

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.

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

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ARGUMENT

I. THERE CAN BE NO RTO WITHOUT THE PSC'S APPROVAL.

The companies, on June 12, 2001, asked the PSC to approve their formation of the GridFlorida RTO, structured at that time as a Transco. [Vol. 2:256, 266, 278] Each company alleged the PSC's approval "is a necessary prerequisite to [the company's] continued participation in the formation of GridFlorida." [Vol. 2:270] Florida Power & Light said it would not proceed with the RTO unless the PSC approved that company's requested method of cost recovery. [Tr. vol. 4:536, 542-43; vol. 5:684-709] GridFlorida could not exist without the PSC's blessing; the PSC was not merely reviewing the companies' interactions with FERC. PSC, at 1, 6; FPC, at 3, 12-13, 15; TECO, at 6-8, 10, 18, 24.¹

The PSC's rejection of the Transco in Order No. 01-2489 would have been the end of the matter if the PSC had not gone further and ordered another filing. Florida Power Corporation recognized this fact at page 4 of its answer brief: "Rather than simply determining that these particular elements [of the Transco proposal] were not prudent and closing the proceeding, the PSC undertook the

¹References to the five answer briefs will be abbreviated as follows: For the PSC: "PSC, at ___"; for Florida Power & Light: "FPL, at ___"; for Florida Power Corporation: "FPC, at ___"; for Tampa Electric: "TECO, at ___"; and for Mirant and Calpine: "M&C, at ___."

additional affirmative task of identifying how the elements of the original proposal could be revised.” The companies only offered an ISO proposal because the PSC told them to. The PSC’s contention (at 1) that it “did not undertake to order the Companies to form an RTO” is contrary to the facts. Left unanswered is the source of the PSC’s authority to make such a decision.

II. THE ISO DID NOT EVEN CONFORM TO THE PSC’S OWN INTERPRETATION OF ITS JURISDICTION.

Appellees’ argument that Public Counsel is too late to challenge approval of the ISO in Order No. 02-1199 because all substantive decisions were made in an earlier order is clearly in error. PSC, at 6-7, 11, 13-14, 16; FPL, at 9, 12; FPC, at 3, 8, 10; TECO, at 12-13, 20, 22-23; M&C, at 2, 5-7, 9, 17. Even if the PSC really had made all relevant decisions in Order No. 01-2489 (which would make the later need for at least nine proposed agency actions in Order No. 02-1199 completely inexplicable), Appellees cannot seriously contend the absence of an appeal gave the PSC authority it did not have before.

The fundamental actions taken by the PSC in Order No. 01-2489 were to find that an RTO was acceptable but that a Transco was not. The companies were directed to form an ISO that would be subject to the PSC’s Grid Bill jurisdiction while leaving the PSC’s ratemaking jurisdiction intact. Taken together, these

decisions merit some reflection. As a practical matter, how could the PSC have determined RTOs were a good idea in the course of rejecting the Transco proposal and directing the companies to file an alternative they had dismissed and in a form the PSC has not yet seen? PSC acceptance of an RTO must be viewed as conditioned upon the companies' ability to file an acceptable ISO.

Significant jurisdictional decisions were reached in Order No. 01-2489, however. The Transco was rejected on jurisdictional grounds. And the companies were ordered to file an ISO alternative that preserved the PSC's authority. Order No. 01-2489, at 14. [Vol. 7:1338] Implicitly, the companies were placed on notice the PSC would also reject, on jurisdictional grounds, an ISO proposal that did not allow for retention of the PSC's Grid Bill and ratemaking authority. The companies did not appeal that decision. They accepted the PSC's right to reject the Transco and to specify the major characteristics an acceptable ISO must have.

No one expected the companies to file an ISO proposal that did not conform to Order No. 01-2489 or that, if they did, the PSC would approve any part of it without a hearing. The specifics are discussed in more detail below, but it is now beyond dispute that the companies' ISO plan failed to satisfy either of the PSC's fundamental requirements. Taking as true Appellees' assertion that all the substan-

tive legal decisions were made in Order No. 01-2489, the PSC should have summarily rejected the ISO proposal offered by the companies.

The distinction between Public Counsel's position and the PSC's interpretation of its jurisdiction in Order No. 01-2489 is that Public Counsel contends Chapter 366, Florida Statutes, does not allow the PSC to sanction any form of RTO, whereas the PSC thinks it can allow formation of an ISO structured as the PSC specified. For purposes of reviewing the PSC's actions in Order No. 02-1199, the important consideration is that the companies' ISO proposal was antithetical to either Public Counsel's or the PSC's interpretation of the agency's authority. The PSC is to be commended for taking the initiative in the proceedings below and acting as it felt appropriate to preserve its jurisdiction. This appeal is necessary, however, because the PSC failed in Order No. 02-1199 to enforce a jurisdictional interpretation from a prior order that the PSC, itself, characterizes as binding.

A. THE ISO PROPOSAL WOULD NOT BE AN ELECTRIC UTILITY SUBJECT TO THE GRID BILL.

In the initial brief, at 32-33, Public Counsel showed that the GridFlorida ISO would not be subject to the PSC's oversight. Appellees have conceded the point by ignoring the topic in their answer briefs. In an attempt to divert the court's attention, however, Appellees allege the PSC will still exercise Grid Bill jurisdiction

over the companies individually. PSC, at 8, 24-25, 29-30; Teco, at 30; M&C, at 16. That argument, however, is beside the point. The PSC, in Order No. 01-2489, contemplated an ISO subject to PSC control, and the PSC mistakenly believed in Order No. 02-1199 that the companies had offered one.² There was never any doubt that each company, even after turning over operational control to the ISO, would still own transmission assets and be an “electric utility” under Section 366.02(2). An appeal was required because the PSC, in Order No. 02-1199, approved an ISO structured in contravention of Order No. 01-2489 that could not possibly meet this statutory definition.

The inconsistent nature of Appellees’ argument on this and other points merits special consideration. Appellees contend all substantive decisions were made in Order No. 01-2489, which was not appealed. Yet Appellees also maintain that the companies’ failure to comply with one of the essential underpinnings of that order can be overlooked now that the PSC’s error in Order No. 02-1199 has been

²The critical importance to the PSC of exercising Grid Bill jurisdiction over the ISO is evident at page 77 of Order No. 02-1199: “We note herein that GridFlorida will be subject to our jurisdiction under Chapter 366, Florida Statutes. As such, GridFlorida and its management will be held responsible for the prudence of the actions they take that impact our jurisdiction. . . . 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]

brought to light. The PSC, in particular, implicitly maintains its mistake is inconsequential. But where is the record supporting this new insight? Total operational control over the state's transmission assets will be transferred to an RTO under FERC's jurisdiction. And the RTO will have ultimate responsibility for expansion of the transmission system. Should the companies' customers and the court take comfort in the fact that the PSC might continue issuing orders to the companies, while GridFlorida, which is out of reach of the PSC's orders, is making all the decisions?

**B. THE ISO WOULD NOT ALLOW THE PSC TO
RETAIN ITS RATEMAKING JURISDICTION.**

This appeal was also required because the PSC gave final approval to a rate structure that did just the opposite of what the PSC ordered. The PSC agreed with Public Counsel that the ISO's rate design was not in compliance with Order No. 01-2489. In Order No. 02-1199, however, the PSC allowed the nonconforming rates to go into effect by final agency action anyway. After noting at page 63 of that order the companies' failure to comply with Order No. 01-2489, the PSC concluded its discussion by saying: "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] During

those five years, rates for both new and existing transmission assets would be on file with FERC. The PSC's statement that it might try to exercise its jurisdiction five years in the future did nothing to make the current transfer of jurisdiction any less final. In its answer brief, at 26, the PSC says it told the companies the ISO's rate design had to be modified. But telling the companies to modify the ISO proposal without providing a deadline for doing so and without rejecting the ISO plan as noncompliant in the meantime did nothing to retain the PSC's rate authority during that five-year period. The PSC's Chairman understood what the PSC had done when she informed FERC's chairman that "[t]his Order [No. 02-1199] contains the FPSC's final determination specifically approving . . . certain aspects of the rate design and pricing protocols." [Emphasis added.] [Vol. 27:5185]

Florida Power Corporation is correct that PSC review of utility actions affecting rates and service is an exercise of the PSC's statutory authority. FPC, at 4. Acting in such a way as to relinquish the PSC's ability to establish those rates, however, is not. Appellees' assertions that the PSC has not given up any of its jurisdiction is patently false. PSC, at 7, 12; TECO, at 9, 17-19; M&C, at 8, 16. Contrary to Mirant and Calpine's assertion (at 17), the PSC has absolutely no discretion to determine how retail transmission rates must be regulated. That is a decision for the Legislature alone.

Perhaps most telling is the PSC's statement (at 18) that "[t]he establishment of an RTO, if approved by FERC, will simply change how a public utility obtains one of the elements needed to supply electricity; that is, transmission service." Yet RTO participation is voluntary. The companies have explicitly stated they will not go forward with the RTO without the PSC's consent. Why should there be a change in the way a public utility in Florida obtains transmission service in response to a voluntary federal initiative before the Legislature has a chance to speak on the subject?

To divert the court's attention from the loss of ratemaking jurisdiction, Appellees contend that the PSC will continue to establish the companies' bundled rates as it has always done. PSC, at 8, 17, 25, 30; TECO, at 16, 18-19, 25-28; M&C, at 12. This argument is transparent — and also beside the point. There are two components to the PSC's "ratemaking" jurisdiction. Currently, the PSC determines the revenue requirement for retail transmission assets, and it also establishes the bundled rates that will allow for recovery of those costs (as well as all other components of retail rates). Whether the PSC or FERC determines the costs for retail transmission, the PSC will continue to establish the bundled retail rate charged to the companies' end-use retail customers. The jurisdictional issue presented here is whether the PSC or FERC will establish the retail costs of the transmission

system in the first instance. Will the PSC be required, under the filed-rate doctrine, to include a revenue requirement based upon GridFlorida's FERC rates in the companies' bundled retail rates, or will the PSC continue to regulate both the retail transmission revenue requirement as well as the bundled rate?

To further confuse the ratemaking issue, the PSC and Tampa Electric suggest ISO charges will be analogous to the current treatment of purchased power. On this point, the PSC in particular seems to think FERC only has jurisdiction over wholesale transmission. PSC, at 17, 19. Under the Federal Power Act, FERC has jurisdiction over wholesale sales of electricity and over the transmission of electricity in interstate commerce, whether for wholesale or retail purposes. Mirant and Calpine noted correctly (at 10-11) that "there is no language in the Federal Power Act that limits FERC's transmission jurisdiction to the wholesale market." The retail sale of electricity obviously contains a transmission component which, in an interconnected electric grid crossing state lines, might be considered to be in interstate commerce. Yet case law holds that Congress, in the Federal Power Act, intended to draw a bright line between state and federal jurisdiction so as to obviate the need for case-by-case jurisdictional determinations. See Federal Power Commission v. Southern California Edison, 376 U.S. 205, 215-16 (1964).

FERC resolved the jurisdictional conundrum by deciding that, where the transmission component of a retail sale of electricity is part and parcel of a delivered product called retail electric service, transmission in interstate commerce is not implicated, and the complete transaction is outside of FERC's jurisdiction.³ In the absence of an RTO, transmission in interstate commerce only occurs in wholesale sales and in unbundled retail sales.

Accordingly, when the companies use their own transmission systems to deliver power to their own retail customers, whether that power is generated or purchased, the PSC determines the revenue requirement for the retail use of the transmission system to be included in the bundled retail rate. Stated simply, the PSC has ratemaking jurisdiction over retail transmission assets if the transmission provider is serving its own end-use retail customers.⁴ If, however, the companies

³FERC said in Order No. 888 that "when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, [FERC's] jurisdiction over sales of electric energy extends only to wholesale sales." Order No. 888, at 430-31, FERC Stats. & Regs., Regs. Preambles 1991-1996, ¶ 31,036 at 31,781.

⁴When some utilities asked on reconsideration of Order No. 888 whether the open access transmission tariff applied when they transmitted power purchased at wholesale to their own retail customers, FERC responded that, as part of a traditional bundled retail sale, the transmission was not in interstate commerce and was, therefore, outside FERC's jurisdiction. Order No. 888-A, at 117-18, FERC Stats. & Regs., Regs. Preambles July 1996-Dec. 2000, ¶ 31,048 at 30,216-17.

purchase transmission service from GridFlorida, then the revenue requirement for retail use of the transmission system would be set by FERC. Purchasing power at wholesale does not affect the PSC's jurisdiction over the companies' use of their own transmission system for retail purposes, but an RTO does.

III. PUBLIC COUNSEL HAS APPEALED THE FINAL ACTIONS TAKEN BY THE PSC IN ORDER NO. 02-1199.

Appellees are incorrect in their allegations that Public Counsel has challenged actions that were either final in Order No. 01-2489 or proposed agency actions in Order No. 02-1199. PSC, at 11, 14-15; FPC, at 3, 8-10; TECO, at 7, 12-13, 20, 23; M&C, at 2. The proposed agency actions in Order No. 02-1199 are identified at page 5 of that order. [Vol. 23:4356] All other substantive decisions were final agency action. The PSC's erroneous finding that GridFlorida would be subject to the PSC's Grid Bill jurisdiction was final in Order No. 02-1199. Similarly, the PSC's decision to allow nonconforming rates to go into effect for at least five years was also final in Order No. 02-1199.

Aside from directing that jurisdiction be retained, Order No. 01-2489 left the details of the ISO plan up to the companies. The PSC first saw the ISO's details at the same time as the other parties, when the Compliance Filing was submitted on March 20, 2002. More details surfaced another three months later, on June 21,

2002, when further modifications were made in response to workshop comments. Factual decisions on the ISO proposal could not have been made in Order No. 01-2489.

Those parts of the ISO proposal that the PSC found acceptable, even though never exposed to cross-examination, were approved as final agency action. The companies' decision to have a nine-member board selection committee, for example, was approved as final agency action in Section C of "Structure and Governance" at pages 8-11 of Order No. 02-1199. [Vol. 23:4359-61] Similarly, the companies' adoption of the Midwest ISO's planning protocol was accepted as final agency action in Section A of "Planning and Operations" at pages 29-31 of the order. [Vol. 23:4380-82] These were clearly decisions determining the companies' substantial interests that had never been subject to evidentiary development. The same is true for the other twenty-five sections of "Structure and Governance," "Planning and Operations" and "Transmission Rate Structure" approved by the PSC as final agency action.

Florida Power & Light is correct that past and future evidentiary hearing opportunities were afforded by the PSC. FPL, at 10. But the previous hearing was on the Transco proposal, and the future hearing was limited to the proposed agency actions and to market design. No hearing opportunities were offered for the

final actions taken in Order No. 02-1199. Having failed to offer a hearing on its final agency actions, the PSC is in no position to argue in its answer brief (at 7, 11, 14-16) that Public Counsel failed to exhaust administrative remedies; none were available. Florida Power Corporation is clearly in error to state that the PSC has not approved GridFlorida “or any of its elements.” FPC, at 3. One of the enduring mysteries of this case is how the PSC could have thought it appropriate to give final approval to so many aspects of the companies’ ISO proposal without a hearing, even as the PSC recognized the companies had failed to provide what they were ordered to file.

IV. THE PSC EXCEEDED ITS JURISDICTION BY APPROVING COSTS IN ORDER NO. 02-1199.

In Order No. 01-2489, at 10, the PSC said it would allow the companies to recover the approximately \$8 million of start-up costs for RTO formation through May 1, 2001. These costs had absolutely nothing to do with the incremental costs of actually obtaining transmission service from the RTO once it was up and running, which was estimated to be approximately \$1.1 billion for just the first five years in Order No. 02-1199. The two types of cost are clearly unrelated. Moreover, start-up costs to voluntarily form a FERC-regulated interstate transmission company are not even remotely related to the PSC’s retail jurisdiction.

V. THE PSC IS NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

Appellees contend the appropriate standard of review for this appeal should be to recognize the PSC's "statutory" presumption of correctness. PSC, at 10; FPC, at 5; TECO, at 9; M&C, at 4. Notably, however, Appellees cannot identify any statute calling for a presumption to be applied. Many years ago, there was such a statute. In 1913, the Legislature enacted Chapter 6527, declaring that laws administered by the PSC's predecessor agency were to be considered remedial in nature, to be liberally construed, and that all presumptions were to be in favor of every act of the Commissioners and all doubts as to their jurisdiction and power was to be resolved in their favor. See State ex rel. Burr v. Jacksonville Terminal Co., 71 So. 474 (Fla. 1916). Similar language existed until 1981 when Section 350.12 was repealed. Ch. 81-170, § 6, at 464, Laws of Fla. There are no similar statutes on the books today. Litigants apparently fell into a pattern of relying on prior decisions without acknowledging the statutory change. Over time, the court's decisions alternated between those that cited to the PSC's purported presumption of correctness and those that recognized that, as a creature of statute, any reasonable doubt about the existence of a particular power had to be resolved against the PSC. See e.g. City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla.

1973). In this case, Appellees contend the PSC's final actions taken contrary to its own jurisdictional interpretations and without a hearing should be upheld on a presumption-of-correctness theory. Instead, the court should recognize that such a standard of review is an anachronism with no place in modern administrative law.

CONCLUSION

The PSC's Order No. 02-1199 should be reversed with directions that the PSC cannot permit the companies to take any steps toward RTO formation until the Legislature provides statutory criteria to recognize federal initiatives affecting the electric power industry.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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