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 ORDER NO. PSC-10-0671-PCO-GU ISSUED: November 5, 2010

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
NATHAN A. SKOP
RONALD A. BRISÉ

ORDER DETERMINING JURISDICTION

BY THE COMMISSION:

Background

Florida City Gas (FCG) is an investor-owned natural gas utility company subject to our regulatory jurisdiction as prescribed in Chapter 366, Florida Statutes (F.S.). Miami-Dade County (Miami-Dade or the County) is a political subdivision of the State of Florida, and Miami-Dade Water and Sewer Department (MDWASD) is a department of the County. MDWASD owns and operates several water and wastewater treatment plants in Miami-Dade County, Florida. As part of its water treatment operations, MDWASD operates lime kilns at the Alexander Orr Plant in South Miami and at the Hialeah-Preston Plant in Hialeah, as well as a cogeneration facility at the South Dade Wastewater Treatment Plant. MDWASD uses natural gas to heat the lime kilns for the water treatment process that produces and distributes water to MDWASD's customers.

FCG, formerly City Gas Company of Florida, executed a Natural Gas Transportation Services Agreement with MDWASD in 1998 (1998 Agreement). Pursuant to the agreement, FCG receives natural gas for MDWASD and transports the gas on the FCG distribution system to MDWASD's facilities. The 1998 Agreement had a ten-year term, expiring July 1, 2008, with no automatic renewal. It appears that FCG's predecessor never submitted the 1998 Agreement to us for approval. However, the impact of the 1998 Agreement on FCG's general body of ratepayers was subject to annual reviews under FCG's Competitive Rate Adjustment (CRA) review, in addition to FCG's 2003 rate case.[1] In its annual CRA filings during the term of the 1998 Agreement, FCG provided the CRA recovery information for the 1998 Agreement.

Before the 1998 Agreement expired, FCG and MDWASD agreed to an amendment dated August 28, 2008 (2008 Amendment), which temporarily extended the term of the 1998 Agreement on a month-to-month basis as of July 1, 2008. Pursuant to the terms of the 2008

[1] See Order No. PSC-04-0128-PAA-GU, issued on February 9, 2004, in Docket No. 030569-GU, In re: Application for rate increase by City Gas Company of Florida.

Amendment, either party could terminate with thirty (30) days' notice.[2] While negotiating the 2008 Amendment, FCG and MDWASD also negotiated a successor agreement to the 1998 Agreement, dated August 28, 2008 (2008 Agreement). The 2008 Agreement contains the same pricing provisions as the 1998 Agreement, and many of the other provisions in the 2008 Agreement are similar to those in the 1998 Agreement. Like its predecessor, the 2008 Agreement provided that FCG would transport natural gas to Miami-Dade's facilities at rates that are significantly below the otherwise applicable tariff rate. The most significant distinction between the 1998 and 2008 Agreements is the provision that if we do not approve the 2008 Agreement within 180 days, or by February 24, 2009, the 2008 Agreement would not become effective and the parties would either renegotiate or terminate the contract service arrangement.

By petition dated November 13, 2008, FCG requested that we approve the 2008 Agreement between FCG and MDWASD.[3] Through communications with Commission staff, FCG learned that our staff's analysis had led staff to believe that the rates in the 2008 Agreement did not comply with the Contract Demand Service (KDS) tariff requirement that such rates should not be set lower than the incremental cost the company incurs to serve the customer. Based on its belief that our staff's review of the 2008 Agreement's terms would likely lead to an unfavorable recommendation, FCG voluntarily withdrew its petition on February 17, 2009, and the docket was closed administratively. MDWASD never intervened in Docket No. 080672-GU.

By letter dated June 22, 2009, FCG advised MDWASD that it was invoking the thirty (30) day termination notice provided in the 2008 Amendment and began charging Miami-Dade the applicable GS 1,250k tariff rate on August 1, 2009. MDWASD remitted payment of the full tariff rates to FCG until October 2009, at which time MDWASD began withholding the balance between the 2008 Agreement rates and the higher tariff rate. According to MDWASD, it has been placing the difference between the 2008 Agreement rates and the tariff rate in a private, separate account since that time.

On December 14, 2009, MDWASD filed a petition for approval of the 2008 Agreement with FCG that initiated the instant docket. In its petition, MDWASD requests that we either recognize that the 2008 Agreement is not subject to our regulatory jurisdiction or, in the alternative, approve the terms of the 2008 Agreement. In addition, MDWASD requests that we order FCG to refund the difference between the 2008 Agreement rates and the tariff rates FCG has been charging MDWASD if we approve the 2008 Agreement. On March 5, 2010, FCG filed a petition for leave to intervene in this docket, which was granted by Order No. PSC-10-0261-PCO-GU, issued on April 26, 2010.

On March 3, 2010, our staff held a noticed, informal meeting with the parties. As a result of that meeting, the parties filed jurisdictional briefs to address the threshold legal issue of whether we have authority to consider the 2008 Agreement. This Order addresses our authority

[2] Paragraph 2, 2008 Amendment.
[3] See Docket No. 080672-GU, In re: Petition for approval of Special Gas Transportation Service agreement with MDWASD by Florida City Gas.

to consider the 2008 Agreement.[4] We have jurisdiction pursuant to Sections 366.04, 366.05, and 366.06, F.S.

Jurisdictional Arguments

MDWASD Jurisdictional Brief

Factual Assertions

According to MDWASD, FCG filed its petition for approval of the 2008 Agreement on November 13, 2008, without notifying the County or seeking the County's concurrence with the petition's terms. MDWASD claims that FCG then withdrew the petition prior to any ruling from this Commission and without notice to or acquiescence of the County. MDWASD contends that FCG represented to the County that Commission approval would be merely procedural and ministerial in nature. However, MDWASD states that FCG is now asserting that the County should have intervened in Docket No. 080672-GU if it wished to enforce the 2008 Agreement's terms.[5]

Section 366.11, F.S. and Rule 25-9.034(1), F.A.C.

MDWASD states that Section 366.11, Florida Statutes (F.S.), exempts utilities owned and operated by municipalities from our jurisdiction and that pursuant to Section 366.02(1), F.S., the term "public utility" does not include a municipality or agency thereof. MDWASD also contends that our rule on special contracts, Rule 25-9.034(1), Florida Administrative Code (F.A.C.), exempts agreements between a regulated utility and a municipality from Commission jurisdiction. Rule 25-9.034(1), F.A.C., provides:

> 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.
>
> ...
>
> 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.

MDWASD asserts that the rule applies to the County because, as explained below, it contends the County is entitled to all rights and privileges available to a municipality. Accordingly,

---

[4] At the September 28, 2010 Agenda Conference, we granted FCG's Motion to Dismiss Miami-Dade's Complaint for an order requiring FCG to show cause why tariff rate should not be reduced and for the Commission to conduct a rate proceeding, overearnings proceeding, or other appropriate proceeding regarding FCG's Acquisition adjustment in Docket No. 100315-GU.

[5] We note that the parties' factual assertions are irrelevant to the legal issue addressed herein. They are only included for a better understanding of the factual background in this case.

MDWASD concludes that we lack jurisdiction to consider the 2008 Agreement between MDWASD, a department of the County, and FCG.

Florida Constitution and Supreme Court Precedent

MDWASD asserts that pursuant to the Florida Constitution and Florida Supreme Court precedent, the County is entitled to all rights available to a municipality, including exemption rights. MDWASD notes that Article VIII, Section 6(f) of the Florida Constitution provides that to the extent not inconsistent with the powers of existing municipalities or general law, the County may exercise "all the powers conferred now or hereafter by general law upon municipalities." MDWASD insists that the 2008 Agreement's exemption from Commission jurisdiction pursuant to Rule 25-9.034(1), F.A.C., is consistent with general law and the powers of existing municipalities.

Applicability of Rule 25-9.034(1), F.A.C.

MDWASD argues that the provision in the 2008 Agreement requiring our approval within 180 days as a condition precedent to the contract is ineffective in light of Rule 25-9.034(1), F.A.C. MDWASD claims that the exemption in Rule 25-9.034(1), F.A.C., eliminates our jurisdiction over contracts with municipalities, and that our lack of jurisdiction cannot be overcome by contractual agreement between two parties. MDWASD asserts that we have found that a term in a contract requiring Commission approval as a condition precedent does not overcome an otherwise applicable exemption from our jurisdiction. In support of this argument, MDWASD relies on several orders in which we declined to rule upon or otherwise consider the terms of contracts between regulated utilities and government entities on the basis that the specific entities and activities involved were exempt from regulation.[6] In Order No. PSC-04-0199-FOF-SU (North Fort Myers Order), for example, a utility filed a bulk wastewater agreement for approval, as required by the agreement's terms. We declined to assert jurisdiction over the agreement because the agreement involved the sale of wastewater service to a government entity and was thus exempt from our jurisdiction pursuant to Section 367.022(12), F.S. MDWASD asserts that these orders confirm the fact that parties cannot invoke jurisdiction by contract. MDWASD claims that just as bulk water and wastewater agreements between a regulated utility and a government entity are exempt, the rates included in the 2008 Agreement are not subject to our jurisdiction due to the exemption provided for in Rule 25-9.034(1), F.A.C.

[6] Order No. PSC-04-0199-FOF-SU, issued on February 24, 2004, in Docket No. 030517-SU, In re: Application for approval of new rate for bulk wastewater service agreement with City of Cape Coral in Lee County, by North Fort Myers Utility, Inc., entitled "Order Declining to Rule upon Application for Approval of Bulk Wastewater Service Agreement;" Order No. PSC-00-1238-FOF-WS, issued on July 10, 2000, in Docket No. 000315-WS, In re: Application by United Water Florida Inc. for approval of tariff sheets for wholesale water and wastewater service in St. Johns County, entitled "Order Declining to Rule upon Application for Approval of Tariff Sheets for Wholesale Water and Wastewater Service and Closing Docket;" and Order No. PSC-00-1902-AS-SU, issued on October 17, 2000, in Docket No. 971638-SU, In re: Application for amendment of Certificate No. 226-S to add territory in Seminole County by Florida Water Services Corporation.

Conclusion

MDWASD maintains that our powers as an administrative body are limited. MDWASD notes that as a creature of the legislature, our powers, duties and authorities are only those conferred expressly or impliedly by Florida statute, and that any reasonable doubt as to the lawful existence of a particular regulatory power must be resolved against the exercise of jurisdiction.[7] Further, MDWASD states that FCG is contractually bound by the rates to which it agreed in the 2008 Agreement. MDWASD claims that during negotiation of the 2008 Agreement, FCG never raised the possibility that the transportation rates in the agreement could be changed by this Commission. MDWASD insists that the basis for exempting agreements with municipalities from the requirement of Commission approval is the fact that such contracts undergo scrutiny at the County level before they are approved and passed on to the County's customers. MDWASD submits that if we find that the 2008 Agreement rates are too low, we can require FCG's shareholders to absorb any existing revenue shortfall to insure that FCG's other customers are not subsidizing the rates charged to the County. However, MDWASD maintains that we have no authority to deprive the County of the benefits of its "hard-fought bargain" with FCG.

FCG Jurisdictional Brief

Factual Assertions

FCG states that at the time it executed the 2008 Agreement, it believed that the contract complied with applicable law, including all Commission-required regulations regarding contract service rates, and that approval of the 2008 Agreement would not have any adverse impact on the general body of ratepayers. After filing the 2008 Agreement for approval and communicating with our staff, however, FCG learned that the contract rates did not appear to comply with FCG's KDS tariff requirement that such rates shall not be set lower than the incremental cost the company incurs to serve the customer. FCG states that it reevaluated the rates in the 2008 Agreement and found that the proposed rates would not comply with the applicable regulatory requirements. Accordingly, FCG held a meeting with MDWASD officials to inform them that the 2008 Agreement did not comply with the KDS tariff requirements and that FCG would be withdrawing its petition for approval of the agreement in Docket No. 080672-GU.[8] FCG then attempted to negotiate another agreement with MDWASD that would meet the statutory and tariff requirements for a rate that was not lower than the incremental cost. However, FCG contends that MDWASD would not renegotiate the contract. FCG states that in order to ensure equitable service to its general body of ratepayers and fulfill its regulatory obligations, FCG was compelled to bring its service into compliance with applicable law by terminating the 2008 Amendment and beginning to charge MDWASD the tariff rate applicable in the absence of a special contract.

---

[7] See City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So. 2d 493 (Fla. 1973) and Lee County Electric Cooperative v. Jacobs, 820 So. 2d 297 (Fla. 2002).

[8] To address MDWASD's contention that it was neither notified of nor involved in Docket No. 080672-GU and its suggestion that FCG unilaterally – and unfairly – withdrew the petition for approval of the 2008 Agreement before the 180-day requirement was fulfilled, FCG states that: (1) the petition was a matter of public record; (2) FCG provided notice and copies of the petition to MDWASD; and (3) MDWASD chose not to intervene.

Exclusive Jurisdiction

FCG asserts that our exclusive jurisdiction with respect to rates and charges extends to all rates and charges of a utility, regardless of the jurisdictional status of the 2008 Agreement itself. Section 366.06(1), F.S., 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 statute then enumerates an extensive procedure for approving new rates and changing existing rates to ensure that the public has access to the rates, terms and conditions of regulated utility service. FCG acknowledges that in Chapter 25-9, F.A.C., which controls the general filing and approval process for a utility's tariffs, we adopted Rule 25-9.034(1), F.A.C., to allow for special contracts. FCG contends that this special contracts provision was promulgated in recognition of the fact that in certain instances public utilities should have some flexibility to retain large volume customers, as any rate over incremental cost will usually benefit the general body of ratepayers. Nevertheless, FCG notes that the rule and the plain, unambiguous meaning of the statute require that FCG only charge a rate that is filed with and approved by us.

FCG contends that our exclusive grant of ratemaking authority is superior to any county or municipality authority. FCG states that as an investor-owned natural gas utility company, it is subject to our regulatory jurisdiction pursuant to Chapter 366, F.S. The Legislature determined, in Section 366.01, F.S., that the regulation of public utilities would be "an exercise of the police power of the state for the protection of the public welfare" and that all the provisions of Chapter 366, F.S., must be "liberally construed for that purpose." FCG claims that under Section 366.04(1), F.S., our exclusive authority with respect to the rates and charges of public utilities is not only extensive, but is complete. Section 366.04(1), F.S., states, in relevant part:

> [T]he 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.

(emphasis added). FCG insists that the Legislature's grant of such exclusive jurisdiction over rates and charges, and its declaration that such authority be "superior" and not concurrent to that of "municipalities, towns, villages, or counties," is sufficient by itself to resolve the jurisdictional question in favor of our authority to address this matter. Furthermore, FCG notes that there is nothing in Chapter 366, F.S., that exempts any public utility's rates from our regulatory authority.

FCG notes that the Florida Supreme Court has repeatedly recognized our exclusive jurisdiction over rates and has even required the immediate termination of circuit court proceedings in instances where there was only a colorable claim of Commission jurisdiction.[9] The Florida Supreme Court held in Miller & Sons v. Hawkins, 373 So. 2d 913 (Fla. 1979)

[9] See Florida Public Service Comm'n v. Bryson, 569 So. 2d 1253, 1255 (Fla. 1990) and Public Service Comm'n v. Fuller, 551 So. 2d 1210 (Fla. 1989).

(Miller & Sons), for example, 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." In Miller & Sons, we ordered a utility to increase the service availability charges to a developer notwithstanding the prior contract rate that had been entered into by the utility pursuant to its tariff. The Court concluded that despite contract law to the contrary, we had complete authority to change rates in a private contract between a utility and a developer independent of the contracting authority of the parties.[10]

FCG also cites Florida Power Corp. v. Seminole County, 579 So. 2d 105 (Fla. 1991) (FPC), to support its contention that this Commission, and only this Commission, has the exclusive authority to address the provision of natural gas transportation service by FCG, a regulated utility, to MDWASD. In FPC, the county and city enacted ordinances requiring FPC to relocate certain power lines underground. While there was no issue regarding the utility's obligation to relocate the lines due to a road-widening project, the city and county requirements that the relocation be *underground* imposed an additional $1.25 million cost on the utility, and ultimately, its ratepayers. Both the county and city relied upon their constitutional grants of authority under Article VIII of the Florida Constitution for authority to require that FPC move the lines underground and to refuse to pay the additional costs of such a requirement. The Florida Supreme Court dismissed the county and city's attempt to relocate the lines underground, holding that an obligation to place power lines underground "clearly affects its rates if not its service" and that the added costs would "necessarily be reflected in the rates of [FPC's] customers."[11] Accordingly, FCG contends that we alone fully regulate the rates, terms and conditions by which FCG provides transportation service to MDWASD and that anything which impacts rates becomes subject to our exclusive jurisdiction.

Exemption from Commission Jurisdiction

FCG asserts that the County's Home Rule Charter, as well as general law, expressly contemplate Commission jurisdiction. FCG states that MDWASD, acting on behalf of Miami-Dade County, may not take advantage of the exemption contained in Rule 25-9.034(1), F.A.C., because MDWASD's authority as a "municipality" is not unlimited; rather, it is subject to the operation of general law and our exclusive and superior jurisdiction with respect to public utilities and their rates. Contrary to MDWASD's arguments, FCG contends that neither Article VIII, Section 6(f) of the Constitution, nor Section 1.01(A)(21) of the County's Home Rule Charter, provide a basis for applying the exemption in Rule 25-9.034(1), F.A.C., to MDWASD.[12] FCG argues that additional provisions in Article VIII, Section 6 of the Constitution and the

[10] MDWASD distinguishes Miller & Sons on the basis that the developer who entered into the agreement with the utility in Miller & Sons was "not a government with constitutionally recognized municipal rights and privileges, including exemptions, akin to Miami-Dade." MDWASD Brief at 12.
[11] FPC, 579 So. 2d at 107.
[12] FCG also argues that it would be improper to expand the reach of Article VIII, Section 6(f), Florida Constitution, to include the County as a "municipality" exempt from our jurisdiction pursuant to Rule 25-9.034(1), F.A.C., when it appears from the cases relied upon by MDWASD that the legislative intent in allowing the County to exercise municipal powers under its Home Rule Charter was to permit it to levy and collect taxes to which it would otherwise not be entitled. FCG Brief at 23.

County's Home Rule Charter actually indicate that the County's authority *is* subject to our jurisdiction and that jurisdiction under the circumstances here does not permit MDWASD to rely on the municipality exemption in Rule 25-9.034(1), F.A.C.

FCG notes that the County's Home Rule Charter was established pursuant to the Dade County Home Rule Amendment, Article VIII, Section 11, Florida Constitution of 1885, which is preserved in Article VIII, Section 6(e), Florida Constitution of 1968. Article VIII, Section 6(e), of the 1968 (and current) version of the Florida Constitution protects and incorporates the former Article VIII, Section 11, Florida Constitution of 1885, which states:

> Nothing in this section shall be construed to limit or restrict the power and jurisdiction of the Railroad and Public Utilities Commission[13] 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.

In addition, Section 9.06(B) of the County's Home Rule Amendment and Charter states that "[n]othing in this Charter shall be construed to limit or restrict the power and jurisdiction of the Florida Railroad and Public Utilities Commission," and subsection (i)(9) of the County's Home Rule Amendment states that "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." The Florida Supreme Court also addressed the constitutional and home rule powers of municipalities and counties as they relate to this Commission in FPC, holding 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."[14] From this, FCG concludes that the drafters of these constitutional provisions intended that the County be subject to our jurisdictional power because the general law of Florida clearly provides that we have exclusive and superior authority with respect to the rates, terms and conditions of service by a public utility, including FCG.

FCG notes that whatever municipal powers have been granted to the County, such powers are only effective to the extent they are authorized by "general law." FCG states that in Lawnwood Medical Ctr. V. Seeger, 990 So. 2d 503, 509-510 (Fla. 2008), the Florida Supreme Court defined the term "general law" as a statute. Accordingly, general law is created by statute, not by rule. FCG asserts that general law, including Chapter 366, F.S., and the Florida Constitution, overwhelmingly provides for our exclusive and superior jurisdiction. The Florida Supreme Court has repeatedly held that general law is supreme, and the County's Home Rule Amendment and Charter are to be strictly construed to protect that supremacy. Furthermore, the exemption upon which MDWASD relies is granted through a rule of the Florida Administrative Code, not a general law, which means that it is not a "power[] conferred . . . by general law upon municipalities." Article VIII, Section 6(f), Florida Constitution. In fact, application of the exemption in Rule 25-9.034(1), F.A.C., would be inconsistent with the general law regarding our

[13] The Florida Public Service Commission is the legal successor to the Railroad and Public Utilities Commission. See Section 350.011, F.S.
[14] FPC, 579 So.2d at 107.

jurisdiction, i.e. Chapter 366, F.S. Thus, FCG argues that MDWASD's attempt to interpret the Florida Constitution and the Home Rule Amendment and Charter to permit it to be treated as a municipality under Rule 25-9.034(1), F.A.C., conflicts with general law.

Finally, FCG asserts that Rule 25-9.034(1), F.A.C., upon which MDWASD relies, may not have a sufficient statutory basis as to be legally effective. FCG states that the rule purports to carve out an exception to the filing of special contracts with the Commission for municipalities and R.E.A. cooperatives. However, FCG contends that the statutory basis for the rule is Section 366.05(1), F.S., which grants us 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 employees necessary to carry out its duties, and to "implement and enforce the provisions of this chapter." FCG claims that according to settled law, the general authority to adopt rules is limited to the promulgation of rules on specific matters delegated to the agency. Section 120.52(8), F.S., provides, in relevant part:

> 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.

FCG argues that the grant of rulemaking authority alone does not grant us authority to create exemptions to the statutory requirement to charge only rates filed and approved by us. Also, there does not appear to be any statutory authority that would authorize us to create an exemption to the legislatively required obligation to file and get approval for rates. FCG contrasts Chapter 366, F.S., which contains no exemption authority, with Section 364.337(2), F.S., which grants us 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), F.S., 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." FCG suggests that to the extent MDWASD's arguments against jurisdiction turn solely on the exception contained in Rule 25-9.034(1), F.A.C., there may not be sufficient statutory authority for such an exception.

Contract Terms

FCG contends that the 2008 Agreement is void and of no effect because the 2008 Agreement was not approved and made effective within the time frame required by Article I of the 2008 Agreement. Article I of the 2008 Agreement 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." Furthermore, in Resolution No. R-1105-08, the Board of County Commissioners of Miami-Dade County acknowledged that the 2008 Agreement was subject to our approval. Resolution No. R-1105-08, which ratifies the 2008 Agreement, states:

> NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this 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***.

FCG argues that because the parties entered into the agreement on August 28, 2008, and more than 180 days have elapsed without our approval, the 2008 Agreement is void and not in effect.

Analysis and Decision

Upon review, we find that we have authority to consider the 2008 Agreement between FCG and MDWASD. The relevant question here is not whether we have jurisdiction to regulate MDWASD in the way we regulate public utilities such as FCG. Rather, the relevant inquiry is whether we have authority to approve a contract to which an unregulated entity, here the County, is a party. Accordingly, while we do not have jurisdiction to regulate MDWASD as a utility, we do have authority to consider a contract between a regulated utility and a non-regulated entity for natural gas transportation service, especially where the contract specifically requires our approval.

Miami-Dade County as a Municipality

The County is entitled to all the rights and privileges available to a municipality pursuant to the Florida Constitution and Miami-Dade County's Home Rule Amendment and Charter.[15] Article VIII, Section 6(f) of the Florida Constitution provides that "[t]o the extent not inconsistent with the powers of . . . general law, [the County] may exercise all the powers conferred now or hereafter by general law upon municipalities." Section 1.01(A)(21) of its Home Rule Amendment and Charter provides that the County is entitled to exercise all powers and privileges granted to municipalities by the Constitution and laws of the state, and Section 1.01(A)(14) specifically allows the County to regulate, control or operate utilities, sanitary and sewage collection and disposal systems, and water supply, treatment, and service systems.

However, we agree with FCG that the County's authority as a municipality is not unlimited. The County's Home Rule Charter was established pursuant to Article VIII, Section

[15] See also Chase v. Cowart, 102 So. 2d 147 (Fla. 1958); State v. Dickinson, 230 So. 2d 130 (Fla. 1970); and Dade County v. Brautigam, 224 So. 2d 688 (Fla. 1969).

11, of the Florida Constitution of 1885, which is preserved in Article VIII, Section 6(e), Florida Constitution of 1968. Article VIII, Section 6(e), of the Florida Constitution protects and incorporates the former Article VIII, Section 11, Florida Constitution of 1885, which states in paragraph (7):

> 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 . . . commission now or hereafter provided for in this Constitution or by general law and said state . . . commissions shall have the same powers in Dade County as shall be conferred upon them in other counties.

In addition, Section 9.06(b) of the County's Home Rule Amendment and Charter states that "[n]othing in this Charter shall be construed to limit or restrict the power and jurisdiction of the Florida Railroad and Public Utilities Commission," and paragraph (9) of the County's Home Rule Amendment states that "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." Accordingly, an examination of general law must inform any discussion of our jurisdiction to consider the 2008 Agreement between FCG and MDWASD.[16]

General Law

MDWASD claims that it is exempt from regulation pursuant to Section 366.11, F.S., which provides, in pertinent part:

> No provision of this chapter shall apply in any manner . . . to utilities owned and operated by municipalities, . . . or to the sale of electricity, manufactured gas, or natural gas at wholesale by any public utility to, and the purchase by, any municipality [] under and pursuant to any contracts . . . when such municipality . . . is engaged in the sale and distribution of electricity or manufactured or natural gas, or to the rates provided for in such contracts.

We do not believe that this statutory provision applies to MDWASD. First, Chapter 366, F.S., governs public utilities, which are defined in Section 366.02(1) as entities "supplying electricity or gas . . . to or for the public within this state." MDWASD is a municipal water and wastewater utility. It does not supply electricity or gas to the public within the state of Florida. Second, the contract at issue here does not involve the sale of electricity or gas at wholesale from FCG to MDWASD, nor is MDWASD "engaged in the sale and distribution of electricity or gas." Accordingly, Chapter 366.11, F.S., which governs our regulation of electric and gas utilities, is not the appropriate statute to consider in determining the extent of our jurisdiction in this case.

Chapter 367, F.S., governs our jurisdiction over water and wastewater utility systems. Section 367.022(2), F.S., states that "[s]ystems owned, operated, managed, or controlled by governmental authorities" are "not subject to regulation by the commission as a utility nor are

[16] As noted by FCG, the Florida Supreme Court defined the term "general law" as a statute in Lawnwood Medical Ctr. V. Seeger, 990 So. 2d 503, 509-510 (Fla. 2008).

they subject to the provisions of this chapter." Section 367.021(7), F.S., provides that a governmental authority is a "political subdivision" as defined in Section 1.01(8), F.S., and a county or city is a political subdivision pursuant to that section. Accordingly, the water and wastewater system of Miami-Dade County is not subject to our regulation "as a utility." However, that does not mean that we lack jurisdiction over a contract to which MDWASD is a party.

As an investor-owned natural gas utility company which supplies gas to the public, FCG is subject to our regulatory jurisdiction pursuant to Chapter 366, F.S. The legislature determined, in Section 366.01, F.S., that the regulation of public utilities would be "an exercise of the police power of the state for the protection of the public welfare" and that the provisions of Chapter 366, F.S., must be "liberally construed for that purpose." Section 366.04(1), F.S., provides that we have jurisdiction to "regulate and supervise each public utility with respect to its rates and service," and this jurisdiction is "exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities . . . or counties." Section 366.04(1), F.S., further states that in the event of a conflict between our jurisdiction and that of another political subdivision, "all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail."

We also have authority to prescribe rates that are fair, just and reasonable, and a public utility cannot charge any rates not on file with this Commission. Section 366.06(1), F.S., provides that we shall have the authority "to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility" for its service. Furthermore, a public utility "shall not, directly or indirectly, charge or receive any rate not on file with the Commission." Section 366.06(1), F.S. Finally, pursuant to Section 366.06(2), F.S., whenever we find that the rates charged by a utility for its service are unjust, unreasonable, unjustly discriminatory, or in violation of law, or that such rates are insufficient to yield reasonable compensation for the services rendered, we are required to hold a public hearing and thereafter determine just and reasonable rates to be charged for such service. These statutory provisions, read in conjunction with the Florida Constitution and the County's Home Rule Amendment and Charter, indicate that we have exclusive and complete authority with respect to the rates and charges of FCG as a public utility under 366.04(1), F.S.

Case Law

The Florida Supreme Court has recognized our exclusive jurisdiction over rates. As FCG points out, the Court in Miller & Sons 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."[17] In Miller & Sons, the Court concluded that we have authority to change rates in a private contract between a utility and a developer independent of the parties' contracting authority. MDWASD attempts to distinguish Miller & Sons on the ground that the developer who entered into the agreement with the utility was not a governmental entity with constitutionally recognized municipal rights, privileges and exemptions

[17] Miller & Sons, 373 So. 2d at 914 (emphasis added).

like the County. However, this distinction is immaterial and was not a basis for the Court's holding. Whether a contract is between a regulated public utility and a private developer, or between a regulated public utility and a governmental entity, the contract itself is subject to our jurisdiction under Chapter 366, F.S., and we may modify it in the public interest.

In addition, the Florida Supreme Court and the United States Supreme Court have acknowledged that parties cannot defeat the government's legitimate police power by contract. The Miller & Sons Court found that the effect of ruling in favor of the developer would be "to allow a private party to circumvent by contract the police power of the state, which is impermissible."[18] The Court in Miller & Sons also agreed with our assertion in the Order under review that:

> [T]he plain and unequivocal mandates of Section 367.101, F.S., that [charges] be just and reasonable, a fact too well known to require further discourse, coupled with references to "public welfare" and application of legal rates without discrimination, spell out adequately the "public interest or welfare."[19]

Furthermore, in Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372 (U.S. 1919), a corporate plaintiff argued that the electric rates fixed by the state railroad commission were invalid because, if given effect, they would supersede the rates agreed to in the private contract between the plaintiff and the power company, which was entered into prior to the commission order changing the rates. The United States Supreme Court held that "private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict," even if contracts previously entered into between the parties may thereby be affected.[20]

We have authority, indeed an obligation, to set rates for a public utility that are fair, just, and reasonable. As noted by FCG, the county and city in FPC argued that their constitutional grants of authority allowed them to require a regulated utility to move lines underground and to refuse to pay the additional costs of such a requirement. The Florida Supreme Court held that an obligation to place power lines underground "clearly affects [the public utility's] rates if not its service" and that the added costs would "necessarily be reflected in the rates of [the public utility's] customers."[21] If the contract rates at issue here are so low that they unfairly require FCG's customers to subsidize those of the County, we can and should exercise our legitimate authority to ensure that the rates charged by FCG are fair, just and reasonable.

---

[18] Id.
[19] Order 7851, issued on June 21, 1977, in Docket No. 760299-WS, In re: H. Miller and Sons Inc., Complainant, vs. Cooper City Utilities, Inc., Defendant at 4-5.
[20] Union Dry Goods, 248 U.S. at 375.
[21] FPC, 579 So.2d at 107.

Rule 25-9.034(1), F.A.C.

Commission Approval Requirement

In 1961, we entered an Order Adopting Rules and Regulations Relating to Construction and Filing of Tariffs by Utility Companies.[22] By that order, we adopted Rule 12.124, F.A.C., entitled "Contracts and Agreements." This predecessor to Rule 25-9.034(1), F.A.C., was virtually identical to the current version, except that it only required that copies of special contracts be placed on file with the Commission rather than that we *approve* such contracts. In 1973, we issued an order proposing an amendment to Rule 12.124, F.A.C., which by that time was Rule 25-9.34, F.A.C. By Order No. 5718,[23] we recommended that all future special contracts and agreements be required to be approved by this Commission. We explained:

> Although special contracts and agreements may have served a valid purpose in the past, we are of the opinion that the final approval for any contracts or agreements entered into hereinafter should be made by this commission . . . Thus, if a utility desires, for example, to sell its services or product at a rate other than that specified in the tariff, pursuant to a special contract with that party, our proposed rule would require detailed justification for deviating from the published tariff rate.
>
> The necessity for such a rule at this time is the ever-increasing number of rate applications being filed by regulated utilities that have some special contracts whose rates have been set at a level generally below the level of rates being paid by customers receiving service under published tariff rates, all due to contractual terms established years ago. Therefore, it is our opinion that, when a utility seeks to enter into a new contract or renegotiate an existing contract with another party, such may be entered into only upon our prior approval under procedures described more fully in the proposed rule. We further conclude that said rule amendment is reasonable, proper, and in the public interest.

We adopted the proposed amendment in Order No. 5786.[24] The current Rule 25-9.034(1), F.A.C., is identical to Rule 25-9.34, F.A.C. Thus, final approval for any contract or agreement entered into by a public utility that is not specifically covered by its filed tariff must be obtained from this Commission.

---

[22] Order No. 3210, issued on August 18, 1961, in Docket No. 5939-RULE, In re: Rules and regulations governing the construction and filing of tariffs by electric and gas utilities, water and sewer systems, telephone and telegraph companies.

[23] Order No. 5718, issued on April 17, 1973, in Docket No. 73139-RULE, In re: Proposed amendment of Rule 25-9.34(1) relating to Special Contracts and Agreements.

[24] Order No. 5786, issued on June 21, 1973, in Docket No. 73139-RULE, In re: Proposed amendment of Rule 25-9.34(1) relating to Special Contracts and Agreements.

Exception to Commission Approval Requirement

While Rule 25-9.034(1), F.A.C., requires that all special contracts and agreements be approved, the rule contains a narrow exception. Rule 25-9.034(1), F.A.C., states:

> 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.
>
> ...
>
> 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.

MDWASD relies primarily on the last sentence of the rule to support its contention that we lack jurisdiction to consider the 2008 Agreement. However, MDWASD's argument that Rule 25-9.034(1), F.A.C., "expressly exempts from the Commission's jurisdiction agreements between a regulated utility and a municipality"[25] is inaccurate. In Chapoteau v. Chapoteau, 659 So. 2d 1381 (Fla. Dist. Ct. App. 3d Dist. 1995), the Third District Court of Appeal held that an agency's jurisdiction can only be established by statute, not by rule.[26] Thus an agency cannot, by rule, expand or contract jurisdiction that the legislature has conferred upon it.[27] The statutory basis for Rule 25-9.034(1), F.A.C., is Section 366.05(1), F.S., which grants this Commission power over public utilities' rates.[28] Pursuant to that section, we have authority to "prescribe fair and reasonable rates and charges." Accordingly, the County's reliance on an agency rule for its assertion that the agency, here the Commission, "lacks jurisdiction," is ill-placed.

We must also look to other governing statutes to determine the extent of our jurisdiction. In this instance, the relevant statutes are those that grant us the authority to set rates charged by a public utility that are fair, just and reasonable pursuant to Sections 366.04, 366.05, and 366.06, F.S., and the statute which states that MDWASD is not subject to regulation by us "as a utility," Section 367.022(2), F.S. As the Florida Supreme Court noted in Forsythe v. Longboat Key

---

[25] MDWASD Brief at 2.

[26] Chapoteau v. Chapoteau, 659 So. 2d 1381, 1383 (Fla. Dist. Ct. App. 3d Dist. 1995)(citing State of Florida, Dep't of Health & Rehabilitative Serv. v. Schreiber, 561 So. 2d 1236, 1240 (Fla. 4th DCA 1990)(citations omitted), *review denied*, 581 So. 2d 1310 (Fla. 1991))(noting that subject matter jurisdiction is a power that arises solely by virtue of law, i.e. can only be conferred by a constitution or a statute).

[27] Rinella v. Abifaraj, 908 So. 2d 1126, 1129 (Fla. Dist. Ct. App. 1st Dist. 2005)("An administrative agency has only such power as granted by the Legislature and may not expand its own jurisdiction."). See also Diamond Cab Owners Ass'n v. Florida R. & Public Utilities Com., 66 So. 2d 593, 596 (Fla. 1953)("Commission may make rules and regulations within the yardstick prescribed by the Legislature, but it cannot amend, repeal or modify an Act of the Legislature by the adoption of such rules and regulations.").

[28] We agree with FCG's assertion that the exemption upon which MDWASD relies is granted through a rule, not a general law, which means that it is not a power conferred by general law upon municipalities, and that application of the exemption in Rule 25-9.034(1), F.A.C., in these circumstances would be inconsistent with the general law regarding our jurisdiction over service rates for a gas utility, namely Chapter 366, F.S.

Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992), courts must "give full effect to all statutory provisions and construe related statutory provisions in harmony with one another."[29] These statutes, read consistently and in conjunction with one another, reveal that we have authority to consider the 2008 Agreement. First, FCG, as a public utility, is clearly subject to our regulation. Second, MDWASD voluntarily submitted the contract to us for approval by agreeing to the term requiring approval of the 2008 Agreement within 180 days. In our opinion, approving or denying a retail contract to which MDWASD is a party does not amount to "regulation" of MDWASD as contemplated in 367.022(2), F.S.

Inapplicability of Rule 25-9.034(1), F.A.C.

The plain language of Rule 25-9.034(1), F.A.C., does not support the County's argument that the 2008 Agreement is exempt from our review. As the Florida Supreme Court held in Fla. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320 (Fla. 2001), courts must adhere to the rule's language as closely as possible and should not look behind the plain language of the rule to determine intent when the rule is clear and unambiguous on its face.[30] The requirement of Commission approval in Rule 25-9.034(1), F.A.C., applies to special contracts for the "sale of [the public utility's] *product* or *service*." The exception upon which MDWASD relies, in contrast, applies only to contracts between public utilities and municipalities that govern the sale or interchange of a "*commodity* or *product*." In the 2008 Agreement, FCG agreed to sell to MDWASD capacity on its gas lines so that MDWASD can transport its own gas product to its treatment plants. Since the contract at issue is for *service*, rather than a commodity or product, the exception to the requirement that we approve the contract does not apply, and the contract must be approved by the Commission. As noted in State Contr. & Eng'g Corp. v. DOT, 709 So. 2d 607 (Fla. Dist. Ct. App. 1st Dist. 1998), an agency's interpretation of its own rules is entitled to great deference.[31]

Section 366.11(1), F.S., also sheds light on the exception contained in Rule 25-9.034(1), F.A.C. Section 366.11(1), F.S., specifically exempts from our jurisdiction "the sale of electricity, manufactured gas, or natural gas *at wholesale*" by any public utility to, and the purchase by, any municipality pursuant to a contract "*when such municipality . . . is engaged in the sale and distribution of electricity or [gas].*" Since contracts for the sale of a product or commodity at wholesale from a public utility to a municipality are statutorily exempt from our jurisdiction, it makes sense that the rule would likewise exempt such contracts from the requirement of Commission approval. In addition, the exemption in Section 366.11(1), F.S., only applies when the municipality is engaged in the sale and distribution of electricity or gas. Accordingly, the statutory exemption only applies to a sale of a product or commodity for resale, i.e. a wholesale sale of electricity or gas from a public utility to a municipality for resale to the

[29] See also McLean v. State, 934 So. 2d 1248, 1259 (Fla. 2006).
[30] Fla. Dep't of Revenue, 789 So. 2d at 323 (holding that where the language of a statute is clear and unambiguous, courts must enforce the law as written and need not resort to rules of statutory construction; thus, even if the court is convinced that the legislature really meant and intended something not expressed in the wording of the statute, court is not authorized to depart from its plain meaning).
[31] State Contr. & Eng'g Corp., 709 So. 2d at 610 (holding that Courts must defer to the expertise of an agency in interpreting its own rules and that the meaning assigned to rules by the agency charged with enforcing them is entitled to great weight).

municipality's end-use customers, not to a retail service sale where the end-use customer is the municipality itself. This is consistent with the legislative directive that municipally-owned utilities be excluded from our jurisdiction over the "rates" a municipality charges its customers, which the Florida Supreme Court defined as "the dollar amount charged for a particular service or an established amount of consumption."[32] While we have authority to approve the 2008 Agreement, we agree that only MDWASD has authority to set rates for its customers for the products and services it provides.

Although the language of the rule is clear, basic construction principles further support this interpretation. The doctrine of "expressio unius est exclusio alterius" holds that the mention of one thing implies the exclusion of the other. As the Florida Supreme Court explained in Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997), if a rule expressly describes a situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded by the rule's drafters. The first sentence of Rule 25-9.034(1), F.A.C., states that it applies to contracts entered into for the sale of products or services. It then creates an exception for contracts governing the sale of commodities or products. The inference must be drawn, then, that if the drafters of the rule had intended for the exception to apply to contracts governing the sale of a service, the exception would have so stated.

2008 Agreement Terms

Even if we found that the exception in Rule 25-9.034(1), F.A.C., applied to this gas transportation service contract, MDWASD waived its right to take advantage of it. We agree with MDWASD that parties cannot confer jurisdiction where there is none, nor can they waive lack of jurisdiction by contract.[33] However, that is not what the parties have done here. As explained above, we have jurisdiction to consider the 2008 Agreement, and Rule 25-9.034(1), F.A.C., does not and cannot limit our jurisdiction. Instead, the rule allows certain types of contracts to be executed without the burden of having to procure our prior approval. A party can, by contract, waive the benefit of an exception to which it would normally be entitled. Here, if the rule did apply to exempt the 2008 Agreement, MDWASD voluntarily relinquished its right to that exemption with respect to this particular contract.

As noted in Zurstrassen v. Stonier, 786 So. 2d 65, 70 (Fla. 4th DCA 2001), and acknowledged in Order No. PSC-09-0753-PCO-EI,[34] Florida law requires the following

[32] Tallahassee v. Mann, 411 So. 2d 162, 163 (Fla. 1981)(finding that the Commission has jurisdiction over a municipal utility's "rate structure" but not its "rates," and that the municipality alone must set reasonable rates to charge its ratepayers).

[33] Chapoteau v. Chapoteau, 659 So. 2d 1381, 1383 (Fla. Dist. Ct. App. 3d Dist. 1995)(citing State of Florida, Dep't of Health & Rehabilitative Serv. v. Schreiber, 561 So. 2d 1236, 1240 (Fla. 4th DCA 1990)(citations omitted), *review denied*, 581 So. 2d 1310 (Fla. 1991))(stating that jurisdiction cannot be created by waiver, acquiescence or agreement of the parties).

[34] Issued on November 16, 2009, in Docket Nos. 080677-EI, 090130-EI, 090079-EI, 090144-EI, and 090145-EI, In re: Petition for increase in rates by Florida Power & Light Company; In re: 2009 depreciation and dismantlement study by Florida Power & Light Company; In re: Petition for increase in rates by Progress Energy Florida, Inc.; In re: Petition for limited proceeding to include Bartow repowering project in base rates, by Progress Energy Florida, Inc.; In re: Petition for expedited approval of the deferral of pension expenses, authorization to charge storm

elements to find waiver: (1) the existence at the time of waiver of a right, privilege, advantage or benefit which may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage or benefit. Here, at the time the parties entered into the 2008 Agreement, Rule 25-9.034(1), F.A.C., existed. It is clear that MDWASD had constructive, if not actual, knowledge of the provisions of the rule. The parties mutually agreed to the unambiguous provision that if the 2008 Agreement was not approved by this Commission within 180 days, it would not become effective. Thus the intent to relinquish the advantage or benefit contained in Rule 25-9.034(1), F.A.C., is expressed clearly in the 2008 Agreement. Accordingly, MDWASD voluntarily submitted the contract to us for approval despite an exception in the rule to which MDWASD believed it was entitled.

The water and wastewater cases cited by MDWASD for the proposition that parties cannot waive lack of jurisdiction by contract are inapplicable. In Order No. PSC-00-1902-AS-SU,[35] Florida Water Services Corporation (FWSC) and the City of Longwood (City) entered into a Settlement Agreement and Bulk Wastewater and Reuse Service Agreement (Agreement). The Agreement, which was filed with this Commission, provided that our approval was required before the contract became effective. While we found that those provisions of the Agreement governing the sale of bulk wastewater service to the City for resale were specifically exempt from our regulatory authority pursuant to Section 367.022(12), F.S, and thus did not need to be ruled upon, we approved the remainder of the Agreement between FWSC and the City. Our basis for declining to rule upon that portion of the Agreement dealing with the sale of bulk wastewater service to the City for resale was Section 367.022, F.S., which states:

> The following are not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided:
>
> (12) The sale for resale of bulk supplies of water or the sale or resale of wastewater services to a governmental authority or to a utility regulated pursuant to this chapter either by the commission or the county.

In the North Fort Myers Order and Order No. PSC-00-1238-FOF-WS,[36] we similarly determined that we lacked jurisdiction to rule upon the sale of bulk water and wastewater service from a regulated entity to a governmental authority. In all three instances, we relied upon a very specific statutory provision, namely Section 367.022(12), F.S., for our determination that the parties' contract terms to the contrary were ineffective to "create" jurisdiction where there was none.

These water and wastewater cases do not undermine the assertion that MDWASD voluntarily submitted the 2008 Agreement to us for approval. As explained above, Rule 25-9.034(1), F.A.C., unlike Section 367.022(12), F.S., neither creates nor destroys our *jurisdiction*

---

hardening expenses to the storm damage reserve, and variance from or waiver of Rule 25-6.0143(1)(c), (d), and (f), F.A.C., by Progress Energy Florida, Inc. at 12-13.

[35] Issued on October 17, 2000, in Docket No. 971638-SU, In re: Application for amendment of Certificate No. 226-S to add territory in Seminole County by Florida Water Services Corporation.

[36] Issued on July 10, 2000, in Docket No. 000315-WS, In re: Application by United Water Florida Inc. for approval of tariff sheets for wholesale water and wastewater service in St. Johns County.

over the 2008 Agreement. Instead, the rule creates a requirement that special agreements to which a regulated entity is a party be approved prior to execution. The 2008 Agreement term requiring our approval was not an attempt to invoke jurisdiction where there was none, as the parties attempted to do in the cases relied on by MDWASD. Instead, it was an agreement by MDWASD to voluntarily submit the contract to us for approval despite an exception that it believed may have otherwise applied.

Conclusion

We accept MDWASD's contention that the County enjoys the same rights, privileges and exemptions as a municipality and that MDWASD is not subject to our regulation "as a utility." However, we have exclusive, superior authority over the rates and charges of FCG, a regulated public utility. Pursuant to Rule 25-9.034(1), F.A.C., all special contracts and agreements entered into by a public utility that are not specifically covered by its filed tariff must be approved by this Commission. The exception provided in Rule 25-9.034(1), F.A.C., does not apply to the 2008 Agreement because the agreement at issue is for service, not for a "product or commodity." As shown by our analysis of Section 366.11(1), F.S., there is no analogous statutory exemption for the type of contract here as there was in the water and wastewater cases cited by MDWASD. For these reasons, we find that we have jurisdiction to consider the 2008 Agreement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that we have authority to approve the 2008 Natural Gas Transportation Service Agreement between Florida City Gas and Miami-Dade Water and Sewer Department. It is further

ORDERED that this docket shall remain open to conduct a hearing.

By ORDER of the Florida Public Service Commission this 5th day of November, 2010.

ANN COLE
Commission Clerk

(SEAL)

ARW

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.