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September 18, 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 each of "Public Counsel's Motion for Stay of Proceedings and Motion for Reconsideration of Order No. PSC-02-1199-PAA-EI" and "Public Counsel's Request for Oral Argument" for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing "Public Counsel's Motion for Stay of Proceedings and Motion for Reconsideration of Order No. PSC-02-1199-PAA-EI" and "Public Counsel's Request for Oral Argument" in WordPerfect for Windows 6.1 format. 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.

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Sincerely,

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JRH/pwd
Enclosures

Reg. for oral argument
DOCUMENT NUMBER DATE

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FPSC-COMMISSION CLERK

Motion for stay
DOCUMENT NUMBER DATE

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Atkinson
FPSC-BUREAU OF RECORDS

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of GridFlorida Regional)
Transmission Organization Proposal.)
_____)

Docket No. 020233-EI
Filed: September 18, 2002

**PUBLIC COUNSEL'S MOTION FOR STAY OF PROCEEDINGS
AND MOTION FOR RECONSIDERATION OF ORDER NO. PSC-02-1199-PAA-EI**

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 28-106.204, Florida Administrative Code, move the Florida Public Service Commission to stay further proceedings until the GridFlorida Companies file an RTO proposal which is in compliance with the Commissions Order No. PSC-02-1199-PAA-EI. The Citizens, pursuant to Rule 28-22.060, Florida Administrative Code, also move the Florida Public Service Commission to reconsider portions of its Order No. PSC-02-1199-PAA-EI issued as final agency action on September 3, 2002. These motions should be granted on the following grounds:

I.

MOTION FOR STAY OF PROCEEDINGS

1. The Commission announced, albeit indirectly, in its Order No. 02-1199 that it would approve GridFlorida as an ISO only if the Commission could retain its Grid Bill and ratemaking jurisdiction over transmission assets. As will be discussed in some detail below, the Commission was mistaken in its belief that the GridFlorida ISO would be subject to its jurisdiction for Grid Bill purposes. And it remains to be seen whether the companies can comply with the order's directions to modify the RTO proposal and keep the Commission's ratemaking jurisdiction intact.

2. This latter point is particularly significant. The Commission's December 20, 2001, order rejected the original RTO proposal because, as a transco, the Commission's ratemaking jurisdiction would have to be ceded to FERC. The companies were directed to file a modified proposal in which GridFlorida would be configured as an ISO so that the Commission's ratemaking jurisdiction would be unaffected. Order No. 02-1199, however, found that, although the rate structure had been modified in the ISO proposal, the Companies were still planning to transfer ratemaking jurisdiction to FERC. The latest proposal was therefore rejected based upon an explicit finding that "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. 02-1199, at 63. The ninth ordering paragraph (at page 78) provided that "the GridFlorida compliance filing shall be modified to recognize the Commission's continuing jurisdiction over the total cost of transmission service to retail customers."

3. The order also provided that the Commission would move forward on the market monitoring issues by requiring prefiled testimony and a hearing. The hearing would be expanded to also encompass those parts of Order No. 02-1199 issued as proposed agency action which might be protested. This hearing dealing with specifics of GridFlorida's operations, however, might become irrelevant if the companies are unable to fashion a proposal which allows for retention of the Commission's ratemaking jurisdiction because, in such a circumstance, the Commission could not approve the formation of GridFlorida in the first place.

4. The Commission should therefore stay further proceedings in this docket until the companies offer a modified proposal which clearly demonstrates that the Commission's

traditional jurisdiction over transmission assets will be unaffected by participation in the GridFlorida ISO.

II.

MOTION FOR RECONSIDERATION

5. The standard for reconsideration, stated generally, requires a showing that the Commission made a mistake of fact or law which, if corrected, would necessarily lead to a result different from that expressed in the order. Following are several mistakes which, if corrected, would necessarily lead the Commission to conclude that it cannot approve of the GridFlorida ISO while simultaneously holding onto its traditional jurisdiction. And, since the Commission is powerless to relinquish any of its jurisdiction, it cannot grant approval for formation of the RTO or allow for recovery of costs associated with the RTO's formation or operation.

6. The Commission has concluded it would be reasonable to permit Tampa Electric, Florida Power Corporation, and Florida Power & Light Company, collectively, to charge their customers over \$1.1 billion dollars of additional estimated costs over five years, from 2004 through 2008 (with more to follow in later years), associated with RTO formation and operation. Order No. 02-1199, at 69. The avowed purpose of the RTO is to facilitate competition among wholesale electric generators: The Commission said that "as a policy matter, we noted [in our December 20 order] our support for the formation of an RTO to facilitate the development of a wholesale energy market in Florida." Order No. 02-1199, at 6. The Florida Supreme Court's decision in Tampa Electric Co. v. Garcia, 767 So. 2d 428 (Fla. 2000), however, prevents a competitive wholesale market from fully developing unless and until the Legislature amends Florida law. The same three utilities who kept large merchant plants out of the state are in no

position to seek cost recovery for an endeavor dependent upon a competitive wholesale market. Simple logic informs that voluntary costs which cannot achieve their intended purpose because of the companies' own efforts and provide no discernable benefits to customers are anything but prudent. The Commission should correct its error and disallow cost recovery.

7. Moreover, the Commission is mistaken that Public Counsel's arguments against cost recovery represented an untimely challenge to the December 20 order. Order No. 02-1199, at 70. The December 20 order rejected GridFlorida as a transco. The companies were directed to file a modified proposal based upon an ISO model which retained the Commission's jurisdiction. The Commission could not possibly have accepted the prudence of RTO costs in the process of rejecting the original filing and without knowing whether the companies could successfully offer an alternative ISO proposal that conformed to the Commission's order.

8. Tampa Electric, FPC and FPL individually petitioned the Commission on June 12, 2001, to approve their participation in the GridFlorida RTO. The burden of proof to change the status quo and alter traditional methods of regulating transmission service at the state level rested with the utilities as the parties seeking affirmative relief. Aspects of retail service which might be adversely affected by the companies' participation in GridFlorida included, among other things, the priority of transmission service traditionally afforded native retail load (for purposes of curtailments, redispatch, etc.), the Commission's jurisdiction for Grid Bill and ratemaking purposes, and the costs to be borne by retail customers. The RTO, as originally proposed, was to be an investor-owned company (a "transco") that would assume ownership of the transmission assets of Tampa Electric and FPL and take over operational control of the transmission assets of

FPC. The transco would ostensibly achieve FERC's intended purpose of facilitating development of a competitive wholesale market for generation.

9. Hearings held in October, 2001, were particularly notable for what the companies did not say. The Commission received neither factual evidence nor legal argument from the companies that the Commission's Grid Bill jurisdiction would not be altered, that its ratemaking jurisdiction over transmission assets would remain intact, that retail customers would retain their priority of transmission service, or that retail customers would receive discernible benefits in return for the additional costs imposed upon them. Furthermore, the three companies offered no evidence or argument to explain how the transco could achieve its intended purpose in light of the companies' success in opposing the Duke New Smyrna merchant plant in the Tampa Electric Co. v. Garcia case. And, most significantly, the companies offered no evidence or argument that it was even possible for the Commission to allow the companies to participate in GridFlorida while at the same time retaining its historic jurisdiction over their transmission assets.

10. Accordingly, there is a fundamental disconnect between the Commission's determination that GridFlorida as an ISO is a good idea and the Commission's statements that it will not accede to the loss of any of its jurisdiction. The record is completely inadequate to support the Commission's implicit conclusion that one concept is not inherently antithetical to the other. The closest the Commission seems willing to come to the pivotal issue in this docket — i.e., whether approving the GridFlorida ISO will unquestionably effect a diminution of the Commission's statutory jurisdiction over transmission assets used to deliver bundled retail service — is contained in Commission statements that it intends to hold onto its traditional jurisdiction. FERC's jurisdiction, however, is defined by action at the state level regardless of

what state officials might say for the record. For example, officials in states that adopted retail competition said they intended to retain their jurisdiction over the unbundled transmission component of retail service. FERC, however, concluded that the act of unbundling effected a jurisdictional transfer regardless what the states might say about the matter. FERC's interpretation of events was upheld by the United States Supreme Court in the recent case of New York v. FERC, 122 S.Ct. 1012 (2002).

11. FERC's responses to questions about the GridSouth RTO are illustrative on this point. In response to a request for clarification by Duke and Carolina Power & Light concerning retention of retail jurisdiction under their participation in the GridSouth RTO, FERC said in a May 30, 2001, order that "GridSouth is now the sole provider of transmission service and the Applicants must take all transmission service, including transmission used to deliver power to bundled retail customers, from GridSouth. As a result, the rates, terms, and conditions of transmission service purchased by the Applicants from GridSouth to serve their retail customers must be on file with [FERC]. . . . The fact that the price the Applicants pay to GridSouth will become their cost for transmission of the energy they sell at retail does not give [FERC] jurisdiction over the other costs that Applicants recover in their retail rates." Carolina Power & Light, et al., 95 FERC ¶ 61,282 (2001) (Order, Section II(A)(1); emphasis added.) Responding to the North Carolina companies' request for rehearing on planning issues, FERC said: "Order No. 2000 held that an RTO must have control of transmission planning The Applicants have not even asserted that transmission planning for retail native load will be adversely affected if GridSouth, rather than the Applicants, controls the planning process. Indeed, transmission

planning for native load is an integral and critical part of the regional transmission plan.” (May 30, 2001, Order, Section II(C)).

12. The disconnect between the Commission’s actions and its statements is perhaps made most apparent by comparing the Commission’s comments on the Planning Protocol and its statements (Order No. 02-1199, at 77) that it will exercise jurisdiction over GridFlorida under the Grid Bill (setting aside for the moment whether the GridFlorida ISO will, in fact, be subject to the Commission’s Grid Bill jurisdiction, an issue addressed below). The Grid Bill, of course, places ultimate responsibility for the planning, development and maintenance of the state-wide transmission grid on the Commission. Section 366.04(5), Florida Statutes (2001). Yet the Commission acknowledges that GridFlorida’s planning protocol “clearly gives GridFlorida ultimate responsibility for the planning functions, including the calculations of ATC.” Order 02-1199, at 43. Clearly the Commission’s action in approving the GridFlorida ISO’s Planning Protocol makes its contradictory statements about retaining jurisdiction meaningless.

13. The Commission needs to ask itself where in the record of this proceeding the GridFlorida Companies demonstrated that it was possible for the Commission to approve their participation in the RTO while, at the same time, allowing the Commission to retain its traditional jurisdiction over their transmission assets. The answer, of course, is that the companies neither made the assertions nor provided the proof. Next, the Commission needs to ask itself whether its actions in approving the GridFlorida ISO might divest the Commission of its historic statutory jurisdiction in spite of the Commission’s explicit statements that it intends to retain that same jurisdiction. The answer, of course, is that FERC will look to the Commission’s actions and disregard its intent. It is a mistake of law for the Commission, by action or inaction,

to permit or cause utilities subject to its pervasive retail authority to lessen the Commission's jurisdiction over them without first receiving directions from the Legislature.

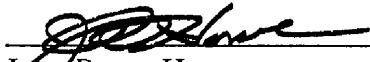
14. The Commission is mistaken in its assertions that the GridFlorida ISO will be subject to its jurisdiction for Grid Bill purposes. Section 366.02(2) defines an "electric utility," for purposes relevant to an analysis of the GridFlorida ISO proposal, to be "an investor-owned electric utility . . . which owns, maintains or operates an electric . . . transmission . . . system within the state." This is evidently the language the Commission relied upon on December 20, 2001, to conclude that GridFlorida — as a transco owned by its stockholders — "will be an electric utility subject to our jurisdiction." Order No. PSC-01-2489-FOF-EI, at 19. Under the current proposal now before the Commission, however, the GridFlorida ISO will not have any stockholders; it will not have any investors at all. The GridFlorida ISO 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. Since the GridFlorida ISO will not be an investor-owned electric utility pursuant to Section 366.02(2), the Commission is mistaken in its assertion that it will have the same jurisdiction over GridFlorida as it does over other wholesale providers such as Seminole Electric Cooperative. Order No. 02-1199, at 77. To the contrary, the Commission will not have any statutory jurisdiction over GridFlorida as an ISO.

15. The undersigned attorney for the Citizens has not contacted the numerous parties in this docket to ascertain whether they would oppose these motions based upon a reasoned assumption that many will certainly respond in opposition.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, move the Florida Public Service Commission to stay proceedings in this docket pending receipt of a modified proposal conforming to Order No. PSC-02-1199-PAA-EI and demonstrating that the Commission's traditional jurisdiction over transmission assets will not be adversely affected by approval of the GridFlorida ISO and further moving the Florida Public Service Commission to reconsider its Order No. PSC-02-1199-PAA-EI.

Respectfully submitted,

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**CERTIFICATE OF SERVICE
DOCKET NO. 020233-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing PUBLIC COUNSEL'S MOTION FOR STAY OF PROCEEDINGS AND MOTION FOR RECONSIDERATION OF ORDER NO. PSC-02-1199-PAA-EI has been furnished by U.S. Mail or *hand-delivery to the following parties on this 18th day of September, 2002:

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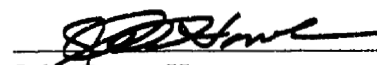
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