

IN THE SUPREME COURT OF FLORIDA

Case No. SC02-2159

On Appeal from an Order of the
Florida Public Service Commission

CITIZENS OF THE STATE FLORIDA,

Appellants,

v.

LILA A. JABER., et al.

Appellees.

**ANSWER BRIEF OF APPELLEE
FLORIDA POWER & LIGHT COMPANY**

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief. Appellant, Citizens of the State of Florida, represented by Office of Public Counsel, is referred to as “OPC.” Appellee, the Florida Public Service Commission, is referred to as the “PSC” or “Commission.” The Federal Energy Regulatory Commission is referred to as “FERC.” Appellees, Florida Power & Light Company, Florida Power Corporation and Tampa Electric Company are referred to individually as “FPL”, “FPC” and “Tampa Electric”, respectively, and referred to collectively as “the Companies.” A regional transmission organization is referred to as an “RTO.” An RTO structured as a for profit transmission company is referred to as a “Transco” and an RTO structured as a not for profit entity is referred to as an “Independent System Operator” or “ISO.” Order No. PSC-01-2489-FOF-EI issued December 20, 2001 in Docket Nos. 000824-EI, 001148-EI and 010577-EI is referred to as “Order No. 01-2489” or the “Phase I Order.” The Order on Appeal, Order No. PSC-02-1199-PAA-EI issued September 3, 2002 in Docket No. 020233-EI is referred to as “Order No. 02-1199.”

Citations to the record on appeal will be shown within parentheses by a volume number and page number separated by a colon (Vol. ____:____). Citations to the transcript of the hearing held in Docket Nos. 000824-EI, et. seq., on October 3-5, 2001 are designated (Tr. Vol. ____:____).

STATEMENT OF THE CASE AND FACTS

The Order on Appeal, Order No. 02-1199, stems from FERC Order No. 2000¹ issued on December 20, 1999. In Order No. 2000, FERC determined that all transmission service should be placed under the control of RTOs. (Tr. Vol. 1:51, 109; Vol. 4:555-556; Vol. 6:762, 801).

The Companies are regulated by both the PSC and FERC. When FERC Order No. 2000 was issued, the Companies responded by filing a joint proposal with FERC proposing the formation and operation of GridFlorida as an RTO to operate the transmission system in peninsula Florida. FERC provisionally approved the GridFlorida proposal on March 28, 2001 but required the Companies to file specific modifications by May 29, 2001. (Tr. Vol. 1: 130, GridFlorida, LLC, 94 FERC ¶61, 363, Order on Rehearing, 95 FERC ¶61, 473 (2001)).

Although FERC Order No. 2000 did not expressly mandate participation in an RTO, the “voluntary” nature of the Order was in effect not voluntary at all. As OPC readily acknowledges in its Brief:

¹FERC Order No. 2000, Regional Transmission Organizations, FERC Stats. & Regs. ¶ 31, 089 (1999), 65 Fed. Reg. 810 (Jan. 6, 2000), Order on Rehearing, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), 65 Fed. Reg. 12088 (March 8, 2000), aff'd, Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2002).

RTO participation was voluntary under FERC's Order No. 2000 (Tr. vol. 2:254, 276). Even so, FERC indicated it would use its authority in other areas to coerce compliance [Tr. vol. 1:151-55; vol. 2:255-57; vol. 6:828-29]. FERC said it might not approve mergers or authorize market-based wholesale rates, and it might be inclined to investigate the reasonableness of existing transmission rates (with the implicit threat of rate reductions) if voluntary RTO formation were not forthcoming. [Tr. Vol. 2:183-85].

And so, the Companies found themselves between the proverbial rock and hard place. On the one hand, FERC had effectively mandated the formation and participation in an RTO. On the other hand, FERC could not guarantee that the Companies would recover the costs of these FERC initiated activities in the event the PSC found it imprudent to join and participate in an RTO.

With that backdrop, on May 29, 2001, the PSC decided to investigate whether the Companies were prudent in complying with FERC Order No. 2000 by the formation of and participation in the GridFlorida proposal filed with FERC. (Vol. 1:163; Vol. 2:201) (Tr. Vol. 1:131); Order No. 02-1199, at 6. Now that the PSC had squarely placed the issue of prudence and cost recovery on the table, the Companies responded by filing petitions on June 12, 2001, requesting the PSC to find that their formation of and participation in GridFlorida was prudent. (Vol. 2:256-290). In its Order Identifying Issues in Phase I, the PSC framed the prudence issue in very clear and plain terms for each of the Companies: "Is the utility's decision to participate in

GridFlorida prudent?” (Vol. 3:413, 416). Thus, the first phase of the proceedings below that resulted in Order No. 01-2489 as well as the “compliance” proceedings resulting in the Order on Appeal can only be characterized as a prudence review.

As noted by OPC, the potential risks imposed on the Companies by complying with FERC Order No. 2000 without a prudence determination from the PSC was expressly referenced in their petitions filed with the PSC. As OPC notes:

The petitions noted that the voluntary formation of RTOs was an integral part of a nationwide federal initiative and stated that PSC approval of the companies’ planned involvement in the RTO was a necessary prerequisite to their participation in GridFlorida. [Vol. 2:270-72]. A May 29, 2001, filing at FERC (quoted in the PSC petitions) informed FERC that “[t]he Applicants are concerned that they will be caught in a situation where the FPSC and [FERC] will reach different conclusions as to whether the Applicants should participate in GridFlorida.

OPC Initial Brief, at 11-12.

Upon filing their individual petitions and the supporting GridFlorida RTO filing, the PSC embarked upon its normal and standard procedural path for a formal administrative hearing under Sections 120.569 and 120.57(1), Florida Statutes (2001). Upon issuance of orders identifying the issues in Phase I of the proceeding and after conducting an evidentiary hearing on those issues, the PSC issued its order in Phase I, Order No. 01-2489. In Order No. 01-2489, the PSC concluded that the Companies

“were prudent in proactively developing a regional transmission organization to satisfy FERC Order No. 2000...” and authorized the Companies’ recovery, subject to audit, of actual jurisdictional start-up expenses incurred through May 1, 2001. See Order No. 01-2489, at 7, 10. The PSC also expressed concerns with certain aspects of the GridFlorida filing and therefore required that certain aspects of the filing be modified to enhance the benefits of an RTO for the customers of the Companies, requiring the filing of a modified RTO proposal. The modified RTO proposal was to comply with the findings in Order No. 01-2489 and present additional proposed provisions if the Companies believed such additional provisions were appropriate. The PSC cautioned, however, that it would not relitigate the issues addressed in the Phase 1 Order. See Order No. 01-2489, at 24.

The Companies duly filed a “Compliance Filing” on March 20, 2002 in new Docket No. 020233-EI incorporating changes necessary or appropriate to conform with the Phase I Order. (Vol. 8:1440, 1466).

The PSC gathered input and comments, and heard oral argument on the Companies’ Compliance Filing by conducting a workshop and authorizing the parties to file comments both before and after the PSC workshop. The PSC Staff issued its Staff Recommendation addressing the Compliance Filing on August 8, 2002, with revisions to that recommendation filed August 13, 2002 (Vol. 21: 4037-4134). On

August 20, 2002, the PSC considered and voted on the Staff Recommendation, after further input from Staff and further oral argument from the parties on provisions that were treated as proposed agency action decisions subject to protest and a second evidentiary hearing. (Vol. 22: 4147-4246; Vol. 23: 4247-4336). The PSC subsequently issued its Order on Review, Order No. 02-1199.

In Order No. 02-1199, the PSC approved many aspects of the Compliance Filing. In certain instances, where the Compliance Filing was viewed by the PSC to go beyond strict compliance with the Phase I Order or where the PSC ordered changes to the Compliance Filing, the PSC treated those decisions as proposed agency action subject to challenge in an evidentiary hearing. (Vol. 22:4147, 4191-93). The PSC also scheduled a hearing on the Companies' revised market design proposals to allow for further evidence and input on these complex issues. Order No. 02-1199, at 76.

OPC and a number of other parties timely filed petitions protesting certain proposed agency action determinations of the PSC.² OPC and other parties also sought reconsideration of other aspects of Order No. 02-1199 that were treated as final agency action.³

²Vol. 23:4437-4446; Vol. 24:4613-4654; Vol. 25:4655-4665.

³Vol. 24:4471-4480, 4489-4551.

While these petitions and motions were pending, OPC timely filed a Notice of Appeal of Order No. 02-1199. OPC's appeal triggered an automatic stay as recognized by the PSC in Order No. PSC-02-1475-PCO-EI issued October 28, 2002. (Vol. 27: 5195).

SUMMARY OF ARGUMENT

OPC asserts that the proceedings conducted by the Commission violated Sections 120.569 and 120.57(1), Florida Statutes. OPC's argument on this issue should be rejected. The Commission conducted a formal administrative hearing that addressed or provided the opportunity to address any and all aspects of the GridFlorida filing. A second formal administrative proceeding to address additional issues and provisions concerning the Compliance Filing and market design principles was ordered and scheduled by the Commission prior to OPC's appeal. All parties, including OPC, were afforded the opportunity to participate in the administrative proceedings below. Those proceedings satisfied the requirements of Section 120.569 and 120.57(1), Florida Statutes. Accordingly, the Commission's Order on Appeal should be affirmed.

ARGUMENT

In its Initial Brief, OPC raises a number of legal arguments in support of reversal of Order No. 02-1199. Many of those arguments are essentially directed to the

proposition that the Commission has somehow divested itself of the jurisdiction granted to the Commission under Chapter 366, Florida Statutes, in approving certain aspects of the Compliance Filing as final agency action. In their Answer Briefs, the Commission and the other GridFlorida Companies fully respond to these arguments, and FPL sees no need to reiterate them in this Answer Brief. Instead, FPL will address only OPC's unsupported contention in Section II of the Argument Section of its Initial Brief, i.e., the contention that the Commission's procedures violated Chapter 120, Florida Statutes.

I. The PSC's Procedures were Consistent with the Administrative Procedure Act, Chapter 120, Florida Statutes (OPC's Argument II).

OPC's assertions to the contrary, the proceedings below reflect the Commission's straightforward and exemplary effort to balance the need to work cooperatively with FERC, achieve maximum benefits for Florida's electric consuming customers, provide cost recovery for the Companies of the FERC jurisdictional RTO initiative, and to do so in a manner that, at minimum, exceeded the due process requirements of Chapter 120, Florida Statutes. It was FERC that first "promoted" the Companies' participation in an RTO and it is FERC who retains exclusive authority to approve an RTO. It is the Companies that have been beckoned by FERC to participate in an RTO and it is the Companies and their customers that will incur

incremental costs arising out of such participation. Opting to take a proactive approach to advocate and support an RTO that would maximize benefits for Florida's customers, the Commission opened the Phase I docket to gather evidence and consider competing views on all aspects of the GridFlorida filing. The procedures employed by the Commission in the proceedings below exceeded the threshold requirements of Sections 120.569 and 120.57(1), Florida Statutes.

In its Brief, OPC asserts that the Commission's procedures violated Chapter 120, Florida Statutes on two grounds. First, OPC maintains that the record in the Phase I proceeding was inadequate to support the Commission's conclusions in Order No. 01-2489 that the Companies should file an Independent System Operator (ISO) proposal. OPC's remedy was to appeal that aspect of Order No. 01-2489 with this Court. OPC elected not to pursue its remedy and should not be heard now to reargue the weight of the evidence supporting the portion of Order No. 01-2489 requiring a modification to an ISO structure.

Second, OPC maintains that by holding a workshop in Phase II (the Compliance Phase) of the proceedings, the Commission failed to offer the point of entry required by Sections 120.569 and 120.57, Florida Statutes. These statutory provisions require an agency to conduct formal administrative proceedings where the substantial interests of a party will be determined by that agency. OPC's position

overlooks the past and future evidentiary hearing opportunities that were afforded to all parties by the Commission in the proceedings below.

Following the opening of the investigation docket in Phase I to determine the prudence of the GridFlorida proposal, the Commission allowed the Companies and Intervenors, including OPC, the opportunity to submit proposed issues addressing any and all aspects of the GridFlorida filing. (Vol. 2:318-412). The issues ultimately framed for disposition in Phase I were broadly worded and allowed for input on any aspect of the GridFlorida proposal as well as alternatives to the proposal. (Vol. 3: 413-417; Vol. 3: 441-443).

The broad nature of the issues framed for hearing in Phase I was recounted by the Prehearing Officer in the reconsideration stage of the Phase I proceeding. Following the issuance of Order No. 01-2489, a number of independent power producers (IPPs) jointly sought reconsideration of certain aspects of the Phase I Order. (Vol. 7: 1354). The IPPs claimed that there was inadequate notice of these issues within the framework of the issues identified for hearing that resulted in the Phase I Order. The Commission disagreed and denied the IPPs' Joint Motion for Reconsideration. (Vol. 8: 1426). Commissioner Biaz, the Prehearing Officer in Phase I of the case, emphasized that the issues had been identified in a manner that was

intended to allow all Intervenors and stakeholders the opportunity to present testimony on any aspect of the GridFlorida filing:

. . . I remember having to sit through two days of prehearing and issue ID, and I think - - and I can speak from my personal experience, that. . . the intent of that order (Order Identifying Issues in Phase I). . . was ... to leave it as broad as possible so that anybody participating could have screamed about anything they wanted.... [L]et's keep it an inclusive process.

And it's my feeling that, yes, you did have an opportunity to offer testimony and to offer comments. If you had a problem with the congestion management proposal, if there was a problem with that specific issue, everyone was free to make the arguments and present their cases the way that they wanted, and I remember using exactly those words. That went for the applicants as well as the intervenors.

(Transcript from February 19, 2002 Agenda Conference; Vol. 7: 1399, 1416).

In its Order Denying the IPPs' Motion for Reconsideration, the Commission memorialized the fact that all parties to the Phase I proceeding had an opportunity to address or contest any aspect of the GridFlorida filing or to propose alternatives to the filing:

As we have stated above, all parties had an opportunity to address the subjects of PTRs (physical transmission rights) and balanced schedules in this proceeding. The (IPPs). . . did not address those subjects and cannot argue now, as a basis for reconsideration, that this Commission made a mistake of fact by failing to

consider facts that the parties failed to put into evidence.
(Vol. 8: 1426, 1432).

In Phase I of the proceeding, OPC, like all other Intervenors, had the opportunity to present testimony addressing any aspect of the GridFlorida proposal and to present testimony offering alternatives to the GridFlorida proposal. OPC did not avail itself of that opportunity and chose not to appeal any aspect of the Phase I Order that it now belatedly challenges in its Initial Brief.

Having forsaken its opportunity to challenge the GridFlorida filing in Phase I and having chosen not to appeal the modifications ordered by the Commission in the Phase I Order, OPC, like any other Intervenor, is bound by the Commission's admonition in the Phase I Order that "the parties should note that the Commission will not relitigate the issues addressed in this Order." Order No. 01-2489, at 24. Nonetheless, upon the submission of the Compliance Filing by the Companies, the Commission embarked on a procedural path that would ensure all parties the opportunity not only to comment on the Compliance Filing through the workshop and written comments, but the opportunity for a second evidentiary hearing on specific aspects of the Compliance Filing. Specifically, the Commission treated as proposed agency action any changes to the Compliance Filing: (1) ordered by the Commission; (2) proposed by the Companies that arguably went beyond the modifications ordered

in the Phase I Order; or (3) resulting from that part of the Phase I Order requiring that GridFlorida be restructured from a Transco to an ISO model. (Vol. 22: 4147, 4191-93). A number of Intervenors, including OPC, filed protests and requested a hearing on the many items treated as proposed agency action in Order No. 02-1199. See, e.g., Vol. 25: 4655. At the time OPC filed its appeal, the Commission had scheduled a second evidentiary hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, to address the protested issues and market design principles.

In sum, the Commission clearly satisfied the requirements of Sections 120.569 and 120.57(1), Florida Statutes, in the proceedings below. An evidentiary hearing was held on any and all aspects of the GridFlorida filing in Phase I. An additional hearing was scheduled prior to OPC's appeal in the compliance phase of the proceeding on both market design principles and proposed agency action determinations that were timely protested. Accordingly, OPC's contention that the Commission's procedures violated Chapter 120, Florida Statutes, should be rejected.

CONCLUSION

The Court should affirm Order No. 02-1199.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Florida Power & Light Company has been furnished by U. S. Mail this 27th day of January, 2003, to the following:

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In compliance with the Court's Administrative Order dated July 13, 1998, the font size used in this Brief is Times New Roman, size 14.

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FPL\answerbrief