BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Review and Determination on 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 and Approval of an Interim Service Arrangement	)	Docket No.: 160175-GU Filed: September 19, 2016

FLORIDA CITY GAS' RESPONSE IN OPPOSITION TO FLORIDA CRYSTAL CORPORATION'S MOTION TO DISMISS PETITION

Florida City Gas ("FCG" or "Company"), formerly known as City Gas of Florida ("City Gas"), hereby files with the Florida Public Service Commission ("PSC" or "Commission") its Response in Opposition to Florida Crystals Corporation's ("Florida Crystals") Motion to Dismiss Petition (the "Response"). FCG's Petition for Review and Determination and Approval of an Interim Service Agreement ("Petition") properly states a cause of action upon which relief may be granted, and thus the Motion to Dismiss Petition ("Motion") should be denied as the arguments addressed by Florida Crystals are affirmative defenses and not pleading deficiencies within the Petition. In support of this Response, FCG states as follows:

Standard of Review

The standard applicable in reviewing Florida Crystal's Motion is whether, in construing all factual allegations in FCG's Petition as true and in the light most favorable to FCG, the Commission determines that the Petition states a cause of action upon which relief may be granted.[1] Under settled legal principles, the Commission cannot dismiss FCG's Petition unless Florida Crystals demonstrates beyond any doubt that FCG cannot prove any facts in support of

[1] *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

the claims made in its Petition.[2] When evaluating the sufficiency of the Petition in response to Florida Crystal's Motion, the Commission must confine itself to matters raised within the four corners of the Petition, and cannot consider any affirmative defenses or evidence that Florida Crystals may intend to present when the Commission considers the merits of the matter.[3] The Commission has recognized that "[d]ismissal is a drastic remedy" and is only appropriate when the "legal standard has been clearly met."[4] Here, Florida Crystals has not and cannot meet the legal standard for dismissal, and its Motion must be denied.

Summary

FCG has never filed the Gas Transportation Agreement ("GTA"), and thus it was never reviewed or approved by the PSC prior to its execution, in contravention of Rule 25-9.034, Florida Administrative Code. Throughout its Motion, Florida Crystals repeatedly and erroneously minimizes the importance of this mandatory process that is a prerequisite for a valid and enforceable contract. Florida Crystals seeks to undermine the Commission's authority over the rates of a public utility, which is absolute under Chapter 366, Florida Statutes, and Rule 25-9.034 in relation to the GTA.

FCG has well pled its Petition properly providing causes of action upon which relief may be granted. The arguments raised by Florida Crystals are affirmative defenses and not pleading problems. In several of its arguments, Florida Crystals looks outside the four corners of the Petition and seeks to utilize other documents to make substantive arguments against the Petition.

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[2] *Morris v. Fla. Power & Light Co.*, 753 So. 2d 153, 154 (Fla. 4th DCA 2000).
[3] *Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 34-35 (Fla. 4th DCA 2004).
[4] In re: Application for certificate to provide competitive local exchange telecommunications service by Matrix Telecom, Inc., Docket No. 050200-TX, Order No. PSC-05-1126-FOF-TX, at *2 (F.P.S.C. Nov. 8, 2005); In re: Application for limited proceeding increase in reuse water rates in Monroe County by K.W. Resort Utilities Corporation, Docket No. 970229-SU, Order No. PSC-97-0850-FOF-SU, at *14-15 (F.P.S.C. July 15, 1997).

This is not proper for a motion to dismiss, as detailed below. Accordingly, the Motion should be denied.

I. The GTA is Not a Valid Contract nor a Special Contract Because It Has Never Been Filed, Reviewed, or Approved by the PSC Prior to its Execution

Florida Crystals argues that the GTA is a valid contract and does not require PSC approval because: (1) the tariff rates on file at the PSC were the same as those negotiated and agreed to by the parties; (2) the GTA is not subject to the requirements of Rule 25-9.034(1); and (3) the GTA complies with the requirements of general contract law. These arguments are misplaced as to the merits of the case and the PSC's jurisdiction to decide the rates of public utilities, thus failing to support dismissal.

(1) None of the GTA Rates Are In Any Tariff

Florida Crystals attempts to bypass the issues raised by FCG's Petition by arguing that the KTS Schedule in effect at the time the GTA was negotiated somehow approved the rates in the GTA. At the outset, it must be noted that this argument is in the nature of an affirmative defense, and the Florida Crystals argument reflects disputed issues of fact and law that do not support dismissal as a matter of law.

The argument that the GTA rates are in the tariff is based upon a completely wrong reading of the tariff and rules. All of the GTA rates are not set forth in the KTS Schedule. Moreover, both the KTS Schedule and under the now effective successor tariff, the KDS Schedule, none of the GTA rates meet the minimum cost standards set forth therein.

First, the GTA rates are not consistent with, or set forth in, the KTS Schedule because the KTS schedule does not set forth specific rates. Rather, the KTS Schedule authorized City Gas to negotiate rates subject to certain standards, which the GTA does not meet. All the KTS Schedule

says on rates is that negotiated rates shall be "not less than $0.01 per therm."[5] Florida Crystals argues that since the "average rate under the GTA is not less than $0.012 (1.2 cents), the rate is in compliance with the KTS Schedule. But an average rate is not the rate charged. On its face, the GTA has one or more specific rate elements that are below one cent. Thus, the rates in the GTA are not in compliance with the plain terms of the KTS. Thus, Florida Crystals' argument completely fails.

Second, both the KTS Schedule and the present KDS Schedule mandate that any negotiated rate "shall not be set lower than the incremental cost the Company incurs to serve the customer." [6] As FCG demonstrates in its Petition, the Initial Term, Make Up Period, and Extended Term fail this standard. Accepting the Petition as true, which the PSC must do for purposes of a motion to dismiss, within the four corners of the Petition and its supporting exhibits, FCG has presented a prima facia case that all of the rates for each respective rate period fail to recover at least their incremental costs in violation of the KDS standards. The GTA states that the service provided by FCG to Florida Crystals is expressly subject to and governed by the terms and conditions of FCG's tariffs. Accordingly, FCG is within its rights, indeed, it is obligated, to ask for this Commission's review of the GTA and for the Commission to conduct such a review. Thus, under the currently effective tariff, Florida Crystals' argument also completely fails.

Florida Crystals seeks to undermine the plain language of the KTS and KDS schedules by arguing that in the emails Florida Crystals attached to its Motion that City Gas agreed to waive any regulatory approvals. The introduction of the emails as a basis for substantiating the Motion

[5] Transportation Rate Schedule KTS, City Gas Company of Florida, FPSC Natural Gas Tariff, Vol. 6, Original Sheet No. 76.
[6] Contract Demand Service (KDS), City Gas Company, FPSC Natural Gas Tariff, Vol. 7, Original Sheet 76.

to Dismiss does not meet the standards for dismissal. Without waiving or limiting FCG's ability to respond to any future defenses Florida Crystals may raise, FCG will simply say that no public utility has the unilateral power to waive its tariff, Rule 25.9.034, or this Commission's authority under Chapter 366. Moreover, it must be noted that the GTA is a sophisticated contract negotiated by Florida Crystals as an informed and well represented company. A business like Florida Crystals cannot engage in the operation of a power plant as described in its Motion or engage in the purchase of natural gas to fuel that facility without being a very knowledgeable entity with respect to the host of regulatory obligations associated with such contracting and operating requirements. Florida Crystals cannot argue to this Commission that City Gas misled or tried to pull one over on Florida Crystals. For Florida Crystals to claim that it knew that City Gas could waive the PSC's regulatory oversight is simply ridiculous.

The real problem with this argument is that the emails do not say what the Motion to Dismiss claims. In reading the emails, the context for the discussion is expressly with respect to the construction of the lateral pipeline to the Florida Crystals plant, not the PSC's regulatory oversight regarding the GTA.

Florida Crystals claims that the April 6, 2001, email from counsel for City Gas, "expressly represented" to Florida Crystals that the PSC's approval of the GTA was not required and the terms of the GTA did not require the Agreement to be filed with the Commission. Florida Crystals also claims that City Gas told Florida Crystals that if it were to issue a Notice to Proceed pursuant to the Agreement, FCG "will effectively waive regulatory approvals," implying that it would not require Florida Crystals to abide by any necessary regulatory criteria – that it is "waiving" such criteria. (Response, p. 7; Exhibit C). But reading these emails in their proper context does not support these after - the - fact arguments.

A plain reading of the definition of "Intent to Proceed" and the Article referenced in that definition demonstrates that there are conditions precedent prior to the commencement of construction. But these preconditions relate to construction of the project, not approval of the contract. For example, "Intent to Proceed" is defined on page 3 of the GTA as:

> . . . the notice provided by Company [FCG] to Customer [Florida Crystals] indicating that Company has satisfied or waived its Conditions Precedent in accordance with Article 4 such that Company is committed to commence construction of the Project.

Article 4 of the GTA states that:

> "[T]he commencement of construction of the Project is expressly made subject to the satisfaction of the following Conditions Precedent:
> 1. The receipt by Company of all necessary regulatory and governmental authorizations, approvals, permits, or exemptions necessary for the construction and operation of the Project and the provision of the Service . . .

Additionally, Article 24 A. of the GTA states as follows:

> [T]his Agreement is subject to all present and future laws, regulations, and lawful orders of regulatory bodies or other duly constituted governmental authority having jurisdiction over the Parties or the subject matter of this Agreement.

As FCG related in its Petition at pages 32-33, the PSC has full authority and oversight responsibility to approve all rates for natural gas public utilities before they are effective, including any special contract rates. As a matter of law, the Petition cannot be dismissed on the basis of the argument of Florida Crystals that all the GTA rates are reflected in the KTS or KDS schedules, especially when they are not.

(2) The GTA does not constitute a special contract pursuant to Rule 25-9.034(1).

Florida Crystals also argues that the GTA is not a "special contract" pursuant to Rule 25-9.034(1), that would require PSC approval "prior to its execution." This argument flies in the face of the plain language of both this rule and PSC's underlying statutory authority over public

utility rates. First, Section 366.06(1), Florida Statutes, clearly requires the PSC to approve all rates for natural gas public utilities before they are effective:

> Rates; procedure for fixing and changing.-
> (1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor. In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

While Florida Crystals argues that the GTA should be treated as a "binding agreement," the GTA has never been submitted to, reviewed or approved by, the PSC and is therefore a non-binding agreement for purposes of this matter.

Pursuant to this statutory authority, the PSC has adopted Rule 25-9.034 to recognize that special circumstances may justify "special contract" rates in lieu of regular tariffed rates. But in permitting special contract rates, the PSC requires that the public utility follow a separate, specific approval process for the review and approval of such rates. The rule provides:

> Wherever a special contract is entered into by a utility for the sale of its product or services in a manner or subject to the provisions not specifically covered by its filed regulations and standard approved rate schedules, such contract must be approved by the Commission prior to its execution. 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.

There are no facts provided within the four corners of FCG's Petition that demonstrate compliance with this process. There are no facts alleged by Florida Crystals that demonstrates compliance with this process prior to the instant Petition, the GTA has never submitted to the PSC for its review. The PSC has never issued an order approving the GTA. The parties signed the GTA prior to this review and approval occuring which is an express violation of the rule.[7] Combined, these facts conclusively demonstrate the PSC must now review the GTA, and thus why the Motion is without merit.

In addition, if the Florida Crystals' argument and underlying rationale were followed, the PSC would never need to approve a utility company contract since all contracts are based upon specific tariff authority. The effect of this would undermine the PSC's authority and in turn eviscerate the Legislature's intent of the PSC having oversight authority of such matters. In support of its contention, Florida Crystals cites to the *Miami-Dade County* case[8], and correctly cites the Commission's ruling that, "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." Florida Crystals attempts to distinguish the instant matter from the *Miami-Dade County* case by arguing that in that case, the matter involved a proposed renewal of an expired agreement, whereas here, the matter revolves around an agreement under which the parties had been operating. This distinction is irrelevant since Rule 25-9.034(1) requires that all contracts "not

[7] See, e.g., Docket 6 No. 050835, Order No. PSC-06-0143-PAA-GU.

[8] 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) ("*Miami-Dade County* case").

specifically covered by its filed regulations and standard approved rate schedules,…" "must be approved by the Commission prior to its execution."

Florida Crystals attempts to avoid these clear legal requirements by arguing that City Gas effectively obtained the PSC's approval by the 2003 Rate Case order. Again, this is an affirmative defense and not a demonstration that the Petition fails to state a cause of action. Without diving into what the 2003 Rate Case Order did or did not do, it would be fair to say that given the context for a rate case, that in 2003 the rates for the Extended Term of the GTA to be effective in 2017 and for the next 15 years were never in any manner reviewed let alone approved by the PSC pursuant to the requirements of Rule 25-9.034. As FCG demonstrates in its Petition, the 2003 Rate Case Order did not in any manner review or approve the GTA rates, as Florida Crystals cannot point the PSC to any part of that order that contains any of the GTA rates, Any argument as to whether the rates were substantively approved would only further bolster the need for the PSC's review.

To argue that the GTA is not a special contract is an affirmative defense. The PSC unquestionably possesses full and complete regualtory authority over FCG's rates. FCG with its Petition has asked for a few of the GTA rates which have never been filed, reviewed, or approved by the PSC. Florida Crystals does not demonstrate compliance with the high standard for dismissal, and thus the Motion should be denied.

(3) Florida Crystals confuses the law with respect to the validity of a contract.

In its Motion, Florida Crystals cites to *Nowlin v. Nationstar Mortgage* case[9], which articulates the elements of a contract that every first year law student knows: there must be an "offer and acceptance of the agreement, and there must be an exchange of value, known as

[9] *Nowlin v. Nationstar Mortgage, LLC*, 193 So.3d 1043, 1045 (Fla. 2nd DCA 2016)

consideration." Florida Crystals claims that since these elements have been met the GTA "contract" is therefore valid. But we are not in first year law school and the issue before the PSC is not a regular, ordinary commercial contract. Rather the instant issue involves a regulated public utility subject to very specific statutory requirements for rates that require explicit and informed PSC approval before they can become effective. Even where the PSC permits a public utility to offer non-tariffed, "special contract" rates pursuant to Rule 25-9.034, those rates are subject to an express review and approval process prior to signing that has not been met and that does not meet the letter or intent of the law. Again, as a represented, sophisticated, and knowledgeable customer, Florida Crystals, knew or should have known, that this was not a regular commercial contract situation. City Gas, regretfully did not follow the law. But Florida Crystals cannot legitimately argue that commercial contract law applies to the GTA when clearly it does not.

To argue that the GTA is subject to general contract law and not the PSC's authority is at best an affirmative defense. FCG and Florida Crystals are not operating under general contract law, but under the administrative arena in which the PSC has the complete statutory oversight and regulatory authority over the submission, review, and approval of contracts, and any changes thereto, and over any subsequent requests for review. Accepting the Petition as true and accepting the PSC's jurisdiction over public utilities, this Florida Crystals argument does not meet the requirements for dismissal.

II. The 2003 City Gas Rate Case Did Not Seek the Review or Approval of the GTA

Florida Crystals attempts to misdirect the PSC's focus by arguing that the GTA "substantially complied" with Florida's statutes and regulations because of the testimony and

evidence City Gas offered in its 2003 rate case. This argument again reflects an affirmative defense and is not a basis for dismissal of the Petition. Nothing in the 2003 rate case or the final order directly or indirectly meets the requirements of Rule 25-9.034 because there was no filing, review, or approval of the GTA. A mere read of the 2003 Rate Case Order confirms this fact. To the extent Florida Crystals believes differently, that would be a disputed fact and a claim that the PSC has the exclusive authority to consider and resolve.

The submission of testimony and evidence in a rate case is not evidence here of a review and approval of the GTA. First, the City Gas rate case petition does not seek approval of the GTA. Second, the GTA was not submitted as an exhibit or other document in the docket file. Third, regarding the cost recovery for the facilities serving the Florida Crystals plant, FCG's testimony may have been true at that time, but under present conditions, it is not and, more importantly, irrelevant since the rate case was not a Rule 255-9.034 proceeding. Finally, Florida Crystals cannot provide us a page and paragraph citation to the approval of the GTA or the approval of any GTA rates in the 2003 Rate Case Order.

This Florida Crystals argument looks outside the four corners of the FCG Petition and seeks to use extraneous documents in an attempt to build an argument for dismissal. In this case, the documents simply don't support the argument or the fact Florida Crystals is seeking to approve.

III. The Doctrine of Administrative Finality Does Not Preclude the Petition Because There is No Prior Administrative Action on the GTA

The Florida Crystals argument regarding administrative finality fails for three reasons: there can be no administrative finality when there has been no final order; even if there was a final order, the doctrine of administrative finality permits an agency to revisit a prior decision if

there is a demonstration of changed facts and circumstances; and finally, this argument is yet again an affirmative defense.

FCG does not dispute the black letter statement of the administrative finality doctrine captured by the Supreme Court in the *Peoples' Gas* case, that agency orders "pass out of the agency's control and become final and no longer subject to modification." The problem with Florida Crystal's reliance on this rule is that the PSC has never issued an order on the GTA because the approval of the GTA was never a matter brought before the PSC for consideration. As FCG has demonstrated above, the GTA itself has never previously been filed with the PSC and the PSC has not issued a final order approving it. There is no order to modify. Thus there can be no finality on a matter that was never specifically the subject of an agency order.

Second, even if there was a final order of the PSC on the GTA, the doctrine of administrative finality does not forever bar an agency's future action on that prior order. If that was true, rates approved in a rate case would exist in perpetuity, which is obviously not the case. Instead, the doctrine of administrative finality has an "out" clause. As the Supreme Court recognized in the *Peoples' Gas* case[10], the power of an agency to modify an earlier decision "may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification . . . is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified." As FCG demonstrates in its Petition, based upon FCG's analysis of the rates in the GTA under each of the three periods of time, the GTA's rates do not recover their costs. Whatever may have happened or not happened in the past, looking at the GTA today, going

[10] *Peoples Gas System, Inc. v. Mason, Fla.*, 187 So. 2d 335, 339 (Fla. SC 1996)

forward the rates violate FCG's tariff by not recovering their incremental costs, thus meriting the PSC's review.

As this discussion demonstrates, an argument for administrative finality requires Florida Crystals to reach outside the four corners of the Petition and introduce new (untrue) facts, orders, and legal doctrines. Yet again, this may be proper for an affirmative defense, but not a motion to dismiss. This whole line of argument should be rejected by the Commission.

IV. FCG is Not Asking the PSC to Interpret the GTA Because the GTA is Not a Valid Contract

Florida Crystals argues that FCG's petition must be dismissed for failure to state a claim upon which relief can be granted because jurisdiction to interpret contracts is within the exclusive jurisdiction of Florida courts. But the instant issue does not involve an interpretation of the GTA – there is no issue regarding performance or compliance with the terms of the GTA. Rather, FCG seeks a determination on the threshold question within the PSC's exclusive jurisdiction – was the GTA filed and approved as is required by PSC's statutes and rules, and if it were submitted for approval, do the rates meet the requirements of Florida law to properly recover their costs.

Florida Crystals acknowledges that Rule 25-9.034 requires public utility companies to file their contract with the PSC prior to execution of the contract by the parties. This did not happen. That is the end of this argument since compliance with the PSC's own rule is not a question of contract interpretation.

Secondarily, FCG seeks the PSC's review and analysis of the GTA's rates to determine if they comply with FCG's tariff and the PSC's statutes and rules. Only the PSC has the authority under Sections 366.04 and 366.06 to set the rates of a public utility. As FCG discuss above, all

of the rates of the GTA have never been reviewed let alone approved, thus FCG's Petition is proper. This is not contract interpretation, so the Motion to Dismiss on this point should be denied.

V. The Failure to Previously Obtain Approval of the GTA Does Not Bar FCG's Present Petition

The PSC has previously determined that it has the exclusive jurisdiction to address rate documents executed by the parties that have not first been submitted to the PSC for approval as is required by Rule 25-9.034. As the Commission has said: "Pursuant to Rule 25-9.034(1), F.A.C., all special contracts and agreements entered into by a public utility that are not specifically covered by its filed tariff must be approved by this Commission. The exception provided in Rule 25-9.034(1), F.A.C., does not apply to the 2008 Agreement because the agreement at issue is for service, not for a "product or commodity."[11]

FCG is seeking the failure of City Gas management to file and obtain approval of the GTA. Indeed, FCG's actions reflect an informed decision to correct prior management mistakes and deal head-on with the present and future situation posed by the GTA. The GTA has never been filed and approved. Whatever may have been said in the 2003 rate case or at any other prior time was based upon whatever the company's then management thought appropriate. Those statements are irrelevant and do not now serve to bar FCG's petition – they are, at best perhaps, affirmative defenses but not a basis for dismissal of the Petition. Accordingly, the motion should be denied.

[11] Docket No. 090539-GU; Order No. PSC-10-0671-PCO-GU, at 19 (November 5, 2010)

VI. FCG Does Not Need to File a General Rate Case to Obtain a Review of the GTA

FCG is not seeking in its Petition to change the rates applicable to all of its customers. Rather, FCG is seeking the PSC's review and determination as to whether the GTA is a lawfully approved special contract under the PSC's statutes and rules and whether the rates meet the cost standard of the tariff and rules. The PSC has the clear and singular jurisdiction under Rule 25-9.034 to consider whether the GTA meets the applicable regulatory requirements.

The issue is not whether FCG is meeting its revenue requirements but only whether the GTA recovers its cost per the rule. This argument reflects a complete failure to understand the difference between a Rule 25-9.034 proceeding and a general rate case. It is not a basis for dismissal, and this argument should be denied.

WHEREFORE, Florida City Gas respectfully requests that the Florida Public Service Commission deny the Florida Crystals Motion to Dismiss Petition because the Petition is well pled and states a cause of action upon which this Commission may grant relief pursuant to its exclusive jurisdiction over the matters raised by the Petition. With respect to the separate Motion for Oral Argument, FCG believes the law is clear and the arguments raised by Florida Crystals are meritless and not supportive of a motion to dismiss. However, FCG does not object to the PSC providing the parties with an opportunity to address the Commission on this matter if it believes it will assist the Commissioners' understanding why the Motion should be denied. FCG would further request that its separate Motion for Approval of a Temporary Interim Service Arrangement be considered immediately following consideration and denial of the Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by E-Mail on this 19th day of September, 2016, to the following:

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