

**IN THE SUPREME COURT OF FLORIDA**

Case No. SC02-2159

On Appeal from a Final Order of  
the Florida Public Service Commission

**CITIZENS OF THE STATE OF FLORIDA**

**Appellants,**

**v.**

**LILA A. JABER, et al.,**

**Appellees.**

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**INITIAL BRIEF OF APPELLANTS,  
THE CITIZENS OF THE STATE OF FLORIDA**

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## STATEMENT OF THE CASE AND OF THE FACTS

### **Nature of the Order Appealed**

The Florida Public Service Commission's ("PSC") Order No. 02-1199-PAA-EI ("Order No. 02-1199"), issued September 3, 2002, in Docket No. 020233-EI, In re: Review of GridFlorida Regional Transmission Organization (RTO) Proposal, approved most aspects of a joint proposal by Florida Power & Light Company, Florida Power Corporation, and Tampa Electric Company (collectively, the "GridFlorida Companies" or "companies"), to transfer operational control of their transmission assets to a regional transmission organization ("RTO") to be known as GridFlorida, Inc., under the jurisdiction of the Federal Energy Regulatory Commission ("FERC") and to impose upon the companies' retail customers in excess of \$1.1 billion of additional costs over the first five years of RTO operations. [Vol. 23:4352]<sup>1</sup> Order No. 02-1199 is grounded upon the PSC's mistaken belief that it could implement a policy in support of wholesale competition under FERC's jurisdiction without first receiving directions from the Legislature in

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<sup>1</sup>Record citations (other than the transcript of the October 3-5, 2001, hearing) will be shown within brackets by a volume number and page number separated by a colon: [Vol. xx:xxx]

the form of statutory amendments and without relinquishing any of the PSC's own statutory jurisdiction.

## **FERC's Jurisdiction Generally**

A description of the case below necessarily requires some explanation of FERC's efforts in recent years to promote competition in the market for wholesale electric generation. FERC's authority derives from Part II of the Federal Power Act, 16 U.S.C. §§ 824 et seq. In Section 201 of the Federal Power Act, 16 U.S.C. § 824, FERC was given jurisdiction over wholesale sales (i.e., sales for resale) of electrical energy in interstate commerce and over the transmission of electrical energy in interstate commerce. FERC has jurisdiction over the nation's investor-owned electric utilities (other than those in Alaska, Hawaii, and most of Texas), but not over municipal utilities or electric cooperatives. [Tr. vol. 2:293; vol.3:465]<sup>2</sup> Each of the GridFlorida Companies is currently subject to FERC's jurisdiction. The GridFlorida RTO would also be subject to FERC's jurisdiction.

## **The PSC's Jurisdiction Generally**

The PSC regulates all aspects of retail sales by "public utilities" as defined in Section 366.02(1), Florida Statutes, which sell electricity to the public in Florida. See e.g. §§ 366.03, 366.041, 366.05(1)-(6), 366.06-366.071. The PSC also regulates a broader class of "electric utilities" as defined in Section 366.02(2) for

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<sup>2</sup>Citations to the transcript of the October 3-5, 2001, hearing will be in brackets with the letters "Tr." followed by the volume and page number: [Tr. vol. x:xx]

purposes, among other things, of maintaining a coordinated state-wide electric transmission grid. §§ 366.04(2) and (5), 366.05(7)-(8), and 366.055 (informally referred to collectively as the “Grid Bill”<sup>3</sup>). Each of the GridFlorida Companies is both a public utility and an electric utility. Municipal electric utilities and electric cooperatives are electric utilities but not public utilities. GridFlorida would not be a public utility, and a topic addressed in this brief is whether the RTO would be an electric utility under Florida law.

### **FERC’s Order No. 888 in 1996**

The generation, transmission and distribution of electricity has traditionally been considered a natural monopoly. Electricity was generally provided on a “bundled” basis, with customers paying a single price for the electrical energy delivered to their meters (as opposed to separate, unbundled prices for the electrical energy and the delivery of energy). The proliferation of non-utility generators after the passage of the Public Utility Regulatory Policies Act in 1978 (“PURPA”)<sup>4</sup> and the

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<sup>3</sup>The history of the Grid Bill and the PSC’s authority under statutes comprising the Grid Bill are addressed in some detail in section VIII of this brief at page 43.

<sup>4</sup>Pub. L. No. 95-617, 92 Stat. 3117, codified in various sections of Titles 15, 16, 42, and 43 U.S.C.

Energy Policy Act of 1992<sup>5</sup> convinced FERC that a competitive market for wholesale generation might develop if all generators had equal access to transmission systems owned by vertically integrated utilities (i.e., those with electric generation, transmission and distribution facilities). [Tr. vol. 2:243- 46]

FERC's Order No. 888<sup>6</sup> in 1996 required transmission owners to file Open Access Transmission Tariffs ("OATTs") under which they would provide transmission service for their own wholesale sales upon the same terms and conditions and at the same rates charged other vendors of wholesale power. [Tr. vol.2:243-44; vol. 6:824-25] FERC also decided that a utility's unbundling of retail service into separate elements for transmission and generation, either voluntarily or as a result of a state's adoption of retail competition, placed the transmission component of unbundled retail sales under FERC's control. Order No. 888, at 430-31, FERC Stats. & Regs. at 31,781. It made no difference that state officials claimed they intended to retain jurisdiction over retail transmission assets. FERC's interpretation of its jurisdiction was upheld in New York v. Federal Energy Regulatory Commis-

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<sup>5</sup>Pub. L. No. 102-486, 106 Stat. 2776, codified in various sections of Titles 16, 25, 26, 30, and 42 U.S.C.

<sup>6</sup>Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997).

sion, 122 S.Ct. 1012, \_\_\_ U.S. \_\_\_ (2002).<sup>7</sup> Retail regulation in Florida was unaffected by FERC’s jurisdictional construction in Order No. 888 because there has been no voluntary or state-initiated unbundling of retail transmission service.<sup>8</sup> [Tr. vol. 1:124]

FERC was less successful when it tried to require transmission system curtailments to be prorated between wholesale and retail customers so that a utility could not favor its own native-load retail customers. The Eighth Circuit Court of Appeal, in Northern States Power Company v. Federal Energy Regulatory Commission, 176 F.3d 1090, 1095-96 (1999), rejected FERC’s contention that “where there is a clash between its tariffs and the state law, the federal tariff must prevail under the Supremacy Clause.” After noting that “FERC concedes that it has no jurisdiction whatsoever over the state’s regulation of NSP’s bundled retail sales activities,” the court concluded that “[FERC’s] attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside the FPA’s specific grant of authority to FERC.” Id. at 1096. The case was

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<sup>7</sup>The opinion outlines the history of federal regulation of electricity and developments at the federal level leading to FERC’s issuance of Order No. 888.

<sup>8</sup>Mr. Naeve, a former FERC commissioner testifying for the companies, said “FERC has taken the position that their [sic] jurisdiction kind of depends on what the state chooses to do.” [Tr. vol. 1:161]

remanded with directions to FERC “to allow amendment to its curtailment orders, as now interpreted under Order No. 888, so as to not encroach upon the authority of the regulatory commissions of the states.” Id.

### **FERC’s Order No. 2000 in 1999**

FERC eventually concluded its Order No. 888 had not gone far enough because transmission owners might still favor their own generators over competitors. [Tr. vol. 1:49, 111, 113; vol. 2:243-47, 260-61, 268, 292-93; vol. 6:821-22] FERC also believed the stacking of charges imposed by each transmission system over the contract path between buyer and seller — transmission rate “pancaking” — was preventing some otherwise economical wholesale transactions from taking place. [Tr. vol. 1:51, 109; vol. 4:555-56; vol. 6:762, 801]

In its Order No. 2000,<sup>9</sup> issued on December 20, 1999, FERC decided all transmission service should be placed under the control of RTOs. [Tr. vol. 1:121; vol. 2:259] The RTO would be an interstate transmission company lacking any incentive to favor one wholesale generator (or marketer) over another. FERC’s intent was to eventually have all of the nation’s transmission-owning entities,

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<sup>9</sup>Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh’g, Order No. 2000-A, 65 Fed. Reg. 12088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000)

including those outside FERC's jurisdiction, place their transmission facilities under an RTO's control. [Tr. vol.1:98-106, 134; vol. 2:252; vol. 3:466; vol. 4:575; vol. 6:831-32, 842] RTOs might take the form of transmission companies ("Transcos") that owned transmission assets or independent system operators ("ISOs") that operated transmission assets under utility ownership. [Tr. vol. 8:987] FERC ordered its jurisdictional utilities that owned, operated or controlled transmission facilities to file a plan for RTO participation. Alternatively, those utilities were directed to provide a detailed explanation for not forming an RTO, including identification of any regulatory impediments to RTO formation. [Tr. vol. 2:252-54; vol. 6:831]

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]

## **The Companies' Response to FERC's Order No. 2000**

The companies filed a joint proposal with FERC on October 16, 2000, to form GridFlorida as a for-profit Transco which would assume ownership of Florida Power & Light's and Tampa Electric's transmission assets and assume operational control of Florida Power Corporation's transmission assets. [Tr. vol. 1:121, 126-27] Although FERC's intent was to form large, multi state RTOs,<sup>10</sup> GridFlorida was proposed to encompass only peninsular Florida because of the state's unique geography and the limited transmission capacity available at the Georgia-Florida interface. [Tr. vol. 1:104-05, 115] The companies made a supplemental filing with FERC on December 15, 2000. [Tr. vol. 1:126-28] FERC approved the governance structure on January 10, 2001, which allowed the board selection process to go forward. [Tr. vol. 1:129] GridFlorida LLC, 94 FERC ¶ 61,020 (2001) ("GridFlorida I"). On March 28, 2001, FERC approved the Grid-Florida Transco proposal on a provisional basis but required the companies to make certain modifications by May 29, 2001. [Tr. 130] GridFlorida LLC, 94 FERC ¶ 61,363 ("GridFlorida II"), order on reh'g, 95 FERC ¶ 61,473 (2001).

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<sup>10</sup>FERC has expressed a preference for four RTOs covering the country. [Tr. vol. 1:137]

## **The PSC's Prudence Review of the Companies' RTO Filing at FERC**

Florida Power Corporation committed to participate in an RTO in its application to FERC for approval of a merger with Carolina Power & Light Company.

[Tr. vol. 8:986] The PSC opened Docket No. 000824-EI on July 7, 2000, to review Florida Power Corporation's rates and its pending merger: In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light. [Vol. 1:14]

On August 15, 2000, the PSC opened another docket, Docket No. 001148-EI, to review Florida Power & Light Company's participation in an RTO and its pending merger with Entergy Corporation: In re: Review of Florida Power & Light Company's proposed merger with Entergy Corporation, the formation of a Florida transmission company ("Florida Transco"), and their effect on FPL's retail rates.<sup>11</sup> [Vol. 1:17]

A third docket was opened on April 23, 2001, Docket No. 010577-EI, to review Tampa Electric Company's participation in the RTO: In re: Review of Tampa Electric Company and impact of its participation in GridFlorida, a Florida

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<sup>11</sup>The docket title was later changed to In re: Review of the retail rates of Florida Power & Light Company.

Transmission Company, on TECO's retail ratepayers.<sup>12</sup> [Vol. 1:28] The Office of Public Counsel ("Public Counsel") intervened in each of the dockets pursuant to Section 350.0611, Florida Statutes. [Vol. 1:15, 18, 20, 22, 148, 161]

The PSC, at its May 29, 2001, agenda conference, decided to investigate whether the companies were prudent in pursuing the GridFlorida proposal at FERC. [Vol. 1:163; Vol. 2:201] [Tr. vol. 1:131] In response, the companies, for the most part, suspended further development of GridFlorida until the PSC's prudence inquiry was completed. [Tr. vol. 1:52, 131-33; vol. 3:391-92; vol. 4:637; vol. 5:661, 669, 674-75]

Each of the companies filed a petition on June 12, 2001, asking the PSC to find its formation of, and participation in, GridFlorida to be prudent.<sup>13</sup> [Vol. 2:256, 266, 278] [Tr. vol. 5:686, 696] 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,

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<sup>12</sup>The PSC bifurcated the Florida Power & Light and Florida Power Corporation proceedings and combined (but did not consolidate) Phase 1 of those dockets with the Tampa Electric docket for purposes of evaluating GridFlorida.

<sup>13</sup>The three petitions were virtually identical, except that Florida Power Corporation sought to turn over operational control whereas the other two asked to transfer actual ownership of their transmission assets to GridFlorida.

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. Because resolution of these jurisdictional issues is too critical to the continued viability of GridFlorida, the Applicants have suspended their RTO development activities until the potential jurisdictional conflicts are resolved.” [Vol. 2:273] The companies’ petitions did not allege that approval of GridFlorida would leave the PSC’s jurisdiction over them unaffected.

Hearings were held on October 3-5, 2001. The companies explained why they rejected an ISO structure in favor of a Transco. [Tr. vol. 1:116-22; vol. 3:449-50, 482] Testimony on the companies’ behalf established that, if GridFlorida were approved, FERC would set the revenue requirement for all uses of the transmission system, both wholesale and retail, and the PSC’s role would be reduced to deciding how the FERC-approved charges would be passed through to retail customers.<sup>14</sup> [Tr. vol. 1:121, 124-26; vol. 2:219, 222-27, 363; vol. 3:430-32, 505;

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<sup>14</sup>The PSC does not set a separate transmission rate. Expenses and investment associated with a utility’s transmission system are part of the overall costs used to derive a bundled rate for retail electric service. Florida Power & Light, for example, would pay GridFlorida to transmit power from the company’s generators to its distribution system for ultimate delivery to the customers’ meters. The total amount

(continued...)

vol. 4:525-27, 561-92, 610, 615; vol. 5:710-13; vol. 6:874-86; vol. 7:934-36; vol. 8:995-1002, 1014] Mr. Naeve, the former FERC commissioner testifying for the companies, said FERC's ratemaking authority would be the same whether Grid-Florida assumed ownership or operational control of transmission assets. [Tr. vol. 1:222] Florida Power & Light said it would not proceed with RTO development at FERC unless the PSC explicitly approved the specific method of cost recovery insisted upon by the company. [Tr. vol. 4:536, 542-43; vol. 5:684-709] The RTO would have ultimate responsibility for planning and expansion of the transmission system, although the PSC would have "input" and a "seat at the table" in the process. [Tr. vol. 2:318, 338, 367-68; vol. 3:424, 432-36; vol. 4:545; vol. 6:764, 859] The PSC's authority to order the construction of transmission facilities would emanate from the FERC tariff, and the PSC could enforce compliance by filing a complaint at FERC. [Tr. vol. 2:369, 374; vol. 4:546-47; vol. 6:811-12; vol. 7:938] Mr. Hoecker, FERC's Chairman when Order No. 2000 issued, said the RTO would enable more efficient transmission planning on a regional (i.e., multi state) basis. [Tr. vol. 2:249, 262, 266, 268, 288-92] If the PSC ordered one of the

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<sup>14</sup>(...continued)

paid for transmission service would become part of the revenue requirement recoverable through rates approved by the PSC. [Tr. vol. 1:125; vol. 2:220-23]

companies to construct transmission assets, GridFlorida would be obligated pursuant to the FERC-approved tariff to actually build the facilities. [Tr. vol. 2:343]

### **The PSC's Order No. 01-2489**

The PSC's Order No. PSC-01-2489-FOF-EI ("Order No. 01-2489"), issued December 20, 2001, approved of RTOs in concept but disapproved of the Transco proposal offered by the companies. [Vol. 7:1325] The PSC concluded that GridFlorida — as a Transco — would be an electric utility subject to Chapter 366, Florida Statutes. Order No. 01-2489 at 19. [Vol. 7:1343] The PSC rejected the Transco proposal, however, because an outright transfer of ownership might be perceived by FERC to effect an unbundling of transmission service causing the PSC to lose its ratemaking authority over transmission assets. Order No. 01-2489 at 14. [Vol. 7:1338, 1466] The companies were directed to file an alternative proposal within 90 days with GridFlorida structured as an ISO that would assume operational control (but not ownership) of transmission assets and allow the PSC

to retain its ratemaking jurisdiction.<sup>15</sup> Order No. 01-2489 at 14, 25-26. [Vol. 7:1338, 1349-50]

The GridFlorida Companies made their “Compliance Filing” on March 20, 2002, “incorporat[ing] those changes that are necessary or appropriate in conformance with the Order.” [Emphasis added.] [Vol. 8:1440, 1466] The GridFlorida Transco proposal was amended in four ways: (1) GridFlorida was changed from a for-profit Transco to a non-profit ISO; (2) Although rates for both wholesale and retail service would still be filed with and approved by FERC, the PSC could set rates for retail service over existing (but not new) transmission facilities for the next five years if the individual companies asked FERC to exempt their bundled retail load from FERC’s zonal rates for that time period; (3) A get-what-you-bid approach for balancing energy and redispatch was adopted; and (4) The planning process was revised to conform to an ISO structure. [Vol. 8:1441-42, 1467-68]

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<sup>15</sup>Order No. 01-2489 also directed, at page 25, that Docket No. 010577-EI (the Tampa Electric docket) be closed, but that Dockets Nos. 000824-EI (the Florida Power Corporation docket) and 001148-EI (the Florida Power & Light docket) remain open to process the Phase 2 rate proceedings. [Vol. 7:1349] Future RTO proceedings would be consolidated in a separate generic docket. The order on appeal, Order No. 02-1199, was issued in the consolidated docket, Docket No. 020233-EI.

Even though the companies (as customers of GridFlorida) might be exempted from paying zonal rates for a five-year transition period, they would still have to pay a FERC-approved system-wide rate for new transmission facilities, a FERC-approved grid management charge (“GMC”), and a FERC-approved charge to cover their pro rata share of the revenue requirements of transmission dependent utilities (“TDUs”). [Vol. 8:1442] [Tr. vol. 7:954] The companies asked the PSC to approve a cost recovery mechanism to pass the increased charges to their retail customers. [Vol. 8:1442-43]

The Executive Summary to the ISO proposal stated that each of the companies “committed to take (and pay for) transmission service under the GridFlorida transmission tariff for all its load (both retail and wholesale)” [Vol. 8:1447, 1475] but that, by electing to exempt their bundled retail load for five years, the companies will enable the PSC to “maintain the status quo with regard to jurisdiction over the [companies’] existing transmission facilities during the five year transition period.” [Vol. 8:1448, 1476]

On the subject of planning, the Executive Summary stated that “GridFlorida will continue to have ultimate decision-making authority over planning, and will develop the regional transmission expansion plan through an open and participatory planning process. . . . The [PSC] has the right to review the GridFlorida Plan (and

supporting data) and to provide input to GridFlorida and transmission owners during the decision making process. [] This provision will not in any way limit the [PSC's] exercise of its jurisdiction.” [Vol. 8:1451-52, 1479-80] The Articles of Incorporation establish GridFlorida, Inc., as a not-for-profit corporation organized pursuant to Chapter 617, Florida Statutes, the Florida Not For Profit Corporation Act. [Vol. 8:1532]

Parties filed pre-workshop comments on May 8, 2002. [Vol. 14:2789; Vol. 15:2842-2941, 2943-3025, 3042, 3069] A workshop on the companies' compliance filing was held on May 29, 2002. [Vol. 17:3191-3390] Post-workshop comments were filed on June 21-August 6, 2002. [Vol. 18:3439-3568; Vol. 19:3569-3768; Vol. 20:3769, 3831, 3873-3997, 4002-4019] The PSC did not hold a hearing on the companies' request for approval of their ISO proposal.

(On July 31, 2002, FERC issued a Notice of Proposed Rule Making on “Standard Market Design” in Docket No. RM01-12-000. Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, 100 FERC ¶ 61,138 (2002). In that notice, FERC construed the U.S. Supreme Court's decision in New York v. Federal Energy Regulatory Commission, *supra*, as allowing FERC to place the transmission

component of bundled retail sales under its jurisdiction. A final decision is expected in the Spring 2003.)

### **The PSC's Order No. 02-1199**

On September 3, 2002, the PSC issued its Order No. 02-1199 [Vol. 23:4352] which reflected at least six different actions taken with regards to the GridFlorida ISO proposal: (1) The PSC gave final approval to aspects of the GridFlorida ISO proposal dealing with “structure and governance,” “planning and operations,” and “transmission rate structure;” (2) The PSC adopted proposed agency actions approving other aspects of the GridFlorida ISO proposal dealing with “structure and governance,” “planning and operations,” and other matters on a tentative basis subject to protests and requests for hearing; (3) The market-design portion of the proposal was set for an evidentiary hearing; (4) The PSC acknowledged that \$1.123 billion of additional costs might be imposed on retail customers over the five-year period 2004-2008; (5) The PSC declared that the GridFlorida ISO would be subject to the PSC’s jurisdiction under Chapter 366, Florida Statutes; and (6) The PSC directed the companies to “recognize” that the PSC retained jurisdiction over transmission costs but provided no deadline for doing so.<sup>16</sup>

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<sup>16</sup>The portions of Order No. 02-1199 issued as proposed agency action are  
(continued...)

Public Counsel and others filed motions for reconsideration. [Vol. 24:4471, 4489-4551] Additionally, Public Counsel and others filed petitions on some of the proposed agency actions. [Vol. 24:4613-4654; Vol. 25:4655] Those proposed agency actions that were not protested became final by the passage of time on September 24, 2002. Public Counsel also requested the PSC to stay further proceedings pending receipt of an ISO proposal that conformed to Orders Nos. 01-2489 and 02-1199 by actually providing for the PSC to retain its jurisdiction. [Vol. 24:4538]

Public Counsel filed a Notice of Administrative Appeal on October 3, 2002. [Vol. 25:4747] The court has jurisdiction over this appeal pursuant to article V,

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<sup>16</sup>(...continued)

identified at page 5 of the order. [Vol. 23:4356] The market-design proposal was set for hearing at page 76. [Vol. 23:4427] All other substantive decisions were final agency action, although not clearly delineated as such. The \$1.123 billion of increased costs was identified at page 69. [Vol. 23:4420] The ISO was said to be subject to the PSC's jurisdiction at page 77. [Vol. 23:4428] And the companies were directed to "recognize" the PSC's jurisdiction over transmission costs in the ninth ordering paragraph on page 78. [Vol. 23:4429]

In a letter to FERC's chairman, the PSC's Chairman described the actions taken in Order No. 02-1199: "This Order contains the FPSC's final determination specifically approving the structure and governance aspects, the planning and operation aspects, and certain aspects of the rate design and pricing protocols of the proposed GridFlorida Independent System Operator (ISO)." [Vol. 27:5185]

section (3)(b)(2) of the Florida Constitution and Sections 350.128 and Section 366.10, Florida Statutes.

On October 28, 2002, the PSC issued its Order No. PSC-02-1475-PCO-EI abating further proceedings pending resolution of this appeal. [Vol. 27:5195]

### SUMMARY OF ARGUMENT

This case should be evaluated on fundamental statutory grounds because the PSC is solely a creature of statute. See e.g. State of Florida, Department of Transportation v. Mayo, 354 So. 2d 359, 361 (Fla. 1977) (“Being a statutory creature, [the PSC’s] powers and duties are only those conferred expressly or impliedly by statute.”). The PSC’s Order No. 02-1199 takes certain final actions approving Florida Power & Light’s, Florida Power Corporation’s, and Tampa Electric’s joint proposal to transfer operational control of their transmission assets to GridFlorida, an interstate transmission company under FERC’s jurisdiction. Yet the PSC has never identified a statute that explicitly permits the PSC to approve the proposal, nor has the PSC provided an interpretation of any statutes that would justify the final actions taken in Order No. 02-1199 by necessary implication. Moreover, the PSC cannot implement a fundamental change in the way electric utilities are regulated in Florida unless and until the Legislature amends Florida law.

The Legislature, in Chapter 366, Florida Statutes, enacted a comprehensive plan for the regulation of Florida’s electric utilities and charged the PSC (an agency which, pursuant to Section 350.001, “has been and shall continue to be an arm of the legislative branch of government”) to administer the legislative plan. This regulatory framework has for many years obligated the PSC to exercise exclusive jurisdiction over the transmission component of traditional bundled retail service and to maintain the integrity of the electrical transmission grid as an exercise of the state’s police power for the protection of the public welfare. In the absence of legislative action to the contrary, all regulation of electric transmission facilities must continue under the PSC’s jurisdiction just as before. See Teleprompter Corp. v. Hawkins, 384 So. 2d 648 (Fla. 1980); Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So. 2d 577, 581 (Fla. 1964); Florida Motor Lines Corporation v. Douglass, 7 So. 2d 843, 847 (Fla. 1941). Final actions taken by the PSC in Order No. 02-1199 are unlawful because they depart from the PSC’s delegated legislative authority and allow public utilities subject to the PSC’s jurisdiction to lessen the PSC’s control over them.

#### STANDARD OF REVIEW

The deference generally accorded to PSC orders is inappropriate because the PSC has exceeded its delegated legislative authority. Tampa Electric Co. v.

Garcia, 767 So. 2d 428, 433 (Fla. 2000); United Telephone Co. of Florida v. Public Service Commission, 496 So. 2d 116, 118 (Fla. 1986); Radio Telephone Communications, Inc. v. Southeastern Telephone Co., *supra*, 170 So. 2d at 582.

The court should conduct a de novo review to ascertain whether the PSC's actions conformed to its statutory jurisdiction.

## ARGUMENT

### I.

#### THE COMPANIES' CUSTOMERS WERE ADVERSELY AFFECTED BY THE PSC'S ORDER NO. 02-1199.

In Order No. 01-2489 (December 20, 2001), the PSC announced its support for RTOs as a matter of policy at pages 4-5 [Vol. 7:1328-29]; concluded at page 19 that GridFlorida, as a transco, would be subject to the PSC's Grid Bill jurisdiction [Vol. 7:1343]; rejected the companies' Transco proposal at page 14 because it would divest the PSC of ratemaking jurisdiction [Vol. 7:1338]; and directed the companies to file an alternative ISO proposal at pages 25-26. [Vol. 7:1349-50] No changes were made in the way the PSC regulates electric utilities under its jurisdiction as a result of Order No. 01-2489. The rejection of their petitions may have adversely affected the companies, but they chose not to appeal the PSC's order. Legal Environmental Assistance Foundation v. Clark, 668 So. 2d 982 (Fla. 1996).

Order No. 02-1199 (September 3, 2002) allows the companies to divest the PSC of its Grid Bill jurisdiction over the state's transmission assets and its rate-making jurisdiction over the transmission component of bundled retail sales. The loss of the PSC's ability to regulate public utilities and electric utilities as an attribute of the state's police power pursuant to Section 366.01, Florida Statutes, caused an immediate harm to the companies' customers who have a reasonable expectation of continuing electric utility regulation by the PSC. Id.

## II.

### THE PSC'S PROCEDURES VIOLATED THE ADMINISTRATIVE PROCEDURE ACT, CHAPTER 120, FLORIDA STATUTES.

The companies, at the October 3-5, 2001, hearings, offered evidence and argument in support of their Transco proposal and explained why they had rejected an ISO structure. [Tr. vol. 1:116-22; vol. 3:449-50, 482] The hearings were completely inadequate to support the PSC's conclusion that the companies should file an ISO proposal. Thus, it was not altogether surprising when the companies responded to Order No. 01-2489 by proposing an ISO that transferred the PSC's Grid Bill and ratemaking jurisdiction to FERC, exactly the opposite of what the PSC wanted. Yet the PSC did not dismiss the purported compliance filing as deficient. See Florida Gas Co. v. Hawkins, 372 So. 2d 1118, 1120 (Fla. 1979)

(“Certainly, the Commission could dismiss any application which is deficient on its face in either form or substance.”). Although a “workshop” was held on May 8, 2002, the PSC never offered the point of entry required by Sections 120.569 and 120.57, Florida Statutes, into the agency process that determined the companies’ substantial interests by accepting their compliance filing in Order No. 02-1199.

### III.

#### AN RTO SUCH AS GRIDFLORIDA IS INHERENTLY INCONSISTENT WITH EXISTING FLORIDA LAW.

FERC, in its Order No. 2000, specified characteristics an RTO must have and functions it must perform based on FERC’s perception of its authority under the Federal Power Act. The companies filed their GridFlorida proposal with FERC to comply with FERC’s order, not with Florida law. 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.

FERC, in its Order No. 2000, did not make RTO participation mandatory; it is voluntary, as the PSC found in Order No. 01-2489, at 7. [Vol. 7:1331] See Public Utility District No. 1 of Snohomish County, Washington v. Federal Energy

Regulatory Commission, 272 F.3d 607, 609 (D.C. Cir. 2001) (“We hold first that the challenged requirements of Order 2000 are voluntary and impose no mandatory requirements upon the Utilities . . . .”) Thus, the changes to Florida regulation espoused by the companies did not emanate from anything imposed upon them, but from their desire to accept FERC’s invitation to voluntary RTO participation. Stated simply, the companies’ voluntary RTO filing at FERC was intended to transfer much of the PSC’s jurisdiction over the state’s transmission assets to FERC.

The companies’ petitions to the PSC did not allege their RTO filing at FERC conformed to Chapter 366, Florida Statutes. To the contrary, the companies asked the PSC to find they acted prudently in accepting FERC’s invitation on FERC’s terms. Even though the PSC recognized it could not allow the companies to diminish the state’s control over them, the PSC’s misguided efforts to support FERC’s vision of a competitive wholesale market eventually led the PSC to do just that in its Order No. 02-1199 by improperly delegating its own Grid Bill and ratemaking authority to FERC. See Broward County Traffic Association v. Mayo, 340 So. 2d 1152 (Fla. 1976); International Minerals & Chemical Corp. v. Mayo, 217 So. 2d 563, 566 (Fla. 1969); Hutchins v. Mayo, 197 So. 495 (Fla. 1940).

IV.

THE PSC CANNOT SUPPORT FERC'S  
PROMOTION OF WHOLESALE COMPETITION.

The PSC had announced in its earlier December 20, 2001, order, Order No. 01-2489, a policy decision to support FERC's efforts to foster competition in the wholesale market for electric generation:<sup>17</sup>

As a policy matter, we support the formation of an RTO to facilitate the development of a competitive wholesale energy market in Florida. . . . Accordingly, our decision in this Order is supportive of the FERC's clear policy favoring RTO development. . . . [O]ur decision contributes to the collaborative process necessary to ensure development of an RTO that satisfies both Federal and State policy concerns.

Order No. 01-2489, at 4-5.<sup>18</sup> [Vol. 1328-29] With this regulatory policy as a starting point, the PSC sought to support FERC's goals while retaining the PSC's own Grid Bill and ratemaking jurisdiction. In so doing, the PSC ignored the obvious: The RTO's obligation to file rates for both wholesale and retail purposes at FERC and to be ultimately responsible for planning an electric transmission grid on a

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<sup>17</sup>Although Order No. 01-2489, standing alone, did not harm the companies' customers, the PSC's reliance on that order to support its final actions in Order No. 02-1199 requires that both the source and the application of the PSC's mistakes be addressed in this brief.

<sup>18</sup>The policy decision in Order No. 01-2489 was described in Order No. 02-1199, at 6: "Further, as a policy matter, we noted our support for the formation of an RTO to facilitate the development of a competitive wholesale energy market in Florida." [Vol. 7:1330]

regional scale could never be reconciled with a single state's desire to retain jurisdiction over those same assets.

More to the point, the PSC overstepped its bounds by assuming it could author a state policy to promote wholesale competition. The PSC can only implement legislative policy under specific statutory guidelines; the PSC has not been, and indeed cannot be, delegated the power to formulate changes in the state's energy policy on its own. Florida Gas Transmission Company v. Public Service Commission, 635 So. 2d 941, 944 (Fla. 1994) (“[A] legislative delegation of power to a legislative or executive agency permitting an agency to declare what the law is violates Florida's separation of powers doctrine. [Citations omitted.] These principles, however, do not prohibit the legislature from delegating the authority to carry out legislative policy when the delegation is accompanied by proper standards and guidelines.”); City of West Palm Beach v. Florida Public Service Commission, 224 So. 2d 322, 325 (Fla. 1969) (“Since the Florida Public Service Commission believes the existing statutory provisions . . . are unsatisfactory and fail the public interest, it can bring the subject to the attention of the Legislature in an effort to secure a revision of existing laws.”). Any reasonable doubt about a power being exercised by the PSC must be resolved against the agency, and further exercise of the claimed power must be arrested. Lee County Electric Cooperative v. Jacobs,

820 So. 2d 297, 300 (Fla. 2002) (“[T]he PSC contends that any reasonable doubt regarding its regulatory power compels the PSC to resolve that doubt against the exercise of jurisdiction. See City of Cape Coral v. GAC Utilities, 281 So.2d 493, 496 (Fla.1973). We agree.”). The PSC did not identify any statutory basis for its proclamation that Florida supports wholesale competition; it did not offer interpretations of its own prior orders that would support the new policy declaration; and it did not cite to any supporting rules or case law. This pattern repeats in Order No. 02-1199; the PSC never identifies any specific grant of authority for its support of RTO formation in Florida.<sup>19</sup>

The Legislature has never adopted a policy supporting wholesale competition. Senate Bill 1752, for example, filed in the 2001 legislative session, would have added a second sentence to the “Legislative declaration” in Section 366.01:

The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose. Such regulation shall provide for the

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<sup>19</sup>The PSC said in Order No. 02-1199, at 6-7, that it had jurisdiction “through the provisions of Chapter 366, Florida Statutes, including, but not limited to, Sections 366.04, 366.05, and 366.06, Florida Statutes.” [Vol. 23:4357-58] Beyond this, the PSC made no attempt to explicate how its actions were statutorily permissible.

restructuring of the wholesale market for electricity in this state.  
[Emphasis added.]

The bill died in committee on May 4, 2001. Fla. Legis., Final Legislative Bill Information, 2001 Regular Session, History of Senate Bills at 169.

The Legislature has never even passed a bill to study whether competition should be introduced into Florida's electric market. Senate Bill 2020, filed in the 2000 legislative session, would have created an Energy 2020 Study Commission to "[e]xamine this state's laws and rules governing the production, transmission, and delivery of electricity" and "[r]ecommend appropriate energy policies for this state which will promote competition." The bill died in committee. Fla. Legis., Final Legislative Bill Information, 2000 Regular Session, History of Senate Bills at 178.

The Governor, by Executive Order 00-127, issued May 3, 2000, directed formation of his Energy 2020 Study Commission to make recommendations for meeting Florida's electrical energy needs over the next 20 years.<sup>20</sup> A proposed committee bill drafted by the Florida House Committee on Utilities and Telecom-

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<sup>20</sup>The interim and final reports of the 2020 Study Commission are on the Internet at [www.myflorida.com/myflorida/government/taskandcommissions/energy\\_commission/documents/interim\\_report.doc](http://www.myflorida.com/myflorida/government/taskandcommissions/energy_commission/documents/interim_report.doc) and [www.myflorida.com/myflorida/government/taskandcommissions/energy\\_commissions/pdfs/final\\_report.pdf](http://www.myflorida.com/myflorida/government/taskandcommissions/energy_commissions/pdfs/final_report.pdf), respectively. The Governor's Executive Order is Appendix A to the final report.

munications, PCB UTCO 01-04, would have implemented the interim recommendations of the Study Commission for wholesale market restructuring, but the proposed bill was never filed.<sup>21</sup> Fla. H.R. Comm. on Util. & Telecom., PCB 01-04 (March 2001)(Relating to “Wholesale Energy Production and Sales”). In its final report, issued December 7, 2001, the Study Commission recommended (at page 6) that “Florida’s transmission-owning utilities should be authorized to transfer their transmission assets to a FERC-approved RTO, or to allow an RTO to exercise operational control over these assets.” This recommendation was made even though the Study Commission found (at page 57) “[t]he establishment of an RTO in Florida would result in . . . transferring jurisdiction over the majority of bulk power transmission assets from the PSC to FERC.” No legislation has been filed to adopt the Study Commission’s final recommendations. It must be noted that Order No. 01-2489 announced the PSC’s policy supporting wholesale competition on December 20, 2001, just two weeks after the Study Commission’s final report recommended wholesale competition be promoted through legislation.

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<sup>21</sup>The Executive Order required a final report to the Governor, the President of the Senate, and the Speaker of the House by December 1, 2001. The Study Commission, however, issued an interim report and recommendation in February, 2001, so that the Legislature might consider the issue of wholesale competition during the 2001 legislative session.

V.

GRIDFLORIDA WOULD NOT BE SUBJECT TO THE  
PSC’S JURISDICTION.

- A. THE PSC WAS MISTAKEN IN FINDING THE  
TRANSCO WOULD BE AN ELECTRIC UTILITY IN  
ORDER NO. 01-2489.

The PSC concluded in Order No. 01-2489, at 19, [Vol. 7:1343] that it could regulate GridFlorida as an “electric utility”:

Under those sections of Chapter 366, Florida Statutes, that comprise the Grid Bill, which provides this Commission jurisdiction over, among other things, the planning, development, and maintenance of a coordinated electric power grid throughout Florida, GridFlorida will be an electric utility subject to our jurisdiction. [Emphasis added.]

The PSC apparently reasoned that, if GridFlorida were an electric utility, supervision of the RTO might be substituted for the loss of transmission-planning jurisdiction over the companies individually. The companies, however, said in their joint brief, at 52, that “it is an open question of law as to whether the Commission would have jurisdiction over the GridFlorida RTO.” [Vol. 5:844] And, of course, the Legislature never said the PSC could support wholesale competition by finding an RTO prudent if the RTO would be an “electric utility” under Chapter 366.

Section 366.02(2) defines an electric utility, as

any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains or operates an electric generation, transmission, or distribution system within the state.

Since, under the original Transco proposal, GridFlorida was to be an investor-owned corporation, the RTO might appear to meet this definition. The statute, however, was created in 1989 to provide a definition of “electric utility” that, among other things, captured all the transmission-owning entities existing in Florida at that time. Chapter 89-292, § 1, at 1798, Laws of Florida. The Legislature could not have contemplated that the PSC, more than a decade later, might stretch statutory intent to further a new PSC-initiated policy of collaboration with FERC. See Radio Telephone Communications, Inc. v. Southeastern Telephone Co., *supra*, 170 So. 2d at 580-81 (“[I]t is our primary duty to give effect to the legislative intent; and if a literal interpretation [of a statute] leads to an unreasonable result, plainly at variance with the purpose of the legislation as a whole, we must examine the matter further. . . . In 1913 the Florida Legislature could not have envisioned — much less have intended to regulate and control — the radio communication services with which we are here concerned.”); City of St. Petersburg v. Carter, 39 So. 2d 804 (Fla.

1949). The GridFlorida Transco would not be an electric utility under Section 366.02(2).<sup>22</sup>

B. THE PSC CANNOT ORDER THE CREATION OF AN ISO.

In any event, whether the Transco was an electric utility became moot because PSC approval of an RTO in that form might be perceived by FERC to cause an unbundling of retail transmission service.<sup>23</sup> However, for reasons unclear in the record, the PSC thought it could retain its ratemaking jurisdiction if the RTO were structured as an ISO:

[U]nder 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 ownership of transmission assets is retained by the individual retail-serving utilities, we believe this Commission would continue to set the revenue requirements needed to support retail transmission service and retain oversight over cost control and cost recovery.

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<sup>22</sup>The proposed committee bill drafted by the Florida House Committee on Utilities and Telecommunications in March 2001(PCB UTCO 01-04) to implement the Energy 2020 Study Commission’s Interim Report would have expanded Section 366.02(2) by adding the term “regional transmission organization.”

<sup>23</sup>The PSC’s mistaken interpretation of the Transco’s status would linger, however, and apparently contribute to the PSC mistaken belief that GridFlorida, as an ISO, would be jurisdictional.

Order No. 01-2489, at 14. [Vol. 7:1338]

The companies were directed to file another RTO proposal within 90 days offering GridFlorida as an ISO. Order No. 01-2489, at 25-26. [Vol. 7:1349-50] Although the PSC must regulate any entity that satisfies the statutory definition of an electric utility, it is quite another matter for the PSC to order the formation of an entity specifically so that the PSC can regulate it. The PSC has no authority under Florida law to order the creation of an ISO. Moreover, as shown below, the ISO proposed by the companies would not be subject to PSC jurisdiction.

**C. THE GRIDFLORIDA ISO WOULD NOT BE SUBJECT TO THE PSC'S JURISDICTION.**

Left to their own devices, the companies offered a “Compliance Filing” that assured GridFlorida could not be an “electric utility” covered by Section 366.02(2). The companies also made sure transmission revenue-requirement jurisdiction resided at FERC, not at the PSC.<sup>24</sup> GridFlorida, as an ISO, would be a non-profit corporation, organized on a non-stock basis which “shall have no members for any purpose whatsoever under the Florida Not For Profit Corporation Act or

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<sup>24</sup>This is not meant to suggest the companies willfully refused to comply with the PSC's directions. The companies may have done their best given that the PSC told them to begin with an ISO proposal acceptable to FERC. The PSC's influence over the companies' financial well-being is such that the companies surely would have allowed for retention of the PSC's jurisdiction if that were possible.

otherwise.” [Vol. 8:1533, 1538] In post-workshop comments, the companies said: “A not-for-profit corporation, as GridFlorida is now structured, has no shareholders.”<sup>25</sup> [Vol. 19:3644] GridFlorida, as an ISO, would have no investors; it could not, under any reasonable reading of Section 366.02(2), be considered “investor-owned.”

Public Counsel pointed this out in post-workshop comments [Vol. 18:3554], but the PSC ignored the topic and just declared in conclusory fashion that “Grid-Florida will be subject to our jurisdiction under Chapter 366, Florida Statutes.” Order No. 02-1199, at 77. [Vol. 23:4428] The PSC was wrong on two counts. The PSC failed (or refused) to consider the change to the RTO’s structure that removed the ISO from the PSC’s own definition of electric utility. And the Legislature, in 1989, could not have intended for Section 366.02(2) to cover RTOs. The PSC would have no jurisdiction whatsoever over GridFlorida, either as a Transco or as an ISO.

**D. THE GRIDFLORIDA ISO PROPOSAL DID NOT  
RETAIN THE PSC’S RATEMAKING  
JURISDICTION.**

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<sup>25</sup>Mr. Naeve had testified for the companies that “a non-profit ISO is not directly accountable to anyone or to any entity that has an interest in ensuring that costs are incurred efficiently. . . . By contrast, a for-profit Transco is accountable to its owners.” [Tr. vol. 1:117]

The PSC was also wrong for not rejecting the ISO proposal because it impaired the PSC’s ratemaking jurisdiction. Under the discarded Transco proposal, the transmission component of bundled retail sales for existing transmission assets, which is presently subject to the PSC’s jurisdiction, would have been subject to zonal charges for five years under a FERC-approved tariff. New transmission assets, which are also currently subject to the PSC’s jurisdiction as they come into service, would have been subject to a FERC-approved system-wide charge. After five years, the system-wide rate was to be phased in for existing transmission facilities so that all transmission assets would eventually have been subject to the system-wide charge. Order No. 02-1199 at 56-58. [Vol. 23:4407-09]

Under the ISO plan, FERC-approved zonal rates would still apply to existing transmission assets for wholesale and retail purposes, and a FERC-approved system-wide rate would still apply to new assets. But now the companies could elect — pursuant to an “option” reserved at FERC — to exclude their bundled retail load from zonal rates for five years.<sup>26</sup> During this transition period, the

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<sup>26</sup>GridFlorida’s Open Access Transmission Tariff, at § 1A.1, provides that “during the Transition Period [i.e., the first five tariff years] a Transmission Customer [i.e., one of the companies] may elect to exempt bundled retail load from the Zonal Rate.” [Vol. 10:1964-65] In post-workshop comments, the companies said: “The Commission . . . expressed concern that it should continue to set the

(continued...)

companies' election at FERC would, in the companies' estimation, allow the PSC to exercise ratemaking jurisdiction over their existing (but not new) transmission assets.<sup>27</sup>

Effectively, the companies introduced an expiration date into Chapter 366 and delegated to the PSC the authority to regulate their existing transmission assets for five more years. New transmission assets would be under FERC's jurisdiction from the start. Additionally, a FERC-approved grid management charge ("GMC") and a pro rata share of the revenue requirement for transmission-dependent utilities ("TDUs") which chose to participate in the RTO would be imposed immediately. Increased charges to retail customers for just the first five years would amount to at least \$1.123 billion. Order No. 02-1199 at 69. [Vol. 23:4420] These costs could be avoided altogether, however, with no degradation of service, if the companies just

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<sup>26</sup>(...continued)

revenue requirements needed to support retail transmission service. See Order [No. 01-2489] at 14. To address the Commission's jurisdictional concern, the GridFlorida Companies amended the GridFlorida pricing structure so that during a five-year transition period the GridFlorida Companies will exempt their bundled retail load from zonal charges under the tariff. [Emphasis added.] [Vol. 19:3668]

<sup>27</sup>The companies stated in the Executive Summary of the ISO proposal, at 4: "The Applicants [i.e., the companies] will elect the option to exempt their bundled retail load from zonal rates during the transition period. . . . This approach will maintain the status quo with regard to jurisdiction over the Applicants' existing transmission facilities during the five-year transition period." [Vol. 8:1448, 1476]

declined FERC's offer of voluntary RTO participation or if the PSC decided the ISO compliance filing did not conform to Order No. 01-2489 and therefore directed the companies not to change the way they provided retail transmission service.

Acceptance of the compliance filing (under the companies' interpretation) would mean today's PSC could diminish its own present range of authority and decide for the Legislature that additional, more substantial elements of statutory jurisdiction expired in five years. See Diamond Cab Owners Ass'n v. Florida Railroad & Public Utilities Commission, 66 So. 2d 593, 596 (Fla. 1953) ("The Commission may make rules and regulations within the yardstick prescribed by the Legislature, but it cannot amend, repeal or modify an Act of the Legislature by the adoption of such rules and regulations."); Atlantic Coast Line R. Co. v. Mack, 57 So. 2d 447, 452 (Fla. 1952) ("The Commission has no more power to make the change or amend the law, by the adoption of rule or regulation, than the Court has."). Thereafter, FERC alone would set the revenue requirement for the transmission component of bundled retail sales. The PSC would transform itself from an economic regulator of retail transmission assets into a mere conduit for FERC-approved rates and charges which, under the filed-rate doctrine, must be

deemed prudent and passed on to retail ratepayers in Florida.<sup>28</sup> [Tr. vol. 2:220] See Naragansett Electric Co. v. Burke, 381 A. 2d 1358, 1363 (R.I. 1977). Obviously, the companies' ISO proposal did not conform to the Order No. 01-2489 requirement that the PSC retain its ratemaking jurisdiction.

A question remains whether the PSC could exercise any ratemaking jurisdiction even if the companies exercised their FERC-approved option. Approval of the ISO tariff might just indicate FERC's willingness not to exercise all of its jurisdiction for a five-year period and nothing more. Certainly, FERC's decision not to regulate within its sphere of authority cannot, without more, be construed as a time-limited delegation to the PSC from the Florida Legislature.

In actuality, approval of the ISO plan would cause an immediate loss of PSC ratemaking jurisdiction over both new and existing transmission assets. Retail jurisdiction over new transmission assets, as noted above, would be ceded to FERC from the start. And a decision by any one of the companies not to exercise its self-

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<sup>28</sup>Mr. Naeve testified that "once the FPSC determines that it is prudent for the GridFlorida Companies to participate in GridFlorida, the GridFlorida Companies must be allowed to pass through to retail customers the costs of the transmission rates charged by GridFlorida and approved by FERC." [Tr. vol. 1:126] See e.g. Florida Municipal Power Agency v. Florida Power & Light Co., 64 F.3d 614, 615 (11th Cir. 1995): "The filed rate doctrine provides that where a regulated company has a rate for service on file with the applicable regulatory agency, the filed rate is the only rate that may be charged."

defined option at FERC would mean an immediate loss of PSC jurisdiction over that company's existing facilities. Obviously, if the PSC's authority depends upon a utility's unilateral decision, jurisdiction is already lost, regardless of what the utility decides. Certainly, the Legislature can allow for a transfer of PSC jurisdiction. See e.g. City of Cape Coral v. GAC Utilities, Inc., supra, 281 So. 2d 493. But the PSC cannot be an instrument of its own demise.

## VI.

### THE PSC SHOULD NOT HAVE APPROVED ANY PART OF THE NONCONFORMING ISO PROPOSAL.

No harm would have been done to the companies' retail customers, even at this stage of the proceedings, if the PSC had just realized its theory of collaboration with FERC (in addition to being illegal) was unworkable. Amazingly, however, the PSC in Order No. 02-1199, at 63, acknowledged the immediate loss of jurisdiction over new transmission assets, recognized that any remaining oversight emanated from the companies' unilateral actions at FERC, allowed the RTO to come into existence, and said it would revisit the rate structure issue in five years:

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. . . .

Based on 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 cost 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]

The PSC rejected the Transco proposal in Order No. 01-2489 because the PSC cannot permit utilities under its charge, through voluntary action, to divest the PSC of its statutory responsibilities over them. Yet, in Order No. 02-1199, the PSC ignores its own earlier insistence upon an ISO proposal that left the PSC's ratemaking authority unaffected. The ISO proposal does exactly what the PSC forbade; yet the PSC approved it, subject only to a future reevaluation.

## VII.

### THE PSC CANNOT AUTHORIZE AN ISO UNTIL THE LEGISLATURE AMENDS FLORIDA LAW.

This is not the first time the PSC tried to change the way it operates based upon FERC's promotion of wholesale competition. In March, 1999, the PSC granted a determination of need for Duke Energy's merchant plant in apparent recognition of recent developments at FERC. Order No. PSC-99-0535-FOF-EM (March 22, 1999), In re: Joint petition for determination of need for an electrical power plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 99 F.P.S.C. 3:401 (1999). However, Florida Power & Light, Florida Power Corporation, and Tampa Electric appealed the PSC's order. The companies pointed out to the Florida Supreme Court how the emergence of a competitive

wholesale market stemmed from recent federal legislative initiatives, including PURPA in 1978 and the Energy Policy Act of 1992, as well as from FERC's Order No. 888. Tampa Electric v. Garcia, *supra*, 767 So. 2d at 431. The companies "emphasize[d] that the Legislature has not amended section 403.519 to authorize the PSC to grant a determination of need for a power plant in Florida that would generate power intended to be sold in the competitive wholesale market which is developing as a result of these federal legislative and regulatory changes." *Id.*

Quoting with approval from United Telephone Co. of Florida v. Public Service Commission, *supra*, 496 So. 2d at 118, the court found it could not apply a presumption of correctness to support the PSC's exercise of jurisdiction in circumstances where none had been granted by the Legislature. 767 So. 2d at 433.

The court accepted the companies' arguments and reversed the PSC's order:

[W]e find that the Legislature must enact express statutory criteria if it intends such authority [to approve wholesale merchant plants] for the PSC. Pursuant only to such legislative action will the PSC be authorized to consider the advent of the competitive market in wholesale power promoted by recent federal initiatives. Such statutory criteria are necessary if the Florida regulatory procedures are intended to cover this evolution in the electric power industry. [Footnote omitted.]

*Id.* at 435-36. Today, as a result of the court's decision, merchant plants with more than 75 megawatts of steam capacity cannot be built in Florida because the Legisla-

ture has not amended the determination-of-need statute to allow the PSC to consider the competitive wholesale generation market envisioned by FERC. As a legal principle, the case stands for the proposition that only the Legislature can change the scope of the PSC's authority in response to developments in the federal arena.<sup>29</sup> In the absence of amendments to existing law, the PSC is expected to follow Florida's historic plan of electric utility regulation. See State ex rel. Sandel v. New Mexico Public Utility Comm'n, 980 P. 2d 55, 61 (N.M. 1999) (“[T]he changes that have taken place in the regulation of the electric power industry at the federal level do not give the NMPUC the authority to erase the [New Mexico Public Utilities Act] as it is presently written.”).

If Duke Energy wanted to build a merchant plant in Florida, it had to go to the PSC for a need determination. Even so, as the court announced in Tampa Electric v. Garcia, the PSC could not grant Duke Energy's petition. Similarly, the PSC is the proper body to evaluate the prudence of the companies' formation of GridFlorida, but from a jurisdictional perspective, the PSC should have realized it

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<sup>29</sup>The court construed its Tampa Electric v. Garcia decision in Panda Energy International v. Jacobs, 813 So. 2d 46, 53 (Fla. 2002): “Based upon our interpretation of the statutes governing the PSC, we concluded that the Legislature had not intended to extend jurisdiction to the PSC to grant a determination of need to an applicant who was a non-regulated out-of-state wholesale power company . . .”

had no option but to reject the proposal. Public Counsel, in a motion for reconsideration of Order No. 02-1199, argued that the PSC had exceeded its jurisdiction. [Vol. 23:4552] In a joint response, the companies answered indirectly, saying “one thing is clear, the GridFlorida Companies cannot unilaterally expand or diminish the Commission’s statutory jurisdiction” — a true statement as far as it goes. [Vol. 25:4679] Similarly, nothing Duke Energy did in asking for a need determination order extended the PSC’s jurisdiction to encompass merchant plants. But the PSC’s action in approving the companies’ ISO proposal, just like the PSC’s action approving Duke Energy’s need determination, redefined the scope of the PSC’s jurisdiction, something only the Legislature can do.

The same three utilities who championed state law over FERC initiatives in Tampa Electric v. Garcia joined forces to propose GridFlorida, first as a Transco, then in response to the PSC’s Order No. 01-2489, as an ISO. This time, however, they wanted the PSC, in deference to FERC’s Order No. 2000, to act without guidance from the Legislature and allow the PSC’s traditional retail jurisdiction over them to be altered. Instead of expanding its authority, as the PSC attempted with the Duke Energy need determination, the companies wanted the PSC to surrender elements of its jurisdiction. The end result, however, would still be a fundamental

change in the way the PSC interprets statutes it administers in order to promote a federal objective without prior authorization from the Legislature.<sup>30</sup>

## VIII.

### THE PSC CANNOT RELINQUISH ITS GRID BILL JURISDICTION.

The Grid Bill was enacted in Chapter 74-196, Laws of Florida, and is now codified at Sections 366.04(2) and (5), 366.05(7)-(8), and 366.055, Florida Statutes. It was adopted just one year after the 1973 Florida Electrical Power Plant Siting Act, Sections 403.501-.518, Florida Statutes, that was the subject of Tampa Electric v. Garcia, well before PURPA, the Energy Policy Act of 1992, or FERC Orders Nos. 888 and 2000 reshaped thinking at the federal level.<sup>31</sup>

The Grid Bill authorizes the PSC to: “require electric power conservation and reliability within a coordinated grid, for operational as well as emergency

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<sup>30</sup>There are cases besides Tampa Electric v. Garcia in which the PSC has interpreted statutes expansively in an attempt to extend its jurisdiction, See e.g. Teleprompter Corp. v. Hawkins, supra 384 So. 2d 648, and there are others in which the PSC decided it did not have jurisdiction, See e.g. Ft. Pierce Utilities Authority v. Florida Public Service Commission, 388 So. 2d 1031, 1035 (Fla. 1980), but this is apparently the first time the PSC acted in a manner which would actually relinquish aspects of its traditional jurisdiction.

<sup>31</sup>Chapter 74-196 also amended the PSC’s jurisdiction to include rural electric cooperatives and municipal electric utilities for rate structure, system-of-accounts, territorial-agreement-and-dispute, and Grid Bill purposes. See Rosalind Holding Co. v. Orlando Utilities Comm’n, 402 So. 2d 1209, 1210 (Fla. 5th DCA 1981).

purposes” by electric utilities pursuant to Section 366.04(2)(c); exercise jurisdiction “over the planning, development, and maintenance of a coordinated electric power grid throughout Florida” pursuant to Section 366.04(5); “require reports from all electric utilities to assure the development of adequate and reliable energy grids” pursuant to Section 366.05(7); require installation or repair of necessary facilities, including generating plants and transmission facilities “[i]f the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry” pursuant to Section 366.05(8); assure that the energy reserves of all utilities in the Florida energy grid shall be available at all times to ensure that grid reliability and integrity are maintained pursuant to Section 366.055(1); and require an electric utility to transmit electrical energy over its transmission lines from one utility to another or as part of the total energy supply of the entire grid to assure efficient and reliable operation of a state energy grid pursuant to Section 366.055(3).

The policy of the state to have the PSC supervise the state’s energy grid is clear. “The purpose of the Grid Bill is to ensure that all electric power within the state grid is available where and when needed. Sections 366.04(3) [now (5)] and 366.055(3) authorize [the] PSC to regulate transmission of that power. The method

of generating that power . . . is irrelevant.” Florida Power & Light Co. v. Nichols, 516 So. 2d 260, 261 (Fla. 1987).

The PSC stated in Order No. 02-1199, at 77, its intent to continue exercising its Grid Bill jurisdiction over the GridFlorida ISO but never explained how this might be possible:

Those sections of Chapter 366, Florida Statutes, that comprise the Grid Bill, provides [sic] this Commission with jurisdiction over, among other things, the planning, development, and maintenance of a coordinated electric power grid throughout Florida. As such, this Commission, as guided by the Florida Legislature, will determine how it will discharge its regulatory responsibilities over a wholesale provider just as we have for the existing wholesale providers in Florida, such as Seminole Electric Cooperative and the Florida Municipal Power Authority [sic: Agency]. While we generally agree with the processes that provide for our input into the planning and reliability aspects of GridFlorida, this in no way affects our ability to regulate GridFlorida in a manner consistent with Florida law. [Vol. 23:4428]

The PSC is mistaken at every turn. Grid Bill jurisdiction only applies to “electric utilities,” but the GridFlorida ISO will not be one. The PSC does not have jurisdiction over wholesale providers per se; it has jurisdiction over entities defined by statute. They include, for Grid Bill purposes, investor-owned utilities, municipals, and cooperatives, regardless of whether they make wholesale sales, retail sales, or both. The direct sale of transmission service to a utility could not be characterized as a wholesale transaction because it is not offered for resale as such.

And lastly, the GridFlorida ISO would be a FERC-regulated interstate transmission company with “ultimate responsibility” for planning the transmission grid.<sup>32</sup> The last sentence in the preceding quote from page 77 of Order No. 02-1199 is particularly notable. The PSC does not even attempt to explain how orders from a state agency could have any effect on an interstate transmission company under FERC’s exclusive jurisdiction.

It is impossible to reconcile the Grid Bill with the companies’ ISO proposal. In their post-work shop comments, the companies left no doubt the PSC would not be in control:

Like other places in the planning protocol, Section IX has been amended to stress that ‘GridFlorida shall be responsible for and have ultimate authority for performing the planning function, and developing a comprehensive and integrated GridFlorida-wide transmission plan.’ Id. There thus is no question that GridFlorida is the ultimate decision-maker. [Emphasis added.] [Vol. 19:3659-60]

The Grid Bill requires the PSC, not FERC, to oversee the state’s transmission grid. Moreover, the PSC’s grid jurisdiction is more extensive than

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<sup>32</sup>At page 43 of Order No. 02-1199, the PSC said: “The Planning Protocol now states that ‘GridFlorida shall be responsible for and have ultimate authority for performing the planning function, and developing a comprehensive and integrated GridFlorida-wide transmission plan.’ . . . This language clearly gives GridFlorida ultimate responsibility for the planning functions, including ATC [Available Transmission Capacity].” [Vol. 23:4394]

FERC's, tying together the transmission assets of investor-owned electric utilities, municipal electric utilities and rural electric cooperatives so that the PSC exercises jurisdiction "over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes." Section 366.04(5). FERC, on the other hand, does not have jurisdiction over municipals or cooperatives. The Legislature has delegated to the PSC the responsibility for long-term planning. The PSC cannot delegate this function to an RTO under FERC's jurisdiction. One major intended outcome from RTO formation is control by a single entity of transmission over multiple service territories. However, that role now resides in the PSC. GridFlorida's responsibilities will not extend to direct oversight of generation, but the PSC must integrate generation and transmission within its grid responsibilities.

## IX.

### VOLUNTARY COMPLIANCE WITH FERC'S INITIATIVES SHOULD NOT INCREASE RETAIL COSTS.

The PSC's allowance of cost recovery is most egregious. Although RTO formation is solely a federal initiative and completely voluntary, the PSC apparently reasons that, since approximately 95% of usage on the transmission system is to

serve retail load, retail customers should pick up 95% of the cost, or \$1.123 billion, for just the first five years of RTO operation. Order No. 02-1199 at 69. [Vol. 23:4420] Moreover, the PSC believes the companies should be permitted to recover these costs on a dollar-for-dollar basis without regard to their profit margins. [Vol. 23:4422] Yet everything about the increased transmission costs suggests the PSC should have found them imprudent: (1) Voluntary costs to promote a federal initiative should not affect retail rates; (2) The PSC lacks the jurisdiction to help promote wholesale competition; (3) Wholesale competition cannot develop fully in Florida because of the companies' successful opposition to large, efficient merchant plants in Tampa Electric v. Garcia; and (4) The companies can avoid the increased costs altogether by just maintaining the status quo and providing transmission service as they have always done.

## CONCLUSION

The PSC cannot allow electric utilities it regulates, through a voluntary filing at FERC or otherwise, to take any action which lessens the PSC's jurisdiction over them. The PSC must continue to fully regulate the operations of Florida Power & Light Company, Florida Power Corporation, and Tampa Electric Company for purposes of setting the revenue requirements associated with the transmission component of bundled retail electric service and for Grid Bill and other operational

purposes until directed to do otherwise by the Florida Legislature. The court should reverse the PSC's Order No. 02-1199 because the Legislature must act to adopt appropriate statutory criteria before federal initiatives such as FERC's Order No. 2000 can be allowed to affect the manner in which the PSC regulates Florida's public utilities and electric utilities pursuant to Chapter 366, Florida Statutes.

Respectfully submitted,

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

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