

Diamond Williams

090539-GU

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Sent: Monday, March 28, 2011 4:57 PM
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Subject: Docket No. 090539-GU
Attachments: 2011-03-28, 090539-GU, County Response to FCG Motion to Disqualify Armstrong.pdf

a) The name, address, telephone number and email for the person responsible for the filing is:

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- b) The filing is made in Docket No. 090539-GU
- c) The document is filed on behalf of Miami-Dade County
- d) The total pages in the document are 75 pages
- e) The attached document is Miami-Dade County's Response in Opposition to Florida City Gas' Motion to Disqualify Miami-Dade Witness Brian P. Armstrong and to exclude this Testimony.

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DOCUMENT NUMBER-DATE

02035 MAR 28 =

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3/28/2011



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March 28, 2011

VIA ELECTRONIC FILING

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

RE: Docket No. 090539-GU

Dear Ms. Cole:

Attached for filing is Miami-Dade County's Response in Opposition to Florida City Gas' Motion to Disqualify Miami-Dade Witness Brian P. Armstrong and to exclude this Testimony.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Henry N. Gillman
Assistant County Attorney

c: All Parties of Record and
Interested Persons

DOCUMENT NUMBER-DATE

02035 MAR 28 =

FPSC-COMMISSION CLERK

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition of Miami-Dade County through
The Miami-Dade Water and Sewer Department
for Approval of Special Gas Transportation
Service Agreement with Florida City Gas

Docket No. 090539-GU

**MIAMI-DADE COUNTY'S RESPONSE IN OPPOSITION TO
FLORIDA CITY GAS' MOTION TO DISQUALIFY MIAMI-DADE
WITNESS BRIAN P. ARMSTRONG AND TO EXCLUDE THIS
TESTIMONY**

Miami-Dade County, by and through its undersigned counsel, files this Response in Opposition to Florida City Gas' Motion to Disqualify Miami-Dade's Witness Brian P. Armstrong and to Exclude this Testimony, and states as follows:

I. INTRODUCTION

Florida City Gas' ("FCG") motion to disqualify Brian Armstrong presumes Brian Armstrong will appear in the instant docket and advocate as an attorney on behalf of Miami-Dade County ("Miami-Dade") at the trial before the Public Service Commission scheduled for June 1-3, 2011. FCG's assumption is simply incorrect and Rules 4-3.7(a) and 4-3.4(e) of The Rules Regulating The Florida Bar, Rules of Professional Conduct have not been violated to the extent they apply to the facts of this case. Also, FCG's request to exclude Mr. Armstrong's testimony as a witness, or alternatively

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to strike portions of Mr. Armstrong's testimony is without merit. Mr. Armstrong is qualified as an expert in areas that are issues in this dispute and his expert testimony should not be excluded or stricken.¹

As shown below, FCG is factually incorrect in its statement that Mr. Armstrong is Miami-Dade's attorney. Further, the legal authorities relied upon by FCG are inapplicable to these facts and do not support FCG's position. Contrary to FCG's assertions, Mr. Armstrong's testimony is permissible and should not be stricken as it contains opinions based on Mr. Armstrong's expertise on utility management and regulatory matters which are relevant issues in this proceeding.

II. FACTUAL BACKGROUND

1. In 2008, AGL Resources' Vice-President executed a Special Transportation Agreement ("2008 Agreement") with Miami-Dade to provide an additional 10 years of gas transportation service to Miami-Dade Water and Sewer Department's Alexander Orr Water Treatment Plant, Hialeah-Preston Water Treatment Plant and South District Wastewater Treatment Plant.²

¹ FCG will have an opportunity to inquire as to Mr. Armstrong's qualifications in a deposition scheduled for April 11, 2011.

² AGL Resources is the parent company of FCG, the regulated utility. The 2008 Agreement was also approved by the Miami-Dade Mayor and ratified by the Miami-Dade Board of County Commissioners.

2. Prior to executing the 2008 Agreement, FCG required the County to agree to make the 2008 Agreement subject to approval by the Public Service Commission (“PSC or Commission”). Miami-Dade agreed to the condition with the understanding that FCG would seek and advocate for Commission approval. FCG initially undertook the duty to have the Commission approve the 2008 Agreement by filing a petition for approval. However, prior to the Commission having an opportunity to review and approve the 2008 Agreement, FCG withdrew the petition from the Commission docket. The withdrawal was solely based on comments from Commission Staff that advised FCG that Staff would not recommend approval because the agreed upon rates did not appear to cover the incremental costs of serving Miami-Dade. These Staff comments were based solely on unverified cost of service amounts and other information that FCG provided to Commission Staff.³

3. FCG advised Miami-Dade that the 2008 Agreement would only be approved by the Commission if it met FCG’s incremental costs of serving Miami-Dade’s plants and provided a document that allegedly revealed FCG’s incremental costs. However, FCG did not provide Miami-Dade with

³ See p.1 of 38 of FCG’s Supplemental Response to Staff’s Third Request for Production of Documents No. 17 attached hereto as Exhibit A. Miami-Dade and PSC Staff subsequently learned through discovery in this proceeding that FCG misrepresented the “incremental costs” and other information to PSC Staff in response to data requests in Docket 080672-GU.

any corroborating documents or information corroborating FCG's original investment in less than 2 miles of pipe serving Miami-Dade, or any other documents supporting FCG's alleged costs.

4. Miami-Dade would not renegotiate the agreed upon rates until the Commission actually considered and issued a ruling upon the 2008 Agreement. When FCG refused to refile the petition, threatened to terminate transportation of natural gas to Miami-Dade's water treatment plants, and unilaterally increased its charges for service by 670%, Miami-Dade's natural gas consultant, Langer Energy Consulting Inc. ("LEC") sought to retain Mr. Armstrong, who has 25 years experience advising public and private utilities including 10 years in senior executive management with a Florida utility that was regulated by the Commission, as a sub-consultant on August 27, 2009 to provide assistance to LEC on matters relating to the 2008 Agreement including to obtain Commission approval.

5. On October 30, 2009, Mr. Armstrong provided to FCG's then outside counsel, Matt Feil, a draft Petition for getting formal Commission action on the 2008 Agreement.

6. When FCG refused, the Miami-Dade County Attorney, by the undersigned assistant county attorney, as counsel for Miami-Dade County

and the Miami-Dade Water and Sewer Department, filed a Petition for Approval of a Special Gas Transportation Service Agreement with Florida City Gas on December 14, 2009.

7. Assistant County Attorney David Hope also filed a formal notice of appearance in the record which can be found on the Case Management System. See Case Management System for Docket 090539-GU, a copy of which is attached hereto as Exhibit B.

8. Based on Mr. Armstrong's background and experience managing and advising utilities regulated by Public Service Commission, each of LEC, the Miami-Dade Water and Sewer Department managers and the County's attorneys have consulted with Mr. Armstrong on various matters within his expertise during these proceedings, particularly as relate to FCG's management practices, tariff compliance and other matters upon which he has presented testimony on the County's behalf.

9. As a consultant, Mr. Armstrong attended several meetings that included the County's attorney, PSC Staff and FCG and has appeared as special counsel to Miami-Dade for limited issues. Mr. Armstrong has not

otherwise appeared as counsel for Miami-Dade during any Commission proceeding.⁴

10. Mr. Armstrong also has reviewed and provided comments and guidance to LEC and Miami-Dade on various pleadings and discovery requests and responses.

11. Since Mr. Armstrong's office is located in Tallahassee, his office assists Miami-Dade in filing certain documents including Miami-Dade's Motion to Strike Rebuttal Testimony of David Heintz.

12. On November 15, 2010, Miami-Dade filed a Preliminary List of Issues that included 31 issues. See copy of List attached hereto as Exhibit C.

13. The issues were placed in the following categories: Jurisdiction; Special Contract; Incremental Cost; Competitive Rate Adjustment; Tariff Rate Schedule; and FCG/AGL Actions.

14. At the Status Conference, the Prehearing Officer found that Miami-Dade may provide testimony, evidence and argument on all issues in its List of Preliminary Issues even though they are not formally identified in the docket because they are subsumed under the identified "global" issues. See

⁴ Contrary to FCG's assertion in its Motion, Miami-Dade's undersigned counsel, Assistant County Attorney, Henry Gillman, did not introduce Mr. Armstrong at the October 26, 2010 hearing. However, as Mr. Gillman was very sick on the morning of the conference, Mr. Armstrong presented and argued Miami-Dade's position to the Commission.

pp. 64-75; 82-90; and 96 of Transcript of December 8, 2010, Status Conference, attached hereto as Exhibit D.

15. Miami-Dade provided Armstrong's direct and rebuttal testimony as an expert in utility management, policy and procedures in the context of Commission regulation, all of which relate to issues in this proceeding. Armstrong's testimony establishes that he possesses more than 25 years of experience in utility management, utility regulation, utility ratemaking, policy and procedures. Mr. Armstrong's experience includes 10 years, or 40% of his career in senior executive management with a Florida utility that was regulated by the Commission. Mr. Armstrong's experience includes both public and private utilities and his testimony is based on personal knowledge and experience in these areas.

16. Mr. Armstrong is scheduled for deposition by FCG for April 11, 2011. See copy of Notice of Taking Deposition Duces Tecum of Brian P. Armstrong attached hereto as Exhibit E.

III. ARGUMENT

A. Rule 4-3.4(e) and Rule 4-3.7(a) of the Rules of Professional Conduct are Inapplicable as Brian P. Armstrong is not Miami-Dade's counsel much less its trial counsel

FCG relies on Rule 4-3.4(e) and Rule 4-3.7(a), The Rules Regulating The Florida Bar, Rules of Professional Conduct, as the legal basis for the Commission to disqualify Mr. Armstrong as an attorney and to exclude Mr. Armstrong's direct and rebuttal testimony.

Rule 4-3.4(e), "Fairness to Opposing Party and Counsel" states as follows:

A lawyer shall not:

(e) **in trial**, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused....

(emphasis added)

Rule 4-3.7 (a), "Lawyer as Witness" states, in pertinent part, as follows:

(a) When Lawyer May Testify. A lawyer shall not act as advocate **at trial** in which the lawyer is likely to be a necessary witness on behalf of a client....

(emphasis added)

The prohibitions in these Rules refer to a lawyer both testifying as a witness and advocating as a lawyer "at trial" or "in trial". Since Mr. Armstrong is not Miami-Dade's counsel, much less its trial counsel as

shown below, neither Rule 4-3.4(e) nor Rule 4-3.7(a) is applicable to this proceeding.

FCG relies on the following actions by Mr. Armstrong as grounds for seeking to disqualify Mr. Armstrong as an attorney in this proceeding:

- (1) A June 2009 phone call to FCG's counsel informing counsel that Miami-Dade would seek PSC approval of the 2008 Agreement since FCG withdrew its petition for approval;
- (2) An email dated October 30, 2009 to Matt Feil, attorney for FCG, asking whether FCG will join Miami-Dade in submitting a petition for approval of the 2008 Agreement with the draft petition attached;
- (3) Attendance at an informal meeting between the parties and Commission Staff on March 3, 2010;
- (4) Presenting argument at the October 26, 2010 Agenda Conference regarding issue of jurisdiction; and
- (5) Participating in an informal conference call of the parties on March 11, 2011 and stating that FCG has failed to provide any evidence of its original investment of the facilities serving Miami-Dade despite the fact that Commission Staff and Miami-Dade have requested this information for over 2 years; the information is a dispositive issue of this proceeding and any such information provided by FCG "this late" in the case should be excluded;
- (6) Giving FCG and Staff representatives at the March 11, 2011 meeting notice that Miami-Dade would be filing an appropriate motion to strike such evidence⁵

Although Mr. Armstrong attended the above-cited meetings and assisted Miami-Dade on various legal issues prior to and during the instant proceedings, Mr. Armstrong has provided such assistance as a consultant to LEC. The record shows that Mr. Armstrong was retained by LEC not

⁵ On March 16, 2011, the undersigned attorney filed a Motion to Strike Rebuttal Testimony of David Heintz through Mr. Armstrong's office. However, contrary to FCG's assertions, this motion does not seek to exclude information regarding FCG's original investment.

Miami-Dade to provide advice, including legal as well as related management advice concerning utility regulation and private utility practices, in general, designed to assist the County's efforts to secure approval of the 2008 Agreement by the Commission.

Even though Mr. Armstrong previously acted as special counsel to Miami-Dade before the Commission on October 26, 2010, such representation was limited to the narrow issue of whether the Commission has jurisdiction to approve the 2008 Agreement. This act does not convert Mr. Armstrong to being Miami-Dade's attorney "at trial". Also, advising Miami-Dade on other legal, regulatory, procedural and policy matters involving various areas of Commission practice and procedure, for example, tariff review, special contracts, ratemaking and cost of service analyses does not equate to advocating for Miami-Dade "at trial."

B. Mr. Armstrong's testimony is presented to the Commission as an expert witness

Miami-Dade offered Mr. Armstrong's direct testimony and rebuttal testimony as an expert witness based on Mr. Armstrong's experience and knowledge in utility management, utility practices, utility regulation, Commission jurisdiction, treatment of expenses incurred by utilities that engage in mismanagement or make imprudent decisions; documentation

required to support incremental costs; the competitive rate adjustment mechanism and Commission policy in general.

FCG acknowledges that Miami-Dade filed Armstrong's direct and rebuttal witness in anticipation of Mr. Armstrong being a witness for Miami-Dade at the final hearing in June. FCG Motion to Disqualify at 8.

By filing the motion to disqualify Armstrong, FCG assumes that Mr. Armstrong currently represents Miami-Dade as its attorney and will represent Miami-Dade as an attorney at the trial of this matter. FCG also surmises that Mr. Armstrong's testimony was not being offered by Miami-Dade as an expert witness.

FCG is mistaken in its assumptions as further explained below. First, the undersigned counsel represents that Mr. Armstrong will not be Miami-Dade's counsel at trial. With regard to representation during the pre-trial proceedings, the official record belies FCG's assertions as Armstrong has never filed a notice of appearance in this docket. Mr. Armstrong is not listed as a representative of Miami-Dade in the Case Management System because he never filed a formal notice of appearance. See Exhibit B. Since he is not an attorney of record, Mr. Armstrong is not served pleadings or discovery documents by either PSC Staff Counsel nor by FCG's counsel. Finally, Armstrong is not on any certificate of service. It is the usual and customary

practice for the attorney that represents a party to file a notice of appearance and for the parties to serve all pleadings and discovery requests on all attorneys representing the parties. FCG has not done so.

Providing advice to Miami-Dade regarding utility management practices particularly as they relate to the Commission's practices, procedures and policies and how the Commission would treat conduct exhibited by FCG during the subject negotiations, this proceeding and related proceedings and submitting testimony that contains his expert opinion on these unique facts and issues is not a violation of Rule 4-3.4(e) or Rule 4-3.7(a) of the Rules Regulating the Florida Bar.

The purpose of Rule 4-3.7(a) is to protect the trier of fact from being confused or misled by a lawyer serving as both advocate and witness. Since Mr. Armstrong will not be serving as both witness and Miami-Dade's attorney at trial, the concerns expressed in the comment to Rule 4-3.7 will not develop. There is no prejudice to FCG and the trier of fact, which is the Commission itself, will likely not be confused or misled as to whether Mr. Armstrong is a witness or an attorney when testifying at trial. Moreover, the Commission is not a jury of lay people but rather professionals with experience and advanced educational backgrounds.

The cases cited and relied upon by FCG to support excluding Mr. Armstrong's testimony pursuant to Rule 4-3.4(e) are inapposite. Both *Servis v. State*, 855 So. 2d 1190 (Fla. 5th DCA 2003) and *Muhammed v Toys "R" Us, Inc.* 668 So. 2d 254 (Fla. 1st DCA 1996) involve comments by a lawyer during closing argument. These cases do not apply to the facts in the instant proceeding since Mr. Armstrong will not make any comments as Miami-Dade's attorney during closing argument. Armstrong will only serve as an expert witness at the trial.

FCG attempts to exclude Mr. Armstrong's testimony stating that "there is no current rule or caselaw authority that authorizes an attorney to simultaneously make these kinds of statements regarding evidence, witnesses credibility, legal analysis, friendly bolstering, and other such non-fact based testimony as MDWASD has prefiled in this matter through Mr. Armstrong's testimony." FCG Motion at 11-12. Again, FCG's argument is based on the mistaken premise that Mr. Armstrong will be Miami-Dade's trial counsel. He will be a witness. There is no rule or caselaw which prohibits a witness much less an expert witness from testifying on the issues upon which Mr. Armstrong has presented testimony before the Commission.

Lastly, FCG is not prejudiced because it may depose Mr. Armstrong prior to the trial and may cross-examine Mr. Armstrong at the trial regarding his testimony including each of his opinions. In fact, FCG has scheduled Mr. Armstrong's deposition for April 11.

C. Armstrong provides expert testimony on various issues

Miami-Dade submitted Mr. Armstrong's direct testimony and rebuttal testimony as an expert witness on various issues in this proceeding. It is clear that Mr. Armstrong is being offered as an expert witness as most of his testimony consists of opinions based on his professional background and utility management experience which includes 25 years advising utilities with 10 years working in senior executive management of a utility regulated by the Commission.

FCG's motion, at page 18, recognizes Armstrong's expertise when it cites Armstrong's testimony that "Based upon my 25 years of experience advising and managing both public and private utilities...." Also, FCG quotes Armstrong's testimony that "It is my opinion and experience in utility regulatory matters, generally, and before this Commission, specifically, that Commission precedent and notions of procedural due process and fairness requires that FCG be foreclosed from attempting to

provide such information at the hearing to be held in this proceeding.” FCG Motion at 22.

Miami-Dade’s Preliminary List of Issues contained 31 issues. See Exhibit C. At the prehearing conference on issues, the Prehearing Officer ordered that the issues that were not expressly listed in the list of issues would be subsumed in the identified list of issues and that the parties were free to provide evidence including testimony on these issues. See Exhibit D.

Mr. Armstrong will provide expert testimony in relation to the following global issues, and Miami-Dade’s issues subsumed thereunder as discussed by the parties and ordered by the Prehearing Officer at the

December 8, 2010 Status Conference :

- (a) Did FCG perform an incremental cost of service study prior to entering into the 2008 Agreement with MDWASD?
- (b) What are FCG’s incremental costs to serve MDWASD’s gas transportation requirements for the Alexander Orr, Hialeah-Preston, and South Dade Wastewater Treatment plants, respectively.
- (c) Does the contract rate in the 2008 Agreement allow FCG to recover FCG’s incremental cost to serve MDWASD?
- (d) Does MDWASD have a viable by-pass option?
- (e) What, if any, FCG tariff schedule applies to the 2008 Agreement for gas transportation services to MDWASD?
- (f) In the absence of a special agreement, what existing FCG tariff schedule applies to the natural gas transportation service provided to MDWASD?
- (g) Should the 2008 Agreement between MDWASD and FCG be approved as a special contract?
- (h) If the 2008 Agreement is approved, should FCG be allowed to recover the difference between the contract rate and the otherwise

applicable tariff rates through the Competitive Rate Adjustment (CRA) factor for the period August 1, 2009, forward? How should any such recovery occur?

- (i) Should the Commission disallow cost recovery for the differential, if any, between FCG revenue under the 2008 Agreement and FCG's incremental cost to serve MDWASD?
- (j) Based on the Commission's decisions in this case, what monies, if any, are due MDWASD and/or FCG, and when should such monies be paid?

D. Armstrong's Expert Testimony is material and relevant and should not be stricken as scandalous or inflammatory

As an alternative to its motion to exclude Armstrong as a witness, FCG seeks to strike portions of Armstrong's direct and rebuttal testimony on the basis of Section 120.569(2)(g), Florida Statutes, and Rule 1.140, Florida Rules of Civil Procedure.

Section 120.569(2), Florida Statutes, provides that "irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial of the courts of Florida." Rule 1.140(f), Florida Rules of Civil Procedure, provides that "a party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any **pleading** at any time." (emphasis added)

Rule 1.140(f) only applies to "pleadings". Black's Law Dictionary (Abridged, 5th Edition), defines "pleadings" as the formal allegations of the

parties of their respective claims and defenses. Rule 1.100(a), Florida Rules of Civil Procedure, titled "Pleadings" states that "there shall be a complaint, or, when so designated by a statute or rule, a petition, and an answer to it." The Rule also refers to an answer to a counterclaim, crossclaim, third-party complaint, and a third-party answer. "No other pleadings shall be allowed." Based on the plain language of Rule 1.140(f), FCG cannot rely on this Rule of Civil Procedure as authority to strike the alleged "redundant, immaterial, impertinent, and scandalous matter" contained in Armstrong's testimony.

It is not surprising that FCG seeks the Commission to exclude Mr. Armstrong's entire testimony, or, alternatively, to strike portions of his testimony as his testimony effectively and clearly illuminates FCG's egregious conduct, including, but not limited to, FCG's mismanagement, abuse of its customers and the regulatory process. As an expert witness, nothing in Mr. Armstrong's testimony should be stricken but rather should be evaluated by the Commission as it does for any other expert testimony based upon years of his utility management experience and experience before state utility regulatory authorities.

Since Mr. Armstrong is testifying as an expert and not a fact witness, FCG's constant refrain in arguing that Armstrong's testimony is irrelevant, immaterial and unduly repetitious is without merit.

1. Policy Recommendations and Jurisdictional Issue

FCG seeks to strike Armstrong's testimony regarding policy recommendations and regarding the Commission's jurisdiction. At the December 8, 2010 Status Conference, the Prehearing Officer stated that the identified issues do not prohibit Miami-Dade from addressing the subsumed issues through testimony, discovery and argument. Mr. Armstrong's expert opinion testimony on these issues is within the scope of issues and therefore relevant and should not be stricken.

2. Comments regarding other witnesses and documents provided by FCG and Commission Staff

It is not improper for an expert witness to review and opine on the testimony of other witnesses and documents produced by other parties. Mr. Armstrong has simply offered his expert opinion on the testimony and documents based on his utility management and utility related experience which is relevant to this proceeding.

3. Expert Opinion Concerning the CRA, the FCG Tariff and what Commission should do with regard to the 2008 TSA

FCG complains that Armstrong's opinions regarding the Competitive Rate Adjustment ("CRA"), FCG's Tariff and in support of Commission approval of the 2008 TSA are "biased and one-sided". Of course, it is customary and usual for a party's expert to espouse opinions supporting that

party's position based on a review of data, documents, and testimony. Mr. Armstrong's testimony is no different than any other expert's opinion with regard to supporting a party's position.

FCG's recent response to Staff that it is unable to identify where the Commission authorized the use of the CRA mechanism in the first place is further evidence of FCG's mismanagement and abuse of the CRA. See FCG Response to PSC Staff Request for Production No. 21, attached hereto as Exhibit F.

4. Armstrong's opinion on behavior of FCG's management and other "scandalous" and "inflammatory" material

FCG repeatedly refers to Armstrong "accusing" FCG of mismanagement and that Armstrong's language and tone is "inflammatory" and "impertinent". With regard to the behavior of FCG's management, FCG seeks to strike Armstrong's opinion, based on many years of utility management experience and in utility regulations, in general, that FCG's recovery under the CRA "constitute[s] an abuse of those customers..." and that "[t]his abuse should be considered by the Commission when evaluating how to respond to FCG's numerous admissions of mismanagement, mistakes, flawed analysis, and omissions with regard to Miami-Dade and the 2008 Agreement." FCG is hard pressed to argue that this testimony is

“scandalous” or “inflammatory” when FCG’s own conduct of misrepresentations and mismanagement has been confirmed by FCG employees in admissions in testimony and sworn discovery responses. See List of Admissions of Mismanagement attached hereto as Exhibit G.⁶

FCG cannot, in good conscience, argue that Mr. Armstrong’s testimony contains inflammatory language and scandalous material where Mr. Armstrong is opining on FCG actions where subsequent discovery and admissions by FCG have confirmed Mr. Armstrong’s opinions, including that FCG has violated its own tariff and failed to comply with Commission rules and regulations. Additionally, terms like “inexplicably”, “bad acts”, “mismanagement”, “inequitable”, “unjustified windfall”, “surprised by [FCG] response”, “outrageous conduct”, “poor management” are neither “scandalous” nor “inflammatory” statements, nor name-calling.

From the inception of this matter, FCG has sought to use the regulatory process to avoid being held accountable for obligations it agreed to in the 2008 Agreement. Mr. Armstrong’s expert opinion is that the

⁶ It is worthwhile for the Commission to note that FCG refused to conduct due diligence to locate corroborating documents to establish incremental costs until after March 1, 2011, which is over 2 years since Commission Staff first inquired as to FCG’s incremental costs which is the pivotal issue in this proceeding. Additional evidence of FCG bad faith is the manner in which FCG responded to Miami-Dade’s interrogatory and discovery requests for this information wherein FCG asserts that responding would be “expensive” and “unduly burdensome”. On March 22, 2011, FCG “dumped” over a hundred pages of documents on Miami-Dade without any summary or explanation of the documents. An initial review appears to indicate that many of the documents are not even related to the pipe serving MDWASD’s plants. This is another example of FCG obfuscation.

Commission should take into consideration all of FCG's misdeeds and use its authority to hold FCG accountable, as the Commission deems appropriate.

Since several issues in this docket may be unique, including the issue of what tariff terms may be amended by a special contract and what terms may be negotiated by the parties, are issues of first impression. Expert opinion from a utility manager and attorney with Mr. Armstrong's regulatory experience and background will assist the Commission in determining whether to approve the 2008 Agreement.

As stated previously, FCG has the right and the opportunity to take Mr. Armstrong's deposition and inquire on matters regarding his testimony and opinions. As FCG has already scheduled Mr. Armstrong's deposition, FCG is taking advantage of the opportunity to cross-examine Mr. Armstrong. In exercising its due process rights, FCG cannot complain that Mr. Armstrong's testimony is prejudicial.

IV. Oral Argument

Miami-Dade believes the facts clearly provide that The Rules Regulating The Florida Bar prohibiting a lawyer to testify as a witness and advocate "at trial" and prohibiting lawyers from certain comments "at trial"

either do not apply to the facts or do not result in any prejudice to any party. Further, Miami-Dade submits that Mr. Armstrong's testimony is not outside the scope of the issues identified for this docket as the Prehearing Officer found that the parties may inquire through discovery and submit testimony on all issues contained in Miami-Dade's preliminary issues list.

Finally, Mr. Armstrong's testimony is not unlike any other expert witness testimony as he provides his opinion on various issues and his testimony is neither "scandalous", "inflammatory", "irrelevant" nor "impertinent" but rather is relevant to the issues to be decided and will aid the Commission in its deliberations.

To the extent the Prehearing Officer believes oral argument would assist in addressing the motion, Miami-Dade is available and to respond to any questions of the prehearing officer.

V. Conclusion

Based on the foregoing, Miami-Dade respectfully requests that the Commission deny Florida City Gas' motion to disqualify Brian Armstrong since Rule 4-3.7(a) of the Rules Regulating The Florida Bar is inapplicable to the facts of this case. The Commission should also deny FCG's request to

disqualify Mr. Armstrong as a witness in this case under Rule 4-3.4(e) as Mr. Armstrong is testifying as an expert witness and not as an attorney for Miami-Dade. Finally, Miami-Dade requests that the Commission deny FCG's request for alternative relief to strike portions of Mr. Armstrong's direct and rebuttal testimony as such testimony does not violate Section 120.569(2)(g), Florida Statutes or Rule 1.140(f), Florida Rules of Civil Procedure.

Respectfully submitted,

R. A. CUEVAS, JR.
Miami-Dade County Attorney

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
was delivered by electronic mail and U.S. Mail this 28th day of March, 2011

to:

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EXHIBIT "A"

6/19/2009

From: Connie Kummer
Sent: Thursday, January 15, 2009 9:33 AM
To: Fell, Matthew
Cc: Martha Brown; Anna Williams
Subject: Docket No. 080672-GU FCG contract with Miami Dade

Matt,

Knowing that everyone is anxious to move this matter along, I spent yesterday going over the responses and additional information from the utility's most recent rate case and CRA filing. The only conclusion I can come to at this point is that the contract is not in the best interests of the general body of ratepayers. I've detailed my concerns in the attached document. Please let me know how the utility wants to

DOCKET NO. 090539-GU
FCG'S SUPPLEMENTAL RESPONSE TO STAFF'S THIRD
REQUEST FOR PRODUCTION OF DOCUMENTS, NO.17
PAGE 1 OF 38

6/19/2009

proceed.

Thanks,

Connie

6/19/2009

Matt,

I have reviewed the information submitted and unfortunately, based on the information I have, I cannot support the proposed contract with Miami Dade for the following reasons:

1. The tariff cited in the contract is not applicable. The KDS applies only incremental load. The load under this contract is the same as it was in 1998 when the original contract was signed. This does not preclude a special contract, but the utility should cite to the proper tariff.
2. The fundamental reason the commission has approved load retention contract rates is the theory that retaining a customer who is paying something above the incremental cost of service is better than losing all supporting revenue and thereby shifting all fixed costs to the general body of ratepayers. This concept was underscored in the company's last rate case (DN 030569-GU) "...the [flex] rate adjustment enables the Company to retain customers that, even at reduced rates, make significant contributions to the recovery of fixed costs." (Direct Testimony of Jeff Householder, p.23)
 - a. At no time should the subsidy paid by the general body of ratepayers exceed the costs they would be responsible for if the at-risk customer left the system.
 - b. Based on the information provided, the general body of ratepayers is paying (through the CRA) over twice the fixed cost which would be shifted to them if the customer were to leave the system (see the company's responses to the fourth and fifth questions submitted on January 9).
 - c. Assuming the incremental is correctly calculated in the company's response dated December 30, the proposed rate does not even cover the incremental cost of providing service to this customer, much less provide any contribution over it, as required under the cited tariff (Tariff Sheet 49 under "Monthly Rate.").
 - d. At the proposed rate, it appears the general body of ratepayers would be better off if the customer left the system.
 - e. The ceiling for any negotiated rate is the cost of the customer's alternative energy source. Based on the estimated cost of bypass provided in the utility's response dated January 9, it appears there is considerable room to increase the contract price without danger of losing the load.

If I have misconstrued any of the data provided, or the company wishes to submit additional information, I will be glad to discuss it further.

Connie

EXHIBIT "B"

The information in this and related pages was automatically generated from the Case Management system and may be incomplete. For COMPLETE and OFFICIAL information from CMS, you MUST contact the (850) 413-6770.

Docket 090539

Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade Co and Sewer Department.

- [Document Filings Index](#)
- [Events List](#)
- [Utilities](#)
- [Parties of Record and Interested Parties](#)
- [Staff Assigned](#)

WARNING: THIS TIME SCHEDULE IS TENTATIVE AND SUBJECT TO REVISION
 Time Schedule (CASR) for Docket 090539

Description	Previous Due Date	Due I
Petition Filed	none	12/14
Data Request to Parties	none	01/25
Parties' Response to Data Request Due	02/08/2010	02/16
Informal Meeting - Staff	02/26/2010	03/03
Briefs Due	04/06/2010	04/16
Preliminary List of Issues and Positions	none	06/21
Informal Meeting (Staff)	none	06/22
Staff Recommendation	09/16/2010	10/14
Agenda	09/28/2010	10/26
Standard Order	10/18/2010	11/15
Informal Meeting (Staff)	none	11/18
Order Establishing Procedure	none	12/07
Status Conference (SK)	none	12/08
Revised Order Establishing Procedure	none	12/08
Transcript of Status Conference Due (Exp)	none	12/13
1st Order Revising Order Establishing Procedure	none	12/13
Direct Testimony & Exhibits - Both Parties	none	12/29
Staff Direct Testimony & Exhibits, if any	none	01/14
Rebuttal Testimony & Exhibits - Both Parties	none	01/28

2nd Order Revising Order Establishing Procedure	none	02/09
Informal Meeting (Staff)	none	03/11
FAW Notice Filed - Prehearing	02/08/2011	04/05
Prehearing Statements	02/14/2011	04/14
FAW Notice Filed - Hearing	02/22/2011	05/03
Prehearing	03/07/2011	05/05
Discovery Actions Complete	03/07/2011	05/05
Transcript of Prehearing Due	03/14/2011	05/12
Hearing (06/01-03/11)	03/23/2011	06/01
Transcript of Hearing Due	04/01/2011	06/13
Briefs Due	04/25/2011	07/05
Staff Recommendation	06/02/2011	08/11
Agenda	06/14/2011	08/23
Standard Order	07/05/2011	09/12
Close Docket or Revise CASR	07/21/2011	09/28

Utilities Involved in Docket 090539

<i>Utility Companies (1)</i>	<i>Select Company</i>
Florida City Gas (GU602)	<input type="button" value="Select"/>

Parties of Record and Interested Parties in Docket 090539

Parties of Record (6)	Interested Persons (0)
AGL Resources Inc. Shannon O. Pierce Ten Peachtree Place, 15th Floor Atlanta, GA 30309 Phone: 404-584-3394 Email: spierce@aglresources.com	
Florida City Gas Mr. Melvin Williams 933 East 25th Street Hialeah, FL 33013 Phone: 305-835-3649	

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Staff Assigned to Docket 090539

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Division of Economic Regulation
Andrew Maurey

Alisha Roberts
Betty Gardner
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Connie Kummer
Elisabeth Draper
George Slemkewicz
Kaley Thompson
Mark Cicchetti
Natalia Salnova
Suzanne Ollila
William McNulty
Office of the General Counsel
Anna Williams
Keven Leveille
Martha Brown

EXHIBIT "C"

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition of Miami-Dade County through
Miami-Dade Water and Sewer Department
for Approval of Special Gas Transportation
Service Agreement with Florida City Gas

Docket No. 090539-GU

Miami-Dade County's Preliminary List of Issues

A. JURISDICTION

1. Whether Miami-Dade County ("Miami-Dade") is a municipality for purposes of Rule 25-9.034, Florida Administrative Code?
2. Whether the Florida City Gas ("FCG")/Miami-Dade gas transportation agreement is exempt from Commission jurisdiction?
3. Whether FCG should be equitably estopped from asserting that the FCG/Miami-Dade gas transportation agreement is not exempt from Commission jurisdiction?

B. SPECIAL CONTRACT

4. What terms and conditions are required to be included in a special contract with FCG for gas transportation services?
5. What are the standards for approving a special contract for gas transportation?

6. Whether any existing FCG tariff schedule applies to the 2008 Agreement for gas transportation services to Miami-Dade Water and Sewer Department ("MDWASD")?

C. INCREMENTAL COST

7. How should "incremental costs" be defined for purposes of this proceeding?

8. What costs should be considered in FCG's "incremental costs"?

9. What was the original cost and installation date for the FCG pipe that transports gas to MDWASD plants?

10. Who paid for the FCG pipe and is the pipe, or any portion of the pipe that serves MDWASD, contributed property?

11. Whether FCG employees have provided any maintenance or other services regarding the FCG pipes serving MDWASD?

12. Whether FCG pipe serving Miami-Dade is fully depreciated?

13. Whether FCG should have performed an incremental cost of service study prior to entering into a special contract for gas transportation services?

14. What are FCG's incremental costs to serve MDWASD's gas transportation requirements for the Alexander Orr, Hialeah-Preston and South Dade Wastewater Treatment Plant, respectively?

15. Whether the contract rate in the 2008 Agreement covers FCG's incremental cost to serve MDWASD?

16. To the extent the rate agreed to in the 2008 Agreement does not cover the costs FCG incurs to serve MDWASD, what is the lowest rate that will cover such costs?

D. COMPETITIVE RATE ADJUSTMENT

17. Whether a competitive rate adjustment is or should be available to FCG relating to the 2008 Agreement?

18. Whether FCG should have unilaterally stopped billing the CRA to its customers?

19. Whether FCG entered into any below-tariff special contracts following approval by the PSC?

20. Whether FCG has improperly billed the CRA to MDWASD?

E. TARIFF RATE SCHEDULE

21. Whether the tariff rate that FCG unilaterally imposed on MDWASD is unjust, unreasonable, excessive, or unjustly discriminatory?

22. Whether the GS-1250K rate schedule is a proper or reasonable classification for MDWASD?

23. Whether FCG's increase of the County's rates by 670% is reasonable?

F. FCG/AGL ACTIONS

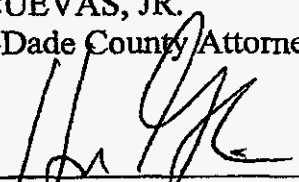
24. Whether FCG's breach of its obligations to act in good faith can be excused by the PSC?
25. What is AGL's financial interest in this matter?
26. Whether FCG shareholders should be required to absorb a deficiency, if any, between FCG revenue under the 2008 Agreement and FCG's incremental cost to serve MDWASD?
27. Whether FCG would over-earn if the Commission allowed FCG to charge MDWASD rates 670% higher than the rates FCG agreed to charge MDWASD in the 2008 Agreement?
28. Whether FCG made misrepresentations to the PSC staff regarding its cost of serving the County?
29. Whether FCG made misrepresentations to the PSC staff regarding the County's cost of bypassing FCG's system?
30. Whether FCG should benefit from its misrepresentations and other actions with regard to the 2008 Agreement?
31. Whether FCG and AGL's treatment of the County should be condoned by the PSC?

Issues were placed in categories for convenience. Issues may fall under more than one category. Miami-Dade reserves the right to enlarge, reduce, edit or otherwise amend this preliminary list of issues.

Respectfully submitted,

R. A. CUEVAS, JR.
Miami-Dade County Attorney

By:


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by email and U.S. Mail this 15th day of November, 2010 to:


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Henry N. Gillman
Assistant County Attorney

EXHIBIT "D"

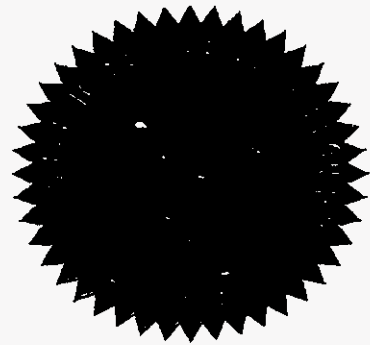
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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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.



PROCEEDINGS: STATUS CONFERENCE

BEFORE: COMMISSIONER NATHAN A. SKOP
PREHEARING OFFICER

DATE: Wednesday, December 8, 2010

TIME: Commenced at 9:30 a.m.
Concluded at 12:04 p.m.

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

REPORTED BY: JANE FAUROT, RPR
LINDA BOLES, RPR, CRR
Official FPSC Reporter
(850) 413-6732/6734

DOCUMENT NUMBER DATE

09894 DEC 13 09

FPSC-COMMISSION CLERK

1 purposes of the rule. The issue is whether this
2 particular contract between Miami-Dade and Florida City
3 Gas is subject to approval by the Commission, and that
4 was decided. Whether they are a muni under the rule or
5 not is irrelevant to the contract.

6 **COMMISSIONER SKOP:** Okay. Looking at Page
7 10 of that order that I have before me, it discusses
8 beginning on Page 10 at the bottom, Miami-Dade County is
9 a municipality, it recites it's entitled to the rights
10 and privileges available to municipalities, as you
11 stated. And then concluding on Page 12, the Commission
12 order, accordingly, the water and wastewater system of
13 Miami-Dade County is not subject to our regulation,
14 quote, as a utility, end quote, however, that does not
15 mean that we lack jurisdiction over a contract to which
16 Miami-Dade is a party.

17 So I think that what has been proposed as
18 Issue 8 has already been adjudicated by the Commission,
19 so my intent or desire is not really to include it. I
20 think it clutters the issue. I mean, certainly, if you
21 need to argue something, you are free to argue it in
22 your brief, testimony, cross-examination, but I think
23 the Commission has conclusively ruled on that by prior
24 order, and I don't want to rehash what the Commission
25 has already ruled upon.

1 So with that, unless there's any other
2 concerns, Issue 8 will not be an issue. All right.
3 hearing none, show that done. Issue 8 is not an issue.
4 If there are arguments that need to be made in briefs,
5 though, you know, the Commission has already ruled upon
6 it, but we don't really to need rehash the past. But if
7 you feel the need, feel free to do that at your own
8 discretion.

9 That takes us to Issue 9, whether Florida City
10 Gas/Miami-Dade gas transportation agreement is exempt
11 from Commission jurisdiction. Just to cut this, nip
12 this in the bud, I think that our prior order has
13 already adjudicated that. So unless there's any concern
14 to Issue 9, I don't believe that it would be appropriate
15 for Issue 9 to be included.

16 Mr. Gillman.

17 **MR. GILLMAN:** Commissioner, only to the extent
18 that the Commission didn't hear actually facts put into
19 the record, and as long as we can still provide factual
20 testimony as needed on this issue.

21 **COMMISSIONER SKOP:** Mr. Self, do you have any
22 problem with that? I mean, we have a prior Commission
23 order that, you know, adjudicates these specific issues.
24 Again, as I expressed, that it's not my intent to put
25 this in the specific issue, but I don't know anything

1 that would preclude Miami-Dade from arguing a change in
2 law or what have you within its briefs. I mean, if it
3 wishes to go there, withstanding the prior Commission
4 order.

5 **MR. SELF:** Well, they can certainly argue a
6 change in law. I don't know what facts changed the
7 legal conclusion. I think 8, 9, and 10 have all been
8 decided by the Commission in the order. You know, there
9 may be stuff that they would say as kind of an
10 explanation or background how the contract came about.
11 They are certainly entitled to discuss that in their
12 testimony.

13 **COMMISSIONER SKOP:** And, again, the Commission
14 has always been pretty liberal in terms of allowing
15 parties to write whatever. I mean, we are cognizant of
16 prior orders and prior rulings as well as our staff is.
17 So, you know, if it has been -- you know, take the
18 arguments into consideration, but, I mean, if it has
19 been adjudicated previously in the Commission order, I
20 think the Commission is smart enough to give it the
21 weight it is due. So with that, hearing no other
22 comments, Issue 9 will not be included.

23 And that takes us to Issue 10, whether FCG
24 should be equitably estopped from asserting that Florida
25 City Gas/Miami-Dade County gas transportation agreement

1 is not exempt from Commission jurisdiction. Again, the
2 same thing. I think the order addressed this. You
3 know, if there is a compelling reason, I'll look to Mr.
4 Gillman and hear from the parties, as well as Mr. Self,
5 but I think Mr. Self hit the nail on the head, that 8,
6 9, and 10 are pretty much covered conclusively by the
7 prior order. But, again, if there are some compelling
8 arguments that need to be raised in briefs, I don't want
9 to rehash the issues that we have already decided, but I
10 don't want to, you know, preclude Miami-Dade from
11 advocating what it wishes to advocate, even if the
12 Commission has already decisively ruled.

13 So, Mr. Gillman, any concern on 10?

14 **MR. GILLMAN:** No, that's fine.

15 **COMMISSIONER SKOP:** Great. Mr. Self.

16 **MR. SELF:** No, sir.

17 **COMMISSIONER SKOP:** Okay. Issue 10 will not
18 be coming in. I will leave it to Miami-Dade if they
19 want to continue to argue up against the prior
20 Commission order.

21 That takes us to Issue 11 through 14. I'll
22 take these individually. My view is that I'll hear from
23 the parties to afford them due process, however this
24 seems to be very substantially similar to the additions
25 that we discussed to Issue 1, so hopefully this won't be

1 a lengthy discussion. But, Issue 11, what are the terms
2 and conditions -- excuse me, what terms and conditions
3 are required to be included in the special contract with
4 Florida City Gas for gas transportation services.

5 Mr. Gillman, I'll let you speak on that
6 briefly, but it sounds like we are trying to define a
7 laundry list in agreements among the parties, and I'm
8 not so sure that even with the best effort you could
9 articulate every possible term and condition, so I'll
10 look to you on that one.

11 **MR. GILLMAN:** Sorry, Commissioner. I think
12 that is the whole point, though, is that we don't know
13 what are the terms and conditions for a special
14 contract. And here City Gas is telling us, you know,
15 this is a special contract, but yet it needs to go to
16 the Commission for approval. So that begs the question,
17 what are the terms and conditions required.

18 **COMMISSIONER SKOP:** Very well. Mr. Self.

19 **MR. SELF:** These are all subsumed within
20 Issues 1, 2, 4, and 5. They can discuss all of these
21 issues. We will have to discuss all of these issues, I
22 do believe. That is a position, I agree with Ms.
23 Kummer, trying to enumerate a specific list of
24 incremental costs as an issue is a waste of time. So I
25 would -- they can discuss all of these, absolutely, but

1 these will relate to their positions on those issues.

2 **COMMISSIONER SKOP:** Very well.

3 Having heard from the parties as well as Ms.
4 Kummer, I tend to agree with Mr. Self and Ms. Kummer.
5 Particularly on Issue 11, you know, to develop a
6 specific list or an express list of terms and
7 conditions, I'm not so sure that anyone can possibly get
8 that right to fit every possible situation.

9 I think that what would be more appropriate is
10 having the parties brief that issue and tell us what
11 should be included from their respective positions, and
12 that gives the Commission the insight to better
13 understanding the parties' positions. But also, again,
14 it's problematic to articulate in any order what these
15 terms and conditions would be on a forward-going basis,
16 and I have pause.

17 So Issue 11 will not be coming in, however,
18 the parties can advocate zealously, if they choose to do
19 so, what they feel should be the required elements, and
20 perhaps then everyone will learn from that process. I
21 look forward to reading the briefs, even though I won't
22 be on the Commission.

23 That takes us to Issue 12, what are the
24 standards for approving a special contract for gas
25 transportation. Again, I think that could be covered in

1 prefiled testimony and discussed at hearing, subject to
2 cross-examination as the parties see fit, but I will
3 hear from the parties in the interest of due process.

4 **MR. GILMAN:** If I may, I would like to have
5 Mr. Armstrong address that.

6 **COMMISSIONER SKOP:** Yes. Mr. Armstrong.

7 **MR. ARMSTRONG:** And I will be brief,
8 Commissioner.

9 And I appreciate your giving us the
10 opportunity to put these on the record in terms of our
11 due process, but we are unable to decipher at all what
12 the standards are for PSC approval of these contracts.
13 And, you know, what we have repeatedly heard is the need
14 for the Commission and Commission staff to protect the
15 financial integrity of the utility, but what we need to
16 also know, though, is where in the standards of approval
17 does a situation like ours where we have a utility owned
18 and operated by a local government, the board of
19 directors of which is comprised of elected officials,
20 who are there are to stand up for and negotiate on
21 behalf of two million customers in this instance, and
22 the acknowledgment that the costs that we are forced to
23 pay to FCG get passed through to those customers. And
24 so I really think our only question is what is the
25 standard for approval? And, you know, Commissioner, so

1 far we don't have an answer.

2 COMMISSIONER SKOP: Okay. Very well. Thank
3 you.

4 Mr. Self.

5 MR. SELF: In Issue 5, they can discuss what
6 they think the standards are for approval, just as we
7 will argue what the standards are for approval and why
8 it shouldn't be approved. So they can discuss all of
9 that there. That is subsumed.

10 COMMISSIONER SKOP: All right. Very well.
11 Ms. Kummer or Ms. Williams, just briefly because we have
12 got a lot of these to move through.

13 MS. WILLIAMS: I agree that it's hard to have
14 a specific list of standards that the Commission will
15 look at. I think the Commission will look at the
16 contract as a whole, consider it in the public interest,
17 and I think that what the Commission considers will be
18 different in every case. I think when the parties will
19 have some idea of what the Commission did consider, and
20 what it does look at, and what standards it does apply
21 will be when they issue their order. And then in the
22 body of that order it will show what the Commission
23 values, sees as important, and includes in its
24 deliberative process about whether or not to include
25 that. So I don't think it's needed as an extra issue.

1 **COMMISSIONER SKOP:** All right. Very well.
2 And also staff feels that it would be subsumed in the
3 broader issues?

4 **MS. WILLIAMS:** Yes, especially agreed Issue 5.

5 **COMMISSIONER SKOP:** Okay. And just briefly to
6 Mr. Armstrong's point. Again, absent express statutory
7 authority as to what the criteria would be, such as in a
8 need determination proceeding for a power plant where
9 you have some express authority, you know, generally the
10 Commission, based on the record evidence, exercises its
11 discretion pursuant to its statutory authority to make
12 decisions that are in the public interest. So I think
13 that, you know, the Commission will exercise its
14 discretion and judgment as it deems fit based on the
15 record evidence pursuant to its statutory charge.

16 With respect to Issue 12, the standards,
17 again, as staff has articulated, as Mr. Self has brought
18 forth, those are arguments that need to be made for the
19 Commission to consider when it renders its decision, and
20 I don't think that it's appropriate to have that as a
21 stand-alone issue. I think it is subsumed within the
22 broader issues that have been mentioned. So certainly
23 at least latitude for Miami-Dade as well as Florida City
24 Gas to argue what the standards should apply, and then
25 the Commission should consider within its briefs or

1 prefiled testimony. So Issue 12 will not be coming in.

2 Issue 13, how should incremental costs be
3 defined for purposes of this proceeding. Again, I think
4 the same argument holds true for 13 and 14, but we will
5 consider 13.

6 Mr. Gillman, you're recognized, briefly.

7 **MR. GILLMAN:** Mr. Armstrong will also address
8 that.

9 **MR. ARMSTRONG:** Commissioner Skop, and I
10 could -- in the hopes of expediting, 13 to 18, my
11 comments would be the same. We have -- you've made it
12 abundantly clear, and we appreciate that, that we will
13 have the opportunity to present evidence, we will have
14 the opportunity to, to, you know, request and hopefully
15 get on the record what exactly these costs are for 13 to
16 18. And as long as we know that that is going to be
17 something specifically addressed and we'll have an
18 opportunity to review, you know, you've covered it,
19 Commissioner. So I can anticipate you're going to
20 reject the issues. And, you know, the company [sic], as
21 long as we have those rights, the company [sic] would
22 agree to -- I mean, the County would agree to withdraw
23 those issues at this point in time.

24 **COMMISSIONER SKOP:** Okay. All right. Well,
25 it, it seems essential to establish what the incremental

1 cost of service is to, to be able to obtain the
2 incremental parts of, of developing that, that cost
3 number. And so, again, defining those as separate
4 issues I think is overkill, noting that we have the
5 discovery process, the prefiled testimony, the
6 cross-examination process, the evidentiary hearing, the
7 post-hearing briefs, as well as the, the global issues
8 that these are all subsumed under.

9 So, Mr. Self, on Issue 13, any comments before
10 I make my ruling?

11 **MR. SELF:** No, Commissioner. I agree.

12 **COMMISSIONER SKOP:** Okay.

13 **MR. SELF:** No, Commissioner. I agree. 13 to
14 18 are all subsumed within existing issues, certainly
15 appropriate for discovery and testimony, and there will
16 be lots of discussion about these, I'm sure.

17 **COMMISSIONER SKOP:** Okay.

18 **MR. GILLMAN:** Commissioner, based on your
19 comments, the County would withdraw 13 through 18.

20 **COMMISSIONER SKOP:** Okay. Very, very well.

21 **MR. GILLMAN:** In light of the fact that they
22 will be, they're subsumed.

23 **COMMISSIONER SKOP:** That, that would expedite
24 things because they are subsumed. And otherwise I would
25 be inclined to disallow them as specific issues. So

1 that takes care of 13 through 18. They will not be
2 issues, but they are subject to discovery and testimony.
3 Specifically what has been framed as Issues 15 through
4 18 that Miami-Dade just withdrew, I would expect that
5 that would be appropriate for discovery, interrogatories
6 and testimony. So I'll let y'all handle it that way.

7 **MR. GILLMAN:** When you say, when you say
8 they're not issues, they're not separately delineated
9 issues.

10 **COMMISSIONER SKOP:** Not separately delineated
11 issues. They are subsumed --

12 **MR. GILLMAN:** But they are still issues that
13 could be addressed, will be addressed.

14 **COMMISSIONER SKOP:** They're subsumed within
15 the broader global issues that have been mentioned
16 ad nauseam here. But it preserves Miami-Dade as well as
17 Florida City Gas's right to pursue discovery
18 interrogatories, testimony on those specific issues as
19 they are subelements of the broader issue that is in
20 consideration by the Commission.

21 Okay. So that takes us to Issue 19 at this
22 point. And Issue 19 is currently disputed and framed as
23 whether FCG should have performed an incremental cost of
24 service study prior to entering into a special contract
25 for gas transportation services. And I'll look to

1 **COMMISSIONER SKOP:** Okay. All right. But,
2 again, just withdrawing 20 does not preclude Miami-Dade
3 from raising those arguments either in its briefs or in
4 its prefiled testimony. Okay?

5 Any other questions before we move on to
6 disputed Issue 21? And we've got about 25 minutes to
7 cover two pages of issues, so.

8 **MR. GILLMAN:** I may be able to squeeze out
9 'til like 12:10 maybe, perhaps.

10 **COMMISSIONER SKOP:** Okay. Well, I think
11 everyone wants to, to pursue this, but give it the
12 attention it's due.

13 So Issue 21, "Whether a competitive rate
14 adjustment is or should be available to FCG relating to
15 the 2008 agreement." Briefly, Mr. Gillman.

16 **MR. GILLMAN:** Just what's said there, Your
17 Honor. Whether that CRA should be available to them,
18 there's nothing in the agreement regarding the CRA, this
19 competitive rate adjustment.

20 **MR. ARMSTRONG:** Yeah. Commissioner, this
21 really applies to 21 and 22. I mean, and I will assume
22 and just would like a confirmation that this is, you
23 know, subsumed within the comments we've heard from you
24 earlier about the ability to put facts into the record
25 that would, we believe, affect the Commission's

1 consideration of prior issues like should the contract
2 be approved? There are facts that have come to light
3 since this process has been going on where, you know,
4 the company has chosen to start to bill us under a new
5 tariff schedule and stopped collecting a CRA
6 voluntarily, and we believe that those impact the
7 Commission's decision or should impact the Commission's
8 decision. So 21 and 22 are subsumed, we believe, within
9 one, as long as we have a reaffirmation of that fact
10 from the Commission.

11 **COMMISSIONER SKOP:** Okay. And that seems to
12 be -- again, my gut is a lot of these, with one or two
13 exceptions that we need to talk about, seem to be better
14 presented as arguments within briefs and testimony or,
15 you know, the course of discovery. But, again, we, you
16 know, if we can get consensus, we can move through it
17 quickly. But I don't want to deny the parties due
18 process to, you know, have me fully informed before I
19 rule on the merits as to what issues come in or stay
20 out.

21 So, Mr. Self, briefly on Issues 21 and/or 22,
22 because I think Mr. Armstrong addressed both of those.

23 **MR. SELF:** Commissioner, I believe we do need
24 a CRA issue in the case, and in fact Issue 36 is the one
25 additional issue that we had proposed. I'm not wedded

1 to any particular language. 36 in particular, my
2 verbiage got way wordier than it should be. But we need
3 a CRA issue because certainly when you talk about
4 incremental costs, when you talk about the contract
5 rate, bypass, what tariff, should the contract be
6 approved, I don't think it's inherently obvious in any
7 of those that there's a CRA aspect to all of this.
8 I'm -- if, if all we do today is agree there is some CRA
9 issue, you know, the language in 21 may be better than
10 my language in 36. I just think, given the fact that
11 the CRA isn't inherent in the contract itself, it's not
12 even mentioned in the contract, I just think the
13 Commission needs a CRA issue. Because, as Mr. Armstrong
14 pointed out and as is clear from 22, the utility did
15 stop charging its customers the CRA rate when we started
16 charging Miami-Dade the tariff rate. And so the
17 consequences of that decision need to be addressed by
18 the Commission, and as well as what happens on a
19 going-forward basis.

20 **COMMISSIONER SKOP:** All right. Very well.
21 And I think that that's a fair point. I think that, you
22 know, Issue 36 as proposed by Florida City Gas
23 certainly, I'll look to Staff here, but Issues
24 21 through 24 generally speak to the CRA, as does 36.
25 So with this I'll look to Commission Staff as to what is

1 Staff's preference whether we should adopt Issue 36 or
2 adopt Issues 21 through 24 or neither. So Ms. Williams
3 or Ms. Kummer.

4 **MS. KUMMER:** I think Issue 36 encompasses all
5 of those because that's the bottom line is should they
6 be allowed to collect CRA from anybody based on the,
7 whatever the rates turn out to be in this contract. So
8 I think 36 covers it. I believe they could make all of
9 their arguments under Issue 36.

10 **COMMISSIONER SKOP:** And that's consistent with
11 my thought process. I think 21 through 24 could
12 obviously be briefed, but I think that Issue 36 as
13 proposed by Mr. Self more succinctly addresses the
14 issue. And I'll look briefly to Mr. Gillman as to
15 whether that suits his clients' needs.

16 **MR. GILLMAN:** We're okay with that,
17 Commissioner.

18 **COMMISSIONER SKOP:** Okay. Very well. So
19 Issues 21 through 24 will be excluded. They will be
20 replaced by what has been agreed to by the parties by
21 Issue 36. And I believe that addresses the CRA aspect
22 of the docket.

23 So that takes us to Issue 25, whether the
24 tariff rate that FG or FCG unilaterally opposed on
25 Miami-Dade is unjust, unreasonable, excessive or unduly

1 discriminatory. Not to waste a whole lot of time, I'll
2 hear from the parties, I think that's better suited for
3 arguments rather than a specific issue. And,
4 Mr. Gillman, if you want to briefly respond.

5 **MR. GILLMAN:** As long as we can make the
6 argument. However, the tariff rate that they've imposed
7 on us, as we stated before, ends up costing the County
8 and its ratepayers over 700 percent more than what we
9 agreed to. And so the question becomes does that, is
10 that rate now something that's unjust and unreasonable
11 and excessive, especially in light of the fact that, you
12 know, what the incremental cost is to serve us and what
13 that rate is, there's a huge disparity between those.

14 **COMMISSIONER SKOP:** All right. And Mr. Self
15 in the interest of fairness, and then we're going to try
16 and move through this pretty quickly from here on out.

17 **MR. SELF:** It's an approved tariff rate. I
18 think they can argue what Mr. Gillman just said under
19 Issues 4, 5, '6. So he's certainly free to argue that
20 point, but I think that's already covered. Clearly this
21 language I think is the wrong kind of language for an
22 issue anyway, but that's a different issue.

23 **COMMISSIONER SKOP:** I understand. And just to
24 expedite this, you know, having heard from the parties
25 on Issue 25 -- and, you know, generally speaking --

1 we'll get to 26 through 29 as a block also -- but on 25,
2 that is subsumed within the global issues. Certainly
3 it's central or appears to be central to Miami-Dade's
4 arguments that it would want to raise within its
5 testimony and its, you know, briefs. So you're not
6 precluded from, from arguing that point.

7 But, again, I don't think it's appropriate to
8 have that as an issue and the wording gives me some
9 concern. So I'm going to exclude Issue 25, but preserve
10 the ability of Miami-Dade to argue and advocate for why
11 the, you know, its concerns on that, on that point. So
12 let's look at Issues 26 through 29 as a group.

13 Again, some of the questions there, as we've
14 had the discussion, seem better suited to discovery
15 testimony, cross-examination at hearing and briefs. So
16 I want to hear briefly from the parties as to Issues 26
17 through 29, and then I'll make my ruling on that.

18 So, Mr. Gillman, you're recognized.

19 **MR. GILLMAN:** 26 goes back to whether, you
20 know, what is the proper and appropriate schedule for
21 the County. And in light of the County being the
22 largest transportation customer and, you know, the fact
23 of in light of the, you know, small amount of
24 infrastructure or pipe that, that City Gas has to
25 transport the County's gas to the County. And 27 goes

1 back to whether their increase, you know, their
2 670 percent increase is reasonable. 28, that refers to
3 their obligation to act in good faith with regard to
4 many of their actions. For example, not going ahead and
5 following through and having the Commission two years
6 ago hear this matter and issue a ruling.

7 **COMMISSIONER SKOP:** I don't, don't mean to cut
8 you off. I don't want to get into the matters. I mean,
9 I'm well versed --

10 **MR. GILLMAN:** Okay. And 29, you know, goes
11 back to AGL and their interest in this matter, since AGL
12 is the one that, you know, that bills us, that handles,
13 you know, essentially these accounts.

14 **COMMISSIONER SKOP:** I understand. Mr. Self,
15 briefly.

16 **MR. SELF:** 26, 27 and 28, he used almost the
17 same words that is in Issues 4, 5 and/or 6 as
18 applicable, so those are covered.

19 Issue 29, AGL Resources is not a party to the
20 docket. The Commission doesn't have any jurisdiction
21 over AGL Resources, and so any issue with respect to AGL
22 is irrelevant, inappropriate, it's not within the scope
23 of their complaint, which doesn't name AGL Resources, so
24 we just need to stick to Florida City Gas because that's
25 the regulated utility.

1 **COMMISSIONER SKOP:** Okay. Staff, briefly.

2 **MS. WILLIAMS:** We agree with Florida City Gas.

3 **COMMISSIONER SKOP:** Okay. All right. Very
4 well.

5 On Issues 26, 27, 28, they're subsumed by
6 global issues. The parties are free to, to argue their
7 positions either in prefiled testimony or briefs or
8 discovery, whatever they need to do on those. But on a
9 standalone basis they do not need to be issues as
10 they're subsumed within global issues.

11 Issue 29, I agree with Mr. Self. Unless,
12 Mr. Gillman, you have a compelling argument why AGL
13 Resources should be even involved, I'm going to put the
14 gavel down on that one and say, you know, it seems to me
15 that the, the appropriate party to this proceeding is
16 Florida City Gas, and we should probably limit it to
17 that, not any affiliates or parents. So any concerns or
18 do you concur with Mr. --

19 **MR. GILLMAN:** The concern is the, what amount
20 of costs or revenues flow upstream to AGL. And, you
21 know, to the extent AGL is, you know, it's the Vice
22 President of AGL that signed off on these agreements.

23 **COMMISSIONER SKOP:** Okay. Let's --

24 **MR. GILLMAN:** AGL is intertwined, inextricably
25 intertwined in this matter. I'm not sure how you can

1 separate them.

2 **COMMISSIONER SKOP:** All right. Let me, let
3 me -- not to cut you off, but again we are time pressed,
4 so I'm going to try and use my knowledge of what I think
5 you're arguing to articulate and then go briefly to
6 Mr. Self before I make my ruling.

7 I think you've asserted that the President or
8 Vice President of the parent, AGL, signed off on the
9 contract, which would make it relevant. As to the
10 financial interest, are you trying to articulate that in
11 terms of the incremental cost, some of that cost may be
12 allocations burden (phonetic) from the parent down to
13 the subsidiary?

14 **MR. GILLMAN:** Yes.

15 **COMMISSIONER SKOP:** Okay. Mr. Self, to that
16 specific point, because I think that those, while it may
17 not be a separate issue, it may be fair game for
18 discovery.

19 **MR. SELF:** And I would agree, I would agree
20 with that, Commissioner. If we're talking about costs
21 allocated from a parent, affiliate, whatever, FCG, that
22 are into the incremental costs, then that's fair game.

23 **COMMISSIONER SKOP:** Okay. All right. So
24 here's my ruling on Issue 29. It will not be a separate
25 issue. Some elements as it pertains to establishing

1 logical order when we consolidate the issues that have
2 been approved. So if it needs to come in before 5 or
3 after 5 or wherever staff deems it to be appropriate so
4 it follows in logical order, that's my ruling.

5 Okay. That takes us to Issues 31, 32, 33, 34,
6 35. I want to take those as a block because again the
7 wording of those issues, it draws conclusions that the
8 language of the issues would probably be offensive to
9 Mr. Self and his client, notwithstanding the fact that
10 they're ripe to be argued if the County so wishes to
11 make those arguments. But I don't believe personally
12 that they need to be separate issues because I think
13 they're subsumed in global issues. But, moreover, it
14 would take us probably an hour to address language
15 changes that would make those more neutral, if at all
16 that could be accomplished.

17 **MR. GILLMAN:** Miami-Dade will agree to
18 withdraw those in light of the fact that they are
19 subsumed under the global issues.

20 **COMMISSIONER SKOP:** All right. Very well.
21 Mr. Self, do you have any objection to that?

22 **MR. SELF:** No objections.

23 **COMMISSIONER SKOP:** All right. Very well. So
24 basically 31, 32, 33, 34, 35 will not be included as
25 separate issues. They may be argued by the parties as

EXHIBIT "E"

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

DATED: March 24, 2011

NOTICE OF TAKING TELEPHONIC DEPOSITION DUCES TECUM

TO:

Henry N. Gillman, Esq.
David Stephen Hope, Esq.
Miami-Dade County
111 NW First Street, Suite 2800
Miami, FL 33128-1993


Please take notice that the deposition of Mr. Brian P. Armstrong, witness for Miami-Dade County Water and Sewer Department, will be taken by telephone pursuant to Rule 1.310, Florida Rules of Civil Procedures, and Rule 28-1065.206, Florida Administrative Code, at 1:00 p.m. on Monday, April 11, 2011.

The telephone call-in number is 866-200-9760, Participant PIN: 2220720#

Please have with you copies of your prefiled testimony, discovery responses attributed to you or which you have prepared, and all the work papers or other materials used by you in the preparation of any testimony or discovery responses in this docket.

These depositions are being taken for the purposes of discovery, for use at final hearing, or for such other purposes as are permitted under the Florida Rules of Civil Procedure.

Please govern yourselves accordingly.



Floyd Self, Esq., B.C.S.
Robert J. Telfer, Esq.
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, FL 32308
(850) 222-0720

Attorneys for Florida City Gas

Deponent is responsible for arranging to have a Notary Public present at his/her location for the purpose of administering the oath at the beginning of the deposition.

DOCUMENT NUMBER - DATE

01980 MAR 25 =

FPSC-COMMISSION CLERK

STATE OF _____

COUNTY OF _____

CERTIFICATE OF OATH

I, the undersigned authority, certify that _____ personally
appeared before me at _____
and was duly sworn by me to tell the truth.

WITNESS my hand and official seal in the City of _____, County
of _____, State of _____, this _____ day
of _____, 2011.

Notary Public

State of _____

Personally known _____ OR produced identification _____

Type of identification produced _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U.S. Mail this 24th day of March, 2011.

Anna Williams, Esq.
Martha Brown, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mr. Melvin Williams
Florida City Gas
933 East 25th Street
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Floyd R. Self

EXHIBIT "F"

REQUESTS

20. Please provide historical and current schematics, diagrams, and/or drawings of FCG's service to MDWASD service (all accounts) showing the location relative of FGT, FCG, and MDWASD facilities, and how such facilities may have changed from 1999 to present.

Response: The facilities reflected in FCG's Response to Staff's Second Production of Documents Request, No. 15 have been essentially unchanged since they were originally constructed, so there are no other documents that would reflect changes over time. The maps provided in response to POD No. 15 reflect the approximate location of the respective MDWASD plants but these maps do not reflect the location of FGT facilities. FCG will supplement this response and provide updated maps that will identify the location of FGT's lines relative to the MDWASD plants and FCG's lines.

21. Please provide a copy of Original Sheet No. 27.1 (CRA tariff sheet), showing the front and back of the sheet (with back showing approval stamp) as provided in FCG's Response to MDWASD's Second Set of Interrogatories No. 29, page 1 of 1.

Response: There are no responsive documents. See FCG's Response to Interrogatory No. 77.

EXHIBIT "G"

Between them, FCG's two witnesses made the following additional admissions of FCG mismanagement and mistakes:

Witness	Page(s)	Admission
Melvin Williams	5	"It does not appear that NUI Corporation submitted the [1998 Agreement] to the PSC for its approval." FCG did not submit the 1998 Agreement to the Commission either.
Melvin Williams	6	First Amendment to 1998 Agreement should have been submitted by FCG to PSC for approval, but it was not.
Melvin Williams	6	"it became clear that the rate in the [2008 Agreement] would not meet the minimum rate requirements in our tariff. . . ."
Melvin Williams	9	"In retrospect, the internal approval process at FCG that was in place at the time the [2008 Agreement] was negotiated and executed was flawed."
Melvin Williams	9	"The level of checks and balances that are now in place were absent such that [FCG] did not engage in a complete and proper evaluation of the terms and conditions of the [2008 Agreement] prior to its execution."
Melvin Williams	9	"The renegotiation process at that time was very compartmentalized and there was no analysis of the cost of service request by [Miami-Dade] during the term of the [2008 Agreement]."
Melvin Williams	9	"Importantly, the individuals directly involved in the negotiation did not seek a review by other key departments to determine compliance with the current tariff or other business requirements of [FCG]."
Melvin Williams	10	"there had not been any substantive analysis at the time of the [2008 Agreement] negotiation."
Melvin Williams	10-11	"[FCG] management realized that the rate in the [2008 Agreement] did not meet the current minimum standard for covering at least the incremental cost of service applicable to [Miami-Dade]."
Melvin Williams	11	"we did not foresee the Commission approving a below cost rate in violation of our tariff or its rules and statutes."
Melvin Williams	11	"each month that service under the [2008 Agreement] continued, the impact of this below cost service on our general body of ratepayers continued to grow."
Melvin Williams	14	"Protracted litigation over a fatally flawed service agreement works to no one's benefit. I felt as if we had made it clear that the old rate was not sufficient to meet the minimum cost of service standards"
Melvin Williams	16	"The rate established in 1999 applicable to service to [Miami-Dade] does not recover the incremental cost of service for

Witness	Page(s)	Admission
		[FCG] to provide service to [Miami-Dade]"
Melvin Williams	17	"we need to develop new tariff language that would permit such a rate because the KDS tariff language does not meet the facts present in our service to [Miami-Dade]."
Melvin Williams	17	"[FCG] regrets the assumptions that have led to this dispute between the parties . . . While [FCG] has admitted its mistakes in how the [2008 Agreement] negotiations were monitored and subsequently executed, the mistake was known and clearly communicated to [Miami-Dade] as early as February 2009."
Carolyn Bermudez	3	"the [2008 Agreement] should be denied and the rates not enforced as they do not recover FCG's cost of service."
Carolyn Bermudez	5	"The document I reviewed purported to be an extension agreement that was signed by Eddie Delgado [an FCG employee in our marketing department, who] had apparently negotiated with [Miami-Dade] and executed the document without the knowledge of FCG's then-Vice President and General Manager."
Carolyn Bermudez	6	"Q. Did you analyze the proposed rate for the [2008 Agreement]? A. No. Based on my cursory review, the rates in the [2008 Agreement] were the same rates that were included in the [1998 Agreement] for which there had never been an issue."
Carolyn Bermudez	7	"the rates in the [1999 Agreement] and [2008 Agreement] did not and do not cover the cost of service attributable to service to [Miami-Dade]."
Carolyn Bermudez	9	"Q. Regarding FCG's efforts to get [Miami-Dade] to negotiate a new agreement that would cover its cost, did you prepare any new cost studies to develop or substantiate a new rate? A. In connection with any rate negotiations with [Miami-Dade], no."
Carolyn Bermudez	10	"FCG did not conduct an analysis of the rate in the [2008 Agreement] prior to its execution by the parties."
Carolyn Bermudez	11	"FCG does not conduct customer specific or site specific cost studies. Thus, you cannot look at our rate case, our surveillance reports and other filings with the PSC, or the books and records of the company to obtain a specific cost of service for [Miami-Dade] collectively or specifically their three plants that we serve."
Carolyn Bermudez	14	"Q. Do the rates in the [2008 Agreement] cover these incremental costs? A. No, they do not."
Carolyn Bermudez	15-16	Ms. Bermudez believes that FCG should have negotiated for rates that fluctuate during the 10 year term of the 2008 Agreement, but it did not do so: "While the capital investment in the plant and facilities to serve [Miami-Dade] may remain unchanged, the expenses to maintain and operate the utility,

Witness	Page(s)	Admission
		and hence the facilities to serve [Miami-Dade], generally have increased over time. . . . Because costs change over time, the rate should be set at a level that will allow the utility to recover all of its costs over time."
Carolyn Bermudez	16	"Q. Does the contract rate in the 2008 Agreement allow FCG to recover FCG's incremental cost to serve [Miami-Dade]? Are the incremental costs that you have developed for service to [Miami-Dade] covered by the price in the [2008 Agreement]? A. No, as I have already testified, they do not."
Carolyn Bermudez	17	"FCG's KDS tariff schedule provides that 'the rate shall not be set lower than the incremental cost the Company incurs to serve the Customer. The charge shall include any capital recovery mechanism. The charge shall be determined by the Company based on Company's evaluation of competitive and overall economic market conditions. . . .'" FCG did none of these things, according to FCG's witnesses.
Carolyn Bermudez	5	"I found that the tariff references were not correct, and so I changed the three tariff references in the draft document to the 'Contract Interruptible Large Volume Transportation Service Rate Schedule' ('CI-LVT') to read as the 'Contract Demand Service Rate Schedule.'" [KDS Rate Schedule]
Carolyn Bermudez	18	"Q. The [2008 Agreement] references that the tariff authority for the service is Contract Demand Service ("KDS") Rate Schedule. Is this appropriate tariff reference? A. No, it is not. . . . [i]t does not apply to the facts and nature of service from [FCG] to [Miami-Dade] in the case of the [2008 Agreement]. [Miami-Dade] did not increase its throughput as part of the new agreement, and thus, the KDS tariff as written does not apply to the [2008 Agreement]."
Carolyn Bermudez	19	"the rate charged to [Miami-Dade] under the [2008 Agreement] is below the cost of service. Pursuant to our tariff and the Commission's rules, we are prohibited from offering service below our cost of service."