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September 24, 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 Petition on Proposed Agency Action for filing in the above- referenced docket.

Also enclosed is a diskette 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,

John Roger Howe
Deputy Public Counsel

JRH/pwd
Enclosures

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 020233-EI
Filed: September 24, 2002

PUBLIC COUNSEL'S PETITION ON PROPOSED AGENCY ACTION

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 28-106.201, Florida Administrative Code, protest certain portions of the Commission's Order No. PSC-02-1199-PAA-EI (hereinafter referred to as Order No. 02-1199), issued as proposed agency action on September 3, 2002. The Citizens request a hearing pursuant to Sections 120.569 and 120.57(2), Florida Statutes (2001), at which the GridFlorida Companies, as the parties seeking affirmative relief, will bear the burden of proof. In support of this petition, the Citizens allege the following:

1. The name and address of the agency affected by this petition is:

Florida Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

The agency's docket number is as indicated in the caption of this pleading.

2. Petitioners are the Citizens of the State of Florida, represented by the Office of Public Counsel. Notices, pleadings, correspondence and orders in this docket should be served on:

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The Public Counsel is appointed to appear on behalf of the State or its Citizens in matters under the jurisdiction of the Public Service Commission pursuant to Sections 350.061-.0611, Florida Statutes (2001). In this docket, the Office of Public Counsel represents customers of Florida Power & Light Company, Florida Power Corporation, and Tampa Electric Company as well as all Citizens of Florida who rely on the Commission to oversee an integrated state-wide transmission system pursuant to Florida Statutes. The Citizens are substantially and adversely affected by the Commission's proposed agency action determinations in Order No. 02-1199 because those proposed actions are part of an overall approach to formation of the GridFlorida regional transmission organization which will cause the loss of state control over transmission assets used to provide retail service while imposing in excess of \$1 billion of additional costs in just the first five years of RTO operation.

3. Order No. 02-1199 was received by the Office of Public Counsel on September 3, 2002, in the normal course of distribution of Commission orders to this office.

DISPUTED ISSUES OF MATERIAL FACT

4. None. This petition is directed to disputes of law and/or policy.

DISPUTED ISSUES OF LAW AND POLICY

Planning and Operation-Sections K, M, O, and R

5. The Commission lacks the jurisdiction to support its proposed agency actions in those portions of Order No. 02-1199 dealing with Planning and Operation of GridFlorida, Sections K, M, O, and R, because the matters at issue in those sections are subsumed within a Planning Protocol that can only be implemented by the Commission divesting itself of jurisdiction over the state-wide energy grid in derogation of its statutory responsibilities. The Planning Protocol places ultimate responsibility for planning and operation with GridFlorida for all transmission assets under the RTO's operational control. The Legislature, however, has delegated ultimate responsibility for planning, development, and maintenance of the Florida transmission grid with the Commission. Sections 366.04(2)(a)-(e) and (5), 366.05(7) and (8), and 366.055, Florida Statutes (2001). The Commission cannot, in turn, delegate these functions to an RTO under FERC's jurisdiction. As such, the actions proposed in those sections, which merely fine-tune an impermissible delegation of authority, are legally irrelevant at the retail level.

6. Additionally, the new-facilities cut-off date addressed in Section R is irrelevant because the Commission explicitly rejected the companies' proposed rate structure which would have had new transmission assets subject to a FERC-approved system-wide rate and existing transmission assets subject to a FERC-approved zonal rate: "[W]e find 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. The Applicants are directed to modify the GridFlorida compliance filing to recognize our continuing jurisdiction over the total cost of transmission service to retail customers." Order No. 02-1199, at 63. The demarcation date

for identifying new transmission assets would, therefore, only serve to distinguish between two categories of transmission assets, both of which would be removed from Commission jurisdiction in contravention of the Commission's December 20 order. The rate structure the companies eventually file to maintain the Commission's ratemaking jurisdiction in response to Order No. 02-1199 will not draw a distinction between new and existing transmission assets because the Commission has the same retail jurisdiction over both. The demarcation date for new transmission assets under the rejected rate structure proposal is, therefore, irrelevant.

Method of Recovering Incremental Transmission Costs

7. The Citizens understand the Commission's proposed action to be limited to the specific method of cost recovery, not to the issue whether cost recovery will even be allowed in the first place. This latter concern is the subject of a motion for reconsideration the Citizens filed on September 18, 2002. If, for some reason, the Commission considers its proposed action at pages 68-71 of Order No. 02-1199 to encompass the propriety of allowing cost recovery as well as the method of recovery, the Citizens incorporate by reference paragraphs 6 and 7 of their September 18 motion for reconsideration.

8. Having said that, it is nonetheless apparent that the method of cost recovery cannot be completely divorced from the type of costs subject to the proposed method of recovery. The implausibility of the Commission's proposal is made evident by considering the nonsensical question the proposed action must be answering: What rate mechanism should be used so that the GridFlorida Companies can recover over \$1 billion of costs voluntarily incurred in furtherance of a federal initiative which divests the Commission of its historic jurisdiction and cannot achieve

its intended purpose because of a decision of the state's highest court rendered in the companies' favor?¹ If an answer must be given, the only plausible response is: "None."

9. The Commission must also consider that it does not yet know whether the GridFlorida Companies will be able to comply with directives to keep the Commission's statutory jurisdiction intact. Determining the method of cost recovery is at best premature under these circumstances. Certainly, the Commission cannot intend to allow for recovery of costs incurred in derogation of its Order No. 02-1199.

10. Lastly, the day-to-day, ongoing costs of transmission service the companies will purchase from GridFlorida to serve native retail load are not the type of volatile, fluctuating costs for which cost recovery mechanisms were intended. The costs of planning, operating and maintaining the transmission grid are base-rate types of costs whose character will not change substantially simply because they are incurred in the first instance by the RTO and subsequently passed on to the utilities. Moreover, the fact that the costs subject to being recovered are incremental to those already in base rates suggests that they are just higher, base-rate costs. The appropriate mechanism for cost recovery is, therefore, through base rates.

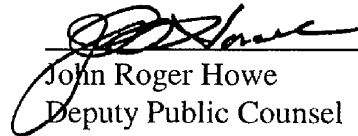
WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to conclude that its proposed agency actions under Planning and Operations, Sections K, M, O, and R, of Order No. 02-1199 are legally irrelevant

¹The referenced case is, of course, Tampa Electric Company v. Garcia, 767 So. 2d 428 (Fla. 2000). In that case the three GridFlorida Companies successfully opposed the Duke New Smyrna merchant power plant and forestalled development of a competitive wholesale market in Florida. Significantly, as a legal principle, that case stands for the proposition that the Commission cannot deviate from its traditional methods in furtherance of a federal initiative without first receiving explicit directions from the Legislature.

and that cost recovery should not be permitted at all or, if permitted, cost recovery should be through base rates.

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
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or *hand-delivery to the following parties on this 24th day of September, 2002:

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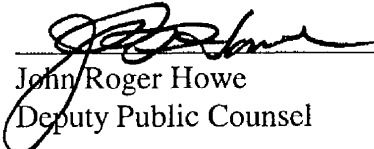
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