

IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE)
OF FLORIDA,)
)
Appellants,)
)
v.)
)
LILA A. JABER, et al.,)
)
Appellees.)
_____)

Case No. SC02-2159

On Appeal From an Order of
the Florida Public Service Commission

AMENDED ANSWER BRIEF OF APPELLEE
FLORIDA POWER CORPORATION

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief. Appellant, Citizens of the State of Florida, are represented by Office of Public Counsel, is referred to as “OPC.” Appellee, the Florida Public Service Commission, is referred to as the “PSC.” The Federal Energy Regulatory Commission is referred to as “FERC.” Appellees, Florida Power Corporation, Florida Power and Light Company and Tampa Electric Company, are referred to individually as “Florida Power,” “FPL,” and “Tampa Electric” and referred to collectively as “the Companies.” A regional transmission organization is

referred to as "RTO." PSC
Order No. PSC-01-2489-FOF-EI
(December 20, 2001) is referred
to as "Order No. 01-2489." PSC
Order No. PSC-02-1199-PAA-EI
(September 3, 2002) is referred
to as "Order No. 02-1199."

**STATEMENT OF THE CASE AND
FACTS**

Florida Power concurs with, and hereby adopts, the Statement of the Case and Facts set forth in the Answer Briefs of Appellees Florida Power & Light Company and Tampa Electric Company.

SUMMARY OF THE ARGUMENT

OPC's appeal represents a collateral attack on matters decided in Order 01-2489 that are no longer subject to review and a premature challenge to non-final matters addressed in Order 02-1199. The appeal is untimely in both respects and therefore should be dismissed.

OPC fails to distinguish between what the PSC has and has not done in its GridFlorida proceeding, including the issuance of the order on appeal. What the PSC has not done is to approve GridFlorida or any of its elements, as OPC contends. Rather, the PSC has undertaken a prudence review of the Companies' actions regarding the RTO filing previously made with FERC and, as a part of this review, is in the process of guiding the formulation of a revised GridFlorida proposal which the

Companies can then submit to FERC with the foreknowledge that the proposal satisfies the PSC's standard of prudence. However, the ultimate authority to approve, modify or reject the proposal, in whatever form it may eventually take, rests with FERC, not the PSC.

The pending GridFlorida proceeding, including the order on appeal that OPC contends cedes the PSC's jurisdiction, is actually an affirmative exercise of the PSC's jurisdiction over the Companies to ensure that the RTO proposal previously filed with FERC is revised in a manner that the PSC finds to be prudent, *i.e.*, consistent with the state's regulatory objectives and the best interests of Florida ratepayers. The exercise of this jurisdiction is in response to the Companies' petitions requesting the PSC to

determine that their actions regarding GridFlorida were prudent. The PSC determined in Order 01-2489 that the Companies' actions in filing an RTO proposal with FERC were a prudent response to Order 2000, but found that certain elements of that proposal did not adequately serve the state's regulatory objectives. See Order 01-2489 at 4. Rather than simply determining that these particular elements were not prudent and closing the proceeding, the PSC undertook the additional affirmative task of identifying how the elements of the original proposal could be revised to better serve these state interests and thereby result in a prudent proposal for the Companies to file with FERC.

retail customers is a clear, if not classic, exercise of the PSC's statutory authority. By exercising this authority in such a thorough and comprehensive manner, the PSC would be more appropriately commended than criticized.

Reviewing the prudence of utility actions that affect the rates and service provided to

STANDARD OF REVIEW

The standard applied by this Court in reviewing orders of the PSC was clearly articulated in Gulf Coast Elec. Co-op., Inc. v. Johnson, 727 So. 2d 259, 262 (Fla. 1999). There, the Court stated that Commission orders "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.'" Id. (quoting Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997) (citations omitted)); see also Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So. 2d 982, 987 (Fla. 1996); United Tel. Co. v. Public Serv. Comm'n, 496 So. 2d 116, 118 (Fla. 1986). This Court in Gulf Coast went on to explain

that "[c]onsidering the PSC's specialized knowledge and expertise in this area, this deferential standard of review is appropriate" and that "an agency's interpretation of a statute it is charged with enforcing is entitled to great deference." 727 So. 2d at 262.

For these reasons, the Court in Gulf Coast found that an appellant seeking review of a PSC order "bears the burden of overcoming [these] presumptions by showing a departure from the essential requirements of law" and concluded that a reviewing court "will approve the Commission's findings and conclusions if they are based on competent substantial evidence and if they are not clearly erroneous." Id. at 262 (footnote omitted) (quoting Ameristeel, 691 So. 2d at 477); see also Fort Pierce Utils.

Auth. v. Beard, 626 So. 2d 1356, 1357 (Fla. 1993); § 120.68(10), Fla. Stat.

The rule of deference reflects a "proper relationship between the courts and administrative agencies charged with particular regulatory duties." Hill Top Developers v. Holiday Pines Serv. Corp., 478 So. 2d 368, 370 (Fla. 2d DCA 1985), rev. denied, 488 So. 2d 68 (Fla. 1986) (describing the judge-made primary jurisdiction doctrine) (quoting United States v. Western P.R. Co., 352 U.S. 59 (1956)). Deference to administrative agencies helps "maintain uniformity at that level or to bring specialized expertise to bear upon the disputed issues." Hill Top, 478 So. 2d at 370.

OPC asserts that the PSC is not entitled to deference in its decision under review because it has exceeded its

statutory authority. For the reasons described herein, this Court has ample basis to find that the PSC has, in fact, acted within its statutory authority. The PSC proceeding in which the order on appeal was issued is in response to the Companies' petitions requesting the PSC to determine that their actions regarding GridFlorida are prudent. In that yet to be competed proceeding, the PSC has attempted to identify the elements of a GridFlorida proposal that will best serve state regulatory objectives and ratepayer interests. In doing so, the PSC will have effectively established the Companies' prudence when they subsequently submit a proposal containing those elements to FERC for its approval.

Determining the prudence of utility actions that affect

the rates and service offered to retail customers is one of the most significant and widely recognized regulatory tools available to the PSC in the exercise of its statutory authority. Because the PSC has acted within its statutory authority in conducting the prudence review at issue here, the PSC's decision in that proceeding is entitled to deference. See Bricker v. Deason, 655 So. 2d 1110, 1111 (Fla. 1995).

ARGUMENT

**I. OPC'S
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The main thrust of the points presented by OPC constitute a collateral attack on the PSC's Order 01-2489 issued December 20, 2001 in Dockets 000824-EI (Florida Power), 001148-EI (FPL), and 010577-EI (Tampa Electric). Page 28 of that order advised the parties, including OPC, that judicial review by the Florida Supreme Court must be initiated by filing a notice of appeal "within thirty days (30) after the issuance of this order." Following the issuance of Order No. PSC-02-0350-FOF-EI, dated March 14, 2002, on reconsideration of Order 01-2489, the last day to file a timely appeal was April 15, 2002. This appeal was not initiated by OPC until October 3, 2002, more than five months after Order

01-2489 became final and non-appealable. OPC's collateral attack on that order is therefore untimely and impermissible.

For example, in Order 01-2489 the PSC found that expenditures by the Companies on behalf of GridFlorida were prudent and recoverable from retail ratepayers. See Order 01-2489 at 4, 5, 10-11. The PSC reached this finding because the formation of an RTO would benefit Florida consumers and because a proactive response by the Companies to FERC's prescriptions regarding RTO formation would provide the best opportunity to tailor an RTO to Florida's specific needs. See Order 01-2489 at 7-8. OPC declined to appeal the order adopting these factual determinations. OPC's attempt to reargue the same issues in this appeal is too late.

Other points in OPC's appeal are directed to portions of the Commission's

Order 02-1199 issued in the subsequent docket, which are (a) pending on reconsideration with respect to final agency action on certain issues; (b) pending a hearing requested with respect to proposed agency action on certain other issues; and (c) pending a hearing set by the PSC on significant market design issues. Clearly, substantial portions of the order on appeal are non-final and reflect the incomplete status of the PSC's proceeding to determine the elements of a prudent GridFlorida proposal. The PSC was well along in the process of making these determinations when it was stopped short of completion by OPC's premature appeal. If, however, the process is allowed to complete itself, as it should have been, OPC and the other parties will know what elements among the variety of alternatives now before the PSC actually comprise the final GridFlorida proposal. The

proposal would then be subject to appropriate judicial review as final agency action.

While the Court may have discretionary jurisdiction to review a non-final administrative order under section 120.68, Florida Statutes, that discretion should not be exercised in the circumstances presented here. OPC has not requested such discretionary review, nor has OPC shown why a subsequent review of the PSC's final agency action would not provide an adequate remedy or result in irreparable injury. See Continental Equities, Inc. v. Jacksonville Transportation Authority, 558 So. 2d 154 (Fla. 1st DCA 1990).

In short, OPC's appeal represents a collateral attack on matters decided in Order 01-2489 that are no longer subject to review and a premature challenge to non-final matters addressed in Order 02-1199. It

is therefore untimely in both respects and should be dismissed.

II. THE COMPANIES' CUSTOMERS WILL NOT BE ADVERSELY AFFECTED BY THE FORMATION OF GRIDFLORIDA.

A. THE PSC DETERMINED RETAIL CUSTOMERS WOULD BENEFIT FROM THE FORMATION OF GRIDFLORIDA.

OPC references a statement in Order 02-1199 that the costs of GridFlorida during its first five years are estimated to be over \$1.1 billion and, based on this, asserts that customers will suffer higher retail rates. See OPC Initial Brief at 47-48. This assertion of a customer detriment is patently one-sided. OPC focuses only on the costs of GridFlorida and completely ignores the

offsetting benefits of the RTO found by the PSC in Order 01-2489. In that order, the PSC balanced both the costs and the benefits of an RTO and concluded that the efficiencies and benefits of an RTO were likely to lead to lower retail rates in the long run. See Order 01-2489 at 5, 8-10. OPC did not appeal that decision, which is now final and no longer subject to judicial review.

As this Court recognized in Legal Environmental Foundation, the appellant of a PSC order must “demonstrate that it will be adversely affected by the Commission’s decision.” 668 So. 2d at 987. OPC has failed to satisfy this essential requirement.

B. THE PSC'S ACTIONS IN SHAPING THE RTO PROPOSAL TO BE SUBMITTED FOR FERC APPROVAL WERE REASONABLE

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OPC argues that the PSC cannot authorize the formation of an entity over which it would not exercise jurisdiction. This presumes that in the absence of forming an RTO, the PSC would continue to exercise jurisdiction over the subject matter of transmission just as it has in the past. That simply could not be known at the time the PSC entered the order on appeal, nor can it be known at this point in time. In light of FERC's expanding jurisdictional initiative over transmission service reflected in its Order 2000 and its pending Standard Market Design rulemaking, the potential for federal preemption could not be taken lightly by the PSC. See Order 2000,

Regional Transmission Organizations, FERC Stat. & Regs., ¶31,089 (1999); Docket No. 01-12-00, Remedying Undue Discrimination Through Open Access Transmission and Standard Market Design, FERC Stats. & Regs., ¶61,138 (2002). Given this uncertainty, the PSC made a factual determination that the GridFlorida proposal, in a form that would be revised as it directed, would preserve as much of its jurisdiction as possible. In addition, by taking an active role in guiding the form of the GridFlorida proposal, rather than passively waiting for preemption, the PSC would capture the opportunity to ensure that the RTO ultimately approved by FERC accommodated the needs and interests of Florida consumers to the greatest extent possible.

Jurisdiction conferred by chapter 366, Florida Statutes, cannot be unilaterally expanded or contracted by

the PSC. The ability to exercise jurisdiction over certain subject matters -- in this context, transmission service -- depends on both authorization by the Legislature in chapter 366 and the forbearance of Congress and FERC in granting and exercising federal regulatory authority. Historically, FERC has deferred to the state commissions in setting the revenue requirements for the transmission component of bundled retail service and in providing regulatory oversight for the expansion and reliability of transmission grids, insofar as these matters have an impact on regulated retail service. What is unknown is the extent to which FERC will continue its deference to state regulatory oversight in the future. FERC has signaled its intention to preempt the states on rates, terms, and conditions of transmission service, although it has not taken final action to do so, nor has it definitively indicated the

extent of regulatory oversight over planning and reliability it will continue to defer to state regulatory agencies. In this context the PSC's intent, as plainly expressed in its order, in reviewing the GridFlorida proposal was to maintain as much of its jurisdiction as possible, not in derogation of its statutory duties under chapter 366, but in support of them.

III. THE PSC'S procedures were consistent with the administrative procedures act, chapter 120, florida statutes.

OPC's unfounded assertion that the proceedings conducted by the PSC violated sections 120.569 and 120.57(1), Florida Statutes, is fully responded to in the Answer Briefs of Florida Power & Light Company and Tampa Electric Company, which Florida Power hereby adopts, and will not be reiterated in this brief.

**IV. THE PSC
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P R U D E N T .**

OPC contends that the PSC should not have "approved" any part of the GridFlorida proposal and complains that, instead, the PSC "allowed the RTO to come into existence" See OPC Initial Brief at 38. As explained earlier, OPC's contention ignores the fundamental fact that authority to approve the GridFlorida proposal rests with FERC, not the PSC. If and when GridFlorida does evolve from its current status as an incomplete proposal to an actual, operational RTO, it

will do so as a result of FERC approval, not the PSC's permission.

In the absence of approval authority that rests exclusively with FERC, the PSC has exercised its traditional authority over the prudence of utility actions to influence the approval process. The PSC has accomplished this by shaping the GridFlorida proposal that the Companies will submit to FERC in a manner to best serve the state's regulatory objectives and to preserve its jurisdiction to the greatest extent possible. While the Companies may have the right to seek approval of GridFlorida from FERC in any form they deem appropriate, the Companies recognize that their failure to include provisions found by the PSC to best serve the interests of the state and the Companies' retail customers

could have serious and ominous
prudence implications that they
would find difficult to ignore.
Thus, the PSC's use of its long
standing responsibility to
oversee the prudence of utility
actions has been both effective
and well within its delegated
regulatory authority.

CONCLUSION

For the reasons set forth above, this Court should dismiss this appeal. In the alternative, this Court should affirm Order 02-1199.

Dated this 27th day of January 2003.

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