ORIGINAL

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June 21, 2002

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

RE: Docket No. 020233-EI

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Public Counsel's Post-Workshop Comments on the GridFlorida Companies' Independent System Operator Proposal for filing in the above referenced docket.

Also enclosed is a 3.5 inch diskette containing the Public Counsel's Post-Workshop Comments on the GridFlorida Companies' Independent System Operator Proposal 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

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Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of GridFlorida Regional Transmission Organization Proposal.	)))	Docket No. 020233-EI Filed: June 21, 2002

PUBLIC COUNSEL'S POST-WORKSHOP COMMENTS ON THE GRIDFLORIDA COMPANIES' INDEPENDENT SYSTEM OPERATOR PROPOSAL

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to the Orders Establishing Procedure, Order No. PSC-02-0459-PCO-EI, issued April 3, 2002, provide the following post-workshop written comments:

I.

THE PURPORTED COMPLIANCE FILING DOES NOT COMPLY WITH THE ORDER

1. In March, 1999, the Commission granted a determination of need for the Duke New Smyrna power plant in apparent recognition of recent developments at the Federal Energy Regulatory Commission. Order No. PSC-99-0535-FOF-EM (March 22, 1999). FERC wants to foster competition in the wholesale electric generation market, and a majority of the Commissioners believed a statute they administer could be construed to allow a merchant plant to be sited in Florida. Three investor-owned electric utilities subject to the Commission's pervasive retail jurisdiction, however, thought otherwise. Tampa Electric Company, Florida Power Corporation, and Florida Power & Light Company appealed the Commission's order, arguing to the Florida Supreme Court that changes in federal law and recent FERC decisions

could not justify the Commission's failure to comply with a state law which only allowed for determinations of need to issue for power plants dedicated to serving retail load.

2. The Florida Supreme Court agreed with the companies that the Commission could not grant a need determination for a merchant plant pursuant to Section 403.519, Florida Statutes. The court reversed the Commission order, "find[ing] that the Legislature must enact express statutory criteria if it intends such authority 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.] Tampa Electric Co. v. Garcia, 767 So. 2d 428, 435-36 (Fla. 2000). Today, as a result of the Tampa Electric v. Garcia decision, large merchant plants (i.e., those with more than 75 megawatts of steam capacity) cannot be built in Florida because the Legislature has not amended the determination-of-need statute to allow the Commission to consider the competitive wholesale generation market envisioned by FERC. More broadly, that case stands for the proposition that only the Legislature can change the scope of the Commission's authority in response to developments in the federal arena; in the absence of new legislative enactments, the Commission is expected to follow Florida's historic plan of electric utility regulation.

3. The same three utilities who championed state law over federal initiatives in Tampa Electric v. Garcia have joined forces in this docket as the GridFlorida Companies. This time, however, the shoe is on the other foot. Now they want the Commission, in deference to FERC's Order No. 2000, to act without guidance from the Legislature and allow the Commission's traditional retail jurisdiction over them to be altered. Instead of expanding its

authority as the Commission attempted with the Duke New Smyrna need determination, the GridFlorida Companies want the Commission to back away from a traditional element of retail jurisdiction. The end result, however, would be the same, a fundamental change in the way the Commission interprets the statutes it administers in order to promote a federal objective without prior authorization from the Legislature.

4. FERC, in its Order No. 2000, did not make RTO participation mandatory; it is voluntary, as the Commission found in Order No. 01-2489. See Public Utility District No. 1 of Snohomish County, Washington v. FERC, 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 GridFlorida Companies do not emanate from anything imposed upon them, but from their desire to accept FERC's invitation to voluntary RTO participation.

5. Under the companies' proposal, the transmission component of bundled retail sales for existing transmission assets, which is presently subject to the Commission's jurisdiction, would be subject to zonal charges for five years under a FERC-approved tariff. The costs of new transmission assets, which are also currently subject to the Commission's jurisdiction as they come into service, would be recovered through a FERC-approved system-wide charge. After five years, the system-wide rate will be phased in for existing transmission facilities. Eventually, the costs of all transmission assets, existing and new, will be recovered through this system-wide charge. (The Participating Owners Management Agreement (POMA) provides that the revenue requirement for each company is to be recovered through GridFlorida's FERC-approved tariff (POMA, §1.1.2) and that each company can establish its revenue

requirements for all its transmission assets, retail and wholesale, by a unilateral filing at FERC. (POMA, § 8.2.1).) The GridFlorida Companies, however, promise to exempt their bundled retail load from zonal rates, pursuant to an option they have reserved at FERC, but only for the five-year transition period. (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 may elect to exempt bundled retail load from the Zonal Rate.")

6. Acceptance of the compliance filing would mean that the Commission would only regulate the revenue requirement associated with the transmission component of bundled retail sales as it relates to existing transmission facilities for five more years. Jurisdiction over the revenue requirement for new transmission assets would be ceded to FERC immediately. Today's Commission would diminish its own present range of authority and decide for another Commission five years in the future (and for the Legislature) that additional, more substantial elements of its statutory jurisdiction had come to an end. Thereafter, FERC alone would set the revenue requirement for the transmission component of bundled retail sales. The Commission will have transformed 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, would have to be deemed prudent and passed on to retail ratepayers in Florida.

7. The Legislature, in Chapter 366, Florida Statutes, enacted a comprehensive plan for the retail regulation of Florida's investor-owned electric utilities and charged the Commission (an agency which, pursuant to Section 350.001, "has been and shall continue to be an arm of the legislative branch of government") with the authority and duty to administer the legislative plan. This regulatory framework has for many years obligated the Commission to exercise exclusive

jurisdiction over retail service provided by Florida's investor-owned electric companies, including the transmission component of traditional bundled retail service, 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, the Commission must assume that the policy of this state is to continue all regulation of retail transmission service under the Commission's continued jurisdiction just as before. The GridFlorida Companies' attempt to alter this regulatory regime and transfer jurisdiction to FERC must be rejected because the Commission cannot permit utilities over whom it exercises total retail authority to decide through voluntary action to lessen the Commission's jurisdiction over them.

8. The Commission has always regulated the revenue requirement associated with the transmission component of bundled retail sales as an aspect of its jurisdiction over Tampa Electric, FPC, and FPL pursuant to Chapter 366. There can be little doubt that a decision by the Commission to stop exercising any of that jurisdiction would be a significant change in the way these utilities have historically been regulated in Florida. There can be no doubt that, under the precedent the companies established in Tampa Electric v. Garcia, action by the Florida Legislature is required before "the PSC [will] be authorized to consider the advent of the competitive market in wholesale power promoted by recent federal initiatives" because "[s]uch statutory criteria are necessary if the Florida regulatory procedures are intended to cover this evolution in the electric power industry." 767 So. 2d, at 435-36. The Florida Legislature never delegated to FERC, to Florida's investor-owned utilities, or to the Commission, itself, the authority to tinker with the Commission's jurisdiction as deemed necessary to facilitate federal

objectives. Until the Legislature acts to change the status quo, the Commission must regulate the transmission component of bundled retail rates as it has always done.

9. Assume FERC never issued its Order No. 2000, and the Commission refused to consider an electric utility's retail transmission assets when setting base rates. The utility would have an easy appeal, arguing that the Commission is statutorily required to allow for the recovery of prudent operating expenses and a return on investment for the transmission facilities which are used and useful in providing service to the public. Alternatively, assume the Commission allowed the utility to set the O&M and investment requirements for retail transmission assets to be included in base rates. Now Public Counsel would have an easy appeal, arguing that the Commission cannot delegate its statutory responsibility to assure that expenses are prudent and that the return allowed on used and useful assets is reasonable. The Commission cannot pick and choose which elements of its jurisdiction it will exercise. The Commission simply has no choice but to fulfill all of the statutory obligations imposed upon it by the Legislature. Nothing happening at the federal level, short of preemption, can change this fundamental reality.

10. The salient facts which dictate this outcome are beyond dispute: (1) Consistent interpretation of Chapter 366 over many years has led the Commission to quantify and to include the transmission component of retail service in bundled retail rates; (2) In the absence of the federal initiative expressed in FERC's Order No. 2000, the Commission would not now be considering whether it should relinquish any of its current jurisdiction over the transmission component of bundled retail sales; (3) The Legislature has not directed the Commission to stop exercising or to phase-out any of its jurisdiction over the transmission component of bundled retail rates; and (4) The Commission, pursuant to Tampa Electric v. Garcia, cannot defer to a

federal initiative as the basis for changing the extent of its regulation over electric utilities in Florida.

11. The compliance filing (at page 4) states that any Commission review "should not relitigate the issues which have already been vetted or which could have been vetted during the extensive hearings in October 2001 which formed the basis of the Order. The review should be an expeditious determination of whether this Compliance filing indeed conforms to the requirements of the Order." The prayer for relief (at page 6) asks the Commission "to determine that this filing is in full compliance with the Order." Order No. 01-2489, however, specifically rejected GridFlorida as a transco and directed a new filing within ninety days based upon an ISO configuration because the Commission could neither relinquish nor allow a utility to effect a relinquishment of its traditional jurisdiction:

> We believe that under 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. . . . However, under an ISO model, where the 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.
>
> Order No. 01-2489, at 15

Implicitly, the Commission's ultimate conclusion was that formation of GridFlorida was acceptable only if creation of the RTO would not impair the Commission's statutory jurisdiction. It could not have been otherwise. The Commission has no authority to acquiesce in the diminution of its statutory jurisdiction. Clearly, a filing which, on its face, would effect a transfer of jurisdiction cannot be in full compliance with an order directing that jurisdiction be retained.

Moreover, the Commission is powerless to approve a curtailment of its jurisdiction under any circumstances.

12. It used to be that a clear delineation could be drawn between retail service, which was always provided on a bundled basis under state control in Florida and elsewhere, and FERC's regulation of wholesale service. However, developments after the passage of PURPA in 1978 and the Energy Policy Act of 1992 led FERC to believe that wholesale electric generation should no longer be viewed as a natural monopoly. Instead, FERC, believing an open, competitive wholesale generation market should now be encouraged, set about opening up the interstate electric transmission system so that transmission owners would be unable to favor their own generating resources over competitors. In the process, FERC evaluated whether the industry had evolved in a manner which might allow it to exercise jurisdiction over the transmission component of retail electric sales.

13. Order No. 888 in 1996 was the first step. That order required transmission owners to take transmission service over their own systems upon the same terms and conditions applicable to all other wholesale generators. The Open Access Transmission Tariff (OATT) mandated by FERC in Order No. 888, did not, however, apply when the transmission owner was transmitting power (from its own generation or purchased power) to its own retail native load customers as part of bundled retail service. Even so, this new focus on whether retail service had been unbundled by actions at the state level offered FERC an opportunity to extend its jurisdiction. The advent of retail competition in some states had led to transmission service being charged for separately or, in other words, unbundled. FERC construed this state-initiated change to effect a shift in the jurisdictional line toward the federal side because retail transmission, after

unbundling, was no longer part of the retail sale of electric energy placed off limits to federal jurisdiction by Section 201(b)(1) of the Federal Power Act. FERC's interpretation was upheld in New York v. FERC, 122 S.Ct. 1012 (2002); 2002 WL 331835 (U.S.).

14. FERC was less successful in its attempt to go further and require that transmission system curtailments be prorated between an electric utility's wholesale and retail customers so that the utility could not favor its own retail native load customers. That position was rejected in Northern States Power Company v. FERC, 176 F.3d 1090, 1095-96 (8th Cir. 1999), in which the court 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 [Federal Power Act's] specific grant of authority to FERC." 176 F.3d, at 1096. After Order No. 888, the transmission component of bundled retail sales remained strictly a matter of state regulation, as did the priority of service to be given to retail, native load customers.

15. Retail regulation in Florida was unaffected by FERC's jurisdictional interpretation in Order No. 888 (or on rehearing in Order No.888A) because nothing has changed in the way retail electric service is provided at the state level. The Commission continues to regulate Florida's investor-owned electric utilities on a bundled retail basis as it has always done. Retail competition has not been adopted by the Florida Legislature, nor has the Legislature directed the Commission to change the way it regulates electric utilities in the state pursuant to Chapter 366. As a result, even today, the OATTs filed at FERC are not applicable when the GridFlorida

Companies serve their own retail native load customers. It will remain this way until something happens in Florida to permit FERC to assume jurisdiction over the transmission component of retail sales. The Legislature might someday, by statute, take such an action directly or delegate such authority to the Commission. The issue in this docket, however, is whether the Commission can allow utilities it regulates to make such a momentous decision without directions from the Legislature.

16. FERC soon concluded Order No. 888 had not gone far enough. Transmission owners still had the actual or perceived ability to favor their own generators over competitors. Order No. 2000 was FERC's attempt to solve the problem in 1999 by strongly encouraging electric companies to form independent RTOs. Since the RTO would be a FERC-regulated interstate transmission company, the jurisdictional limitations which prevented Order No. 888 from offering global solutions might be overcome. (Notably, Order No. 2000 did not find that any of FERC's jurisdictional interpretations in Orders Nos. 888 and 888A were incorrect.) Transmission service at FERC-approved rates would apply to both wholesale and retail load. The bundled-versus-unbundled distinction might become irrelevant because the RTO would not, by definition, have native load customers of its own to receive the power. The RTO's customers would, instead, be electric utilities. With this approach, it would no longer make any difference whether retail transmission service was unbundled through retail restructuring. FERC would have jurisdiction simply by virtue of the RTO's existence as an interstate transmission company. All that was needed to make RTOs a reality was for investor-owned electric utilities to voluntarily turn over ownership or operational control of their transmission assets to an RTO.

17. This brings us to the compliance filing now before the Commission. Order No. 01-2489 rejected the original GridFlorida transco proposal. The companies' acceptance of that decision demonstrates that the Commission can prevent electric utilities under its jurisdiction from transferring away assets used and useful in providing retail service. The Commission concluded it will only allow voluntary RTO participation if it leaves the Commission's historic jurisdiction over retail transmission assets undisturbed. The compliance filing fails in this regard by assuming the Commission can accept something less than a full loaf where its statutory jurisdiction is concerned. The GridFlorida Companies mistakenly assumed they could "retain as much [Commission] authority over retail transmission revenue requirements for existing facilities as possible, while retaining the overall pricing protocol approved by FERC." Executive Summary, at 4. The companies, however, were not charged in Order No. 01-2489 to act on the Commission's behalf before FERC so that as much jurisdiction as FERC deigns to allow could be salvaged. It is not FERC's decision to make. Until directed otherwise by Legislature, the Commission cannot permit investor-owned electric utilities over whom it exercises total retail authority to decide through voluntary action how its jurisdiction over them should be constrained.

18. Under the compliance filing, the GridFlorida Companies, not the Legislature, would determine the extent and duration of the Commission's regulatory authority over the transmission component of bundled retail sales. The compliance filing would only give the Commission the authority to set GridFlorida's retail revenue requirements during a five-year transition period, and that authority would only apply to "existing" transmission facilities. Additional costs, including a Grid Management Charge, a new system-wide rate for new

transmission facilities, and a pro rata share of the revenue requirement of transmission dependent utilities would be established by FERC and passed through to bundled retail load even during the transition period.

19. The GridFlorida Companies wish to strip the Commission of its historic jurisdiction over the revenue requirements associated with the transmission component of bundled retail sales and transfer that authority to FERC. The transfer is to take place in a manner and at a time of the companies' choosing. But they cannot act alone. In a perverse twist of regulatory control, they need the Commission's assistance to remove themselves from its jurisdiction. They need to convince the Commission to decide for the Legislature that Chapter 366 should no longer apply for purposes of new transmission assets, that Chapter 366 expires for other purposes relating to retail transmission assets in five years, and that a future Commission should not have the same breadth of regulatory control enjoyed by the current Commission. In other words, the companies need an order the Commission has no power to issue. Utility regulation, like water, naturally flows in only one direction. The Legislature dictates to the Commission, which dictates to the investor-owned electric utilities; regulatory control does not flow in the other direction.

II.

THE COMMISSION CANNOT ALLOW THE GRIDFLORIDA COMPANIES TO TURN OPERATIONAL CONTROL OF THEIR RETAIL TRANSMISSION ASSETS OVER TO AN ISO

20. Chapter 366 does more than just require the Commission to regulate the individual GridFlorida Companies for purposes of revenue requirements and cost recovery; it also requires operational oversight of their transmission assets pursuant to the Grid Bill and other

provisions. "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, whether oil, coal, nuclear, or QF is irrelevant." Florida Power & Light Co. v. Nichols, 516 So. 2d 260, 261 (Fla. 1987).

21. In spite of its statutory charge to regulate from both an economic and operational perspective, the Commission apparently decided in Order No. 01-2489 that, even though it must hold on to its economic oversight, it was free to give up its operational control. GridFlorida was rejected as a transco because, with that configuration, the Commission might lose its revenue requirement and cost recovery jurisdiction over the individual company's retail transmission assets. Yet the Commission sanctioned the formation of GridFlorida as an ISO without addressing the loss of grid jurisdiction over those same assets which a transfer of operational control might entail. Actually, the threatened loss of jurisdiction prevents the Commission from allowing the companies to transfer either revenue-requirement or operational authority to GridFlorida. The manner in which the Commission oversees the grid cannot change in response to FERC's RTO initiative until the matter is first addressed by the Legislature.

22. In addition to the Grid Bill, other provisions of Chapter 366 bear on the Commission's jurisdiction over transmission assets. Section 366.02(2) defines an "electric utility," for purposes relevant to an analysis of the GridFlorida proposal, to be "an investor-owned electric utility . . . which owns, maintains or operates an electric . . . transmission . . . system within the state." This is evidently the language the Commission relied upon to conclude that "GridFlorida will be an electric utility subject to our jurisdiction." Order No. 01-2489, at 19.

However, GridFlorida will 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 otherwise." GridFlorida Articles of Incorporation, Preamble, and Articles VI and IX. It is therefore doubtful that GridFlorida could be construed as an investor-owned electric utility pursuant to Section 366.02(2). If this is the case, then the Commission might have no jurisdiction at all over GridFlorida. Clearly, the Commission cannot permit the companies to transfer operational control of their transmission assets to the RTO if to do so might divest the Commission of its own jurisdiction over retail transmission assets.

23. In any event, characterizing GridFlorida as an electric utility might still not give the Commission leeway to reduce its regulation of the GridFlorida Companies individually. Tampa Electric, FPC, and FPL would each still be an "investor-owned electric utility . . . which owns . . . a[] transmission . . . system within the state" pursuant to Section 366.02(2). As such, each would remain subject to the Commission's jurisdiction over retail transmission assets for both Grid Bill and other purposes. For example, under Section 366.041(1), the Commission can consider the "adequacy of the facilities provided," presumably including transmission assets, when setting retail rates. Under Section 366.05(1), the Commission can require "repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto." Under Section 366.051, the companies individually must, in the absence of harm being caused to the utility's retail and wholesale customers, provide transmission service to enable a retail customer to send its own power generated at one location to the customer's facilities at another location. The Commission could

directly order any one of the three companies, as both a public utility and an electric utility owning transmission assets in the state, to add new transmission lines or to repair existing ones. The company might respond that, pursuant to the POMA with GridFlorida, such orders should be directed to the RTO. But the company could not, by contract, affect the Commission's jurisdiction over it. Nothing in the history of the Grid Bill specifically, or of Chapter 366 generally, suggests the Legislature envisioned joint regulation over the state's transmission assets for planning and other purposes at both the state and federal level.

24. It would be one thing if the Commission sought to recognize GridFlorida as an entity subject to its jurisdiction after the RTO independently appeared on the Florida scene. It is quite another for the Commission to facilitate the contraction of its historic jurisdiction over the GridFlorida Companies by taking an overt act necessary for the creation of GridFlorida in the first place. Nothing in Chapter 366 suggests the Commission can be instrumental in creating an entity subject to both FERC's and perhaps (to a lesser extent) its own jurisdiction. The Commission is not free to decide for the Legislature that, in light of the federal initiative expressed in FERC's Order No. 2000, a new transmission-only company should be brought into being or that jurisdiction over GridFlorida can be substituted for the Commission's traditional jurisdiction over the GridFlorida Companies individually.

25. The Grid Bill was originally enacted in Chapter 74-196, Laws of Florida, and is now codified at Sections 366.04(2)(a)-(e) and (5), 366.05(7) and (8), and 366.055, Florida Statutes. It was adopted just one year after the 1973 Siting Act which 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. Chapter 74-196 also amended the Commission's

jurisdiction to include rural electric cooperatives and municipal electric utilities for rate structure, system-of-accounts, territorial-agreement-and-dispute, and grid purposes. Section 366.02(2) was amended in 1989 to provide a definition of "electric utility" (Chapter 89-292, Laws of Florida), but this was apparently done for the most part to help distinguish between "public utilities" over whom the Commission exercised ratemaking jurisdiction and the larger mix of "electric utilities" (i.e., including municipals and co-ops) over which the Commission exercised, among other things, rate structure and grid authority.

26. The Grid Bill requires the Commission, not FERC, to oversee the state's transmission grid. Moreover, the Commission's grid jurisdiction is more extensive than FERC's, tying together the transmission assets of investor-owned electric utilities, municipal electric utilities and rural electric cooperatives so that the Commission 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 Commission the responsibility for long-term planning. The Commission 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 Commission. GridFlorida's responsibilities will not extend to oversight of generation, but the Commission must integrate generation and transmission within its grid responsibilities.

27. The heart of the Grid Bill is found in Section 366.04(5):

> The commission shall further have 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 in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

Beyond question, the Legislature placed ultimate responsibility for planning Florida's transmission infrastructure for both operational and emergency purposes with the Commission. The GridFlorida Companies' Executive Summary, at page 7, however, states that "GridFlorida will . . . have ultimate decision-making authority over planning." (The Executive Summary, at page 8, says the Commission will be allowed to provide "input" to GridFlorida and the transmission owners during their decision-making process.) It would, of course, be impossible for the Commission to regulate GridFlorida as an electric utility for Grid Bill purposes while GridFlorida, independently, reserves ultimate decision-making authority over planning under a delegation from FERC.

28. Contrast the language of Section 366.04(5), above, with the statement in Order No. 01-2489, at page 19, that the GridFlorida Companies plan to keep the Commission "involved" in the planning and reliability processes that GridFlorida will follow. The Commission, of course, must be more than involved to determine the adequacy of transmission facilities in the ratemaking process or to decide whether to require repairs, improvements, additions, or extensions of transmission assets.

29. Instead of saying the Commission will be involved, why doesn't the proposal explicitly state that the Commission will exercise the same jurisdiction over GridFlorida in the future that it currently exercises over the GridFlorida Companies individually today? Answer: It is not said because it will not happen that way. GridFlorida will have the "obligation and the sole

authority" to provide transmission service. POMA, § 6.2.1. GridFlorida will have the "obligation and sole responsibility" for short-term reliability. POMA, § 6.3. Only GridFlorida can receive and process requests for interconnection from generation owners. POMA, § 6.5.1. Participating owners must follow GridFlorida's directions concerning operation of their transmission assets, and no participating owner can place their transmission assets into or out of service without instructions and permission from GridFlorida. POMA, § 7.1. Participating owners must follow GridFlorida's directions regarding maintenance of their transmission facilities. POMA, § 7.2. FERC must issue an order approving the transfer of operational control over the participating owner's facilities to GridFlorida. POMA, § 5.1.

30. As a general matter, the Commission does not order construction of power plants, transmission and distribution lines or any of the other facilities needed to deliver electricity to the customer's meter because the utilities act on their own initiative with the Commission's concurrence. Commission approval varies in form from formal orders to acquiescence in the recording of expenses and investment for rate-of-return surveillance purposes. In the past, this process has generally been adequate to assure sufficient assets under the Commission's jurisdiction to meet its statutory responsibilities. Although the companies are generally left to their own devices to construct the grid (along with their other assets), Section 366.05(8) allows the Commission, upon a finding of inadequacies in the grid, to perform the planning function itself and "require installation or repair of necessary facilities, including . . . transmission facilities."

31. The applicability of Section 366.05(8) was addressed in some detail in In re: Investigation into the adequacy of the electrical transmission grid in North Florida, Order No. 23909, issued December 12, 1990:

> With respect to joint transmission ownership, we draw our power to implement a coordinated grid in Florida from Section 366.05(8), F. S. This statute states, in part: 'If 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, it shall have the power, after proceedings as provided by law, and after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities, with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to ensure compliance.' [Emphasis in original.]
>
> Therefore, in order to mandate joint ownership of transmission facilities in Florida, we must first establish probable cause that the lack of joint transmission ownership constitutes a deficiency in the State's transmission grid and then determine, through evidentiary hearings, that mutual benefits will accrue to the joint owners of the transmission facilities. We do not believe that simply wanting joint transmission ownership constitutes the 'probable cause' required by the Florida Statutes. [Emphasis added.]
>
> Joint transmission ownership is not necessarily a prerequisite to coordinated transmission planning.
>
> Order No. 23909, at 10-11.

See In re: Petition of Gulf Power Company involving complaint and territorial dispute with Alabama Electric Cooperative, Inc., Order No. 13191, issued April 12, 1984, where the Commission said that if the Companies could not reach agreement "the Commission shall select an expert to assist it in developing the [transmission] plans for the area in Florida west of the Appalachicola River." Order No. 13191, at 6. In its ordering paragraphs, at pages 6-7, the Commission ordered that "Gulf Power Company shall continue to provide wholesale power to West Florida Electric Cooperative Association, Inc. at the Altha, Grand Ridge, and Pittman

delivery points and Alabama Electric Cooperative shall be prohibited from constructing any facilities in Florida to serve those delivery points; It is further ORDERED that no utility shall construct any transmission facilities in the area of northwest Florida west of the Appalachicola River until further order of the Commission." This latter provision was clarified on rehearing in Order No. 13926, issued December 12, 1984, at page 4, where the Commission required Gulf and AEC to review each other's transmission plans and report back to the Commission.

32. A fair assumption is that most of the GridFlorida Companies' assets were acquired, in the first instance, to serve retail customers. Retail customers are, among other things, entitled to economic dispatch which commits the lowest cost generation (consistent with good utility practices) to meet the load on the companies' systems. Those systems are, or certainly should be, operated with an understanding of the priority status of retail native load customers under the Commission's oversight.

33. The Commission's statutory authority allows it to require utilities under its jurisdiction to build, to own, and to operate the assets necessary for the provision of reliable retail electric service. From a regulatory perspective, there is no substantive difference between assets acquired at the Commission's insistence and those a utility obtains on its own with either prior or after-the-fact Commission approval. The legislative intent of Chapter 366, as expressed in Section 366.01, defines the regulation of electric utilities to be an attribute of the police power, necessary for the protection of the public welfare and provides for the liberal interpretation of laws to accomplish that purpose. Provisions of Chapter 366 cannot reasonably be interpreted in such a way that an electric utility can be forced by Commission action to acquire a used and useful transmission assets in the first place but cannot be prevented from transferring away

operational control over them immediately afterwards. FPL, for example, built the two 500 kv transmission lines down the East Coast of the State at the Commission's urging to bring in "coal by wire" from the Southern Company. Retail ratepayers provided accelerated cost recovery through the oil-backout cost recovery process. It would be irrational to contend FPL always had the ability to just transfer operational control of those backbone transmission assets out of the Commission's jurisdiction at anytime and to anyone it chose. The Commission's jurisdiction is the same now as it was then.

34. The only thing that has really changed has been FERC's pronouncements. The Florida Supreme Court, however, has declared that the Commission cannot alter its regulatory scheme in response to federal initiatives without first receiving directions from the Legislature. As things now stand, the Commission must continue to regulate Florida's investor-owned electric utilities as the Florida Statutes direct. Transmission assets used to provide retail electric service are now within the exclusive province of this Commission's jurisdiction. There has been no indication from the Florida Legislature that it wants such oversight at the state level to change in recognition of recent developments at FERC. Therefore, the Commission should not permit the GridFlorida Companies to take any action which would permit FERC to construe retail transmission assets as being subject to its jurisdiction.

III.

EXCESSIVE COSTS, VOLUNTARILY INCURRED, CANNOT BE PRUDENT

35. FERC's Order No. 2000 urged Florida's electric utilities to see the wisdom of voluntarily creating an RTO, not as an end unto itself, but as a means to facilitate competition in

the wholesale electric generation market. The Florida Supreme Court's decision in Tampa Electric v. Garcia, however, prevents a competitive wholesale market from fully developing in this state until the Legislature amends Florida law. Thus, expenditures for RTO formation and operation in Florida cannot at this time support the underlying reason for having RTOs in the first place. Yet the GridFlorida Companies' compliance filing, in its prayer for relief at page 6, asks the Commission to provide "express authorization for recovery of the Charges, at least to the extent they exceed the amounts reflected in base rates, through a recovery clause mechanism." Stripped to its essentials, the compliance filing seeks recovery of unquantified costs (but certainly in the hundreds of millions of dollars range) voluntarily incurred in support of a federal endeavor which divests the Commission of some of its historic jurisdiction and cannot achieve its intended purpose because of a decision by the state's highest court. Spending the ratepayers' money for such a purpose lacks any semblance of logic, let alone prudence, particularly when the additional costs can be avoided altogether without any degradation of service if the companies would just choose not to participate in an RTO.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to issue a final order concluding that: (1) the GridFlorida Companies' purported Compliance Filing is not in compliance with Order No. PSC-01-2489-FOF-EI; (2) the Legislature must act to adopt appropriate statutory criteria before federal initiatives such as FERC's Order No. 2000 can be taken into consideration within the Florida regulatory process; (3) the Commission cannot and will not allow electric utilities it regulates, through voluntary action at FERC or otherwise, to take any action which now or in the

future lessens the Commission's retail jurisdiction over them; (4) the Commission will continue to fully regulate the operations of Tampa Electric Company, Florida Power Corporation, and Florida Power & Light 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; and (5) retail cost recovery will not be permitted for costs voluntarily incurred in support of a federal endeavor.

Respectfully submitted,

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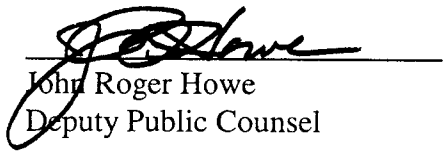

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I HEREBY CERTIFY that a true and correct copy of the foregoing PUBLIC COUNSEL'S POST-WORKSHOP COMMENTS ON THE GRIDFLORIDA COMPANIES' INDEPENDENT SYSTEM OPERATOR PROPOSAL has been furnished by U.S. Mail or *hand-delivery to the following parties on this 21st day of June, 2002:

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