

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of:

DOCKET NO. 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.

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PROCEEDINGS: COMMISSION CONFERENCE AGENDA  
ITEM NO. 19

COMMISSIONERS  
PARTICIPATING: CHAIRMAN ART GRAHAM  
COMMISSIONER LISA POLAK EDGAR  
COMMISSIONER NATHAN A. SKOP  
COMMISSIONER RONALD A. BRISÉ

DATE: Tuesday, October 26, 2010

PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR, CRR  
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## P R O C E E D I N G S

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3           **CHAIRMAN GRAHAM:** Item 19. Ms. Williams,  
4 you're up.

5           **MS. WILLIAMS:** Good morning, Commissioners.  
6 Anna Williams on behalf of Commission Staff.

7           Item 19 is Staff's recommendation addressing  
8 the threshold legal issue in Docket 090539-GU of whether  
9 the Commission has authority to approve the 2008 Special  
10 Gas Transportation Service agreement between Florida  
11 City Gas and Miami-Dade Water and Sewer Department.  
12 Staff believes that the Commission does have authority  
13 to consider this agreement.

14           Representatives from Florida City Gas and  
15 Miami-Dade County are available, and Staff is also  
16 available, should you have any questions.

17           **CHAIRMAN GRAHAM:** Thank you, Ms. Williams.

18           Let's start with Florida City Gas. Any  
19 opening comments? Yes, sir.

20           **MR. SELF:** Thank you, Mr. Chairman. Floyd  
21 Self of the Messer, Caparello & Self Law Firm, appearing  
22 on behalf of Florida City Gas. Also with me is Shannon  
23 Pierce, who is Senior Counsel with AGL Resources, an  
24 affiliate of Florida City Gas.

25           Mr. Chairman, we agree with the Staff rec --

1 excuse me. We agree with the Staff recommendation, and  
2 it might be more efficient if Miami-Dade would speak,  
3 and then I would provide any response that may be  
4 necessary.

5 **CHAIRMAN GRAHAM:** They're next. Miami-Dade.

6 **MR. ARMSTRONG:** Thank you, Mr. Chair. And  
7 congratulations on your vote.

8 **CHAIRMAN GRAHAM:** Thank you, sir.

9 **MR. ARMSTRONG:** Best of luck to you. I do,  
10 will go out of order with the provision, and I know the  
11 Commission will allow me to be able to address FCG's  
12 arguments, if they differ from my own.

13 **CHAIRMAN GRAHAM:** Sir, I just need your name  
14 for the record, please.

15 **MR. ARMSTRONG:** Sure. It's Brian P.  
16 Armstrong, Law Firm of Nabors, Giblin & Nickerson,  
17 appearing today as special counsel for Miami-Dade  
18 County.

19 **CHAIRMAN GRAHAM:** Please continue.

20 **MR. ARMSTRONG:** Thank you.

21 Commissioners, to Miami-Dade this is a simple  
22 issue. This Commission has a rule which exempts  
23 contracts between a municipal utility and a regulated  
24 utility from its jurisdiction. Only three things are  
25 necessary for the exemption to apply: A contract, a

1 regulated public utility and a municipal utility. These  
2 three things exist in the case before you today.

3 Miami-Dade is a special political subdivision  
4 in Florida explicitly established and recognized in  
5 Florida's Constitution. Miami-Dade's charter and the  
6 Florida Constitution recognize Miami-Dade's special  
7 character as a government entitled to all powers and  
8 privileges of any Florida municipality, which would  
9 include applicable exemptions. Staff identifies no  
10 court or Commission precedent that addresses the rule  
11 before you and the exemption that it provides for the  
12 Miami-Dade/FCG contract, yet Staff's recommendation  
13 appears to go out of its way to assert jurisdiction over  
14 this contract.

15 Why? In meetings with Miami-Dade  
16 representatives, Staff has reminded Miami-Dade that it  
17 must protect the financial integrity of the utilities  
18 which this Commission regulates. Fine. What about the  
19 customers of Miami-Dade, Florida's largest local  
20 government?

21 What is before you is a contract that FC&G and  
22 Miami-Dade signed. FCG's president and Miami-Dade's  
23 mayor signed it. Miami-Dade wishes to be clear; we do  
24 not want the Commission to make FCG's other customers  
25 pay anything as a result of our contract with FCG.

1           The contract at issue in this proceeding is  
 2 exempt from your jurisdiction, and this exemption should  
 3 not be construed to harm FCG's other customers at all.  
 4 We emphasize this fact because Staff has focused on a  
 5 potential adverse impact on those other customers which  
 6 Staff presumes would occur if the Commission does not  
 7 reject this contract. There should be no adverse impact  
 8 on other customers.

9           This Commission can deny FCG recovery and  
 10 rates of any contract expense which the Commission deems  
 11 unreasonable or imprudent. FCG's shareholders absorb  
 12 disallowed expenses in every rate case filed with this  
 13 Commission.

14           The same concept should hold true as a result  
 15 of the contract before you. In FCG's next rate case, if  
 16 the evidence shows that FCG should have bargained for a  
 17 higher contract price for Miami-Dade, this Commission  
 18 should impute additional revenue to FCG's revenues. You  
 19 do this all the time under similar circumstances in rate  
 20 cases.

21           The bottom line, this Commission is not  
 22 required to allow FCG to recover the difference from  
 23 other customers. FCG shareholders should absorb the  
 24 difference, if any. On this point, you, Commissioners,  
 25 should also know that FCG originally filed this contract

1 with the Commission in an application which included  
2 FCG's assertion that the contract price covered its cost  
3 of service. FCG then changed its mind after discussions  
4 with Staff and informed Staff that the contract price  
5 will result in revenue below its incremental cost of  
6 service. But under oath and in response to Miami-Dade's  
7 interrogatories, FCG has now admitted that it never  
8 conducted any incremental cost of service study at all.  
9 This is no surprise to Miami-Dade, as the incremental  
10 cost to maintain the short distribution lines used to  
11 serve Miami-Dade, a portion of which Miami-Dade paid for  
12 and contributed to FCG, would be far below the alleged  
13 cost of service which FCG has identified to date for  
14 this Commission.

15 If you approve Staff's recommendation, you'll  
16 be interpreting your own rule in such a way that it is a  
17 nullity. Staff is saying that the exemption in the rule  
18 is trumped by this Commission's general rate setting  
19 authority over FCG. If this argument is true,  
20 Miami-Dade can think of no contract which would be  
21 exempt under Staff's interpretation of the rule's scope.

22 What purpose does the rule's exemption serve  
23 if Staff's interpretation is correct? There would be no  
24 exemption available to any contract between any  
25 government utility and a regulated public utility if

1 Staff's interpretation holds.

2 To conclude, we have a contract signed by  
3 FCG's president, Hank Linginfelter, binding FCG to serve  
4 Miami-Dade at a designated rate. FCG's arguments to  
5 this Commission and its conflicting assertions as to  
6 whether the contract price covers its incremental cost  
7 of service, when it finally admitted to Miami-Dade and  
8 to you that it did not even perform a typical  
9 incremental cost of service study, leads only to the  
10 conclusion that FCG simply wishes to use this Commission  
11 and to abuse the regulatory process to get a higher  
12 price than its own president agreed to.

13 As a former general counsel and senior vice  
14 president of what was then Florida's largest water  
15 utility, I represent to this Commission that no utility  
16 should attempt to use this Commission in such a way.  
17 FCG signed a contract with Miami-Dade, and a reputable  
18 utility would live by its terms.

19 Miami-Dade requests that this Commission apply  
20 its rule and exempt the FCG/Miami-Dade contract from PSC  
21 jurisdiction. Let the contract stand. Let FCG, a  
22 multimillion dollar utility owned by a huge multistate  
23 utility conglomerate, be bound by the contract terms its  
24 own president agreed to with Miami-Dade's mayor and  
25 governing body. Do not take out of the pockets of

1 Miami-Dade residents any money in excess of the funds  
2 which their elected representatives bargained for with  
3 FCG. Do not force this Commission, Miami-Dade and FCG  
4 to unnecessarily spend significant funds, which would be  
5 required if you send this case to a hearing, a likely  
6 appeal and the associated brief writing, testimony  
7 drafting, pleadings, discovery and other costs which  
8 everyone in this room and ultimately our customers would  
9 incur.

10 Apply your rule, exempt the contract and we  
11 are done. Thank you, Commissioners. I appreciate your  
12 time.

13 **CHAIRMAN GRAHAM:** Thank you, sir.

14 A question to Staff. The question before us,  
15 the only question before us is do we have the authority  
16 to, to approve this agreement; correct?

17 **MS. WILLIAMS:** Yes, Chairman, that's correct.

18 **CHAIRMAN GRAHAM:** Okay. Commission board, do  
19 you have any questions of Miami-Dade before I get the  
20 reply from Florida City or from Staff?

21 Commissioner Skop.

22 **COMMISSIONER SKOP:** Thank you.

23 A question for Staff. With respect to the  
24 issue before us as to whether the Commission has  
25 jurisdiction or authority to approve the 2008 agreement



1 between Miami-Dade and Florida City Gas, what are the  
2 ramifications of the Commission adopting the Staff  
3 recommendation?

4 **MS. WILLIAMS:** To clarify, do you mean the  
5 ramifications for this docket in particular or in  
6 general?

7 **COMMISSIONER SKOP:** What are the ramifications  
8 for this docket in general of adopting the Staff  
9 recommendation as to whether the Commission has the  
10 authority to approve a contract that was executed  
11 apparently two years ago?

12 **MS. WILLIAMS:** From -- as it should have been,  
13 in Staff's opinion, all along, when parties enter into  
14 these type of service contracts with municipalities,  
15 they would still be required to submit them for  
16 Commission approval in accordance with Rule 25-9.0341.

17 **COMMISSIONER SKOP:** Okay. So if the  
18 Commission were to exercise its jurisdiction over the  
19 contract, what would happen in the event that the  
20 Commission ultimately denied approval of the contract?  
21 What would happen?

22 **MS. WILLIAMS:** If the Commission ultimately  
23 denied, if we found that we had jurisdiction and then  
24 went forward and denied approval of the contract, either  
25 the parties could go back, renegotiate and come up with

1 something that may be better to the Commission's liking,  
2 or the, they could continue service to Miami-Dade County  
3 under an otherwise applicable tariff rate.

4 **COMMISSIONER SKOP:** Okay. And I understand  
5 that the tariff rate, that's a separate issue. Again,  
6 it seems to me, based on what I've read, that the  
7 contract is below incremental cost based on Staff's  
8 analysis. Is that correct, Ms. Kummer?

9 **MS. KUMMER:** Based on the preliminary numbers  
10 that we've seen, sir, it appears so, yes. But, again,  
11 those are preliminary.

12 **COMMISSIONER SKOP:** Okay. All right. Thank  
13 you for that clarification.

14 If the Commission were ultimately to deny  
15 approval of the contract, again, the tension here is  
16 Commission jurisdiction as we should have jurisdiction,  
17 but there's also a potential legal issue regarding  
18 enforcement of a contract, a legally binding document  
19 that's outside the jurisdiction of the Commission. So  
20 we're kind of in the crossfire between, you know, should  
21 we exercise jurisdiction and ultimately deny approval of  
22 the contract? Does that, in Staff's opinion, not  
23 deprive Miami-Dade of the benefits of its bargain under  
24 the existing contract?

25 **MS. WILLIAMS:** I'm sorry. Could you repeat

1 the question about --

2           **COMMISSIONER SKOP:** Assuming the, assuming the  
3 Commission has jurisdiction and the Commission adopts  
4 the Staff recommendation today, which is to exercise its  
5 jurisdiction to have authority to approve or deny the  
6 2008 agreement, okay, which is two years after the fact  
7 that we're now getting involved in this, what would  
8 happen ultimately if the Commission denied the contract  
9 because the contract, in the Commission's view, as  
10 Ms. Kummer has mentioned, is currently below incremental  
11 cost, which results in a cross-subsidy to a certain  
12 class of ratepayers? I think I'm saying this correctly.

13           The fallout question of that is that the  
14 Commission interjects itself into a contract, which  
15 obviously there's concurrent jurisdiction here, then --  
16 and denies that contract. I'm trying to understand the  
17 ramifications to the extent that if we deny the  
18 contract, does that not put Miami-Dade in the position  
19 of effectively denying Miami-Dade the benefit of the  
20 bargain it made when it entered into such agreement two  
21 years ago?

22           **MS. WILLIAMS:** Thank you. I have a better  
23 understanding now of what you're getting at.

24           I think the controlling case law, specifically  
25 the *H. Miller & Sons* case, demonstrates where the

1 Supreme, Florida Supreme Court determined that contracts  
2 made with regulated public utilities are made subject to  
3 the reserved power of the state via the Public Service  
4 Commission to make sure that rates are set in the  
5 benefit of the public interest and for the public  
6 welfare.

7 In that case, the Commission had ordered a  
8 utility to change the rates that had been agreed to in a  
9 private contract, and the Supreme Court upheld the  
10 Commission's doing that because this Commission does  
11 have the power granted by the Legislature to look out  
12 for that public interest.

13 **COMMISSIONER SKOP:** Okay. And I'm not going  
14 to dispute that we have that power or that jurisdiction.  
15 But what I am looking at is we're now asked to approve  
16 or deny a contract that's been in effect for at least  
17 two years, if not more, depending upon when it was  
18 executed. Do we know the execution date of the  
19 contract, the 2008 agreement?

20 **MS. KUMMER:** I believe it was in August of  
21 2008. Somebody can correct me, if I'm wrong.

22 **COMMISSIONER SKOP:** Okay. So it's been in  
23 effect for a little bit over two years apparently,  
24 assuming, subject to check. Okay.

25 I guess what I'm trying to, you know, before

1 we leave, obviously, you know, there's a case to be  
2 made, as Staff has indicated in the Staff  
3 recommendation, the Commission has jurisdiction. If we  
4 exercise that jurisdiction, I'm trying to gain a better  
5 appreciation of the benefits and peril. Obviously we  
6 desire to protect the ratepayers. But if we're  
7 effectively intervening late in the game due to Florida  
8 City Gas not providing us with a contract to approve  
9 until very late in the game, then, you know, how do you  
10 reconcile, you know, the two instances?

11 I mean, if I understand Staff's analysis,  
12 they're using Supreme Court precedent to come in and  
13 trump any contractual rights that the parties may have  
14 in a civil court of law, thereby giving the Commission  
15 complete scope of jurisdiction on this, which seems to,  
16 if the Commission were to reject, ultimately reject the  
17 contract and deny it, then it seems to me that, you  
18 know, at least one party suffers potential harm.

19 **MS. KUMMER:** I hesitate to jump in here  
20 because I am not a lawyer, but from a purely practical  
21 standpoint this contract is nothing more than a customer  
22 specific rate schedule.

23 **COMMISSIONER SKOP:** Okay.

24 **MS. KUMMER:** And that's the way I treat it  
25 from my perspective, that it is a special rate for this

1 customer designed on their specific circumstances. And  
2 as such, the Commission always approves rates for  
3 regulated utilities. Again, that's not a legal  
4 analysis, but from a technical perspective, that's how I  
5 see it.

6 **COMMISSIONER SKOP:** Okay. What does Staff  
7 intend to do -- and, again, generically, because this is  
8 getting down the path -- but with respect to Florida  
9 City Gas not providing the Commission with a contract  
10 for approval until two years after the fact, how does  
11 Staff intend to analyze or address that fact in this  
12 chain of events?

13 **MS. KUMMER:** I believe at this point, I think  
14 Ms. Williams could probably address it better than I  
15 can, but they did submit the contract at the point it  
16 was being, was up for renewal in 2008. It was  
17 subsequently withdrawn. And then Miami -- it is  
18 Miami-Dade's petition to require that that contract that  
19 was withdrawn now be enforced.

20 So it wasn't that the Commission -- that the  
21 Utility didn't present it for approval; they did in a  
22 timely manner. But because of the other events that  
23 have taken place, we're now at the point we are.

24 **COMMISSIONER SKOP:** All right. Well, again,  
25 looking at the Staff recommendation, I think the gist of

1 it, beyond what the Commission chooses to do or not to  
2 do here, seems to be a very complicated legal issue of  
3 how to properly balance the exercise of the Commission's  
4 jurisdiction to protect ratepayers and ensure that the  
5 contract is one that is -- hold on for one second -- not  
6 priced below incremental cost.

7 But on the flip side too, if the Commission  
8 were to take action to deny the contract, obviously that  
9 sends the parties back to the, you know, negotiating  
10 table. And arguably in a legal sense, absent the  
11 Commission being involved, that would implicate a whole  
12 different body of law to which the Commission doesn't  
13 have jurisdiction.

14 But it seems under the precedent cited that if  
15 the Commission has jurisdiction to approve contracts  
16 between utilities that are in the public interest, then  
17 the Commission has exclusive jurisdiction, in which case  
18 the contractual remedies probably aren't going to be  
19 available. Is that correct?

20 **MS. WILLIAMS:** Yes.

21 **COMMISSIONER SKOP:** Okay. All right.

22 **CHAIRMAN GRAHAM:** Thank you, Mr. Skop.

23 **COMMISSIONER SKOP:** Thank you.

24 **CHAIRMAN GRAHAM:** The, and the way I'm looking  
25 at this, the question that's before us is do we have the

1 authority to, to approve this contract? And we still  
2 have to hear from Florida City, but from the things that  
3 I see, we do have that authority. We have to make sure  
4 that, I guess our job is to protect the ratepayers that  
5 are out there, and our job is to make sure that there is  
6 no cross-subsidy that's out there where the ratepayer is  
7 going to be picking up for lost revenue that Miami-Dade  
8 is not paying, or if the rate is just too low. But  
9 before I continue, let's hear from Mr. Self.

10 **MR. SELF:** Thank you, Mr. Chairman.

11 Commissioner Skop, I think your fundamental  
12 questions that you're going to are right on point. And  
13 unfortunately this is a difficult factual issue, but  
14 don't let that distract you from the Florida  
15 Legislature's fundamental and primary policy decision  
16 that this Commission has the exclusive and superior  
17 jurisdiction to address the rates that Florida City Gas  
18 charges its customers. And in this particular  
19 situation, Miami-Dade Water and Sewer Department is, in  
20 fact, a customer.

21 And I think the Commission -- the Staff  
22 recommendation did a good job in kind of connecting the  
23 dots on the full effect, scope and meaning of the  
24 exemption that's in your rule, and that in fact the  
25 exemption for a municipality does indeed relate back to



1 the fact that exempt from the Commission's jurisdiction  
2 are municipal, electric and gas utilities. Well, in  
3 this particular case, Miami-Dade is not an electric or  
4 gas utility. It's simply a customer of the  
5 transportation service.

6 And, again, looking at the plain language of  
7 your rule, which talks about a commodity or product,  
8 that that's what's exempt, contracts for a commodity or  
9 product with a municipality. And in this particular  
10 instance what you have is a transportation service.  
11 We're not selling them gas, we're not selling them  
12 electricity. We're simply selling them the  
13 transportation for the gas that they purchase elsewhere.

14 With respect to Miami-Dade County's unique  
15 status as a home rule charter under the Florida  
16 Constitution, again, as we point out in our brief and  
17 the staff as well addresses, within that authority in  
18 the Florida Constitution is an express recognition that  
19 that exemption or that constitutional authority is  
20 subject to this Commission's jurisdiction. So while  
21 Miami-Dade County does, in fact, possess some unique and  
22 special powers, when it comes to matters that are within  
23 the jurisdiction of the Public Service Commission, the  
24 setting of rates for public utilities, that authority  
25 is, in fact, preeminent with this Commission.

1           And in addition to the Miller case that the  
2 staff discussed with you, Commissioner Skop, the Florida  
3 Power Corporation versus Seminole County case in 1991 by  
4 the Florida Supreme Court, I think also reinforces the  
5 fact that this Commission has that exclusive and  
6 superior authority to address these things.

7           A lot of the issues that Mr. Armstrong  
8 addressed are matters that fortunately or unfortunately  
9 will be addressed in -- I think will be the eventual  
10 substantive hearing on whether or not the contract rate  
11 is appropriate, and if it's not what happens after that.

12          So we would urge you to adopt the staff recommendation.

13          Thank you.

14          **CHAIRMAN GRAHAM:** Thank you, Mr. Self.

15          What I plan on doing is letting staff finish  
16 up, give Miami-Dade and Mr. Armstrong time to reply and  
17 then come back to the board.

18          Staff.

19          **MS. WILLIAMS:** Thank you.

20          Commission staff agrees with Florida City Gas,  
21 all the statements that Mr. Self just made. In response  
22 to Mr. Armstrong's statements, again, I want to  
23 emphasize, and I think you have already made this point  
24 that we are only here to address the jurisdictional  
25 issue. If we do end up determining that we have

1 jurisdiction over the contract, in going forward to a  
2 hearing we will address all the issues raised by the  
3 parties here today.

4 And, second of all, staff's interpretation of  
5 the rule is not that it's trumped by the Commission's  
6 general ratemaking authority, but simply that it does  
7 not apply in this situation to this contract present  
8 here.

9 **CHAIRMAN GRAHAM:** Thank you.

10 **MS. WILLIAMS:** That's all we have.

11 **CHAIRMAN GRAHAM:** Mr. Armstrong.

12 **MR. ARMSTRONG:** Thank you, Mr. Chair. Just  
13 three brief rebuttal points.

14 First, both staff and FCG are absolutely  
15 misinterpreting the holding in the H. Miller & Sons  
16 case. There are three very clear distinctions between  
17 that case and this one. That case did not involve a  
18 government utility. That case did not involve an  
19 applicable rule of the Commission that exempts the  
20 contract that was at issue. There is no limitation, in  
21 that proceeding, regarding the utility's ability to  
22 recover its incremental cost of service under the rates  
23 that were approved. None of those situations apply, and  
24 none of those facts apply in H. Miller & Sons, so it  
25 really is inapposite and distinguishable from this case.

1           The second point, Commissioners, it's easy to  
2 protect ratepayers. It's easy. You do it all the time  
3 in every rate case. If FCG signed a contract where they  
4 agreed to pay a million dollars, which is the amount at  
5 issue here, under the tariffed rate Miami-Dade would be  
6 paying a million dollars to FCG for this transportation  
7 service. If we were in a rate case and FCG signed a  
8 contract that said they would pay a million dollars to a  
9 vendor, and they went to a rate case and this  
10 Commission, based on the evidence, determined that the  
11 proper price was only \$100,000, you could deny them  
12 recovery of the \$900,000 which they would be  
13 contractually obligated to the pay to the vendor. They  
14 don't get out that million dollar payment.

15           The same thing applies here, the same concept  
16 applies here. They agreed to take \$100,000 from my  
17 client, Miami-Dade County, after a year plus of  
18 negotiations. If this Commission says you should have  
19 taken more, then you deny them recovery from the  
20 ratepayers. You make their shareholders pay for that.  
21 That's what you do when it's an expenses; you do the  
22 same thing for revenue. Constantly you guys impute  
23 revenue when you find a situation like that in rate  
24 cases, constantly. The third point, staff's  
25 interpretation does render this exemption a nullity.

1 There is no fact pattern we could think of, and we tried  
2 to say if they interpret it this way so say the general  
3 rulemaking authority trumps this exemption, that there  
4 is any kind of exemption available to any utility in the  
5 state of Florida. There is not.

6 The fourth issue raised by Florida City Gas,  
7 now -- and, again, I have to point out, they are trying  
8 to get in out of a contract that they sign. The  
9 president of that company signed this contract, and they  
10 are trying to get out of it. But the fourth point about  
11 the commodity or service, the capacity on their  
12 distribution line is the commodity they are selling to  
13 Miami-Dade. The capacity on that line. That line, a  
14 substantial portion of which was paid for by Miami-Dade,  
15 now why are we talking about impact on customers?  
16 Because staff's recommendation refers to this. Staff  
17 has repeatedly referred to Miami-Dade and the need to  
18 protect the financial integrity of Florida City Gas and  
19 protect other customers.

20 You can certainly protect other customers as  
21 we have mentioned, you do it all the time. In a rate  
22 case, a subsequent rate case, impute the revenue if you  
23 think there is a problem. Commissioners, right now I  
24 haven't heard anybody acknowledge the fact that what we  
25 are dealing with and why we are here today is because

1 Florida City Gas originally said in their application  
2 that the revenue collected on this contract meets its  
3 costs of service. After they have communication, which  
4 we have possession of with your Staff, they decided, no,  
5 it doesn't meet our incremental cost of service, that's  
6 far in excess of what we will get under this contract,  
7 you're right, maybe you should have disapproved this  
8 contract, and they withdrew it from your consideration.  
9 On their own they withdraw it from you and your  
10 consideration. That's why we are here today.

11 Now, we have an interrogatory. Because we  
12 filed an application, Miami-Dade had the ability to ask  
13 questions, and so we asked. Give us a copy of your  
14 incremental cost of service study, an easy cost of  
15 service study done all the time in utility ratemaking.  
16 They didn't do one, and they admitted under oath, after  
17 all the issues that your staff was provided, an  
18 incremental cost of service study far in excess of the  
19 contract rate, your Staff says we can't allow that to  
20 happen because the customers might have to pay it, we've  
21 got two very simple issues: One, your other customers  
22 do not have to pay it; and, two, they didn't even do an  
23 incremental cost of service study.

24 Commissioners, I don't think we can avoid  
25 addressing those facts and applying an exemption which

1 exists in a very simple way. We have a contract between  
2 a regulated public utility and a municipal utility. The  
3 contract is exempt under your rule. And I thank you for  
4 your time.

5 **CHAIRMAN GRAHAM:** Thank you, Mr. Armstrong.

6 Commission board? Mr. Brisé, did you have --

7 **COMMISSIONER BRISÉ:** Yes. Thank you, Mr.  
8 Chairman. When I look at this, I think it boils down to  
9 whether we have the ability to address this issue.

10 However, I think when you look at the backdrop  
11 of it, there's a whole lot more involved with it. And I  
12 certainly agree with Miami-Dade County that there is a  
13 contract. And the terms that that contract stipulates  
14 should be adhered to. And maybe we should look at the  
15 circumstances, as to why a set amount was agreed to.

16 But when we move out of that, and simply ask  
17 the question that is before us today, which is do we  
18 have the right to address this issue, I can't, even  
19 though I think that in terms of the merits of the other  
20 issues, we might want to address them, but with the  
21 question before us today, I think there is, we have very  
22 few option in terms of that. So I'm very concerned  
23 about some of the issues that are raised, but I think  
24 that we probably do have the ability to address whether  
25 we have the right to address the contract or not.

1                   **COMMISSIONER GRAHAM:** Thank you, Commissioner  
2 Brisé.

3                   Commissioner Skop.

4                   **COMMISSIONER SKOP:** Thank you.

5                   I just agree with Commissioner Brisé. Again,  
6 clearly the Commission has jurisdiction over the  
7 contract. What appears to be unfortunate is that the  
8 contract, for whatever reason, was never brought before  
9 the Commission for official approval two years ago, and  
10 the contract has been in force and effect until  
11 Commission staff pointed out that the contract may be,  
12 on a preliminary basis, below incremental cost of  
13 service thereby resulting in a cross-subsidy to other  
14 ratepayers which is not a good thing, because the  
15 Commission needs to ensure that rates are fair, just,  
16 and reasonable.

17                   It seems to me that the case law cited the  
18 Florida Supreme Court case in Miller allows the  
19 Commission, reserves the authority of the state to  
20 modify a contract in the interest of public welfare, and  
21 then looking at the United States Supreme Court case  
22 that's cited, arguably the Commission has jurisdiction  
23 there also. So I don't think jurisdiction is at issue,  
24 but I think both of the controlling cases that are cited  
25 by Staff give the Commission some ultimate discretion of



1 when we go to hearing of how to view the facts as they  
2 are adduced at hearing and make a decision on the merits  
3 in a fair and impartial manner to both parties. So at  
4 this point, if there are no further questions, I'd move  
5 the staff recommendation on Item 19.

6 **COMMISSIONER GRAHAM:** It has been moved and  
7 seconded?

8 **COMMISSIONER BRISÉ:** Second.

9 **CHAIRMAN GRAHAM:** Let the record show that it  
10 has been moved and seconded that we move the staff  
11 recommendation on Item 19.

12 That all being said, all in favor signify by  
13 saying aye.

14 (Vote taken.)

15 **CHAIRMAN GRAHAM:** Those opposed?

16 By you action you have approved Item 19.

17 \* \* \* \* \*

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STATE OF FLORIDA )

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:

CERTIFICATE OF REPORTERS

4

COUNTY OF LEON )

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6

WE, JANE FAUROT, RPR, and LINDA BOLES, RPR,  
CRR, Official Commission Reporters, do hereby certify  
that the foregoing proceeding was heard at the time and  
place herein stated.

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10

IT IS FURTHER CERTIFIED that we  
stenographically reported the said proceedings; that the  
same has been transcribed under our direct supervision;  
and that this transcript constitutes a true  
transcription of our notes of said proceedings.

11

12

13

WE FURTHER CERTIFY that we are not a relative,  
employee, attorney or counsel of any of the parties, nor  
are we a relative or employee of any of the parties'  
attorneys or counsel connected with the action, nor are  
we financially interested in the action.

14

DATED THIS 1st DAY OF NOVEMBER, 2010.

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16



JANE FAUROT, RPR  
Commission Reporter  
(850) 413-6732

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LINDA BOLES, RPR, CRR  
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