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ORIGINAL

May 8, 2002

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RE: Docket No. 020233-EI

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Public Counsel's Pre-Workshop Comments on the GridFlorida Companies' Independent System Operator Proposal for filing in the above referenced docket.

Also enclosed is a 3.5 inch diskette containing the Public Counsel's Pre-Workshop Comments on the GridFlorida Companies' Independent System Operator Proposal in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,


John Roger Howe
Deputy Public Counsel

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of GridFlorida Regional)
Transmission Organization Proposal.)
_____)

Docket No. 020233-EI
Filed: May 8, 2002

**PUBLIC COUNSEL'S PRE-WORKSHOP
COMMENTS ON THE GRIDFLORIDA COMPANIES'
INDEPENDENT SYSTEM OPERATOR PROPOSAL**

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to the Orders Establishing Procedure (Order No. PSC-02-0459-PCO-EI, issued April 3, 2002, and Order No. PSC-02-0548-PCO-EI, issued April 22, 2002) provide the following pre-workshop written comments:

1. It has been the Public Counsel's position throughout this docket (and its predecessors) that the Commission should not, indeed cannot, permit or cause Florida's investor-owned electric utilities to transfer any portion of traditional retail oversight from the Commission to the Federal Energy Regulatory Commission. Although Order No. PSC-01-2489-FOF-EI is not always perfectly clear on the subject, it appears that the Commission rejected GridFlorida as a transco because, in the Commission's estimation, that form of RTO structure would divest the Commission of jurisdiction over the transmission component of bundled retail sales. Even though the GridFlorida Companies' Compliance Filing asks the Commission to "determine that this filing is in full compliance with the Order," the current proposal is facially antithetical to the Commission's retention of its historic jurisdiction.

2. The Commission's Order No. 01-2489 reached three fundamental conclusions. The Commission found the decision by Florida's largest investor-owned electric utilities to participate in an RTO in response to FERC's Order No. 2000 was, in fact, voluntary. The Commission also concluded that, even though participation was voluntary, the utilities acted prudently in response to FERC's not-so-veiled threats by proposing GridFlorida as a Peninsular Florida RTO. The Commission disagreed, however, with formation of GridFlorida as a transco. Transferring ownership of FPL's and Tampa Electric's transmission assets to the RTO was not acceptable because it would divest the Commission of its traditional jurisdiction. The GridFlorida companies were therefore given ninety days to modify their proposal and return with one in which GridFlorida was configured as an independent system operator because

[u]nder 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. This view was supported by witness Southwick who indicated that the revenue requirement approved by this Commission for FPC, which would retain ownership of its transmission assets and keep those assets on its books, would be an input into FERC's establishment of a revenue requirement for GridFlorida.

Order No. 01-2489, at 15 [Emphasis added].

Implicitly, the Commission's ultimate conclusion was that formation of GridFlorida was acceptable only if creation of the RTO would not lessen the Commission's statutory jurisdiction.

Thus, the GridFlorida Companies' March 20, 2002, Compliance Filing could only conform to Order No. 01-2489 if it leaves the Commission's historic jurisdiction intact.

3. It appears, however, that the Compliance Filing would effect a transfer of jurisdiction from this Commission to FERC: (1) The GridFlorida Companies (not the Commission and not Florida Statutes) determine the extent and duration of traditional retail regulatory oversight; (2) The Commission would only have the authority to set GridFlorida's retail revenue requirements during a five-year transition period, and that authority would only apply to "existing" transmission facilities; and (3) Additional costs, including a Grid Management Charge, a new system-wide rate for new transmission facilities, and a pro rata share of the revenue requirement of transmission dependent utilities would be established by FERC and passed through to bundled retail load even during the transition period.

4. The GridFlorida Companies are in the unenviable position of trying to serve two masters. It may very well be that the companies cannot fashion an RTO proposal which satisfies FERC while leaving the Commission's traditional jurisdiction intact. Perhaps such a conundrum was bound to surface when the "bright line" separating jurisdictions was intentionally blurred. But it's important not to lose sight of the fact that FERC in its Order No. 2000 did not make RTO participation mandatory; it is voluntary, as the Commission found in Order No. 01-2489. See Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607, 609-610 (D.C. Cir. 2001) ("We hold first that the challenged requirements of Order 2000 are voluntary and impose no mandatory requirements upon the Utilities, and second, that the Utilities have failed to demonstrate that they are aggrieved by Order 2000.") FERC may someday preempt the Commission's jurisdiction, or a court of competent jurisdiction may modify its authority, or the

Legislature may alter the Florida regulatory scheme, but until something of that nature happens, the Commission cannot acquiesce in the transfer of any of its responsibilities. Certainly, voluntary action by companies regulated by the Commission could never be the vehicle for a diminution of its jurisdiction.

5. Let's focus on one aspect of the current GridFlorida proposal, the five-year transition period. At the transmission customer's (i.e., the electric utility's) "option," that customer's bundled retail load will be exempt from the zonal charges under the GridFlorida tariff for the transition period. The GridFlorida companies will "choose" (Where? At FERC?) to exempt their own bundled retail load. And the Commission will have the authority "during the transition period" to set the revenue requirement for "existing" transmission facilities. Chapter 366, Florida Statutes, in its present form, of course, does not have an expiration date. Are the GridFlorida Companies giving the Commission permission to continue regulating them under Chapter 366, but only for five more years? Are the GridFlorida Companies deciding for themselves that the Commission will no longer exercise revenue requirement jurisdiction over new transmission assets (which can only be sited in the first place with the Commission's approval)? Does Chapter 366 have any continued viability (or applicability) if the Commission's delegation comes from the GridFlorida Companies instead of from the Legislature? The Commission has always held that it cannot bind future Commissioners. Can a Commission decision today decide for another Commission five years down the road that its jurisdiction over the transmission component of bundled retail rates has come to an end?

6. It might be worthwhile to review how things got to this point. FERC believes competition in the wholesale generation market cannot develop and thrive if transmission owners

are able to discriminate against competitive suppliers in favor of their own generating resources. FERC's earlier attempt to alleviate this situation was embodied in its Order No. 888. In that order, FERC directed transmission owning utilities to file Open Access Transmission Tariffs (OATT's) which would require them to take transmission service from their own assets at the same rates they charged competitors. Significantly, the OATT did not apply when the transmission owner transmitted electricity (whether from its own generators or purchased power) to its own retail native load customers as part of bundled retail service. The OATT was inapplicable in this situation because FERC acknowledged it had no jurisdiction over any part of a transmission owner's bundled retail sale to its own customers.

7. FERC did, however, believe it could require that curtailments be prorated between an electric utility's wholesale and retail customers so that the utility could not discriminate in favor of its own retail native load customers. That position, however, was rejected by the 1999 decision of the Eighth Circuit Court of Appeals in Northern States Power Company v. FERC, 176 F.3d 1090, in which the court expressly disagreed (at 176 F.3d, 1095-96) with FERC's contention that "where there is a clash between its tariffs and the state law, the federal tariff must prevail under the Supremacy Clause." After noting (at 1096) that "FERC concedes that it has no jurisdiction whatsoever over the state's regulation of NSP's bundled retail sales activities," the court concluded that "[FERC's] attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside the [Federal Power Act's] specific grant of authority to FERC." After Order No. 888, the transmission component of bundled retail sales was strictly a matter of state regulation, as was the priority of service to be given to retail, native load customers.

8. While Florida's investor-owned electric utilities may have had to contend with a paradigm shift at FERC, it was business as usual in the Florida retail jurisdiction where regulation pursuant to Chapter 366, Florida Statutes, had always resulted in bundled retail electric service. FERC had clarified in Order No. 888-A, at 117-18, that a transmission provider "did not have to" use the pro forma tariff for wholesale purchases going to bundled retail load. Florida's investor-owned electric utilities apparently interpreted these words as being synonymous with "voluntary" or "not mandatory," and even today they do not apply their OATT's to retail load. (In the Executive Summary to their Compliance Filing, at page 5, the GridFlorida Companies noted that they "do not, however, pay for transmission service associated with bundled retail load under their FERC tariffs, leaving the [Florida] Commission with the jurisdiction to set the transmission component of bundled retail service." One is left to wonder if the companies think it was their decision not to adopt the OATT for retail load that permits the Commission to exercise jurisdiction over them pursuant to Chapters 350 and 366.) Thus, the state and federal jurisdictions remained clearly delineated by the "bright line" called for in Federal Power Commission v. Southern California Edison Company, 376 U.S. 205 (1964). It could hardly have been otherwise. FERC had apparently done all it could to mandate competition for wholesale electric generation without crossing the federal/state jurisdictional line. And the Commission could do nothing, absent legislative action, to change the extent of its retail jurisdiction over electric companies. Retail transmission might still move under the Federal umbrella if Florida were to voluntarily unbundle retail transmission pursuant to a competitive initiative, but retail restructuring in Florida was not in the offing.

9. Even though FERC had done all it could to force wholesale competition, it still believed Order No. 888 had not gone far enough. The actual or perceived ability of a transmission owner to discriminate in favor of its own generation in the wholesale market remained. FERC's solution was expressed in Order No. 2000 where electric utilities were strongly encouraged to form independent RTO's. Although participation in an RTO would be strictly voluntary, a failure to participate might lead to the denial of mergers and the denial of market-based wholesale rates. Since the RTO would be a FERC-regulated interstate transmission company, the jurisdictional limitations which prevented Order No. 888 from offering global solutions might be overcome. Transmission service at FERC-approved rates would apply to both wholesale and retail load. The bundled-versus-unbundled distinction might become irrelevant because the RTO would not, by definition, have native load customers of its own to receive the power. The RTO's customers would, instead, be electric utilities. With this approach, it would no longer make any difference whether retail transmission service was unbundled through retail restructuring. FERC would have jurisdiction simply by virtue of the RTO's existence as an interstate transmission company. All that was needed to make RTO's a reality was for investor-owned electric utilities to voluntarily turn over ownership or operational control of their transmission assets to an RTO.

10. This brings us to the Compliance Filing now before the Commission. Order No. 01-2489 rejected the original GridFlorida transco proposal. The companies' acquiescence in that decision demonstrates that the Commission has the authority to prevent electric utilities under its jurisdiction from transferring away assets used and useful in providing retail service. The Commission concluded it will only allow voluntary RTO participation if it leaves the

Commission's historic jurisdiction over retail transmission assets undisturbed. The Compliance Filing fails in this regard by assuming the Commission has the discretion to accept something less than a full loaf where its jurisdiction is concerned. The GridFlorida Companies' fundamental error was their attempt to "retain as much [Commission] authority over retail transmission revenue requirements for existing facilities as possible, while retaining the overall pricing protocol approved by FERC." Executive Summary, at 4. The companies, however, were not tasked to act on the Commission's behalf before FERC so that as much jurisdiction as FERC deigns to allow could be salvaged. It is not FERC's decision to make. Until directed otherwise by a higher authority, the Commission cannot allow utilities over whom it exercises total retail authority to decide through voluntary action how its jurisdiction over them should be constrained in terms of time and assets.

11. The Preliminary List of Workshop Subjects identified in Staff's April 12, 2002, memorandum would appear to be largely irrelevant since the Compliance Filing does not conform to the directions given to the GridFlorida Companies in Order No. 01-2489. However, a short statement of Public Counsel's position (or statement of no position) is provided as follows:

Preliminary List of Workshop Subjects

Structure and Governance

1. Appropriateness of a not-for-profit versus for-profit ISO

OPC's Position: No position.

2. Flexibility of RTO plan and documents, such as the By-Laws, the POMA, and the Agency Agreement, to change over time

OPC's Position: No position.

3. Applicability of Code of Conduct to GridFlorida, the Board of Directors, the Board Selection Committee, and the Stakeholder Advisory Committee

OPC's Position: No position.

4. Meetings open to the public

OPC's Position: No position.

5. Performance incentives and the mechanism to implement incentives, i.e., who has approval authority

OPC's Position: No position.

6. Role of the Florida Public Service Commission

OPC's Position: The Commission cannot allow its jurisdiction to be defined or limited by utilities over whom it exercises total retail jurisdiction.

Planning and Operations

7. Consideration of demand side options and generation alternatives when identifying needed expansion and maintaining reliability

OPC's Position: No position.

8. Available transmission capacity (ATC) and the role of participating owners in determining ATC

OPC's Position: No position.

Market Design

9. Use of physical transmission rights

OPC's Position: No position.

10. Method for determining flowgates

OPC's Position: No position.

11. Pricing of ancillary services

OPC's Position: No position.

Pricing Protocol and Rate Design

12. Details of cost recovery mechanism

OPC's Position: Cost recovery should not be permitted.

13. Inclusion of transmission dependent utility (TDU) costs in zonal rates

OPC's Position: No position.

14. Revenue shifts resulting from de-pancaking of rates

OPC's Position: No position.

12. Two additional issues should be added to Staff's list:

New Issue: Does the Compliance Filing conform to the directions of Order No. PSC-01-2489-FOF-EI?

OPC's Position: No. The Compliance Filing should be rejected because it would effect a transfer of jurisdiction from the Commission to FERC.

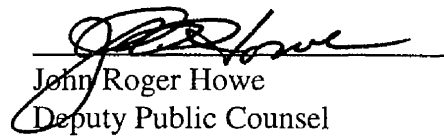
New Issue: Will native load retail customers retain priority of service during curtailments under the Compliance Filing?

OPC's Position: No.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to find that the GridFlorida Companies purported Compliance Filing is not in compliance with Order No. PSC-01-2489-FOF-EI.

Respectfully submitted,

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**CERTIFICATE OF SERVICE
DOCKET NO. 020233-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing PUBLIC
COUNSEL'S PRE-WORKSHOP COMMENTS ON THE GRIDFLORIDA COMPANIES'
INDEPENDENT SYSTEM OPERATOR PROPOSAL has been furnished by U.S. Mail or

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