjemian's 1994 Testimony

The Commission's reexamination of Witness Adjemian's 1994 testimony in the Reconsideration Order revealed that the 1994 test fundamentally considered whether Florida Municipal's facilities "provided *any* benefit to [Florida Power's] system." Reconsideration Order at P 14, JA 48-49; *see also id*. at P 12 ("The fact that a negligible amount of power can flow over the [Florida Municipal] line is not, however, determinative of *whether the line benefits [Florida Power]*.") (quoting Adjemian 1994 Testimony at 54, Add. B-9, JAA 59) (emphasis added), JA 47; Rehearing Order at P 21 ("Adjemian focused on whether Florida Power facilities could serve *all loads* absent Florida Municipal's Fort Pierce-Vero Beach line") (emphasis added), JA 63. *See also* Adjemian 1994 Testimony at 52 (even if the facilities are integrated, "there is still the issue of whether those facilities in any way benefit [Florida Power]"), Add. B-7, JAA 57.

To ascertain whether Florida Municipal's facilities provide "any benefit" to Florida Power, Florida Power tested the facilities to determine whether they are necessary for Florida Power to serve either local or remote load. Adjemian 1994 Testimony at 53 ("To resolve this issue, I applied the following tests: (i) do [Florida Municipal's] facilities reduce [Florida Power's] costs in providing

transmission service to [Florida Municipal]?, and (ii) do [Florida Municipal's] facilities reduce [Florida Power's] costs in serving [Florida Power's] other customers? The answer to both questions is 'no.'"), Add. B-8, JAA 58; *see also* Reconsideration Order at n.12 ("[Florida Power] submitted prepared testimony on July 7, 1994, June 15, 2005, July 15, 2005 and January 12, 2006, stating that its witness performed load flow studies in 1993/1994 to test the [Florida Power] system (with all of [Florida Municipal's] Vero Beach-to-Fort Pierce facilities removed from the transmission model) for violations of [Florida Power's] planning criteria . . . ."), JA 46.

As a result of the load flow studies, Witness Adjemian made the factual finding that "even without [Florida Municipal's facilities], [Florida Power] is able to deliver power to retail customers in that area *and* to transmit power to [Florida Power's] other load centers in South Florida." Reconsideration Order at P 12 (citing Adjemian 1994 Testimony at 54, Add. B-9, JAA 59) (emphasis in Reconsideration Order), JA 47-48. Construing Witness Adjemian's testimony, the Commission determined that the word "and" in this finding signals that Florida Municipal's facilities failed both prongs of the test; "[i]t does not signal that [Florida Power] had used a two-step threshold for integration." *Id*. at P 13, JA 48. In other words, based upon Adjemian's 1994 testimony, it was reasonable for the Commission to conclude that Florida Municipal's facilities were tested to

determine whether they were necessary for Florida Power to serve remote *or* local load, with the result being that they were not necessary to serve remote *and* local load.

Florida Municipal argues that because Florida Power has not produced a copy of the 1994 test,[5] the Commission must draw an "adverse inference" against Florida Power – *i.e.* assume that the test, if produced, would show that Florida Power did not treat Florida Municipal's and its own facilities comparably. Br. 34. As the Commission held, Florida Municipal misapplies the adverse inference principle: It is true that where a "party does not produce . . . information, the information is presumed to be unfavorable to that party. But this is not the end of the analysis . . . ." Rehearing Order at P 31, JA 67 (citing *Alabama Power Co. v. FPC*, 511 F.2d 383, 391 & n.14 (D.C. Cir. 1974) (applying a "reasonable inference" that the proposed reporting requirements did not harm parties as they alleged, where they "were both in a position to provide evidence and had an incentive to do so," but did not provide any additional evidence)). The party with the adverse inference "must provide adequate information to support its position," which, in this case under FPA section 825*l*(b), requires "substantial evidence." *Id.*

[5] *See* Adjemian June 2005 Affidavit at 3 (explaining that 1994 test results were a "series of load flow computer runs" with the results being "nothing more than the null set" because no violations of the applicable reliability criteria were found), R. 38, JA 353.

(citing *Town of Highland v. Nantahala Power & Light Co*, 37 FERC ¶ 61,149, *on reh'g*, 38 FERC ¶ 61,052 (1987), *aff'd*, *Nantahala Power & Light Co. v. FERC*, 727 F.2d 1342 (4th Cir. 1984) (affirming Commission orders relying on *Alabama Power Co*., applying the burden of proof to the utility (Nantahala) with exclusive access to the evidence, and ruling against the utility when it failed to come forward with sufficient evidence to satisfy that burden)). In other words, consistent with *Alabama Power* and Commission precedent, the party with the adverse inference may overcome that inference by producing other evidence and satisfying the applicable evidentiary burden.

As detailed above, Florida Power has indeed produced substantial evidence upon which the Commission reasonably relied. The Commission readily identified the fundamental principles of the "unneeded redundancy" test in Witness Adjemian's 1994 testimony. And, as further described below, the Commission relied upon the corroborating testimony of both Witnesses Adjemian and Sanchez. *Infra* Part III.A. Consistent with the Commission's application of the adverse inference principle, the Commission was "not persuaded that the lack of the 1994 model is a fatal evidentiary flaw." Rehearing Order at P 32, JA 68. For purposes of judicial review, the substantial evidence standard, "does not demand perfect information" and such evidence "may include findings made in light of uncertainty." *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 464 (D.C. Cir.

2004). In a rate case such as this, where the Court "affords great deference" to the Commission, *Blumenthal*, 552 F.3d at 881 (quoting *Morgan Stanley*, 128 S. Ct. at 2738), Florida Municipal's challenges to the Commission's determination that the 1994 test required only that a facility be needed to serve either local or remote load must fail. *See also Nantahala Power & Light Co.*, 727 F.2d at 1345 ("It is not the function of this court to reweigh the evidence and draw inferences therefrom.").

2. The Commission's Interpretation Of Witness Adjemian's 1994 Testimony Is Consistent With Commission and Court Precedent, As Well As Florida Municipal's Arguments Earlier In This Proceeding

In 1996, in the Transmission Case, the Commission relied upon this same interpretation of the 1994 test and Adjemian's findings, and this Court fully affirmed the Commission in *Florida Municipal I*. The Commission applied this standard in denying pricing credits to Florida Municipal:

> While [Florida Municipal] has the ability to use the Fort Pierce-Vero Beach line to independently transmit power between its resources and loads, Florida Power will not be using the line to transmit power for itself *or* to provide transmission service to [Florida Municipal] *or* any other Florida Power transmission customer.

Rehearing Order at P 22 (quoting January 5, 1996 Order, 74 FERC at 61,010)) (emphasis added), JA 63. Likewise, this Court relied upon the same standard in later affirming the January 5, 1996 order:

> While the [Florida Municipal] facilities may serve a transmission function on the [Florida Municipal] side of the interconnection point between [Florida Municipal] and the [Florida Power] system, they are not used by

> [Florida Power] to provide transmission service to [Florida Municipal] or any other party. Nor are they used to transmit [Florida Power's] power to its non-[Florida Municipal] customers.

Florida Municipal I, 315 F.3d at 367 (quoting January 5, 1996 Order, 74 FERC at 61,010); *see also id.* at 367 ("the expert [Witness Adjemian] further explained that [the] flow provided no benefit to [Florida Power]").

Florida Municipal's assertions that the Commission has essentially conjured anew the 1994 test and is otherwise in error (Br. 52-54) contradict not only the Commission's and Court's findings in the Transmission Case, but also its own statements in that case. On rehearing of the January 5, 1996 order, Florida Municipal did not challenge, and in fact applied, "the same standard – *i.e.* whether the facility is needed to serve either local or remote load" in arguing that its Fort Pierce-Vero Beach line qualified for credits. Rehearing Order at P 23 (citing Florida Municipal Request for Rehearing at 16-19, FERC Docket No. 93-4 (Feb. 5, 1996)), JA 63. While Florida Municipal argued, ultimately unsuccessfully, that the Fort Pierce-Vero Beach line satisfied the 1994 test, it did not challenge the test itself:

> The only question is whether under the Commission's standards the line is of sufficient benefit to [Florida Power] to provide more than 'unneeded redundancy.' . . . The Commission cites as a test whether customer-owned transmission is used for transmission of [Florida Power] power to 'provide transmission service to [Florida Municipal] or any other party . . . or to [Florida Power's] non-[Florida Municipal] customers.'

Florida Municipal Request for Rehearing at 16, FERC Docket No. 93-4 (Feb. 5,m 1996) (internal citation omitted) (quoting January 5, 1996 Order, 74 FERC at 61,010). Thus, in the Transmission Case, Florida Municipal did not dispute that its own facilities would have passed the test – and qualified for pricing credits – if they were needed by Florida Power to serve only Florida Municipal.

B. The Commission Reasonably Explained Its Conclusion That It Had Previously Misinterpreted, And Therefore Misstated, The 1994 Test

Florida Municipal incorrectly asserts that the Commission departed from precedent without adequate explanation by interpreting the unneeded redundancy test as requiring a facility to be needed by Florida Power to serve either remote or local load, not both. Br. 52. The Reconsideration Order and Rehearing Order reflect the Commission's reasoned explanation for its change in view. In the Reconsideration Order "the Commission re-examined Adjemian's 1994 testimony, realized it had erred, acknowledged its error" and, of course, corrected that error. Rehearing Order at P 21, JA 63.

As described above, the Commission found that Witness Adjemian's testimony demonstrates that the purpose of the unneeded redundancy test is to determine whether a facility provides "any benefit" to Florida Power's system. *See* Rehearing Order at P 14, JA 60. A facility need not be useful to Florida Power in serving both remote *and* local load in order to provide "any" benefit. The

Commission acknowledged its earlier error and, as discussed in Part II.A above, explained the facts in support of its interpretation in the orders on review. This Court's recent decision in *Westar v. FERC* demonstrates that nothing more is required. *Westar*, 568 F.3d 985, 989 (affirming FERC orders applying a new policy and requiring refunds) (relying on *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. at 1811 (agency "need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one")).

III. The Commission Reasonably Weighed The Evidence And Correctly Determined That The Test Applied To Florida Power's Facilities Satisfies The Comparability Principle

A. Substantial Evidence Supports The Commission's Determination That Florida Power Properly Applied The 1994 Test To Its Facilities

Florida Municipal next claims (*e.g.*, Br. 36-40, 41-42) that the Commission has violated the comparability principle as well as the just and reasonable standard of the FPA, 16 U.S.C. § 824d, by not ordering further reductions to Florida Power's rate base or credits for Florida Municipal facilities. But, "comparability, in this context, requires only that Florida Power exclude from rate base those facilities not needed to provide transmission service to either local or remote loads." Rehearing Order at P 24, JA 64. That is, Florida Power must apply the same standard to its own facilities as it applied to Florida Municipal's facilities.

Substantial evidence demonstrates that Florida Power has done just that and the resulting rates are just and reasonable.

The Commission reasonably relied upon Florida Power Witnesses Sanchez and Adjemian in finding that Florida Power applied the same test to both Florida Municipal and Florida Power facilities. First, Witness Sanchez testified that he adopted the same base model that Adjemian had used in 1994. Based upon review of Adjemian's 1994 testimony, Sanchez determined that Adjemian used the 1994 Florida Coordinating Group load flow model[6] as the base model for his tests. Rehearing Order at P 25 (citing Sanchez April 2005 Affidavit at 3-4, JA 245-46), JA 64. The Commission accepted his reasonable explanation for why Adjemian used this model: The 1994 Florida Coordinating Group model was not only the most recent available at that time, it was also the first model to include the Fort Pierce-Vero Beach line. *Id*. at P 25, JA 64. The Fort Pierce-Vero Beach line was upgraded from 69kV to 138kV in 1994 and prior to that upgrade had not been included in the Florida Coordinating Group models. *Id*. As corroborating evidence, the Commission noted Witness Adjemian's confirmation that "Mr. Sanchez is correct when he explains that the 1994 [Florida Coordinating Group]

[6] The load flow model "provides a snapshot of the system at the time of peak load, and consists of data that includes the Florida companies' respective forecasted loads, generation, expansion plans, and long-term firm wholesale obligations." Sanchez April 2005 Affidavit at 3, JA 245.

model *logically was the only model that could have been used* . . . . [because] the 138kV Fort Pierce-Vero Beach line was not placed into service until 1994." Adjemian June 2005 Affidavit at 2, JA 352 (emphasis added); *see* Rehearing Order at PP 25, 29, JA 64, 66. Florida Municipal offered no evidence to contradict these findings.

Next, Witness Sanchez testified that he used the same methodology that Adjemian had used in 1994. Rehearing Order at P 27, JA 65. Once again, based upon his review of Adjemian's 1994 testimony, Sanchez found that "Adjemian removed the Fort Pierce-Vero Beach line from the [Florida Coordinating Group] model and determined whether, without that line, [Florida Power] would be able to meet its wholesale transmission and retail obligations." *Id*. at P 28 (quoting Sanchez April 2005 Affidavit at 7, JA 249), JA 65. Again, Adjemian's 1994 testimony confirms this methodology, Adjemian 1994 Testimony at 55 ("I modeled the [Florida Power] system both with and without the interconnection [facilities] . . . ."), Add. B-10, JAA 60, as does his July 2005 affidavit. Adjemian July 2005 Affidavit at 2 ("Mr. Sanchez used the same standards and methodology when he tested [Florida Power's] transmission facilities that I used when I tested [Florida Municipal's] facilities."), R. 41, JA 387; *contra*, *e.g.*, Br. 34 (asserting that Witness Adjemian does not unequivocally state that Witness Sanchez employed the same methodology and standards).

Following this methodology, Sanchez also "remov[ed] each facility from [the] base models, and perform[ed] a load flow simulation to determine whether any reliability criteria violations occurred for a first contingency (i.e., for a sudden loss of a single transmission line, transformer, or generator)." Rehearing Order at P 27 (citing Sanchez April 2005 Affidavit at 5-7, JA 247-49), JA 65. The reliability criteria violations assessed were "whether load continued to be served, transmission facilities remained at or below 100 percent of their applicable respective thermal ratings, and voltages at substations were at or above 95 percent of nominal voltage." *Id*. The Commission previously found, in the December 15, 2005 order, that "[i]n 1994, these standards were essentially no different," and Florida Municipal has offered no evidence to the contrary. December 15, 2005 Order at P 22, JA 30.

If a first contingency resulted in a violation of a reliability criterion, Florida Power Witness Sanchez determined the facilities to be "needed, i.e., to provide more than 'unneeded redundancy.'" Rehearing Order at P 27, JA 65. Adjemian, the Commission noted, similarly analyzed the result of his testing, "conclud[ing] that Florida Power did not need to rely on the Fort Pierce-Vero Beach line, and therefore, that the line did not provide a benefit to the Florida Power transmission system." *Id*. at P 29, JA 66.

The Commission reasonably relied upon Witness Adjemian and Sanchez's testimony in finding that Florida Power comparably treated Florida Municipal's facilities and its own. As discussed immediately above, the Commission reasonably accepted Witness Sanchez's explanations for his selection of a model and methodology. *See* Rehearing Order at P 25 ("the Commission was persuaded by the reasoned explanations for the choices that Sanchez made to recreate what was, in his expert opinion, Adjemian's 1994 test"), JA 64. Adjemian's testimony is neither speculative nor hearsay (Br. 33-34): Adjemian himself conducted the 1994 test and "thus was in the best position to describe the test." Rehearing Order at P 29, JA 66. Moreover, the Commission found his 2005 testimony, confirming the test methodology, credible because it was consistent with his 1994 testimony. *Id*.

Florida Municipal also argues that Florida Power erred in testing segments of lines rather than entire lines. Br. 28-29, 49. But, the Commission reasonably determined that this claim is misdirected. Rehearing Order at P 35 (Florida Municipal "incorrectly focuses on how Florida Power should have performed an 'and' test on its own facilities"), JA 69. In other words, whether segments or lines are tested is relevant to testing whether a facility is needed to serve remote load. Thus, Florida Municipal's argument assumes that Florida Power must examine

whether a facility is necessary to serve both local "*and*" remote load.[7] As described above, the Commission found that in 1994 Adjemian did not perform an "and" test on Florida Municipal's facilities, and Florida Power is not required to perform an "and" test on its facilities here. In both 1994 and 2005, Florida Power tested Florida Municipal's and its own facilities to identify *any* benefit to Florida Power's network. Consistent with this standard, the Commission reasonably held here that "what is relevant is that both Florida Power's and Florida Municipal's facilities were comparably tested by eliminating loop flow." Rehearing Order at P 35, JA 69.

Moreover, as this Court has recognized in this very series of cases, Florida Municipal must do more than put forward "some contradictory evidence," *Florida Municipal I*, 315 F.3d at 368, or even "convince [the court] of the reasonableness of [its] views." *Florida Municipal III*, 264 F. App'x at 5 (quoting *Transmission Access*, 225 F.3d at 714). *See also Florida Municipal I*, 315 F.3d at 368 (finding Florida Municipal's evidence concerning benefits of the Fort Pierce-Vero Beach line insufficient because the "question . . . is not whether record evidence supports [Florida Municipal's] version of events, but whether it supports FERC's"). Rather,

[7] Florida Municipal's faulty assumption is demonstrated by the fact that it first raised this issue in challenging Florida Power's September 5, 2006 compliance filing, which reflected Florida Power's methodology for the "and" test, and which the Reconsideration Order dismissed as moot. *See* Br. at 16-17 (discussing Florida Municipal's October 3, 2006 Protest at 2, R. 72, JA 636).

Florida Municipal must demonstrate that the Commission's orders are so without basis that they "are arbitrary and capricious, a heavy burden indeed." *Florida Municipal III*, 264 F. App'x at 5 (quoting *Transmission Access*, 225 F.3d at 714). Florida Municipal's attempt to undercut the record support for the Commission's decision falls short of this standard. *See also Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996) (when "the subject of [the court's] scrutiny is a ratemaking--and thus an agency decision involving complex industry analyses and difficult policy choices--the court will be particularly deferential to the Commission's expertise") (citation omitted).

B. The Commission Reasonably Determined That The Test Applied To Florida Power's Facilities Satisfies The Comparability Principle And Is Therefore Fully Consistent With Commission Precedent

Far from "abandoning" comparability (Br. 52), the Commission's finding that Florida Power's treatment of its own facilities is comparable to its treatment of Florida Municipal's facilities is fully consistent with both Court and Commission precedent. In 1994 and now, the test required that a facility must be needed by Florida Power to serve local *or* remote load. Florida Municipal's facilities failed the test because while they serve *Florida Municipal's* local load, they are not needed by *Florida Power – the transmission provider* – to serve *any* load. *See Florida Municipal I*, 315 F.3d at 367.

Florida Municipal's assertions that it must receive credits or rate-base reductions appear to reflect a fundamental misunderstanding of the 1994 test and Florida Power's position as the transmission provider: The test examined whether the facilities are useful to *Florida Power* to serve *Florida Power's* transmission customers (including Florida Municipal), not whether the facilities are useful to Florida Municipal to serve its own customers. *Contra* Br. 37-39. This distinction explains why Florida Power may include in its rate base facilities that are needed to serve its transmission customers, but Florida Municipal may not receive credit for facilities that it needs (and Florida Power does not) to serve its own customers. This Court's decision in *Florida Municipal I*, 315 F.3d at 367-68, likewise recognizes repeatedly that Florida Municipal's facilities must benefit *Florida Power's* network:

- "The expert also testified that the five [Florida Municipal] facilities provide no benefit to the Florida Power network . . . ," *id*. at 367;
- "the facilities in no way reduce [Florida Power's] costs . . . ," *id*. (quotation omitted);
- "but the expert further explained that this flow provided no benefit to Florida Power," *id*.;
- "While the [Florida Municipal] facilities may serve a transmission function [for Florida Municipal] . . . they are not used by Florida Power . . . ." *Id*.

A reduction in Florida Power's rate base is appropriate only if Florida Power's facilities provide "unneeded redundancy." "Comparability, in this

context, requires only that Florida Power exclude from rate base those facilities not needed to provide transmission service to either local or remote loads." Rehearing Order at P 24, JA 64. Florida Power has removed from its rate base those facilities which do not serve either remote or local load and, consistent with the Commission's findings here, nothing more is required. *See* December 15, 2005 Order at P 6 (noting that Florida Power's April 25, 2005 compliance filing (ultimately accepted by the Commission in the Reconsideration Order) removed $29 million in costs from Florida Municipal's rates), JA 25; *see also* January 5, 1996 Order, 74 FERC at 61,010 ("while the Ft. Pierce/Vero Beach line may be redundant to certain facilities comprising the Florida Power network, unneeded redundancy provided by [Florida Municipal] cannot qualify for a credit any more than an unnecessary Florida Power transmission facility could qualify for cost recovery"). In particular, the Commission's decisions here comply with *Florida Municipal I*, which provides that rate base reductions are a means to ensure comparability – but does not require unjustified rate base reductions. *See Florida Municipal I*, 315 F.3d at 366 (Commission could not have violated comparability principle because it had not yet ruled on Florida Power's rate base). Thus, the portions of Florida Municipal's brief dedicated to potential remedies, including credits for Florida Municipal's facilities, are irrelevant. *See* Br. 44-46.

To the extent, however, that Florida Municipal argues that the test – *i.e.* whether Florida Power's facilities are necessary for Florida Power to serve either local or remote load – is not just and reasonable because "[Florida Power] does not use these facilities in selling transmission to [Florida Municipal]," Br. 39, Florida Municipal collaterally attacks the Commission's orders in the Transmission Case, as affirmed in *Florida Municipal I*, and Order No. 888, as also affirmed by this Court. *Florida Municipal I* affirmed the Commission's application of the standard requiring "any" benefit to Florida Power and mandates, through the comparability principle adopted by the Commission in this proceeding and in Order No. 888, that the Commission apply the same standard to Florida Power's own facilities. *Florida Municipal I*, 315 F.3d at 364 (discussing Order No. 888), 367 (affirming FERC's denial of pricing credits because the facilities "'are not used by Florida Power to provide transmission service to [Florida Municipal] or any other party. Nor are they used to transmit Florida Power's power to its non-[Florida Municipal] customers.'") (quoting January 5, 1996 Order, 74 FERC at 61,010).

Florida Municipal's charges of discrimination fail in the face of substantial evidence demonstrating that Florida Power applied the same test to both its own and Florida Municipal's facilities. Florida Power may disagree with the result but that alone is insufficient to support a claim that the Commission's orders finding Florida Power's rates just and reasonable are arbitrary and capricious. *See Florida*

Municipal III, 264 F. App'x at 5 (finding "no reason to doubt the Commission's judgment" where it offered a reasoned explanation for denying the requested exception).

IV. The Commission Reasonably Rejected Florida Municipal's Testimony Claiming That Its Own Facilities Satisfy The Test

Florida Municipal argues that its Witness Williams again tested the Fort Pierce-Vero Beach facilities and determined that they provide more than "unneeded redundancy" – and should therefore qualify for the pricing credits denied in *Florida Municipal I*. *E.g.*, Br. 41-42. As an initial matter, this proceeding is not an opportunity for Florida Municipal to relitigate the qualifications of its Fort Pierce-Vero Beach line, or any of its other facilities, for pricing credits. That issue is the subject of the Commission's final determinations in the Transmission Case, as affirmed by this Court in *Florida Municipal I*. *See* December 15, 2005 Order at n.33 (rejecting Florida Municipal's argument as to its own facilities as outside the scope of the proceeding), JA 31.

Moreover, the Commission reasonably explained that it was "not convinced that the test Florida Municipal now champions resembles the one that Adjemian used in 1994." Rehearing Order at P 33, JA 68. Indeed, Florida Municipal does not dispute that it is not applying the 1994 test, asserting that it is applying Florida Power's "2005 test." Br. 31. But, because the Commission found that Florida

Power employed comparable tests in 1994 and 2005, Florida Municipal should have done the same.

The Commission's analysis of Florida Municipal's Witness Williams' testimony found significant deviations from the test employed by Florida Municipal. Florida Municipal used a "multiple contingency scenario by shutting down all of the generators at either Vero Beach or Fort Pierce." Rehearing Order at P 34, JA 68. But the Commission determined that a "multiple-contingency scenario would result in an increase in the peak load that Florida Power must deliver to Fort Pierce and Vero Beach" beyond Florida Power's obligations. *Id*.; *see* Sanchez July 2005 Affidavit at 3-4 (explaining that Witness Williams "altered the 1994 [Florida Coordinating Group] model" by removing all generation at either Vero Beach or Fort Pierce), JA 393-94. Both Florida Power Witnesses Sanchez and Adjemian testified that they used single, *i.e.*, first, contingencies in their 1994 and 2005 testing. Sanchez testified that he "performed a load flow simulation . . . to determine whether any reliability criteria violations occurred for a first contingency (*i.e.*, for a sudden loss of a single transmission line, transformer, or generator) . . . ." Sanchez April 2005 Affidavit at 6, JA 248; *see also* Reconsideration Order at n.23 ("Sanchez attested that an analysis of first contingencies under the various system conditions is consistent with the analyses [Florida Power] uses when it assesses its transmission system during the planning

process."), JA 48. Witness Adjemian likewise confirmed that he used single contingencies in performing the 1994 test. Reconsideration Order at n.24 (citing, *e.g.*, Adjemian January 2006 Affidavit at 3 (describing use of single contingencies in 1994 test), R. 47, JA 519), JA 49; *see also* Adjemian July 2005 Affidavit at 3, JA 388.

As the Commission explained, Florida Municipal did not even attempt to "explain[] how the use of such [multiple] contingencies is consistent with Adjemian's 1994 description of his 1994 test." Rehearing Order at P 34, JA 68. Accordingly, the Commission rejected Florida Municipal's evidence because it did not employ the same model or comparable method as Florida Power's testing. The Commission's reasoned explanation for its rejection of Florida Municipal's testimony and its weighing of the evidence, particularly in deciding between "disputing expert witnesses," warrants deference. *Florida Municipal I*, 315 F.3d at 368.

Finally, Florida Municipal repeatedly (*e.g.*, Br. 18 n.14, 30, 49, 51) questions why Florida Power did not test the Fort Pierce-Vero Beach line again in 2005. But, as discussed in two affidavits by Florida Power Witnesses Sanchez and Adjemian, Florida Power did run the test on Florida Municipal's line again in 2005 – and reached the same result it had in 1994: the Fort Pierce-Vero Beach line does no more than provide "unneeded redundancy" on the Florida Power system.

Sanchez July 2005Affidavit at 3, JA 393; *see also* Adjemian July 2005 Affidavit at 2, JA 387; *see also Florida Municipal I*, 315 F.3d at 367-68 (finding that substantial evidence supports FERC's finding that the Fort Pierce-Vero Beach line provides "at best, 'unneeded redundancy' with Florida Power's network").

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review should be affirmed in their entirety.

Respectfully submitted,

Cynthia Marlette
General Counsel

Robert H. Solomon
Solicitor

/s/ Holly E. Cafer
Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, DC 20426
Phone: (202) 502-8485
Fax: (202) 273-0901
Email: holly.cafer@ferc.gov

August 3, 2009
FINAL BRIEF: September 22, 2009

Florida Municipal Power Agency v. FERC **Docket No. ER93-465**
D.C. Cir. No. 09-1060

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 9,004 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

/s/ Holly E. Cafer
Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
TEL: (202) 502-8485
FAX: (202) 273-0901
Email: holly.cafer@ferc.gov

September 22, 2009

ADDENDUM A

STATUTES

TABLE OF CONTENTS

PAGE

Administrative Procedure Act, 5 U.S.C. § 706(2)(A)……...A-2

Federal Power Act, Section 201(b)(1), 16 U.S.C. § 824(b)(1)……..A-3

Federal Power Act, Section 205(a)-(b), 16 U.S.C. § 824d(a)-(b)…….A-4

Federal Power Act, Section 206(a), 16 U.S.C. § 824e(a)……..A-5

Federal Power Act, Section 313(b), 16 U.S.C. § 825*l*(b)……..A-6

The Administrative Procedure Act, 5 U.S.C. § 706, provides as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

Section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1), provides as follows:

(b)(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

Section 205(a)-(b) of the Federal Power Act, 16 U.S.C. § 824d(a)-(b), provides as follows:

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 206(a) of the Federal Power Act, 16 U.S.C. § 824e(a), provides as follows:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), provides as follows:

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

ADDENDUM B

ADJEMIAN 1994 TESTIMONY

UNITED STATES OF AMERICA

Before The

FEDERAL ENERGY REGULATORY COMMISSION

FLORIDA POWER & LIGHT COMPANY

DOCKET NO. ER93-465-000, ET AL

PREPARED ANSWERING TESTIMONY OF KARABET ADJEMIAN

JULY 7, 1994

The FCG, which is made up of all of the utilities in Florida, provides for utilities to make available to a central data bank a host of information concerning their respective loads and load forecasts, generating resources, and expansion plans. This information is then compiled in a standard, agreed-upon format to be used by each utility in conducting its own analyses. The FCG also provides a forum for the utilities to discuss such topics as planned projects and state-wide operating procedures. However, coordinated planning under the FCG does not treat the utilities' loads, resources and transmission facilities as part of a single integrated system.

Q. Can it be reasonably said that the internal facilities owned by the FMPA member cities are a part of the FPL transmission system?

A. No. The participants who are located throughout FPL's service territory can be classified into two categories: utilities that are interconnected only with the FPL transmission system at a single receipt/delivery point, and utilities that, in addition to FPL, are interconnected with each other, also through a single receipt/delivery point. This is depicted graphically on Figure 1 below.

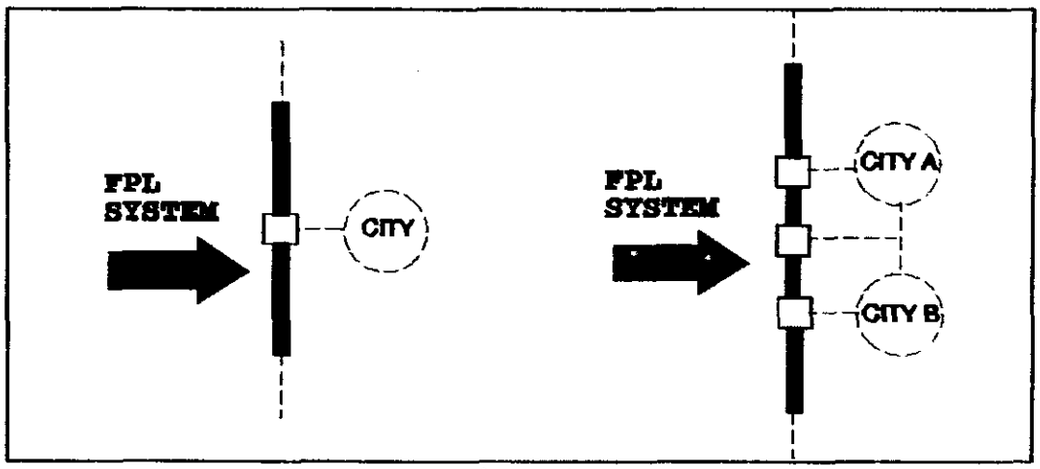

Figure 1

Q. Who are the single interconnection cities?

A. Certain of the IDO members, namely, Key West, Lake Worth, Clewiston, Green Cove Springs, and Jacksonville Beach are interconnected only with the FPL transmission system. This is also true of the Florida Cities of Homestead and Starke, both of which are also FMPA members. As depicted in Figure 2, these utilities' facilities generally consist of a delivery transmission system, internal facilities used to distribute power from the delivery point to their customers, and, in the case of Key West, Lake Worth and Homestead, various generating resources and facilities to deliver power from those resources to their customers. The cities' internal facilities that operate at transmission voltages typically consist of those facilities that deliver power from the interconnection with the FPL system into the distribution system and those facilities that run from the local generation and feed into the distribution system. Figure 2 shows that each of

these utilities essentially can be thought of as a "dead-end" off the FPL system, in that, just as with the FPL distribution substations, power delivered from the FPL transmission system necessarily must be consumed wholly within the city; i.e., the internal facilities do not provide a parallel path for FPL.

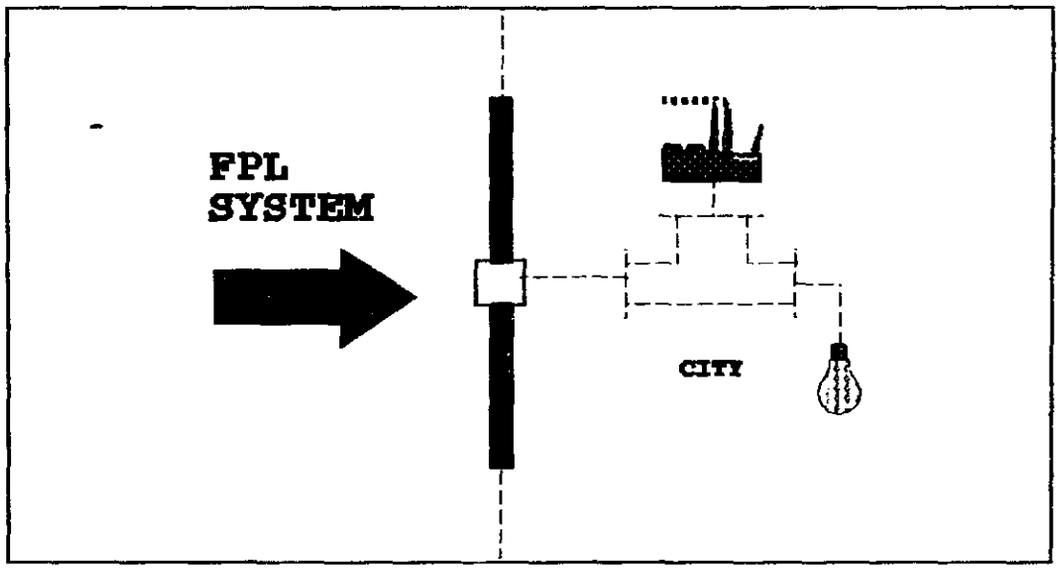

Figure 2

Q. Please continue.

A. Figure 2 also demonstrates that the cities' internal facilities serve one purpose -- they deliver power to or from FPL and, where applicable, from local generation. These facilities were built either because the internal distribution systems are not located immediately adjacent to FPL's transmission system or the local generation is not located immediately adjacent to their internal distribution systems. As Figure 3 shows, from the perspective of planning the FPL transmission system,

these systems can be represented electrically simply as a load (and, where applicable, a generating resource) located at the delivery point interconnected with the FPL transmission system; i.e., without any internal transmission facilities.

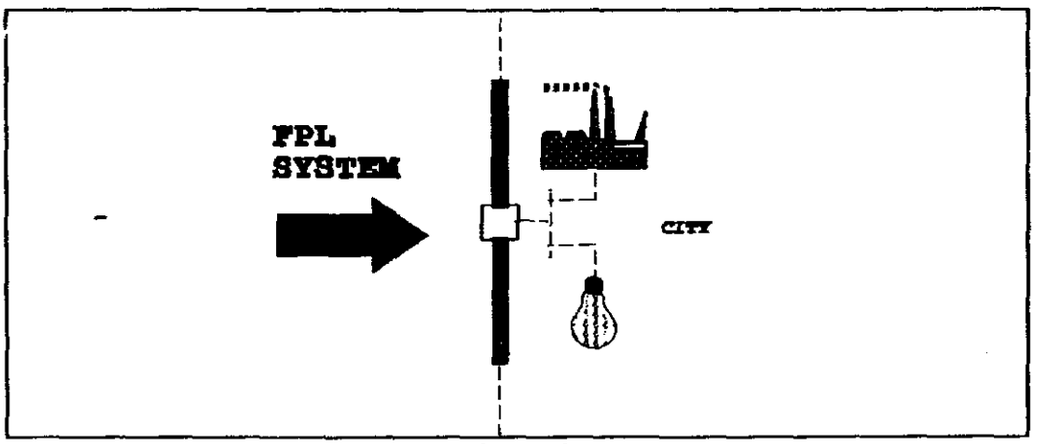

Figure 3

Q. What about other FMPA cities in FPL's service territory?

A. In contrast to the utilities interconnected only with FPL, the electric facilities of Vero Beach and Fort Pierce -- also IDO members -- are interconnected with the FPL system and with each other. As Figure 4 depicts, like the other utilities, Vero Beach's and Fort Pierce's internal facilities enable the cities to receive power from and/or deliver power to the FPL system and to receive power from their local generation. The addition of the interconnecting line enables one city to receive power from the local generation of the other city.

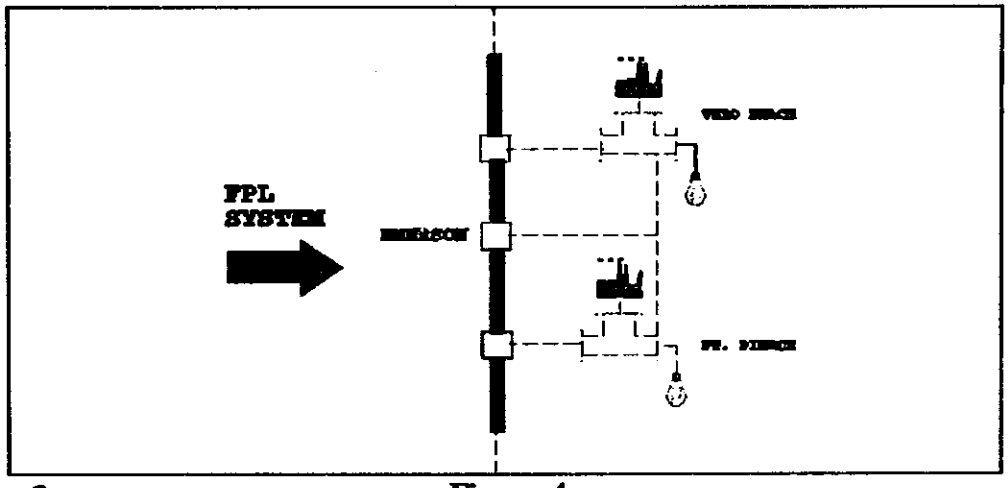

Figure 4

Q. Please continue.

A. With the exception of the line interconnecting the cities, the internal facilities of Vero Beach and Fort Pierce perform the same function as in the other cities.

Figure 5 shows, however, that from FPL's transmission planning perspective, the line does not change the fact that Vero Beach and Fort Pierce consist of load and resources interconnected directly at the FPL delivery points.

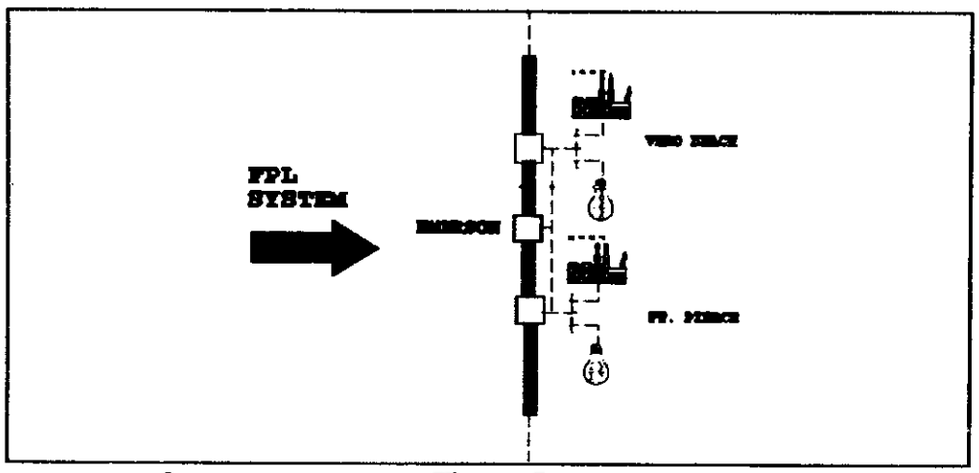

Figure 5

Q. Please summarize.

A. The internal facilities serve the limited purpose of enabling the cities either to deliver power to the FPL receipt points or receive power from the FPL delivery points. The size and type of these facilities are immaterial as they have no impact on FPL's planning process. None of the internal facilities are or will be used by FPL to integrate FPL's load and generation. Accordingly, those internal facilities cannot be considered to be part of FPL's integrated system.

Q. Do any of the cities internal facilities reduce FPL's costs in providing transmission service?

A. No. Even if one could assume that the cities' internal facilities and FPL's transmission system are part of an integrated transmission grid, there is still the issue of whether those facilities in any way benefit FPL; i.e., reduce FPL's costs

enabling FPL to defer or cancel investment in transmission facilities as a result of the facilities owned and operated by those members. To resolve this issue, I applied the following tests: (i) do the cities' facilities reduce FPL's costs in providing transmission service to them?, and (ii) do the cities' facilities reduce FPL's costs in serving FPL's other customers? The answer to both questions is "no."

As for the cities with a single receipt/delivery point, the resolution of the issue is rather straight-forward. The facilities needed for FPL to transmit power to and from the cities' delivery points would be the same whether those cities had internal transmission facilities or whether the cities' generation and distribution facilities were connected directly to the delivery point interconnecting the FPL transmission system with the individual cities. Removing the internal facilities would have no impact on the FPL transmission system. In addition, because these cities essentially are dead-ends off the FPL transmission system, none of the cities' internal facilities provide any benefit in serving any of FPL's other customers. As such, none of these facilities will enable FPL to defer or cancel any future investment in transmission facilities.

Q. What about cities that are interconnected?

A. I applied the same analyses to Vero Beach and Fort Pierce. The distinction between the two cities from the other cities is that Vero Beach and Fort Pierce built a line that enables them to directly exchange power. Even with the interconnecting line, however, the two cities' internal facilities do not reduce FPL's costs in providing network transmission service because the line has a negligible electrical impact on FPL's ability to transmit power to and from the two cities. Indeed, FPL would not have built this line to provide reliable service to Vero Beach and/or Fort Pierce.

Q. Please continue.

A. In addition to providing an interconnection between Vero Beach and Fort Pierce, the line provides an electrical path from the FPL system, through one or both of the cities, and back to the FPL system. The fact that a negligible amount of power can flow over the line is not, however, determinative of whether the line benefits FPL. The question is whether FPL has sufficient transmission facilities in the area such that, even without the line, FPL is able to deliver power to retail customers in that area and to transmit power to FPL's other load centers in South Florida. Until recently, the 69 kV interconnection between the two cities was not included in the FCG data bank and, therefore, could not even have been modeled by FPL. Since the cities updated the line to 138 kV and have included it in the

FCG data bank, I modeled the FPL system both with and without the interconnection to ascertain whether the line would allow FPL to defer or cancel any facilities that currently are included within FPL's ten-year transmission expansion plan. The results show that in no cases did the interconnection benefit FPL by allowing any such deferrals or cancellations.

Q. Would FMPA's IDO Project change anything?

A. The IDO Project would change the way that FPL has to plan its transmission system to accommodate the expanded and more flexible uses proposed by FMPA. However, implementation of the Project will not cause any additional "integration" of FPL's and FMPA's respective transmission facilities. In terms of integration of the transmission facilities, the IDO Project represents no change from the point-to-point regime that exists under the current contracts between FMPA and FPL. Under both scenarios, FPL plans (i) to receive power from the receipt point interconnecting FPL with the system upon which the generating resource is located (for example, Lake Worth), and (ii) to deliver that power to the delivery point interconnecting FPL with the system that has contracted to receive the power (for example, Clewiston). Under neither scenario, however, is FPL's planning process impacted by the internal facilities located on either side of the interconnection with FPL's transmission system.

Florida Municipal Power Agency v. FERC **Docket Nos. ER93-465*, et al.***
D.C. Cir. No. 09-1060

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 22nd day of September 2009 served the following upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

Clifford M. Naeve — US MAIL
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005

Daniel I. Davidson — EMAIL
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Glen Scott Bernstein — US MAIL
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005

Kathryn Baran — EMAIL
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005

Peter J. Hopkins — EMAIL
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Rebecca J. Baldwin — EMAIL
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Robert A. Jablon — EMAIL
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Stephen L. Huntoon — US MAIL
Florida Power & Light Company
801 Pennsylvania Avenue, NW
Suite 220
Washington, DC 20004-0000

/s/ Holly Cafer
Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-8485
Fax: (202) 273-0901
Email: holly.cafer@ferc.gov