State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: September 16, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Williams) ARW JSC CRB JS
Division of Economic Regulation (Maurey, Kummer, Slemkewicz) ALM

RE: Docket No. 100315-GU – Complaint by Miami-Dade County for order requiring Florida City Gas to show cause why tariff rate should not be reduced and for the Commission to conduct a rate proceeding, overearnings proceeding, or other appropriate proceeding regarding Florida City Gas' Acquisition adjustment.

AGENDA: 09/28/10 – Regular Agenda – Motion to Dismiss – Oral Argument Requested – Participation at Commission's Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Oral Argument Requested – Issue 1

FILE NAME AND LOCATION: S:\PSC\GCL\WP\100315.RCM.DOC

Case Background

Florida City Gas (FCG), formerly City Gas Company of Florida, executed a Natural Gas Transportation Services Agreement with Miami-Dade Water and Sewer Department (MDWASD) in 1998 (1998 Agreement). FCG and MDWASD negotiated a successor agreement to the 1998 Agreement, dated August 28, 2008 (2008 Agreement). By petition dated November 13, 2008, FCG requested that the Commission approve the 2008 Agreement between FCG and

MDWASD.[1] Thereafter, FCG voluntarily withdrew its petition on February 17, 2009, and the Commission administratively closed the docket.

FCG began charging MDWASD its approved tariff rate in August 2009. In September 2009, MDWASD stopped paying the tariff rate in full and began remitting payment for only the previously agreed to 2008 Agreement rate. MDWASD claims that it has since been placing the difference between the tariff rate and the 2008 Agreement rate into a private escrow account.

On December 14, 2009, MDWASD filed its own petition for approval of the 2008 Agreement with FCG.[2] In its petition, MDWSD requested that the Commission find that it lacks jurisdiction over the 2008 Agreement executed by MDWSD and FCG. Alternatively, MDWSD requested that if the Commission does find it has jurisdiction, that it approve the 2008 Agreement and order FCG to refund to MDWSD the difference between the 2008 Agreement rates and the current tariff rates now being charged to MDWSD by FCG. The Commission is scheduled to address the jurisdictional question in Docket No. 090539-GU at the October 26, 2010 Agenda Conference.

On June 4, 2010, Miami-Dade County (Miami-Dade or the County) initiated the present docket by filing a complaint for an order requiring FCG to show cause why its tariff rate should not be reduced and for the Commission to conduct a rate proceeding, overearnings proceeding or other appropriate proceeding regarding FCG's acquisition adjustment (Complaint). On June 24, 2010, FCG filed a Motion to Dismiss the County's Complaint with prejudice (Motion to Dismiss) and a Request for Oral Argument. FCG filed a correction to its Motion to Dismiss to remove the phrase "with prejudice" on June 28, 2010. By Order No. PSC-10-0425-PCO-GU, the County was granted a 7-day extension of time within which to file its response to FCG's Motion to Dismiss, which it filed on July 8, 2010 (Response).

Staff's recommendation addresses FCG's Motion to Dismiss and its Request for Oral Argument. For the reasons described below, the Commission should grant FCG's Motion to Dismiss. The Commission has jurisdiction pursuant to Section 366.04, Florida Statutes (F.S.), and Rules 25-22.036 and 28-106.201, Florida Administrative Code (F.A.C.).

[1] See Docket No. 080672-GU, In re: Petition for approval of Special Gas Transportation Service agreement with MDWASD by Florida City Gas.
[2] See Docket No. 090539-GU, In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department.

Discussion of Issues

Issue 1: Should the Commission grant Florida City Gas's (FCG) Request for Oral Argument?

Recommendation: Yes. The Commission should grant FCG's Request for Oral Argument. Staff recommends allowing each side 10 minutes to address this matter. (Williams)

Staff Analysis: Pursuant to Rule 25-22.022(1), F.A.C., FCG filed its Request for Oral Argument concurrently with its Motion to Dismiss. No objections to FCG's request have been filed, and the time for doing so has expired.

The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying motion. Rule 25-22.0022(3), F.A.C., provides that granting or denying a request for oral argument is within the sole discretion of the Commission.

Staff believes that the Commissioners would benefit from oral argument on FCG's Motion to Dismiss and Miami-Dade County's Response. Accordingly, staff recommends that the Commission grant FCG's Request for Oral Argument. Staff further recommends that if the Commission decides to hear oral argument, FCG and Miami-Dade County should each be allowed 10 minutes to address the Commission on this matter.

Issue 2: Should the Commission grant Florida City Gas's (FCG) Motion to Dismiss Miami-Dade County's (Miami-Dade or the County) Complaint without prejudice?

Recommendation: Yes. Staff recommends that the Commission grant FCG's Motion to Dismiss, without prejudice. The County's Complaint fails to state a cause of action upon which the Commission can grant relief. (Williams)

Staff Analysis:

Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition and documents incorporated therein can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963); and Rule 1.130, Florida Rules of Civil Procedure.

County's Complaint

On June 4, 2010, Miami-Dade initiated the present docket by filing a complaint for an order requiring FCG to show cause why its tariff rate should not be reduced and for the Commission to conduct a rate proceeding, overearnings proceeding or other appropriate proceeding regarding FCG's acquisition adjustment. In its Complaint, the County states that by Order No. PSC-07-0913-PAA-GU[3] (Positive Acquisition Adjustment Order), the Commission determined that AGL Resources, Inc.'s (AGLR) acquisition of FCG resulted in a benefit to FCG's customers because FCG would realize a $442,270 annualized cost savings. Accordingly, the Positive Acquisition Adjustment Order allowed FCG to record the purchase price premium of $21,656,835 as a positive acquisition adjustment to be amortized by FCG over a 30-year period beginning in November 2004. The County notes that the Commission also approved FCG's proposed five-year base rate stay-out period, which prohibits FCG from increasing base rates for five years beginning October 23, 2007, as being in the best interest of customers. According to the County, the Commission reserved the right to reevaluate the reasonableness of the acquisition adjustment at any time during the stay out period and to revisit the effects of the acquisition adjustment in FCG's next rate proceeding. The County states that the Commission may partially or totally remove the acquisition adjustment in the event it is determined that the $442,270 annualized cost savings no longer exist.

The County asserts that the Commission should reexamine the alleged $442,270 annual savings for AGLR's acquisition of FCG because the Commission's approval in the Positive Acquisition Adjustment Order took into account the contract rates that the County was paying

[3] Issued November 13, 2007, in Docket No. 060657-GU, In re: Petition for approval of acquisition adjustment and recognition of regulatory asset to reflect purchase of Florida City Gas by AGL Resources, Inc.

FCG under the 1998 Agreement.[4] The County asserts that the higher tariff rates that the County is currently being charged by FCG will provide FCG with $800,000 more annually than the amount provided for in the 2008 Agreement that is before the Commission for approval in Docket No. 090539-GU. The County contends that if the Commission does not approve the 2008 Agreement in Docket No. 090539-GU and allows FCG to continue charging the County the tariff rates, FCG will receive a $8 million windfall ($800,000 a year for ten years). Accordingly, the County believes that the increased rates FCG is charging will allow FCG to overearn in light of the acquisition adjustment.

FCG's Motion to Dismiss

FCG asserts that the County's Complaint is premature and duplicative of the issues in Docket No. 090539-GU. FCG claims that the County has failed to state a cause of action because it has not made a prima facie showing of overearnings that would justify the initiation of a rate proceeding or overearnings investigation. FCG also contends that the County's challenge of the tariff rate and the Positive Acquisition Adjustment Order amounts to an out of time motion for reconsideration that must be denied.

FCG states that the Commission will determine the legality of the 2008 Agreement and the otherwise applicable tariff rate that the County must pay in the absence of a special contract in Docket No. 090539-GU, and Docket No. 090539-GU is thus the appropriate forum within which to address that dispute. According to FCG, the County's fundamental objection is that it does not want to pay FCG's lawfully approved and applicable tariff rate because it is significantly higher than the 1998 and 2008 Agreement rates. FCG asserts that the County's attempt to re-litigate the issues in Docket No. 090539-GU in the present docket constitutes a collateral attack that would be duplicative and a waste of Commission and party time and resources. Furthermore, FCG asserts that any alleged overearnings associated with the County paying FCG's tariff rate cannot begin to be established until the Commission decides the issues in Docket No. 090539-GU.

FCG claims that the County's naked assertion that FCG is overearning merely because the County has been billed for transportation service under its approved tariff does not meet the minimal pleading requirements for invoking Commission action.[5] According to FCG, the County has not demonstrated, as required by Section 366.071(1), F.S., that FCG is earning outside the range of reasonableness on its approved rate of return. FCG contends that the statute's prerequisite is met when the utility's surveillance reports indicate that the utility's achieved return on equity exceeds its authorized return. FCG insists that the County failed to include such prima facie allegations in its Complaint because there is no evidence to support or indicate that FCG is overearning. In support of this contention, FCG states that its surveillance

[4] The County notes that the 2008 Agreement contains the same rates as the 1998 Agreement. Complaint at 5.
[5] FCG acknowledges that while it has charged the County the tariff rate, the County has only actually paid FCG the old contract rate, with the County holding the difference between the contract and tariff rates in escrow pending the outcome of Docket No. 090539-GU. FCG notes, however, that for regulatory reporting purposes and calculation of the utility's rate of return, FCG has booked the billed revenue and accounts for the escrow amounts as a receivable on its books, so the full billed amount is included in the rate of return calculation. Motion to Dismiss at 7, fn.9.

reports for the June 2009, September 2009, December 2009, and March 2010 quarters indicate that FCG is in fact earning *below* its 7.36 percent rate of return authorized by the Commission.[6]

In addition, FCG argues that even accepting the County's figures, the fact that the County is paying a higher rate than it desires does not automatically result in an increase in net revenues to FCG. FCG states that once it began charging the County the tariff rate in August 2009, it stopped charging its end users the Competitive Rate Adjustment (CRA) rider in its tariff. FCG explains that the CRA rider provides that if FCG's contract customers are not paying the tariff rate, the difference between the contract rate and the tariff rate is recovered by a surcharge paid by the general body of ratepayers. Once FCG began charging MDWASD the tariff rate, FCG ceased charging the CRA rider for the County differential since FCG was recovering its revenue requirements through the County paying the tariff rate. Accordingly, FCG's charging the County the tariff rate "has been revenue neutral to FCG."[7]

Finally, FCG contends that any review of the cost savings from AGLR's acquisition of FCG should occur in FCG's next rate proceeding. FCG states that according to the Positive Acquisition Adjustment Order:

> The permanence of the cost savings supporting FCG's request shall be reviewed in the Company's next rate proceeding. The Company shall file its earnings surveillance reports with and without the effect of the acquisition adjustment. If it is determined that the cost savings no longer exist, the acquisition adjustment may be partially or totally removed as deemed appropriate by this Commission.

Positive Acquisition Adjustment Order at 9. FCG insists that the Positive Acquisition Adjustment Order does not provide an independent cause of action that would allow the County to petition the Commission for a rate or overearnings proceeding. In the absence of any evidence of overearnings, FCG claims that the County has failed to cite to any rule, order or statute that would permit the Commission to initiate a rate case proceeding solely to again review the appropriateness of the prior Commission decision in the Positive Acquisition Adjustment Order. FCG also states that the County has failed to indicate that, whether the positive acquisition adjustment is included or excluded, FCG is in an overearnings situation now that the County is being charged the tariff rate. Accordingly, FCG argues that the County has not offered any legal basis for reexamining the Commission's determinations in the Positive Acquisition Adjustment Order, or for initiating a rate case.

County's Response to FCG's Motion to Dismiss

The County contends that it has not failed to state a cause of action. In support of its contention, the County cites Sections 366.076 and 366.07, F.S. Section 366.076, F.S., permits the Commission to conduct a limited proceeding upon petition or its own motion regarding any matter which requires a public utility to adjust its rates consistent with statutory provisions. Section 366.07, F.S., also provides the Commission with authority upon its own motion or a

[6] Motion to Dismiss at 5, fn. 5, citing Order No. PSC-04-0128-PAA-GU, issued on February 9, 2004, in Docket No. 030569-GU, In re: Application for rate increase by City Gas Company of Florida.
[7] Motion to Dismiss at 7.

complaint to fix fair and reasonable rates whenever it finds the rates to be unjust, unreasonable, insufficient, excessive, unjustly discriminatory or preferential, or in violation of law. The County argues that pursuant to these statutes, FCG must establish that the revenues generated from the tariff rates it is charging the County do not place FCG in an overearnings situation.

The County asserts that it is not seeking reconsideration of the Positive Acquisition Adjustment Order but rather for the Commission to reevaluate the adjustment based on the circumstances of the 2008 Agreement and FCG's subsequent treatment of the County. According to the County, the Commission's show cause procedures best serve to protect the County's interests in relation to FCG's other customers because FCG should not be permitted to charge the County excessive rates without any ramification on the rates FCG charges its other customers.

Finally, the County acknowledges that its instant Complaint will address many of the issues to be addressed in Docket No. 090539-GU. However, it insists that the issue of whether FCG would overearn if allowed to charge the County the tariff rate rather than the 2008 Agreement rate is not duplicative and should be considered in the instant docket.

Analysis

Upon review of the County's Complaint, staff believes that the County has failed to state a cause of action upon which the Commission can grant relief. Staff recommends that the Commission should dismiss the Complaint, without prejudice, for the reasons provided below.

Show Cause

The Commission has jurisdiction to review conduct that is alleged to violate Chapter 366, F.S., or any lawful rule or order of the Commission. Section 366.095, F.S., provides that if any utility knowingly refuses to comply with, or willfully violates, any provision of Chapter 366, F.S., or any lawful rule or order of the Commission, the utility shall incur a penalty for each offense. Each day that the refusal or violation continues constitutes a separate offense, and a penalty of not more than $5,000 shall be imposed for each offense. The purpose of the Commission's show cause procedures is to address specific instances where a utility knowingly refuses to comply with, or willfully violates, a specific Commission order, rule or statute and to bring the utility into compliance.[8]

Staff believes that the County's attempt to invoke the Commission's show cause procedures through its Complaint is inappropriate in this case. Upon circumstances brought forth by a utility's customers or other parties, staff may recommend that a show cause proceeding is warranted and should be initiated. However, the decision to invoke the

[8] See Section 367.161, F.S.; Order No. PSC-00-1675-PAA-WS, issued September 19, 2000, in Docket No. 991984-WS, In re: Application for transfer of Certificate Nos. 277-W and 223-S in Seminole County from Alafaya Palm Valley Associates, Ltd. to CWS Communities LP d/b/a Palm Valley at 5; Order No. PSC-00-1389-PAA-WU, issued July 31, 2000, in Docket No. 991001-WU, In re: Application for transfer of facilities and Certificate No. 424-W in Highlands County from Lake Josephine Water to AquaSource Utility, Inc. at 4; Order No. PSC-98-1594-FOF-GU, issued December 1, 1998, in Docket No. 981039-GU, In re: Request for authorization, pursuant to Rule 25-7.015, F.A.C., to keep records out of state, by City Gas Company of Florida at 3.

Commission's show cause procedure is ultimately the Commission's. In its Complaint, the County requests that the Commission enter an order requiring FCG to show cause why its tariff rate should not be reduced. The basis for the County's request is that FCG will overearn if it is allowed to charge the County its currently approved tariff rate. However, in order for the Commission to initiate a show cause proceeding, the Commission must be able to identify a statutory section, rule, or agency order that has been violated, as well as the facts or conduct relied upon to establish the violation.[9] Assuming that all of the allegations in the Complaint are true and viewing all reasonable inferences in favor of the County, the County has failed to plead facts sufficient to make a prima facie showing that the utility is willfully violating or refusing to comply with any rule, statute or order of the Commission. Accordingly, a show cause proceeding is inappropriate and should not be initiated.

Overearnings Investigation

The County's Complaint also requests that the Commission initiate an overearnings investigation or conduct a rate proceeding or other appropriate proceeding regarding FCG's acquisition adjustment. In support of its request, the County states that notwithstanding the five-year base rate stay-out period, the Commission reserved the right to revisit the effects of the acquisition adjustment in the future. Accordingly, the County contends that the Commission can initiate an overearnings proceeding because it specifically ordered in the Positive Acquisition Adjustment Order that in FCG's next rate proceeding, the acquisition adjustment may be partially or totally removed if it is determined that the $442,270 annual cost savings no longer exist.

While the statutory provisions the County cites give the Commission authority to conduct a limiting proceeding or to fix fair and reasonable rates when it finds that rates must be adjusted in order to comply with the statutes, Sections 366.06, 366.07 and 366.071, F.S., are the substantive statutes which govern rate setting. Pursuant to Sections 366.06(2) and 366.07, F.S., when the Commission, upon a request made, finds that the rates being charged by a utility are "unjust, unreasonable, unjustly discriminatory, or in violation of law" or yield excessive compensation, it shall hold a public hearing to determine just and reasonable rates to be charged. Such a request by any party must allege sufficiently detailed facts to warrant the Commission's proceeding.[10] In the past, the Commission has proceeded to hearing when a prima facie case has been made that a utility is overearning, i.e., earning in excess of the top of the range of either its last allowed rate of return or its last stipulated rate of return.[11] Likewise, Section 366.071, F.S., provides that "upon petition from any party" interim rate decreases may be ordered provided the moving party establishes a prima facie entitlement to such relief by demonstrating that the utility is earning outside the range of reasonableness on its rate of return.[12]

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[9] For the reasons discussed below, staff believes the County has failed to make a prima facie showing that FCG is violating or failing to comply with the statutes which govern overearnings or unjust rates, namely Sections 366.06 and 366.071, F.S.

[10] See Order No. 15765, issued March 3, 1986, in Docket No. 860058-EI, In re: Petition by the Citizens of the State of Florida to initiate a show cause action that directs Florida Power Corporation to justify why Crystal River 3 should remain in the utility's rate base.

[11] Id.

[12] Id.

In considering the Motion to Dismiss, staff believes the County's assertion that "FCG must . . . establish that the excessive revenues generated from its proposed charges to the County do not place FCG in an overearnings situation" is incorrect. The County, as the requesting party, has the initial burden of going forward.[13] In order to initiate an overearnings investigation, the County must demonstrate that FCG is earning outside the range of reasonableness on its approved rate of return.[14] This means that the County must allege and support its allegations with facts tending to show that FCG is earning over 100 basis points above its authorized return on equity. The County asserts that the higher tariff rate that the County is currently being charged will provide FCG with $800,000 more annually than the amount provided for in the 2008 Agreement. From this, the County concludes that the increased rates FCG is charging will allow FCG to overearn in light of the acquisition adjustment. However, the mere fact that FCG may receive $800,000 more annually if the 2008 Agreement is not approved does not necessarily establish that FCG will overearn.

Even assuming that the Commission can reevaluate its decisions in the Positive Acquisition Adjustment Order, the County has also failed to make a prima facie showing that the annual savings from AGLR's acquisition of FCG no longer exist. The County states that the Commission should reexamine the alleged annual savings because the Commission's approval in the Positive Acquisition Adjustment Order took into account the contract rates that the County was paying FCG under the 1998 Agreement and would be paying under the 2008 Agreement, if it is approved. However, the County has not alleged, nor has it made specific factual assertions to support an allegation, that the $442,270 annualized cost savings no longer exist. Accordingly, the County has failed to allege that FCG is earning outside the authorized range of its return on

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[13] Order No. 8020, issued on October 20, 1977, in Docket No. 750710-TP, In re: On the complaint of Dade Electronics, Inc. against Southern Bell Telephone and Telegraph and the Defendant's answer thereto (holding that "the burden of proving or substantiating the complaint rests at all stages with the Complainant" because the complainant must establish a prima facie case for relief) and Order No. PSC-99-1233-PCO-WS, issued on June 22, 1999, in Docket No. 960545-WS, In re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County (finding that the burden of proof shifts to the utility once the evidence put on by customers conclusively demonstrates that there is a quality of service problem). Staff notes that FCG, as a regulated utility, would have the ultimate burden of proving that it is in compliance with Commission statutes, rules and orders if the County could clear the initial hurdle of meeting its burden of going forward. Order No. PSC-93-1386-PCO-WS, issued on September 22, 1993, in Docket No. 920649-WS, In re: Complaint and Petition of Cynwyd Investments Against TAMIAMI VILLAGE UTILITY, INC. Regarding Termination of Water and Wastewater Services in Lee County and Docket No. 930642-WS, In Re: Complaint Against TAMIAMI VILLAGE UTILITY, INC. by CYNWYD INVESTMENTS, and Request for Emergency Order Requiring the Utility to Reestablish Water and Wastewater Service to Cynwyd's Friendship Hall in Lee County at 3-4.

[14] Order No. 19641, issued July 8, 1988, in Docket No. 870220-EI, In re: Request by Occidental Chemical Corporation for reduction of retail electric service rates charged by Florida Power Corporation (granting utility company's motion to dismiss because petitioner did not demonstrate a prima facie case that the company's rates and charges were either unjust, unreasonable, unjustly discriminately, or in violation of law); Order No. 15765, issued March 3, 1986, in Docket No. 860058-EI, In re: Petition by the Citizens of the State of Florida to initiate a show cause action that directs Florida Power Corporation to justify why Crystal River 3 should remain in the utility's rate base; Order No. 22762, issued April 3, 1990, in Docket No. 900038-EI, In re: Review of rates and charges of Florida Power & Light Company; Order No. 17649, issued June 3, 1987, in Docket No. 870220-EI, In re: Request by Occidental Chemical Corporation for reduction of retail electric service rates charged by Florida Power Corporation at 2-3; Order No. 18627, issued on January 4, 1998, in Docket No. 870220-EI, In re: Request by Occidental Chemical Corporation for reduction of retail electric service rates charged by Florida Power Corporation.

equity or that the annual savings no longer exist; thus, it has not established a prima facie entitlement to rate relief.

Furthermore, the County does not, and cannot, allege that FCG is currently receiving an additional $800,000 each year because the 2008 Agreement has not yet been approved or denied. The County's contention that if the Commission does not approve the 2008 Agreement in Docket No. 090539-GU and allows FCG to continue charging the County the tariff rate, FCG will receive a $8 million windfall is purely speculative and conjectural at this time. The Commission will determine in Docket No. 090539-GU whether the 2008 Agreement should be approved and, if not, what tariff rate should apply to the County. Staff agrees with FCG that any alleged overearnings associated with the County paying FCG's tariff rate cannot begin to be established until after the Commission has decided the issues in the other docket. The County's Complaint, therefore, is not only duplicative of the issues to be decided in Docket No. 090539-GU, but also premature.

Conclusion

Considering the County's Complaint in a light most favorable to the County, staff believes that the County has failed to state a cause of action upon which relief can be granted. The County's speculative and conclusory assertions that the $442,270 annualized cost savings approved in the Positive Acquisition Adjustment Order *might* no longer exist and that FCG *may* overearn in the future if the 2008 Agreement is not approved in Docket No. 090539-EI are insufficient to warrant the Commission's proceeding to hearing. The County also has not made allegations sufficient to warrant the initiation of a show cause proceeding. Staff recommends that the Commission dismiss the County's Complaint without prejudice. In light of staff's recommendation, FCG's argument that the County's Complaint amounts to an untimely motion for reconsideration of the Positive Acquisition Adjustment Order is not addressed.

Staff notes that Section 120.569(2)(c), F.S., provides that dismissal of a petition shall, at least once, be without prejudice to timely filed amended petitions curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. In this instance, staff does not believe that the Petition conclusively demonstrates that the defect can never be cured. The County could conceivably remedy its failure to state a cause of action if, for example, after the issues in Docket No. 090539-GU are decided, it can specifically allege that FCG is earning above its authorized range of return on equity or that the annual cost savings from the Positive Acquisition Adjustment Order no longer exist. Accordingly, staff recommends that the Commission grant FCG's Motion to Dismiss without prejudice, thus giving the County the opportunity to file an amended petition at a later date.

Issue 3: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation, the docket should be closed after time for an appeal has run. If the Commission denies staff's recommendation, the docket should remain open. (Williams)

Staff Analysis: If the Commission approves staff's recommendation, the docket should be closed after time for an appeal has run. If the Commission denies staff's recommendation, the docket should remain open.