BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for review and determination on the project construction and gas transportation agreement between NUI Utilities, Inc. d/b/a City Gas Company of Florida and Florida Crystals Corporation, and approval of an interim service arrangement.	)	DOCKET NO. 160175-GU FILED: August 29, 2016

FLORIDA CRYSTALS CORPORATION'S MOTION TO DISMISS PETITION

Florida Crystals Corporation ("Florida Crystals"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), and subject to its pending unopposed motion to be designated a party or, in the alternative to intervene, in this proceeding filed herein on August 5, 2016, hereby files this motion to dismiss ("Motion to Dismiss") the "Petition for Review and Determination and Approval of Interim Service Agreement" (the "Petition") filed by Florida City Gas ("FCG") on July 22, 2016. In summary, the Commission should dismiss FCG's Petition for the following reasons.

1. The subject "Project Construction and Gas Transportation Agreement" (the "Agreement") between FCG and Florida Crystals is a valid contract under Florida law and did not require filing because it was covered by and otherwise complied with FCG's applicable tariffs, specifically Rate

Schedule KTS (Contract Transportation Service). Accordingly, no basis exists to grant FCG the relief requested in the Petition.

2. If there were any doubt, or even assuming that the Agreement was required to be filed, FCG substantially and substantively complied with any such requirement thirteen years ago, in 2003, in its general rate case, Commission Docket No. 030569-GU. In that case, FCG fully informed the Commission about the Agreement and the costs that it incurred to serve Florida Crystals pursuant to the Agreement, to the point of averring – in expert testimony filed with and relied upon by the Commission – that "The Company's negotiated rate contract with Florida Crystals establishes a rate that recovers its costs to provide service." The Commission thus had at least adequate knowledge of the Agreement, of the costs incurred by FCG to provide service to Florida Crystals under the Agreement, and the rates paid by Florida Crystals thereunder in 2003, when FCG induced the Commission to approve its Rate Schedule KDS (Contract Demand Service) as the successor to Rate Schedule KTS and to set rates on the basis of cost information and additional supporting information provided by its expert witness. Therefore, the Commission should dismiss FCG's Petition because FCG substantially and substantively – albeit tardily – complied with the Rule.

3. Any attempt to reverse the Commission's approval of the rates as supported by FCG's expert witness is also barred by the doctrine of administrative finality.

4. The Agreement provides for rates that are fully compliant with FCG's tariff, and specifically with the provision in FCG's Rate Schedule KDS (the successor to Rate Schedule KTS) that the rate for transportation service shall never be less than $0.01 (one cent) per therm, because under the Agreement, there is no way that the average rate paid by Florida Crystals can ever be less than $0.012 (1.2 cents) per therm.

5. The interpretation of contracts, at least as between the parties thereto, is solely within the jurisdiction of the judicial courts of Florida, and accordingly, the Commission should dismiss FCG's Petition because the Commission lacks the jurisdiction to grant FCG's requested relief of determining that the Agreement is "not legally effective."

6. FCG violated its tariff (by not following the tariff requirement that it submit the Agreement to the PSC), and further asserts that it violated the Commission's Contract Approval Rule. Then, incredibly, FCG asks the Commission to allow FCG's own failures to enable FCG to escape its contractual obligations and the consequences of its prior representations to this Commission. The Commission cannot allow FCG to bootstrap its violations into depriving Florida Crystals of the benefit of its bargain by authorizing FCG to charge Florida Crystals higher rates for the services covered by the Agreement.

7. FCG's supposed premise for its requested relief – that either FCG or its other customers could be harmed if FCG does not recover higher amounts from Florida Crystals – is not at issue in this proceeding. FCG has not pleaded that it requires rate relief to earn an adequate return; rather it simply seeks more money from Florida Crystals. As a matter of law, any impact on other customers could only occur, if ever, after a future general rate case in which, by hypothesis, the Commission might determine that both (a) the rates paid by Florida Crystals are insufficient and (b) any deficiency in revenues resulting from Florida Crystals continuing to pay the rates set forth in the Agreement instead of, again hypothetically, paying higher rates pursuant to some future rate case determination, should be borne by FCG's other customers, instead of being borne by FCG's stockholders.

In further support of this Motion to Dismiss, Florida Crystals states as follows.

PRELIMINARY STATEMENT

As used in this Motion to Dismiss, the following terms have the meanings shown below.

"Agreement" shall refer to the "Project Construction and Gas Transportation Agreement By and Between NUI Utilities, Inc. d/b/a City Gas Company of Florida and Florida Crystals Corporation dated April 24, 2001," which may also be referred to herein as the "Gas Transportation Agreement" or simply as the "GTA."

"Commission" or "PSC" means the Florida Public Service Commission.

"Contract Approval Rule" or "Rule" shall mean Rule 25-9.034, F.A.C., Contracts and Agreements.

"F.A.C." shall refer to the Florida Administrative Code.

"FCG" shall mean the natural gas public utility providing natural gas transportation service to Florida Crystals pursuant to the Agreement, and the term "FCG" shall refer to and include City Gas, Florida City Gas, NUI d/b/a/ City Gas, AGL Resources Inc., and Southern Company Gas, as applicable.

"Florida Crystals" shall mean Florida Crystals Corporation.

"Parties" shall refer to FCG and Florida Crystals as the parties to the Agreement.

"Rate Schedule KTS" shall mean FCG's Rate Schedule KTS as it existed when the Parties entered into the Agreement. A copy of the subject Rate Schedule KTS is attached hereto as Exhibit A.

Other capitalized terms have the meanings given herein.

PROCEDURAL BACKGROUND

On July 22, 2016, Florida City Gas ("FCG") initiated this docket by filing with the Commission a "Petition for Review and Determination and Approval of Interim Service Agreement" (the "Petition"). In the Petition, FCG is seeking (1) a determination from the Commission that the "Project Construction and Gas Transportation Agreement By and Between NUI Utilities, Inc. d/b/a City Gas Company of Florida and Florida Crystals Corporation dated April 24, 2001" is not a legally effective or enforceable special contract under Florida law and (2) the Commission's approval of an interim service arrangement between FCG and Florida Crystals. Petition at 3, 23. On August 5, 2016, Florida Crystals filed its

Unopposed Motion to be Designated a Party, or In the Alternative, Motion to Intervene, which remains pending. On the same date, Florida Crystals also filed its Unopposed Motion for Enlargement of Time to File Responsive Pleadings, up to and including August 29, 2016, and therefore this Motion to Dismiss is timely filed.

HISTORICAL AND FACTUAL BACKGROUND

The Parties to the Agreement

Florida Crystals is FCG's contract partner in the Agreement and a Delaware corporation registered with the Florida Department of State and duly authorized to do business in Florida. Florida Crystals, through wholly owned subsidiaries, owns and operates sugar growing, processing, and refining facilities in Florida, including the Okeelanta sugar mill and an associated cogeneration power plant that provides electricity and thermal energy to its mill and refinery. As FCG's counterparty in the Gas Transportation Agreement and as the customer for whom FCG is attempting to establish an interim service arrangement for future gas transportation services, Florida Crystals is a necessary and indispensable party to this docket.

FCG began its business as City Gas in 1946, serving customers in Dade County, and later expanded its service area into Brevard County in the 1960s. In 1988, City Gas became a part of NUI Corp. and extended its gas distribution system into Saint Lucie, Indian River, Martin, and Palm Beach Counties. In 2004, City Gas became a part of AGL Resources Inc., an Atlanta-based energy company, and changed its name to Florida City Gas. In 2016, before FCG filed its Petition,

AGL Resources became Southern Company Gas, a wholly-owned subsidiary of the Southern Company.

The Agreement Between Florida Crystals and FCG

In April 2001, after extensive negotiations, FCG and Florida Crystals entered into the Gas Transportation Agreement. Florida Crystals has fully performed its obligations under the Gas Transportation Agreement and the Gas Transportation Agreement remains in full force and effect. The Agreement, by its own terms, does not require the Agreement to be filed with the Commission. Additionally, FCG expressly represented to Florida Crystals that the PSC's approval was not required, and further, shortly before the Agreement was executed, stated to Florida Crystals that, if FCG were to issue a Notice to Proceed pursuant to the Agreement, FCG "will effectively waive regulatory approvals" even of any such requirements were to exist. Email dated April 6, 2001 from Paul Chymiy, attorney for NUI (FCG's owner at the time) to Gus Cepero of Florida Crystals, Mark Lewis, an attorney for Florida Crystals, Ed Liberty of NUI, and Mark Casaday (apparently an attorney or other representative of NUI/City Gas). A copy of the referenced email is attached as Exhibit C to this Motion to Dismiss.

Pursuant to the terms of the Agreement, Florida Crystals has been required to pay, and has consistently paid, rates specified in the Agreement for the first fifteen years of the Agreement term on a "take or pay" basis, i.e., for a defined minimum amount of gas transportation service regardless of whether Florida Crystals actually used the service or not. The purpose of this "take or pay" requirement was, as indicated in the title of the Agreement – specifically, the fact

that it is a ***Project Construction*** and Gas Transportation Agreement (emphasis supplied) – to ensure FCG that it would recover its costs of constructing facilities to serve Florida Crystals. The rates for the first fifteen years of service were and are significantly greater than the rates specified for the last fifteen years of the Agreement's term, with the reduction a key part of the bargain struck by the Parties in 2001. The higher rates applicable for service in the first 15 years ensured that FCG recovered its construction costs. To date, Florida Crystals has paid FCG more than $8.7 million for service pursuant to the Agreement, as compared to the "total cost of the facilities allocated and assigned to Florida Crystals of $3,454,782" as testified to by FCG's expert witness in its 2003 rate case. Going forward, with Florida Crystals having paid well over two times the "total cost of the facilities allocated and assigned to Florida Crystals," the "take or pay" provision of the Agreement no longer applies, and depending on the actual volume of transportation service used, annual payments to FCG could be up to $328,000 per year, plus adjustments for increases in the Consumer Price Index, beginning in the sixteenth year of the Agreement's term (the "Extended Term").

Pursuant to the terms of the Agreement, Florida Crystals receives gas transportation service from FCG to its Okeelanta cogeneration facility, located near South Bay, Florida. The natural gas supplied under the Gas Transportation Agreement is used by a wholly-owned subsidiary of Florida Crystals (New Hope Power Company) to operate a cogeneration plant. The cogeneration plant provides process steam for the sugar mill and sugar refinery owned and operated by another wholly-owned subsidiary of Florida Crystals (Okeelanta Corporation). The

cogeneration plant also generates electricity for sale to the Florida electric power grid.

Although the specific rates are confidential, simple arithmetic shows that the average rate paid for the transportation service provided under the Agreement can never be less than 1.2 cents per therm. This is so because the rate for the first block of consumption defined in the Agreement is higher than the rate for the second block of consumption, and the relationship of the first-block and second-block rates is such that, even if Florida Crystals were to use the maximum amount allowed under the Agreement, 1.2 cents per therm is the weighted average rate that Florida Crystals would pay for such maximum transportation quantities. In any month in which Florida Crystals were to use less than the maximum quantity, the rate paid per therm would be greater than 1.2 cents per therm.

The PSC's Knowledge of and Actions Regarding the Agreement

Commission Rule 25-9.034, F.A.C., Contracts and Agreements, provides in its entirety as follows.

> **25-9.034 Contracts and Agreements.**
>
> (1) Wherever a special contract is entered into by a utility for the sale of its product or services in a manner or subject to the provisions not specifically covered by its filed regulations and standard approved rate schedules, such contract must be approved by the Commission prior to its execution. Accompanying each contract shall be completed and detailed justification for the deviation from the utility's filed regulations and standard approved rate schedules. If such special contracts are approved by the Commission, a conformed copy of the contract shall be placed on file with the Commission before its effective date.
>
> The provisions of this rule shall not apply to contracts or agreements governing the sale or interchange of commodity or product by or

between a public utility and a municipality or R. E. A. cooperative, but shall otherwise have application.

(2) Each utility shall make provision to file with the Commission a conformed copy of all such special contracts which are currently in effect and which have not been previously filed.

(3) If the number and size of such special contracts warrant, they may be placed in a separate binder.

Rulemaking Authority 366.05(1), 367.121 FS. Law Implemented 366.05(1), 367.041(2) FS. History–New 6-27-73, Repromulgated 1-8-75, Formerly 25-9.34.

As shown in the history note above, the Rule was originally promulgated in 1973 and repromulgated in 1975.

FCG's approved Rate Schedule KTS, Contract Transportation Service, as it existed when the Agreement was executed and performance by both Parties began, included the following provision:

> Within 30 days after a service agreement has been executed under this rate schedule, the Company [FCG] shall file the service agreement and related documents with the Commission's Division of Records and Reporting for review by the Commission Staff who shall treat them as confidential documents.[1]

Notwithstanding the requirements of its own tariff, FCG apparently never submitted the Agreement to the Commission. (FCG freely admitted its failure to file the Agreement in its Petition, and a diligent search of the Commission's records has not revealed any such filing.) It is clear from the provisions of Rate Schedule KTS that FCG was required by its tariff to file the Agreement with the

[1] FCG's current Rate Schedule KDS, Contract Demand Service, which the Commission approved to replace Rate Schedule KTS in 2003, contains the same provision.

Commission Clerk for review by the PSC Staff. As explained below, Florida Crystals believes that the Contract Approval Rule does not apply to the Agreement, such that no filing was required ***by that Rule***. If the Commission believes otherwise, then it is indisputable that FCG not only failed to comply with its tariff but also that FCG failed to comply with the PSC's Rule at the time the Agreement was entered into.

Although FCG did not file the Agreement with the Commission pursuant to its own tariff, in the 2003 City Gas Rate Case, FCG at least presented sworn testimony to the Commission regarding the Agreement both in relation to its requested approval of a new, successor tariff, Rate Schedule KDS (Contract Demand Service) to replace Rate Schedule KTS, and further in inducing the Commission to set rates on the basis of the sworn testimony of FCG's expert witness, Mr. Jeff Householder. In Order No. PSC-04-0128-PAA-GU, the Commission discussed Rate Schedule KTS and approved the replacement Rate Schedule KDS, noting that "One customer currently takes service under this rate." It is clear from Mr. Householder's testimony that the "one customer" was and is Florida Crystals. Order No. 04-0128-PAA-GU at 29-30. The Commission further discussed its ratemaking treatment for projects served by the Clewiston Pipeline Extension, including the Commission's determination that certain "unmaterialized projections [of future sales and revenues] represent a business risk of the Company that is more appropriately borne by its stockholders, rather than by its ratepayers." Id. at 30.

The Commission specifically relied on Mr. Householder's testimony, which stated in pertinent part the following:

> **Q. PLEASE DESCRIBE THE DIRECT ASSIGNMENT OF COSTS TO THE KTS CUSTOMER CLASS.**
>
> A. The Okeelanta Sugar Florida Crystals plant is served from a lateral main off the primary feeder main in the Palm Beach Division. The investment costs related to serving Florida Crystals were isolated and directly assigned. Service line, meter and regulator costs were identified from the Company's construction records. The Company's Engineering Department prepared a cost analysis of the lateral main, service line, M&R station and appurtenant facilities. The lateral is tapped to serve an additional customer 2,706 feet from the primary feeder main. The cost of this section of the lateral was excluded from the cost assigned to Florida Crystals. The cost to install the above facilities was $1,338,159. The investment cost of the distribution system primary feeder main and gate station serving the lateral to Florida Crystals was allocated. The allocation was based on an analysis of Florida Crystal's capacity requirements compared to that of the primary feeder main. The total cost of the facilities allocated and assigned to Florida Crystals was $3,454,782. The plant's relatively minor annual O&M costs were allocated using the methodology applied to all other classes in the cost study. Florida Crystals is, at present, the only customer in the KTS class. The Company's negotiated rate contract with Florida Crystals establishes a rate that recovers its cost to provide service.

Docket No. 030569-GU, Direct Testimony of Jeff Householder, August 2003, contained in Commission Document No. 03-07495, filed on August 15, 2003. A copy of the cover page and the cited pages of Mr. Householder's testimony is attached as Exhibit B to this Motion to Dismiss.

Notably, Mr. Householder's testimony, upon which the Commission relied in its Order, expressly identified the investment costs incurred to serve Florida Crystals, explicitly recognized that the "annual O&M costs" to serve Florida Crystals were "relatively minor," and concluded with the clear statement that:

> The Company's negotiated rate contract with Florida Crystals establishes a rate that recovers its cost to provide service.

Thus, FCG's current argument advanced in the Petition directly contradicts the position it advanced to the Commission in the 2003 City Gas Rate Case.

MOTION TO DISMSS

For the reasons set forth herein, the Florida Crystals Corporation respectfully moves the Commission to enter its order dismissing the Town's Petition with prejudice.

Standard of Review

A motion to dismiss raises, as a question of law, whether the facts alleged in a petition state a cause of action. The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. See Varnes v. Dawkins, 624 So.

2d 349, 350 (Fla. 1st DCA 1993).[2] In considering a motion to dismiss, the Commission is confined to an examination of the pleading and any attached documents. See Posigian v. American Reliance Ins. Co., 549 So. 2d 751, 754 (Fla. 3d DCA 1989).

SUMMARY OF ARGUMENT

In short, FCG struck an advantageous bargain for itself in 2001, when Florida Crystals committed to pay higher rates for the first fifteen years of the Agreement on a "take-or-pay" basis to support FCG's construction of its Clewiston Pipeline Extension Project. FCG further, in sworn testimony supporting its rate case, informed the PSC of the Agreement and the costs incurred to serve Florida Crystals, upon which the PSC relied in setting FCG's rates, and thus the PSC specifically knew of and recognized the existence of the Agreement in FCG's 2003 general rate case. FCG, however, now faced with the prospect of having to fulfill its contractual obligations for the remainder of the Agreement's term, which provides for Florida Crystals to pay less during those last fifteen years, simply seeks to get out of its commitments, relying on its own failures to comply with the Commission's Rules and its own tariff to escape its obligations. Following any

[2] Accordingly, Florida Crystals assumes as true the facts alleged by FCG in its Petition, but Florida Crystals provides additional facts relevant to the Commission's understanding of the Parties' history and bargain, and Florida Crystals further states that, in the event that this Motion to Dismiss is denied, it will dispute many of the facts alleged by FCG.

and all reasonable principles of fairness, justice, and good regulatory policy, the Commission cannot allow this to occur, and the Commission should accordingly dismiss FCG's Petition for the reasons set forth herein.

ARGUMENT

I. The Agreement Between FCG and Florida Crystals Is a Valid Contract Under Florida Law and Did Not Require Filing Because it was Covered by and Otherwise Complied with, FCG's Applicable Tariffs.

The Agreement between FCG and Florida Crystals is a valid contract under Florida law and did not require filing with the PSC because it was covered by, and otherwise complied with, FCG's applicable tariffs, specifically Rate Schedule KTS (Contract Transportation Service). Regarding the validity of the Agreement, the elements of a valid contract under Florida law are simple and straightforward. There must be an offer and acceptance of the agreement, and there must be an exchange of value, known as consideration. Nowlin v. Nationstar Mortgage, LLC, 193 So. 3d 1043, 1045 (Fla. 2nd DCA 2016). These requirements are clearly met in this instance. The Agreement is written and on its face recognizes the Parties' mutual agreement to the terms of the Agreement as well as the exchange of consideration supporting their covenants under the Agreement. Moreover, the Parties have mutually performed their respective duties under the Agreement for the past fifteen years. The Agreement is valid as between the Parties.

Regarding compliance with the Contract Approval Rule, Rule 25-9.034(1) F.A.C., that Rule provides in pertinent part:

> 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.

(Emphasis supplied.) In 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 (Nov. 5, 2010), the Commission explained that "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." Id. at 19.[3]

In 2001, at the time Florida Crystals and FCG entered into the Gas Transportation Agreement, the filed tariff applicable to Florida Crystals was FCG's Rate Schedule KTS. Rate Schedule KTS provides in pertinent part:

> Monthly Rate
>
> Transportation Charge: An amount negotiated between Company and customer, but not less than $0.01 per therm. The rate shall not be set lower than the incremental cost the Company incurs to serve the customer.

[3] The Miami-Dade County case is readily distinguishable from the facts here because in that case, the contract at issue was a proposed renewal of a ten-year agreement that had expired (i.e., a new contract between FCG and Miami-Dade County), not a 30-year contract that had been performed by both parties for the first fifteen years of its 30-year term like the Agreement between FCG and Florida Crystals. Moreover, the issue of whether the Miami-Dade County-FCG contract was "covered by" the Rule was not in dispute in that case.

Consistent with the applicable Rate Schedule KTS, Florida Crystals and FCG negotiated the Gas Transportation Agreement that contains a gas transportation rate that is consistent with and covered by the terms of the Rate Schedule KTS. Accordingly, because the GTA's rates do not deviate from the rates provided for in Rate Schedule KTS, the plain language of Rule 25-9.034(1), F.A.C., provides that FCG was not required to obtain the Commission's approval of the Agreement. Thus, no basis in law or fact exists for the relief requested by FCG in its Petition, and the Petition should be dismissed.

Moreover, FCG expressly represented to Florida Crystals that the PSC's approval was not required, and further stated to Florida Crystals that, if when FCG were to issue a Notice to Proceed pursuant to the Agreement, FCG "will effectively waive regulatory approvals" even of any such requirements were to exist. Email dated April 6, 2001 from Paul Chymiy, attorney for NUI (FCG's owner at the time) to Gus Cepero of Florida Crystals, Mark Lewis, an attorney for Florida Crystals, Ed Liberty of NUI, and Mark Casaday (apparently an attorney or other representative of NUI/City Gas). A copy of the referenced email is attached as Exhibit C to this Motion to Dismiss.

II. The Commission Should Dismiss FCG's Petition Because FCG Substantially and Substantively – Albeit Tardily – Complied with the Rule. Moreover, the Commission's Approval of All of FCG's Rates in the 2003 City Gas Rate Case Necessarily Included Approval of the Rates Paid by Florida Crystals.

If there were any doubt, and even assuming that the Agreement was required to be approved pursuant to the Contract Approval Rule, FCG substantially and

substantively complied with any such requirement thirteen years ago, in 2003, in its general rate case, Commission Docket No. 030569-GU. In its 2003 rate case, FCG fully informed the Commission about the Agreement and the costs that it incurred to serve Florida Crystals pursuant to the Agreement, to the point of averring – in expert testimony filed with the Commission – that "The Company's negotiated rate contract with Florida Crystals establishes a rate that recovers its costs to provide service." The Commission thus had full – or at least substantially and substantively adequate – knowledge of the Agreement, the costs incurred for FCG to provide service to Florida Crystals under the Agreement, and the rates paid by Florida Crystals thereunder in 2003, when FCG induced the Commission to approve its Rate Schedule KDS (Contract Demand Service) as the successor to Rate Schedule KTS and to set rates on the basis of cost information and additional supporting information provided by its expert witness. Therefore, the Commission should dismiss FCG's Petition because FCG substantially and substantively – albeit tardily – complied with the Rule.

Moreover, the Commission's approval of all of FCG's rates in the 2003 City Gas rate case explicitly approved the rate schedule under which Florida Crystals receives gas transportation service and necessarily included approval of the rates paid by Florida Crystals. This is clearly so because the Commission set all of FCG's rates on the basis of FCG's representation that "The Company's negotiated rate contract with Florida Crystals establishes a rate that recovers its cost to provide service" and confirmed by the imputation of revenues to FCG based on the Commission's determination that certain "unmaterialized projections [of future

sales and revenues] represent a business risk of the Company that is more appropriately borne by its stockholders, rather than by its ratepayers." Order No. 04-0128-PAA-GU at 30.

III. Any Attempt to Reverse the Commission's Approval of the Rates Paid by Florida Crystals as Supported by FCG in 2003 Is Also Barred by the Doctrine of Administrative Finality.

Further, any attempt to reverse the Commission's constructive approval of the rates as supported by FCG's witness is also barred by the doctrine of administrative finality. "The doctrine of decisional finality provides that there must be a 'terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein.'" Florida Power Corp. v. Garcia, 780 So. 2d 34, 44 (Fla. 2001) (citing Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679, 681 (Fla. 1979)). The Commission has held that administrative finality applies to the allocation of costs in utility rate cases. In re: Analysis of Utilities, Inc.'s Financial Accounting and Customer Service Computer System, 2014 WL 1319761, Docket No. 120161-WS, Order No. PSC-14-0143-PCO-WS at 4. There, the Commission stated

> For example, Order No. PSC-10-0585-PAA-WS, [footnote omitted] issued September 22, 2010, addressed the Phoenix Project's allocation costs regarding 6 UI systems during 2009. As part of the allocation of costs, this Order approved the total Phoenix Project costs and held that UI could not reallocate costs to surviving utilities as a result of divestiture of certain of its utilities. This Order, and the orders in all

subsequent rate cases of UI's utilities, are subject to the principle of administrative finality. The principle is described in general terms in Peoples Gas v. Mason, 187 So. 2d 335, 339 (Fla. 1966), which provides that:

> Orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

Accordingly, the doctrine of administrative finality bars FCG's efforts to overturn the Commission's approval of its rates, including those paid by Florida Crystals pursuant to the Agreement, recognized in the Commission's Order No. 04-0128-PAA-GU approving all of FCG's rates in its 2003 rate case.

IV. The Agreement Provides for Rates That Are Fully Compliant With FCG's Tariffs, Specifically With the Provision in FCG's Rate Schedule KDS that the Rate for Transportation Service Shall Never be Less Than $0.01 (One Cent) Per Therm, Because Under the Agreement, It Is Mathematically Impossible for the Average Rate paid by Florida Crystals To Ever Be Less Than $0.012 (1.2 Cents) Per Therm.

Although the specific rates are confidential, simple arithmetic shows that the average rate paid for the transportation service provided under the Agreement can never be less than 1.2 cents per therm. This is so because the rate for the first block of consumption defined in the Agreement is higher than the rate for the

second block of consumption, and the relationship of the first-block and second-block rates is such that, even if Florida Crystals were to use the maximum amount allowed under the Agreement, 1.2 cents per therm is the weighted average rate that Florida Crystals would pay for such maximum transportation quantities. In any month in which Florida Crystals were to use less than the maximum quantity, the rate paid per therm would be greater than 1.2 cents per therm.

Accordingly, because it is impossible for Florida Crystals to ever pay a rate less than 1 cent per therm for transportation service under the Agreement, FCG's assertion that the Agreement is inconsistent with its tariff is false on its face and its Petition with respect to FCG's assertions must be dismissed.

V. FCG's Petition Should Be Dismissed at Least in Part for Failure to State a Claim Upon Which Relief Can Be Granted Because the Jurisdiction to Interpret Contracts As Between the Parties Thereto Lies Solely and Exclusively With the Judicial Courts of Florida.

With respect to its primary request for "a determination by this Commission" that the Agreement "is not a legally effective or enforceable contract under Florida law," FCG's Petition fails to state a claim upon which relief can be granted, because jurisdiction to interpret contracts between the parties thereto rests exclusively with the judicial courts of Florida. As explained above, the Agreement is a valid contract under Florida law. The Commission's Contract Approval Rule is simply a regulatory requirement applicable to FCG, with which FCG failed to comply. Nothing in the Commission's Contract Approval Rule says that filing and approval of contracts and agreements subject to that Rule is a requirement for

such contracts to be effective as between the parties to such contracts; rather, the Rule simply requires public utilities to file such contracts before executing them. A utility cannot escape its valid contractual obligations by failing to comply with the Commission's Rule, particularly where, as here, the parties have been performing their obligations under the contract for 15 years.

The Commission lacks the jurisdiction to grant FCG's requested relief of determining that the Agreement is "not a legally effective or enforceable contract under Florida law," because the interpretation of contracts, at least as between the parties thereto, is solely within the jurisdiction of the judicial courts of Florida. The Commission derives its authority from the Legislature, "which defines the [Commission's] jurisdiction, duty and authority. Fla. Pub. Serv. Comm'n v. Bryson, 569 So. 2d 1253, 1254 (Fla. 1990). Section 26.012(2), Florida Statutes, provides that Florida's circuit courts have exclusive original jurisdiction in all actions at law not cognizable in Florida's county courts. Contract actions are matters of law.

The Commission has recognized and adhered to this jurisprudence in cases involving contracts between public utilities and other parties. In a 1995 order, the Commission recognized that an electric public utility's petition regarding a contract pricing term under negotiated cogeneration contracts was a request to interpret the contract, and following earlier precedent,[4] stated that "matters of

[4] In re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, Docket No. 840438-EI, Order No. 14297 (March 31, 2985)

contract interpretation were properly left to the civil courts" and went on to hold that the Commission would "defer to the courts to resolve that dispute." In re: Petition for Determination that Implementation of Contractual Pricing Mechanism for Energy Payments to Qualifying Facilities Complies with Rule 25-17.0832, F.A.C., by Florida Power Corporation, Docket No. 940771-EQ, Order No. PSC-95-0210-FOF-EQ (Feb. 15, 1995) at 8. The Commission further noted that its approval of the negotiated power purchase contracts did not confer continuing jurisdiction over such contracts, in perfect harmony with the above-cited section of Chapter 26, Florida Statutes: only a Florida court can rule on the legal effectiveness of a contract as between the parties.

To the same point and effect, in United Telephone Co. of Florida v. Pub. Serv. Comm'n, 496 So. 2d 116, 118, the Florida Supreme Court recognized that the Commission's jurisdiction derives from the statutes, and that the statutes at issue in that telecommunications case did not confer jurisdiction to interpret contracts between the parties, but rather only "to disapprov[e] settlement contracts which are not in the public interest or resolving settlement disputes." Here, the Commission had the jurisdiction to approve the rate contract between FCG and Florida Crystals in the first instance, and based on FCG's expert testimony in 2003, presumably would have done so, and the Commission further had ***and exercised*** its jurisdiction to set FCG's rates in recognition of FCG's expert's testimony that the Agreement "establishes a rate that recovers [FCG's] cist to provide service." City Gas 2003 Rate Case, Order No. 04-0128 at 30; Householder Testimony at 77. This

authority, however, is completely different from the jurisdiction to rule, as requested by FCG, that the Agreement is not legally effective and not enforceable.

VI. FCG Has Admitted That it Violated Its Own Tariff and Further Argues that it Violated the Commission Contract Approval Rule. The Commission Cannot Allow FCG to Bootstrap its Violations to Escape the Consequences Of FCG's Prior Representations to the Commission or to Deprive Florida Crystals of the Benefit of its Bargain.

FCG has admitted that it violated its own tariff, Rate Schedule KTS, by not filing the Agreement with the Commission as required by that tariff. This is facial evidence of FCG's management failures, which evidence is further confirmed and corroborated by the fact that FCG cannot find any records of its participation in developing the Agreement, which was critical to FCG's being able to proceed with its Clewiston Extension Project.[5] FCG further asserts that it violated the Commission's Contract Approval Rule, and then, incredibly, FCG asks the Commission to allow FCG's own failures – with no fault attributed or attributable to Florida Crystals – to deprive Florida Crystals of the benefit of the bargain and further, both to insulate FCG from the legal consequences of its actions by letting it

[5] FCG's attempts to disavow knowledge of the Agreement by its subsequent owners, NUI and AGL Resources, and probably also by Southern Company Gas, are irrelevant to the utility's obligations and duties under the Agreement, and only demonstrate further failures by FCG and its subsequent owners to conduct adequate due diligence in managing and assessing FCG's obligations. The ignorance of FCG's owners provides no basis to deprive Florida Crystals of the benefit of its bargain and no basis to allow FCG and its current owners to escape their contractual obligations. That being said, FCG's knowledge and the timing of its Petition will be disputed factual issues (along with many others) if this matter proceeds to an evidentiary hearing.

escape its contractual obligations, by letting it escape the Commission's findings and holdings – based on FCG's representations – in the 2003 City Gas rate case, and, FCG argues, by letting it keep the excess revenues that it collected from Florida Crystals over the first fifteen years of the Agreement's life.[6] The consequences of FCG's failures must rest entirely with FCG, its owners, and its shareholders. Florida Crystals should not be punished for its assiduous compliance with its obligations under the Agreement over the past 15 years.

VII. FCG's Suggestion That Other Customers Could Be Harmed if FCG Does Not Recover Greater Amounts from Florida Crystals Is Not – and Cannot Be – at Issue in this Proceeding, Nor Can FCG Prove that it Needs Any Additional Revenues Without a General Rate Case.

At pages 18-19 of its Petition, FCG states that its "general body of ratepayers have been insulated and not adversely impacted because City Gas and FCG have not had a rate case since 2003 and have not sought Competitive Rate Adjustment recovery or any other regulatory relief in connection with the GTA." To the extent that FCG is suggesting that its customers will be harmed if it is not

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[6] Florida Crystals strongly believes and asserts that the proper action by the Commission is to dismiss FCG's Petition for the reasons stated in this Motion to Dismiss, but if the Commission were to determine that the Agreement is subject to review under the Contract Approval Rule, it should review the Agreement on a *nunc pro tunc* basis, i.e., on the basis of what was known to FCG at the time that FCG its own tariff, in April 2001. Allowing FCG to escape its contractual obligations by virtue of FCG's own unilateral failures – again recognizing that to even get to such point, the Commission would have to have determined that the Agreement was subject to the Rule and further to have determined that FCG violated the Rule – would be fundamentally unfair and manifestly unjust to Florida Crystals, and contrary to all reasonable principles of fairness and justice embodied in sound regulatory policy.

allowed to charge Florida Crystals higher rates, any such issue is simply not present in this proceeding, under any scenario. As a matter of law, any impact on other customers can only occur, if ever, after a future general rate case in which, by hypothesis, the Commission might determine (a) that the rates paid by Florida Crystals are insufficient and (b) that any deficiency in revenues resulting from Florida Crystals continuing to pay the rates set forth in the Agreement instead of, again hypothetically, paying higher rates pursuant to some future rate case determination should be borne by FCG's other customers, instead of being borne by FCG's stockholders.[7] Similarly, for FCG to justify any relief on the basis that its shareholders would be harmed if FCG is not allowed to charge Florida Crystals more than the rates that FCG contractually agreed to fifteen years ago, it would have to establish in an appropriate general rate case proceeding that it was entitled to any increases in rates at all.[8]

---

[7] Although the Commission is not called upon to decide factual issues at this juncture, it bears noting that the Commission made exactly the opposite decision in the 2003 City Gas rate case, when it determined that a projected revenue shortfall from its Clewiston Extension Project should be borne by FCG's stockholders and imputed revenues to FCG accordingly, noting that FCG took a business risk in developing the Clewiston Pipeline Extension Project.

[8] Again, if such a proceeding were to be held, Florida Crystals strongly believes and will assert that FCG is barred by administrative finality and numerous other legal principles from even seeking such relief in such hypothetical future rate case.

CONCLUSION

Even though Florida Crystals would dispute many of FCG's allegations, taking all of FCG's facts as true, the Commission should dismiss FCG's Petition because:

1. As between Florida Crystals and FCG, the Agreement is a valid and binding contract under Florida law. The Agreement was not required to be filed because it was covered by and otherwise complied with FCG's applicable tariff, Rate Schedule KTS. Moreover, FCG represented to Florida Crystals that the Agreement did not require regulatory approval, and further acknowledged that it waived any claim regarding regulatory approvals.

2. Even assuming that approval under the Rule was required, FCG substantially and substantively complied with the Rule when it represented to the Commission in its 2003 general rate case that

   > The Company's negotiated rate contract with Florida Crystals establishes a rate that recovers its cost to provide service.

   In so doing, FCG induced the Commission to grant its constructive approval of the arrangements under the Agreement, of the costs allocated to Florida Crystals, and of the rates paid by Florida Crystals under the Agreement.

3. FCG's Petition is barred by the doctrine of administrative finality.

4. The Agreement provides for rates that are fully compliant with FCG's tariff. Although the specific rates are confidential, simple arithmetic shows that the average rate paid for the transportation service provided under the Agreement can never be less than 1.2 cents per therm. Accordingly, because it is impossible for Florida Crystals to ever pay a rate less than 1 cent per therm for transportation service under the Agreement, FCG's assertion that the Agreement is inconsistent with its tariff is false on its face and its Petition with respect to FCG's assertions must be dismissed.

5. Only Florida's courts can determine whether a contract is legally effective and enforceable as between the parties.

6. FCG violated its tariff, and further asserts that it violated the Commission's Contract Approval Rule. Then, incredibly, FCG asks the Commission to allow FCG's own failures to enable FCG to escape its contractual obligation and the consequences of its prior representations to this Commission. The Commission cannot allow FCG to bootstrap its own failures into such an unfair, unjust, and unreasonable result.

7. FCG's premise that its other customers could be harmed is not, and cannot be, at issue in this proceeding, nor can FCG prove that it needs any additional revenues without a general rate case.

Accordingly, the Commission should dismiss FCG's Petition.

RELIEF REQUESTED

WHEREFORE, Florida Crystals Corporation respectfully requests the Commission to issue its Order dismissing the Petition filed herein by Florida City Gas.

Respectfully submitted this 29th day of August, 2016.

Robert Scheffel Wright
schef@gbwlegal.com
John T. LaVia, III
jlavia@gbwlegal.com
Gardner, Bist, Bowden, Bush, Dee,
LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308
Telephone (850) 385-0070
Facsimile (850) 385-5416

Attorneys for Florida Crystals

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 29th day of August, 2016.

Margo Leathers
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Floyd R. Self
Berger Singerman
313 North Monroe Street, Suite 301
Tallahassee, Florida 32301
fself@bergersingerman.com

Carolyn Bermudez
Florida City Gas
4045 NW 97th Avenue
Doral, Florida 33178-2300
cbermude@aglresources.com

Blake O'Farrow
Southern Company Gas
Ten Peachtree Place NE
Atlanta, Georgia 30309
bofarrow@aglresources.com

Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 160175-GU

EXHIBIT A

TO

FLORIDA CRYSTALS CORPORATION'S MOTION TO DISMISS

CITY GAS COMPANY RATE SCHEDULE KTS AS OF 2001

AUGUST 29, 2016

EXHIBIT 1

RATE SCHEDULE KTS
Contract Transportation Service

Availability

Throughout the service area of the Company.

Objective

The objective of this service classification is to enable the Company to attach incremental load to its system by providing the Company with the flexibility to negotiate individual service agreements with customers taking into account competitive and economic market conditions and system growth opportunities.

Applicability

Transportation service is available under this rate schedule to any non-residential, commercial or industrial customer bringing a minimum new incremental demand of 250,000 additional therms per year to the Company's system at one location.

Terms of service including operating conditions and, if applicable, a capital repayment mechanism acceptable to Company, which may include, but shall not be limited to, a minimum monthly or annual bill, will be set forth in individual service agreements between the Company and the customer. Absent a service agreement with Company under this rate schedule, Company has no obligation to provide, and the customer shall have no right to receive, service under this rate schedule, and customer may elect to receive service under other applicable rate schedules.

Gas Supply Obligation

The Company shall have no obligation to provide natural gas supplies to customers under this rate schedule.

Monthly Rate

Transportation Charge: An amount negotiated between Company and customer, but not less than $0.01 per therm. The rate shall not be set lower than the incremental cost the Company incurs to serve the customer. The transportation charge shall include any capital recovery mechanism. The transportation charge shall be determined by the Company based on Company's evaluation of competitive and overall economic market conditions and the opportunity for the Company to expand its system into areas not served with natural gas. Such evaluation may include, but is not necessarily limited to: the cost of gas which is available to serve customer; the delivered price and availability of customer's alternate fuel or energy source; the nature of the customer's operations (such as load factor, fuel efficiency, alternate fuel capacity, etc.); and the opportunity to extend gas service to areas not supplied with natural gas. With respect to existing customers, an additional load of at least 250,000 therms must be added, and the negotiated KTS rate will only apply to the additional load added to the Company's system.

Interruption and Curtailment

Company shall have the right to reduce or completely curtail deliveries to Customer pursuant to this rate schedule:

(A) If in Company's opinion, Customer will overrun the volume of gas to which it is entitled from its supplier (or overrun the volume of gas being delivered to Company for Customer's account); or

(B) in the event Company is notified by its supplier or pipeline transporter to interrupt or curtail deliveries to Customer, or deliveries of gas for uses of the same type or category as Customer's use of gas hereunder; or

(C) when necessary to maintain the operational reliability of Company's system

Confidentiality

The Company and Customer each regard the terms and conditions of the negotiated service agreement as confidential, proprietary business information.

The Company and Customer agree to utilize all reasonable and available measures to guard the confidentiality of said information, subject to the requirements of courts and agencies having jurisdiction hereof.

In the event either party is asked to provide the information by such a court or agency, it will promptly inform the other of the request, and will cooperate in defending and maintaining the confidentiality of the information.

This provision shall not prohibit or restrict the FPSC from reviewing the service agreement in the performance of its duties, but the FPSC shall treat the service agreement as a confidential document. Within 30 days after a service agreement has been executed under this rate schedule, the Company shall file the service agreement and related documents with the Commission's Division of Records and Reporting for review by the Commission Staff who shall treat them as confidential documents.

Special Conditions

1. Service under this rate schedule shall be subject to Section 11 of Rules and Regulations for Transportation – Special Conditions, except to the extent modified in a service agreement.

2. The rates set forth in this rate schedule shall be subject to the operation of the Company's Tax and Other Adjustments set forth on Sheet No. 26.

3. Service under this rate schedule shall be subject to the Rules and Regulations set forth in the tariff, except to the extent modified in a service agreement.

4. If the provision of service hereunder requires the installation of natural gas equipment at customer's facility, Company and customer may enter into an

agreement as to the terms and conditions regarding the reimbursement of costs relating to such equipment. The initial term of the service agreement shall, at a minimum, be equal to the period of cost reimbursement. The rates established in the Monthly Rates section may be adjusted to provide for such cost reimbursement to the Company including carrying costs.

5. Service under this rate schedule shall not be subject to the Competitive Rate Adjustment Clause.

6. When entering into a service agreement with a customer under this rate schedule, Company will take reasonable steps to mitigate the potential of any revenue shortfalls between the revenues received under a service agreement and the total cost and expenses relating to the associated capital investment made by the Company.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 160175-GU

EXHIBIT B

TO

FLORIDA CRYSTALS CORPORATION'S MOTION TO DISMISS

EXCERPT FROM DIRECT TESTIMONY OF JEFF HOUSEHOLDER
ON BEHALF OF CITY GAS COMPANY OF FLORIDA
FILED IN PSC DOCKET NO. 030569-GU
(AUGUST 15, 2003)

AUGUST 29, 2016

City Gas Company of Florida

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 030569-GU

DIRECT TESTIMONY AND EXHIBITS

VOLUME II

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DIRECT TESTIMONY OF

JEFF HOUSEHOLDER

ON BEHALF OF CITY GAS COMPANY OF FLORIDA

DOCKET NO. 030569-GU

AUGUST 2003

Q. PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS ADDRESS.

A. My name is Jeff Householder. I provide energy consulting and business development services to natural gas utilities, propane gas retailers, government agencies and a number of industrial and commercial clients. I have participated in a variety of filings before the Florida Commission including several general rate proceedings. My business address is 2333 West 33rd Street, Panama City, Florida, 32405.

Q. PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE AND EDUCATIONAL BACKGROUND.

A. Prior to beginning my consulting business in January 2000, I was Vice President of Marketing and Sales for TECO Peoples Gas from 1997 to 1999. While with TECO, I was also responsible for the management of TECO Gas Services, an unregulated energy marketing company. I joined Peoples Gas subsequent to the 1997 TECO Energy acquisition of West Florida Natural Gas Company. At West Florida Natural Gas, I served as Vice President of Regulatory Affairs and Gas Management from 1995 to

to recover these costs from the TPS customers is described later in my testimony.

Q. PLEASE DESCRIBE THE DIRECT ASSIGNMENT OF COSTS TO THE KTS CUSTOMER CLASS.

A. The Okeelanta Sugar Florida Crystals plant is served from a lateral main off the primary feeder main in the Palm Beach Division. The investment costs related to serving Florida Crystals were isolated and directly assigned. Service line, meter and regulator costs were identified from the Company's construction records. The Company's Engineering Department prepared a cost analysis of the lateral main, service line, M&R station and appurtenant facilities. The lateral is tapped to serve an additional customer 2,706 feet from the primary feeder main. The cost of this section of the lateral was excluded from the cost assigned to Florida Crystals. The cost to install the above facilities was $1,338,159. The investment cost of the distribution system primary feeder main and gate station serving the lateral to Florida Crystals was allocated. The allocation was based on an analysis of Florida Crystal's capacity requirements compared to that of the primary feeder main. The total cost of the facilities allocated and assigned to Florida Crystals was $3,454,782. The plant's relatively minor annual O&M costs were allocated using the methodology applied to all other classes in the cost study. Florida Crystals is, at present, the only customer in the KTS class.

The Company's negotiated rate contract with Florida Crystals establishes a rate that recovers its cost to provide service.

Q. PLEASE DESCRIBE HOW YOU ALLOCATED CAPACITY COSTS IN THE COST OF SERVICE STUDY.

A. Capacity costs were allocated on the basis of peak and average monthly sales volume for most customer classes. The principle underlying the peak and average allocator is that fixed demand costs should be apportioned to rate classes in a manner that reflects both the basis for which the costs are incurred, as well as the actual utilization of the system by customers entitled to receive service once the system has been installed. However, for classes GS-250k and GS-1,250k the peak and average allocation method resulted in uneconomical rates and a separate allocation method was employed. The customers in these classes are very price sensitive and frequently have alternate fuel options. The peak and average methodology attempts to allocate commonly used plant by assessing system-wide monthly demand by customer class. It is not sophisticated enough to account for peak hour demand, system load diversity or demand requirements on particular segments of the distribution system. Gas distribution systems are designed to meet peak hour requirements. Employing a capacity cost allocator based on peak and average monthly data typically results in poor load factor customers receiving a lower than appropriate allocation of capacity costs. Conversely, customers with higher load factors

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 160175-GU

EXHIBIT C

TO

FLORIDA CRYSTALS CORPORATION'S MOTION TO DISMISS

ELECTRONIC MAIL MESSAGES BETWEEN NUI/CITY GAS
AND FLORIDA CRYSTALS CORPORATION,
DATED APRIL 5-6, 2001

AUGUST 29, 2016

Rhonda Dulgar

From: Paul Chymiy <pchymiy@NUI.com>
Sent: Friday, April 06, 2001 4:32 PM
To: Gus_Cepero@floridacrystals.com; Ed Liberty; 'mark.lewis@bakerbotts.com'
Cc: pentexmark@email.msn.com; Armando_Tabernilla@floridacrystals.com
Subject: RE: Definitive Agreement - Open Items

Mark -

As discussed. I agree with No. 3 in your e-mail. I don't agree with Nos. 1 and 2.. The delivery of the Financial Information alone is insufficient. It must be coupled with the delivery of Adequate Assurance, but only if Adequate Assurance is required after NUI's review of the Financial Information.

Therefore, I suggest that Condition Precedent 3 read as follows:

"Delivery
> by Customer of Financial Information in accordance with Article __ of
> this Agreement and, if required pursuant to the terms Article __,
> delivery by Customer to Company of any Adequate Assurance."

Similarly, I suggest "Adequate Assurance" remain in lines 5 and 8.
In line 5, we can add "if" after Adequate Assurance" and in line 8, we can either change "the" to "such" or after "Adequate Assurance" insert "if required pursuant to the terms of Article __ of this Agreement.

Clearly, NUI doesn't expect the delivery of Adequate Assurance if none is required. However, if it is required, its delivery should be a condition precedent.

I'll look forward to hearing from you.

Paul

> ----------
> From: mark.lewis@bakerbotts.com[SMTP:mark.lewis@bakerbotts.com]
> Sent: Friday, April 06, 2001 3:51 PM
> To: pchymiy@nui.com; Gus_Cepero@floridacrystals.com; eliberty@nui.com
> Cc: pentexmark@email.msn.com; Armando_Tabernilla@floridacrystals.com
> Subject: RE: Definitive Agreement - Open Items
>
> I have reviewed the documents forwarded by Ed on Thursday, April 5,
> 2001, and I have discussed my comments with Gus.
>
> My comments are as follows:
>
> 1. Condition Precedent 3 should be rewritten to state as follows:
> "Delivery
> by Customer of Financial Information in accordance with Article __ of
> this Agreement."
>
> 2. In the paragraph under condition precedent 4 on the e-mail from Ed,
> in the 5th and 8th lines, the words "Adequate Assurance" should be
> deleted and replaced with the words "Financial Information"
>
> Both of these comments are intended to reflect the substance of the
> Security article that requires Florida Crystals to provide Financial
> Information, but does not require the provision of Adequate Assurance
> unless and until NUI determines that Florida Crystals credit rating is
> not at least investment grade. I believe that the suggested revisions
> accurately reflect the intent of Florida Crystals and NUI.

>
> 3. In the draft Security article, I suggest inserting a period after
> the word "entity" in the 4th line of the 3rd paragraph. Then, delete
> the words "in an amount not to exceed" and insert the following:
> "The amount of any such security shall not exceed, but may be less than, .
> .
> ."
>
> Also, I agree with Paul's clarifications to Ed's e-mail.
>
> If there are questions about these suggested revisions, please call or
> e-mail. The foregoing are my comments on the materials forwarded by
> Ed, and the foregoing have been discussed with Gus. Florida Crystals
> continues to review the materials and Gus may forward additional
> comments to you.
>
> Mark K. Lewis
> Baker Botts L.L.P.
> The Warner
> 1299 Pennsylvania Avenue, NW
> Washington D.C. 20004
> (202)639-7732
> fax (202)639-7890
> e-mail: mark.lewis@bakerbotts.com
>
>
> -----Original Message-----
> From: Paul Chymiy [mailto:pchymiy@NUI.com]
> Sent: Friday, April 06, 2001 8:31 AM
> To: 'Gus Cepero'; 'Mark Lewis'; Ed Liberty
> Cc: 'Mark Casaday'
> Subject: RE: Definitive Agreement - Open Items
>
>
> I'd just like to clarify a few points made by Ed. First, the
> Insurance Exhibit is "Exhibit D", not "Exhibit B". Second, NUI does
> not intend to "remove regulatory approvals" as a Condition Precedent.
> If these conditions are not satisfied at the time that NUI elects to
> issue its Intent to Proceed, pursuant to the Agreement, NUI will
> effectively waive regulatory approvals as a condition precedent when
> it issues the Intent to Proceed.
> Therefore, I believe no changes are necessary to the document with
> regard to this matter Finally, if Florida Crystals has satisfied its
> condition concerning the air permit, FC should notify NUI in writing
> that the condition has been satisfied. Again, there would be no need
> to alter the Agreement.
> Paul
>
> > ----------
> > From: Ed Liberty
> > Sent: Thursday, April 05, 2001 6:15 PM
> > To: 'Gus Cepero'; 'Mark Lewis'
> > Cc: Paul Chymiy; 'Mark Casaday'
> > Subject: Definitive Agreement - Open Items

> >
> > <<File: Florida Crystals CP 4-3-01.doc>><<File: FL Crystals monthly
> > payment-rev_.doc>><<File: Florida Crystals Security Language draft
> 3.doc>>
> >
> >
> > Gus,
> >
> > Paul and I sat down today to identify the remaining open items.
> > We're down to what appears to be a few simple items, here's a
> > listing of them and a plan for disposition:
> >
> > * Exhibit C "Amortization of Conversion Costs" : included above as
> > an attachment to this email, it includes both a formula for
> > repayment
> and
> > an example of how it would be applied. Please review it and comment.
> > * Exhibit B "Insurance" : A copy of a sample insurance certificate
> > will be faxed to your office at Okeelanta by my assistant Mary
> > Saunders
> > (908 470 4661). Please review and comment.
> > * Security language : Revised draft language is included above as an
> > attachment to this email, we made a few changes after your comments
> > earlier this week. The changes are designed to make the language
> > work well within the time frame we have to work with to get started
> > on the project and to make sure it "fits" well with the Conditions
> > Precedent section of the agreement. We think the two sections now
> > work well together but please review and comment.
> > * Conditions Precedent Language : Revised language attached above in
> > this email, please review and comment.
> > * Confidentiality Agreement for Financial Statements: I forwarded
> > signed documents to you at your Okeelanta office. Please sign and
> return
> > with the needed documents so we can perform our review as quickly as
> > possible. The fianancial reports/documents should go directly to
> > the attention of Bob Lurie at our Bedminster office as he will be in
> > charge
> of
> > the review.
> >
> > Other items:
> > * As you know we intend to remove regulatory approval as a condition
> > precedent
> > * You need to issue us a letter with regards to your condition
> > precedent related to obtaining air permits, either that you are
> > waiving the condition or to remove it from the document altogether.
> > We
> understand
> > these permits are in place but can't make the change to the
> > agreement without your approval.
> > * We will be changing the tariff designation to KTS
> > * Exhibit B "Rate Tables" : we will be using the same table we have in
> > the Letter Agreement for the Definitive Agreement
> > * Exhibit A "Project Costs" : we will be using the same table we have

> > in the Letter Agreement for the Definitive Agreement
> >
> >
> > Our goal remains as we discussed on Monday. We'd like to wrap up
> > with a signature from you by Friday April 13th which would allow NUI
> > to be
> ready
> > for signatures as early as Tuesday April 17th.
> >
> > I will be away on vacation until Tuesday April 17th. During that
> > time please feel free to call or email Mark Casaday (610 415 0622)
> > and/or
> Paul
> > Chymiy (908 719 4228) with your comments. They will be working
> > together to wrap this up.
> >
> > Regards,
> >
> > Ed
> >
>