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September 10, 2001

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

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RE: Dockets Nos. 000824-EI, 001148-EI and 010577-EI

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Public Counsel's Prehearing Statement for filing in the above referenced dockets.

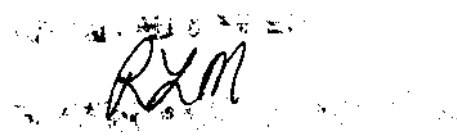
Also enclosed is a 3.5 inch diskette containing Public Counsel's Prehearing Statement in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,


John Roger Howe
Deputy Public Counsel

JRH/dsb
Enclosures

APP _____
CAF _____
CMF _____
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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.)))))))))

Docket No. 000824-EI

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.)))))))))

Docket No. 001148-EI

In re: Review of Tampa Electric Company and impact of its participation in GridFlorida LLC, a Florida Transmission company, on TECO's retail ratepayers.)))))))))

Docket No. 010577-EI
Filed: September 10, 2001

PUBLIC COUNSEL'S PREHEARING STATEMENT

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Order No. PSC-01-1549-PCO-EI, issued July 26, 2001, submit this Prehearing Statement:

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JOHN ROGER HOWE, Esquire
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On behalf of the Citizens of the State of Florida

DOCUMENT NUMBER: DATE
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A. WITNESSES:

None.

B. EXHIBITS:

Certain exhibits, unknown at this time, may be introduced during the course of cross-examination.

C. STATEMENT OF BASIC POSITION

Regardless of the direction taken by its federal counterpart, the Florida Public Service Commission cannot alter its fundamental approach to electric utility regulation in Florida unless and until changes are made to state law. The statutory framework under which the Commission has operated for many years results in electric utilities providing bundled retail service pursuant to Commission-approved tariffs, with the embedded transmission component provided over assets under the Commission's jurisdiction. The Legislature must reasonably expect past Commission practices will continue in the future and that the Commission will not take any action in these dockets which directly or indirectly permits or causes a change in matters subject to its historic jurisdiction.

The Federal Energy Regulatory Commission (FERC), in addition to its jurisdiction over wholesale sales of electricity, also exercises exclusive jurisdiction under the Federal Power Act ("FPA") over the transmission of electricity in interstate commerce. FERC, however, has never held that transmission service provided as part of bundled retail electric service amounts to transmission in interstate commerce subject to its jurisdiction. To the contrary, FERC has concluded that, where transmission service is part of the delivered price of electricity, it is strictly a matter of state oversight. This is true whether the bundled retail service involves the delivery of the transmission owner's own generation or power purchased from someone else. Where the transmission takes place over the transmission providers own facilities for delivery to the transmission providers own retail customers, it is a bundled retail sale of electricity and strictly a matter of state jurisdiction.

As long as transmission is bundled with traditional retail service (as it always has been in Florida), FERC is apparently without jurisdiction. Unbundling, however, gives FERC jurisdiction over retail transmission service:

[W]e have exclusive jurisdiction under the FPA over 'transmission in interstate commerce' by public utilities, which includes the unbundled interstate transmission component of a previously bundled retail transaction. Our assertion of jurisdiction in such a situation arises only if the retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail program. [Emphasis added; footnote omitted.] Order No. 888-A, FERC Statutes and Regulations, Regulations Preambles ¶ 31,048 at 30,226 (1996), mimeo at 143.

(States which instituted retail competition were chagrined when FERC asserted jurisdiction over their retail transmission service, something evidently not contemplated when they passed the competitive initiative. See Transmission Access Policy Study Group v. Federal Energy Regulatory Commission, 225 F. 3d 667 (D.C. Cir. 2000).)

Given that there is no “state retail program” in Florida at present, the ability of Florida’s electric utilities to participate in GridFlorida would apparently turn on their ability to “voluntarily” place retail transmission assets under FERC’s jurisdiction. However, the statutory underpinnings for the Commission’s jurisdiction over electric utilities has not changed in its essential elements for many years. The Legislature has given no indication that it expects a lessening of electric utility oversight from this Commission. The current statutory scheme in Florida does not allow Florida Power & Light Company, Florida Power Corporation or Tampa Electric Company to act unilaterally to affect the terms or conditions of retail electric service. In short, these utilities are incapable of acting “voluntarily” to transfer away state regulation of retail transmission service.

The fact that these utilities are powerless to act without Commission approval, however, does nothing to establish the Commission’s own authority to allow retail transmission service to be removed from state control. As noted above, the legislative directive under which the Commission has operated for many years has always resulted in bundled retail service. Certainly, FERC’s actions at the federal level cannot directly affect the Commission’s statutory duty to regulate all aspects of retail electric service as an attribute of the State’s police power. Just as an agency is incompetent to interpret the constitutionality of a statute it must administer, an agency cannot divest itself of statutory responsibilities. Until the Legislature declares otherwise, the Commission should not allow Florida’s electric utilities to unbundle their retail transmission service or transfer ownership or operational control of their transmission assets to GridFlorida. The final order in this docket should direct Florida Power & Light Company, Florida Power Corporation, and Tampa Electric Company to continue providing bundled retail electric service to their customers.

D., E., AND F. STATEMENT OF ISSUES AND POSITIONS:

ISSUE 1: Is participation in a regional transmission organization (RTO) pursuant to FERC Order No. 2000 voluntary?

OPC: Yes.

ISSUE 2: What are the benefits to Peninsular Florida associated with the utility’s (FPC, FPL, or TECO) participation in GridFlorida?

OPC: The Commission can only speak to this issue within the scope of its own jurisdiction. At this level, the Commission must assume, in the absence of legislative directives, that the policy of this state is to continue all regulation of retail transmission service under the Commission’s continued oversight. As such, there are no benefits to Peninsular Florida associated with participation in GridFlorida.

ISSUE 3: What are the benefits to the utility's ratepayers of its participation in GridFlorida?

OPC: None are readily identifiable at this time. Certainly no benefits have been identified which would fully offset the increased costs caused by participation in GridFlorida.

ISSUE 4: What are the estimated costs to the utility's ratepayers of its participation in GridFlorida?

OPC: No position at this time.

ISSUE 5: Is TECO's/FPL's decision to transfer ownership and control of its transmission facilities of 69kV and above to GridFlorida appropriate?

and

Is FPC's decision to transfer operational control of its transmission facilities of 69 kV and above to GridFlorida while retaining ownership appropriate?

OPC: No. Moreover, the companies cannot make such a decision without prior Commission authorization. Inasmuch as such an authorization may effectively divest the Commission of jurisdiction over retail transmission assets, the Commission cannot allow either the unbundling or the transfer.

ISSUE 6: Is the utility's decision to participate in GridFlorida prudent?

OPC: No.

ISSUE 7: What policy position should the Commission adopt regarding the formation of GridFlorida?

OPC: GridFlorida would be a FERC-regulated entity outside the Commission's jurisdiction. As such, the Commission should refrain from making policy pronouncements in matters not related to retail electric regulation.

ISSUE 8: Is Commission authorization required before the utility can unbundle its retail service?

OPC: Yes. A utility cannot unilaterally alter the terms or conditions of service governed by tariffs approved by the Commission. Moreover, a utility cannot take an action that would affect any aspect of the Commission's regulatory oversight without the Commission's prior approval. This is true even though "unbundling" is not explicitly referenced in statute. See e.g. City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965) (Even though there was no explicit authority for Commission approval of territorial agreements, such agreements were invalid without

Commission approval because they impinge upon the Commission's statutory authority to order additions and extensions to utility facilities.) The Commission cannot authorize unbundling if to do so would effectively divest it of some of its jurisdiction.

ISSUE 9: Is Commission authorization required before the utility can stop providing retail transmission service?

OPC: Yes. A utility cannot unilaterally alter the terms or conditions of service governed by tariffs approved by the Commission. Moreover, a utility cannot take an action that would affect any aspect of the Commission's regulatory oversight without the Commission's prior approval. See e.g. City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965) (Even though there was no explicit authority for Commission approval of territorial agreements, such agreements were invalid without Commission approval because they impinge upon the Commission's statutory authority to order additions and extensions to utility facilities.) The Commission cannot allow Florida's electric utilities to get out of the retail transmission business if to do so would effectively divest it of some of its jurisdiction.

ISSUE 10: Is Commission authorization required before FPC can transfer operational control of its retail transmission assets?

and

Is Commission authorization required before FPL/TECO can sell its retail transmission assets?

OPC: Yes. A utility cannot unilaterally alter the terms or conditions of service subject to tariffs approved by the Commission. Moreover, a utility cannot take an action that would affect any aspect of the Commission's regulatory oversight without the Commission's prior approval. This is true even though statutes administered by the Commission do not explicitly address either the transfer of retail transmission assets or the transfer of operational control of retail transmission assets. See e.g. City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965) (Even though there was no explicit authority for Commission approval of territorial agreements, such agreements were invalid without Commission approval because they impinge upon the Commission's statutory authority to order additions and extensions to utility facilities.) The Commission cannot authorize either an outright transfer or a transfer of operational control if to do so would effectively divest it of some of its jurisdiction.

ISSUE 11: Is a Regional Transmission Organization for the Southeast region of the United States a better alternative for Florida than the GridFlorida RTO?

OPC: Passing on the relative merits of matters outside the Commission's retail jurisdiction would be inappropriate.

G. STIPULATED ISSUES:

None.

H. PENDING MOTIONS:

None.

I. PENDING REQUESTS OR CLAIMS FOR CONFIDENTIALITY:

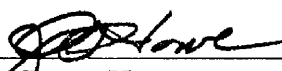
None.

J. STATEMENT OF COMPLIANCE WITH ORDER ESTABLISHING PROCEDURE:

There are no provisions of the order establishing procedure with which the Office of Public Counsel cannot comply.

Respectfully submitted,

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CERTIFICATE OF SERVICE
DOCKETS NOS. 000824-EI, 001148-EI, 010577-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing PUBLIC COUNSEL'S PREHEARING STATEMENT has been furnished by U.S. Mail or *Hand-delivery to the following parties on this 10th day of September, 2001.

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