

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: September 1, 2023

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Cibula, Harper, Sparks) *AH*
Division of Accounting and Finance (Cicchetti, Norris) *ALM*
Division of Economics (Galloway, McNulty, Smith II, Wu) *EJD*
Division of Engineering (Ellis, King, Knoblauch, Ramos, Thompson) *TB*

RE: Docket No. 20220069-GU – Petition for rate increase by Florida City Gas.

AGENDA: 09/12/23 – Regular Agenda – Motion for Reconsideration; Oral Argument Request

COMMISSIONERS ASSIGNED: Fay, Passidomo, La Rosa

PREHEARING OFFICER: Fay

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On May 31, 2022, Florida City Gas (FCG or Company) filed a petition seeking the Florida Public Service Commission's (Commission) approval of a rate increase and associated depreciation rates based on a projected test year ending December 31, 2023. FCG is a natural gas local distribution company providing sales and transportation of natural gas, and is a public utility subject to this Commission's regulatory jurisdiction under Chapter 366, Florida Statutes (F.S.). As a subsidiary of Florida Power & Light Company (FPL), FCG currently serves approximately 116,000 residential, commercial, and industrial natural gas customers in Miami-Dade, Broward, St. Lucie, Indian River, Brevard, Palm Beach, Hendry, and Martin counties.

FCG's requested rate plan consisted of: (a) an increase in base rates and charges sufficient to generate a total base revenue increase of \$29.0 million based on a projected 2023 Test Year; (b) a 10.75 percent mid-point return on equity (ROE) and an equity ratio of 59.6 percent from investor

sources for all regulatory purposes; (c) implementation of a reserve surplus amortization mechanism (RSAM); (d) approval of RSAM-adjusted depreciation rates; (e) the continuation of the Storm Damage Reserve provision approved as part of FCG's 2018 Settlement Agreement, as modified to reflect the Commission's new storm rule for gas utilities; (f) a mechanism that will allow FCG to adjust base rates in the event tax laws change during or after the conclusion of this proceeding; (g) continuation and expansion of the existing SAFE program; and (h) implementation of a new limited advanced metering infrastructure pilot program (AMI Pilot). (Rate Plan).

The Commission acknowledged intervention by the Office of Public Counsel (OPC), and intervention was granted to the Federal Executive Agencies (FEA) and to the Florida Industrial Power Users Group (FIPUG) (collectively "Intervenors"). An administrative hearing was held December 12-13, 2022. At the hearing, the Commission approved proposed stipulations on a number of issues. The parties filed post-hearing briefs which argued their positions on the remaining litigated issues. After the parties filed their briefs, the Commission held Special Agenda Conferences on March 28, 2023, and April 25, 2023, to address those issues. On June 9, 2023, the Commission issued a Final Order Granting in Part and Denying in Part Florida City Gas' Petition for Certain Rate Increases (Final Order).

One of the major issues of contention in this case was the FCG RSAM. The RSAM is an accounting mechanism created by FCG in an effort to manage its earnings, and it is dependent upon the presence of a theoretical surplus in the Depreciation Reserve. The RSAM allows FCG the flexibility to use that reserve surplus to increase or decrease depreciation expense in order to bring about a more favorable earnings position.

Depreciation parameter¹ values are routinely adjusted during the life of the underlying plant assets, and the change in depreciation rates can lead to a reserve imbalance. Depending on the adjustment, a theoretical reserve surplus can be created. For example, increasing the estimated service life of an asset can result in a theoretical reserve surplus based on the fact that depreciation expense was being collected at a higher rate in the early years of an asset based on the shorter service life. When that service life is then increased, which allows for more time to recover the undepreciated balance, a theoretical reserve surplus may now exist. In this case, three proposals were put forth regarding the depreciation parameters: those that resulted from FCG's depreciation study, FCG's RSAM-adjusted parameters,² and OPC's proposed parameters. The Commission ultimately approved the RSAM-adjusted parameters in its Final Order.

On June 23, 2023, the Office of Public Counsel (OPC) filed its Citizens' Motion for Reconsideration (Motion) pursuant to Rule 25-22.060, Florida Administrative Code (F.A.C.), and a Request for Oral Argument on Citizens' Motion for Reconsideration (Request) pursuant to Rule 25-22.0022, F.A.C. In its Motion OPC took issue with the Commission's approval of

¹ Depreciation parameters consist of account-specific values of Average Age, Average Service Life, Average Remaining Life, Future Net Salvage, and Iowa Curve type, all of which are used to determine the plant account's depreciation rate.

² The RSAM-adjusted depreciation parameters are the parameters approved by the Commission as part of a settlement agreement in Docket No. 20200051-GU, *In re: Petition for Rate Increase by Peoples Gas System*, Order No. PSC-2020-0485-FOF-GU, issued December 10, 2020.

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FCG's RSAM, which it claimed warrants reconsideration. OPC also appealed the Final Order to the Florida Supreme Court, but the appeal was stayed by the Court pending the Commission's disposition of the Motion.

On June 30, 2023, FCG filed its Florida City Gas Response to Office of Public Counsel Motion for Reconsideration (Motion Response) and argued that reconsideration was neither necessary nor appropriate. FCG also filed its Response in opposition to Office of Public Counsel's Request for Oral Argument (Request Response).

This recommendation addresses OPC's Request for Oral Argument and OPC's Motion for Reconsideration, and FCG's responses thereto. The Commission has jurisdiction over this matter pursuant to Chapter 366, F.S., including Sections 366.041, 366.06, and 366.071, F.S.

Discussion of Issues

Issue 1: Should OPC's Request for Oral Argument on its Motion for Reconsideration be granted?

Recommendation: No. Staff believes that the pleadings are sufficient on their face for the Commission to evaluate and decide OPC's Motion for Reconsideration. However, if the Commission wants to exercise its discretion to hear oral argument, staff recommends 5 minutes per party as sufficient. (Sparks, Harper)

Staff Analysis:

Law

Rule 25-22.0022(1), F.A.C., allows a party to request oral argument before the Commission for any dispositive motion before the Commission by filing a separate written pleading filed concurrently with the motion on which argument is requested and stating with particularity why oral argument would aid the Commission. Granting or denying oral argument is within the sole discretion of the Commission under Rule 25-22.0022(3), F.A.C.

OPC's Position

OPC requested the opportunity to provide 10 minutes of oral argument on its Motion for Reconsideration to further elaborate on the arguments made within and to aid the Commissioners in understanding and evaluating the issues raised as well as answer any questions.

FCG's Position

In its Response, FCG argues that OPC's Request fails to articulate with particularity why oral argument would aid the Commissioners as required by Rule 25-22.0022(1), F.A.C. FCG further argues that oral argument is unnecessary as the issues raised in OPC's Motion are straightforward and do not require further explanation.

Analysis:

Granting or denying oral argument is within the sole discretion of the Commission. Staff believes that the pleadings are sufficient on their face for the Commission to evaluate and decide OPC's Motion. However, if the Commission wants to exercise its discretion to hear oral argument, staff recommends 5 minutes per party as sufficient.

Issue 2: Should OPC’s Motion for Reconsideration be granted?

Recommendation: No. OPC’s Motion for Reconsideration should be denied as to both points raised within. However, staff recommends clarifying the Final Order so that it is clear that the Commission has the authority to approve the RSAM-adjusted depreciation parameters under section 366.06(1), F.S. The Order should be clarified to state that the Commission has the authority under 366.06(1), F.S., to set depreciation rates using another utility’s depreciation parameters as long as the parameters are applied to the utility’s own used and useful assets, such as in this case. (Sparks, Harper)

Staff Analysis:

Law

The appropriate standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering the order under review. *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 162 (Fla. 1st DCA 1981). It is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959); citing *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted “based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.” *Stewart Bonded Warehouse, Inc.*, 294 So. 2d at 317.

OPC’s Motion

In its Motion, OPC argues that (1) the depreciation parameters approved in the Final Order violate section 366.06(1), F.S., and (2) the Commission’s primary justification for approval of the RSAM and the RSAM-adjusted parameters was subsequently eliminated after the Commission’s vote on those issue.

OPC first argues that the Commission failed to consider whether “adopting another company’s depreciation parameters” violated the provisions of section 366.06(1), F.S. This section states:

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 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.

Section 366.06(1), F.S., (emphasis added). There is no disagreement that the depreciation parameters approved in the Final Order were taken from the People’s Gas rate case. OPC argues “using a different utility company’s depreciation parameters instead of the depreciation

parameters of FCG's actual, used and useful property violates [Florida statutes]." OPC states that it previously argued that the Commission lacked the authority to approve an RSAM in general, but now it argues against FCG's RSAM for the specific reason that it establishes depreciation rates not developed using the actual assets of the company. In other words, OPC's motion argues the FCG's RSAM parameters are taken from assets in use by another company and this is inappropriate under section 366.06(1), F.S.

OPC also argues its position in its motion for reconsideration differs from the position taken by Commission staff in its recommendation. OPC argues "[c]onsidering whether there is precedent" for using another company's depreciation parameters is different from considering whether using another company's depreciation parameters violates section 366.06(1), F.S. OPC contends this distinction is a matter of law which warrants reconsideration.

Second, OPC argues that the "Commission's primary reason for approving the RSAM – rate stability – was eliminated subsequent to the Commission's approval." OPC claims that all of FCG's "guarantees" were premised on the entirety of its proposed Rate Plan being approved, and because not all of the elements of FCG's requested Rate Plan were approved (in this case the Commission lowered FCG's Return on Equity (ROE) from what it requested in its petition), "the record does not support the rationale that underlies the approval of the RSAM." OPC cites FCG witness Kurt Howard's testimony, which states that the "rate plan, in its entirety, will allow us to stay out for four years." OPC further states that "[b]y correctly finding that the four-year plan was unenforceable and by failing to approve the entirety of FCG's proposed four-year plan, the Commission eliminated the primary basis for approving the RSAM; therefore, the Commission should reconsider its approval of the RSAM."

FCG's Response

FCG first addresses the argument that approval of the RSAM-adjusted depreciation parameters violates section 366.06(1), F.S., arguing that OPC did not raise this argument in its testimony or anywhere in its pre- or post-hearing filings. FCG argues that for OPC to raise this specific issue here for the first time raises "serious due process concerns" under section 120.57(1)(b), F.S., and should therefore be denied. According to FCG, while OPC did cite to section 366.06(1), F.S., in its post-hearing brief, OPC did not raise the specific issue that use of the RSAM-adjusted depreciation parameters themselves violate the statute and only argued that the RSAM as a whole violates the statute. FCG also contends that raising an issue not set out in the Order Establishing Procedure without showing just cause violates that Order.

FCG disagrees with OPC's assertion that a plain reading of the statute prohibits it from using the RSAM-adjusted depreciation parameters. FCG takes the position that applying the RSAM-adjusted depreciation parameters from *People's Gas to its own used and useful plant in service* satisfies the requirements of section 366.06(1). FCG further states that "nothing in the Florida statutes precludes the Commission from approving depreciation lives and net salvage based on the application of depreciation parameter data for a similar Florida natural gas utility with assets similar to the utility's property used and useful in serving customers." FCG contends that holding otherwise would limit the Commission from approving the RSAM in this case and would set a precedent that would preclude the Commission from considering or approving

alternative depreciation parameters proposed by other parties as proxies or included in settlements. Furthermore, FCG asserts that contrary to OPC's allegations, use of the RSAM-adjusted parameters is consistent with Commission practice. FCG points to Docket No. 20220067-GU, *In re: Petition for rate increase by Florida Public Utilities Company, Florida Division of Chesapeake Utilities Corporation, Florida Public Utilities Company - Fort Meade, and Florida Public Utilities Company - Indiantown Division*, Order No. 2023-0103-FOF-GU, issued March 15, 2023, as a similar case in which the Commission approved a depreciation study that relied on the service life estimates of other similar utilities.

FCG also states that, regardless of whether or not the issue was properly raised, it is clear the Commission considered and addressed the authority to approve the RSAM-adjusted depreciation parameters. FCG states the "record in this proceeding clearly demonstrates that the Commission in fact considered . . . whether the RSAM-adjusted depreciation parameters violate [section 366.06(1), F.S.]." FCG maintains that OPC's interpretation of the statute is incorrect, and that the RSAM-adjusted depreciation parameters are service life estimates that are in fact applied to FCG's used and useful plant in service.

FCG also addresses OPC's second argument regarding rate stability. FCG states that OPC failed to identify a mistake of fact or law or identify anything overlooked by the Commission. Instead, "OPC misinterprets the Commission's denial of FCG's four-year rate plan as a determination, wholly unsupported by the record, that RSAM is not effective in providing a measure of rate stability to customers." FCG states there is nothing in the record to support the conclusion that the rate stability provided by the RSAM was contingent upon approval of FCG's proposed plan in its entirety. Without any evidence to support this conclusion, FCG contends that the Commission could not have overlooked or failed to consider it.

Furthermore, FCG states the Commission did clearly consider whether the RSAM would provide rate stability to customers, citing the text of the Final Order which states, "We find the RSAM will result in a reduction of revenue requirement, save customers money on their utility bills, and give FCG the ability to manage its day-to-day business fluctuations, and allow FCG to take on the risk of increases in interest rates and inflation." FCG also argues this finding was supported by record evidence, citing to the staff recommendation as well as the transcript of the March 28, 2023 Special Agenda Conference. FCG contends that, in failing to identify something that was overlooked, OPC instead asks the Commission to reweigh the evidence it already considered and to reach a different conclusion.

Analysis

Depreciation Parameters and Section 366.06(1), F.S.

The appropriate standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering the order under review. Because there was testimony that FCG's use of PGS as a source for its depreciation parameters was reasonable, the Commission voted in favor of FCG's RSAM-adjusted depreciation parameters. However, it may be unclear whether the Commission considered OPC's particular interpretation of how the depreciation parameters did not fall under section 366.06(1), F.S., and thus, staff recommends clarifying the Final Order so that the

authority to approve the RSAM-adjusted depreciation parameters under section 366.06(1), F.S., is clear.

Section 366.06(1), F.S., requires the Commission investigate and determine the amount of money that (1) is honestly and prudently invested by the utility; (2) in assets that are used and useful; (3) less accrued depreciation; and (4) excludes any goodwill, going concern, or franchise value in excess of payment.

In this case, FCG used PGS's depreciation parameters to determine FCG's appropriate depreciation parameters arguing the assets used by PGS were similar to its own. FCG then applied the PGS depreciation parameters to its own assets to arrive at the depreciation rates used to calculate FCG's depreciation expense, and thus, FCG's accrued depreciation, which is contemplated by the statutory phrase "less accrued depreciation."

For the reasons noted previously, OPC argues that FCG's use of PGS's depreciation parameters violated section 366.06(1), F.S. However, there is testimony showing that, while FCG used PGS's depreciation parameters, it applied them to its own assets to arrive at its depreciation rates. The Commission was persuaded by the testimony that FCG's approach was reasonable and would result in lower revenue requirements than the amount requested by FCG if the RSAM was not approved. Because FCG applied PGS's depreciation parameters to its own assets to arrive at the depreciation rates, and because these assets are used and useful in providing service, there is no conflict with section 366.06(1), F.S. The Order should be clarified to state that the Commission has the authority under 366.06(1), F.S., to set depreciation rates using another utility's depreciation parameters as long as the parameters are applied to the utility's own used and useful assets, such as in this case.

Justification for the RSAM

OPC argues that because not all of the elements of FCG's requested rate plan were approved "the record does not support the rationale that underlies the approval of the RSAM." OPC in essence argues that the utility prefaced its guarantee of rate stability on the Commission granting *all* of the elements of its proposed Rate Plan, and thus, when the Commission did not approve FCG's requested ROE, an element of its Rate Plan, there was no guarantee of rate stability, and the Commission's "primary reason for approving the RSAM" was therefore eliminated.

The appropriate standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering the order under review. *See Stewart Bonded Warehouse*.³ On this issue OPC fails to identify any points of fact or law that were overlooked or not considered. The Order considers whether the RSAM would be a benefit to consumers regardless of any guarantees from the Utility. The Order states:

³ *Supra*, at 317.

We find the RSAM will result in a reduction of revenue requirement, save customers money on their utility bills, and give FCG the ability to manage its day-to-day business fluctuations, and allow FCG to take on the risk of increases in interest rates and FCG.

Final Order at page 17. The Final Order further states:

By approving the RSAM, we believe FCG is in the best position to maintain its ROE within the approved range and thus reduce the likelihood of additional rate increases in the near future.

Final Order at page 16. OPC points to no support in the record for its contention that the RSAM could only contribute to rate stability if FCG's proposal was granted in its entirety, nor does OPC cite to anything in the record showing the benefits of the RSAM are solely conditioned upon the approval of all elements of the Rate Plan or the proposed rate structure as a whole. In fact, the Order acknowledged that, even if all of the elements of FCG's proposal were approved exactly as requested, there could still be no binding commitment by FCG to "stay out" of future rate proceedings. *See* Order at page 6. Thus, because the Final Order acknowledges FCG's inability to make a binding commitment, OPC's argument is without merit and the record supports the rationale that underlies the approval of the RSAM.

Conclusion:

OPC's Motion for Reconsideration should be denied as to both points raised within. However, staff recommends clarifying the Final Order so that it is clear the Commission believes it has the authority to approve the RSAM-adjusted depreciation parameters under section 366.06(1), F.S., as referenced above.

Issue 3: Should this docket be closed?

Recommendation: No. This docket shall remain open while OPC's appeal is processed at the Florida Supreme Court. (Sparks, Harper)