

IN THE SUPREME COURT OF FLORIDA

Case No. SC02-2159

CITIZENS OF THE STATE OF FLORIDA,

Appellants,

vs.

LILA A. JABER, et al.,

Appellees.

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ON APPEAL FROM A FINAL ORDER OF THE  
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEES  
MIRANT AMERICAS DEVELOPMENT, INC.  
AND  
CALPINE CORPORATION

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## **PRELIMINARY STATEMENT**

This is an appeal from an order of the Florida Public Service Commission. The Appellants are the Citizens of the State of Florida, as represented by the Office of Public Counsel, and will be referred to as Public Counsel. Among the Appellees are the Public Service Commission (the “PSC” or “the Commission”), Tampa Electric Company, Florida Power & Light and Florida Power Corp. (collectively referred to as “the GridFlorida applicants”), and a host of intervenors before the PSC. This brief is filed on behalf of Mirant Americas Development, Inc. (“Mirant”) and Calpine Corporation (“Calpine”), both of which were intervenors below.

Mirant and Calpine adopt and incorporate by reference those arguments made by the PSC in its answer brief with respect to Issues I, II, IV and VIII. All references to the record are designated by volume and page number, and all emphasis is supplied by Mirant and Calpine unless otherwise indicated.

## **STATEMENT OF THE CASE AND FACTS**

This Court’s review is limited to those matters considered by the Commission in the record developed before the agency. See section 120.68(7), Florida Statutes; International Minerals & Chemical Corp. v. Mayo, 217 So. 2d 56 (Fla. 1969). Accordingly, Mirant and Calpine Corporation adopt the Statement of the Case and Facts presented by the PSC which is limited to the record compiled below.

## **SUMMARY OF THE ARGUMENT**

Public Counsel has appealed the action of the Public Service Commission which finds, in part, the GridFlorida applicants' modified proposal of a Regional Transmission Organization ("RTO") from a Transco to an independent system operator ("ISO") to be, for the most part, in compliance with a prior order of the Commission, i.e., Order No. 01-2489. The Commission's jurisdiction is based upon "the provisions of Chapter 366, Florida Statutes, including, but not limited to, Sections 366.04, 366.05, and 366.06, Florida Statutes." (R-23-4359) Although Public Counsel attempts to couch his arguments as an appeal from the September 3, 2002, final order of the PSC (Order No. 02-1199), his arguments either address issues that were decided as final agency action in Order 01-2489 or will be addressed in a future case and controversy that is not yet before the Court.

In many respects, Public Counsel is asserting that the PSC erred when it rendered its Order 01-2489, which stated the PSC's position with respect to the wholesale market and directed the GridFlorida applicants to submit a revised proposal based upon an ISO model. The December 20, 2001 order provided notice of the parties' right to judicial review, as required by Chapter 120, Florida Statutes. Public Counsel did not appeal Order 01-2489, which was rendered December 20, 2001. Having chosen to forego his opportunity to appeal that decision, he cannot attack it

through review of the September 3, 2002 order.

To the extent that Public Counsel's position has not been waived, it is premature. While he touts a parade of horrors regarding what might occur, in fact all of the possible outcomes to which he alludes are speculative. As such, there is no present case or controversy about which to complain. Moreover, while Public Counsel asserts that the Commission has by this Order "implemented a fundamental change in the way electric utilities are regulated in Florida," he never identifies how the PSC's function or processes will change. Public Counsel also advocates the Commission exercising its jurisdiction in a vacuum. The Commission not only must act within the ambit of its legislatively delegated authority, but must also recognize where the boundaries of that authority intersect with that of the Federal Energy Regulatory Commission ("FERC"). The Order under review manages to walk that fine line and should be affirmed. Any changes in the boundaries of the PSC's jurisdiction vis a vis the Federal Energy Regulatory Commission should await a definitive decision by that agency that is properly presented to the courts for review. This decision, however, does not present the controversy Public Counsel seeks to address.

## **STANDARD OF REVIEW**

The Commission's orders come to this Court "clothed with the statutory presumption that they have been made within the Public Service Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." Panda Energy International v. Jacobs, 813 So.2d 46, 52 (Fla. 2002), quoting Gulf Coast Elec. Coop., Inc. v. Johnson, 727 So.2d 259, 262 (Fla. 1999). The Commission is accorded this deferential standard regarding the interpretation of the statute it is charged with enforcing because of the specialized knowledge and expertise in the area the PSC regulates. Gulf Coast Electric Coop., Inc. v. Johnson, 727 So. 259, 262 (Fla. 1999). Accordingly, in order to overcome this presumption of correctness, Public Counsel bears the burden of showing a departure from the essential requirements of law, and the Commission's findings and conclusions will be approved unless they are not supported by competent, substantial evidence or are clearly erroneous. Gulf Coast; Ameristeel Corp. v. Clark, 691 So.2d 473, 477 (Fla. 1997).

## **ARGUMENT**

### **I. THE COMPANIES' CUSTOMERS WERE NOT ADVERSELY AFFECTED BY THE PSC'S ORDER NO. 02-1199**

Mirant and Calpine adopt by reference the argument made by the Public Service Commission in its answer brief. Mirant and Calpine also join in the request that Public Counsel's appeal be dismissed.

**II.**  
**THE PSC'S PROCEDURES DID NOT VIOLATE THE  
ADMINISTRATIVE PROCEDURES ACT, CHAPTER 120,  
FLORIDA STATUTES**

Mirant and Calpine adopt by reference the argument made by the Public Service Commission in its answer briefs.

**III.**  
**AN RTO SUCH AS GRIDFLORIDA IS CONSISTENT  
WITH EXISTING FLORIDA LAW**

Public Counsel asserts that "in order to conform to FERC's order, the GridFlorida Transco's revenue requirements and rates, for both wholesale and retail purposes, would be filed with and approved by FERC, and the RTO, under FERC's supervision, would have ultimate responsibility for expansion of the transmission grid." Appellant's brief at 22. Based upon this assertion, Public Counsel claims that the PSC has improperly delegated its own Grid Bill and ratemaking authority to FERC. Public Counsel's assertion is misleading in two respects: 1) under Order No. 02-1199, GridFlorida would not be a Transco; and 2) the statement regarding what would occur is inconsistent with Order No. 01-2489, which is beyond review.

In Order No. 01-2489, the PSC found that transfer of ownership of transmission assets that would take place under a Transco model would not be in the best interests of Florida's retail ratepayers at this time, and ordered that GridFlorida be structured as an independent system operator (ISO). Accordingly, the PSC ordered the GridFlorida companies to modify the proposal consistent with the PSC's findings in that order. (R-VII- 1328, 1335). The GridFlorida Applicants then filed a new, modified ISO proposal which was the subject of Order No. 02-1199. (R-8-1459; 23-4358). Public Counsel's assertions regarding what would happen with respect to GridFlorida as a Transco model have absolutely no relevance to the findings in the Order under appeal. Given the Commission's rejection of the Transco model in Order No. 01-2489, any perceived deficiencies regarding the original proposal are now moot.

Further, Public Counsel's description of how revenue requirements and rates would be handled is inconsistent with what the PSC ultimately found, even in Order No. 01-2489. That Order stated:

Under several provisions of Chapter 366, Florida Statutes, this Commission is charged with the responsibility of establishing fair and reasonable retail rates for Florida's investor-owned electric utilities, which include the GridFlorida Companies. We believe that under the transco model proposed for GridFlorida, it would be difficult for this Commission to retain ratemaking and cost control jurisdiction over the retail component of transmission. In essence, our approval of the transco model could be

viewed as a voluntary unbundling, because ownership of transmission assets would be transferred away from the retail-serving utility. However, under an ISO model, where the ownership of transmission assets is retained by the individual retail-serving utilities, we believe this Commission should continue to set the revenue requirements needed to support retail transmission service and retain oversight over cost control and cost recovery. The retail transmission revenue requirement set by this Commission would then be an input into the FERC ratemaking process, to which would be added the appropriate and prudently incurred management and operating costs of the ISO. 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.

(R-VII-1338). Public Counsel chose not to appeal Order 01-2489. That Order clearly indicated that it was final agency action with respect to the direction that a Transco model was unacceptable and that new proposal based upon an ISO be submitted. Having chosen not to appeal Order 01-2489, the merits of that order are beyond review. Guest v. Department of Professional Regulation, 429 So.2d 1225 (Fla. 1<sup>st</sup> DCA 1983). See also Escobar v. Economy Awning Co., 559 So.2d 367 (Fla. 1<sup>st</sup> DCA 1990); Sponholtz v. Estate of Sponholtz, 468 So. 2d 385 (Fla. 3d DCA 1985); Universal Erectors, Inc. v. Murphy, 410 So.2d 209 (Fla. 1<sup>st</sup> DCA 1982); Vetric v. Hollander, 379 So.2d 970 (Fla. 4<sup>th</sup> DCA 1979), review denied, 389 So.2d 1988).

Moreover, nothing in Order 02-1199 changes the PSC's jurisdiction over the retail rates of a public utility supplying electricity to the public, and Public Counsel does not explain how the PSC's jurisdiction is different as a result of this Order. The PSC's jurisdiction over retail rates is supplied by Chapter 366, Florida Statutes, and FERC's jurisdiction over interstate transmission service is established by the Federal Power Act. Neither the actions of the GridFlorida applicants nor the issuance of Order 02-1199 changes either entities' jurisdiction.

**IV.  
THE PSC IS NOT PROHIBITED FROM SUPPORTING  
FERC'S PROMOTION OF WHOLESALE COMPETITION**

Mirant and Calpine adopt and incorporate by reference the arguments made by the Public Service Commission in its Answer Brief.

**V.  
THE PSC WILL RETAIN ITS CURRENT JURISDICTION  
PURSUANT TO CHAPTER 366, FLORIDA STATUTES**

Public Counsel claims that the PSC was mistaken in finding that the Transco model would be an electric utility in Order No. 01-2489; that the PSC cannot order the creation of an ISO; that GridFlorida would not be subject to PSC's jurisdiction; and that ISO would remove GridFlorida from the PSC's own definition of a public utility, thus removing it from PSC's ratemaking jurisdiction. None of these statements has merit.

First, as discussed in response to Issue III, Public Counsel cannot attack the decisions made in Order No. 01-2489 through the guise of this appeal. The opportunity to challenge the decisions made by the Commission in that order, with respect to the effect of a Transco model and the formation of an ISO model RTO, expired when the deadline for appealing that final order occurred, which was January 22, 2002.<sup>1</sup> The Commission also recognized Public Counsel's arguments regarding the prudence of forming an RTO to be untimely, noting that OPC's arguments "appear to represent an untimely challenge to our December 20 Order." (R-23-4506).

Second, while Public Counsel asserts that an ISO model will not be subject to the Commission's authority because it will not be a public utility as defined by section 366.02(2), Florida Statutes, it does not explain how an ISO would be exempted from the plain language of the statute. Public Counsel depends upon its argument that the creators of Chapter 366, Florida Statutes, could not have envisioned the creation of this new entity. However, the United States Supreme Court recently dispatched a similar argument with respect to FERC's jurisdiction under the Federal Power Act, stating that, like Public Counsel here, New York argued that when the FPA was enacted in 1935, no party could have envisioned the current state of the industry and

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<sup>1</sup> January 19, 2002 fell on a Saturday. Thus, a notice of appeal from the final order of the Commission would have been filed no later than Tuesday, January 22, 2002, following the January 21 observance of Martin Luther King Jr. Day.

the rapid developments to which FERC has responded. The Court rejected New York's contentions, stating that there was no evidence that Congress would have objected to FERC's interpretation of the FPA had it foreseen the developments, and that the Court must depend on the statutory text as the clearest guidance of how far the agency's jurisdiction may reach. New York v. Federal Energy Regulatory Commission, 535 U.S. 1, 38-39 (2002). Clearly, Public Counsel's argument has no merit.

Moreover, despite Public Counsel's contention that the PSC is relinquishing its jurisdiction to FERC, FERC's jurisdiction is determined by the Federal Power Act, not by the actions of the Public Service Commission. In New York v. Federal Energy Regulatory Commission, 535 U.S. 1 (2002), the United States Supreme Court considered whether FERC had exceeded its jurisdiction by including unbundled retail transmissions of electric energy within the scope of open access requirements and whether it had acted properly in declining to include bundled retail transmissions within the scope of its jurisdiction. New York asserted that FERC's jurisdiction over transmission should be limited to wholesale transactions, while Enron asserted that all transmission, both bundled and unbundled, should be within FERC's authority. The Supreme Court noted that there is no language in the Federal Power Act that limits FERC's transmission jurisdiction to the wholesale market. 535 U.S. at 30-31. The

Court stated in part,

New York also correctly states that the legislative history demonstrates Congress' interest in retaining state jurisdiction over retail sales. But again, FERC has carefully avoided assuming such jurisdiction, noting repeatedly that "the FPA does not give the Commission jurisdiction over sales of electric energy at retail. . . . Because federal authority has been asserted only over unbundled *transmissions*, New York retains jurisdiction of the ultimate sale of the *energy*. And, as discussed below, FERC did not assert jurisdiction over bundled retail transmissions, leaving New York with control over even the transmission component of bundled retail sales.

535 U.S. at 38.

While New York asserted that FERC had gone too far, Enron argued that it had not gone far enough, because it did not also apply its open access remedy to bundled retail transmissions of electricity. The Court determined that FERC was correct in saving that decision for another day because the problem sought to be remedied in Order Number 888 was discrimination in the wholesale electricity market. Inasmuch as retail sales were not at issue, FERC was not required in this Order to exercise its jurisdiction over such sales. However, the Court did not rule out the possibility of such jurisdiction being asserted by FERC in the future. See *Id.* at 45-46.

Should FERC interpret the Federal Power Act as extending its jurisdiction over retail transmissions of power, no doubt there will be litigation to challenge the reach

of that power. However, Order No. 02-1199 simply does not address that issue. Nothing in Order 02-1199 deprives the PSC of its current jurisdiction over bundled transmission rates charged to retail customers, and Public Counsel's belief to the contrary is simply speculative. Appellant's Initial Brief reveals the speculative nature of Public Counsel's claims.<sup>2</sup>

## **VI. THE PSC DID NOT ERR IN ITS APPROVAL OF THE ISO PROPOSAL**

Public Counsel claims that the PSC should not approve any proposal for an RTO. In doing so, he provides selective quotes from Order No. 02-1199 to support his contention that the PSC has ceded its ratemaking jurisdiction.<sup>3</sup> See Appellant's

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<sup>2</sup>The initial brief is filled with "possibilities," such as: "Acceptance of the compliance filing ...would mean today's PSC *could* diminish its own present range of authority" (page 35); "The PSC *would* transform itself from an economic regulator . . . into a mere conduit for FERC-approved rates;" (page 36); "A question remains whether the PSC *could* exercise any ratemaking jurisdiction. . . Approval of the ISO tariff *might* just indicate FERC's willingness not to exercise all of its jurisdiction (page 37).

<sup>3</sup> Public Counsel quoted from Order 02-1199 at page 38 of its Initial Brief as follows:

While the Applicants' OATT allows us to retain jurisdiction over the costs of the existing transmission system for a five-year period, the costs to the retail jurisdiction of any new transmission facilities (the System Charge), as well as the TDU Adder and the GMC, would be determined by FERC from the outset. Beginning in year six, FERC would have exclusive control over all charges for both retail and wholesale transmission service. . . .

Brief at 38. The portion of Order No. 02-1199 that Public Counsel chose to omit from his quote specifically addresses this issue and demonstrates just why Public Counsel's action in this respect is premature:

We find that it is premature at this time to decide whether the Applicant's proposal to phase in systemwide changes after year five of the RTO operation is appropriate. We agree with FMG, who at the workshop supported a "wait-and-see" approach. FMG stated that "there is no reason that if we get to the end of a four-or-five-year period and find that there needs to be a change, that it can't be, can't be sought at that point. . . ."

(R-23-4414). Further, the portion of the Order quoted by Public Counsel addresses the very shortcoming about which Public Counsel complains, and requires additional action on the part of the GridFlorida Applicants. Indeed, the Commission specifically found that the modified compliance filing must be further modified to recognize the PSC's continuing jurisdiction over the total costs of transmission service to retail customers. (R-23-4414) Public Counsel has demonstrated no basis for reversal by

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Based upon the preceding analysis, we find the modified compliance filing does not provide for preservation of our jurisdiction over retail transmission rates and, therefore, does not comply with our December 20 Order [Order No. 01-2489]. The Applicants are directed to modify the GridFlorida compliance filing to recognize our continuing jurisdiction over the total costs of transmission service to retail customers. At the end of the five-year operation of the RTO, we shall review the transmission rate structure, given the operation of the RTO and the competitive market conditions in Florida. [Vol. 23:4414]

this Court.

**VII.**  
**THE PSC ACTED WITHIN ITS JURISDICTION AUTHORIZED  
BY CHAPTER 366, FLORIDA STATUTES**

Appellant claims that the PSC has overstepped its jurisdictional bounds in this case as it did in Tampa Electric Co. v. Garcia, 767 So. 2d 428 (Fla. 2000). Public Counsel states that because of the Tampa Electric decision, merchant plants with more than 75 megawatts of steam capacity cannot be built in Florida because the Legislature has not amended the determination of need statute to allow the PSC to consider the competitive wholesale generation market envisioned by FERC. Public counsel overstates the holding of the Tampa Electric case.

In Tampa Electric Co. v. Garcia, this Court indicated that it was answering a “precise” question:

Does section 403.519, Florida Statutes, authorize the granting of a determination of need upon a application of a proposed power plant for which the owner and operator is not a Florida retail utility regulated by the PSC and for which only thirty magawatts of the plant’s 514-megawatt capacity have been committed by contract to be sold to a Florida retail utility regulated by the PSC?

767 So.2d at 433. While answering the question in the negative, the Court noted that the Siting Act was enacted for the purpose of minimizing the adverse impact of power plants on the environment. Thus, the need for proposed power plants must

be determined based upon certain statutory criteria, and the determination of need is available only to a qualified applicant that has demonstrated that a utility or utilities serving retail customers has a specific, committed need for all of the electric power to be generated at a proposed plant. *Id.* at 434. Because the competitive market of wholesale power promoted by recent federal initiatives was not one of the statutory criteria to be considered in determining need, it could not be a basis for approving an application for building a new power plant. *Id.* at 435-36.

The Court explained its decision in Panda Energy International v. Jacobs, 813 So. 2d 46 (Fla. 2002), stating “Tampa Electric addressed whether the PSC had the statutory authority under the Siting Act to grant a determination of need to an entity other than a Florida retail utility regulated by the PSC whose petition was based upon a specified demonstrated need of Florida retail utilities for serving Florida power customers. . . . We concluded that the Legislature had not intended to extend jurisdiction to the PSC to grant a determination to an out-of-state wholesale power company where only thirty megawatts of the proposed 514-megawatt capacity had been committed by contract to be sold to a Florida utility. . . . Therefore, . . the Court did not address, let alone change, the need determination standards pertinent to Florida retail utilities such as FPC.” *Id.* at 53-54.

This case has nothing to do with the Siting Act. The PSC’s jurisdiction pursuant

to section 403.519, Florida Statutes is not at issue and the PSC did not claim any authority pursuant to Chapter 403 in rendering its decision. It relied on its traditional grants of authority under Chapter 366, Florida Statutes. Moreover, all of the GridFlorida applicants are Florida electric utilities as defined in Chapter 366, Florida Statutes, and are already subject to the PSC's jurisdiction. Nothing in Order No. 02-1199 changes the jurisdiction under Chapter 366, nor could it. This argument has no merit.

**VIII.**  
**THE PSC HAS NOT RELINQUISHED**  
**ITS GRID BILL JURISDICTION**

Mirant and Calpine Corp. adopt and incorporate by reference the argument made by the PSC in its Answer Brief. As noted by both the PSC and the GridFlorida Applicants, each of the three companies will, without question, remain electric utilities under the ISO proposal and the PSC retains all of the powers it has over those utilities to set retail rates. The only party questioning the PSC's jurisdiction is Public Counsel.

**IX.**  
**PUBLIC COUNSEL HAS NOT DEMONSTRATED THAT**  
**COMPLIANCE**  
**WITH FERC'S INITIATIVES WILL INCREASE RETAIL COSTS**

Finally, Public Counsel challenges the PSC's ultimate finding of prudence and

the GridFlorida applicants' ability to recover their costs associated with the formation of the RTO. Once again, the finding that the GridFlorida Applicants acted prudently is a belated attempt to appeal Order 01-2489. Moreover, section 120.68(7), Florida Statutes, specifically indicates that the Court may not substitute its judgment for that of an agency in its exercise of discretion. Floridians for Responsible Utility Growth v. Beard, 621 So. 2d 410 (Fla. 1993); Florida Cities Water Co. v. Florida Public Service Commission, 778 So. 2d 310 (Fla. 1<sup>st</sup> DCA 2000); see also City of Oviedo v. Clark, 699 So. 2d 316 (Fla. 1<sup>st</sup> DCA 1997). Public counsel seeks to displace the Commission's exercise of discretion with Public Counsel's opinion of how transmission should be regulated. The discretion, however, rests with the Commission. Inasmuch as the Commission has not exceeded its jurisdiction, its judgment should not be disturbed.

### **CONCLUSION**

Based upon the foregoing, Mirant and Calpine urge the Court to dismiss the appeal for the reasons expressed in the Public Service Commission's brief. Mirant and Calpine also request that this Court find that Order 01-2489 is beyond review because the time for filing an appeal has long since passed. In addition, Order 02-1199 should be affirmed and proceedings on those parts of the Order that were not final should proceed.

Respectfully submitted this 27<sup>th</sup> day of January, 2003.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer  
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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that this brief was prepared using Times New Roman, 14-point typeface.

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