BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida City Gas.	DOCKET NO. 20220069-GU ISSUED: January 9, 2023

POST-HEARING BRIEF OF THE OFFICE OF PUBLIC COUNSEL

The Citizens of the State of Florida, through the Office of Public Counsel ("Citizens" or "OPC"), pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2022-0224-PCO-GU, issued June 22, 2022, and the First Order Revising Order Establishing Procedure Granting in Part and Denying in Part the Office of Public Counsel's Motion to Modify Key Activity Dates, Order No. PSC-2022-0275-PCO-GU, issued on July 15, 2022, hereby submit this Post-Hearing Brief.

STATEMENT OF BASIC POSITION

The Office of Public Counsel's (OPC) basic position in this case is that Florida City Gas (FCG) has failed to meet their burden to prove that every aspect of their requested rate increase is appropriate. The case filed by FCG grossly overstates the revenue requirement needed to provide safe and reliable service. The Commission may only approve the parts of FCG's rate request which are fair, just, and reasonable. In today's tough economic climate, FCG's customers are already under great financial pressure, so any increase will have a significant impact on them. Now more than ever, the Commission must consider that impact when evaluating FCG's rate request.

OPC's expert witnesses, Helmuth Schultz III and David Garrett, testified in depth about the flawed aspects of FCG's requested rate increase. FCG has failed to meet its burden of proof on several aspects of their request. The Commission does not possess the authority to create the RSAM in a contested hearing by artificially manipulating depreciation parameters and expense. Likewise, the Commission lacks the authority to agree to the unenforceable, illusory four year rate plan proposed by FCG. FCG also failed to justify the magnitude of the equity ratio and the revenue requirement, as well as several other requests, including the need for the experimental Advanced Metering Infrastructure (AMI) pilot program and the increase in funding for the extremely delayed and imprudently planned Liquefied Natural Gas (LNG) facility. The Commission must disallow these requests as they are inappropriate and inconsistent with the Commission's established policy.

Additionally, the Office of Public Counsel requests that the Commission give serious consideration to a troubling element that has shaped the issues in the case. The last Florida City Gas (FCG) rate case in Docket No. 20170179-GU was filed on October 23, 2017, scheduled for a hearing beginning on March 26, 2018 and was resolved by a Settlement that was entered into on March 12, 2018 and approved on March 26, 2018 in Order No, PSC-2018-0190-FOF-GU,[1] issued on April 20, 2018. A mere thirty days later, NextEra announced that they had entered into an agreement to buy Florida City Gas ("FCG") from Southern Company. On July 29, 2018 the transaction closed and NextEra simultaneously transferred FCG to Florida Power & Light ("FPL"). Evidence introduced at hearing proves that as early as January 30, 2018, but certainly well in advance of that date, NextEra and Southern were actively involved in negotiating NextEra's acquisition of FCG and Gulf Power Company. The intervenor parties who negotiated the settlement were not told of the negotiations. There is no evidence that the Commission or its Staff were told of the negotiations. The Commission has stated in a 2009 gas rate case decision that a merger in the near future could make the rates being set by the Commission "inappropriate." [2] FCG – through both Southern and NextEra -- was on notice that the Commission considers the existence of a merger to be material to the ratemaking process. Nevertheless, there was total silence from FCG about what was going on behind the scenes. The customers and the Commission

[1] EX 189.
[2] PSC Order No. PSC-2009-0375-PAA-GU, issued May 27, 2009, p. 39-40, *In re: Petition for rate increase by Florida Public Utilities Company.*

deserve better. FCG has suffered no repercussions in what may have been an unprecedented instance of the Commission and customers being kept in the dark by circumstances that impacted the test year. Based on Commission precedent, the rates established by FCG were presumptively inappropriate. These circumstances also have colored at least two key issues in the case. Issues 12 and 15, relating to the 4 year delay of the in-service date of the Liquefied Natural Gas ("LNG") Facility and consequent excess recovery of up to $11,596,631 and changes in plant siting after the deal had closed when FPL became the FCG owner and Issue 15 relating to an acquisition adjustment that may have received closer inspection and attention in negotiations.

STATEMENT OF FACTUAL ISSUES AND POSITIONS

ISSUE 1: **Is FCG's projected test period of the twelve months ending December 31, 2023, appropriate?**

OPC: *No. If there are no imminent plans to merge the company with another and with appropriate adjustments, the proposed 2023 test year may be representative of the period of time in which rates will be in effect. FCG has failed to meet its burden of demonstrating the appropriateness of the test year since, given its concealed merger activities in the 2018 case, it has refused to demonstrate that there will be no merger activities that will affect the appropriateness of the test year.*

ARGUMENT:

The problem with the proposed test year is intertwined with the issue of a potential merger or sale, which is not idle speculation. NextEra Energy (NEE) negotiated to by FCG from Southern Company during the pendency of the 2017 rate case without informing the Commission or parties to the case and settlement. EX 192, p. 110. The company failed to respond to discovery or unequivocally refute that there are ongoing discussions to sell or merge the company. TR 325. The Commission has stated before that a merger near in time to the setting of rates can yield rates that are “inappropriate.”[3] Company witnesses Campbell and Fuentes have each denied that there are ongoing merger or sale activities underway that would affect the rates. TR 822, 943, 1232. The caveat provided by these witnesses was that neither witness could unequivocally state that they would be in a position to know under all circumstances. TR 943, 1232. Nonetheless, together they represented witnesses designated to address the issue on the stand before the Commission. FCG has the burden of proof to demonstrate that the projected costs included in the test year are appropriate and representative of conditions affecting the business during the time rates are in effect. FCG is again on notice that disclosure of the existence of any impending merger is material to this case. In setting fair, just, and reasonable rates, the Commission is entitled to rely on the representations of the company that there are no such activities in progress. Clearly, O&M expenses related to payroll and administrative and general (A&G) expenses can be impacted due to the synergies that usually accompany a merger or sale of a utility. In 2001, while placing $113 million of revenues subject to refund and ordering Duke Energy Florida’ predecessor to file MFRs, the Commission made it crystal clear that the impacts of a merger could have a material impact on a company’s earnings. The Commission noted that circumstances related to elimination of one-time merger costs and other events caused the achieved ROE to jump from 11.48% to 17.02% and above the 13% ROE maximum.[4] In a merger scenario, even capital projects can be cancelled or delayed if synergies can be achieved after rates have been set using a projected test year. In this case, the sale of FCG in 2018 coincided with a four-year (and counting) delay of a $58 million

[3] *Id.*

[4] Order No. PSC-2001-1348-PCO-EI at 3, issued June 20, 2001,Docket No. 2000084-EI, *In re: Review of Florida Power Corporation’s earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.* $64.6 million of one-time merger costs – mostly severance pay – were identified as masking the recurring benefits that the company received by did not willingly share with customers. Specifically, the Commission noted:

> The possibility for overearnings in 2001 is increased when taking into account the effects of Progress Energy's acquisition of FPC. Beginning in January 2001, certain functions, primarily in the administrative area, are being integrated with CPL's, an affiliate of Progress Energy. FPC has indicated that this will result in significant cost savings for FPC. Order at 3.

LNG facility -- even though rates to recover a portion of the facility became effective in 2018. Additional costs were incurred related to a failed zoning of a parcel of land that happened to end up with FCG's parent, FPL, becoming the owner. EX 185, 206. FCG customers are now being asked to pay an additional $10 million to site the facility elsewhere. TR 588; EX 185, 206. Clearly, mergers can significantly impact the appropriateness of rates. At a minimum, this issue represents a placeholder for the Commission to take action should circumstances turn out differently.

By relying on the representations and testimony of FCG witnesses to make the case, FCG also places the company in the position of having its revenue requirements adjusted prospectively and retroactively (but without any retroactive ratemaking limitation) if circumstances are different than presented.

<u>ISSUE 2:</u> **Are FCG's forecasts of customer and therms by rate class for the projected test year ending December 31, 2023, appropriate? If not, what adjustments should be made?**

OPC: *No. FPL appears to have understated these elements of the forecast and an adjustment should be made based on information being developed in discovery and at hearing.*

<u>ARGUMENT:</u>

FCG expects their average annual customer account to grow by 1,032 from 2023 to 2024 and 1,019 from 2024 to 2025. TR 1263. Witness Campbell was asked if he had calculated the increase to revenues that would result from the forecasted increase in customers. TR 1263. The witness responded that he had not forecasted the impact but estimated it to be approximately $200,000 per year. TR 1263. In addition, the witness admitted that customer and therm forecasts could typically become progressively less reliable the further they are projected into the future. TR 1264. The prospect of understated revenues in the test year and beyond mitigates against the need to consider a RSAM or four-year rate plan.

ISSUE 3: **Are FCG's estimated revenues from sales of gas by rate class at present rates for the projected test year appropriate? If not, what adjustments should be made?**

OPC: *****No. FPL appears to have understated these elements of the revenue estimate and an adjustment should be made based on information being developed in discovery and at hearing.*

ARGUMENT:

See argument on Issue 2.

QUALITY OF SERVICE

ISSUE 4: **Is the quality of service provided by FCG adequate?**

OPC: *At least one customer has submitted a comment to the Commission in this docket and expressed dissatisfaction with the quality of service provided by FCG. Furthermore it is unclear if some of the testimony of the individuals who appeared at the customer service hearings reflect actual service provided by FCG. The merits of this testimony and other customer information adduced through the hearing should be considered.*

DEPRECIATION STUDY

ISSUE 5: **Based on FCG's 2022 Depreciation Study, what are the appropriate depreciation parameters (e.g., service lives, remaining life, net salvage percentage, and reserve percentage) and resulting depreciation rates for each distribution and general plant account?**

OPC: *The depreciation parameters and resulting depreciation rates are shown in OPC Witness Garrett's testimony and Exhibits 66-74. These parameters and rates are proposed for the legitimate establishment -- in the Commission's litigated ratemaking process -- of depreciation expense to the lives of the assets and not for the purpose of creating an artificial earnings manipulation device.*

ARGUMENT:

OPC witness Garrett testified that he used the straight-line method, the average life procedure, the remaining life technique, and the broad group model in order to establish his recommended depreciation rates in this case. TR 416. Witness Garrett created an "observed life table" or "OLT" for each account using FCG's aged property data. TR 418. These curves are not theoretical curves – they represent actual observed data from the Company's records. TR 418.

Since OLTs are often not "complete" curves, it is necessary to compare OLTs to a complete survivor curve. TR 418. Iowa survivor curves are empirically derived curves based on the extensive studies of the actual mortality patterns of many different types of industrial property. TR 418. To select the correct curve to use, witness Garrett used a mathematical curve-fitting technique that involved measuring the distance between the OLT curve and the selected Iowa curve to get an objective, mathematical assessment of how well the curve fits. TR 418-19. For each of the accounts to which witness Garrett proposed adjustments, FCG's proposed average service life, as estimated through an Iowa curve, was too short to provide the most reasonable mortality characteristics of the account. TR 420. Generally, for the accounts that witness Garrett proposed a longer service life than FCG witness Allis, witness Garrett's proposal is based on the objective approach of choosing an Iowa curve that provides a better mathematical fit to the observed historical retirement pattern derived from the Company's data. TR 420. OPC witness Garrett also pointed out that it appears FCG witness Allis relied too heavily upon expectations of Company personnel rather than historical data when making his recommendations about FCG's service life estimates. TR 421-22.

With regard to specific accounts, OPC witness Garrett recommends using an R3-70 curve for accounts 376.10 and 376.20, as opposed to witness Allis' recommended R4-65. TR 422. The more significant data points on these curves indicate a flatter trajectory than what is otherwise displayed in the curve recommended by witness Allis. TR 423. For accounts 378.00 and 379.00, witness Garrett recommends using the S3-45 curve, rather than the S3-35 curve as recommended by witness Allis. TR 424. Witness Garrett testified that a 35-year service life is simply too short given the actual evidence presented for this account, and it would result in an unreasonably high depreciation rate. TR 425. Witness Garrett's recommended curve represents a better fit both visually and mathematically. TR 426. For accounts 380.10 and 380.20, witness Garrett recommends an R2.5-55 curve rather than witness Allis recommended R2.5-50 curve. TR 426 Witness Garrett testified that the R2.5-55 curve provides a better fit to the observed data and results in more reasonable and accurate depreciation rates. TR 427. For Account 383, witness Garrett recommends a R2-47 curve as opposed to witness Allis' recommended R2.5-40 curve. TR 428. witness Garrett testified that the curve recommended by witness Garrett ignores relevant data points occurring between the 30-45 year age intervals. TR 429. Therefore, it would be more reasonable to use the curve recommended by witness Garrett. TR 429.

Taking into account all of witness Garrett's recommendations in Exhibits 66-74, OPC recommends that the depreciation expense proposed by witness Allis be reduced by $1,543,130 as reflected in witness Schultz testimony. EX 46, Schedule C. This would also result in a reduction to the depreciation reserve of $771,565. EX 46, Schedule B.

ISSUE 6: **If the Commission approves FCG's proposed RSAM (Issue 67), what are the appropriate depreciation parameters (e.g., service lives, remaining lives, net salvage percentages, and reserve percentages) and depreciation rates?**

OPC: *****The Commission does not have the authority to, and should not, approve FCG's proposed RSAM. The Commission may not establish depreciation rates in a general rate case for the express purpose of creating a depreciation imbalance (surplus) based on parameters which are not factually based on a depreciation study. Such a practice would be a departure from generally accepted accounting principles. It would also eliminate any incentive for FCG to generate efficiencies, and it would be grossly unfair to FCG's current and future customers.*

ARGUMENT:

See discussion on Issue 67 for a more complete analysis demonstrating that (1) the Commission lacks the authority to establish a Reserve Amount and RSAM in a contested rate case and (2) also should decline to establish a RSAM for a natural gas company in a rate case.

For the reasons set out below, the Commission lacks the authority to establish depreciation rates that ignore the remaining life technique methodology and that neither the company's expert nor the intervenor experts nor the Commission's rules, practices, and policies support, for the sole purpose of artificially creating a surplus to be used for an amortizable Reserve Amount capable of effectively setting rates at the top of the range.

FCG has presented the Commission with a bizarre chicken-and-egg scenario. Company testimony presents the creation of a suggested RSAM as the end-result that envisions the artificial manufacture of a reserve surplus (referred to as a "Reserve Amount") instead of the deficit imbalance that the depreciation study produced. The proposed Reserve Amount could be enlarged and shrunk based on factors that have nothing to do with the depreciation rates and parameters. The mechanism would be worthless to FCG and its parent FPL if there is no Reserve Amount created. In fact, no reserve amount can be lawfully created by the agency if Commission rules and policy are followed.

As it happens, the issue is incorrectly worded. It has the FCG thumb on the scale as it presumes that the threshold decision is whether a RSAM is to be authorized. Accordingly, through this issue postulation, FCG seeks to coopt the Commission in its mission to reverse-engineer parameters and rates for the benefit of shareholders. This would be accomplished through abandonment of the Commission's depreciation rate establishment, policy and the theoretical depreciation reserve elimination techniques that are embedded in Commission rules, policy and practice. This would pave the way for shareholders, but not customers, to benefit from the subsequent elimination of the freshly-minted surplus. Such a result would turn the rate case process on its head.

The first decision here should be whether, in a contested rate case, the Commission possesses the authority to independently establish depreciation rates and a depreciation surplus for reasons wholly unrelated to determining the cost of consumption of capital that is enshrined in Rule 25-7.045, Florida Administrative Code ("F.A.C."). The answer to the question that should be framed in this issue -- as discussed more fully in Issue 67 -- is ***no***. The issue that the OPC sought to raise at the Prehearing Conference read:

> Absent a stipulation of the parties, does the Commission have the authority to establish depreciation rates in a general rate case for the express purpose of creating a depreciation imbalance (surplus) and which are based on parameters which are not factually based on a depreciation study?[5]

FCG (and FPL) ask this Commission to independently establish a depreciation reserve component that would be created by depreciation rates that are not supported by the study performed by FCG's expert and which can be expanded and contracted by debits and credits completely decoupled from the changes in the depreciation accounting. Establishing these accounting measures in a rate case is prohibited by Commission rules and Section 120.68(7)(e)3, Fla. Stat.

This proceeding is being conducted pursuant to Section 366.06(1), Fla. Stat., which provides in relevant part:

> 366.06 Rates; procedure for fixing and changing.—
> (1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. ***All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed***, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. ***The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service***, ***and shall keep a current record of the net investment*** of each public utility company in such property which value, as determined by the commission, shall be used for

[5] Prehearing Statement of the Office of Public Counsel, filed November 15, 2022, Document No. 11319-2022.

> ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, ***less accrued depreciation***, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor.

(Emphasis added.) This statute establishes two bedrock principles in gas utility ratemaking in Florida. The first mandates that the rate case petition must be filed by the company pursuant to the prescribed rules and regulations. These rules and regulations must be faithfully followed, absent a waiver, granted pursuant to Section 120.542, Fla. Stat. The second is that when considering an application for a change in rates, the Commission is required to set rates based on cost and account for that cost in a uniform and systematic way, including the net investment which is investment "less accrued depreciation."

As a part of its ratemaking function in setting rates based on costs in a base rate proceeding, the Commission has established relevant policy through its rules, including Rule 25-7.045, F.A.C., ("Depreciation Rule")[6] which states:

> (3)(a) Each utility shall maintain depreciation rates and accumulated depreciation reserves in accounts or subaccounts in accordance with the Uniform System of Accounts for Natural Gas Companies (USOA) as found in the Code of Federal Regulations, Title 18, Subchapter F, Part 201, as revised April 1, 2013, which is incorporated by reference in subsection 25-7.014(1), F.A.C. Utilities may maintain further sub-categorization.

Through these rules, and in accordance with the mandate of Section 366.06(1), Fla. Stat., the Commission has adopted and prescribed the Federal Energy Regulatory Commission ("FERC") Uniform System of Accounts ("USOA"), including Account 108[7] Accumulated Provision for

[6] The Commission cites Section 366.06(1) as authority for promulgating the Depreciation Rule.
[7] See, 18 CFR 201, Account 108, Uniform System of Accounts, Federal Energy Regulatory Commission, as incorporated by reference in Rule 25-7.014(1), F.A.C.

Depreciation of Gas Utility Plant ("accumulated depreciation reserve") in establishing the depreciation reserve accounting. In pertinent part, this rule states:

> A. This account shall be credited with the following:
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> (1) Amounts charged to account 403, Depreciation Expense, or to clearing accounts for current depreciation expense for gas plant in service.
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> ***
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> B. At the time of retirement of depreciable gas utility plant, this account shall be charged with the book cost of the property retired and the cost of removal and shall be credited with the salvage value and any other amounts recovered, such as insurance.
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> ***
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> C. For general ledger and balance sheet purposes, this account shall be regarded and treated as a single composite provision for depreciation. ***For purposes of analysis, however, each utility shall maintain subsidiary records in which this account is segregated according to the following functional classification for gas plant*:**
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> (1) Production–manufactured gas, (2) production and gathering—natural gas, (3) products extraction—natural gas, (4) underground gas storage, (5) other storage, (6) baseload LNG terminaling and processing plant, (7) transmission, (8) distribution, and (9) general. ***These subsidiary records shall reflect the current credits and debits to this account in sufficient detail to show separately for each such functional classification (a) the amount of accrual for depreciation, (b) the book cost of property retired, (c) cost of removal, (d) salvage, and (e) other items, including recoveries from insurance.*** Separate subsidiary records shall be maintained for the amount of accrued cost of removal other than legal obligations for the retirement of plant recorded in account 108, Accumulated provision for depreciation of gas utility plant.

(Emphasis added.) This rule strictly controls what can be recorded as a debit or credit in the reserve.

In other words, the depreciation expense and the gross salvage are recorded in the accumulated depreciation reserve ("credit") while the cost of removal and an amount equal to the investment that retires is taken out of the accumulated depreciation reserve ("debit"). The Commission's Depreciation Rule does not allow it to depart from this practice in establishing depreciation rates or debiting or crediting the reserve for reasons not established in the rule. Notwithstanding the ability of parties to negotiate a RSAM in the context of other ratesetting trade-offs, when adjudicating a depreciation study petition and setting cost-based rates in a litigated setting, the Commission itself cannot authorize credits to the depreciation reserve that are not described and prescribed in the USOA as required by the Depreciation Rule.[8]

Commission practice and policy in cost-based rate setting has been to utilize the remaining life technique to eliminate the theoretical depreciation imbalances over time, unless the theoretical reserve imbalance has been material enough to trigger intergenerational inequities and erode the matching principle.[9] This policy is fundamentally based in the bedrock principle that the generation of customers that cause an expense or cost to be incurred should be the generation that pay for the expense or cost through the rates charged for the usage of the final product – here natural gas. The Commission has acknowledged that the matching principle plays a significant role in determining the best way to resolve depreciation reserve imbalances.[10] The Commission has stated that "the very presence of a reserve imbalance indicates the existence of intergenerational inequity."[11] The commission elaborated further:

> We agree with FPL witness Deason and OPC witness Pous that it is unlikely there would ever be a time when there is no reserve imbalance, simply because as time passes, more information is known and better estimates of life and salvage can be determined. However, that is not a reason to defer taking some action to correct reserve imbalances, where possible, either through reserve transfers ***or an amortization***. The magnitude of the reserve imbalance should also dictate what action is taken. The matching principle argues for

[8] Section 366.06(1), Fla. Stat.
[9] Order No. PSC-2010-0153-FOF-EI, issued March 17, 2010, *In re petition for increase in rates by Florida Power & Light.* ("2010 FPL Rate Case Order")
[10] *Id.* at 83.
[11] *Id.* at 83.

> a quick correction of any surplus; the quicker the better so that the ratepayers who may have overpaid would have a chance of benefitting.[12]

(Emphasis added.)

In the 2010 FPL rate case order, the Commission was faced with deciding how to correct a depreciation surplus of at least $1.2 billion. Interestingly, FPL urged that the remaining life technique be utilized.[13] However, the Commission concluded that the materiality of the imbalance was such that an amortization to the direct benefit of current customers over the period of four years was appropriate and ordered a credit of one-fourth of $894.6 million to be included in the test year's income statement for setting rates. That action was consistent with the Commission's Depreciation Rule, which directs the company to demonstrate how any reserve imbalance will be *corrected*.[14] This rule does not contemplate that the *creation* of a surplus imbalance is the goal of the study. FCG's requested RSAM seeking the creation of a reserve imbalance squarely violates the Depreciation Rule's requirement that Companies demonstrate how they will correct a reserve imbalance.

The parameters and rates recommended by FCG expert Allis as modified by OPC expert Garrett should be adopted as discussed in Issue 5. Any resulting imbalance should be addressed

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[12] *Id.* at 83.
[13] *Id.* at 87.
[14] The relevant portion of the rule provides that:

> (5) A depreciation study shall include:
> ***
> (f) An explanation and justification for each study category of depreciable plant defining the specific factors that justify the life and salvage components and rates being proposed. Each explanation and justification shall include substantiating factors utilized by the utility in the design of the depreciation rates for the specific category, e.g., company planning, growth, technology, physical conditions, trends. The explanation and justification shall discuss any proposed transfers of reserve between categories or accounts intended to ***correct*** deficient or surplus reserve balances. It shall also state any statistical or mathematical methods of analysis or calculation used in design of the category rate.

(Emphasis added.)

utilizing the remaining life technique as recommended by those experts and in a manner consistent with Commission rules, policy and practices, and Section 366.06(1), Fla. Stat.

ISSUE 7: **Based on the application of the depreciation parameters that the Commission has deemed appropriate to FCG's data, and a comparison of the theoretical reserves to the book reserves, what, if any, are the resulting imbalances?**

OPC: *****The depreciation parameters and resulting depreciation rates are shown in OPC Witness Garrett's testimony and Exhibits 66 and 68. The resulting imbalance, if any, with these adjustments is a fallout number.*

ARGUMENT:

OPC witness Garrett testified that an imbalance exists when the actual accumulated depreciation account does not equal the calculated accumulated depreciation. EX 75, Appendix C. With use of the remaining life technique, adjustments to accumulated depreciation are amortized over the remaining life of the property and are automatically included in the annual accrual. EX 75, Appendix C.

ISSUE 8: **What, if any, corrective depreciation reserve measures should be taken with respect to any imbalances identified in Issue 7?**

OPC: *Imbalances identified by adoption of the parameters and resulting depreciation rates in Garrett's testimony and exhibits should, consistent with Commission practice, be allocated over the service life of the assets using the parameters included in his testimony and exhibits. The Commission lacks authority to establish depreciation rates in a general rate case for the express purpose of creating a depreciation imbalance (surplus) based on parameters which are not factually based on a depreciation study. Such a practice would be a departure from Generally Accepted Accounting Principles ("GAAP") and would be grossly unfair to FCG's current and future customers.*

ISSUE 9: **What should be the implementation date for revised depreciation rates and amortization schedules?**

OPC: *****The depreciation parameters and resulting depreciation rates are as shown in OPC Witness Garrett's testimony and exhibits and should be implemented upon approval by the Commission, effective January 1. 2023. The implementation date should be consistent with the Rule 25-7.045, F.A.C.*

RATE BASE

ISSUE 10: **Has FCG made the appropriate adjustment to Rate Base to transfer the SAFE investments as of December 31, 2022 from clause recovery to base rates?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 11: **Should FCG's proposed Advanced Metering Infrastructure (AMI) Pilot be approved? If so, what adjustments, if any, should be made?**

OPC: *No, the cost for this experimental program should be borne by shareholders, not customers, since it is not known whether there will be a benefit. The adjustments shown on Exhibit 46, Schedule B-3, of a plant in service adjustment of $837,500 and related accumulated depreciation adjustment of $23,456 and should be made. In addition, the related O&M expense of $20,000 and depreciation expense of $46,913 should be reduced as shown in Issue 49 and Exhibit 46, Schedules C and C-7.

ARGUMENT:

The Commission should not approve FCG's proposed Advanced Metering Infrastructure (AMI) pilot since this is an experimental program with no known, or even estimated, benefit to customers. FCG acknowledged that this technology has only been used by a very limited number of gas utilities throughout the country and never before in Florida. EX 135. FCG also admitted that FCG has not projected or estimated potential O&M savings or reductions associated with deploying AMI technology across FCG's system. TR 665, EX 135. By including this program in FCG's rate request, FCG is attempting to shift the financial cost of this program onto consumers without even attempting to calculate the potential savings. Additionally, any efficiencies or O&M savings generated by this program will inure only to FCG, not customers, until at least the next rate case. TR 298. The Commission should find the FCG has not met its burden of proof with regard to the AMI pilot program since FCG has not even attempted to demonstrate the prudence of this program at this time.

The adjustments shown on Exhibit 46, Schedule B-3, of a plant in service adjustment of $837,500 and related accumulated depreciation adjustment of $23,456 and should be made. In addition, the related O&M expense of $20,000 and depreciation expense of $46,913 should be reduced as discussed in Issue 49 and Exhibit 46, Schedules C and C-7.

ISSUE 12: **What is the appropriate amount of plant in service for FCG's delayed LNG facility that was approved in its last rate case?**

OPC: *****OPC Witness Schultz's testimony and exhibits address the appropriate amount of plant-in-service. The plant in service for the delayed LNG facility should be reduced by at least $7,692,308 and the associated accumulated depreciation of $56,253. Further adjustments may be warranted based on the actual in-service date of the facility.*

ARGUMENT:

Five years after a $58 million LNG facility was proposed as being urgently needed to meet peak demand, the situation is mess. The Commission and customers were told the facility would be operational in January 2019. Responding to the urgency of the situation, in the settlement approved in Order No. PSC-2018-0190-FOF-GU,[15] intervenor parties agreed to include allow annual recovery of $2.5 million of LNG costs in rates beginning in June 2018. One month later, FPL announced that it had closed the deal to acquire FCG. In January 2023, there is no facility. The site failed to receive zoning approval. The cost has gone up $10 million, so far. Customers have paid over $11,596,631 for the cost of this non-existent facility. It will be sometime in 2023 *at the earliest* before the facility will be in service. Even so, FCG wants to keep the $11,596,631 and prospectively recover the new $68 million cost in new rates. Given that FPL has earned a profit from the four-year delay and ended up with the land that failed the zoning review, the Commission is faced with what to do with the project in a manner that is fair to customers.

[15] Order No. PSC-2018-0190-FOF-GU, issued April 20, 2018, *In re: Petition for Rate Increase by Florida City Gas. ("2018 FCG Settlement Agreement Order")*

The OPC's initial concern is the timeframe over which ratepayers have been paying for the project. These facts cannot be reconciled with FCG witness Howard's testimony that at least some element of rate recovery through base rates should depend on the facility being in service. TR 293. However, rate base of $29,000,000 is included in current base rates representing the 13-month average balance of the LNG facility and related land, while $167,150 of related operating expenses is also included. TR 293, 877. The OPC acknowledges that some recovery is allowed under the settlement, but the central issue is whether only one amount of recovery is occurring as contemplated, based on representations that were made.

FCG witness Fuentes confirmed that Company has been collecting a return on the $29 million beginning June 2018 and in each of the years 2019 through the current period. TR 877, 888-889. Current rates also include recovery of $200,000 of operating expenses related to the LNG facility. TR 859. The specific revenue requirement included in base rates today is $2,530,174. TR 890.

It should be noted that there are two different revenue requirements that are similar but designated to recover different amounts. The $2,530,174 is embedded in current rates, while the parties agreed to an "additional revenue requirement" of $3.8 million that was composed of another $2.5 million amount and a $1.3 million amount that was intended to recover the remaining full revenue requirement of the facility. Depending on the timing of the in-service date, the second and third increments could be combined into one $3.8 million base rate increase. TR 890, EX 189 at 16. At the time of the 2018 settlement was approved, the total annual revenue requirement upon completion would have been approximately $6.3 million. EX 108 at 7, line 26.

In fact, the Company has collected $11,596,631 to-date from ratepayers for this facility based solely on the first of the three revenue requirement components. TR 890-91,961. As the plant is not in service, it is inequitable that ratepayers have been providing a return on and of $29 million of rate base for this entire period. Remarkably, very little work on the project had been completed as of April 2022, which raises the distinct possibility that the inclusion of any related costs in rates – including the new incremental costs requested in the filing -- will continue to be inappropriate.

The related issue of double recovery is also a concern. As the Company is now requesting recovery of the full $68 million (the original $58 million plus a $10 million increase), the amounts already collected through depreciation would constitute a double recovery from ratepayers. If FCG can collect $68 million plus retain all of the $11,596,631 already received from ratepayers, the Company would stand to collect more than the facility actually cost. FCG argues that ratepayers should not be entitled to a credit for the amounts already collected from them because some recovery of those costs were allowed in the settlement agreement. TR 860. However, the 2018 FCG Settlement Agreement did not authorize double recovery from ratepayers. Witness Fuentes conceded that the intent of the 2018 FCG Settlement Agreement was that the LNG facility costs be recovered only one time. TR 892. Mr. Schultz has raised a concern of basic fairness. TR 292-97. The Commission must rectify this injustice and ensure that the 2018 FCG Settlement Agreement is honored.

1. *The Commission should create a mechanism to ensure that customers only pay once for the LNG facility.*

Despite the troubling and inequitable circumstances, FCG points to a provision in the settlement approved in the 2018 FCG Settlement Agreement as justification for allowing it to retain revenues in excess of the revenue requirement for the facility. This position is faulty for several reasons.

The evidence shows that the parties expected that the facility would be providing service to customers no later than January of 2019. TR 899. The intervenor parties were not told that there were secret negotiations underway that could have affected the timing of the facility's construction or the ultimate zoning and land acquisition intentions and efforts of the soon-to-be new owners. The 2018 FCG Settlement Agreement does not evince a mutual agreement on an open-ended term contemplating that the project could be delayed indefinitely, customers would pay $2,530,174 a year for it and that (the then obscured) NEE shareholders would earn an equity return within the weighted average cost of capital ("WACC") carrying costs for that time. All this has occurred while the customers were being told that the dire need for LNG capacity required immediate construction of the facility.[16]

However the evidence demonstrates that the circumstances surrounding the LNG provision may have been based on a misapprehension of the facts surrounding the timing of the facility's in-service date amid a then-secret process to sell the company to FPL. Testimony from 2017 by FCG employees exposed a severe disconnect between the expectations and representations about the immediate need for construction and dire consequences for a failure to bring it on-line and what has turned out to be the "actual" in-service date of the facility. On one hand the Commission and customers were told January 2019, but the ultimate, actual in-service date will be no earlier than the Spring of 2023. TR 898-899; EX 190, Becker testimony at 15-16; Wassell testimony at pp 8, 11-12.

Despite this, and as noted above, FCG has so far recovered over $11,596,631, including a return to the shareholders of FPL for a plant that is at least 4 years overdue, with no guarantees that it will even be in service during the test year. TR 656. The circumstances surrounding the delay are documented in the testimony of FCG witness Howard and OPC witness Schultz. TR 295, 560. Putting aside for the moment the prudence of the decisions and actions leading to the delays, it cannot be reasonably said that the intervenor parties to the 2018 FCG Settlement Agreement could have rationally contemplated or assented to a prolonged in-service delay while customers

[16] *Id.* at 17

paid a significant cost for a phantom LNG facility, year after year. Witness Fuentes confirmed that revenue requirements related to depreciation (but not credits to a depreciation reserve account), property taxes and payroll were collected from customers even though these costs did not actually exist. TR 873, 875, 876, 877, 886, 887. The costs were "recovered" in each of years 2018, 2019, 2020, 2021, and 2022, by virtue of customers paying $2,530,174 annually in each year. TR 901-902. It is not clear that the return on the $29 million could even represent a carrying cost on construction work in progress ("CWIP") as no significant capital costs or land costs were apparently incurred up through April of 2022. TR 293.[17] Witness Schultz demonstrated the minimal level of capital spending on the facility after FPL took over:

2018	5,079,175
2019	3,836,252
2020	4,569,635
2021	9,453,490
Total	$ 22,935,552

EX 46, Schedule B-4, p.1. During this 3.5 year period, FCG collected $9,066,457[18] from customers even though the $2,530,174 annual revenue requirement (ignoring growth in billing determinants) was based on a 13-month average balance of $29 million for each year. Ms. Fuentes also conceded that shareholders earn a return on the WACC that is earned on the LNG capital costs, based on a

[17] From 2018 through 2021, the company's accumulated capital cost spend was less than $23 million in non-land LNG. EX 46, Schedule B-4, line 1-4. As to the land, despite the use of terminology like "acquired" (TR 606, 642-643) or "sell" (TR 584-585, 586) by FCG witnesses referring to the original LNG site, it is not apparent that FCG actually ever even owned the parcel that was denied the zoning exemption. Exhibit 206, p. 3 indicates that prior to August 27, 2019 the owner of the property was shown as Marie Charbonneaux. Even if FCG had an option to buy, the value of the option would not constitute an investment upon which a return could be given. Assuming *arguendo* that FCG held an option on the original site, there is no evidence that an option would have been exercised earlier than August 27, 2019. EX 206 at 3. The zoning exemption denial occurred on June 5, 2019. TR 606. At this time, the property was still owned by Marie Charbonneaux according to the official property records. It would not have been prudent for FCG or FPL – on behalf of FCG -- to have exercised the option after denial in a manner that would add to ratebase. *See* EX 161, Interrogatories 112 and 114.

[18] TR. 890. 2018 collection of $1,475,935 plus $2,530,174 each year for 2019 – 2021 equals $9,066,457.

13-month average capital cost of $29 million, representing the total 2018 estimated LNG facility cost of $58 million. TR 877, 902.

The OPC is not seeking to overturn the allowed early recovery of the initial $2,530,174 cost recovery that provides a return on the originally estimated LNG capital cost, the return of such costs (depreciation) and the O&M costs like labor and property taxes. The OPC only seeks that the Commission treat the customers fairly and equitably for the costs collected for a facility whose in-service date was kicked down the road for four years after FPL clandestinely acquired and then assumed control of the company and took over the decisions about planning and executing the completion of the project. It was during this time that FPL ended up owning the property that was originally slated to be the LNG site. EX 185, 206.

Mr. Schultz recommends that the phantom recovery amounts be reflected as a regulatory liability and deferred until the Company's next rate filing or be reflected as a credit adjustment in one of the annual cost recovery clauses at a WACC that recognizes the cost carried in base rates. TR 697. Accordingly, the OPC recommends that any funds that have been collected from ratepayers related to the LNG facility be accounted for in a regulatory liability and returned to ratepayers over five years.

2. *The Commission should protect customers from overpaying to the LNG facility at the new site.*

OPC is not confident that the LNG project will be in-service on the latest iteration of a projected in-service date. There are contradictory indications from the Company on when the project will be complete. During the hearing, witness Howard suggests that the project would be in-service in March 2023. TR 654. However, Exhibit 99 indicates the project will be finished in June of 2023 and that the in-service date will be April 2023. *Id.* Alternatively, witness Howard conceded that it is possible the facility may not go into service until sometime after March of 2023 and that the Company will continue to refine the schedule based on the actual status of the facility. TR 656.

Given the history of the project, until the project is in-service, the cost recovery of the $68 million should not be collected from ratepayers. The OPC further recommends that any added projected depreciation included in rates associated with the facility that is not in service be reflected as a regulatory liability and deferred until the Company's next rate case or be reflected as a credit adjustment in one of the annual recovery clauses at a WACC that recognizes the cost carried in rates.

3. *The Commission should disallow the imprudently incurred $10 million extra cost of the LNG facility.*

On behalf of customers, Mr. Schultz further recommends disallowance of $10 million in additional LNG facility costs given management's imprudence in failing to properly and prudently plan the project when acquiring land and incurring costs prior to receiving the pivotal zoning exemption for the site. TR 296. FCG claimed, as justification for proceeding and incurring the extra costs that:

> On August 17, 2018, FCG received a formal consistency determination from the County Planning Director. Thereafter, FCG acquired the original site for the LNG Facility and began pursuing the permits and approvals needed for the site, including the special or unusual use zoning exemption from the County.[19]

TR 606.

After explaining that the zoning exemption was ultimately denied and consequently this additional $10 million was incurred and drove costs from $58 million to $68 million, FCG witness Howard curiously testified that the 2018 signatories were "fully aware" that the costs could change.

[19]The August 17, 2018 letter was in response to a letter that was sent by FCG's outside counsel on March 6, 2018, which was only 6 days before the 2018 Settlement was filed, but while Southern Company and NextEra were secretly negotiating for FPL to acquire FCG. EX 191, 192 at 2, 102, 110. See also footnote 17.

TR 609. At the same time the OPC was *fully unaware* that the company was secretly negotiating to sell the company in a manner that could and seemingly would change the in-service date of the LNG facility. There was no similar testimony offered to make the intervenors "fully aware" that the January 2019 date would slip by over 4 years. FCG witness Howard liberally relies on cherry-picked testimony from the 2018 case to support recovery of the extra costs, but when asked about details surrounding the crucial zoning process that occurred nearly a month *after* FPL ownership occurred on July 29, 2018 (TR 562), severe instances of amnesia and inattention to detail cropped up. TR 645-649. The Commission should not allow FCG to use the self-serving FCG prefiled testimony of 2017 like a sword and then hide behind the events of August 2018 and beyond as a shield. The non-answers and deflections of witness Howard should count heavily against the company in its burden of proof to justify $10 million of cost overruns that occurred on FPL's watch.

More troubling is that witness Howard was shown to be embellishing the true nature of the signal that FCG claimed to have received from an individual in the Miami Dade County planning department. In his prefiled testimony seeking to justify the extra costs incurred after a failed zoning effort, witness Howard claimed that FCG "acquired" that land after obtaining a formal consistency determination from the County Planning Director. TR 606, 643-644. When confronted at hearing with the actual letter, he acknowledged that the plain language of disclaimer in the letter from the "Assistant Director for Planning" reads:

> This letter is provided in response to your ***request for interpreting*** the provisions of the CDMP and does ***not constitute a departmental recommendation on any pending or future requests for development approval***. This interpretation is based upon the policies and provisions of the CDMP currently in effect. If you have any questions regarding this review, please contact me or Garett Rowe, Chief, Metropolitan Planning Section at the letter head address or phone number.

TR 645-646, EX 185.

Clearly, no approval of any type was given. The letter was not even signed by the "County Planning Director" as claimed in testimony. No formal decision was made. On its face the letter is an *interpretation* that a lawyer at Holland & Knight solicited from planning department staff. Nothing about the letter provides a basis to begin incurring millions of dollars. Proceeding on the basis of this letter is *prima fasciae* evidence of management imprudence. Witness Howard's embellishment that used the phrase "formal consistency determination" is so far wrong that it can only be viewed as designed to mislead the Commission. Yet even after he admitted when confronted that no *recommendation*, much less determination or approval, had occurred, and despite the explicit statement in the so-called "formal consistency determination" letter, mere minutes later, Witness Howard persisted in using the term "recommendation" in testimony before the Commission:

> **Q. You referenced the loss of the original site as a viable project location; however, that original site was never zoned adequately enough for FCG to build its facility there, correct?**
>
> A. No, it was not specifically zoned. But given the diligence that we could take before the vote of the City Council, once again reaching out to the Planning and Zoning Director, getting a *favorable recommendation*, we felt that was a good indication of the viability of the site.

TR 651.

Again, the interpretation letter received was not from the "Planning and Zoning Director" as claimed here. Minutes earlier, witness Howard read into the record the clear statement that the interpretation opinion of the Assistant Director for Planning was not a recommendation for zoning approval. The Commission should strongly and negatively construe this mischaracterization as an unrepentant effort to mislead it about the miserably weak basis for FPL and FCG to put the cart before the horse and imprudently proceed to incur engineering and other costs on or related to the original site – that the company apparently never even owned[20] -- prior to having any certainty about the necessary zoning exemption approval. TR 584.

One subsequent slip of the tongue in using the term "recommendation" might be chalked up as over eager zealousness, but Witness Howard continued to testify to the same misleading effect:

> **Q. Okay. Therefore, since you never had everything you needed as far as zoning was concerned, that site was never viable, correct?**
>
> A. I would disagree. The site was viable until the point that the exemption did not come through. We were -- you know, this is -- was an important investment for Florida City Gas to make, and we were doing the diligence necessary to ensure that this was an appropriate site. ***Once again, getting a favorable recommendation from the Planning and Zoning Director,*** doing community outreach until the time of the vote and we -- and we received a no vote, it was a viable site.

TR 651-652. (Emphasis Added.)

Not true. Once again, the interpretation letter received was not from the "Planning and Zoning Director" as claimed here. Two times using the term that was explicitly rejected by the Assistant Director cannot be an accident. Witness Howard was relentless in his efforts to buff up the opinion letter when he further described it as a "determination we got from the County Zoning Planning Director" (TR 648, line 11) and "the positive determination from the Planning and Zoning Director" (TR 653, line 2). Again witness Howard mischaracterized the status of the opinion letter author. This completely incorrect story must be rejected. FCG's persistent efforts – even after confronted with irrefutable proof – to mischaracterize the company's flimsy basis for recklessly proceeding in a way that placed 100% of the risk of its missteps on the customers

[20] EX 206. See also discussion at footnote 17.

demonstrates that it knew it had acted imprudently. Mr. Schultz is spot on when he testifies that FCG failed to plan the project properly and prudently. TR 295-296.

One additional element of the facts surrounding the zoning fiasco that the Commission should consider is that the land for which FCG failed to receive zoning approval and which was central to the four-year delay that earned FCG a profit on the LNG facility costs ultimately benefitted FPL. A bonus of the failed zoning effort is that the property that was the subject of the August 17, 2018 opinion letter from the assistant planning director appears to have ended up in the hands of FPL. Exhibit 185 contains a folio number of 3060300000120 which matches the property described in Hearing Exhibit 206. This property is shown as now being owned by FPL. This curious and convenient coincidence lends strong support to the OPC's request that FCG/FPL management not be allowed to profit from the LNG facility delay that occurred on its watch. The extra costs of $7,692,308, representing the average plant in service related to the extra $10 million that FCG incurred because of its misplaced reliance on the planning department opinion letter must be disallowed. TR 296

<u>ISSUE 13:</u> **What is the appropriate level of plant in service for the projected test year? (Fallout Issue)**

OPC: ***OPC Witness Schultz's testimony and exhibits demonstrate that the appropriate amount of plant-in-service to include in the projected test year should be no greater than $624,911,908. This includes an adjustment to remove $9,637,988 of overstated projected plant in service plus $460,884 of accumulated depreciation.***

<u>ARGUMENT:</u>

The Company's projected capital additions appear to be overstated. First, the projections are significantly higher than prior years' actual expenditures. From 2019 to 2021, capital expenditures were only between $36.6 million and $40.9 million while projections for 2022 and 2023 are $89.4 million and $50.6 million, respectively. TR 299. Removing LNG costs for a more apples-to-apples comparison, the projected capital expenditures for 2022 and 2023 are increases of $20.0 million and $21.5 million over the $31 million three-year average of non-LNG actual capital expenditures, an increase of approximately 67%. TR 299-300. Additionally, since 2019, actual non-LNG expenditures have declined each year.

Additionally, the 2020 actual capital expenditures may have been unusually high due to the 2020 costs including $12.2 million for a major improvement for a new customer and $10 million for a systems investment. TR 300. As 2020 actuals may have been an anomaly, the increases for 2022 and 2023 may be even more extreme.

The 2022 budget-to-actual information also casts doubt on the Company's projections. Based on the comparison of budget-to-actual spending on Exhibit 46, Schedule B-4, the Company's projections are overstated by an average of $36,954,004. FCG witness Howard acknowledged that capital expenditures for January to September 2022 were significantly under budget. TR 668-669. The actual spending of $14 million was far lower than the projected $23 million.[21]

It appears possible that un-reflected SAFE costs in the actuals may contribute to this overstatement. Although, SAFE costs were included in the filing, due to the Company's failure to provide some requested information, it is not clear if SAFE costs explain the $36,954,004 discrepancy. TR 301. Since FCG did not adequately explain this discrepancy, the forecasted rate base should be reduced.

Because the Company did not provide adequate information to perform a complete analysis, the OPC is recommending an adjustment to 2022 plant additions only. Supporting this recommendation is the fact that 2022 spending to date is $9 million below projected plant as

[21] EX 46, Schedule B-4.

testified to by the Company.[22] The OPC recommends a reduction of $9,637,988.[23] This was calculated by subtracting the actual three-year average of plant additions from the estimated 2022 plant additions. The OPC also recommends a corresponding reduction of $307,256 to depreciation expense.[24] As the first depreciation accrual would occur in 2022, the OPC recommends a $460,884 reduction to accumulated depreciation to reflect a year and a half of depreciation. Based on the over projections to date the OPC's recommendation is considered conservative.

<u>ISSUE 14:</u> **Has FCG made the appropriate adjustments to remove all non-utility activities from Plant in Service, Accumulated Depreciation, and Working Capital?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

<u>ISSUE 15:</u> **Should any adjustments be made to the amounts included in the projected test year for acquisition adjustment and accumulated amortization of acquisition adjustment?**

OPC: *Yes. The net unrecovered acquisition adjustment of $8,181,470 resulting from the original acquisition adjustment of $21,656,835 less the accumulated amortization of acquisition adjustment in the amount of $13,475,365 should be disallowed pursuant to existing Commission policy. Acquisition adjustments do not survive subsequent purchases of a utility's assets. Amortization expense in the amount of $721,894 should also be removed from the test year net income.*

<u>ARGUMENT:</u>

The Commission has an established policy that acquisition adjustments resulting from previous transactions do not survive subsequent purchases of a utility's assets. This policy is enshrined in two orders that do not distinguish among industries. TR 934, EX 193. Order No. PSC-2000-1165-PAA-WS states that "acquisition adjustments do not survive subsequent purchases of the utility's assets."[25] Order No. PSC-2005-1242-PAA-WS echoes Order No. PSC-2000-1165-

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[22] EX 46, Schedule B-4.
[23] EX 46, Schedule B-4.
[24] EX 46, Schedule B-4.
[25] PSC Order No. PSC-2000-1165-PAA-WS, issued June 27, 2000, p. 17, *In re: Application for limited proceeding increase and restructuring of water rates by Sun Communities Finance Limited Partnership in Lake County, and overearnings investigation.* Docket No. 20040951-WS, *In re: Joint application for approval of sale of Florida Water*

PAA-WS, stating that "consistent with prior Commission decisions, acquisitions adjustments do not survive subsequent transfers."[26] The clear, unambiguous language of these orders does not limit the policy to the water or wastewater industry. Notably, Order No. PSC-2000-1165-PAA-WS refers simply to the "utility's" assets. This term is generic and applies to all utilities the Commission regulates. Nothing more is required to dispose of this issue in favor of the customers. These two orders memorialize the Commission's policy. FCG failed to meet its burden of proof of demonstrating why it should be allowed to recover the acquisition premium in contravention of commission policy. Failure to follow the policy would require reversal pursuant to Section 120.68(7)(e)3, Fla. Stat.

FPL seems to have been unaware of this policy when it (NEE) acquired FCG from Southern Company. Accordingly, FCG asks the Commission to ignore its policy. Instead, all of FCG's eggs are in a basket woven around the presumption of an oversight by the OPC's that may have resulted in the OPC failing to challenge the expired ALGR acquisition adjustment. TR 818. The 2018 FCG Settlement Agreement is silent on the issue of the survivability of an acquisition adjustment from a previous purchase. Despite pointing elsewhere to express language in the 2018 FCG Settlement Agreement in support of its assertion that FCG should be allowed to over-recover the cost of the LNG facility (see Issue 15), FCG nevertheless improperly asks the Commission to resort to extraneous evidence of what it speculates was in the OPC's mindset at the time of entering into the 2018 FCG Settlement Agreement as support for ignoring the Commission policy.

Services Corporation's land, facilities, and certificates in Brevard, Highlands, Lake, Orange, Pasco, Polk, Putnam, a portion of Seminole, Volusia, and Washington counties to Aqua Utilities Florida, Inc.; EX 193.

[26] PSC Order No. PSC-2005-1242-PAA-WS, issued December 20, 2005, p. 21, *In re: Joint application for approval of sale of Florida Water Services Corporation's land, facilities, and certificates in Brevard, Highlands, Lake, Orange, Pasco, Polk, Putnam, a portion of Seminole, Volusia, and Washington counties to Aqua Utilities Florida, Inc.* and Docket No. 20040952-WS, *In re: Joint application for approval of sale of Florida Water Services Corporation's land, facilities, and certificates for Chuluota systems in Seminole County to Aqua Utilities Florida, Inc.*; EX 193.

There are at least two defects with this approach. First, a putative omission by the OPC or other intervenors in the negotiation of an agreement or the Commission staff or the Commission itself in the review and approval process does not establish or override Commission policy or precedent. In the context of that 2017 FCG rate case or the resulting 2018 FCG Settlement Agreement, the Commission was never asked to decide whether an acquisition adjustment from a prior transaction survives a subsequent purchase. Obviously, the Commission cannot be said to have made a determination by implication on a question that was never placed before it. Likewise no other instances cited by witness Fuentes involved the non-survivability question being put to the Commission.

Likewise, any errors that might have been made in overlooking the application of the subsequent purchase policy to the circumstances of the 2017 FCG rate case do not require replication or perpetuation of the error. Even FCG witnesses Fuentes shied away from endorsing this concept. TR 942. It cannot be reasonably argued that Commission policy should be based on oversight or inadvertence. In any event, the orders cited above regarding acquisition adjustments contain the Commission's policy. Period.

FCG further asks the Commission to place significant weight on submission of a discovery response provided by Southern Company at a time the company knew – but did not disclose to parties or the Commission -- that Southern Company and NEE were engaged in negotiations for FCG to be sold to NEE. TR 918, EX 108, EX 192 pp. 2, 4, 22, 102, 110.[27] For that reason alone

[27] The two Stock Purchase Agreements ("SPA") for both the Gulf Power Co. ("GPC") and FCG acquisitions, have the defined term of "Seller Pension Materials" on Bates numbered pages 22 and 110 of Hearing Exhibit 192. These identical defined terms in each SPA read in substance as follows: "[M]eans the AON HEWITT document ***provided by Seller to Purchaser*** entitled Basis for Measuring Retirement Benefit Obligations and Costs at Year-End 2017, ***delivered on January 30, 2018***." (Emphasis added.). This information disclosed to the United States Securities and Exchange Commission and to investors is irrefutable proof that the FCG sale negotiations were underway at least as early as January 30, 2018 and obviously even prior to that date, as the arrangements for that transaction deliverable would have been agreed to in advance of actual delivery. Southern Company was definitively engaged in secret negotiations to sell FCG (and GPC) to NextEra very early in the pendency of FCG's 2017 rate case and during the two month period leading up to the March 12, 2018 consummation of the 2018 Settlement and the Commission's March 26, 2018 consideration and approval of that agreement.

this FCG suggestion should be given zero weight. It is quite brazen for FCG to suggest that a discovery response fashioned by the secretly negotiating seller should be considered at all. At best this information is extraneous parole evidence that can only be considered by the Commission in interpretation of a provision under narrow circumstances that are not present here. As the Commission decided in Order No. PSC-2019-0225-FOF-EI,[28] when interpreting the 2016 FPL settlement agreement related to FPL's retention of $772 million in tax savings:

> If the contract language is ambiguous, extrinsic evidence can be used to determine the intent of the parties at the time of executing the agreement. However, extrinsic evidence cannot be used to vary or change the terms of the contract but only to explain, clarify, or elucidate the ambiguous language, the relation of the parties, and the circumstances surrounding them when they entered into the contract. (Footnote omitted).

FCG seeks to write a term into the agreement – that the ALGR Acquisition Adjustment was approved and continued irrespective of the pending, but concealed, sale of FCG to NEE. FCG hopes to accomplish this by resorting to language in a discovery response that has no bearing on a question that was not raised or before the agency.

In the document in Hearing Exhibit 108 at 4, the Staff's inquiry was based on an obsolete, red herring issue of the continuity of the acquisition adjustment under the criteria established in a 2007 order[29] that had been overtaken by the impending sale to NEE. The real issue had slipped unnoticed by intervenors and Commission Staff – namely the validity of the survivability of the AGLR-to-Southern acquisition adjustment. The Commission cannot discount the likelihood that that had the OPC, FEA or Staff known that there was a secret effort to sell the company well

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[28] PSC Order 2019-0225-FOF-EI, issued June 10, 2019, at 12, *In re: Consideration of the tax impacts associated with Tax Cuts and Jobs Act of 2017 for Florida Power & Light Company.*

[29]Order No. PSC-2007-0913-PAA-GU Issued November 13, 20076, *In re: Petition for approval of acquisition adjustment and recognition of regulatory asset to reflect purchase of Florida City Gas by AGL Resources. Inc.*

underway during the pendency of the case and negotiations, the inquiry and focus on the acquisition adjustment would likely have been different.

FCG also implies that the company relied on the OPC's actions in the 2017 rate case. TR 818-822. However, FCG has not explicitly demonstrated that it affirmatively relied upon the OPC's actions in joining in settlement of the 2017 case nor has it demonstrated that it was entitled to so rely. In any event, there is no legal basis for FCG to rely on the OPC's inaction (or even affirmative action) on any issue had they overtly made such a claim. Notably, NEE publicly stated that it had performed due diligence on all aspects of the transaction, including the assets acquired. TR 927-929, EX 192 at p. 134. Witness Fuentes testified that that a specialized segment of the company (or even a vendor) would have reviewed all relevant information.[30] At the end of the day, NEE and FPL are responsible for their own assessment of the recoverability of assets pursuant to Commission precedent.

It is worth noting that NEE appears to have absorbed a very large acquisition premium that has not been transferred to the books of FCG. The $8,181,470 net amount of the unamortized AGLR Acquisition Adjustment[31] is relatively minor when viewed alongside the approximately $231 million[32] acquisition premium that NextEra has absorbed on its books. TR 909. In fact, the unamortized AGLR acquisition adjustment is the equivalent of approximately 3.5% of the premium on NEE's books. Any notion that NEE's reliance on recovery of this amount was material – apart from the company's failure to conduct adequate due diligence regarding the existence of the subsequent purchaser policy – fails on these facts.[33]

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[30] *Id.*
[31] TR 290.
[32] This estimate is the product of the FCG purchase price of $530,000,000 less the equity investment (including purchased book retained earnings) of $299,001,221 recorded as the FPL investment in FCG on December 31, 2018. EX 192 at pp1, 115; EX 186 at p. 115, line 8.
[33] It could even be said that retention of the $231 million premium and its apparent viability to be carried on the books could be indicative of further merger activities underway related to FCG that would allow that amount to be recovered.

ISSUE 16: **What is the appropriate level of CWIP to include in the projected test year?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 17: **What is the appropriate level of Gas Plant Accumulated Depreciation and Amortization for the projected test year?**

OPC: *OPC Witness Schultz addresses this in his testimony and exhibits including, but not limited to, EX 46, Schedule B. The appropriate level of Accumulated Depreciation and Amortization for the projected test year should be at least $208,172,408.*

ISSUE 18: **Have under recoveries and over recoveries related to the Purchased Gas Adjustment, Energy Conservation Cost Recovery, and Area Expansion Plan been appropriately reflected in the Working Capital Allowance?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 19: **Should the unamortized balance of Rate Case Expense be included in Working Capital and, if so, what is the appropriate amount to include?**

OPC: *No, unamortized rate case expense should not be included in working capital for a gas company pursuant to Commission policy. OPC's adjustments to rate case expense are explained in Issue 47.*

ISSUE 20: **What is the appropriate amount of deferred pension debit in working capital for FCG to include in rate base?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 21: **Should the unbilled revenues be included in working capital?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 22: **What is the appropriate level of working capital for the projected test year?**

OPC: *OPC Witness Schultz's testimony and exhibits including, but not limited to, Schedule B, address the appropriate adjustments to the Working Capital Allowance. Working capital should be no more than $10,103,595.*

Such a specter mitigates against the Commission succumbing to FCG's entreaties to reverse its two-decades old policy on the survivability of acquisition adjustments.

ARGUMENT:

Based on historical balances, the Company's request for cash working capital is improperly inflated. For example, a number of the cash working capital components were significantly higher than the requested amounts. TR 299-309. The Company has requested $5,000,000 for cash despite the fact that this expense has averaged only $2,312,949 in the prior years. The request for accounts receivable has been increase by $6,225,528 over the three-year average of $9,278,408. The request for gas storage is double the three-year average for this cost. Another significant increase was to Miscellaneous Deferred Debits for which the Company is requesting approximately three times the three-year average.

The OPC's recommended adjustment is a disallowance of $7,850,000. The recommended reductions can be considered conservative as each results in a debit balance greater than the three-year average for that expense. There is also an $800,000 reduction to Accounts Payable which results in a credit less than the historical three average. These adjustments are shown on Exhibit 46, Schedule B-5.

ISSUE 23: **What is the appropriate level of rate base for the projected test year? (Fallout Issue)**

OPC: ***OPC Witness Schultz's testimony and exhibits including, but not limited to, Schedule B, page 1, address the appropriate adjustments to rate base. The adjusted amount should be no more than $455,035,463. This should be adjusted for any regulatory credit for LNG plant already collected as discussed in Issue 12.***

COST OF CAPITAL

ISSUE 24: **What is the appropriate amount of accumulated deferred taxes to include in the projected test year capital structure?**

OPC: ***OPC Witness Garrett's testimony and exhibits including, but not limited to, Exhibit 65, as well as OPC Witness Schultz's testimony and exhibits including, but not limited to Exhibit 46, Schedule D, address the appropriate amount of accumulated deferred taxes to include in the projected test year capital structure. The appropriate amount of accumulated deferred taxes is at least $50,182,538.***

ISSUE 25: **What is the appropriate amount and cost rate for short-term debt to include in the projected test year capital structure?**

OPC: *****The appropriate amount of short-term debt $18,821,767 and cost rate for short-term debt to include in the projected test year capital structure, which is 1.78%. EX 46, Schedule D; EX 65*

ISSUE 26: **What is the appropriate amount and cost rate for long-term debt to include in the projected test year capital structure?**

OPC: *****The appropriate amount of long term debt is $194,277,560 and the cost rate is 4.28%. EX 46, Schedule D; EX 65*

ISSUE 27: **What is the appropriate amount and cost rate for customer deposits to include in the capital structure?**

OPC: *****The appropriate amount of customer deposits is $ $3,535,924 and the cost rate is 2.64%. EX 46, Schedule D; EX 65*

ISSUE 28: **What is the appropriate equity ratio to use in the capital structure for ratemaking purposes?**

OPC: *****The Commission should authorize an equity ratio of no more than 46.9%.*

ARGUMENT:

The capital structure refers to the way a company finances its overall operations through external financing. TR 400. The capital structure is made up of debt and equity of which equity requires a higher cost than debt capital because it is a lower priority claimant on the company's assets. TR 400. In a competitive market, a firm has an incentive to minimize its WACC to maximize the firm's value. TR 401-02. However, regulated utilities under a rate base rate of return model, where there is no competition, do not have the same incentive because a higher WACC results in higher rates, all else held constant. TR 402. Thus, because there is no incentive for a regulated utility to minimize its WACC, a Commission standing in the place of competition must ensure that the regulated utility is operating at the lowest reasonable WACC. TR 402.

FCG's proposed capital structure consists of 40.4% long-term debt and 59.6% common equity from investor-supplied sources, which equates to a debt-equity ratio of only 0.68. TR 404. OPC witness Garrett and FCG witness Nelson used the same proxy group of utilities in their cost of capital analyses. TR 404. The proxy group of utilities reported an average debt ratio of 53.1, which equates to a debt-equity ratio of 1.13. TR 404-05. This is a significantly higher debt-equity ratio than the one proposed by the FCG. TR 405.

FCG argues that their requested 59.6% equity ratio is appropriate since that is the equity ratio of their parent company, FPL, and thus the source of FCG's financing. TR 113-14. However, there is no merit to this assertion. Regulators generally establish capital structures for utilities based on the operational and market risk factors that apply to the individual utility. TR 410. Electric utility companies like FPL face different market risks and pressures than do gas utility companies, such as FCG. TR 410-11. This inherent difference becomes apparent when the Commission considers that while FPL's has maintained its equity ratio between 59-60% for over two decades, FCG's equity ratio for the last twenty years averages to be less than 44%. TR 410-11. FCG's most recent rate case, which took place when FCG was a subsidiary of Southern Company, established FCG's current equity ratio of 48%.[34] Interestingly, Gulf Power, an electric utility, was also a subsidiary of Southern Company at that time, and utilized an equity ratio of 52.5%.[35] This further demonstrates that the Commission historically evaluates utilities in different industries individually given the natural differences in risk between the industries, and despite those utilities having the same parent company.

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[34] PSC Order No. PSC-2018-0190-FOF-GU, issued April 20, 2018, p. 17, *In re: Petition for rate increase by Florida City Gas.*

[35] PSC Order No. PSC-2017-0178-S-EI, issued May 16, 2017, p. 13, *In re: Petition for rate increase by Gulf Power Company* and *In re: Petition for approval of 2016 depreciation and dismantlement studies, approval of proposed depreciation rates and annual dismantlement accruals and Plant Smith Units 1 and 2 regulatory asset amortization, by Gulf Power Company.*

Additionally, FCG witness Nelson's rebuttal testimony failed to demonstrate the reasonableness of FCG's request. In fact, her rebuttal testimony improperly attempts to shift the burden of proof from FCG to intervenors when she states, "…the Intervenor Witnesses have not demonstrated that the Company's requested capital structure deviates substantially from sound utility practice." TR 149. This is inappropriate. "[The] [b]urden of proof in a commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates."[36] Witness Nelson also attempts to critique all intervenor witnesses whose recommendations, "presume that FCG should be financed with the same proportions of equity and debt as the 'average' natural gas utility in 2021." TR 149. Rather than explaining why that logical basis of comparison is flawed, witness Nelson merely claims that "utility capital structures vary wildly," which in fact is precisely why the intervenors' recommendations based on an average are logical. TR 149.

OPC witness Garrett's recommended 53.1% long-term debt ratio would result in an equity ratio of 46.9%, and therefore a debt-to-equity ratio of 1.13, which is consistent with the proxy group average. TR 328,412; EX 65.

<u>ISSUE 29:</u> **What is the appropriate authorized return on equity (ROE) to use in establishing FCG's projected test year revenue requirement?**

OPC: *****OPC Witness Garrett's testimony and exhibits address the appropriate authorized ROE of 9.25% to include in the projected test year capital structure shown on Exhibit HWS-2, Schedule D, page 1 of 2.*

<u>ARGUMENT:</u>

Pursuant to the standards set forth in *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia*,[37] and *Federal Power Commission v. Hope Natural Gas*

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[36] *Fla. Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982).
[37] *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923). (*Bluefield*)

Co.,[38] the financial integrity of a company should be sufficient to attract capital on reasonable terms under a variety of market and economic conditions. TR 51-2. As is typical with experts and regulators, witness Garrett relied on the Discounted Cash Flow (DCF) model and Capital Asset Pricing Model (CAPM) to estimate the cost of equity and weight those results against the results from proxy groups. TR 45. Witness Garrett used the same proxy group chosen by FCG's witness Nelson. TR 351. As part of his analysis, witness Garrett accounted for the effects of recent inflation which has negatively impacted the entire U.S. markets and disproportionately affected utility customers relative to utility shareholders. TR 337. He accounted for this in the yields on 30-year Treasury bonds (which can fluctuate given the Federal Reserve's response to inflation more directly than the current level of inflation) as a proxy for the risk-free rate in the CAPM. TR 338.

Pursuant to *Hope* and *Bluefield*, there are two primary legal principles that must be observed when determining an appropriate return on equity (ROE) in utility matters. TR 349. First, risk is the most important factor in determining the awarded return. TR 349. The awarded return should be commensurate with those returns on investments of corresponding risk. TR 349. The more (or less) risk an investor assumes, the more (or less) return the investor requires. TR 349. Since utility stocks are low risk, the return required by equity investors should be relatively low. TR 349. Witness Garrett used financial models to closely estimate the Company's cost of equity, and those models account for risk. TR 349. The cost of equity models confirm that the industry experiences relatively low levels of risk by producing relatively low cost of equity results. TR 349. Therefore, the awarded ROE in this case should reflect FCG's relatively low market risk. TR 349.

The other guiding legal principle to be followed is that the awarded return should be sufficient to assure financial soundness and integrity under efficient management. TR 349. *Hope*

[38] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). (*Hope*)

establishes that the allowed return should be based on the actual cost of capital.[39] TR 342. If the Commission sets the awarded return based on witness Garrett's lower and more reasonable proposed ROE, the Commission will better comply with the U.S. Supreme Court's standards, allow the Company to maintain its financial integrity, and allow the Company to achieve reasonable returns for its investors. TR 343. However, if the Commission sets the awarded ROE much higher than the true cost of capital, as requested by FCG, it will run contrary to the U.S. Supreme Court's mandates and result in an inappropriate transfer of wealth from ratepayers to shareholders. TR 343.

Both OPC witness Garrett and FCG witness Nelson used the Discounted Cash Flow (DCF) Model and the Capital Asset Pricing Model (CAPM) to assist them with their recommendations to the Commission regarding ROE. The basic theory behind the DCF Model is that the value of a security is equal to the present value of the future cash flow it generates. TR 359-60. The major inputs necessary in the model are the stock price, the dividend, and the sustainable growth rate. While the stock price and the dividend are known inputs, the growth rate must be estimated. TR 360. Unfortunately, witness Nelson used non-sustainable and unreasonably high growth rates in her DCF model, which led to the extremely high cost of equity result of 11.2%. TR 376. The growth rates witness Nelson used were in fact two times the projected annual long-term nominal U.S. GDP. TR 376-77. In contrast, witness Garrett used more reliable long-term growth projections, which resulted in a much more reasonable 7.1% cost of equity for FCG. TR 375.

When witness Garrett and witness Nelson ran their CAPMs, similar differences occurred. The CAPM is a market-based model founded on the principle that investors expect higher returns for incurring additional risk. TR 378. Using the CAPM to estimate the cost of equity of a regulated utility is consistent with the legal standards governing the fair rate of return. TR 378. The three

[39] *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. at 603.

inputs for the CAPM model include the risk-free rate, the beta coefficient, and the equity risk premium (ERP). TR 378. The ERP represents the level of return investors expect above the risk-free rate in exchange for investing in risky securities. TR 381. Witness Garrett also testified that the ERP is also arguably the single most important factor in estimating the cost of capital in this matter. TR 381.

Witness Garrett testified that there are three different ways to estimate the ERP: calculate a historical average, take a survey of experts, or calculate the implied ERP. TR 381. In calculating the ERP, witness Garrett considered the results of the ERP expert surveys as well as the implied ERP calculations. TR 383. Ultimately, witness Garrett's CAPM cost of equity was 7.9%. TR 387. However, witness Nelson used an extremely inflated ERP of 12.27%, which led to the unrealistic cost of equity of 12.9%. Witness Nelson's CAPM analysis is flawed due to this overestimated 12.27% ERP. TR 389. For example, the highest ERP the Witness Garrett found in his research was 5.8%, which is less than half of the ERP Witness Nelson used. TR 389. Witness Nelson suggests that her use of an empirical CAPM accounts for a purported underestimation of the return required from low-beta securities in the real CAPM. TR 391. However, the betas used in the real CAPM have already been adjusted by Value Line to be higher, and sometimes overly adjusted for consistently low-beta industries like utilities. TR 391. Additionally, witness Nelson also overestimated the risk-free rate. TR 391. For these reasons, the Commission should disregard Witness Nelson's empirical CAPM results as unreliable.[40] TR 391-92.

Witness Nelson also suggested that FCG's size and flotation costs support FCG's request for a higher awarded ROE. TR 394-99. However, Witness Garrett points out that the size premium

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[40] The Federal Executive Agencies' expert witness, Christopher C. Walters, opined on many of the same shortcomings in Witness Nelson's testimony that Witness Garrett testified to, including the unsustainably high growth rates used in Ms. Nelson's DCF model, the flawed empirical CAPM methodology, and her incorrect ultimate conclusion that FCG's requested capital structure is reasonable. TR 486.

theory has been debunked since 1983. TR 395. Therefore, the Commission should ignore this suggestion. TR 394-96. With regard to the flotation costs, the Commission should also ignore Witness Nelson's recommendation for several reasons. FCG is not a publicly-traded company, which means that it does not issue securities to the public and thus would have no need to retain an underwriter. TR 397. FCG has not experienced any out-of-pocket flotation costs. TR 397. Additionally, investors already have access to the information they need about underwriter's costs when investors make their decision to purchase shares at a certain price, so the market has already adjusted for the costs without needing the Commission's involvement. TR 397-98. Finally, since FCG's proposed cost of equity is nearly 300 basis points above the market-based cost of equity, the Commission should not entertain FCG's arguments that the "size premium" theory and the flotation costs justify an even more exorbitant awarded return. TR 398-99.

Witness Garrett's thorough and objective analysis showed that FCG's cost of equity of approximately 8.0%. TR 399. Given the legal standards by which the Commission is bound, the Commission should award FCG an ROE of no more than 9.25%. TR 338. This ROE would result in fair, just, and reasonable rates, and would benefit both FCG's consumers as well FCG's shareholders. Setting the awarded ROE far above the cost of equity would result in an excessive transfer of wealth from FCG's customers to FCG and its shareholders. TR 339.

ISSUE 30: **Has FCG made the appropriate adjustments to remove all non-utility investments from the common equity balance?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 31: **What is the appropriate weighted average cost of capital to use in establishing FCG's projected test year revenue requirement?**

OPC: *OPC Witnesses Garrett and Schultz testimony, including errata, and exhibits show the appropriate weighted average cost of capital of 5.75% to use in establishing the projected test year revenue requirement.*

ARGUMENT:

OPC witness Garrett testified that the three primary components of a company's WACC are the cost of debt, the cost of equity, and the capital structure. TR 336. The cost of capital is expressed as a weighted average because it is based upon a company's relative levels of debt and equity, as defined by the particular capital structure of that company. TR 336. Pursuant to the standards set forth in *Bluefield* and *Hope*, financial integrity should be sufficient to attract capital on reasonable terms under a variety of market and economic conditions. Witness Garrett has recommended that the Commission impute a capital structure for ratemaking purposes consisting of long-term 53.1% debt, and a 9.25% return on equity.TR 328,411-12. This would result in an overall rate of return on 5.75%. TR 328, 411-12.

NET OPERATING INCOME

ISSUE 32: **Has FCG properly removed Purchased Gas Adjustment and Natural Gas Conservation Cost Recovery Clause revenues, expenses, and taxes-other-than-income from the projected test year?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 33: **Has FCG made the appropriate adjustment to Net Operating Income to remove amounts associated with the transfer of SAFE investments as of December 31, 2022 from clause recovery to base rates?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 34: **Should FCG's proposal to transfer outside service costs incurred for clause dockets from base rates to each of the respective cost recovery clause dockets be approved and, if so, has FCG made the appropriate adjustments to remove all such outside service costs incurred for clause dockets from the projected test year operating revenues and operating expenses?**

OPC: No position.

ISSUE 35: **What is the appropriate amount of miscellaneous revenues?**

OPC: No position.

ISSUE 36: **Is FCG's projected Total Operating Revenues for the projected test year appropriate? (Fallout Issue)**

OPC: *****No.*

ARGUMENT:

FCG expects their average annual customer account to grow by 1,032 from 2023 to 2024 and 1,019 from 2024 to 2025. TR 1263. Witness Campbell was asked if he had calculated the increase to revenues that would result from the forecasted increase in customers. TR 1263. The witness responded that he had not forecasted the impact but estimated it to be approximately $200,000 per year. TR 1263. In addition, the witness admitted that customer and therm forecasts could typically become progressively less reliable the further they are projected into the future. TR1264.

ISSUE 37: **Has FCG made the appropriate adjustments to remove all non-utility activities from operation expenses, including depreciation and amortization expense?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 38: **What is the appropriate amount of salaries and benefits to include in the projected test year?**

OPC: *****Base payroll should be reduced by $793,501. Excessive incentive compensation should be reduced by $524,119. Incentive compensation should be reduced by $398,746. Long term incentive compensation should be reduced by $163,461. Benefits should be reduced to match actual employee complement in the amount of $49,533. Payroll taxes should be reduced by $122,767 as reflected in Issue 52. Affiliate payroll related expenses should be reduced by the amount of $405,440, and affiliate SERP expense should be reduced by $29,576.*

ARGUMENT:

FCG's response to OPC's First Set of Interrogatories, No. 62,[41] stated that, "FCG did not remove any incentive compensation costs from the 2023 test year." In Docket No. 20210015-EI, FPL, the Company's affiliate, excluded portions of executive and non-executive incentive compensation that FPL stated were excluded by the 2010 FPL rate case order. That decision first excluded executive and non-executive incentive compensation associated with an above target ratio and adjusted it to the target ratio. The decision then excluded 100% of what was defined as target executive compensation and 50% of what was identified as target non-executive compensation. FCG's incentive compensation costs are based on the same plans for which FPL excluded costs from recovery in Docket No. 20210015-EI. TR 306-12. At a minimum, since FCG is using the same incentive compensation plan as FPL, FCG should treat the costs of the incentive compensation for setting rates consistent with that of FPL. TR 306-12.

Based on Order No. PSC-2010-0153-FOF-EI, 100% of the long term incentive plan costs should be excluded. Short term incentive plan costs should be adjusted first by assuming the 2021 expense amount of $797,492 is the target amount reducing the requested cost by $524,119 and then, following the order, the short term target amount of $797,492 should be reduced by 50% or $398,746. The adjustment is conservative since, the Company failed to provide justification for including any incentive cost, therefore all the cost could be excluded. TR 312.

Additionally, FCG's request assumes an employee complement of 187 full-time employees ("FTEs") throughout the 2023 test year without any consideration of a vacancy factor. TR 304. The Company filled 12 positions as of June 30, 2022 which should increase the December 31, 2021 year-end count of 163 to 175. TR 304. However, the June 30, 2022, employee count was 173 a clear indication that as employees are added, others leave, meaning vacancies occur. TR 304.

[41] EX 160.

The vacancy concern is substantiated by the fact that the projected complement for 2021 was 175 FTEs and the year-end complement and average complement were 163 FTEs and 159 FTEs, respectively. The fact that vacancies occur, and projected additions do not always occur cannot be ignored when setting rates. TR 304.

The Company did not detail any specifics as to what positions are required and why they are required. When the Company was asked for additional information about the positions requested, the response to OPC's Fifth Set of Interrogatories, No. 170[42] referred to page 6 of FCG witness Howard's direct testimony. However, FCG witness Howard's testimony at Page 6 simply stated the request is reasonable and appropriate, but it does not mention adding employees. This is not justification. TR 305

Additionally, in 2021, actual payroll, excluding recovery clause costs, was $11,232,775, which was $1,893,794 under the Company budget of $13,126,569. The variance explanation offered by the Company in response to OPC's Fourth Set of Interrogatories, No. 149,[43] was that actual payroll costs were lower than budgeted because the Company was unable to fill the positions within the budgeted timeline. TR 305. Clearly, the projections are overly optimistic.

Based on the most known and measurable employee count of 173 FTEs, as of June 2022, the payroll expense request of $10,598,909 should be reduced by $793,501 to $9,805,408. The adjustment multiplies the known vacancies as of June 30, 2022, times the average payroll expense per employee, excluding incentive compensation. TR 306.

In summary, base payroll should be reduced by $793,501. TR 306. Excessive incentive compensation should be reduced by $524,119. TR 312. Incentive compensation should be reduced by $398,746. TR 524. Long term incentive compensation should be reduced by $163,461. TR 312.

[42] EX 163.
[43] EX 162.

Benefits should be reduced to match actual employee complement in the amount of $49,533. TR 312. Payroll taxes should be reduced by $122,767 as reflected in Issue 52. TR 321. Affiliate payroll related expenses should be reduced by the amount of $405,440, and affiliate SERP expense should be reduced by $29,576. TR 320-21.

ISSUE 39: **What is the appropriate amount of the affiliate expense to be included in the projected test year?**

OPC: ***Yes, AMI O&M expense should be removed from the projected test year since the Commission should not grant FCG's request to burden customers with the cost of this experimental program. OPC Witness Schultz addresses this in his testimony and exhibits including, but not limited to, Schedule C-7.***

ARGUMENT:

The OPC has a number of concerns regarding FPL's affiliate costs. The first issue is that the Company was unable to provide a comparison of affiliate costs included in the 2018 settlement to the requested 2023 affiliate costs. TR 320. As this information related to costs charged by an affiliate is necessary to determine whether the costs are appropriate, this lack of information is unacceptable.

The second issue is that the Company has $405,440 of costs that the Commission has disallowed all or part of in prior dockets. These costs were included in a document provided in response to OPC's First Request for Production, No.1 titled "Affiliate Spend WV3." TR 320; EX 167. These costs should again be disallowed in the current case.

The third issue is that $29,576 of SERP costs were included in Corporate Service Charges. EX 162. As SERP costs are considered excessive compensation, the OPC recommends their disallowance as well. Both adjustments, $405,440 and $29,576, are shown on Exhibit 46, Schedule C-9.

ISSUE 40: **What is the appropriate amount of pensions and post-retirement benefits expense to include in the projected test year?**

OPC: *Affiliate SERP costs in the amount of $29,576 should be removed as shown in Issue 39.*

ARGUMENT:

See argument in Issue 39.

ISSUE 41: **Is the injuries and damages expense in the test year reasonable?**

OPC: *No. OPC Witness Schultz addresses this issue in his testimony and exhibits including but not limited to, Schedule C-5. The Commission should adjust the injuries and damages expense by $212,790.*

ARGUMENT:

Injuries and damages expense doubled from 2019 to 2020 and doubled again from 2020 to 2021. During that period the cost increased from $111,135 to $243,888 to $552,519. TR 314. The Company is requesting $515,304. TR 314. This doubling of costs related to safety is of great concern. This increase, which took place under the ownership of FPL, is of concern as it relates to the following: insurance or reserve accruals to protect the service company against injuries and damages claims by employees or others, losses of such character not covered by insurance, and expensed incurred from settlements of such claims. TR 314-15. Is should be noted that in both 2020 and 2021, the Company failed to meet its goals for Safety: Number of OSHA Recordables (per 200,000 hours). TR 315. OPC recommends using a three-year average for injuries and damages expense, a reduction of $212,790, as shown on Exhibit 46, Schedule C-5.

ISSUE 42: **Is the insurance expense in the test year reasonable and/or appropriate?**

OPC: *No. OPC Witness Schultz addresses this issue in his testimony and exhibits including but not limited to, Schedule C-6. The Commission should adjust the Directors & Officers Liability (DOL) insurance amount by $9,431.*

ARGUMENT:

As DOL protects the Company's officers and directors from lawsuits that arise from their own questionable decisions, and the lawsuits are generally brought by shareholders, the ratepayers receive no benefit from this insurance. Since the ratepayers are not receiving the benefit, they should not bear the costs. OPC recommends a complete disallowance of this cost, a reduction of $9,431 to DOL insurance as shown on Exhibit 46, Schedule C-6. Cost should follow benefit, so although 50% has been allowed in prior dockets, the OPC recommends a complete disallowance of this expense. If the Commission is disinclined to remove all of the cost, at least 50% should be removed.

ISSUE 43: **Is the level of projected contractor cost reasonable, appropriate and/or justified?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 44: **Should the projected test year O&M expenses be adjusted to reflect changes to the non-labor trend factors for inflation and customer growth?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 45: **Should FCG's proposal to continue the Storm Damage Reserve provision included in the 2018 Settlement Agreement be approved and, if so, what is the appropriate annual storm damage accrual and target reserve amount?**

OPC: *No. The Storm Reserve Accrual in the amount of $57,500 should be discontinued and removed.*

ARGUMENT:

The Company's storm reserve is currently adequately funded based on the historical record. In the prior 46 months, only two storms had costs charged against the reserve for a total of $58,127. TR 313. This is an annual average of $15,164. At $162,290 as of March 31, 2022, if costs continue at this level, the storm reserve would be sufficient for more than 10 years. As such, there is currently no need for a further increase to the reserve. It should be further noted that the storm reserve increased $14,375 from April 2022 to June 2022. TR 314.

The Company provided a self-insurance reserve study to support its requested increase. TR 313. The study claims an expected annual cost of $190,000. TR 313. However, that claim is not consistent with the historical record which, again, reflected actual annual charges of only $15,164. TR 313. When asked if the Company had discussed the fact that the reserve was already three times higher than the historical costs, the witness replied that they relied on the independent expert. TR 679-80. As the actual historic costs are much lower than the Company's estimated costs, the increase to the reserve should be rejected. The OPC recommends the discontinuation of the annual accrual of $57,500 as of January 1, 2023, as shown on Exhibit 46, Schedule C-4.

ISSUE 46: **Is a Parent Debt Adjustment pursuant to Rule 25-14.004, Florida Administrative Code, appropriate, and if so, what is the appropriate amount?**

OPC: ***Yes, a Parent Debt Adjustment is appropriate and is required by Rule 25-14.004, F.A.C. in this case. OPC Witness Schultz addresses this issue in his testimony and exhibits including, but not limited to, Schedules C and C-12. The Commission should approve a Parent Debt Adjustment of $382,452.*

ARGUMENT:

This issue is simple. The Commission has an effective, valid Rule 25-14.004, F.A.C. ("PDA Rule") that is not subject to a waiver (requested or granted pursuant to Section 120.542, Fla. Stat.) which mandates the required application of the Parent Debt Adjustment ("PDA") unless the utility rebuts the presumption that debt of the parent may be invested in the equity of the subsidiary. The burden of proof – while always on the company to justify its revenue requirement – fell heavily on FCG to rebut the presumption, and they failed.

OPC expert Schultz testifies that the evidence filed by the company in the MFRs failed to rebut the PDA Rule presumption. He noted that the original investment in FCG upon the closing of the transaction after purchase by NextEra does not represent an equity contribution. He further points out that the transactions after the acquisition do not eliminate the fact that the initial investment of FPL contains a portion of the debt that is embedded in the FPL capital structure. TR 323. At hearing, the evidence overwhelmingly supported Mr. Schultz's testimony.

FCG witness Campbell admitted to each of the key affirmative elements contained in the PDA Rule. This is a proceeding to establish revenue requirements. FCG is a regulated company. FCG is a subsidiary of FPL. FCG and FPL join in the filing of a consolidated tax return. TR 1207-1208. The only question for the Commission to resolve is whether the company carried its burden to rebut the presumption that parent debt may be invested in FCG's equity. FCG offered no evidence to rebut this very specific presumption.

FCG was apparently aware of the PDA Rule when it filed its case on May 31, 2022. However, no direct testimony was filed rebutting the presumption. Only a token effort to rebut the presumption was offered in a footnote buried in MFR C-26, [44] which stated,

> Florida City Gas is not including an income tax adjustment for interest expense of Florida Power & Light Company's investment in equity of Florida City Gas. Florida City Gas's dividends to parent have exceeded equity contributions from parent.

TR 1209-1210, EX 4, Schedule C-26.

To the extent that this affirmative statement by FCG was intended to rebut the presumption, it miserably failed.

The evidence in this case demonstrated that FCG distributed no more than $63,750,143 in dividends while paid-in capital (or equity contributions) from FPL totaled over $151 million in addition to the retained earnings on the books that FPL effectively contributed to the business

[44] EX 6.

when it acquired the company in July 2018.[45] TR 837 - 854, 1213-1215, 1218, EX 186, EX 204. Not only does this fail to even address the issue of the degree to which the source of funds invested in the subsidiary originate from FPL debt, it demonstrates that the statement in the MFR C-26 is patently false. The Commission should hold the company accountable for this representation. The solicited testimony on re-direct that the MFR C-26 was a historical period schedule is a red herring. TR 978. The statement on the MFR was false as shown by the evidence. The solicited testimony on re-direct that the actual dividends in the calendar year 2021 exceeded capital contributions in that year is nonsensical. The evidence showed that since FPL became the owner of FCG, the cumulative investment in FCG greatly exceeded dividends. Furthermore, the transactions that yielded a Commission authorized 48% equity ratio are consistent with the presumption that FPL (and perhaps NEE debt) is invested in the equity of FCG. The claim made on the MFR schedule was that "dividends to parent have exceeded capital contributions." FCG witness Campbell acknowledged that the dividend and capital contribution process or "pattern" is one that occurs over time:

> No, it's -- also your -- your equity also grows by the amount of retainings and [sic] earnings you have each year, so it's not absolutely impossible. But depending on the amount of time that we look at this, there could be a situation where, you know, if it's six, seven, eight years, you could start looking at a fact pattern where you start dividending more money back up to FPL as you are balancing the capital structures and staying within and targeting that approved capital structure.

TR 1217.

The amount of equity on FCG's books is a continuous process as demonstrated in the balance sheets contained in Exhibit 186.

[45] Witness Campbell claimed that he had different figures for dividend, but when he asked what they were he said, "I don't remember off the top of my head." This response demonstrates a failure to meet the company's burden of proof. The sworn annual report numbers are unrebutted and demonstrate that the claim in the Note on MFR C-26 is incorrect.

Pivoting from the incorrect statement in the initial filing, on rebuttal FPL, through Mr. Campbell, claims that FCG should be excused from application of the PDA Rule because its proposed equity ratio of 59.6% -- if granted over the objections of the intervenors – would be the same as the parent. This superficial assertion cannot rebut the presumption. Matching equity ratios are meaningless in this context. What matters, and what FPL and FCG should have addressed, is whether the source of the equity investment can be proven to have *no debt financing* as the originating source of the funds that FPL recorded as equity on FCG's books. FCG failed in this task. In fact, the evidence demonstrates that FCG was acquired from Southern using 100% debt financing. TR 908, EX 191 at 43. If anything, this created a presumption that debt of the grandparent was the true source of the investment in FCG.[46]

The 48% equity ratio that was established after three and a half years of FPL ownership cannot be grown from 48% to 59.6% without exacerbating the disparity in equity contributions from FPL greatly exceeding dividends distributed to FPL. TR 1217-1218. This does not meet the PDA Rule's rebuttal requirements. The evidence further demonstrates that by the end of 2018, FPL had invested 100% equity of $299 million into FCG. TR 851, EX 186 at Bates numbered p. 151. The series of transactions that replaced the Southern Company capitalization with the FPL/NEE capitalization were facilitated by a series of debt transactions between 2018 and 2021 TR 1215, EX 191 at 43; EX 186 at Bates numbered pp. 16, 34, 50, 86, 98, 138, and 151; EX 204. While these transactions cannot be traced to the source of funds, the origin of the acquisition financing as debt and the use of debt instruments to mold the capital structure into the Commission-

[46] Although not raised in the OPC testimony of Mr. Schultz, the overall financing of the transaction of 100% debt implicates subsection (2) of the PDA Rule which mandates that "Where the regulated utility is a subsidiary of tiered parents, the adjusted income tax effect of all parents invested in the equity of the subsidiary utility shall reduce the income tax expense of the utility." The circumstances about the debt financing investment of NextEra in FCG supports the notion that the PDA adjustment proposed by OPC is conservative.

authorized equity ratio strengthen the presumption that there “may” be debt of FPL invested in FCG.

The PDA Rule does not require the Commission or intervenors to prove that debt *is* invested in the equity of the subsidiary. The rule presumes that that debt “may” be invested in the FCG equity. FCG must prove that it cannot be. Today at a 48% equity ratio (derived at Exhibit 186 at Bates numbered p. 16, lines 4, 5, 8, and 16) it is fairly obvious that the source of the equity contributions from FPL contain debt on the parent or grandparent books. In the event that the Commission agrees to allow the unheard of increase of 11 percentage points in the equity ratio to 59.6%, the facts supporting presumption of parent debt invested in FCG equity will not materially change. Debt will still be embedded in the FCG equity. It matters not what the equity ratio of the parent is; what would have been important for defeating the presumption in the PDA Rule would have been to show that the source of the funds for the investment in the subsidiary can only be purely equity. FPL did not and cannot meet this burden. To the contrary, the overwhelming evidence is that the debt is affirmatively shown to be embedded in FPL’s investment in FCG. Federal income tax expense should be reduced by $382,452. EX 46, Schedule C-12.

<u>ISSUE 47:</u> **What is the appropriate annual amount and amortization period for Rate Case Expense?**

OPC: *****OPC Witness Schultz addresses this issue in his testimony and exhibits including, but not limited to, Schedule C-8. Rate case expense should be amortized over four years. The appropriate annual amount of rate case expense should be reduced by $142,785.*

<u>ARGUMENT:</u>

The Company’s requested rate case expense increase is excessive. The test year costs have increased $769,350 or 62.97% over the costs from the Docket No. 20170179-GU. TR 317. The requested costs for the test year depreciation study have more than doubled. TR 317. Although the scope of the study has increased, the requested amount is still excessive.

The Company has included FPL replacement costs of $1,564,981. TR 318. This amount is unwarranted. The result of the Company's usage of FPL assistance resulted in the elimination of $725,000 of costs from the last case. TR 318. However, even if that amount was escalated using the compound multiplier from MFR Schedule C-37, [47] the replacement cost would be only $876,018. TR 318. As such the requested $1,564,981 costs are inappropriately higher than the eliminated costs. Further, these costs are higher than the entire Benchmark rate case expense of $1,476,260 applicable to the entire Docket No. 20170179-GU as calculated by Mr. Schultz and shown on Exhibit 46.

Another concern is that the Company has failed to take advantage of a streamlined regulatory approach that was designed to benefit customers. The approach is the Proposed Agency Action (PAA) method and its use was authorized by Florida law to seek rate relief. TR 318. It appears that the Company's decision to ignore this opportunity to benefit ratepayers instead benefitted shareholders through an inflated equity ratio and a mechanism that would result in increased profits. TR 319. As such, this failure to assist ratepayers is additional cause for reducing ratepayers share of rate case expense.

The OPC recommends reducing depreciation study costs by $50,000 and FPL costs by $521,139. This is a total reduction to rate case costs of $571,139. The results, as shown on Exhibit 46, Schedule C-8, are a reduction to working capital of $499,746 for the deferred rate case cost and a reduction of $142,785 to rate case expense included in the cost of service.

[47] EX 6.

ISSUE 48: **Should an adjustment be made to Uncollectible Accounts and for Bad Debt in the Revenue Expansion Factor?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 49: **What is the appropriate amount of projected test year O&M expenses? (Fallout Issue)**

OPC: ***OPC Witness Schultz addresses this issue in his testimony and exhibits including, but not limited to, Schedule C. The total amount of O&M expense, including removal of AMI O&M in the amount of $20,000, should be reduced to no more than $23,174,085. AMI O&M expense should be removed from the projected test year since the Commission should not grant FCG's request to burden customers with the cost of this experimental program. OPC Witness Schultz addresses this in his testimony and exhibits including, but not limited to, Schedule C-7.*

ARGUMENT:

The proposed AMI costs are related to an experimental program designed to obtain data related to the deployment, benefits, and cost savings related to AMI with two-way communications. TR 297. The proposed program includes one year for meter installation and three years of evaluation. TR 297. Costs include $3.4 million total capital expenditures, and O&M expense of $20,000 for administration of the pilot program. TR 298.

It would be inappropriate to recover the costs for this program from ratepayers. As the program is experimental, it is not known whether ratepayers will receive any benefit. In fact, the Company's witness admitted that it is not known whether a full scale deployment of the AMI technology is reasonable or prudent. TR 664. Further, even if there is a benefit, no such benefit has been reflected in the Company's filing. It would be inappropriate for ratepayers to be responsible for costs but not receive any resulting benefit. There is an additional concern due to the lack of denial of the possibility of a future sale of the Company. TR 298.

In addition, the Company witness stated that the program will provide significant benefit including cost savings. TR 659. For example, one potential benefit is a reduction to costs associated with driving routes to read meters on a monthly basis. TR 665. However, the Company could not provide an estimate of the savings. TR 665. It should be noted that the Company's shareholders will benefit from any cost savings that result from the program absent any savings being reflected in the filing. The OPC recommends a reduction of $837,500 to capital costs, a reduction of $46,913 to depreciation expense, and a reduction of $20,000 to O&M expense. These are adjustments are shown on Exhibit 46, Schedule B-3.

ISSUE 50: **Should any adjustments be made to the amounts included in the projected test year for amortization expense associated with the acquisition adjustment?**

OPC: *****Yes, amortization expense associated with the acquisition adjustment in the amount of $721,894 should be removed.*

ARGUMENT:

As demonstrated in Issue 15, Commission policy does not allow for an acquisition adjustment resulting from a prior transaction to survive a subsequent purchase. Accordingly, no amortization of the acquisition adjustment can be included in test year expenses. See argument on Issue 15.

ISSUE 51: **What is the appropriate amount of Depreciation and Amortization Expense for the projected test year?**

OPC: *****The total amount of Depreciation and Amortization Expense should be reduced to no more than $18,189,244, after making the adjustments identified in lines 18-22 of Exhibit 46, Schedule C, page 2 of 2.*

ISSUE 52: **What is the appropriate amount of projected test year Taxes Other than Income?**

OPC: *****OPC Witness Schultz addresses this issue in his testimony and exhibits including, but not limited to, Schedule C. The total amount of Taxes Other than Income should be reduced to no more than $6,263,843, after the payroll tax adjustment of $122,767. See also Issue 39.*

ISSUE 53: **What is the appropriate amount of projected test year Income Tax Expense? (Fallout Issue)**

OPC: ***OPC Witness Schultz addresses this issue in his testimony and exhibits including, but not limited to, Exhibit 46, Schedule C. The appropriate amount of income tax expense is no more than $241,372.***

ISSUE 54: **What is the appropriate amount of Total Operating Expenses for the projected test year? (Fallout Issue)**

OPC: ***OPC Witness Schultz addresses this issue in his testimony and exhibits including, but not limited to, Exhibit 46, Schedule C. The Total amount of Operating Expenses should be reduced to no more than $49,398,824.***

ISSUE 55: **What is the appropriate amount of Net Operating Income for the projected test year? (Fallout Issue)**

OPC: ***OPC Witness Schultz addresses this issue in his testimony and exhibits including, but not limited to, Exhibit 46, Schedule C. The total amount of Net Operating Income should be increased to at least $15,342,115. In addition, OPC believes that because revenue projections are understated and the Company has already recovered over $11,596,631 from ratepayers for the LNG facility not yet used and useful, a credit should be reflected to prevent a double recovery of the plant cost once it is put into service.***

REVENUE REQUIREMENTS

ISSUE 56: **What are the appropriate revenue expansion factor and the appropriate net operating income multiplier, including the appropriate elements and rates for FCG?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 57: **What is the appropriate annual operating revenue increase for the projected test year? (Fallout Issue)**

OPC: ***The Commission should authorize a base rate revenue increase of no more than $4,805,981. This increase should be reduced to reflect the impact of revenue projections being understated and to reflect the impact of the Company having already recovered over $11,596,631 from ratepayers for the LNG facility not yet used and useful by means of a credit to prevent a double recovery of the plant cost once it is put into service.***

COST OF SERVICE AND RATE DESIGN

ISSUE 58: **Is FCG's proposed cost of service study appropriate and, if so, should it be approved for all regulatory purposes until base rates are reset in FCG's next general base rate proceeding?**

OPC: No position.

ISSUE 59: **If the Commission grants a revenue increase to FCG, how should the increase be allocated to the rate classes?**

OPC: No position.

ISSUE 60: **Are FCG's proposed Customer Charges appropriate?**

OPC: No Position.

ISSUE 61: **Are FCG's proposed per therm Distribution Charges appropriate?**

OPC: No Position.

ISSUE 62: **Are FCG's proposed Demand Charges appropriate?**

OPC: No Position.

ISSUE 63: **Are FCG's proposed connect and reconnection charges appropriate?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 64: **Is FCG's proposed per transportation customer charge applicable to Third Party Suppliers appropriate?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 65: **What is the appropriate effective date for FCG's revised rates and charges?**

OPC: *The effective date of FPUC's revised rates and charges should allow for time for implementation promptly after the Commission's final order in this matter.*

ISSUE 66: **Should the Commission give staff administrative authority to approve tariffs reflecting Commission approved rates and charges?**

OPC: No Position.

OTHER ISSUES

ISSUE 67: **Should the Commission approve FCG's requested Reserve Surplus Amortization Mechanism (RSAM)?**

OPC: ***FCG's case is built around the RSAM. Absent the agreement of the parties, the Commission lacks the authority to approve the request as filed and cannot and should not approve the RSAM. Witness Schultz thoroughly demonstrates why the Commission should deny this request. Additionally, the Commission may not establish depreciation rates in a litigated rate case for the express purpose of creating a depreciation reserve surplus. Such a practice would be a departure from GAAP and Commission Rules. A RSAM would eliminate any incentive for FCG to generate efficiencies, and would be grossly unfair to FCG's current and future customers.*

ARGUMENT:

This poorly worded issue should be framed in two parts. The first part should be a threshold legal issue that requires the Commission to address its authority to consider and grant the Company request to establish a RSAM. The legal issue that has been raised by the OPC reads:

> Absent a stipulation of the parties, does the Commission have the authority to establish depreciation rates in a general rate case for the express purpose of creating a depreciation imbalance (surplus) and which are based on parameters which are not factually based on a depreciation study?

Adjunct to this issue is the issue about whether the Commission has the authority to establish a RSAM mechanism that can be utilized in conjunction with the artificially created surplus or Reserve Amount.

The Commission declined to list the issue in the prehearing order, when it erroneously concluded that the legal issue "could be addressed" in currently worded issue(s).[48] This ruling denies the customers the right to have the Commission make a separate and distinct threshold ruling on its legal authority to establish the specific two-way amortization mechanism requested

[48] Docket No. 2022-0069-GU, Document No. 11918-2022, Prehearing Conference Transcript at 17-31, 35. The Prehearing order (Order No. PSC-2022-0413-PCO-GU) does not expressly list the ruling but the omission speaks for itself.

by the company. The OPC is nevertheless entitled and obligated to address the legality of the RSAM and related depreciation reserve issues in this brief. Accordingly, the OPC will first address the legality of the Commission establishing a RSAM, in contrast to approving a RSAM as part of a negotiated settlement agreement, as requested by FCG. After addressing the legality, the OPC will present an *arguendo* discussion of the reasons why a RSAM should nevertheless be denied regardless of FCG's suggestion that the Commission's may possess authority to grant the request.

1. *The Commission has established a policy and practice that prohibits it from lawfully establishing a stand-alone RSAM outside of a settlement agreement.*

FCG and FPL ask this Commission to independently establish a depreciation reserve component that would be created by depreciation rates that are not supported by FCG's expert and which can be shrunken and enlarged by debits and credits that are completely unrelated to the changes in the depreciation accounting. Establishing these accounting measures in a rate case is prohibited by Commission rules and Section 120.68(7)(e)3, Fla. Stat.

As a part of its ratemaking function in establishing cost based rates in a base rate proceeding, the Commission has established the relevant policy through its rules, including the Depreciation Rule which states:

> (3)(a) Each utility shall maintain depreciation rates and accumulated depreciation reserves in accounts or subaccounts in accordance with the Uniform System of Accounts for Natural Gas Companies (USOA) as found in the Code of Federal Regulations, Title 18, Subchapter F, Part 201, as revised April 1, 2013, which is incorporated by reference in subsection 25-7.014(1), F.A.C. Utilities may maintain further sub-categorization.

Through these rules, the Commission has adopted and prescribed the FERC USOA, including Account 108[49] Accumulated Provision for Depreciation of Gas Utility Plant ("accumulated

[49] See, 18 CFR 201, Account 108, Uniform System of Accounts, Federal Energy Regulatory Commission, as incorporated by reference in Rule 25-7.014(1), F.A.C.

depreciation reserve") in establishing the depreciation reserve accounting. In pertinent part, this rule states:

> A. This account shall be credited with the following:
>
> (1) Amounts charged to account 403, Depreciation Expense, or to clearing accounts for current depreciation expense for gas plant in service.
>
> ***
>
> B. At the time of retirement of depreciable gas utility plant, this account shall be charged with the book cost of the property retired and the cost of removal and shall be credited with the salvage value and any other amounts recovered, such as insurance.
>
> ***
>
> C. For general ledger and balance sheet purposes, this account shall be regarded and treated as a single composite provision for depreciation. *For purposes of analysis, however, each utility shall maintain subsidiary records in which this account is segregated according to the following functional classification for gas plant*:
>
> (1) Production–manufactured gas, (2) production and gathering—natural gas, (3) products extraction—natural gas, (4) underground gas storage, (5) other storage, (6) baseload LNG terminaling and processing plant, (7) transmission, (8) distribution, and (9) general. ***These subsidiary records shall reflect the current credits and debits to this account in sufficient detail to show separately for each such functional classification (a) the amount of accrual for depreciation, (b) the book cost of property retired, (c) cost of removal, (d) salvage, and (e) other items, including recoveries from insurance.*** Separate subsidiary records shall be maintained for the amount of accrued cost of removal other than legal obligations for the retirement of plant recorded in account 108, Accumulated provision for depreciation of gas utility plant.

(Emphasis added.)

In other words, the depreciation expense and the gross salvage are recorded in the accumulated depreciation reserve ("credit") while the cost of removal and an amount equal to the investment that retires are taken out of the accumulated depreciation reserve ("debit"). The

Commission's rules do not allow it to depart from this practice in establishing depreciation rates or debiting or crediting the reserve based on a basis not established in the rule. Regardless of the ability of parties to negotiate a RSAM in the context of other ratesetting trade-offs, the Commission itself cannot authorize credits to the depreciation reserve that are not described and prescribed in the USOA as required by the Depreciation Rule.

The principle that a utility regulator cannot depart from its obligation to set cost based rates and allow the use of the accumulated depreciation reserve to increase earnings in the ratesetting context finds support in United States Supreme Court precedent. While a debit or credit to accumulated depreciation reserve to achieve a certain ROE is not only contrary to the definition of the Account 108, and Commission rules as discussed *supra*, the court has buttressed this concept by ruling that the amounts in the accumulated depreciation reserve "represent the consumption of capital, on a cost basis."[50] Further, the Supreme Court puts depreciation as a cost in the following context thusly:

> "to that extent, subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered, and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return."[51]

In other words, the use of the accumulated depreciation reserve for ratemaking items that are unrelated to the retirement of utility plant, or the costs related to that retirement of utility plant, results in ratepayers providing more than their fair share of capital contributions to the utility. The Supreme Court expressed its approval of cost-based depreciation ratemaking (and, by implication, its disapproval of a departure from cost based ratemaking) in *Hope:*[52]

[50] *Lindheimer v. Illinois Bell Tel. Co.,* 292 U.S. 151, 169 (1934).
[51] *Id.*
[52] *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. at 606-07.

> Moreover, this Court recognized in *Lindheimer v. Illinois Bell Tel. Co., supra,* the propriety of basing annual depreciation on cost. By such a procedure, the utility is made whole and the integrity of its investment maintained. No more is required.
>
> ***
>
> Chief Justice Hughes said in that case (292 U.S. 4 pp. 292 U. S. 168-169): "If the predictions of service life were entirely accurate and retirements were made when and as these predictions were precisely fulfilled, the depreciation reserve would represent the consumption of capital, on a cost basis, according to the method which spreads that loss over the respective service periods. But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent, subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered, and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return."
>
> *See* Mr. Justice Brandeis (dissenting) in *United Railways & Electric Co. v. West,* 280 U. S. 234, 280 U. S. 259- 288, for an extended analysis of the problem.[53]

The Commission has a long-standing policy and practice of abiding by the Supreme Court's mandates by establishing depreciation rates based on cost. Regardless of whether a series of settlement agreements with FPL have, in the course of reaching negotiated revenue requirement concessions, established a RSAM approved on a "public interest" standard, the Commission has not been exempted from following its policy.[54] Independent establishment of a depreciation reserve in contravention of the mandatory use of the USOA and application of the Commission's own Depreciation Rule would be a prohibited departure from Commission policy.

2. *The negotiated FPL RSAM is unique, limited on its facts to the circumstances of its creation, and provides no precedent or support for what FCG is trying to do.*

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[53] *Federal Power Commission v. Hope Natural Gas C*o.,320 U.S. at 606, 606 nn. 10-11.
[54] Section 120.68(7)(e)3, Fla. Stat.

The FPL RSAM provides no precedent or support for allowing a natural gas local distribution company like FCG to have a RSAM. The conditions that led to the creation of the negotiated FPL RSAM do not apply to the FCG situation. The RSAM mechanism(s) negotiated and approved in the FPL cases and cited by FCG are isolated on a highly specific and historically unusual set of facts.

The record and Commission precedent demonstrates that the origin of the FPL RSAM was an evolutionary process that was over 20 years in the making and was initially the product of market forces that the Commission believed would create stranded assets. This agency sought to "write-off" potential stranded assets. Effectively the Commission addressed this concern by applying credits from excess earnings and increasing the credit balance of depreciation reserves so that underdepreciated plant could be retired from regulated accounts without leaving a debit balance to be recovered from future customers.[55]

By the early 2000s, it had become apparent that the stranded investment concerns did not materialize and that the previous accelerated recovery of plant had created an enormous theoretical depreciation imbalance in the form of a surplus. By the time of the filing of the 2009 rate case and depreciation study petitions (Docket Nos. 20080677-EI and 20090130-EI), FPL identified at least $1.2 billion in a theoretical depreciation reserve surplus, while the OPC's expert identified at least $2.75 billion. The Commission, FPL and the intervenor parties all agreed that the surplus was at least $1.208 billion and that it should be addressed in that case. The Commission found in the 2010 FPL Rate Case Order that "the [$1.2 billion] reserve surplus is of such a magnitude that its existence results in abnormal depreciation rates."[56]

[55] PSC Order No. PSC-2010-0153-FOF-EI, issued March 17, 2010, pp. 84-85, *In re: Petition for increase in rates by Florida Power & Light Company* and *In re: 2009 depreciation and dismantlement study by Florida Power & Light Company*. EX 195.
[56] *Id*. at 86.

Despite the record evidence supporting the creation of a larger surplus, the Commission limited its actions to the imbalance identified in the FPL depreciation Study.[57] Interestingly, FCG's parent company argued for addressing the enormous imbalance using remaining life technique and according to the Commission the company, "contended that remaining life approach to resolve reserve imbalances is the norm and there is no reason to deviate."[58]All parties concurred that $314.3 million of the surplus should be used to offset capital recovery schedules associated with retired plant. The remaining $894.6 million of surplus was ordered applied to reduce the revenue requirement by amortizing it over 4 years. This decision effectively applied one-fourth of the surplus to the test year revenue requirement and reduced rates immediately. Notably, the Commission did not adopt the OPC expert's $2.75 billion surplus determination or order that the additional $1.5 billion be used for any other purpose.

In the 2011 settlement of the disputes emanating for the 2010 FPL Rate Case Order, the signatory parties left the revenue requirement and ROE ordered in 2010 undisturbed, but agreed to allow FPL some discretion to vary the amortization of the surplus within a limited range of discretion. EX 196 at 20. The very first FPL Storm Cost Recovery Mechanism ("SCRM") was also negotiated and established as part of the negotiated consideration. The requirement to flow back the previously established $894.6 million over recovery of depreciation by the end of 2013 also remained in place. Nothing approaching these circumstances exists within this FCG request.

In 2012, FPL filed a rate case (permissible since there was no stay-out provision negotiated in the 2011 settlement) and recognized that there was slightly less than $200 million of the original $894.6 million remained to be amortized. Order No. PSC-2012-0428-PCO-EI at 131-132.[59] In a settlement of that 2012 case, the signatories agreed to combine an estimated $191 of the remainder

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[57] *Id.* at 81.
[58] *Id.* at 81.
[59] Docket No. 20120015-EI, *In Re: Petition for increase in rates by Florida Power & Light Company.*

of the original $894.6 million with $209 million of surplus from the fossil dismantlement reserve to create a $400 million Reserve Amount. Order No. PSC-2013-0023-S-EI at 19-20.[60] FPL was given full discretion to amortize that amount similar to the manner that FCG now requests. The revenue requirement agreed to in the settlement was 32.2% less than the filed revenue increase request.[61] Nothing approaching these circumstances exists within this FCG proposal.

In 2016, FPL filed a rate increase request and submitted a depreciation study that revealed a depreciation imbalance of only $80 million and its expert recommended use of the remaining life technique to correct it. EX 197 at 79,81. The OPC expert in that 2016 case (whose testimony was withdrawn[62]) identified a theoretical reserve surplus of $1.5 billion of which $923 million was recommended for flowback consistent with the 2010 FPL Rate Case Order. FPL sought an ROE of 11.5% (including a 50 basis point ROE inflator) and an initial revenue increase of $826 million in 2017 and an additional $270 million for 2018. After the hearing, a settlement was reached that set the ROE at 10.55%, and increased rates for 2017 and 2018 by $400 million and $209 million, respectively. The revenue requirement agreed to in the 2016 settlement was 58.2% less than the filed revenue increase request. TR 1152-1153. A RSAM was created incorporating $250 million of the $400 million reserve amount, including some from the original $894.6 million surplus identified in 2009, plus a negotiated $1 billion reserve surplus amount to yield a $1.25 billion Reserve Amount for use with the negotiated RSAM. Order No. 2016-0560-AS-EI at 24;[63] Order No. PSC-2019-0225-FOF-EI at 14.[64] Nothing approaching these circumstances exists within this FCG request.

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[60] Docket No. 20120015-EI, *In Re: Petition for increase in rates by Florida Power & Light Company.*

[61] FPL requested revenue increase of $516.5 million for 2013 as shown in Order No. PSC-2012-0428-PCO-EI at 8, while the agreed revenue increase was $350 million. Order No. PSC-2013-0023-S-EI at 11. (516.5 – 350)/516.5 = 32.2%.

[62] See Document No. 07063-2016 in Docket No. 20160021-EI.

[63] Docket No. 20160021-EI, *In Re: Petition for rate increase by Florida Power & Light Company.*

[64] Docket No. 20180046-EI, *In Re: Consideration of the tax impacts associated with Tax Cuts and Jobs Act of 2017 for Florida Power & Light.*

In 2021, the current FPL RSAM was the product of unused Reserve Amount of approximately $346 million of un-amortized Reserve amount[65] plus an amount of a negotiated depreciation reserve surplus to bring the available Reserve Amount to a maximum of $1.45 billion. The requested ROE in 2021 was 11.5% (including a 50 basis point inflator). The initial year revenue requirement request was $1.075 billion and the second year additional revenue increase amount was $605 million.[66] The final negotiated ROE was 10.6% and the final negotiated revenue requirement amounts were $692 million for 2022 and $560 million for 2023.[67] Each of these negotiated provisions that gave FPL discretion in usage of the Reserve Amount were the products of negotiated revenue requirement compromises and concessions and intended by the negotiating parties to be limited to the specific circumstances of the case and negotiated outcomes. Nothing approaching these circumstances exists within this FCG request.

FCG requests that the Commission violate its own order and pilfer a RSAM and tax mechanism provisions from an electric company negotiated agreement and add them to its full requested revenue requirement and ROE. Such pirating of individual provision of the settlement agreements was prohibited by a specific term that the Commission approved and agreed to enforce. FPL agreed to these provisions of the 2021 Settlement Agreement that contained at least 86 separate substantive negotiated terms (including the RSAM, the reserve Amount, limitations on the RSAM, etc.) with undoubtedly additional sub-parts that each represent individual terms that were each bargained-for consideration. The Commission approved them as a package in Order No. PSC-2021-0446-S-EI as expressly provided for below:

> WHEREAS, the Parties have entered into this Agreement in compromise of positions taken in accord with their rights and

[65] This amount theoretically includes some of the original $894.6 million of the original 2009 deregulation-induced surplus that the Commission ordered to be amortized. See discussion *supra.*
[66] PSC Order No. PSC-2021-0302-PHO-EI, issued August 10, 2021, p. 10, *In re: Petition for rate increase by Florida Power & Light Company.*
[67] PSC Order No. PSC-2021-0446-S-EI, issued December 2, 2021, p. 4, *In re: Petition for rate increase by Florida Power & Light Company.* EX. 194.

> interests under Chapters, 350, 366 and 120, Florida Statutes, as applicable, and as a part of the negotiated exchange of consideration among the Parties to this Agreement each has agreed to concessions to the others with the expectation that all provisions of the Agreement will be enforced by the Commission as to all matters addressed herein with respect to all Parties regardless of whether a court ultimately determines such matters to reflect Commission policy, upon acceptance of the Agreement as provide herein and upon approval in this public interest;
>
> ***
>
> 30. The provisions of this Agreement are contingent on approval of this Agreement in its entirety by the Commission without modification.
>
> ***
>
> No party will assert in any proceeding before the Commission or any court that this Agreement or any of the terms in the Agreement shall have any precedential value, except to enforce the provisions of this Agreement.

Order at 25, 55.

The Commission is obligated to follow its order and bar FPL and FCG from pirating these provisions that are inextricably tied to the entire bundle of bargained-for consideration. FCG is a subsidiary of FPL and witness Campbell is an employee of FPL. By advocating that the Commission borrow these provisions from the agreement, FCG is inviting the Commission to join it in violating the 2021 FPL Settlement Order. The Commission should decline the invitation.

FCG is not in a comparable situation where the Commission responded to market conditions and established a practice of accelerating depreciation for FCG in a way that shortened plant lives and created a surplus theoretical depreciation reserve. The FCG depreciation study revealed a *deficit* imbalance of only $2 million. TR 1160. There are no revenue requirement concessions, or other bargained-for consideration that would provide precedent for the Commission to ignore its own rules and policy and independently establish a Reserve Amount and RSAM.

3. PGS one-way reversal mechanism is not a precedent.

FCG sought on rebuttal to point to a negotiated provision in the 2020 Peoples Gas (PGS) Settlement as support or precedent for the RSAM. The negotiated PGS depreciation reserve reversal mechanism ("DRRM") was a negotiated provision in a comprehensive settlement of a rate case filed on the eve of hearing. PGS sought a net base rate increase of $61.7 million and an ROE of 10.75%. The negotiated settlement resulted in a base rate increase of $34.4 million with an authorized ROE of 9.9%. When the PGS depreciation study was filed, a $245 million depreciation reserve surplus was identified by the company's expert. TR 285-286, EX 200 at 15. In that study, the company's expert proposed that the imbalance should be corrected using the remaining life technique. TR 286. A specific term of the agreement allowed PGC to utilize a one-way DRRM at its discretion, up to $34 million.[68] Once the credits are transferred to the depreciation expense component of the income statement, they cannot be restored. While PGS is allowed to make reversals that result in achieved earnings up to the top of the range, the evidence demonstrated that, as of September 30, 2022, PGS had only reversed $14 million and the latest reversal only brought the achieved earnings to 9.77% as of September 30, 2022, or 17 basis points below the midpoint. TR1195; EX 201 at 14; EX 202, Schedule 1. Nothing approaching these circumstances exists within this FCG RSAM request.

Witness Campbell acknowledged that he had no idea what role the negotiated DRRM term played in the give-and-take or consideration for other terms such as the revenue requirement reduction of 44% or the 85 basis point reduction in the company-requested ROE. TR 1175. The PGS settlement contains a provision that, like the FPL agreements, is intended to isolate the compromises to the specific circumstances of the bargained-for consideration in the negotiations and the case. The PGS settlement, like the 2021 FPL settlement, contained at least 55 separate

[68] The $34 million is a maximum amount. $12 million of the surplus was restricted from reversal unless and until certain capital projects were completed and in service. EX 200 at 15, paragraph 4.(c). EX 200.

substantive negotiated terms (including the DRRM, the surplus, limitations on the use of the surplus and the DRRM, etc.) with undoubtedly additional sub-parts that each represent individual terms that were each bargained-for consideration. The Commission approved them as a package in accordance with the following recitals that are found in the Stipulation and Settlement Agreement approved in Order No. PSC-2020-0485-FOF-GU:

> The Parties have entered into this Agreement in compromise of positions taken in accord with their rights and interests under Chapters 350, 366 and 120, Florida Statutes, as applicable, and as a part of a negotiated exchange of consideration among the Parties to this Agreement, each party has agreed to concessions to the others with the expectation, intent, and understanding such that all provisions of the Agreement, upon approval by the Commission, will be enforced by the Commission as to all matters addressed herein with respect to all Parties.

EX 200 at 8.

Additionally, the parties agreed to the following terms:

> 12. <u>Commission Approval</u>
> (a) The provisions of this Agreement are contingent on approval of this Agreement ***in its entirety*** by the Commission without modification.
> (b) No Party will assert in any proceeding before the Commission that this Agreement or any of the terms in the Agreement shall have any precedential value.
>
> ***
>
> The Parties further expressly agree that no individual provision, by itself, necessarily represents a position of any Party in any future proceeding, and the Parties further agree that no Party shall assert or represent in any future proceeding in any forum that another Party endorses any specific provision of this Agreement by virtue of that Party's signature on, or participation in, this Agreement. It is the intent of the Parties to this Agreement that the Commission's approval of all the terms and provisions of this Agreement is an express recognition that no individual term or provision, by itself, necessarily represent a position, in isolation, of any Party or that a Party to this Agreement endorses a specific provision in isolation, of this Agreement by virtue of that Party's signature on, or participation in, this Agreement.

EX 200 at 24-25. (Emphasis added.)

Allowing the PGS DRRM provision to be harvested by FCG as precedent from the highly fact-specific bargained-for consideration in negotiations conducted by PGS or other litigants would create a powerful disincentive for parties to make concessions and devise creative ways to reduce rate impacts on customers. It would violate the spirit and the express terms of the PGS settlement. The one-way PGS DRRM, while theoretically allowing it to be used to take earnings up to the top of the range, actually contains a powerful disincentive for doing so. The one-way only direction of the pre-existing reserve surplus forces the company to judiciously use the DRRM to maintain a reasonable achieved ROE.

4. *The proposed RSAM is designed to achieve top of the range earnings*.

The size of the proposed FCG Reserve Amount is deceptively large even at $25 million and the Commission should assume that it has been "reverse engineered" to enable FCG and FPL to achieve earnings at the top of the ROE range. There are several comparative facts that the Commission should consider. First, FCG is 1/125th the size of FPL. TR 1168-1169. It is one-fourth the size of PGS. TR 1159, 1199, EX 202, Schedule. 2. The revenue requirement value of 100 basis points on equity for FCG is $3.5 million. TR 1183. For FPL, the revenue requirement value of 100 basis points on equity is $360 million. TR 1184. The revenue requirement value of 100 basis point on equity value of approximately $10.3 million for PGS can be directly derived from the record.[69] For illustrative purposes, these financial ratios demonstrate that a similarly ratioed Reserve Amount for FPL would have been $3.125 billion. TR. 1168-1169. For PGS, a similarly ratioed reversible surplus would have been $146 million. Conversely, a hypothetical indicative

[69]The value of 100 basis points for PGS can mathematically derived from the September 2022 earnings surveillance report ("ESR"). Using Schedule 4 of the ESR the difference between the midpoint equity weighted cost of capital of 4.62% and the low point of 4.16%, is .46%. That .46% multiplied by the overall rate base of $1,671,953,000 (Schedule 2, column 11) yields the related equity return value amount of $7,690,984 applicable to that reconciled jurisdictional ratebase. This amount has to be expanded for taxes. Multiply the $7,690,984 times a revenue expansion factor of 1.3361 (EX 200 at 10) This yields a 100 basis points on equity revenue requirement value for PGS of $10,275,923, as of September 30, 2022. EX 202, September ESR.

FCG Reserve Amount based on the relative size, given the $1.45 billion FPL Reserve Amount would be no more than $11.6 million. TR.1171. Simple math shows that a hypothetical indicative FCG Reserve Amount based on the relative size of $1.6 billion to $ 400 million (or 4X), given the $34 million PGS reversible surplus amount, would be no more than $6.25 million. Clearly the deceptively small proposed RSAM amount of $25 million would nevertheless provide FCG with a powerful tool to always achieve top-of-range earnings, especially if future revenues are understated or if other un-forecasted efficiencies materialize.

On a 100 basis point on equity basis, the comparison of FCG to FPL is equally concerning, given FPL's success at achieving top-of-range earnings. EX 47. For FPL, the ratio of the mid-point to the top of the range relative to the available FPL Reserve Amount is more than 4.02X ($1.45 billion/$360 million) and for PGS, this ratio is only 3.3X, while the same ratio applied to the FCG proposed Reserve Amount yields a ratio of 7.14X. This means that, compared to FPL, the proposal would provide an approximately 77% greater chance to use the proposed $25 million to divert customer-provided depreciation funds to boost achieved earnings to the top of the range.[70] PGS has no track record of using the DRRM to achieve top-of-range earnings, but the evidence reveals that FCG would have a 116%[71] greater chance of hitting the high end of the range than PGS does.

It is important to note that FCG did not dispute witness Schultz's testimony that FPL has achieved top of the range earnings for 11 years with the availability of a smaller multiple. TR 284, EX 47. Witness Campbell conceded that the payment of dividends can be facilitated by top-of-the-range earnings in a way that is facilitated by the proposed RSAM. TR 1256-1257. He also conceded that the availability of the RSAM would facilitate a greater amount of dividends to the parent and enhancement of shareholder value through increased retained earnings. These elements

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[70] (7.14 - 4.02)/4.02 = 77%.
[71] (7.14 - 3.3)/3.3 = 116%

of the proposed RSAM do not favor customers and in fact could mean that after all of the high earnings parties are over, the customer would be left with the hangover of higher rate base and higher future revenue requirements. TR 1254-1259. This would not be to the benefit of customers in a non-settlement negotiated scenario where substantial revenue requirement concessions were not traded as bargained-for consideration for the agreed-to FPL RSAM flexibility. Witness Campbell tacitly acknowledged that the existence of the RSAM would not prevent the company from achieving top of range earnings even if no efficiencies were achieved. TR 1258-1259. This is consistent with witness Schultz testimony that the RSAM would actually remove the incentive for FCG to be more efficient. TR 283. Such a situation emanating from a rate case context would mean that the customers would receive no value for agreeing to a departure from the Depreciation Rule and policies that are cost based. Customers could in fact be saddled with higher rate base costs after shareholders benefited from earnings at the top of the range, as noted by witness Schultz. TR 282. Witness Campbell agreed that this could happen. TR 1258-1259. Using over collected depreciation expense provided by customers to enhance shareholder earnings above the rate setting point provides zero benefit to customers outside of a comprehensively negotiated settlement that can take into account revenue requirements and adjust them in exchange for the flexibility of a RSAM.

5. Additional Reasons for discretionary denial.

If the FCG RSAM were to be approved and used by the Company for enhanced shareholder earnings and value, then in a future rate case, customers will have a rate base that is $25 million higher. The result would be enhanced shareholder earnings now and in the future. TR 282,540. The RSAM-driven future rate base increase would not be the product of any expert's opinion on depreciation, but rather would reflect adjustments that ultimately would drive the rate base to higher levels. Such an approach is not consistent with setting just and reasonable depreciation rates. A RSAM mechanism that would allow FCG to manage their earnings within the range without a termination point contained in a negotiated settlement could yield an unintended by-product of limiting the Commission's and other parties' ability to review FCG's rates in the future by creating a self-regulating mechanism. This could happen since rate proceedings are generally triggered when the Company is either over-earning or under-earning outside the Commission approved range. If the earnings are artificially managed within the range using the RSAM, it would be less likely that a review would occur, even if the effects of cost increases or decreases are being masked by the RSAM's debits and credits. The Commission should reject any mechanism that could diminish its ability to conduct an adequate level of economic oversight that can be exercised using the context of a traditional rate case proceeding – especially if another merger materializes in the near future.

<u>ISSUE 68:</u> **Should the Commission approve FCG's proposal for addressing a change in tax law, if any, that occurs during or after the pendency of this proceeding?**

OPC: *****No. Furthermore, this issue should be stricken from the case and FCG's request should be summarily dismissed based on Commission precedent.*

<u>ARGUMENT:</u>

There are at least two bases requiring the Commission to peremptorily deny FCG's request to establish a tax adjustment mechanism. First, the Commission has established a policy in a final order that a rate case is not the proper venue for establishing a prospective change in rates as a result of a future change in federal income tax rates.[72] See Order No. PSC-2017-0099-PCO-EI, issued in Docket No. 20160186-EI ("*2017 Gulf Tax Decision*"). The Commission has ruled such a measure to be premature and that a separate, subsequent proceeding is the only appropriate way

[72] PSC Order No. PSC-2017-0099-PCO-EI, issued March 14, 2017, p. 107-08, *In re: Petition for rate increase by Gulf Power Company* and *In re: Petition for approval of 2016 depreciation and dismantlement studies, approval of proposed depreciation rates and annual dismantlement accruals and Plant Smith Units 1 and 2 regulatory asset amortization, by Gulf Power Company.* (2017 Gulf Tax Decision).

to address this problem when and if a change in the tax law occurs. This should be the end of the inquiry.

Secondly, FCG through its parent FPL and FPL-employee witnesses in this case is acting contrary to the 2021 Settlement agreement terms adopted by Order No. PSC-2021-0446-S-EI in Docket No. 20210015-EI. FCG seeks to have the Commission rely on the negotiated provision in that settlement agreement as precedent which is prohibited by an express term of the 2021 Settlement Agreement. As a matter of policy, the Commission should further decline to authorize the provision because it is single issue ratemaking that would ignore the other relevant conditions that might exist at a time when tax laws might change in the future.

Negotiated provisions in other company situations may well be accompanied by bargained for revenue requirement concessions that would indicate fairness and balance in the negotiated prescriptive adjustment to rates and revenue requirements in the future. No such bargained for consideration is present in this fully litigated case.

During the period leading up to the sale to FPL in 2017, Gulf Power argued against the OPC and intervenors even raising the issue about whether a mechanism should be adopted. The issue was worded:

> In the event federal legislation is passed and signed into law between now and a reasonable period after new base rates become effective that results in a change in the corporate income tax rate to which Gulf is subject, or changes in the depreciation allowance for tax purposes associated with plant additions incorporated in test year rate base, what adjustments or provisions, if any, should the Commission make to address such changes? Should the Order in this case require a limited reopening within a reasonable period after new base rates become effective to address income tax expense as well as the accumulated deferred income taxes in the capital structure in the event such legislation is passed that would impact Gulf's revenue requirements?[73]

[73] *Id.* at 107.

On behalf of the entire Commission, the Prehearing Officer then ruled:

> I find the issue is premature and not ripe for consideration at this time. Should federal tax changes occur in the future, the issue may be addressed at the appropriate time in a separate proceeding.[74]

The 2017 Gulf Tax Decision became final and controlling for the case. The parties ultimately settled the case and in the shadow of the decision, negotiated a tax rate adjustment provision that became the first such mechanism in Florida.[75] Both orders established the predicate that if the parties wanted certainty in the resolution of tax changes that the method for accomplishing it was in a rate case settlement since the remedy was not available in a conventional litigated rate case. For FCG to just show up and demand to receive a Commission-ordered tax adjustment mechanism on top of a fully litigated revenue requirement award violates the policy enunciated in the 2017 Gulf Tax Decision. Since the company conceded that there is no impact of the August 2022 Inflation Reduction Act ("IRA") on the company, it is undisputed that the purpose of the proposal is premature for some future, unknown (and purely speculative) tax law change. TR 1231.

The ruling in the 2017 Gulf Tax Decision establishes a policy that prohibits the relief sought by FCG and its parent. Agency action authorizing the tax adjustment provision would be a violation of Section 120.68(7)(e)3, Fla. Stat., which requires that a court reverse unexplained agency action that is contrary to Commission policy or practice. The Florida Supreme Court has cautioned that not just any explanation will do in efforts to explain deviation from precedent. The agency cannot merely check a box here. In *Citizens v. Graham*, 213 So. 3d 703 (Fla. 2017), the Court reversed this Commission's decision to ignore a provision in a settlement agreement without

[74] *Id.* at 108.
[75] PSC Order No. PSC-2017-0178-S-EI, issued May 16, 2017, p. 15-6, *In re: Petition for rate increase by Gulf Power Company* and *In re: Petition for approval of 2016 depreciation and dismantlement studies, approval of proposed depreciation rates and annual dismantlement accruals and Plant Smith Units 1 and 2 regulatory asset amortization, by Gulf Power Company.*

explanation or rationale. Citing to *McDonald v. Department of Banking & Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), the Court took pains to note that not just any explanation will do in stating:

> The final order must display the agency's rationale. It must address countervailing arguments developed in the record and urged by a hearing officer's recommended findings and conclusions or by a party's written challenge of agency rationale in informal proceedings, or by proposed findings submitted to the agency by a party.
>
> Failure by the agency to expose and elucidate its reasons for discretionary action will, on judicial review, result in the relief authorized by Section 120.68(13): an order requiring or setting aside agency action, remanding the case for further proceedings or deciding the case, otherwise redressing the effects of official action wrongfully taken or withheld, or providing interlocutory relief.

Citizens at 712. The *Citizens* Court also cited with approval *Seminole Electric Cooperative, Inc. v. Department of Environmental Protection*, 985 So. 2d 615 (Fla 5th DCA 2008), in which the Fifth District Court of Appeals set aside agency action that disregarded a stipulated evidentiary record and proposed order with sparse explanation. The Court also pointed out that "[o]ther contexts in which an agency has insufficiently addressed its action include *orders ignoring precedent on point*..." *Citizens* at 713. (Emphasis added.)

Any "heads-I-win-tails-you-lose" decision that rewards the company that is now Gulf's affiliate after virtually identical facts yielded the opposite result would be arbitrary and undermine any "explanation" or rationale that might be offered to a reviewing court. Most certainly such an arbitrary result would run afoul of the warning in the *Citizens*, *McDonalds*, and *Seminole* cases.

Policy reasons for not adopting the proposal beyond the legal prohibitions are that the proposal is entirely designed to favor dollar-for-dollar pass through of tax rate *increases* for the company in a manner that would ignore whether other equally offsetting cost reductions were occurring. The mechanism – if adopted outside of a negotiated posture where it is bargained for consideration - would create an asymmetrical environment of single-issue ratemaking. Debits in the form of tax rate increase would be recovered while credits in the form of synergies or other savings would be retained inside of the earnings range.

ISSUE 69: **Should the Commission approve FCG's proposal to continue the SAFE program to include additional mains and services to be relocated from rear property easements to the street front? If so, what adjustments, if any, should be made?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 70: **Should the Commission approve FCG's proposal to expand the SAFE program to include replacement of "orange pipe"? If so, what adjustments, if any, should be made?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 71: **Should the Commission approve FCG's requested four-year rate plan?**

OPC: *No. The so-called four-year rate plan cannot be lawfully implemented because the Commission lacks the authority to deny the company rate-relief if it demonstrates that it is earning outside of its established range. This type of plan is an illusion and is cannot be defined. FCG's commitment is unenforceable against the current owners and any future owners of the company. Regarding portions of FCG's requested rate increase, including FCG's request to maintain the acquisition adjustment, the Commission does not have the authority, absent an agreement of the parties, to approve the request as filed.*

ARGUMENT:

The Commission should not approve FCG's proposed four-year rate plan for several reasons. First, the Commission lacks any authority or precedent for approving a "stay out" provision absent a settlement agreement. FCG is well aware of this, and yet they are attempting to offer the Commission the invisible sleeves-off-their-vest as an incentive to negotiate with them. The Commission must not accept that invitation. Second, the standard of review for this rate case requires each request to stand on its own fair, just, and reasonable feet, and several of these requests would result in rates that fail that statutory mandate. Finally, the Commission must realize that

FCG's offer is illusory and will seriously harm customers if accepted unmodified by the Commission.

As FCG noted in its petition in this case, Fl. Stat. § 366.06 and F.A.C. Rules 25-7.039 and 25-7.045 permit FCG to petition the Commission for a rate increase. Nowhere in the Statutes or Rules regulating gas utilities is the Commission given the authority to limit a utility's ability to request a rate increase. The only time-period restrictions on a utility's ability to request a rate increase ever approved by the Commission were the result of a negotiated settlement agreement between the utility and intervenor(s). Obviously, no such negotiated settlement agreement exists in this case; therefore, if the Commission were to attempt to order such a restriction, the Commission would be acting against Florida law and Commission precedent.

The Commission's standard of review for settlement agreements is different than the standard of review for litigated rate cases. "Within a rate case, the Commission applies this prudence standard to the individual investment projects for which a utility is seeking cost recovery."[76] However, when the Commission reviews a settlement agreement, "...[T]he Commission's review shifts to the public interest standard: whether the agreement—as a whole—resolved all the issues, 'established rates that were just, reasonable, and fair, and that the agreement is in the public interest.'" Id. at 909. The Florida Supreme Court further noted, "Importantly, in the absence of a settlement agreement, prudence review of investments-regardless of magnitude-is still an express statutory requirement." Id. at 912. This means that in the absence of a settlement agreement in this case, the Commission must analyze each one of FCG's requests, including the "four year" stay out proposal, and determine whether each one would result in fair, just and reasonable rates.

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[76] *Sierra Club v. Brown*, 243 So. 3d 903, 908 (Fla. 2018).

The Commission's prior practice in reviewing settlement agreements versus reviewing litigated base rate cases is also summarized in PSC Order No. PSC-2021-0446-S-EI:

> However, there is a significant difference between the legal evaluation of these mechanisms and adjustments under Section 366.06(1), F.S., in the development of revenue requirements and rates when made in the context of a base rate case, and when made as part of a settlement agreement. In a base rate case each adjustment and mechanism is evaluated individually based on the applicable statutes, rules, case law, and our past decisions. ***The determination of the prudence of each issue, adjustment, or mechanism is necessary in a base rate case in order to construct the elements needed to establish the revenue requirement used to develop fair, just, and reasonable rates for each revenue class.*** In a settlement case, each issue, adjustment, or mechanism does not require our individual approval because the revenue requirement is the result of negotiations between the signatories that may or may not have included the individual impact of each such item.[77]

(Emphasis added.)

Since the Commission does not have a settlement agreement to review in this matter, the Commission must analyze each of FCG's requests, and each must stand on its own two feet as being fair, just, and reasonable. As it relates to the four-year stay out provision relevant to this issue, FCG's evidence fails to satisfy the burden of proof that the four-year "stay out" provision is prudent and would result in fair, just, and reasonable rates, if approved. Such a provision would be unenforceable when ordered outside of a settlement agreement. Therefore, the Commission's approval of FCG's unmodified rate request in exchange for FCG's unenforceable and questionable promise not to come in for a rate case for four years would be extremely unfair, unjust, and unreasonable since customers would have to pay for every single request of FCG's while having no enforceable way to prevent FCG from coming in sooner with a new rate request.

[77] PSC Order No. PSC-2021-0446-S-EI, issued December 2, 2021, p. 13, *In re: Petition for rate increase by Florida Power & Light Company.*

Additionally, the Commission has never ordered a "stay out" provision absent a settlement agreement. Although the Commission suggested in PSC Order No. PSC-2021-0446-S-EI, issued December 2, 2021, that, "…there is no statute specifically prohibiting the inclusion of any of the mechanisms or adjustments at issue here in either a base rate case or a settlement agreement," and although one of the items at issue in that case was a "stay out" provision, that case was ultimately resolved through a settlement agreement and the Commission was never required to make a ruling on the propriety of the individual "stay out" provision since that issue was not involved in the case or essential to its determination. Since settlement agreements and fully-litigated base rate cases require different standards of review, the Commission's statement in that order does not constitute Commission precedent in a fully-litigated base rate case. Rather, that statement constitutes unenforceable *obiter dictum* in a fully-litigated base rate case such as this one.[78] Furthermore, the Commission further clarified, at the hearing to determine whether to approve that 2021 FPL settlement that just because a particular mechanism was previously a part of a settlement agreement or base rate case does not automatically mean the Commission should approve that mechanism again.[79]

Additionally, paragraph 30 of the agreement between the parties in that case, attached to PSC Order No. PSC-2021-0446-S-EI, stated, "No party will assert in any proceeding before the Commission or any court that this Agreement or *any of the terms in the Agreement shall have any precedential value*, except to enforce the provisions of this Agreement."(Emphasis added.)[80] To the extent that FCG argues that since the Commission has previously approved four-year "stay

[78] "…[A] purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple." Bunn v. Bunn, 311 So. 2d 387, 389 (Fla. 1975).
[79] "And I do think that – that just having one of these mechanism present, by itself, in a previous rate case or settlement is – is not sufficient to allow it to – just by itself. Doesn't mean it's in or out." *See* PSC Document No. 12594-2021, p. 18.
[80] Order No. PSC-2021-0446-S-EI, issued December 2, 2021, p. 55, *In re: Petition for rate increase by Florida Power & Light Company*.

out" provisions in cases resolved through settlement agreements; therefore, the Commission has the authority to do so absent a settlement agreement – OPC vehemently objects.

Additionally, even if the Commission had the authority to negotiate with FCG, it is necessary to analyze FCG's so-called offer. In FCG Witness Howard's pre-filed direct testimony, he states that, "With the approval of FCG's four-year rate plan, FCG would not seek a general base-rate increase effective prior to January 1, 2027." TR 558. However, during OPC's cross examination at the hearing and when asked about whether or not FCG was agreeing not to seek a rate increase for four years, Witness Howard equivocated and instead stated, "This plan would allow us to stay out of an additional rate proceeding for at least four years." TR 636. This change in terminology is highly suspicious as it reflects a change in the degree of certainty that FCG is "offering" to stay out for four years. When counsel for the Florida Industrial Power Users Group (FIPUG) questioned witness Howard about the nature of FCG's commitment to "stay out," witness Howard insisted on repeatedly stating varying versions of the same non-committal response. TR 671-673. Then counsel for FIPUG asked witness Howard, "So am I correct, that your commitment does not obligate you to stay out for four years?" TR. 678. Witness Howard, who FCG put forth as FCG's witness to meet their burden of proof on the four year "stay out" provision issue, responded, "I do not know." TR 678. Even if the Commission *could* accept such an offer from FCG, the evidence shows that FCG is already wavering in their commitment not to request another rate increase for four years. FCG has utterly failed to establish both the propriety of such a provision absent a settlement agreement and FCG's commitment to abiding by such an Order.

Even if the Commission accepts that FCG would honor FCG's commitment to stay out for four years if ordered to do so, the Commission needs to look at FCG's vacillating statement that approval of FCG's "four year" plan would allow FCG to stay out for four years from another angle, as well. Consider that 2022 was a year practically defined by record inflation across the globe and extreme volatility in the natural gas market. These factors, and others, caused soaring prices for everything from gas to groceries. Consumers' utility bills were not spared, and many Florida utility customers are going to be forced to pay for the billions of dollars of under-recovered fuel costs starting sometime in 2023.[81] Witness Howard even acknowledged in his direct testimony that "inflationary pressures" resulted in $2.4 million of the increased O&M expense in the 2023 test year. TR 568; 579. Despite FCG's familiarity with the unpredictability of inflation, FCG is potentially willing to promise not to come in for another rate case for four years. Why would any company potentially waive their statutorily-guaranteed right to request a rate increase for four years? The only logical explanation to that question in this case is that FCG is confident that the revenues generated by their rate proposal, if approved unmodified, would be so lucrative that FCG could absorb any expense that comes their way for the next four years. FCG's "stay out" proposal should generate sincere concern rather than entice the Commission to approve the proposal unmodified.

In an attempt to convince the Commission that FCG's "stay out" offer is worthy of consideration, FCG suggests that the Company is subject to several forms of risk, due to inflation, interest rates, and operating and capital expenses by making this "offer." Tr. 94. However, this is a fallacy given that the Commission already routinely authorizes a 200 basis point ROE range precisely so that utilities can continue to earn a fair profit with the ebbing and flowing of the economy. FCG also fails to mention that inflation could go down and/or weather conditions could cause higher-than-expected revenues which would make this illusory "four year stay out" provision even less valuable to FCG's customers. The Commission must not take FCG's "stay out" provision bait with the RSAM, capital structure, ROE, LNG, etc… hooks attached.

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[81] *See* PSC Docket 20220001-EI.

In summary, the Commission lacks the authority to approve FCG's proposed "four year" plan since there is no Commission precedent for doing so, since FCG's offer is already changing from the way it was phrased in FCG's initial filing, and since accepting that unenforceable offer would be extremely unfair, unjust, and unreasonable to consumers. The Commission is not a party to this case, it is the tribunal. Negotiations occur between parties, not between a party and the tribunal. The Commission must reject FCG's "four year" proposal, and view it as the request that it is. This case remains a litigated base rate case, and the Commission must determine if FCG has met their burden that this rate request would result in fair, just, and reasonable rates. As demonstrated above and throughout this post-hearing brief, FCG has not met that burden, and the Commission should reject FCG's "four year" proposal.

ISSUE 72: **Should FCG be required to file, within 90 days after the date of the final order in this docket, a description of all entries or adjustments to its annual report, rate of return reports, and books and records which will be required as a result of the Commission's findings in this rate case?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

ISSUE 73: **Should this docket be closed?**

OPC: *This Issue was resolved by a Type 2 Stipulation.*

Dated this 9th day of January, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE
DOCKET NOS. 20220069-GU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 9th day of January 2023, to the following:

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