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The Docket No. is 090539-GU - Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department

This is being filed on behalf of Florida City Gas

Total Number of Pages is 27

Florida City Gas' Jurisdictional Brief

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April 16, 2010

VIA ELECTRONIC FILING
Ms. Ann Cole, Commission Clerk
Office of Commission Clerk
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 090539-GU

Dear Ms. Cole:

Enclosed for filing on behalf of Florida City Gas is a Jurisdictional Brief of Florida City Gas in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosure
cc: Shannon O. Pierce, Esq.
Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Approval of Special Gas Transportation Service Agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department	)	Docket No. 090539-GU Filed: April 16, 2010

JURISDICTIONAL BRIEF OF FLORIDA CITY GAS

Florida City Gas ("FCG" or "Company"), by and through its undersigned counsel, hereby files this brief in support of the jurisdiction of the Florida Public Service Commission ("Commission" or "PSC") in the above-captioned Petition of Miami-Dade County, through the Miami-Dade Water and Sewer Department ("MDWASD"), to find that the Commission not only has the jurisdiction and authority to approve or disapprove the contract service arrangement ("CSA") at issue in this matter, but to also find that the Commission has the exclusive duty to regulate such matters, and pursuant to such superior authority the Commission should deny the CSA at issue in this docket. In furtherance of such jurisdictional authority, FCG states as follows:

I. INTRODUCTION

The real issue inherent in the jurisdictional question presently before the Commission is who controls FCG rates – this Commission or Miami-Dade County. As is discussed more fully below, while FCG may negotiate contractual service arrangements with certain customers, those rates *always* remain subject to the ratemaking requirements of Chapter 366, Florida Statutes, and this Commission's exclusive jurisdiction to review and approve such rates. Negotiated CSA rates that fail to meet the minimal requirements of the Commission's rules, orders, and statutes are not enforceable,

and the Florida Legislature has granted this Commission the *exclusive* and *superior* jurisdiction to make such determinations subject only to judicial review by the Florida Supreme Court.

The present cause began in June 2008, when the Company negotiated terms for a new special gas transportation CSA with MDWASD. The Natural Gas Transportation Agreement between the Company and MDWASD, dated August 28, 2008 ("2008 CSA") contained similar terms to the 1998 Special Gas Transportation Agreement negotiated by the Company's predecessor owners and MDWASD ("1998 CSA").[1] Generally, the 2008 CSA, like the 1998 CSA, provided that FCG would transport natural gas to MDWASD's facilities at rates that are significantly below the otherwise applicable tariff rate.

It does not appear that the predecessor to the Company submitted the 1998 CSA to the Commission for approval, or that any order of the Commission was issued specifically approving the 1998 CSA. However, the impact of the 1998 contract on FCG's general body of ratepayers was subject to annual reviews under FCG's Competitive Rate Adjustment ("CRA") review, in addition to the Company's 2003 Rate Case.[2] In its annual CRA filings during the term of the 1998 CSA, FCG provided the CRA recovery information for the 1998 CSA.[3]

Notwithstanding the absence of any specific approval of the 1998 CSA by this Commission, one significant difference between the 1998 CSA and the 2008 CSA was a requirement that the 2008 CSA not become effective until approved by the Commission.[4]

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[1] Petition, Exhibit A (1998 CSA); Exhibit C (2008 CSA)
[2] The final rate case decision is reflected in Order No. PSC-04-0128 (Feb. 9, 2004) (PAA Order) and Order No. PSC-04-0240 (Mar. 3, 2004) (Consummating Order).
[3] FCG's Response to Staff's Data Request No. 1, ¶ 2, Confidential Attachment 2.
[4] The current ownership and management of the Company cannot speak for the reasoning underlying the decision of prior ownership and management to not file the 1998 CSA with the Commission. However, it

Another difference between the two documents is that the 2008 CSA also provided that if the 2008 CSA was not approved by the Commission within 180 days from the date it was entered, the parties either would renegotiate or terminate the CSA. Finally, the 2008 CSA stated that it was being executed pursuant to the Company's authority in its Contract Demand Service Rate Schedule ("KDS") to enter into special contracts "to attach incremental load to its system by providing the Company with the flexibility to negotiate individual service agreements with Customers taking into account competitive and economic market conditions and system growth opportunities."[5] Article I of the 2008 CSA states, in pertinent part:

> Subject to all other provisions, conditions, and limitations hereof, ***this Agreement shall become effective as of the date that the Commission approves and makes this Agreement effective (the "Effective Date")***, and shall continue in full force and effect until ten years from the Effective Date, at which time the Agreement shall terminate (hereinafter, the "Term"). . . . ***If the Agreement is not approved and made effective by the Commission subject to terms and conditions satisfactory to the Parties within one hundred eighty (180) days from the date this Agreement is entered into by the Parties, this Agreement shall not become effective, and the parties will continue to negotiate a new agreement, pursuant to the First Amendment to Natural Gas Transportation Service Agreement Between Florida City Gas and Miami-Dade County (the "Amendment"), unless one of the parties elects to terminate the Amendment***, as provided in the Amendment, through written notice.[6]

In addition, the parties executed a First Amendment to the 1998 CSA ("Amendment"), which purported to extend the Term of the 1998 CSA while the parties

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was clear to the present management of the Company that the 2008 CSA needed to be filed and approved, and hence the specific language to that effect in the contract.

[5] FCG Tariff, CONTRACT DEMAND SERVICE (KDS), Original Sheet 49.

[6] Petition, Exhibit C, Article I, p. 2 (emphasis added). MDWASD contends, in its Petition, that it "reluctantly agreed to add the term to the 2008 Agreement because FCG insisted that approval was necessary and assured MDWASD that there would be no problems with the Commission process and approval."

negotiated and finalized the 2008 CSA and obtained the PSC's approval. The Amendment states, in pertinent part:

> The parties are currently negotiating a renewal of the Agreement (the "New Contract"). ***Pursuant to the terms of the New Contract, such contract shall not become effective until the date that the Florida Public Service Commission ("Commission") approves and makes the New Contract effective (the "Effective Date"). Further, if the New Contract is not approved and made effective by the Commission subject to terms and conditions satisfactory to the parties within one hundred eighty (180) days from the date the New Contract is entered into by the parties, the New Contract shall not become effective.***[7]

The Board of County Commissioners of Miami-Dade County, Florida, subsequently passed Resolution Number R-1105-08, ratifying the 2008 CSA ("Resolution"). The Resolution states:

> NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that his Board hereby ratifies the County Mayor's action of the execution, by the Mayor or his designee, of a Natural Gas Transportation Service Agreement between Florida City Gas and Miami-Dade County and to exercise the cancellation and renewal provisions contained therein, ***subject to approval by the Public Service Commission.***[8]

On or about November 13, 2008, FCG filed its Petition for Approval of Special Gas Transportation Agreement (hereinafter, the "CSA Petition"), requesting that the Commission accept jurisdiction and approve the 2008 CSA.[9] Although MDWASD was not named a party in the proceeding and formally served with the CSA Petition, the filing was a matter of public record, and MDWASD was provided notice of and copies of the CSA Petition informally by FCG. MDWASD did not file to intervene in the docket even though it had the right to do so.

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[7] Petition, Exhibit D (emphasis added).
[8] Petition, Exhibit E (emphasis added).
[9] Docket No. 080672-GU. *See also*, Petition, Exhibit F.

At the time the Company executed the 2008 CSA, and at the time it submitted the 2008 CSA to the Commission for its approval, the Company believed that the 2008 CSA complied with all applicable law, including all Commission-required regulations regarding contract service rates and that approval of the 2008 CSA would not have any adverse impact on the general body of ratepayers.

In subsequent communications with the Commission Staff, the Company learned that the Commission Staff's analysis had determined that the rates in the 2008 CSA did not comply with the KDS tariff requirement that such rates "shall not be set lower than the incremental cost the Company incurs to serve the Customer." Upon further consideration, the Company reevaluated the rates in the 2008 CSA and agreed that the proposed rates would not comply with the applicable regulatory requirements. During this time, the Company held a meeting with MDWASD officials to review the Commission Staff's analysis and to inform them that the 2008 CSA did not comply with the KDS tariff requirements. During this meeting, the Company informed MDWASD of its intention to withdraw the CSA Petition. FCG subsequently withdrew its CSA Petition by a voluntary dismissal on February 17, 2009, and the Commission administratively closed the docket.[10]

The problems with the 2008 CSA rates unquestionably placed FCG in a difficult position with both the Commission and its customer, with MDWASD facing an increase to a rate that the parties had negotiated in good faith. Desirous of maintaining MDWASD as a customer, and to otherwise meet the intent of the 2008 CSA, FCG attempted to negotiate a successor agreement that would meet the statutory and tariff requirements for a rate that was not "lower than the incremental cost." After attempting

[10] Docket No. 080672-GU, Staff Memorandum (Feb. 25, 2009).

in good faith to negotiate a successor agreement for several months, it was clear from MDWASD's position that a successor agreement was not going to be obtained. In view of the Company's regulatory obligations and its commitment to ensure equitable service to its general body of ratepayers, FCG was compelled to bring its service to MDWASD into compliance with applicable law by terminating the 2008 CSA and to begin charging MDWASD the otherwise applicable tariff rate. By letter dated June 22, 2009, FCG terminated the 2008 Amendment to the 1998 CSA, and effective August 1, 2009, FCG began to charge MDWASD the GS 1,250k tariff rate.

Ten months after FCG withdrew the 2008 CSA from Commission consideration, and more than five months after FCG terminated the 2008 Amendment to the 1998 CSA, on December 14, 2009, MDWASD filed its Petition for Approval of Special Gas Transportation Service Agreement with Florida City Gas that initiated the present docket. In its Petition, MDWASD requests that the Commission either (1) recognize that the 2008 CSA is not subject to the Commission's regulatory jurisdiction, or (2) approve the terms of the 2008 CSA. With the Commission Staff's concurrence, the parties have agreed to bifurcate this proceeding and brief the issue of Commission jurisdiction first, with the scope of any subsequent proceedings to be based upon the jurisdictional determination. As is argued below, the 2008 CSA is subject to the Commission's exclusive jurisdiction and superior authority, and the Commission must exercise such jurisdiction over the Company's tariff and any contract service arrangements.[11]

[11] While FCG believes the Commission has jurisdiction to consider the 2008 CSA, FCG reserves all of its defenses to this matter, including, but not limited to, the following: the 2008 CSA is void and of no effect because the 2008 Agreement was not approved and made effective by the Commission within 180 days from the date the parties entered into the Agreement, as required by Article I of the 2008 CSA; gas transportation service at the rate MDWASD desires is not adequately supported by Company cost data nor supported by data provided by MDWASD; the prospective and retroactive relief that MDWASD seeks

II. ARGUMENT

To accept MDWASD's argument that this Commission is without jurisdiction to consider the 2008 CSA, this Commission would need to: (a) ignore the Florida Legislature's broad and well-established grant of jurisdiction in its general law, specifically Chapter 366, Florida Statutes; (b) ignore decades of Florida Supreme Court precedent that holds that the Commission has exclusive jurisdiction over public utilities; (c) ignore its exclusive jurisdiction with respect to rates and charges under Section 366.06(1), Florida Statutes; (d) ignore clear and unambiguous provisions of the Florida Constitution and the Miami-Dade County Home Rule Charter and Amendment that recognize and provide for Commission jurisdiction over Miami-Dade County; (e) elevate an exemption found in Rule 25-9.034(1), Florida Administrative Code, for "municipalities," when that exemption may be in excess of the Commission's statutory authority, and when Miami-Dade County executed the 2008 CSA as a county, as opposed to a municipality; and (f) ignore the clear language of the 2008 CSA, the First Amendment to the 1998 CSA, and Resolution Number R-1105-08, all of which state that the 2008 CSA is subject to approval by this Commission. In other words, at multiple levels, from the Florida Legislature to this Commission; and from the Florida Constitution, to the general law found in the Florida Statutes, to the Miami-Dade Home Rule Amendment and Charter, this Commission's jurisdiction with respect to rates, terms, and conditions of a public utility's service to its customers is exclusive and superior to any other agency, county, and municipality in Florida. As is discussed more

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from a lawful, Commission-approved tariffed rate is without legal foundation; and the Commission should specifically disapprove the 2008 CSA.

fully below, it is clear that only this Commission has the authority to consider and approve or disapprove the 2008 CSA.

A. THE COMMISSION'S EXCLUSIVE JURISDICTION OVER RATES AND SPECIAL SERVICE CONTRACTS IS WELL ESTABLISHED LAW.

1. The PSC's Exclusive Grant of Authority in Ratemaking is Superior to Any County or Municipality Authority.

FCG is an investor-owned natural gas utility company subject to the regulatory jurisdiction of Chapter 366, Florida Statutes. The Florida Legislature, in Section 366.01, Florida Statutes, has enumerated the general jurisdiction of the Commission with respect to such public utilities: "The regulation of public utilities as defined herein . . . shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for that purpose."

The PSC's exclusive authority with respect to the rates and charges of public utilities is not only extensive but it is complete:

> In addition to its existing functions, the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service; . . . ***The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other*** boards, agencies, political subdivisions, ***municipalities***, towns, villages, ***or counties***, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

Section 366.04(1), Florida Statutes (emphasis added). The fact that the Legislature has granted such exclusive jurisdiction over rates and charges, and declared such authority to be "superior" and not concurrent to that of "municipalities, towns, villages, or counties" should be sufficient by itself as to resolve the instant jurisdictional question in favor of this Commission's authority to address the relationship between FCG and MDWASD, whether by contract or tariff. Indeed, such exclusive jurisdiction has been repeatedly

recognized by our Florida Supreme Court as to require the immediate termination of circuit court proceedings, even in those instances where there is only a colorable claim of Commission jurisdiction. *See Florida Public Service Comm'n n v. Bryson*, 569 So. 2d 1253, 1255 (Fla. 1990). See also, *Public Service Comm'n v. Fuller*, 551 So. 2d 1210 (Fla. 1989).

To the extent there is any question regarding the full meaning of this grant of exclusive jurisdiction with respect to the authority of municipalities and counties, the Florida Supreme Court has specifically addressed this question as well and found that the exclusive and superior authority in all public utility rate matters lies only with the Commission. In *Florida Power Corp. v. Seminole County*,[12] the immediate issue was county and city ordinances that required Florida Power Corp to relocate certain power lines underground. While there was no issue regarding the utility's obligation to relocate existing aerial power lines due to a road widening project, the county and city requirements that such relocation be to underground lines imposed an additional $1,250,000 cost on the utility, and ultimately its ratepayers. Both the county and city relied upon their constitutional grants of authority under Article VIII, sections 1(g) and 2(b), respectively, as well as their home rule powers under section 125.01(3)(a)-(b) and chapter 166, Florida Statutes,[13] respectively, for authority to require Florida Power Corp by ordinance to move the lines underground and their refusal to pay the additional costs of such a requirement.

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[12] 579 So. 2d 105 (Fla. 1991) (hereinafter, "*FPC*").

[13] As is more fully discussed in the Section B of this brief, the constitutional and statutory home rule provisions relied upon by Seminole County and the City of Lake Mary are comparable to those powers relied upon by MDWASD in the present case.

The Court dismissed the attempt of the county and municipality to relocate such lines underground. The Court recognized that an obligation to place power lines underground "clearly affects its rates if not its service" and that the cost to convert such overheard lines to underground "will necessarily be reflected in the rates of its customers."[14] As such, "the jurisdiction of the Public Service Commission to regulated rates and services of public utilities preempts the authority of the city and county to require FPC to place its lines underground."[15] Moreover, the Court found that "both the constitution and statutes recognized that cities and counties have no authority to act in areas that he legislature has preempted.[16]

The grant of exclusive authority means that this Commission fully and completely regulates the rates, terms, and conditions by which FCG provides transportation service to MDWASD. As a matter of fundamental law, this Commission should find that it, and only it, has the exclusive and superior authority to address the provision of natural gas transportation service by FCG, a regulated public utility, and MDWASD.

2. **All Rates At All Times are Subject to Commission Approval.**

The PSC's exclusive jurisdiction with respect to rates and charges extends to all rates and charges of the utility, regardless of the jurisdictional status of the 2008 CSA.

Section 366.06(1), Florida Statutes, provides that "[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 . . . ." The plain meaning of this obligation is unambiguous – FCG must only charge a rate that is filed and approved by the

[14] *FPC*, 579 So. 2d at 107.
[15] *Id.*
[16] *See id.*

Commission. As the Florida Supreme Court recognized in the *FPC* case, anything that impacts rates becomes subject to the PSC's exclusive jurisdiction.

The filing and approval of rates occurs through the tariff process, with rate changes usually effectuated through a rate case. The implementation of section 366.06(1) is accomplished through the Commission's Rule 25-9.001, et. seq., Florida Administrative Code, which controls the general filing and approval process for tariffs.

While tariffs are the general rule, the Commission has recognized that in certain instances public utilities should be afforded some flexibility in obtaining or retaining certain large volume customers, as any rate over incremental cost will generally benefit the general body of ratepayers. To provide such authority, the PSC has promulgated Rule 25-9.034(1), Florida Administrative Code, which provides as follows:

> Wherever a special contract is entered into by a utility for the sale of its product or services in a manner or subject to the provisions not specifically covered by its filed regulations and standard approved rate schedules, such contract must be approved by the Commission prior to its execution. Accompanying each contract shall be completed and detailed justification for the deviation from the utility's filed regulations and standard approved rate schedules. If such special contracts are approved by the Commission, a conformed copy of the contract shall be placed on file with the Commission before its effective date. The provisions of this rule shall not apply to contracts or agreements governing the sale or interchange of commodity or product by or between a public utility and a municipality or R.E.A. cooperative, but shall otherwise have application.

Fundamentally, and consistent with the general statutory framework, this Rule provides that any such special contracts must be filed with and approved by the Commission.[17] The 2008 CSA recognized both the imperative to file the CSA as well as the tariff basis for the Company's ability to enter into such contracts. Article II of the 2008 CSA states

[17] The application of the municipality or R.E.A. cooperative exception is more fully discussed in Section B below.

that the parties "confirm that Customer [MDWASD] qualifies for the Contract Demand Service Rate Schedule." The company's Contract Demand Service Rate Schedule ("KDS") is set forth at Sheets 49 to 51 of its tariff. The KDS schedule does not enumerate a requirement for such contracts to be approved. But whether the Company enters into a contract with MDWASD pursuant to the KDS schedule or some other schedule, Section 1 of the Company's tariff, at Sheet 8, states that the company's tariff is "supplemental" to the Commission's rules and regulations, and that where there is a contradiction between the tariff and the Commission's rules and regulations, that the Commission's rules and regulations shall prevail. These requirements for filing ensure that the public has access to the rates, terms, and conditions of regulated utility service. Rule 25-9.003, Florida Administrative Code.

The paramount importance of filing such contract service arrangements was previously addressed in the *Chesapeake Utilities Order*[18] of this Commission in 2006. In approving Chesapeake's gas transportation agreement with Polk Power Partners, this Commission analyzed the utility's cost of service calculations to ensure that the proposed rates covered Chesapeake's cost of service to Polk Power. In approving the contract and rejecting a show cause proceeding, the Commission extensively discussed the important legal and public policy rationale for a public utility obtaining Commission approval of a special contract "prior to the execution of the special contract, not promptly thereafter.[19]

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[18] Order No. PSC-06-0143, Docket No. 050835-GU, In re: Petition for Approval of Amendment No. 2 to gas transportation agreement (special contract), master gas transportation service agreement, delivery point lease agreement and letter agreement: CFG Transportation Aggregation Service between Florida Division of Chesapeake Utilities Corporation and Polk Power Partners, L.P. (Feb. 27, 2006) ("*Chesapeake Utilities Order*").

[19] Order No. PSC-06-0143-PAA-GU, at 15 Docket No. 050835-GU (Feb. 27, 2006).

While MDWASD now chooses to contest the Commission's jurisdiction with respect to contract service arrangements, MDWASD acknowledged this Commission's jurisdiction over the 2008 CSA when it executed the 2008 CSA and the First Amendment to the 1998 CSA. Further, in Resolution Number R-1105-08, the Board of County Commissioners of Miami-Dade County, Florida, acknowledged that the 2008 CSA was subject to approval by the Commission. Thus, in addition to the strong presumption in favor of Commission jurisdiction, MDWASD has acknowledged and assented to such jurisdiction though its prior actions in this matter.

Even if there is a situation in which the Commission might find that it does not have the authority to require the filing of the 2008 CSA, the Commission shall retain the absolute and ultimate authority to control any rates that FCG might charge MDWASD. First, there is nothing in chapter 366 that exempts any public utility's rates from Commission authority. Indeed, the statutory directive in Section 366.04, that "the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and services" is without exception.

Second, Section 366.06(1) provides, "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." The statute then enumerates an extensive procedure for approving new rates and changing existing rates. Thus, any rate charged by FCG to MDWASD is fully and completely subject to the Commission's plenary control.

Third, the Florida Supreme Court has held that "contracts with public utilities are made subject to the reserved authority of the state, under the police power of express

statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts."[20] In this case the PSC ordered the utility to increase the service availability charges to a developer notwithstanding the prior contract rate that had been entered into pursuant to the utility's tariff. Thus, independent of any contracting authority of the parties and regardless whether the contract is filed or not, the PSC retains the complete authority to change the rates in such a contract irrespective of the usual contract law to the contrary.

Finally, the exception to the rule MDWASD relies upon may not have a sufficient statutory basis as to be legally effective. The municipalities and R.E.A. cooperative language in the final sentence of Rule 25-9.034(1) purports to carve out an exception to the filing of contract service arrangements with the Commission. However, the statutory basis for this rule is Section 366.05(1), which grants to the PSC the authority to "prescribe fair and reasonable rates and charges," to require repairs and other improvements to a utility's operations, to fix the compensation of examiners and other employees necessary to carry out its duties, and to adopt rules "to implement and enforce the provisions of this chapter." The law is well settled that the general authority to adopt rules is limited to the promulgation of rules on specific matters delegated to the agency.[21]

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[20] *Miller & Sons v. Hawkins*, 373 So. 2d 913, 914 (Fla. 1979).

[21] Section 120.52(8) provides: "A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute." *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1 DCA 2000) (interpreting the 1999 amendments to the Administrative Procedure Act with regards to agency rulemaking authority to require that the authority to adopt an administrative rule be based on an explicit power or duty identified in the enabling statute); *see also*

Thus, the grant of authority to promulgate rules standing alone does not grant the PSC the authority to create exemptions to the requirement to charge only rates filed and approved by the PSC. As far as the remainder of this section, on its face there does not appear to be any statutory authority that would authorize the PSC to create an exemption to the obligation to file and approve rates. Contrast the language in Chapter 366 with Section 364.337(2), which grants the PSC the authority, upon petition, "for a waiver of some or all of the requirements of this chapter, except ss. 364.16, 364.336, and subsections (1) and (5)" and Section 364.3375(1), which provides, "In granting such certificate the commission, if it finds that the action is consistent with the public interest, may exempt a pay telephone provider from some or all of the requirements of this chapter.". To the extent this case turns solely on the exception language in Rule 25-9.034(1), FCG respectfully suggests that there may not be sufficient statutory authority for such an exception, which is the sole basis if MDWASD's argument that the Commission lacks the jurisdiction to approve the CSA.

In the final analysis, irrespective whether the 2008 CSA is filed or not with the Commission, the Commission retains the full and complete authority to control all rates of a public utility, including FCG. Such control is necessary in the public interest in order to ensure that rates are "fair and reasonable" for all customers.

Osheyack v. Garcia, 814 So. 2d 4 (Fla. 2001) (approving *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.* construction of revised 120.52(8), and holding the PSC's disconnect authority rule was directly and specifically related to the authority granted it under section 364.19).

B. MDWASD IS NOT ENTITLED TO AN EXEMPTION FROM COMMISSION JURISDICTION.

1. The Miami-Dade County Home Rule Charter and Amendment, as well as General Law, Expressly Provide for Commission Jurisdiction.

Regardless of the municipality powers possessed by Miami-Dade County as exercised by or through its water and sewer department, MDWASD may not take advantage of the exemption contained in Rule 25-9.034(1), Florida Administrative Code, which provides that Commission approval of special contracts do not apply "to contracts or agreements governing the sale or interchange of commodity or product by or between a public utility and a municipality or R.E.A. cooperative . . . ." MDWASD's authority as a "municipality" is not unlimited, and is subject to the operation of general law and this Commission's exclusive and superior jurisdiction with respect to public utilities and their rates.

MDWASD relies on Article VII, Section 6(f), of the Florida Constitution of 1968, which states "[t]o the extent not inconsistent with the powers of existing municipalities or general law, the Metropolitan Government of Dade County may exercise all the powers conferred now or hereafter by general law upon municipalities." MDWASD has also cited Section 1.01A.21 of the Miami-Dade County Home Rule Charter for the same proposition. Finally, MDWASD cites Section 2-340 of the Code of Miami-Dade County, arguing that it is the policy of Miami-Dade County to establish, own and operate a countywide sanitary sewage collection and disposal system and water supply, treatment and distribution system. MDWASD's contention is that these provisions provide unchecked authority for it to be treated as a municipality under Rule 25-9.034(1)'s

exemption for municipalities, and that the 2008 CSA thus does not need to be approved by the Commission.

Contrary to MDWASD's arguments, neither Article VIII, Section 6(f), of the Florida Constitution, nor Section 1.01A.21, of the Miami-Dade County Home Rule Charter, provide a basis for the application of the Rule's exemption to MDWASD. In fact, additional provisions in Article VIII, Section 6, Florida Constitution, as well as the Miami-Dade Home Rule Charter, indicate that Miami-Dade County's authority is subject to the jurisdiction of the Commission, and that such jurisdiction in these limited circumstances does not permit MDWASD to rely upon the municipality exemption created by Rule by this Commission.

The Miami-Dade Home Rule Charter was established pursuant to the Dade County Home Rule Amendment, Article VIII, Section 11, Florida Constitution of 1885, preserved by Article VIII, Section 6(e), Florida Constitution of 1968. Article VIII, Section 6(e) states:

> Article VIII, Sections 9, 10, 11 and 24 of the Constitution of 1885, as amended, shall remain in full force and effect as to each county affected, as if this article had not been adopted, until that county shall expressly adopt a charter or home rule plan pursuant to this article. All provisions of the Metropolitan Dade County Home Rule Charter, heretofore or hereafter adopted by the electors of Dade County pursuant to Article VIII, Section 11, of the Constitution of 1885, as amended, shall be valid, and any amendments to such charter shall be valid; provided that the said provisions of such charter and the said amendments thereto are authorized under said Article VIII, Section 1, of the Constitution of 1885, as amended.

(internal footnotes omitted).

Thus, Article VIII, Section 6(e) of the 1968 (and current) version of the Florida Constitution protects and incorporates the former Article VIII, Section 11 of the Florida

Constitution of 1885. In fact, Article VIII, Section 11 of the Florida Constitution of 1885 is included in footnote 3 to Article VIII, Section 6. Article VIII, Section 11(7) of the Florida Constitution of 1885 creates an overriding constitutional requirement for Commission jurisdiction:

> Nothing in this section shall be construed to limit or restrict the power and jurisdiction of the Railroad and Public Utilities Commission or of any other state agency, bureau or commission now or hereafter provided for in this Constitution or by general law and said state agencies, bureaus and commissions shall have the same powers in Dade County as shall be conferred upon them in other counties.[22]

The effectiveness of this constitutional requirement is acknowledged and recognized by Section 9.06(b) of the Miami-Dade County Home Rule Amendment and Charter, as amended through November 4, 2008, which states, "[n]othing in this Charter shall be construed to limit or restrict the power and jurisdiction of the Florida Railroad and Public Utilities Commission." It is clear that the drafters of these provisions intended that Miami-Dade County be subject to the general jurisdictional power of the Commission.

Moreover, as the Florida Supreme Court recognized in *Gray v. Golden,* the Miami-Dade Home Rule Amendment, in subsection (i), contains additional limiting language on Miami-Dade's home rule powers:

> [A]nd it is further declared to be the intent of the Legislature and of the electors of the State of Florida that the provisions of this Constitution and general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida enacted pursuant thereto by the Legislature shall be the supreme law in Dade County, Florida, except as expressly provided herein and ***this section shall be strictly construed to maintain such supremacy of this Constitution and of the Legislature in the enactment of general laws pursuant to this Constitution.***[23]

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[22] The Florida Public Service Commission is the legal successor to the Railroad and Public Utilities Commission. *See* Fla. Stat. § 350.011.

[23] 89 So. 2d 785, 789 (Fla. 1956) (emphasis added).

The *Gray* court additionally concluded that the Home Rule Amendment "preserves the status of Dade County in state matters as a political subdivision of the state, subject to the general law of the state."[24] As has been previously discussed, the general law of Florida is clear that the PSC has the exclusive and superior authority with respect to the rates, terms, and conditions of service by a public utility, including FCG.

The Florida Supreme Court has specifically addressed the constitutional and home rule powers of municipalities and counties *vis a vis* the PSC in *Florida Power Corp. v. Seminole County*.[25] In this case, the Supreme Court rejected the arguments of a municipality and county that the constitutional home rule powers of each of these units of government permitted either of them to require a PSC-regulated public utility to bear the entire cost of relocating certain power lines underground. Instead, the Supreme Court held that "[w]hile the authority given to cities and counties in Florida is broad, both the constitution and statutes recognize that cities and counties have no authority to act in areas that the legislature has preempted."[26] In that case, as in the instant case, the Florida Constitution, the Florida Legislature, and the general laws of this state provide that this Commission, and only this Commission, shall have the exclusive and superior authority to regulate public utilities.

The law is well settled by the Florida Supreme Court that the home rule authority of Miami-Dade County is limited and subject to the general laws of Florida. *See, e.g., Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 504 (Fla.

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[24] *Id.* at 791.

[25] 579 So. 2d 105 (Fla. 1991).

[26] *Id.* at 107.

1999) ("The Home Rule Amendment must be 'strictly construed' to maintain such supremacy."); *Dade County v. Young Democratic Club of Dade County*, 104 So. 2d 636, 638 (Fla. 1958) (Miami-Dade electors cannot "infring[e] on the supremacy of the Florida Constitution and the general laws of Florida 'except as expressly authorized' by specific grants of power given" by the Constitution relating to home rule in Dade County); *State v. Dade County*, 142 So. 2d 79, 85 (Fla. 1962) (same regarding powers of the Miami-Dade County Commission). It is clear from the Florida Constitution and the Miami-Dade Home Rule Amendment and Charter that the extensive powers granted to Miami-Dade are explicitly limited and secondary when it comes to those matters within the jurisdiction of the Commission.

It is also very important to note that whatever municipal powers granted to Miami-Dade, including the authority to take advantage of exemptions that might otherwise apply to municipalities, that such powers are only effective to the extent they are authorized by *general law*. "General law" is law created by *statute*, and not by rule. In *Lawnwood Medical Ctr. v. Seeger*, the Supreme Court stated that a general law is defined as a ***statute*** relating to subjects or to persons or things as a class, based upon proper distinctions and differences that inhere in or are peculiar or appropriate to the class.[27] This decision is further born out by the general law of the State of Florida, as enunciated by the Legislature, in Chapter 366 Florida Statutes, which provides that Commission jurisdiction "shall be deemed an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for that purpose." As noted above, the Florida Supreme Court has repeatedly held that the Florida Constitution and general law are supreme, and the Miami-Dade

[27] 990 So. 2d 503, 509-10 (Fla. 2008).

Home Rule Amendment and Charter are to be strictly construed to respect that supremacy. Finally, the clear language of the Miami-Dade Home Rule Amendment and Charter, as found in Article VIII, Section 11(7), Florida Constitution 1885 (incorporated by Article VII, Section 6(e), Florida Constitution 1968) and Section 9.06(b), Miami-Dade County Home Rule Amendment and Charter, as amended through November 4, 2008, provides that Miami-Dade County shall be subject to Commission jurisdiction.

MDWASD's attempts to interpret certain provisions of the Florida Constitution and the Miami-Dade Home Rule Amendment and Charter to permit it to be treated as a municipality under Rule 25-9.034(1) conflicts with general law, as well as overwhelming authority that the Miami-Dade Home Rule Amendment and Charter are to be strictly construed to maintain the supremacy of the Florida Constitution and general law. General law overwhelmingly provides for the exclusive and superior Commission jurisdiction. *See* Fla. Stat. Ch. 366. Finally, the clear, express provisions of the Florida Constitution and the Miami-Dade County Home Rule Amendment and Charter provide that the 2008 CSA is subject to Commission jurisdiction. The requested application of the Commission's own rule exemption for municipalities is not supported by any aspect of Florida law.

2. Miami-Dade County is Not Entitled to Rule 25.9.034(1)'s Exemption under Article VII, Section 6(f), Florida Constitution.

MDWASD claims that it should be considered a "municipality" for purposes of Rule 25-9.034(1), Florida Administrative Code, and that the 2008 CSA thus does not require Commission approval. MDWASD attempts to bolster this argument by relying on Article VII, Section 6(f), Florida Constitution. However, a plain reading of that constitutional provision, and an analysis consistent with the overwhelming precedent

discussed above that the Miami-Dade County Charter should be strictly construed to maintain the supremacy of the Florida Constitution and general law, reveals that this exemption should not apply to MDWASD.

Article VII, Section 6(f), Florida Constitution, provides that "[t]o the extent not inconsistent with the powers of existing municipalities ***or general law***, the Metropolitan Government of Dade County may exercise all powers conferred now or hereafter by ***general law*** upon municipalities" (emphasis added). Application of the exemption in Rule 25-90.34(1) would be inconsistent with the general law regarding Commission jurisdiction, *i.e.*, Chapter 366. Further, the exemption is granted through a rule of the Florida Administrative Code, which is not a general law. *See, e.g., Lawnwood Medical Ctr., Inc. v. Seeger*, 990 So. 2d 503, 509-10 (Fla. 2008). Thus, Miami-Dade County should not be permitted to exercise this exemption because it is not a "power conferred . . . by general law upon municipalities." For this, and all reasons argued previously, the Commission should exercise jurisdiction over the 2008 CSA.

3. The Commission Should Not Construe Miami-Dade County's Home Rule Amendment and Charter and Rule 25-9.034(1) to treat MDWASD as a "Municipality" that is Exempt from Commission Jurisdiction.

It appears from cases (relied on by MDWASD) interpreting Miami-Dade County's Home Rule Amendment and Charter that Article VIII, Section 6(f) was intended, at least in part, to permit Miami-Dade Count to levy and collect taxes that were authorized to be levied and collected by municipalities. For example, in *State v. Brautigam*, the Florida Supreme Court noted:

> One of the serious limitations under the Dade County Home Rule Amendment was the inequity between the taxing powers of the county in unincorporated areas and the taxing powers of existing municipalities.

> The county could be called upon to provide more and more municipal type services in unincorporated areas, yet would have no more taxing power than a small rural county. In recognition of this inequity in the tax structure, Art. VIII, § 6(f), must necessarily grant to the county the same power to levy and collect taxes as municipalities. This construction of the Constitution removes the existing inequity and gives the county the revenue necessary to meet the increasing demands for services.[28]

Similarly in *State v. Dickinson,* the Florida Supreme Court held:

> We construe Fla. Const. art. VIII, § 11(1) (1885), which has been carried forward under Article VIII, § 6(e) of the current constitution, and the Home Rule Charter for Metropolitan Dade County in its present form, as granting Metropolitan Dade County a preeminent right, superseding the right of the various Dade municipalities, to determine and set whatever millage level is necessary for the support of the county-wide municipal purposes, functions and services which the County fulfills, provides or renders under the Charter.[29]

FCG submits that it would be improper to expand the reach of Article VIII, Section 6(f), Florida Constitution, to include Miami-Dade County as a municipality exempt from Commission jurisdiction under Rule 25-9.034(1), when it appears that the intent of allowing Miami-Dade County to exercise municipal powers under its home rule charter was to permit it to levy and collect taxes it would not otherwise be entitled to. MDWASD's policy-based argument is not persuasive in this proceeding because Commission jurisdiction is well-established by both general law and the Miami-Dade County Home Rule Charter and Amendment itself. *See* Fla. Const. Article VII, § 11(7) (1885) (as incorporated by Fla. Const. Art. VII, § 6(e) (1968); Miami-Dade County Home Rule Amendment and Charter, § 9.06(b) (2008). Further, Miami-Dade County executed the 2008 CSA as "Miami-Dade County," and not as a municipality, evidencing

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[28] 224 So. 2d 688, 692-93 (Fla. 1969).

[29] 230 So. 2d 130 (Fla. 1969).

an intent that MDWASD operate under the 2008 CSA as a county as opposed to a municipality.

C. THE 2008 CSA IS NOT IN EFFECT BECAUSE THE COMMISSION DID NOT APPROVE IT WITHIN 180 DAYS FROM THE DATE THE PARTIES ENTERED INTO IT.

Although the Commission undoubtedly has jurisdiction to consider the 2008 CSA as discussed above, Article I of the 2008 CSA states that "[i]f the Agreement is not approved and made effective by the Commission subject to terms and conditions satisfactory to the Parties within one hundred eighty (180) days from the date this Agreement is entered into by the Parties, this Agreement shall not become effective . . . ." The parties entered into the 2008 CSA on August 28, 2008, and more than 180 days have elapsed without Commission approval. Thus, the 2008 CSA is not in effect.[30]

MDWASD has previously contended that it was not a party to the previous Petition for Approval of Special Gas Transportation Agreement filed November 13, 2008, and that FCG unilaterally withdrew the Petition. However, the Petition was a matter of public record, MDWASD was provided notice and copies of the Petition by FCG, and the rate problems were discussed with MDWASD staff.[31] MDWASD did not participate in that proceeding, and waited until the expiration of the 180 day time limit to bring the instant Petition. The June 22, 2009 letter effectively gave MDWASD 30 days'

[30] FCG is currently billing MDAWSD tariff rates under its Rate Schedule GS-1,250k tariff rate. If there is no contract and no service under the Company's Contract Demand Service Rate Schedule ("KDS"), then FCG is required under Section 366.06 to charge MDWASD only rates that have been approved by the Commission, which would be one of the rate schedules in the tariff.

[31] FCG verbally informed MDWASD that it had filed the November 13, 2008 Petition in Docket No. 08067-GU shortly after filing and emailed MDWASD he docket number in the proceeding on November 26, 2008.

notice of termination of the 2008 CSA. FCG stands by its stated position that no valid special contract exists because the 2008 CSA was not approved by the Commission.

III. CONCLUSION

Jurisdiction in the Commission is to be liberally construed in favor of its exclusive and superior jurisdiction with respect to FCG as a Commission-regulated public utility. There is complete authority for the Commission to exercise its jurisdiction over the 2008 CSA and make a determination of whether it should be approved. MDWASD asks this Commission to ignore this ample authority and instead misread a provision in Rule 25-9.034(1) to exempt it from Commission jurisdiction. Based on the foregoing, the Commission must exercise jurisdiction over the 2008 CSA and deny MDWASD's arguments for exemption.

Respectfully submitted, this 16th day of April, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U.S. Mail this 16th day of April, 2010.

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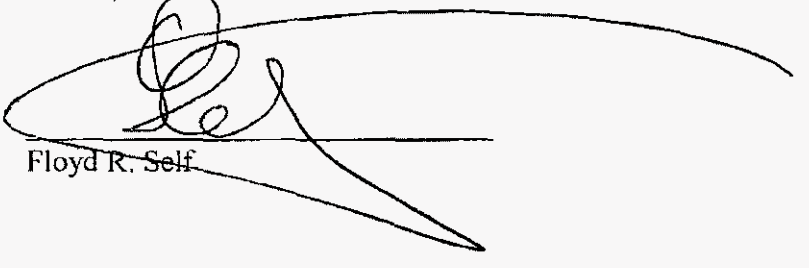

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