

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of 2025 depreciation study and for approval to amortize reserve imbalance, by Florida City Gas.

DOCKET NO.: 20250035-GU

FILED: April 11, 2025

CITIZENS' MOTION FOR RECONSIDERATION

The Citizens of the State of Florida, by and through the Office of Public Counsel (“OPC”), pursuant to Rule 25-22.0376, Florida Administrative Code (F.A.C.), hereby request the Florida Public Service Commission (“FPSC” or “Commission”) to reconsider its decision in non-final Order No. PSC-2025-0102-PCO-GU, issued on April 1, 2025 (“Non-Final Order”). In support, Citizens provide the following:

I. Standard of Review for Motion for Reconsideration

The standard of review for a motion for reconsideration of a Prehearing Officer’s order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order.¹ When alleged legal errors first appear in an order, it is necessary to provide the Commission a fair opportunity to address the alleged errors.²

Additionally, the Public Counsel has the statutory power, “to appear, in the name of the state or its citizens, in any proceeding or action before the commission or the counties and urge therein any position which he or she deems to be in the public interest, whether consistent or

¹ Order No. PSC-2004-0849-PCO-EI, Docket No. 20031033-EI, p. 2, In re: Review of Tampa Electric Company's 2004-2008 waterborne transportation contract with TECO Transport and associated benchmark. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981).

² Citizens of State v. Clark, 373 So. 3d 1128, 1132 (Fla. 2023).

inconsistent with positions previously adopted by the commission.” § 350.0611, Fla. Stat. (2024). Accordingly, OPC asserts that the Commission practice of applying the same review standard when the full Commission reviews the decision of a single Commissioner is neither in the public interest nor just. The Non-Final Order was issued by an individual Commissioner sitting as pre-hearing officer in the docket. This means that the majority of the Commission has not reviewed, considered, or ruled upon the specific matters in OPC’s Motion to Hold Proceedings in Abeyance in any public deliberations. The ordinary standard for reconsideration does not fit this scenario because the matters for which the OPC seeks review have not been previously considered by a majority of the Commission nor have they been the subject of any hearing or public deliberation. For this reason, the OPC asks that the Commission apply a *de novo* standard of review to this motion and the issues raised herein. To the extent that OPC may pursue further review of the issues in the Motion to Hold Proceedings in Abeyance, this motion, or any other matters in the Non-Final Order, OPC maintains and does not waive any appellate rights regarding the merits of these matters as well as the standards of review that the agency applies despite not expressly addressing such other issues here.

II. Background

1. On May 31, 2022, Florida City Gas (“FCG”) filed a Petition for Approval of Rate Increase and Request for Approval of Depreciation Rates by Florida City Gas (“Petition”).
2. Along with the Petition, FCG submitted a depreciation study (“2022 Depreciation Study”) conducted by an outside witness, Ned Allis, Vice President of Gannett Fleming Valuation and

Rate Consultants, LLC., who was retained by FCG to conduct the 2022 Depreciation Study.³

3. Separate from Mr. Allis' 2022 Depreciation Study, "the Company requested FCG witness Allis to utilize alternative depreciation parameters that the Commission could approve in lieu of those presented in the 2022 Depreciation Study to enable the use of the [Reserve Surplus Amortization Mechanism]."⁴
4. On June 9, 2023, the Florida Public Service Commission ("Commission") issued Order No. PSC-2023-0177-FOF-GU ("Final Order"), which, by a 2-1 vote, approved FCG's use of the Company-requested alternative depreciation parameters and the Reserve Surplus Amortization Mechanism ("RSAM") itself.
5. This resulted in the creation of a reserve surplus of \$52.1 million.⁵
6. FCG was authorized to utilize the RSAM to flexibly amortize \$25 million of the artificially-created reserve surplus over the course of four years, leaving \$27.1 million "on FCG's books and records until the Company files its next depreciation study."⁶
7. On June 23, 2023, OPC filed a motion for reconsideration of the Final Order, which the Commission denied via Order No. PSC-2023-0299-FOF-GU ("Clarifying Order").
8. OPC appealed the Commission's approval of the RSAM and RSAM-adjusted alternative depreciation parameters in the Final Order and the Clarifying Order to the Florida Supreme

³ Document No. 03282-2022, Docket No. 20220069-G, p. 3, 5-6, In re: Petition for rate increase by Florida City Gas.

⁴ Document 03279-2022, Docket No. 20220069-GU, p. 14, lines 18-20, In re: Petition for rate increase by Florida City Gas.

⁵ Document No. 03276-2022, p. 11, Docket 20220069-GU, In re: Petition for Rate Increase by Florida City Gas.

⁶ PSC Order No. PSC-2023-0177-FOF-GU, Docket. No. PSC-20220069-GU, p. 17, *In re: Petition for rate increase by Florida City Gas.*

Court.⁷

9. The Florida Supreme Court heard oral argument on December 10, 2024, and has not yet issued a decision in the matter as of the filing of this motion.
10. On February 24, 2025, FCG filed a petition that is the subject of this docket, which requests approval of a 2025 Depreciation Study conducted internally by FCG that purportedly identifies a reserve surplus of \$27.3 million.⁸
11. On February 27, 2025, OPC filed a Motion to Hold Proceedings in Abeyance (“Motion”).⁹
12. On March 6, 2025, FCG responded in opposition of OPC’s Motion (“Response”).¹⁰
13. On April 1, 2025, the pre-hearing officer denied OPC’s motion and issued PSC Order No. PSC-2025-0102-PCO-GU (“Order”).
14. The pre-hearing officer held, in part, that “[b]ased on the representations of FCG in its Response, that this is a new study conducted by a different expert and in accord with previous practices, I agree that the two are sufficiently distinct and the matter shall proceed.”¹¹

III. Argument

1. The Commission overlooked or failed to consider two different points of law in denying OPC’s Motion to Hold Proceedings in Abeyance.
 - a. The Commission does not have subject-matter jurisdiction to change depreciation rates in this docket.

In OPC’s Motion, OPC argued that “[i]t would be premature of the Commission to initiate proceedings regarding amortization of the remaining \$27.3 million reserve surplus when the

⁷ Florida Supreme Court Docket Nos. SC2023-0988; SC2023-1433.

⁸ Document No. 01103-2025, PSC Docket No. 20250035-GU.

⁹ Document No. 01166-2025, Docket No. 20250035-GU.

¹⁰ Document No. 01377-2025, Docket No. 20250035-GU.

¹¹ PSC Order No. PSC-2025-0102-PCO-GU, Docket No. 20250035-GU, p. 3, *In re: Petition for approval of 2025 depreciation study and for approval to amortize reserve imbalance, by Florida City Gas*.

legality of the creation of the surplus is pending before the Florida Supreme Court.”¹² Said differently, the Commission lacks jurisdiction to hear this case at this time. OPC agrees that the identified reserve surplus amount from PSC Docket No. 20220069-GU (and Florida Supreme Court Appeals SC2023-0988 and SC2024-1344) that the Commission ordered to “remain on FCG’s books and records unto the Company files its next depreciation study” is \$27.1 million.¹³ However, OPC strongly disputes FCG’s assertion that, “the reserve surplus at issue in this case is not the reserve surplus referenced in [PSC Order No. 2023-0177-FOF-GU].” (emphasis in original).¹⁴ The issue of the legality of the \$27.1 million reserve surplus that was created using Company-requested, non-depreciation-study-based, “alternative” depreciation parameters in 2023 is inextricably intertwined with the issue of whether those parameters -- which are, in part, the subject of the pending appeal¹⁵ -- should be changed in light of a purported \$27.3 million reserve surplus resulting from the Company’s in-house 2025 depreciation study. The Commission cannot entertain the transmutation or relabeling of the reserve surplus and associated parameters on appeal without encroaching on the Florida Supreme Court’s jurisdiction. Proceeding with this docket directly affects the subject matter of the appeal in violation of Florida law, as stated in *Dep’t cf Revenue ex rel. Simmons v. Wardlaw*, 25 So. 3d 80, 82 (4th DCA 2009):

[I]f a matter is on appeal, “the test to determine loss of jurisdiction is not whether the trial court is proceeding in matters *related* to the final judgment, but rather the proper test is whether the trial court is proceeding in a matter which *affects* the subject matter on appeal.” *Casavan v. Land O’Lakes Realty, Inc. cf Leesburg*, 526 So. 2d 215, 215-16 (Fla. 5th DCA 1988) (citing *Bernstein v. Berrin*, 516 So. 2d 1042, 1043 (Fla. 2d DCA 1987)) (emphasis in original).

¹² Document No. 01166-2025, Docket No. 20250035-GU, p. 1.

¹³ PSC Order No. PSC-2023-0177-FOF-GU, Docket. No. PSC-20220069-GU, p. 17, *In re: Petition for rate increase by Florida City Gas*.

¹⁴ Document No. 01377-2025, Docket No. 20250035-GU, p. 2.

¹⁵ The remaining \$27.1 million identified reserve surplus amount was briefed and discussed at oral argument on December 10, 2024.

OPC also notes that “any ground showing that the court lacks jurisdiction of the subject matter may be made at any time.” Fla. R. Civ. P. 1.140(b) (emphasis added).¹⁶ As initially argued in OPC’s Motion and more specifically elaborated upon in this motion for reconsideration, it is indisputable that the Commission lacks jurisdiction to proceed with determining whether to change depreciation rates in this docket since doing so directly affects the very same depreciation rates currently being reviewed by the Florida Supreme Court. The Commission overlooked or failed to consider this point of law. Florida law is clear that the Commission lacks subject-matter jurisdiction to proceed in this docket until the Florida Supreme Court decides the pending appeal and a mandate is issued.¹⁷ The Commission should reconsider its decision to deny OPC’s Motion and hold these proceedings in abeyance pending a decision and mandate from the Florida Supreme Court.

- b. The Commission must not prejudge whether FCG’s Depreciation Study was conducted “in accord with previous practices.”

The Order concludes that “[b]ased on the representations of FCG in its Response, that this is a new study conducted by a different expert and in accord with previous practices, I agree that the two are sufficiently distinct and the matter shall proceed.”¹⁸ Notwithstanding the Commission’s

¹⁶ OPC believes that since the matter of the legality of FCG’s current depreciation rates are on appeal and could be resolved by the Florida Supreme Court in any number of ways, a motion to hold the proceedings in abeyance is more appropriate than a motion to dismiss at this time. Just as FCG wishes to avoid having to file another rate case, OPC wishes to avoid seeking further judicial review and drawing the Florida Supreme Court into the matter and/or filing a motion to dismiss FCG’s Petition should this motion and OPC’s motion to hold the proceedings in abeyance be denied.

¹⁷ Not knowing when the Commission would issue a ruling on the jurisdictional matter encompassed in the request to hold the proceedings in abeyance, the OPC did serve discovery requests because it could not risk being unprepared to litigate the case that might nevertheless proceed.

¹⁸ PSC Order No. PSC-2025-0102-PCO-GU, Docket No. 20250035-GU, p. 3, *In re: Petition for approval of 2025 depreciation study and for approval to amortize reserve imbalance, by Florida City Gas*.

lack of subject-matter jurisdiction to proceed in this matter at this time, the Commission should reconsider its Order because the Commission overlooked or failed to consider that whether FCG conducted its in-house 2025 Depreciation Study “in accord with previous practices” is a legal issue to be litigated in this docket and must not be prejudged.

2. The Commission overlooked or failed to consider the point of fact that both the depreciation parameters on appeal and the depreciation parameters included in the in-house 2025 Depreciation Study are from the same source – FCG.

As stated above, the Order concludes that “[b]ased on the representations of FCG in its Response, that this is a new study conducted by a different expert and in accord with previous practices, I agree that the two are sufficiently distinct and the matter shall proceed.”¹⁹ The entity that requests approval of the in-house 2025 Depreciation Study is the same entity that submitted the admittedly “alternative,” non-depreciation-study based depreciation parameters later approved by the Commission and appealed by OPC. That entity is FCG. Since it is indisputable that FCG’s current depreciation rates and parameters currently on appeal were put forth by FCG, the Order’s conclusion that the in-house 2025 Depreciation Study “is a new study conducted by a different expert” is not accurate. FCG is the singular source of the depreciation parameters and rates on appeal and the proposed depreciation parameters and rates contained in the in-house 2025 Depreciation Study. This further demonstrates how the depreciation parameters and rates on appeal and the proposed depreciation parameters and rates in FCG’s 2025 Depreciation Study are inextricably intertwined. Since the Commission overlooked or failed to consider this point of fact, the Commission should reconsider its Order and hold these proceedings in abeyance.

¹⁹ PSC Order No. PSC-2025-0102-PCO-GU, Docket No. 20250035-GU, p. 3, *In re: Petition for approval of 2025 depreciation study and for approval to amortize reserve imbalance, by Florida City Gas*.

IV. Conclusion

For all the reasons stated above, OPC asks the Commission to reconsider the Order and hold these proceedings in abeyance until the Florida Supreme Court has decided the pending appeal and the Commission is once again vested with jurisdiction to address these matters. OPC conferred with FCG regarding this motion, and FCG opposes.

Respectfully submitted,

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CERTIFICATE OF SERVICE
DOCKET NO. 20250035-GU

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail on this 11th day of April, 2025, to the following:

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