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October 12, 2001

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 001148-EI - 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.

Re: Docket No. 000824-EI - Review of Florida Power Corporation's Earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.


Re: DOCKET NO. 010577 - Review of Tampa Electric Company and impact of its Participation in GridFlorida, a Florida Transmission Company, on TECO's retail ratepayers.

Dear Ms. Bayo:

Enron Corporation files electronically its Post-Hearing Brief of Law and Evidence in the above-referenced dockets.

If you or your Staff has any questions regarding this filing, please contact Bill Bryant or Natalie Futch at (850) 224-9634.

Sincerely,



DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Natalie B. Futch

Enclosures

cc: Parties of Record
Interested Parties

NBF:pah:NBF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Post-Hearing Brief of Law and Evidence has been furnished by U.S. Mail to the following this 12th day of October, 2001.

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Natalie B. Futch

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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
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In re: Review of Tampa Electric Company and impact of its participation in GridFlorida, a Florida transmission Company, on TECO's retail ratepayers	DOCKET NO.	010577-EI
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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
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Submitted for filing: Oct. 12, 2001

ENRON CORPORATION'S POST-HEARING BRIEF OF LAW AND EVIDENCE

Enron Corporation ("Enron"), in accordance with this Commission's Order Number PSC-01-1959-PHO-EI as amended during the hearing in this matter, submits the following as its Post-Hearing Brief of certain issues in this proceeding:

Summary of Position

Enron generally supports the positions of Florida Power Corporation, Florida Power & Light Company and Tampa Electric Company (the "Joint Utilities") in this proceeding. The Joint Utilities have well supported their position that participation in a

Regional Transmission Organization ("RTO") is prudent, and Enron will not burden the file with additional argument. Enron's limited comments address Issue #7, related to this Commission's policy position regarding RTOs, and Issue #11, asking whether a RTO for the region is a better alternative for Florida

Policy Position in Favor of Markets (Issue #7):

Even in the absence of state regulation of transmission and wholesale electric power production, sufficient remedies exist to deter and address market abuses. The Federal Energy Regulatory Commission (the "FERC") enjoys broad authority to correct anticompetitive activity in wholesale electricity markets. At the margin of the FERC's power exist the antitrust laws, enforced by such authorities as the United States Department of Justice (the "DOJ") and the Federal Trade Commission (the "FTC"). Pressures of economic competition and the scrutiny of these agencies ensure that market discipline continues absent state regulation.

Geographic Scope (Issue #11):

A RTO for the Southeast region is a better alternative for Florida than a single-state RTO. A larger RTO will dilute the market power of participants and reduce transaction and management costs across the region. Improved transmission planning, outage coordination and shared reserves will ensure the highest levels of reliability. In addition, increased competition in energy trading will encourage private investment in generation and new transmission and will result in economic benefits for all consumers.

Part one of Enron's brief addresses discipline in competitive power markets. In part two, Enron explains why a RTO for the Southeast region is a better alternative for Florida.

I.

Discipline will exist in competitive power markets

Absent state regulation of bundled electricity sales, the remedial powers of the FERC and the antitrust laws will act as sufficient deterrents to discriminatory practices among participants in competitive wholesale power markets. The FERC may punish market participants for discriminatory practices through such means as changing anticompetitive rates and refusing to permit such participants to charge market-based rates. This Commission protects Florida consumers by allowing the electric energy market in Florida to develop in ways that attract private investment in energy assets to the benefit of the public.

A. Discipline at the FERC

The FERC serves as the primary forum for resolving claims of discrimination in wholesale electricity markets. Sections 201(a) and (b) of the Federal Power Act (“FPA”) grant the FERC jurisdiction to regulate most wholesale electricity transactions and the interstate transmission of electricity.¹ Sections 205 and 206 of the FPA give the FERC

¹ See 16 U.S.C. §§ 824(a), (b) (2000) (extending federal regulatory power to the “sale of electric energy at wholesale in interstate commerce”); *Federal Power Comm’n v. Southern California Edison Co.*, 376 U.S. 205, 217, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964) (holding that § 201(b) grants the Federal Power Commission jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself, including a sale between two California electric utilities); *Federal Power Comm’n v. Florida Power & Light Co.*, 404 U.S. 453, 459, 92 S.Ct. 637, 30 L.Ed.2d 600 (1972) (permitting the Federal Power Commission to exercise jurisdiction over power FP&L sold even though all of its generation and transmission facilities were located in the State of Florida and did not connect with out-of-state utilities, customers, or power sources on grounds that electrons FP&L generated reached the

power to establish just, reasonable and nondiscriminatory rates for the interstate transmission and wholesale sale of electricity.² The FERC may remedy unduly discriminatory or preferential rules, regulations, practices, or contracts affecting public utility rates when it is in the public interest to do so.³ The FERC's authority to regulate interstate rates for electric transmission includes the responsibility to consider the anticompetitive effects of interstate electric utility operations.⁴

Economic remedies in the FERC's arsenal provide compelling deterrents to market abuse. One means through which the FERC may deter corporate affiliates of the RTO from anticompetitive activity is through exercising its authority to amend rates, terms and conditions for discriminatory wholesale transactions.⁵ FERC remedies also

State of Georgia since FP&L's transmission lines were connected with another Florida utility which connected with Georgia Power Company).

² See 16 U.S.C. § 824d(a), 824e(a) (2000).

³ See *id.* § 824e(a). Though antitrust laws are not binding to the FERC, antitrust concepts are "intimately involved in a determination of what action is in the public interest, and therefore the [FERC] is obliged to weigh antitrust policy." See, e.g., *City of Huntingburg, Indiana v. Federal Power Comm'n*, 498 F.2d 778, 783 (D.C. Cir. 1974) (finding the Federal Power Commission was obligated to consider the alleged anticompetitive effects of an interconnection agreement between the utility and the city because the regulatory authority vested in the Commission pursuant to sections 205 and 206 of the Federal Power Act carried with it the responsibility to consider the anticompetitive effects of any proposed action by a public utility).

⁴ See *id.* *City of Huntingburg* at 783-84. The term "electric utility" as used in the FPA includes any person which sells electric energy. See 16 U.S.C. § 796(22) (2000). A "person" is an individual or a corporation. See *id.* § 796(4).

⁵ See *id.* § 824e(a) (giving the FERC authority to order rates, charges, contracts and practices when it finds an existing practice "is unjust, unreasonable, unduly discriminatory or preferential"). Where parties have negotiated a contract that sets firm prices or dictates a specific method of computing charges and includes a clause denying either party the right to change such prices or charges unilaterally, the Supreme Court's *Mobile-Sierra* doctrine provides that "FERC may abrogate or modify the contract only if the public interest so requires." See *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998); see also *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55, 76 S.Ct. 368, 100 L.Ed. 388 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45, 76 S.Ct. 373, 100 L.Ed. 373 (1956). It is pursuant to its ratemaking authority under sections 205 and 206 of the FPA that the FERC issued Orders 888, 889 and 2000 respecting wholesale electricity transmission. See *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998); *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035, 61 Fed. Reg. 21,737 (1996), *on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049, 62 Fed. Reg.

include refusing to permit utilities to charge market-based rates and imposing cost-of-service regulation.⁶ For example, should a claim arise that power producers and marketers are withholding power from the market in an effort to increase prices, the FERC could address such claim through amending the rates, terms and conditions such firms may charge.

B. Discipline in antitrust laws

In the developing competitive environment, the DOJ and the FTC will help deter anticompetitive practices through enforcing the Sherman Antitrust Act and the Clayton Act against market participants.⁷ For example, should a claim arise that a power producer has market power or is monopolizing essential facilities necessary to compete in the competitive wholesale market, the antitrust laws may provide recourse supplemental to the FERC's authority to deter such anticompetitive practices.

12,484 (1997), *on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997); Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, 65 Fed. Reg. 809 (2000), *order on reh'g*, Order No. 2000-A, 90 FERC ¶ 61,201 (2000) *petitions for review pending sub nom.*, *Public Utility District No. 1 of Snohomish County, Washington v. FERC*, Nos. 00-1174, et al. (D.C. Cir).

⁶ See *Dartmouth Power Associates Limited Partnership*, 53 FERC ¶ 61,117 (1990) (setting forth the requirements for having the ability to charge market-based, as opposed to cost-based, rates).

⁷ The Sherman Antitrust Act is enforced both civilly and criminally. See 15 U.S.C. §§ 1-7 (2000). The Department of Justice ("DOJ") enforces the Sherman Antitrust Act. Section 1 of the Sherman Antitrust Act prohibits contracts, combinations and conspiracies that unreasonably restrain interstate trade. Section 2 of the Sherman Act prohibits efforts by a single entity to monopolize a product or service in interstate commerce, if achieved through anticompetitive conduct and not solely because of superior products or services. The Clayton Act is a civil statute that prohibits certain mergers or acquisitions and other practices, including price discrimination, that are likely to lessen competition. See *id.* at §§ 12-27a. The DOJ and the Federal Trade Commission ("FTC") enforce the Clayton Act. The Robinson-Patman Act amended the Clayton Act to prohibit price discrimination that is aimed at substantially lessening competition. See *id.* at § 13(a)-(f). The Federal Trade Commission Act further amended the Clayton Act to prohibit unfair methods of competition and unfair or deceptive acts or practices in interstate commerce. See *id.* at § 45. The antitrust laws generally prohibit horizontal restraints on trade, involving agreements between competing entities; vertical restraints on trade, involving agreements on price or non-price restraints between manufacturers and distributors of the same product; and monopolization, which section 2 of the Sherman Act defines as "willful acquisition or maintenance" of monopoly power in a relevant market coupled with the possession of monopoly power and an element of conduct intended to acquire, use, or preserve the power.

State regulation is unnecessary in light of sufficient remedies for and deterrents to anticompetitive practices that exist both at the FERC and in antitrust laws. Even if this Commission does not regulate the wholesale markets, it may still petition the FERC, the DOJ or the FTC to remedy market abuses. An unnecessary layer of regulation will dissuade investment in the energy market within Florida to the ultimate detriment of Florida consumers.

II.

A Southeast RTO is a better alternative for Florida

An effective RTO will facilitate the development of a competitive wholesale generation market in Florida. Enron believes the benefits of a RTO generally are magnified if the RTO is region-wide.⁸ A RTO for the region provides increased reliability through enhanced coordination, flexibility and diversity of supply; better ability to identify true transmission constraints as opposed to artificial, institutionally-created constraints; greater capability to minimize energy costs through incorporation of real constraints in dispatch; more ability to rely on demand side management through better price signals; and greater incentive to invest in transmission where warranted.

⁸ Historically, single-state ISOs are at a greater risk for market flaws. See, e.g., *Order on RTO Compliance Filing, New York Independent System Operator Inc., et. al.*, Docket No. RT01-95-000 (issued July 12, 2001) (noting that independence and seams problems have developed in and among the New York ISO and other small Northeast ISOs and ordering the parties to mediate to pursue a regional approach adopting the "best practices" of each model); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Service Into Markets Operated by the California Independent System Operator Corp. and the California Power Exchange*, 95 FERC ¶ 61,418 (June 19, 2001) (correcting dysfunctions in the markets operated by the California Power Exchange ("PX") and ISO).

These benefits will facilitate the confidence in the market to attract more participants, thus alleviating market power concerns.

Central coordination in a RTO for the Southeast can improve the security, reliability and economic benefits of the grid. A Southeast RTO will provide an independent coordination process between operators and generators and will facilitate market liquidity through hub trading and real time information. Central coordination will advance security through the ability of the RTO to make decisions based on regional data, rather than the current decentralized decisionmaking among the approximately 33 control areas in the Southeast.⁹ Management of reserves on a RTO-wide basis, rather than in control areas, will provide the RTO greater ability to reliably and efficiently transmit electricity from region to region. At the same time, regional management will increase reserve sharing and reduce total reserve requirements. The grid will improve as firms invest capital based on increased knowledge of locational and operational requirements and real time market information the RTO will provide. Finally, large regional RTOs can provide redundancy to each other through the use of similar types of systems.

This Commission should support a proactive effort by the Joint Utilities to join a Southeast RTO. If this Commission determines GridFlorida is the better alternative for Florida, it should encourage the Joint Utilities to develop GridFlorida in such a way that it is compatible with the characteristics and functions of a Southeast RTO. Such compatibility will reduce the likelihood of duplicating effort and expense should GridFlorida choose to merge into a Southeast RTO at some point in the future.

⁹ This includes the Southeastern Reliability Council and the Florida Reliability Coordinating Council. An additional 18 control areas are in the Southwest Power Pool.

Conclusion

This Commission should favor the development of competitive wholesale electricity markets because sufficient remedies for anticompetitive actions exist at the FERC and in antitrust laws. Simply because this Commission does not have regulatory control of the markets does not mean it is without recourse to remedy market abuses. Further, this Commission should encourage the Joint Utilities to join a RTO for the Southeast region as a better alternative to a single-state RTO.

DATED this 12th day of October, 2001.

Respectfully submitted



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