

IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF)
FLORIDA,) CASE NO. SC02-2159
)
Appellant,)
)
v.)
)
LILA A. JABER, et al.,)
)
Appellees.)
_____)

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE,
THE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS

Appellant, Citizens of the State of Florida, represented by the Office of Public Counsel, is referred to as "OPC." Appellee, the Florida Public Service Commission, is referred to as "the Commission." Appellees, Florida Power and Light Company, Florida Power Corporation, and Tampa Electric Company, are referred to collectively as "the Companies." The Federal Energy Regulatory Commission is referred to as "FERC."

Order No. PSC-01-2489-FOF-EI issued December 20, 2001, is referred to as Order No. 01-2489. Order No. PSC-02-1199-PAA-EI issued September 3, 2002, is referred to as Order No. 02-1199. FERC's Order, Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶31,089 (1999), 65 Fed. Reg. 810 (2000), on reh'g, Order No. 2000-A, FERC Stats. & Regs. ¶31,092, 65 Fed. Reg. 12,088 (2000) (codified at 18 C.F.R. §35.34), aff'd, Public Utility District No. 1 v. Federal Energy Regulatory Commission, 272 F. 3d 607 (D.C. Cir. 2001) is referred to as "FERC Order No. 2000".

A regional transmission organization is referred to as an "RTO." An RTO structured as a for profit transmission company owning transmission assets is referred to as a "Transco." An RTO structured as a not-for-profit entity that does not own transmission assets is referred to as an "independent system

operator" or "ISO." The Companies' RTO proposal is referred to as "GridFlorida" or the "RTO proposal."

References to the record on appeal are designated (R.__:__) listing the volume and page number. Appellant's initial brief is cited as (I.B. at __).

All citations to Florida Statutes are to Florida Statutes (2002).

STATEMENT OF THE CASE AND FACTS

OPC's Statement of the Case and of the Facts is inaccurate in several important respects. In particular, OPC misapprehends the nature of the Commission's proceedings, the December, 2001, final order that is not the subject of this appeal, and the September, 2002, order that is. In addition, contrary to OPC's statement on page 1 of its brief, the Commission did not approve a proposal "to impose upon the Companies' retail customers in excess of \$1.1 billion of additional costs over the first five years of RTO operations." No additional costs were approved by the Commission in Order No. 02-1199, the order that is the subject of this appeal.

As to the nature of the proceeding below, the Commission did not undertake to order the Companies to form an RTO. Rather, an initial determination was made by the Commission in the existing rate cases of Florida Power and Light Company and Florida Power Corporation, and by a separate proceeding for Tampa Electric company, to review the prudence of the actions the Companies themselves had taken in response to FERC Order No. 2000.

FERC Order No. 2000 directed utilities under its jurisdiction that owned, operated, or controlled transmission facilities to file a plan for participation in an RTO or explain any barriers to such participation. Id. The Companies filed a proposal for an RTO on October 16, 2000, and FERC provisionally

approved that plan on March 28, 2001. GridFlorida LLC, 94 FERC ¶61,363 ("GridFlorida II"), order on reh'g, 95 FERC ¶61,473 (2001). Before a modified plan was submitted to FERC, however, the Commission decided to investigate whether the Companies acted prudently in complying with Order No. 2000 by proposing to form an RTO known as GridFlorida. The Commission conducted a three-day evidentiary hearing, in which OPC participated, that culminated in Order No. 01-2489 issued on December 20, 2001. (R. 7:1325)

Order No. 01-2489 was issued as a Final Order. The Commission found, based on the evidence produced at hearing, that "in light of FERC's Order No. 2000 and its subsequent statements strongly encouraging participation in RTOs," the Companies were prudent in forming GridFlorida. (R. 7:1328) Based upon this finding, the Commission approved the Companies' associated costs incurred through May 31, 2001, subject to audit. (R. 7:1335; amended order at R. 7:1394) The Commission also found that a Peninsular Florida RTO was preferable for Florida's utilities and ratepayers at this time than a larger, southeast regional RTO. In addition, the Commission found that it was not in the best interest of Florida retail ratepayers for the Companies to transfer ownership of their transmission facilities to GridFlorida. The Commission further determined that the prudence of the Companies' ongoing participation in

GridFlorida would necessitate some changes in the proposal. (R. 7:1335-1350) One of the changes was a modification of the RTO proposal to use an independent system operator (ISO) structure in which each utility maintains ownership of its transmission facilities. (R. 7:1328) The Notice of Further Proceedings or Judicial Review contained in the order stated that any adversely affected party could request reconsideration of the Commission's final action or seek judicial review by filing a notice of appeal within 30 days after the issuance of the order. (R. 7:1352-53) OPC was a party, but did not appeal this final order.

A subsequent proceeding, Docket No. 020233-EI, was initiated for the Commission to determine whether the Companies' modified proposal, which was to be filed with FERC, complied with Order No. 01-2489. In addition to ruling on issues of compliance with the 2001 order, the Commission approved a methodology for future cost recovery. (Order 02-1199, issued September 3, 2002, at p. 71, 79; R. 23:4422, 4430) OPC argued that the Companies' actions in incurring incremental costs were imprudent because they were voluntarily incurred. At page 70 of Order No. 02-1199, the Commission addressed OPC's argument and noted that its December, 2001, Order No. 01-2489 directly addressed the issues of whether the Companies' formation of GridFlorida was truly voluntary and whether it was prudent. The Commission further

observed that "OPC's arguments appear to represent an untimely challenge to our December 20 Order." (R. 23:4421)

The Commission did not approve the recovery of costs in the order on appeal, Order No. 02-1199. Only a cost recovery methodology was approved, for costs that are later found to be prudent. The Commission specifically said that any costs would be subject to the same review and discovery as any other cost that is proposed for recovery:

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

(Order No. 02-1199 at p. 70; R. 23:4422)

The order further stated that the cost methodology decision was a preliminary one, subject to the filing of a petition for a formal proceeding, and that any such protested preliminary actions would be the subject of an evidentiary proceeding. (R. 23:4356, 4430) OPC filed a protest of this issue and requested a hearing on September 24, 2002. (R. 25:4655-4665) On October 3, 2002, however, OPC filed its notice of appeal. Thereafter, the Commission cancelled its hearing and abated further

proceedings pending resolution of this appeal. OPC's appeal left pending at the Commission 12 separate pleadings either protesting proposed agency action contained in Order No. 02-1199 or asking the Commission to reconsider its order. (R. 23:4437-4446; 24:4471-4480, 4489-4551, 4613-4654, 25:4655-4665)

OPC's presentation of the facts and case is otherwise generally adequate to understand the history of the proceedings and the context of the Commission's action.

SUMMARY OF THE ARGUMENT

OPC's appeal is based upon a basic misapprehension of the Commission's action. The Commission did not implement a fundamental change in the way electric utilities are regulated in Florida. It has only determined the prudence of actions that the Companies took in response to a FERC order. It considered what would be in the best interests of Florida ratepayers, determined what aspects of the Companies' RTO proposal would not be prudent for the Companies to pursue, and directed the Companies to make the appropriate changes to their proposal to FERC. The Commission then determined whether the Companies complied with the substantive findings it had made in a previous order.

The Commission conducted its prudence review pursuant to its authority over the rates and service of public utilities under sections 366.041 and 366.05, Florida Statutes, and its duty to assure a coordinated electric power grid under sections 366.04 and 366.055, Florida Statutes. The Commission recognized that it was far better for Florida to take action to shape an RTO tailored to the needs of Florida than to ignore FERC's actions with the likely consequence of having a federally-imposed RTO structure. The Commission's actions were well within its discretion and authority.

OPC purports to appeal Commission Order No. 02-1199, but the actions OPC challenges were either final agency action in Order No. 01-2489, or were preliminary action in Order No. 02-1199. OPC's argument that the Commission should not have found the Companies' action in forming an RTO to be prudent, and its challenge to the decision approving an ISO instead of a Transco, is an untimely attempt to appeal Order No. 01-2489 and should be dismissed. The Companies modifications to their proposal were reviewed in Order No. 02-1199, the order subject to this appeal, to determine whether the modifications complied with Order No. 01-2489. The Commission reiterated provisions of its Order No. 01-2489 in Order No. 02-1199, but OPC cannot challenge those provisions now by appealing the present order.

To the extent OPC's appeal is not untimely, it is premature. OPC failed to exhaust the administrative remedies available with respect to the preliminary agency action in Order No. 02-1199. Moreover, OPC has failed to show that the Companies' customers whom OPC represents are adversely affected by the Commission's action.

Order No. 02-1199 effects no change in the Commission's jurisdiction or its regulatory duties. OPC's arguments to the contrary are based on pure speculation.

OPC contends that the Commission should not have "approved" any part of the GridFlorida proposal nor "allowed" the RTO to

come into existence. OPC overlooks the fact that the Companies' RTO proposal will only take effect if and when FERC approves it.

If and when the Companies' modified RTO proposal is submitted to FERC and approved, wholesale transmission rates charged to or by the Companies will be regulated by FERC, just as they have been for years. The costs incurred under FERC-approved transmission rates will become an element of cost the Commission will consider in setting retail rates. The Commission will continue to determine the Companies' revenue requirements and it will continue to set their retail rates.

Pursuant to sections 366.04(2) and (5), sections 366.05(7) and (8), and section 366.055, Florida Statutes, the Commission's Grid Bill authority extends to electric utilities and the electric power grid throughout Florida. Each of the Companies, the municipal utilities, and the cooperative utilities in Florida will remain subject to the Commission's authority with respect to the planning, development, and maintenance of the coordinated electric power grid. The proposal does not and cannot change the Commission's Grid Bill authority.

Contrary to OPC's assertions, the Commission did not approve recovery of any costs in the order on appeal. All the Commission did was determine a cost recovery methodology to be used should the Companies have increased costs and should they seek recovery. In addition, that decision was proposed agency

action, subject to protest and the right to a hearing. OPC has failed to exhaust its administrative remedies as it is required to do.

In summary, Order No. 02-1199 did not diminish the Commission's control over the Companies, nor delegate the Commission's Grid Bill or ratemaking authority to FERC. If the Court does not dismiss the appeal, it should affirm the Commission's order in all respects. OPC has not shown that the Commission abused its discretion and it has failed to meet the burden required to overcome the presumption of validity attached to Commission orders.

STANDARD OF REVIEW

As this Court has said many times, orders of the Commission come to this Court "clothed with the statutory presumption that they have been made within the commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." Gulf Coast Electric Coop. v. Johnson, 727 So. 2d 259, 262 (Fla. 1999) (citations omitted). The Commission's interpretations of its statutes are entitled to great weight and a party challenging an order bears the burden of overcoming the presumption of validity by showing a departure from the essential requirements of law. Id., citing AmeriSteel v. Clark, 691 So. 2d 473, 477 (Fla. 1997). The Commission's findings will be upheld if they are based on competent substantial evidence and are not clearly erroneous. Id. The deference afforded the Commission's orders is appropriate given the agency's special expertise in the area of utility regulation. Gulf Coast, 727 So. 2d at 262.

The Commission's decision to review the Companies' RTO proposal was an exercise of its discretion. The Court should not substitute its judgment for that of the Commission on an issue of discretion. §120.68(7)(e), Fla. Stat. Absent a clear showing by the appellant that the Commission has abused its discretion, the Court must affirm the decision. Panda Energy

Int'l v. Jacobs, 813 So. 2d 46 (Fla. 2002); Shevin v. Yarborough, 274 So. 2d 505 (Fla. 1973).

ARGUMENT

I. THE COURT SHOULD DISMISS THIS APPEAL ON SEVERAL GROUNDS.

Section 120.68(1), Florida Statutes, states the standard for judicial review of administrative actions and it provides that "[a] party who is adversely affected by final agency action is entitled to judicial review." This Court has held that there are thus four requirements for standing to seek such review:

(1) the action is final; (2) the agency is subject to provisions of the act; (3) the person seeking review was a party to the action; and (4) the party was adversely affected by the action.

Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So. 2d 982, 986 (Fla. 1996)(citations omitted). OPC is not adversely affected by the Commission's action. In addition, the action that OPC claims adversely affected the customers was final by virtue of Order 01-2489, which OPC did not timely appeal. As to the action OPC challenges that was proposed agency action in Order No. 02-1199, OPC has failed to exhaust its administrative remedies. Therefore, the Court should dismiss this appeal.

A. The Companies' customers were not adversely affected.

OPC contends that the Commission has allowed the Companies to divest it of its Grid Bill jurisdiction over the states'

transmission assets and its ratemaking jurisdiction over the transmission component of bundled retail sales. (I.B. 21) That is not the case. The Commission has only directed the Companies to modify the proposal they submitted to FERC in order to accommodate the Commission's concerns about the proposal's effect on the interests of Florida retail ratepayers, and to maximize the benefits for the ratepayers. The entry of an order giving directions to the Companies about what to include in a filing with another agency cannot reasonably be viewed as adversely affecting customers.

Moreover, OPC's claim that the customers may be harmed should the Companies submit their modified proposal to FERC, should FERC ultimately approve the proposal, and should FERC thereafter attempt to assert jurisdiction that it does not unquestionably possess, is purely speculative at this point. Notwithstanding OPC's argument about the potential effect of an RTO, the Commission has not given up any of its ability to regulate the Companies. OPC has not shown that the Companies' customers have been adversely affected by any action the Commission has taken.

The mere possibility of legal injury on the basis of a hypothetical state of facts is not sufficient for OPC to have standing to appeal the Commission's decision. Santa Rosa County v. Administration Comm'n, 661 So. 2d 1190, 1193 (Fla.

1995)(Florida courts may not render "advisory opinions at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical state of facts"); Florida Chapter of the Sierra Club v. Suwannee American Cement Company, Inc., 802 So. 2d 520 (Fla. 1st DCA 2001). OPC has provided no facts concerning any customer who is affected adversely by the Commission's prudence review of the Companies' proposal. The Companies' customers have not been adversely affected by the Commission's order and OPC has no standing to appeal it.

B. OPC's appeal is untimely.

In Point V. of OPC's brief, at pages 31-33, OPC argues that it is the Commission's rejection of the Companies' Transco proposal in favor of an ISO that will cause the Commission to lose its jurisdiction, and that there was insufficient evidence to support the Commission's decision. But that decision in favor of an ISO structure was final action by virtue of Order No. 01-2489, issued December 20, 2001, following the October, 2001, evidentiary hearing, as was the decision that the Companies were prudent in developing the RTO proposal. Thus, even if it were possible for the Commission to divest itself of jurisdiction, and it is not, OPC has appealed the wrong order.

To the extent that Order No. 02-1199, the order OPC has appealed, says anything about an ISO versus a Transco, the Commission was merely reiterating its earlier decision. OPC

acknowledges as much in footnotes 17 and 18 on page 24 of its brief where it says that Order No. 02-1199 relied on Order No. 01-2489, and that “[t]he policy decision in Order No. 01-2489 was described in Order No. 02-1199.” OPC is simply trying to bootstrap this issue into its appeal in order to avoid the failure to timely appeal Order No. 01-2489. Under established principles of appellate review, however, OPC cannot appeal a subsequent order that merely relies on or reiterates the decision stated in another, earlier order. Nassau Power Corp. v. Beard, 601 So. 2d 1175, 1178 (Fla. 1992). As was the case in Nassau, the Commission did not first articulate its policy in the order on appeal, and OPC cannot challenge it now under the guise of appealing the present order.

Order No. 01-2489 noted on pages 28-29 that judicial review by the Florida Supreme Court must be initiated by filing a notice of appeal “within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.” Order No. 01-2489 was issued on December 20, 2001, and the order denying reconsideration and granting clarification was issued March 14, 2002. R. V. 8, 1426. The last day to file a timely appeal was April 15, 2002. OPC’s Notice of Appeal was filed on October 3, 2002. OPC’s failure to file such a notice is jurisdictional. Fla. R. App. P. 9.110(b); Griffin v. Sistuenck, 816 So. 2d 600 (Fla. 2002); Williams v. State, 324

So. 2d 74 (Fla. 1975). Consequently, Order No. 01-2489 is no longer subject to review.

C. OPC has not exhausted its administrative remedies.

OPC has not challenged any action taken by the Commission that was final by virtue of Order No. 02-1199, the order OPC has appealed. The actions complained of were either final by Order No. 01-2489, as discussed above, or they were proposed agency action (PAA) in Order No. 02-1199.

OPC filed a protest of this PAA order and requested a hearing on September 24, 2002. The Commission scheduled a hearing; however, on October 3, 2002, OPC filed its notice of appeal. A party that fails to avail itself of further administrative remedies below is foreclosed from appeal. General Electric Credit Corp. v. Metropolitan Dade County, 346 So. 2d 1049, 1053 (Fla. 3rd DCA 1977). By failing to exhaust its administrative remedies, OPC gave up its right to judicial review.

The reasons for requiring a party to exhaust the available administrative remedies are many:

to avoid premature or unnecessary judicial labor, to assure agency action by the authentic agency head, to encourage improvement in agency decisionmaking processes, to afford remedies simpler and less expensive than court litigation, and to encourage a responsible autonomy in the executive branch of state government.

Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, 400 So. 2d 66, 73 (Fla. 1st DCA 1981)(citations omitted)¹; State Dept. of Revenue v. Brock, 576 So. 2d 848 (Fla. 1st DCA 1991).

Although courts have the jurisdiction to review certain non-final administrative orders under section 120.68(1), Florida Statutes, that discretion should not be exercised absent a showing that review of the final agency action would not provide an adequate remedy. OPC has made no such showing and it is its burden to do so. Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029 (Fla. 2001). Thus, this appeal should also be dismissed for OPC's failure to exhaust its administrative remedies.

II. THE COMMISSION'S PROCEDURES WERE CONSISTENT WITH THE ADMINISTRATIVE PROCEDURES ACT, CHAPTER 120, FLORIDA STATUTES.

OPC complains that the evidence presented at the October, 2001, hearing that was held in the earlier dockets was inadequate to support Commission Order No. 01-2489, issued December 20, 2001. OPC was a party to that proceeding, participated in the evidentiary hearing, and was well aware that the Commission's determination was to be a final decision. By attempting to reach back now and address the Commission's decision on an ISO versus a Transco, OPC seeks to relitigate issues it previously chose not to appeal. The order that

¹Even though the Commission is a legislative entity, the principle is the same.

resulted was a final order and it properly notified the parties of their right to seek judicial review. OPC did not seek review of that order and should not be heard now to complain that the order was not supported by competent substantial evidence.

In Order No. 01-2489, the Commission determined that the Companies should not transfer ownership of their transmission assets to the RTO. Rather, the Commission determined that the RTO in GridFlorida's proposal to be submitted to FERC should be an ISO with the Companies retaining ownership of their transmission assets. The Commission directed the Companies to make this change in their proposal. That is precisely what the Companies included in their compliance filing--the filing submitted to the Commission in compliance with Order No. 01-2489. OPC was not entitled to a further hearing on the issue of whether the RTO should be an ISO or a Transco. See, U.S. Sprint Communications Co. v. Nichols, 534 So. 2d 698 (Fla. 1988) (Order to file amended tariffs complying with earlier order resulted in no substantive change and therefore did not constitute new agency action entitling utility to a hearing.)

To the extent that any issues were not the subject and outcome of the October, 2001, hearing in the earlier dockets, those determinations were proposed agency action--not final agency action. OPC was offered the opportunity for a hearing on those issues and, in fact, requested one. OPC frustrated that

process, however, and prevented the hearing being held by filing this appeal.

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

Contrary to OPC's assertions, Order No. 02-1199 did not diminish the Commission's control over the Companies, nor delegate the Commission's Grid Bill or ratemaking authority to FERC. The Commission continues to fully regulate the Companies' retail rates.

If and when the Companies' modified RTO proposal is submitted to FERC and approved, wholesale transmission rates charged to or by the Companies will be regulated by FERC, just as they have been for years. See, Fort Pierce Utilities Authority et al. v. Federal Energy Regulatory Commission, 730 F. 2d 778, 779 (D.C. Cir. 1984)(Appeal by several Florida municipal utilities of a FERC order claiming that transmission rates set for Florida Power and Light Co. were excessive and discriminatory). The costs incurred under FERC-approved transmission rates will become an element of cost the Commission will consider in setting retail rates. The establishment of GridFlorida will not change this regulatory dichotomy--federally regulated transmission costs will continue to flow through the Companies' state regulated retail tariffs. This is what occurs now when transmission and generation services are purchased by Florida electric utilities regulated by the Commission. The

charges are subject to FERC jurisdiction but regulated by the Commission as a component of retail rates.

The establishment of an RTO, if approved by FERC, will simply change how a public utility obtains one of the elements needed to supply electricity; that is, transmission service. There are currently two methods available to obtain this service. First, a utility can build transmission lines that it owns and operates. Second, a utility can purchase transmission service from other utilities that own transmission facilities. Some electric utilities in Florida own very few transmission facilities. Thus, they rely heavily on other utilities to provide transmission services that are essential to the provision of retail service. The same options exist for generation. In both cases, where transmission service or generation is procured from another utility, the rates for that wholesale purchase are set by FERC under the Federal Power Act. Florida law, in fact, recognizes this. §366.055(2)(a), Fla. Stat. (Requiring the Commission to direct purchasing utilities to pay the wholesale rates approved for the producing utility by FERC.)

All utilities in Florida buy some generation and transmission service from other utilities under FERC-set wholesale rates, and some Florida utilities buy all generation and virtually all transmission services under FERC-approved

tariffs. See, Order No. 02-1199 at pages 59-60; R. 23:4410-4411. Moreover, all FERC jurisdictional utilities that have transmission facilities currently have on file FERC-approved transmission rates for the provision of wholesale transmission services, and currently provide wholesale transmission services to other utilities under those FERC-approved rates. Public utilities in Florida currently include in their Commission-set retail rates the cost of transmission and generation services provided under FERC-approved rates.

Because of its concern about the extent of FERC's control over charges for retail transmission service in the future, the Commission found that it was premature to make a decision whether certain aspects of the Companies' proposal were appropriate. The Commission expressly stated in its order:

[W]e find that 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. The Applicants are directed to modify the GridFlorida compliance filing to recognize our continuing jurisdiction over the total cost of transmission service to retail customers. At the end of the initial 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.

(Order 02-1199, p. 63; R. 23:4414) Consequently, the Commission's order did not change the scope of its jurisdiction,

nor could it. That jurisdiction is established by Chapter 366, Florida Statutes.

IV. THE COMMISSION CAN ACKNOWLEDGE FERC'S ACTIONS AND DETERMINE IF PUBLIC UTILITIES UNDER ITS JURISDICTION ACTED PRUDENTLY UNDER THE CIRCUMSTANCES.

The Commission agrees that it can only implement legislative policy in accordance with Florida Statutes, and that it cannot on its own author a new state energy policy. That is not what the Commission has done here. Rather, the Commission acknowledged the initiative of a federal agency to promote wholesale competition. It further acknowledged that, based on the FERC's order and other pronouncements, a prudent utility regulated by both FERC and the Commission would proceed to formulate and participate in an RTO. That was the decision the Commission made in Order No. 01-2489, after an evidentiary hearing, and OPC failed to appeal that order. The Commission recognized that it was far better for Florida to take action to shape an RTO tailored to the needs of Florida than to ignore FERC's actions with the likely consequence of having a federally-imposed RTO structure.

OPC focuses on the Commission's statement in Order No. 01-2489, reiterated in Order No. 02-1199, regarding its support for development of a competitive wholesale energy market, as if that were an end in itself. OPC omitted from the middle of its quoted material the reasons for the Commission's support, that

"[i]n the long term, the efficiencies and benefits identified through our evidentiary hearing should put downward pressure on transmission and wholesale generation rates and, in turn, on retail rates." (Order 01-2489 at page 5; R. 7:1329)

The Commission has the statutory responsibility to review the prudence of utility management decisions affecting a public utility's operations pursuant to its authority to regulate rates and service. §366.05(1), Fla. Stat. The Commission is also charged with the development of an efficient and reliable coordinated electric grid throughout Florida. §366.04(5), §366.055(3), Fla. Stat. Recognizing, and even directing, changes in utility operations that lead to greater efficiencies and a better coordinated grid are certainly not inconsistent with Florida law. Development of an RTO is expected to facilitate and enhance competition in the wholesale market, but it does not create a competitive market where none existed as OPC suggests. Competition in the wholesale market has existed on a limited basis in Florida for many years. (Order No. 01-2489 at p. 13; R. 7:1337) See generally, In re: Review of the appropriate application of incentives to wholesale power sales by investor-owned electric utilities, 00 F.P.S.C. 9:414 (1981)(Reviewing the changes to the wholesale market since 1984.) For example, each time that Seminole Electric Cooperative purchases generation from another entity and uses

Florida Power and Light to transmit the energy, it is competing with Florida Power and Light Company (FPL) because it did not buy the generation from FPL. Establishment of an RTO will simply improve the efficiency of that transaction. No revision of existing law is necessary for the Companies to make changes to their operations that will lead to greater efficiencies and that should, in turn, benefit both the Companies and the ratepayers. The Commission has not authored a new state policy by finding the Companies' actions prudent or by finding that modifications to the RTO proposal should be made if the Companies' ongoing participation in GridFlorida was to be found prudent.

OPC cites to proposed legislation in 2001 restructuring the wholesale market for electricity and a study commission report on the electric industry to bolster its argument that the Commission has authored a new state policy. None of these documents is in the record on appeal, nor are they authorities within the meaning of the appellate rules. Nevertheless, the documents do not provide legal support for OPC's contention and OPC does not put forth any legal argument on the issue for the Court to consider.

Although legislative inaction in the face of a judicial opinion construing a particular statute has been used by this Court as an aid to statutory construction, OPC has identified no

statute whose meaning is in need of construction in this case. State v. Hall, 641 So. 2d 403 (Fla. 1994). In addition, there is no judicial opinion construing a statute that OPC relies upon. OPC cannot be relying on the Tampa Electric v. Garcia decision because that opinion construed section 403.519, Florida Statutes, a statute not at issue here. 767 So. 2d 428 (Fla. 2000).

As OPC points out on page 28 of its brief, the Commission's Order No. 01-2489 determining the prudence of the Companies' RTO activities was issued soon after the 2020 Study Commission's final report, before the 2002 legislative session. The Legislature took no action during that session to adopt legislation to overturn the Commission's decision, nor was there any proposed legislation on the subject. Thus, if any conclusion may be drawn from the Legislature's inaction it would be that it had no quarrel with the Commission's decision and did not believe legislation was required. State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So. 2d 529, 531 (Fla. 1973) ("When the Legislature reenacts a statute, it is presumed to know and adopt the construction placed thereon by the State Tax administrators.") At best then, the Legislature's inaction supports the Commission's position. Otherwise, it is meaningless. Either way, it does not support OPC's argument.

V. WHETHER OR NOT GRIDFLORIDA WOULD BE SUBJECT TO THE COMMISSION'S JURISDICTION AS AN "ELECTRIC UTILITY" IS NOT DISPOSITIVE OF THE COMMISSION'S CONTINUED JURISDICTION.

OPC argues at length in this point about the jurisdictional status of an RTO formed as a Transco that would own transmission assets. OPC criticizes the Commission's decision that the RTO should be structured as an ISO instead of a Transco; and argues that approval of the ISO plan would cause an immediate loss of Commission ratemaking jurisdiction. OPC's argument is irrelevant as to the first point and untimely as to the second. OPC misapprehends the actual decision the Commission made, and its argument is based on pure speculation.

OPC repeatedly speculates what it "would" mean to the Commission's jurisdiction if the Commission accepted certain details of the Companies' proposal and what FERC might do under certain circumstances. But the Commission did not accept the part of the proposal that OPC complains of--the Companies' proposed transmission rate structure. (I.B. 34-35) In Order No. 02-1199 at page 63, the Commission expressly stated, based on its analysis of the proposed transmission rate structure, that "we find that 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]." (R. 23:4414)

Even if the Commission had accepted the Companies' proposal, whether or not the GridFlorida RTO would be an "electric utility" is not dispositive of the Commission's jurisdiction. The Commission will continue to determine the Companies' revenue requirements and set the Companies' retail rates. §366.041, §366.05(1), Fla. Stat. If the GridFlorida RTO is ultimately approved by FERC, OPC is correct that under the filed-rate doctrine the Commission would be required to consider as prudent the rates paid by a utility that FERC has found to be fair and reasonable. As noted in Point III above, however, that is what occurs now with respect to the transmission and generation services that are regularly purchased by Florida electric utilities whose retail rates are regulated by the Commission.

In addition, OPC overlooks the point that it is FERC's action, not the Commission's, that will ultimately result in the operation of an RTO. The Commission's order in and of itself has effected no change in its regulation of the Companies.

VI. THE COMMISSION HAD THE DISCRETION TO REVIEW THE COMPANIES' GRIDFLORIDA RTO PROPOSAL AND DETERMINE WHETHER THE COMPANIES' ACTIONS WERE PRUDENT.

OPC contends that the Commission should not have "approved" any part of the GridFlorida proposal or "allowed" the RTO to come into existence. Once again, OPC misconprehends the nature of the proceeding below and the action taken by the Commission. OPC overlooks the fact that the Companies' RTO proposal was

submitted to FERC in response to FERC's Order, and will take effect if and when FERC approves it. The Commission determined the prudence of the Companies' actions in the proceeding below, determined what is in the best interest of Florida ratepayers, and directed the Companies to make changes to their proposal to serve that interest. That is all.

OPC argues that the Commission approved a proposal that does "what the PSC forbade." As shown by the language of the order that OPC quotes at pages 38-39 of its brief but apparently does not understand, the Commission did not approve a proposal that does "what the PSC forbade." The quoted language specifically states that the compliance filing must be further modified to recognize the Commission's continuing jurisdiction over the total costs of transmission service to retail customers. (R: 23:4414) The Commission's actions were well within its discretion and did not constitute its "approval" of the GridFlorida proposal from a jurisdictional perspective.

VII. OPC'S CONTENTION THAT THE COMMISSION CANNOT AUTHORIZE AN ISO MISAPPREHENDS WHAT THE COMMISSION DID IN ITS ORDER.

Contrary to OPC's assertion, the Commission has not changed the way it operates or limited the scope of its authority. Neither the Commission nor the Companies can unilaterally or in concert expand or diminish the Commission's statutory jurisdiction. That is not what was done here.

The Commission directed the Companies to revise GridFlorida's structure to conform it to what the Commission considered to be the most prudent RTO proposal to submit to FERC for approval. Because FERC is the regulatory body that is charged with approving RTO proposals, and FERC provisionally approved a GridFlorida RTO prior to the Commission's proceeding, the Commission's action essentially amounted to instruction to the Companies regarding the changes it should request FERC to approve. The Commission's action was entirely consistent with its existing statutory duty to review the costs, benefits, and potential impact of utility operations on Florida ratepayers, and its duty to assure the operation of a coordinated electric power grid.

OPC is mistaken about the relevance of the Court's decision in Tampa Electric Co. v. Garcia, 767 So. 2d 428 (Fla. 2000), to this case. As the Court later explained in Panda Energy Int'l v. Jacobs, 813 So. 2d 46 (Fla. 2002), Tampa Electric was limited to the construction of the need determination statute, section 403.519, Florida Statutes. The Court only construed the scope of the Commission's jurisdiction to grant a determination of need to an applicant that was a non-regulated out-of-state wholesale power company where only 30 megawatts of the proposed 514-megawatt capacity had been committed by contract to be sold to a Florida utility. Panda Energy, 813 So. 2d at 53. The

Commission here has neither expanded nor limited its authority by reviewing the Companies' RTO proposal and directing that certain changes be made before the proposal is resubmitted to FERC. Tampa Electric does not stand for the proposition that the Commission must ignore FERC's actions or the changes in the electric industry in the process of exercising its currently delegated statutory authority. The Commission's duty is to protect the public interest and to assure adequate and reliable energy and a coordinated electric power grid throughout Florida. §366.01, 366.04(5), Fla. Stat. The Commission has carried out that duty here.

OPC also cites to State ex rel. Sandel v. New Mexico Public Utility Comm'n, 980 P. 2d 55, 61 (N.M. 1999), implying that the Commission has acted outside its authority based on changes in the regulation of the electric power industry at the federal level. The action taken by the New Mexico Commission that the New Mexico Supreme Court found impermissible, however, was totally different. There, the Commission effectively deregulated the retail side of the state's electric power industry. It required a regulated public utility to unbundle its transmission and distribution services and offer them to another company so that the other company could in turn sell electricity directly to retail customers, allowing the new company to charge a rate set by market forces. That action

bears no similarity to what Florida's Commission has done. The Commission has not deregulated any activity, allowed a new entity to sell electricity, nor authorized retail competition.

VIII. THE COMMISSION HAS NOT RELINQUISHED ITS GRID BILL JURISDICTION.

Pursuant to sections 366.04(2) and (5), 366.05(7) and (8), and 366.055, Florida Statutes, the Commission's grid bill authority extends to electric utilities and the electric power grid throughout Florida. Each of the Companies, the municipal utilities, and the cooperative utilities in Florida will remain subject to the Commission's authority with respect to the planning, development, and maintenance of the coordinated electric power grid. The Commission will continue to exercise its jurisdiction just as it does today--even if FERC ultimately approves the Companies' RTO proposal. The proposal does not change this. Nor does it change the fact that the Companies will continue to be electric utilities subject to the power of the Commission to determine the prudence of their management decisions, to determine cost recovery of transmission and purchased power costs, and to set the Companies' retail rates.

OPC's assertion that the Commission has delegated its responsibility or authority with regard to planning is incorrect. The language in the RTO proposal about GridFlorida's "ultimate authority for performing the planning function" does not change the role of the Commission or its ultimate authority

to approve the plans under section 366.04(5), Florida Statutes. The Commission will continue to review each of the electric utility's Ten Year Site Plans pursuant to section 186.801, Florida Statutes. It will continue to determine the need for transmission lines pursuant to section 403.537, Florida Statutes. It will continue to require the installation or repair of transmission facilities pursuant to section 366.05(1) and (8), Florida Statutes, if it finds inadequacies exist. It will review each public utility's transmission and generation construction activities, determine their prudence, and determine whether and how the utility will recover its costs pursuant to section 366.041, Florida Statutes. The Commission will also continue to set each public utility's retail rates pursuant to section 366.04(1), Florida Statutes.

The Commission has not relinquished its jurisdiction. If anything, it has acted to maintain it. If it had not taken the actions that it did, it appeared clear to the Commission that FERC would go forward with an RTO absent the Commission's involvement. The Commission believed it had a duty to protect and maximize the benefits for Florida and that is precisely the action it has taken. OPC has not demonstrated that the Commission committed any legal error.

IX. THE COMMISSION DID NOT ALLOW THE COST RECOVERY OPC COMPLAINS OF.

OPC contends that the Commission's "allowance of cost recovery is most egregious". Once again, however, OPC's contention is premised on a mistaken reading of the Commission's Order No. 02-1199 and is based on pure speculation. The Commission did not approve recovery of any costs in that order. It merely addressed a cost recovery methodology to be used should the Companies have increased costs and should they seek recovery. The Commission only noted that the Companies estimated that the cost could reach \$1.123 billion over five years. That amount itself was a rough estimate of the gross amount, subject to offsetting benefits and cost reductions, and subject to the normal review and determination of prudence if and when the Companies sought cost recovery.

Moreover, the Commission's decision determining that the cost recovery methodology would be through the capacity cost recovery clause was proposed agency action. It was subject to protest and the right to a hearing. OPC in fact protested this proposed decision and requested a hearing, but then abandoned the protest to file its notice of appeal. Thus, not only has OPC misapprehended the Commission's actual decision, but it has failed to exhaust its administrative remedies as it is required to do.

CONCLUSION

OPC's appeal should be dismissed. If the Court nevertheless finds that Commission Order No. 02-1199 is properly before it, the Commission's order should be affirmed in all respects. OPC has failed to meet the burden required to overcome the presumption of validity attached to Commission orders or to demonstrate that Order No. 02-1199 violates the essential requirements of law. Gulf Power Co. v. Florida Public Service Comm'n, 453 So. 2d 799 (Fla. 1984).

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