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ORIGINAL

December 4, 2000

BY HAND DELIVERY

Blanca Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: City Gas -- Docket No. 000768-GU

Dear Ms. Bayó:

Enclosed for filing on behalf of City Gas Company of Florida are the original and fifteen copies of its Response in Opposition to FPUC's Petition to Intervene.

If you have any questions regarding this filing, please call.

Very truly yours,

Richard D. Melson

Richard D. Melson

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RECORDS AND REPORTING

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for Rate Increase)
by City Gas Company of Florida)
_____)

Docket No. 000768-GU
Filed: December 4, 2000

ORIGINAL

**CITY GAS COMPANY OF FLORIDA'S
RESPONSE IN OPPOSITION TO FPUC'S PETITION TO INTERVENE**

City Gas Company of Florida ("City Gas") files this Response in Opposition to the Petition to Intervene filed in this docket on November 22, 2000 by Florida Public Utilities Company ("FPUC"). As grounds for its opposition, City Gas states:

SUMMARY

1. FPUC's Petition to Intervene should be rejected as an improper attempt to insert into this rate case issues that are beyond the scope of a rate proceeding under Section 366.06, Florida Statutes, and that are more properly the subject of a petition to resolve a territorial dispute under Section 366.04(3)(b), Florida Statutes. FPUC has not sufficiently alleged any interests of the type that a *rate proceeding* is designed protect. Further, FPUC has not alleged any interests that will be affected in an immediate and substantial way by any decision that the Commission might make in this rate proceeding. Its Petition to Intervene must therefore be denied for lack of standing.

STANDING AND BURDEN OF PROOF

General

2. When an entity's standing to participate in a proceeding is contested, the burden is on the petitioner to demonstrate that it does, in fact, have standing to participate in the case.

Department of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045, 1052 (Fla. 1st DCA 1979). FPUC has totally failed to carry that burden.

3. FPUC's petition was filed pursuant to Rule 25-22.039, Florida Administrative Code. Under that rule, petitions to intervene:

. . . must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

FPUC has not alleged, and could not allege, any constitutional, statutory or rule provision which gives it a right to participate in this proceeding. FPUC must therefore meet the traditional test of standing; namely, will its substantial interests be affected by the proceeding within the meaning of Chapter 120, Florida Statutes.

4. Although "substantial interest" is not defined by statute, the Commission and the courts have consistently applied the two pronged test for standing first articulated in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981) rev. den. 415 So.2d 1359 (Fla. 1982).¹ As the Florida Supreme Court recently stated in Ameristeel Corporation v. Clark, 691 So.2d 473, 477 (Fla. 1997):

To demonstrate standing to intervene under Agrico, a petitioner must demonstrate:

1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and

¹ See, e.g., In re: Application for original certificates to operate water and wastewater utility in Duval County by Nocatee Utility Corporation, Docket No. 990696-WS, Order No. PSC-00-1265-PCO-WS, issued July 11, 2000; In re: Joint Application of MCI Worldcom, Inc and Sprint Corporation for Acknowledgment or Approval of Merger, Docket No. 991799-TP, Order No. PSC-00-0421-PAA-TP, March 1, 2000.

2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

406 So.2d at 482 As the district court explained in that case, the first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

The Petition to Intervene in this case fails to meet either prong of the Agrico test and must therefore be denied.

No Immediate Injury in Fact

5. To satisfy the first prong of the Agrico test for standing, a party must show that its rights and interests are immediately affected by the proceeding in question and are thus in need of protection. Florida Society of Ophthalmology v. Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988). Furthermore, the alleged injury cannot be speculative or conjectural. Village Park Mobile Home Association v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987) rev. den., 513 So.2d 1063 (Fla. 1987).

6. While the Petition to Intervene alleges that FPUC's substantial interests could be affected by this rate proceeding, a closer analysis of the matters at issue in this case shows that the interests asserted by FPUC will not be affected by any decision the Commission might make. FPUC's only allegations of "injury" are that:

(a) an expansion of City Gas' natural gas distribution system that is addressed in City Gas' petition for a rate increase and accompanying prefiled testimony "will parallel or duplicate existing facilities of FPUC resulting in a duplication of facilities" (Petition ¶5); and

(b) "[s]hould the Commission approve the request for rate relief or portions thereof, and the proposed changes to the tariff sheets, City Gas will have received approval for expansion of its service area into areas served or capable of being served by FPUC." (Petition ¶6)

7. The allegation in Paragraph 5 that City Gas' proposed expansion will result in a duplication of facilities and the implicit allegation in Paragraph 6 that City Gas is planning to serve territory that is served, or capable of being served, by FPUC are factually incorrect.² Accepting those statements as true for purposes of determining FPUC's standing, however, as a matter of law they do not sufficiently allege that any Commission decision in this docket will result in immediate injury to FPUC.

8. First, nothing in City Gas' petition for rate relief requests approval of a territorial boundary or otherwise addresses the territory that City Gas is entitled to serve. The Commission's decision to grant all, part, or none of the requested rate increase will simply have no impact on any potential territorial issues.

9. Second, Commission approval of the revised tariff sheets filed in this docket likewise will have no impact on any future territorial dispute. The tariff sheets filed in this docket make no change to City Gas' service area boundary in Palm Beach County, where any potential territorial conflict with FPUC might arise. As demonstrated by Exhibit A, the Commission approved the tariff sheets which show the eastern boundary of City Gas' service area in Palm Beach County over a year ago, effective August 6, 1999. While some minor

² City Gas proposes to install a high volume, high pressure gas distribution system (the "Clewiston Expansion Project") to serve primarily industrial loads located to the west of a north-south boundary line drawn approximately eight miles west of the Florida Turnpike in Palm Beach County. This extension will not result in any duplication of service or facilities with FPUC. FPUC has no current service to any of this territory; FPUC has no current facilities in or near this territory; FPUC has previously declined to provide service to potential customers in this territory; and the closest FPUC's facilities (which are located just to the west of the Turnpike) are part of a low volume, low pressure system that is incapable of providing the pressures and volumes required to serve major industrial loads. These and other factors will be the subject of proof if and when FPUC files a territorial dispute under Section 366.04(3)(b).

updates are being proposed to these tariff sheets as part of this rate filing, none of those changes affect the service boundary in Palm Beach County.

10. As a matter of law, therefore, none of FPUC's allegations rises to the level of a present, actual "injury in fact" as required by Agrico. There is no decision that the Commission is being asked to make in this case that would affect any territorial boundary between FPUC and City Gas.

Outside Zone of Interest

11. FPUC has also failed to meet the second prong of the Agrico test because the interest asserted by FPUC -- the interest in avoiding duplication of facilities -- does not fall within the "zone of interest" which this proceeding is designed to protect.

13. This is a rate case proceeding under Section 366.06, Florida Statutes. The purpose of the proceeding is to set rates at the level required to give City Gas the opportunity to earn a fair rate of return on its investment in property used and useful in the public service. The "zone of interest" at issue in a rate proceeding includes the interest of the utility and its customers (who may be represented by the Office of Public Counsel) in having rates set at the appropriate level. FPUC is not a customer of City Gas and it will not be affected by any rates to be set in this proceeding.

14. Based on the allegations in the Petition to Intervene, FPUC's interest is only that of a potential competitor of City Gas, and then only with respect to portions of the service territory included in City Gas' currently approved tariff sheets. A rate proceeding is not designed to protect the interests of a competitor from a potential duplication of facilities and FPUC

therefore fails to meet the second prong of the Agrico test for standing. FPUC simply has no legally cognizable interest in the outcome of the rate proceeding.

Conclusion

15. In order to grant FPUC's Petition to Intervene, the Commission must conclude that FPUC has alleged *both* that its interests may be immediately and substantially affected by the proceedings in this docket *and* that those interests are of a type this rate proceeding is designed to protect. In this case, FPUC has failed to meet not only one, but both prongs of the test. Its Petition to Intervene must therefore be denied.

16. A Commission decision to deny FPUC's intervention in this rate case will not leave FPUC without a remedy for any territorial claim it may wish to assert. FPUC is free at any time to file a petition under Section 366.04(3)(b) asking the Commission to resolve any territorial dispute it may have with City Gas. FPUC must not be permitted, however, to interject territorial issues into an unrelated rate proceeding. To do so would have the effect of holding City Gas' request for a rate increase hostage to a territorial issue that is well beyond the legitimate scope of this proceeding.

WHEREFORE, City Gas respectfully urges that the Petition to Intervene filed by FPUC be denied for lack of standing, without prejudice to FPUC's right to file a separate petition under Section 366.04(3)(b) for the resolution of a territorial dispute if FPUC believes that a basis exists for such a petition.

RESPECTFULLY SUBMITTED this 4th day of December, 2000.

HOPPING GREEN SAMS & SMITH, P.A.

By: Richard D. Melson
Richard D. Melson
P.O. Box 6526
Tallahassee, FL 32314-6526
(850) 425-2313

Attorneys for
City Gas Company of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following by
Hand Delivery this 4th day of December, 2000:

Marlene Stern
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Norman H. Horton
Messer, Caparello & Self, P.A.
P.O. Box 1876
Tallahassee, FL 32301



Attorney

STATE OF FLORIDA

Commissioners:
JOE GARCIA, CHAIRMAN
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.



DIVISION OF ELECTRIC & GAS
JOSEPH D. JENKINS
DIRECTOR
(850) 413-6700

Public Service Commission

August 9, 1999

Authority No. G-99-16

Michael A. Palecki
Manager of Regulatory Affairs
NUI/City Gas Company of Florida
PMB 110M
3111-20 Mahan Drive
Tallahassee, Florida 32308

Re: Tariff Approval

Dear Mr. Palecki:

We are returning to you one copy of the following tariff pages for NUI/City Gas Company of Florida.

First Revised Sheet No. 3
First Revised Sheet No. 4
Original Sheet No. 5a

These pages were approved by Commission Authority No. G-99-16, and will be incorporated into the official copy of your tariff on file with this Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "Wayne R. Makin".

Wayne R. Makin
Bureau of Gas Regulation

WRM:lcf

cc: Joseph D. Jenkins, Director, Division of Electric and Gas
Robert L. Trapp, Assistant Director, Division of Electric and Gas
Cheryl R. Bulecza-Banks, Chief, Bureau of Gas Regulation
Division of Consumer Affairs - Tariff Files
Doree Sobel, NUI Corporation, P. O. Box 3175, Union, NJ 07083

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PSC Website: www.scri.net/psc

Internet E-mail: contact@psc.state.fl.us

Exhibit A

City Gas Company of Florida
FPSC Natural Gas Tariff
Volume No. 5

First Revised Sheet No. 3

CITY GAS COMPANY OF FLORIDA
NATURAL GAS TARIFF
ORIGINAL VOLUME NO. 5
AS FILED WITH THE
FLORIDA PUBLIC SERVICE COMMISSION

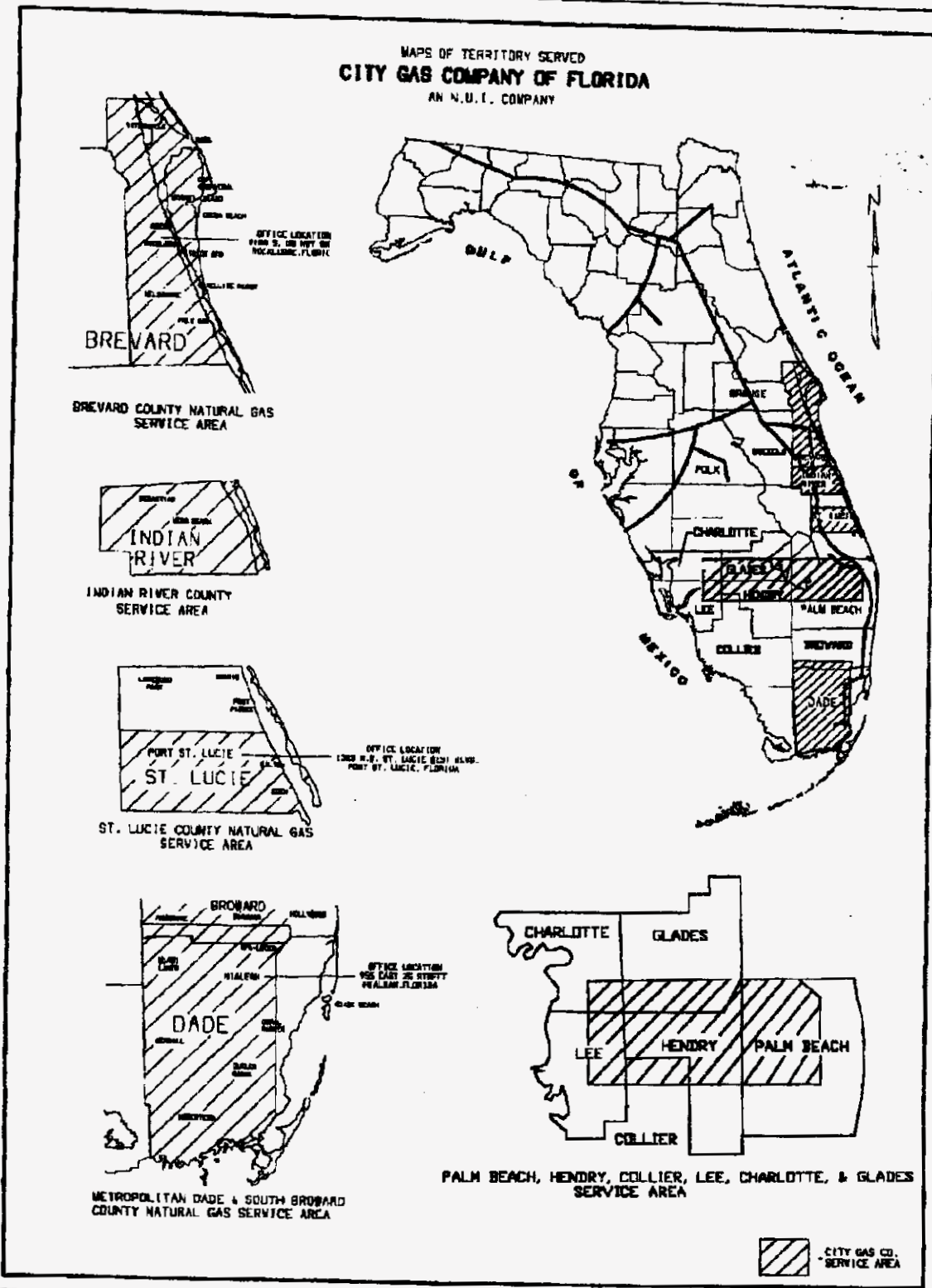
Territory Served

Dade, Broward, St. Lucie, Indian River, Brevard,
Palm Beach, Hendry, Lee, Glades, Charlotte,
and Collier Counties, Florida; other than those
areas presently served by other natural gas
companies.

(See map on following page)

Issued by: Victor A. Fortkiewicz
Vice President

Effective: **AUG 6 1999**



Issued by: Vice President
 Victor A. Fortkiewicz

Effective: **AUG 6 1999**

City Gas Company of Florida
FPSC Natural Gas Tariff
Volume No. 5

Original Sheet No. 5a

LIST OF COMMUNITIES SERVED

Municipalities

Unincorporated
Communities

Palm Beach County:

Belle Glade
South Bay

Hendry County

Labelle

Lee County

Ft. Myers Shores

Glades County

Charlotte County

Collier County

*Franchise held by City Gas Company

Issued by: Victor A. Fortkiewicz
Vice President

Effective: **AUG 6 1999**