

REVISED 8/22/2025

FILED 8/22/2025

DOCUMENT NO. 08136-2025

FPSC - COMMISSION CLERK

State of Florida



## Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** August 22, 2025

**TO:** Office of Commission Clerk (Teitzman)

**FROM:** Office of the General Counsel (Rubottom, Sparks, Imig) *AEH*  
Division of Economics (Kunkler, Galloway, Richards, Wu) *EJD*  
Division of Accounting and Finance (Higgins) *MC*

**RE:** Docket No. 20250035-GU – Petition for approval of 2025 depreciation study and for approval to amortize reserve imbalance, by Florida City Gas.

**AGENDA:** 09/04/2025 – Regular Agenda – Decision on Motion for Reconsideration of Non-Final Order – Decision on Motion to Dismiss – Oral Argument Requested – Participation is at the Discretion of the Commission

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Fay

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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### Case Background

On February 24, 2025, Florida City Gas (FCG or Company) filed a Petition for Approval of Depreciation Study and for Approval to Amortize Reserve Imbalance under Rule 25-7.045, Florida Administrative Code (F.A.C.). The petition includes a depreciation study (2025 Depreciation Study) and proposes depreciation parameters that result in a total calculated reserve surplus of \$27.3 million. FCG seeks approval of its 2025 Depreciation Study; an effective date for new depreciation rates of January 1, 2025; and approval to amortize the calculated \$27.3 million reserve surplus over a two-year period.

The Commission last approved depreciation rates for FCG in 2023, in connection with the Company's 2022 request for base rate increase, by Order No. PSC-2023-0177-FOF-GU (2023

Final Order).<sup>1</sup> That order approved depreciation parameters that resulted in a total reserve surplus of \$52,126,500, of which \$25 million could be amortized over a four-year period using a Reserve Surplus Amortization Mechanism (RSAM) requested by FCG. The Office of Public Counsel (OPC) appealed the 2023 Final Order, as well as the Commission's subsequent Clarifying Order. The matter is currently pending before the Florida Supreme Court, awaiting the Court's decision.

On February 26, 2025, OPC filed a Notice of Intervention<sup>2</sup> pursuant to Section 350.0611, Florida Statutes (F.S.). The following day, OPC filed a Motion to Hold Proceedings in Abeyance (Abeyance Motion),<sup>3</sup> which was denied by the Prehearing Officer by Order No. PSC-2025-0102-PCO-GU, issued on April 1, 2025 (Denial Order). OPC subsequently filed a Motion for Reconsideration<sup>4</sup> of the Denial Order on April 11, 2025, and an accompanying Request for Oral Argument,<sup>5</sup> to which FCG filed a Response in Opposition to Citizens' Motion for Reconsideration and Response to Request for Oral Argument (Reconsideration Response)<sup>6</sup> on April 17, 2025.

Separately, on June 20, 2025, OPC filed a Motion to Dismiss,<sup>7</sup> in which it argued the Commission lacks jurisdiction to consider FCG's Petition, and an accompanying Request for Oral Argument<sup>8</sup> on its Motion to Dismiss. On June 30, 2025, FCG filed a Response in Opposition to OPC's Motion to Dismiss and Response to Request for Oral Argument (Dismissal Response).<sup>9</sup>

This recommendation addresses both of OPC's pending motions, the Motion to Dismiss and its Motion for Reconsideration, as well as its corresponding Requests for Oral Argument (collectively OPC's Motions). The Commission has jurisdiction pursuant to Chapter 366, F.S., including Section 366.05 and 366.05, F.S., as well as Rules 25-22.0022, 25-22.0376, and 28-106.204, F.A.C.

### **Review of OPC's Motions**

As a threshold matter, staff notes that both of OPC's Motions, as well as its prior Abeyance Motion, raise questions related to the Commission's jurisdiction to consider FCG's petition in this docket or requests that the Commission should not consider FCG's petition until the Florida Supreme Court renders a decision on OPC's appeal of the Commission's Rate Case Order. While staff acknowledges that OPC has a right to raise lack of jurisdiction at any time in a case,<sup>10</sup> it notes that each of these motions has been filed under different legal standards. For the sake of

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<sup>1</sup> Order No. PSC-2023-0177-FOF-GU, issued June 9, 2023, in Docket No. 20220069-GU, *In re: Petition for rate increase by Florida City Gas*.

<sup>2</sup> Document No. 01130-2025.

<sup>3</sup> Document No. 01166-2025.

<sup>4</sup> Document No. 02777-2025.

<sup>5</sup> Document No. 02778-2025.

<sup>6</sup> Document No. 02899-2025.

<sup>7</sup> Document No. 05037-2025.

<sup>8</sup> Document No. 05038-2025.

<sup>9</sup> Document No. 05322-2025.

<sup>10</sup> See Rule 28-106.204(2), F.A.C.

clarifying the scope of this recommendation and the standard by which the Commission should consider and rule on each of OPC's Motions, staff offers a brief review of the prior motions.

OPC's first motion in this docket, the Abeyance Motion, was resolved by the Prehearing Officer's Denial Order, issued on April 1, 2025. That motion was filed pursuant to Rule 28-106.211, F.A.C., which provides that the prehearing officer "may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case." As such, the Prehearing Officer's decision to deny the Abeyance Motion was an exercise of discretion that, as stated in the order, "pragmatically balance[d] regulatory efficiency, fairness to all the concerned parties, and the public interest in general."<sup>11</sup>

OPC's second motion, the Motion for Reconsideration of the Prehearing Officer's order denying its Abeyance Motion, is pending before the Commission. It was filed pursuant to Rule 25-22.0376, F.A.C., which allows a party to seek reconsideration of non-final orders. The standard by which the Commission considers a motion for reconsideration is whether the motion identifies a point of fact or law that the prehearing officer overlooked or failed to consider in rendering an order. *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981).

OPC's third motion, the Motion to Dismiss, is also pending before the Commission and raises as a legal question whether the Commission has jurisdiction to consider FCG's petition. Because the Commission is a creature of statute that can properly exercise only such power as it is given by the Legislature, if at any stage of a proceeding it determines that it lacks jurisdiction and thus the power to adjudicate a particular claim or to take a particular action, it must enter an appropriate order. *See, e.g., Polk Cty. v. Scjka*, 702 So. 2d 1243, 1245 (Fla. 1997). Thus, in considering OPC's Motion to Dismiss, the Commission must determine as a finding of law whether it has jurisdiction.

This recommendation will first address OPC's two requests for oral argument in Issue 1. Then, in Issue 2, it will address OPC's Motion to Dismiss for lack of jurisdiction. Because all three of OPC's motions have raised the issue of the Commission's jurisdiction, staff recommends that the Commission's decision on Issue 2 should squarely resolve the question of its jurisdiction to consider FCG's Petition, whether raised explicitly in OPC's Motion to Dismiss or implicitly in OPC's prior motions. To that end, this recommendation will cite to and discuss the jurisdictional arguments raised by OPC in each of its motions and in FCG's responses to those motions. Because a decision on OPC's Motion for Reconsideration depends upon the Commission having jurisdiction over this case, this recommendation will address that motion in Issue 3.

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<sup>11</sup> Order No. PSC-2025-0102-PCO-GU, at p. 3.

## Discussion of Issues

**Issue 1:** Should the Commission grant OPC's Requests for Oral Argument on its motions?

**Recommendation:** No. Staff recommends that the Commission should deny OPC's requests because the pleadings are sufficient on their face for the Commission to consider and rule on each of the motions. However, if the Commission exercises its discretion to grant oral argument, staff recommends that 5 minutes per side is sufficient. (Rubottom, Sparks, Imig)

### **Staff Analysis:**

#### **Law**

Rule 25-22.0022(1), F.A.C., provides that a party may request oral argument before the Commission for any dispositive motion (such as a motion for reconsideration or a motion to dismiss) by filing a separate written pleading filed concurrently with the motion on which argument is requested. The rule requires that the request "shall state with particularity why oral argument would aid the Commissioners . . . in understanding and evaluating the issues to be decided." Granting or denying oral argument is within the sole discretion of the Commission.<sup>12</sup>

#### **OPC's Position**

In each request, OPC states that oral argument "could benefit the Commission's review and deliberation of the issues" involved in its motion and provide an opportunity to "answer any questions the Commissioners may have." With regard to its Motion for Reconsideration, OPC contends that oral argument could be beneficial because the issues "involve complex depreciation matters." OPC requests 10 minutes of time per party to present arguments on each of OPC's Motion.

#### **FCG's Position**

With respect to the Motion for Reconsideration, FCG states that OPC's motion does not involve "complex depreciation matters" that necessitate oral argument. To the contrary, the question appropriately before the Commission as a result of OPC's motion is whether the Prehearing Officer made a mistake of fact or law in determining that the depreciation issues pending before the Florida Supreme Court are sufficiently distinct from the depreciation study and petition that are the subject of this proceeding such that this docket should be allowed to proceed. FCG contends that Oral argument is unlikely to provide additional insight in that regard.

With respect to the Motion to Dismiss, FCG states that the issues raised by OPC in its motion have been thoroughly addressed in the motion and in FCG's response, and states its opinion that it is "unlikely that greater clarity will be gained as a result of oral argument."

#### **Staff Analysis**

Granting or denying oral argument is within the sole discretion of the Commission. Staff recommends that OPC has not stated with particularity why oral argument would aid the Commission in determining the issues raised in the Motions, as required by Rule 25-22.0022(1), F.A.C. Additionally, staff believes the pleadings are sufficient on their face for the Commission

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<sup>12</sup> Rule 25-22.0022(3), F.A.C.

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to thoroughly consider and rule on the Motions. Further, with respect to the Motion to Dismiss, staff believes OPC raises a pure question of law to which oral argument is not likely to provide additional insight beyond what was developed and presented for the Commission's consideration in the written pleadings.

For the reasons stated above, staff recommends the Commission deny OPC's Requests for Oral Argument. However, if the Commission exercises its discretion to grant OPC's Requests, staff recommends that 5 minutes per side is sufficient to assist the Commission in its deliberation.

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**Issue 2:** Should the Commission grant OPC's Motion to Dismiss due to a lack of subject matter jurisdiction?

**Recommendation:** No. The Commission should deny OPC's Motion because FCG's petition for approval of a new depreciation study and depreciation parameters is within the Commission's jurisdiction. The Commission has subject matter jurisdiction over FCG's depreciation rates, the present case is separate and distinct from the case pending on appeal before the Supreme Court, and a Commission decision in this case would not affect the appeal currently pending before the Supreme Court. (Rubottom, Sparks, Imig)

**Staff Analysis:** Staff believes that the Commission has jurisdiction to hear and decide FCG's petition for the following reasons:

- "Subject-matter jurisdiction" concerns the power of the trial court to deal with a class of cases to which a particular case belongs.<sup>13</sup> The Commission has subject matter jurisdiction over FCG's rates and service pursuant to Section 366.04(1), F.S. Because FCG's Petition pertains to FCG's depreciation rates, the Commission has subject matter jurisdiction to hear and decide this case.
- "Case jurisdiction" concerns the power of the Commission over a particular case that is within its subject matter jurisdiction.<sup>14</sup> When a Commission order is appealed, exclusive jurisdiction lies with the appellate court,<sup>15</sup> and the Commission loses case jurisdiction over the particular case and any matter that would affect the issues on appeal. The Commission has case jurisdiction because FCG's Petition in the present docket is distinct from the case decided by the 2023 Rate Case Order that is currently pending before the Florida Supreme Court, and because FCG's Petition does not raise issues that affect the appeal.<sup>16</sup>
- Even if FCG's Petition is in some way connected with the prior case and could affect the issues on appeal, Florida law favors administrative hearings to develop and flesh out the differences between successive administrative proceedings.<sup>17</sup> Thus, it would be premature to dismiss the case for lack of jurisdiction.

For these reasons, as discussed in more detail below, staff recommends the Commission deny OPC's Motion to Dismiss and find that it has jurisdiction over FCG's Petition in this case.

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<sup>13</sup> *Viverette v. State, Dep't of Transp.*, 227 So. 3d 1274, 1278 (Fla. 1st DCA 2017).

<sup>14</sup> *Allen v. Helms*, 293 So. 3d 572, 577-578 (Fla. 1st DCA 2020).

<sup>15</sup> Art. V., § 3(b)(2), Fla. Const.

<sup>16</sup> *Dep't of Revenue ex rel. Simmons v. Wardlaw*, 25 So. 3d 80, 82 (Fla. 4th DCA 2009); *Schultz v. Schickendanz*, 884 So. 2d 422, 424 (Fla. 4th DCA 2004); *Thursby v. Stewart*, 138 So. 742, 751 (Fla. 1931).

<sup>17</sup> *Delray Medical Center, Inc. v. State, Agency for Health Care Admin.*, 5 So. 3d 26, 30 (Fla. 4th DCA 2009).

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### Legal Standard of Review & Jurisdiction

In recent years, Florida courts have distinguished between “subject matter jurisdiction,” which concerns the power of the trial court to deal with a class of cases to which a particular case belongs, and “procedural” or “case” jurisdiction, which concerns the power of the court over a particular case that is within its subject matter jurisdiction. *Allen v. Helms*, 293 So. 3d 572, 577-578 (Fla. 1st DCA 2020). If at any stage of a proceeding an agency determines that it lacks jurisdiction and thus the power to adjudicate a particular claim, it must enter an appropriate order. *Polk Cty. v. Scjka*, 702 So. 2d 1243, 1245 (Fla. 1997).

Subject matter jurisdiction relates to the power of a court or agency to deal with the class of cases to which a particular case belongs, and does not depend upon whether a plaintiff ultimately has a good cause of action in the particular case. *Viverette v. State, Dep’t of Transp.*, 227 So. 3d 1274, 1278 (Fla. 1st DCA 2017). Subject matter jurisdiction is conferred upon a court by constitution or statute, and thus cannot be waived or created by agreement of the parties. *See, e.g., Snider v. Snider*, 686 So. 2d 802, 804 (Fla. 4th DCA 1997); *See also, City of Cape Coral v. GAC Utilities, Inc. of Fla.*, 281 So. 2d 493, 495-96 (Fla. 1973) (stating that as a “creature[] of statute . . . the Commission’s powers, duties and authority are those and only those that are conferred expressly or impliedly by statute”). Thus, to determine whether an agency has subject matter jurisdiction over a class of cases, one must look to Florida’s constitution and statutes.

Subject matter jurisdiction is “generally tested by the good-faith allegations in the complaint and is not dependent upon the ultimate disposition of the lawsuit.” *Faulk v. State, Dep’t of Revenue*, 157 So. 3d 534, 536 (Fla. 1st DCA 2015) (quoting *Seven Hills, Inc. v. Bentley*, 848 So. 2d 345, 350 (Fla. 1st DCA 2003)). However, when considering a motion to dismiss for lack of subject matter jurisdiction, the Commission may look beyond the four walls of the petition. *See Morgan v. Dep’t of Env’tl. Protection*, 98 So. 3d 651, 653 (Fla. 3d DCA 2012) (“A trial court may look to facts gathered outside the pleadings, including affidavits, to determine subject matter jurisdiction.”); *Mancher v. Seminole Tribe of Florida, Inc.*, 708 So. 2d 327, 328 (Fla. 4th DCA 1998) (“A motion to dismiss based on lack of subject matter jurisdiction may properly go beyond the four corners of the complaint when it raises solely a question of law.”). Additionally, the test for whether a pleading sufficiently involves the jurisdiction of a court is not as stringent as the test to determine whether the claimant has failed to state a cause of action. *See Fla. Power & Light Co. v. Canal Auth. of Fla.*, 423 So. 2d 421, 425 (Fla. 5th DCA 1982).

With respect to “case jurisdiction,” lack of case jurisdiction is an issue where a lower court has subject matter jurisdiction over the class of cases but is divested of jurisdiction over a particular case due to, for instance, procedural posture. *See Stokes v. Jones*, 319 So. 3d 166, 169 (Fla. 1st DCA). Courts have sometimes referred to this as “continuing jurisdiction” or “procedural jurisdiction” because it turns on the procedural posture of a case or whether certain issues remain to be resolved after a final judgment.<sup>18</sup> In the context of gas utility regulation, the Florida Supreme Court has exclusive jurisdiction to “review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.”<sup>19</sup> However, the Commission does not lose jurisdiction over the utility involved in the case on appeal, nor over the entire class of subject matter involved in the appeal; the appellate court’s jurisdiction only covers the subject

<sup>18</sup> *See* Judge Scott Stephens, *Florida’s Third Species of Jurisdiction*, 82 Fla. Bar J. 10, 16 (Mar. 2008).

<sup>19</sup> Art. V., § 3(b)(2), Fla. Const.

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matter of the particular case on appeal. *See, e.g., Thursby v. Stewart*, 138 So. 742, 751 (Fla. 1931) (stating that “when an appeal is perfected . . . [t]he authority of the lower court is terminated, and it cannot proceed in the cause, *at least as to the subject-matter of the appeal*, until the appeal is heard and determined”) (emphasis added); *Schultz v. Schickendanz*, 884 So. 2d 422, 424 (Fla. 4th DCA 2004) (holding that a court “is divested of jurisdiction upon notice of appeal *except with regard to those matters which do not interfere with the power and authority of the appellate court.*” (emphasis added) (quoting *Palma Sola Harbour Condo., Inc. v. Huber*, 374 So. 2d 1135, 1138 (Fla. 2d DCA 1979)).

Additionally, “the test to determine loss of jurisdiction is not whether the [Commission] is proceeding in matters *related to the final judgment*, but rather the proper test is whether the [Commission] is proceeding in a matter which *affects the subject matter on appeal.*” *Dep’t of Revenue ex rel. Simmons v. Wardlaw*, 25 So. 3d 80, 82 (Fla. 4th DCA 2009) (cleaned up) (emphasis added). *See also, Hollywood, Inc. v. Clark*, 15 So. 2d 175, 181 (Fla. 1943) (“The scope of the ‘subject matter of an appeal’ must be measured by what the appeal is from and what it brings before the appellate court for review.”); *Waltham A. Condo. Ass’n v. Vill. Mgmt., Inc.*, 330 So. 2d 227, 234 (Fla. 4th DCA 1976) (“[S]ubsequent proceedings in the lower court may not interfere with the power of the appellate court to make its jurisdiction effective with respect to the . . . order on appeal.”). Therefore, the Commission may lose case jurisdiction over certain issues in a case where those issues affect the subject matter of a pending appeal, but retain case jurisdiction as to issues that would not affect the appeal.

Although courts have articulated doctrines and tests to determine jurisdiction, Florida law also recognizes significant differences between courts and administrative agencies, and it cautions against applying analogous procedural and jurisdictional doctrines in a manner that precludes an agency from exercising its regulatory jurisdiction. As the Florida Supreme Court explained in *Pecples Gas System, Inc. v. Mason*, 187 So. 2d 335, 339 (Fla. 1966):

We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. . . . [W]hereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.<sup>20</sup>

Likewise, Florida law generally “favors administrative hearings to develop and flesh out the differences between” cases before arriving at conclusions on an agency’s power to hear and decide the issues. *Delray Medical Center, Inc. v. State, Agency for Health Care Admin.*, 5 So. 3d

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<sup>20</sup> *Pecples Gas System*, 187 So. 2d at 339. *See also, Cmty. Fin. Corp. v. Fla. Dep’t of Envtl. Regulation*, 416 So. 2d 813, 817 (Fla. 1st DCA 1982) (stating that the purpose of the APA is to favor resolution by agencies rather than courts those “disputes which are particularly within the administrative agency’s expertise”).



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26, 30 (Fla. 4th DCA 2009). Thus, staff's view is that Florida law favors allowing a proceeding to continue if a potential decision on a utility's petition could fall within the Commission's jurisdiction, and that dismissal for lack of jurisdiction prior to the point of a final agency action in such cases would be premature.

### **OPC's Arguments**

In its Motion to Dismiss, OPC argues that "[t]he Commission lacks the authority, at this time, to change FCG's RSAM-adjusted depreciation rates when the legality of the Commission's approval of those same depreciation rates and application of Rule 25-7.045, F.A.C.[,] is currently pending before the Florida Supreme Court." (OPC Motion to Dismiss 5) OPC alleges that "a Commission decision to change the depreciation rates in the instant docket *affects* the depreciation rates on appeal." *Id.* (emphasis in original) (citing to *Wardlaw*, 25 So. 3d at 82). Similarly, in its Motion for Reconsideration, OPC stated 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." (OPC Motion for Reconsideration 6)

### **FCG's Response**

FCG argues that the Commission is vested with subject matter jurisdiction by Chapters 350 and 366, and that the depreciation study filed in this docket was "filed in accordance with Rule 25-7.045, F.A.C." (FCG Dismissal Response 2) FCG argues that *Wardlaw* is inapplicable because, unlike this case, the *Wardlaw* case arose when a party appealed an agency order then subsequently filed a motion to vacate the same order from which he appealed. FCG argues that this case is distinguishable because "[t]he depreciation study, parameters, and reserve surplus addressed in the [2023 Final Order] are not at issue in the current proceeding, nor is the 2025 Depreciation Study the subject of an ongoing appeal at the Florida Supreme Court." *Id.* at 3. FCG also states that the two cases OPC cites along with *Wardlaw*<sup>21</sup> involve cases in which "the appellate courts determined the trial court retained jurisdiction to address the separate requests for attorney's fees." *Id.*

FCG also argues that:

While it is true that FCG is seeking to change the actual rates that are a component of the issues appeal [*sic*], FCG's requests in this docket do not alter the prior Rate Case Order whatsoever, nor would a Commission decision addressing FCG's current requests impede the Court's ability to address the Commission's prior decision to accept the RSAM and RSAM-adjusted depreciation parameters. *Id.* at 4.

FCG also argues that OPC's argument "blurs the line between 'subject matter jurisdiction' and 'case jurisdiction.'" (FCG Dismissal Response 4-5) FCG states that subject matter jurisdiction "involves the power of a court to hear a class of cases," while case jurisdiction is "the power of a court or agency over a particular case that is within its subject matter jurisdiction." *Id.* Although FCG states that distinguishing between the two types of jurisdiction is "critical, because lack of

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<sup>21</sup> *Casavan v. Land O'Lakes Realty, Inc. cf Leesburg*, 526 So. 2d 215 (Fla. 5th DCA 1988); *Bernstein v. Berrin*, 516 So. 2d 1042 (Fla. 2d DCA 1987).

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‘case’ jurisdiction does not render proceedings or decisions automatically void,” FCG argues that the Commission has both case jurisdiction and subject matter jurisdiction to address FCG’s Petition and 2025 Depreciation Study. *Id.* at 5-6 (emphasis removed).

### **Staff Analysis and Recommendation**

A closer look at OPC’s Motion to Dismiss shows that it is not actually arguing that the Commission does not have subject matter jurisdiction over this case. Because OPC’s arguments relate to the Commission’s power to proceed in a particular case based on procedural posture, staff agrees with FCG that OPC’s arguments are better understood as a challenge to the Commission’s “case jurisdiction,” according to the legal doctrine articulated by recent Florida court decisions.<sup>22</sup> However, construing OPC’s Motion to Dismiss liberally, and applying the relevant law, the threshold legal standards for both subject matter jurisdiction and case jurisdiction are satisfied in this case, and the Commission therefore has jurisdiction to consider and decide FCG’s Petition.

With respect to subject matter jurisdiction, the Legislature granted the Commission exclusive jurisdiction “to regulate and supervise each public utility with respect to its rates and service.”<sup>23</sup> Thus, there is no question that the Commission has subject matter jurisdiction over the class of cases regulating FCG’s depreciation rates. Because FCG’s Petition requests approval of its 2025 Depreciation Study, approval of new depreciation parameters resulting from that study, and approval of a two-year amortization of a resulting depreciation reserve surplus, staff’s view is that this docket falls into the class of cases addressing FCG’s depreciation rates. Therefore, staff believes the Commission has subject matter jurisdiction over FCG’s Petition.

Next, staff believes the Commission has case jurisdiction over FCG’s Petition for two reasons: (1) the prior case decided by the 2023 Rate Case Order is distinct and independent of the present case; and (2) even assuming the two proceedings originate from the same “case,” the Commission retains jurisdiction to address FCG’s Petition because a final order would not alter the Court’s analysis of the issues raised in OPC’s appeal of the 2023 Rate Case Order nor impair the court’s ability to resolve the appeal. Each of these reasons is sufficient on its own to find that the Commission has case jurisdiction, and they are supported by staff’s view of the facts as discussed below.

First, staff views the prior case decided by the 2023 Rate Case Order as distinct and independent of the current case because each arises from a separate petition supported by an independent evidentiary record. While OPC does not explicitly allege in its Motions that FCG’s Petition in this docket is so interrelated with the prior proceeding as to essentially originate from the same “case,” it argues in its Motion for Reconsideration that the reserve surplus at issue in this case is the same as that recognized by the Commission in the 2023 Rate Case Order. (OPC Motion for Reconsideration 5). Additionally, OPC argues that “the depreciation parameters and rates on appeal and the proposed depreciation parameters and rates in FCG’s 2025 Depreciation Study are inextricably intertwined.” *Id.* at 7.

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<sup>22</sup> *Allen v. Helms*, 293 So. 3d at 577-578; *Stokes v. Jones*, 319 So. 3d at 169.

<sup>23</sup> Section 366.04(1), F.S.

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Staff disagrees. In utility regulation, a depreciation study is meant to provide the regulator with a current-view update on the utility's recovery of its plant investment, and a request for updated depreciation rates and parameters is meant to align the cost recovery period for utility assets on a going-forward basis with the projected service lives of those assets. Thus, while it is clear from FCG's Petition that the Company is requesting that the Commission change depreciation rates previously established by the Rate Case Order, that is the extent of the relationship between the cases. The Commission would not be considering modifying its previous order nor any aspect thereof. Rather, the Commission would consider FCG's current circumstances and updated projections to decide the questions at issue on the basis of a distinct, independent petition and evidentiary record.

Here, FCG's Petition requests approval of its 2025 Depreciation Study, approval of updated depreciation parameters resulting from that study, and approval of a two-year amortization of a resulting depreciation reserve surplus. As previously observed by the Prehearing Officer in this docket, FCG represents that this petition is supported by an independent record, including a different expert witness and a new depreciation study.<sup>24</sup> Further, staff is actively engaging with the Company in the discovery process to investigate FCG's requests based upon the evidence provided in this docket. Thus, FCG's Petition initiated a new case, and the Commission therefore has case jurisdiction because the Florida Supreme Court's jurisdiction extends only to the prior case on appeal.

Second, even if the two dockets originate from the same "case" for purposes of case jurisdiction, the Commission retains case jurisdiction over FCG's Petition in this docket because it does not affect the issues raised by OPC on appeal. As discussed above, an appeal from one of the Commission's orders only divests it of jurisdiction over matters that affect the issues on appeal.<sup>25</sup>

In its appeal of the Commission's 2023 Rate Case Order, OPC raised three main arguments related to FCG's depreciation rates. First, OPC argued that the Commission's approval of FCG's alternative, RSAM-Adjusted Depreciation Parameters to create a reserve surplus was inconsistent with Rule 25-7.045, F.A.C.<sup>26</sup> Second, OPC argued that the Commission's approval of the RSAM and RSAM-Adjusted Depreciation Parameters deviated without explanation from a policy that "reserve imbalances represent intergenerational inequity and . . . that such imbalances therefore should be corrected."<sup>27</sup> And third, OPC argued that the Commission's approval of the RSAM and RSAM-Adjusted Depreciation Parameters was not supported by competent, substantial evidence.<sup>28</sup>

Staff agrees with OPC that the test of determining loss of jurisdiction is "whether the [Commission] is proceeding in a matter which affects the subject matter on appeal."<sup>29</sup> A decision

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<sup>24</sup> Order No. PSC-2025-0102-PCO-GU, at p. 3.

<sup>25</sup> *Wardlaw*, 25 So. 3d at 82; *Schultz*, 884 So. 2d at 424; *Thursby*, 138 So. at 751.

<sup>26</sup> See Citizens' Initial Brief at 26, *Citizens cf State v. Fla. Pub. Serv. Comm'n*, No. SC2023-0988 (Fla. filed Jan. 31, 2024).

<sup>27</sup> *Id.* at 33.

<sup>28</sup> *Id.* at 40.

<sup>29</sup> *Wardlaw*, 25 So. 3d at 82. In some of the pleadings in this docket, OPC seems to reverse this test, arguing instead based on the potential for the *Supreme Court's* decision to impact the Commission's ability to resolve FCG's Petition in *this* docket.

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by the Commission in this docket would not affect or interfere with the Florida Supreme Court's ability to resolve the case on appeal because none of the three aforementioned issues could be considered or altered by a decision in this docket. FCG's Petition here does not include a new RSAM, RSAM-adjusted depreciation parameters, nor a request to modify the terms of the 4-year RSAM approved in the 2023 Rate Case Order. Staff agrees with FCG that "FCG's requests in this docket do not alter the prior Rate Case Order whatsoever, nor would a Commission decision addressing FCG's current requests impede the Court's ability to address the Commission's prior decision to accept the RSAM and RSAM-adjusted depreciation parameters." (FCG Dismissal Response 4)

While staff agrees that each docket addresses a depreciation reserve imbalance issue, in each case this was a fallout issue resulting from the depreciation rates and parameters established or requested, respectively, based on distinct and independent record evidence in each docket. In other words, the Commission in this docket will determine appropriate depreciation parameters and rates for FCG's assets on a going-forward basis, and, if a reserve imbalance exists as a result of that decision, the Commission will prescribe a going-forward treatment to address that imbalance. Thus, staff's view is that the Commission's decisions in this docket will not have a retroactive effect that would interfere with the case on appeal.

Therefore, because staff's view is that matters involved in this docket do not affect the issues raised in OPC's appeal of the 2023 Rate Case Order, staff believes the Commission has case jurisdiction to hear and decide FCG's Petition in this case.

### **Conclusion**

For the reasons stated above, staff recommends the Commission find it has jurisdiction to hear and decide FCG's Petition in this case. The Commission has subject matter jurisdiction because Section 366.04(1), F.S., grants the Commission jurisdiction to regulate the rates and service of public utilities, including depreciation rates. The Commission has case jurisdiction because the present case is distinct and independent from the one decided by the 2023 Rate Case Order currently pending on appeal, and because the matters at issue in this docket do not affect the issues raised in the appeal.

Even assuming for the sake of argument that the Commission *could* make a decision in this case that affects the subject matter of the appeal, staff believes it is premature to dismiss the case before completing discovery and litigating the case to help the Commission "develop and flesh out the differences between" the two cases and the potential effect a decision in this docket might have. *See Delray Medical*, 5 So. 3d at 30. Therefore, staff recommends the Commission deny OPC's Motion to Dismiss.

**Issue 3:** Should the Commission grant OPC's Motion for Reconsideration?

**Recommendation:** No. Staff recommends that the Commission deny OPC's Motion for Reconsideration under the Commission's traditional standard of review for such motions because OPC has failed to articulate a reason to depart from that standard and because the Motion fails to raise a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Denial Order. (Rubottom, Sparks, Imig)

**Staff Analysis:**

**Law: Standard of Review**

The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering the order under review. *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). It is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959) (citing *State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958)). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." *Stewart Bonded Warehouse, Inc.*, 294 So. 2d at 317.

**OPC's Arguments**

As an initial matter, 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." (OPC Motion for Reconsideration 2) OPC argues the ordinary standard for reconsideration should not apply here because "the majority of the Commission has not reviewed, considered, or ruled upon the specific matters in OPC's [Abeyance Motion]," and because the matters OPC raises "have not been previously considered by a majority of the Commission nor have they been the subject of any hearing or public deliberation." *Id.* OPC therefore asks that the Commission apply a *de novo* standard of review to its motion.

In regard to the merits of its Motion, OPC makes three arguments. First, OPC argues that, in its original Motion for Abeyance, it stated "[i]t would be premature of the Commission to initiate proceedings regarding amortization of the remaining \$27.3 million reserve surplus when the legality of the creation of the surplus is pending before the Florida Supreme Court." *Id.* at 4-5. OPC asserts this is the same as stating the Commission lacks jurisdiction to hear this case at this time. To support this position, OPC argues that "[t]he 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" and that "[p]roceeding with this docket directly affects the subject matter of the appeal in violation of Florida Law." *Id.* at 5. OPC argues the Prehearing Officer overlooked or failed to consider this point of law.

Second, OPC argues the Commission should reconsider its Order because the Prehearing Officer overlooked or failed to consider that the issue of whether FCG conducted its in-house 2025

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Depreciation Study “in accord with previous practices” is a legal issue to be litigated in this docket and therefore must not be prejudged. (OPC Motion for Reconsideration 5-6)

Third, OPC argues that the Prehearing Officer failed to consider the fact that the depreciation parameters on appeal and those from the 2025 Depreciation study are from the same source, namely, FCG. *Id.* at 7. OPC states that, as FCG is the source of both the 2022 and the 2025 Depreciation Study, “the [Prehearing] Order’s conclusion that the in-house 2025 Depreciation Study ‘is a new study conducted by a different expert’ is not accurate.” *Id.* OPC additionally argues that this fact further demonstrates how the depreciation parameters on appeal and the proposed depreciation parameters are inextricably intertwined. OPC argues that, “[s]ince the Commission overlooked or failed to consider this point of fact, the Commission should reconsider its Order and hold these proceedings in abeyance.” *Id.*

### **FCG’s Response**

In regard to the standard of review, FCG argues that, as the Commission has recognized time and again, the appropriate standard of review in a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or that the Prehearing Officer failed to consider in rendering his or her decision. (FCG Reconsideration Response 1) FCG argues that OPC’s motion fails to elaborate on why departing from the norm in this case is necessary or why the application of the traditional standard is not in the public interest, and that some rationale is required to make such a departure. FCG states that the Commission has previously rejected OPC arguments and should reject them again here. Applying the traditional standard, FCG argues that OPC’s Motion must be denied because it fails to identify any mistake of fact or law in the Prehearing Officer’s decision, or anything that was overlooked in rendering that decision. *Id.* at 2. Instead, OPC simply disagrees with the Prehearing Officer’s conclusion, which is not sufficient to merit reconsideration. *Id.*

FCG states OPC’s first argument regarding jurisdiction is wrong for several reasons, but mainly contends the matter pending before the Commission is FCG’s 2025 Depreciation Study, while the subject matter of the appeal pending before the Florida Supreme Court in Docket SC2023-0988 is FCG’s 2022 Depreciation Study.

FCG argues OPC’s second argument, which claims that the Prehearing Officer prejudged whether FCG’s 2025 Study was conducted “in accord with previous practices” is demonstrably incorrect by the language in the Denial Order itself. FCG contends that, as stated in the Denial Order, the Prehearing Officer simply determined that the subject of the appeal and the 2025 Depreciation Study which is the subject of this docket were “sufficiently distinct to allow this docket to proceed.” (FCG Reconsideration Response 4-5) In that context, the Prehearing Officer also recognized that the 2023 Final Order, as well as the 2023 Clarifying Order, regarding FCG’s 2022 rate Request and 2022 Depreciation Study, have not been stayed. FCG argues OPC has identified no mistake of fact or law in the Prehearing Officer’s Decision on this point.

Finally, in regard to OPC’s final argument, FCG states that it is a re-argument that should not serve as the basis for reconsideration. *Id.* at 5. The Prehearing Officer both understood and acknowledged that the depreciation study that is the subject of the appeal currently being considered in SC2023-0988 was submitted by the same Company that has submitted the 2025

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Depreciation Study in this proceeding. That both were submitted by the same Company does not, however, demonstrate that the parameters and rates are “inextricably intertwined” nor does it demonstrate that the Prehearing Officer’s determination that to allow this case to proceed was erroneous. FCG states that OPC has failed to identify a mistake of fact or law in the Denial Order on this point and argues that its motion must therefore be denied.

### Staff Analysis and Recommendation

In regard to the appropriate standard of review, staff agrees with FCG that the Commission’s traditional standard regarding motions for reconsideration should apply here, and OPC failed to provide sufficient rationale to differ from long-standing Commission precedent for review of a Prehearing Officer’s decision on a motion for abeyance. OPC contends a mistake of fact or law standard does not fit this scenario because the matters for which OPC seeks review have either not been previously considered by the majority of the Commission, or have not been the subject of a hearing. Pursuant to Rule 28-106.211, F.A.C., the Prehearing Officer may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case. Accordingly, the Prehearing Officer has wide discretion in balancing the interests of parties in the furtherance of the orderly administration of justice.<sup>30</sup> The Commission has repeatedly held that the traditional standard, whether a point of fact or law was overlooked or unconsidered, applies to reconsideration by the Commission of a Prehearing Officer’s order.<sup>31</sup> OPC has failed to provide a compelling reason to differ from prior practices, and staff does not recommend doing so in this case.

In staff’s view, by requesting *de novo* review rather than the Commission’s traditional standard of review, OPC is essentially requesting something approximating *en banc* review by the full Commission. Contrary to OPC’s assertions, the fact that a majority of Commissioners has not considered the specific matters raised in a prehearing motion is not grounds to grant a motion for reconsideration. As the Commission has previously stated, “[t]he unequivocal rejection by the Prehearing Officer of [a party’s] arguments . . . does not allow [the party] to restate the entirety of its arguments under the guise of a motion for reconsideration or clarification by this whole Commission.”<sup>32</sup>

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<sup>30</sup> Order No. 25245, issued October 23, 1991, in Docket No. 19880069-TL, *In re: Petitions of Southern Bell Telephone and Telegraph Company for Rate Stabilization and Implementation Orders and Other Relief* (balancing competing interests of new counsel desiring more time to prepare and party seeking to proceed with discovery by delaying deposition).

<sup>31</sup> See Order No. PSC-2016-0231-FOF-EI, issued June 10, 2016, in Docket No. 20160021-EI, *In re: Petition for rate increase by Florida Power & Light Company*; Order No. PSC-2002-1442-FOF-EI, issued October 21, 2002, in Docket Nos. 20020262-EI, *In re: Petition to Determine Need for an Electrical Power Plant in Martin County by Florida Power & Light Company* and 20020263-EI, *In re: Petition to Determine Need for an Electrical Power Plant in Manatee County by Florida Power & Light Company*; Order No. PSC-2001-2021-FOF-TL, issued October 9, 2001, in Docket No. 19960786A-TL, *In re: Consideration of BellSouth Telecommunications, Inc.’s entry into interLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996*; Order No. PSC-1997-0098-FOF-EU, issued January 27, 1997, in Docket No. 19930885-EU, *In re: Petition to Resolve territorial dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company*; Order No. PSC-1996-0133-FOF-EI, issued January 29, 1996, in Docket No. 19950110-EI, *In re: Standard offer contract for the purchase of firm capacity and energy from a qualifying facility between Panda-Kathleen, L.P., and Florida Power Corporation*.

<sup>32</sup> Order No. PSC-08-0549-PCO-TP, issued Aug. 19, 2008, in Docket No. 20070691-TP, *Complaint and request for emergency relief against Verizon Florida, LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers’ numbers to Bright House Networks*

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Not only would granting OPC's request be a departure from the Commission's established practice, it would also be contrary to well-established principles of Florida law governing motions for reconsideration and rehearing.<sup>33</sup> For example, the Florida Supreme Court has held that the purpose of a motion for rehearing is "merely to bring to the attention of the trial court or, . . . the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance." *Diamond Cab*, 146 So. 2d at 891.<sup>34</sup> Florida courts have also explained that the alleged overlooked fact or law must be such that if it was considered, the court would have reached a different decision. *Sherwood*, 111 So. 2d at 98 (citing *State ex rel. Jaytex Realty Co.*, 105 So. 2d at 818-19). Furthermore, it is not necessary for a Prehearing Officer to respond to every argument and fact raised by each party. *State ex rel. Jaytex Realty Co.*, 105 So. 2d at 819). Additionally, the Florida Supreme Court has upheld the Commission's denial of a motion for reconsideration under its traditional standard of review.<sup>35</sup>

Staff does not believe it would be appropriate for the Commission to, contrary to guidance from Florida Supreme Court, grant OPC's motion to reconsider the same arguments already presented to the Prehearing Officer based upon an "arbitrary feeling that a mistake may have been made," nor merely because OPC disagrees with the judgment of the Prehearing Officer. *Stewart Bonded Warehouse, Inc.*, 294 So. 2d at 317. In staff's view, it is not the role of the full Commission sitting in a prehearing posture to second-guess every decision made by individual Commissioners, acting within their capacity as Prehearing Officers, with which any party disagrees. Rather, staff believes that by limiting review in such cases to ensuring that a Prehearing Officer properly considers all the facts and law relevant to a motion or issue that arises, Florida law strikes a fair balance between justice and efficiency. Florida law provides an aggrieved party ample remedies for review of agency decisions, whether non-final or final, and staff sees no need to add another administrative hurdle that delays a final order resolving a party's petition for regulatory relief. Thus, staff believes the Commission's traditional standard of review is sufficient in this instance.

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*Information Services (Florida), LLC, and its affiliate, Bright House Networks, LLC., and Docket No. 20080036-TF, Complaint and request for emergency relief against Verizon Florida, L.L.C. for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone.*

<sup>33</sup> A motion for rehearing is the civil or criminal law analogue to a motion for reconsideration in the administrative law context. See, e.g., *State v. Clark*, 373 So. 3d 1128, 1131-32 (Fla. 2023) (discussing principles derived from cases addressing motions for rehearing and applying them to motions for reconsideration before the Commission).

<sup>34</sup> See also *State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 818-19 (Fla. 1st DCA 1958) ("The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. . . . It is only in those instances in which [a careful] analysis leads to an honest conviction that the court did in fact fail to consider (as distinguished from agreeing with) a question of law or fact which, had it been considered, would require a different decision, that a petition for rehearing should be filed."). The Florida Supreme Court recently clarified that a motion for reconsideration is also appropriate "when a final order addresses substantive issues or reaches legal conclusions that have not been previously raised or challenged." *State v. Clark*, 373 So. 3d at 1131. However, as the order challenged by OPC the present docket is a non-final order, and because OPC's rights to argue and make objections and its ability to preserve arguments for appeal are not at issue, this additional purpose and standard for a motion for reconsideration is inapplicable.

<sup>35</sup> See *McDonald v. Fla. Pub. Serv. Comm'n*, 147 So. 3d 524 (Fla. 2014) (holding that the Commission "properly denied [a] motion for reconsideration when [the movant] did not provide any facts or law overlooked by the Commission").



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Turning to the merits of the Motion for Reconsideration, staff recommends that OPC has not clearly identified any specific mistakes of fact or law the Prehearing Officer made or overlooked in issuing the Denial Order. Without a specific point of fact or law overlooked or unconsidered, a motion for reconsideration must be denied, even if the reviewing body may have reached a different decision.<sup>36</sup>

As to OPC's first argument, OPC essentially acknowledges it is simply restating an argument that was considered and rejected by the Prehearing Officer and therefore should be rejected here.<sup>37</sup>

As to OPC's second argument, staff submits that a plain reading of the Order does not reflect any prejudgment in regard to the study or the veracity of any of the claims made by FCG, nor of any of the claims made by OPC. Instead, the Denial Order merely concludes that the two matters are sufficiently distinct to proceed "[b]ased on the representations of FCG," and that moving forward "pragmatically balances regulatory efficiency, fairness to all the concerned parties, and the public interest in general." Accordingly, OPC has identified no mistake of fact or overlooked point of law in the decision on this point, and therefore, no relief should be granted on these grounds.

As to OPC's third argument, staff submits that the Prehearing Officer correctly denied the abeyance motion because, as discussed above under Issue 2, there has been no demonstration that the cases are "inextricably intertwined" such that a decision in this case would affect the matter on appeal. The Denial Order acknowledges that FCG filed both the depreciation study that is the subject in this docket and the depreciation study that is the subject of the appeal currently being considered in SC2023-0988. That alone sufficiently demonstrates that the Prehearing Officer did not overlook or fail to consider this fact. Furthermore, the fact that both were submitted by the same Company does not demonstrate that the parameters and rates are "inextricably intertwined." Nor does it render "the Order's conclusion that the in-house 2025 Depreciation Study 'is a new study conducted by a different expert'" inaccurate, as the Denial Order explicitly states this conclusion is based on FCG's representations. OPC has failed to identify a mistake of fact or law in the Prehearing Officer's Denial Order and therefore, the Motion for Reconsideration should not be granted on these grounds.

## Conclusion

Staff recommends denying OPC's Motion for Reconsideration under the Commission's traditional standard of review for such motions because OPC has failed to articulate a reason to depart from that standard and because the Motion fails to raise a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Denial Order.

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<sup>36</sup> *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315, 317 (Fla. 1974); Order No. PSC-2016-0231-FOF-EI, issued June 10, 2016, in Docket No. 20160021-EI, *In re: Petition for rate increase by Florida Power & Light Company* (page 5).

<sup>37</sup> To the extent OPC claims the Commission lacks jurisdiction, these arguments were discussed above in Issue 2.

**Issue 4:** Should this docket be closed?

**Recommendation:** No. This docket should remain open pending the Commission's final resolution of FCG's Petition. (Rubottom, Sparks, Imig)

**Staff Analysis:** This docket should remain open pending the Commission's final resolution of FCG's Petition for Approval of Depreciation Study and for Approval to Amortize Reserve Imbalance.