

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Review and)
Determination on the Project Construction)
and Gas Transportation Agreement By and) Docket No.: 160175-GU
Between NUI Utilities, Inc. d/b/a City Gas)
Company of Florida and Florida Crystals) Filed: November 1, 2016
Corporation dated April 24, 2001 and)
Approval of an Interim Service Arrangement)
_____)

**FLORIDA CITY GAS RESPONSE TO
NOTICE OF APPARENT VIOLATION**

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 to the Notice of Apparent Violation of Rule 25-9.034, Florida Administrative Code, and Possible Implementation of Show Cause Proceedings Against Florida City Gas (“Notice”). Based upon the particular facts and circumstances associated with 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 (hereinafter the “GTA” and attached to the Petition initiating these proceeding Confidential Exhibit 1), a show cause proceeding, penalty, or other negative administrative action against FCG is not warranted. The relief FCG is seeking in this docket is appropriate and balances the interests of the customer, Company, FCG’s general body of ratepayers, and the Commission’s rules and regulations. In support of this Response, FCG states as follows:

1. On July 22, 2016, FCG filed its 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 (the “Petition”). FCG is seeking the Commission’s determination that the GTA is not a legally effective or enforceable special contract under Florida law since the GTA was never filed and approved by the PSC prior to its execution, as is required by Rule 25-9.034, Florida Administrative Code.

2. On October 18, 2016, Commission Staff Attorney Margo Leathers served on undersigned counsel via email, U.S. Mail, and Certified Mail the Notice that is the subject of this Response. This Notice states: “The information provided by FCG indicates that FCG failed to submit the special contract at issue in this docket to the Commission for its approval prior to its execution.” The Notice requested that FCG provide any mitigating information or circumstances related to FCG’s apparent violation in writing by November 1, 2016. Pursuant to that Notice, FCG provides the following mitigating information and circumstances and hereby submits that a show cause is not appropriate and should not be issued against FCG.

3. In submitting its Petition in this docket, FCG has stated and openly acknowledged that the GTA was executed by management of the former owners prior to any review and approval by the PSC. In submitting this matter to the Commission, FCG recognizes that the execution of the GTA and the provision of service for the last 15 years is, on its face, an apparent violation of Rule 25-9.034. However, based upon all of the evidence in connection with this matter, FCG believes that there are mitigating facts and circumstances that would fully support a determination by the Commission that a show cause action is not justified or appropriate as a matter of law or public policy.

4. In its Petition, FCG details in paragraphs 9 through 28 what current management knows regarding the development, execution, and implementation of the GTA, and FCG incorporates that information into this Response. The key aspects of this history reflect the fact

that when AGL Resources Inc. (“AGL”) acquired City Gas through its parent NUI in November 2004,¹ there was nothing remarkable about service to Florida Crystals. Indeed, as is reflected on Confidential Exhibit No. 2A, filed in response to Staff’s First Set of Data Requests, the natural gas transportation service provided to Florida Crystals in 2004 was very nominal. Moreover, the revenues associated with the GTA for the 2004-2008 period were at the GTA minimum, so there was nothing to call attention to Florida Crystals from a volumetric or a revenue basis. At the time the GTA was executed, City Gas was under the jurisdiction and control of a different company, and at the time of acquisition by AGL there was no reason to suspect that the GTA had never been filed or approved by the PSC.

5. FCG’s post-merger management did not learn that the GTA had not been approved by the PSC until sometime in the 2010-2011 period. At that time the Company was deeply engaged with the Miami-Dade docket,² which involved another unfiled transportation service agreement that was negotiated and signed during the NUI ownership era prior to AGL. In the Miami-Dade docket in response to a question seeking the identification of other service arrangements for which the Company had sought Competitive Rate Adjustment (“CRA”) relief under Rider “C” to FCG’s tariff, the GTA was identified as the only other agreement involving non-tariffed rates. However, the GTA was nonresponsive to the question because there was no CRA recovery for the GTA. In the process of searching for responsive documents, the Company could not find a PSC order approving the GTA, but because of the extensive litigation in the Miami-Dade docket, there was no time for a more thorough investigation into the GTA’s

¹ Docket No. 060657-GU, Order No. PSC-07-0913-PAA-GU (November 13, 2007), consummated by Order No. PSC-07-0979-CO-GU (December 6, 2007).

² Docket No. 090539-GU, *Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department* (hereinafter referred to as the “Miami-Dade docket”).

formation or its PSC status. As the Petition indicates in Paragraph 12, FCG did not fully resolve all of its service issues with Miami-Dade County until late 2013, after the negotiation and approval of a new 10-year successor transportation agreement. A final order in the Miami-Dade docket was also important to any further action on the GTA because the underlying agreement in the Miami-Dade docket had also never been filed with the PSC. When the Miami-Dade docket was finally concluded, the PSC found it appropriate to not issue a show cause order or impose a fine or any other penalty on.³ This precedent was important given the similar genesis for both the Miami-Dade transportation agreement and the Florida Crystals GTA.

6. As the Miami-Dade proceedings wound down, FCG began to focus on Florida Crystals. Without doing a comprehensive investigation into the GTA, FCG sought a business solution with Florida Crystals through a new transportation agreement. But a combination of events over 2012 to 2015 – failed discussions for an expansion of service and later a transportation cap violation – led to the realization that a business solution would not be possible. Moreover, FCG learned in late 2015 that Florida Crystals believed the Extended Term of the GTA could begin as early as October 2016. With this information, FCG began a thorough investigation into the GTA that led to the filing of the Petition in this docket.

7. Notwithstanding a comprehensive search for information, key elements of the development and implementation of the GTA still remain unknown. The individuals who were involved in this transaction are no longer with the Company, and current employees who were employed during that time have no personal knowledge regarding the GTA. FCG could not find any rate development information or other supporting workpapers, including the absence of any cost studies, correspondence or emails, revenue analyses, bypass analysis, or even a complete

³ See PSC-10-0671 (November 5, 2010) and Order PSC-12-0171 (April 2, 2012).

copy of the GTA. These facts suggest to FCG management that the GTA was negotiated in secret and kept hidden from City Gas employees. The only real information FCG could find about the GTA came from the City Gas rate case in 2003, but the context of that discussion was to justify the investment in the East-West Pipeline and not a formal review of the un-filed GTA (referred to as an approved contract in the testimony) or, more importantly, a formal review and approval of the rates in the GTA since the GTA was not filed in that case. After meeting with Florida Crystals before the Petition was filed, FCG concluded that it must formally seek the PSC's review of the unfiled GTA.

8. The paramount importance of filing and obtaining PSC approval for a special service arrangement before its execution by the parties was addressed by the Commission in 2006 in the *Chesapeake Utilities Order*.⁴ The issue in that docket was the negotiation of an amendment to the existing, previously approved special contract between the parties, the execution of three new, interrelated operating agreements, and the retroactive application of the new rates under the amendment. In approving these four documents, the Commission specifically analyzed the fact that Chesapeake and Polk Partners executed the amendment and new operating agreements prior to submission and approval by the PSC. With respect to a potential show cause proceeding for Chesapeake's failure to obtain PSC approval prior to execution, the PSC reminded Chesapeake of its duty to know the governing statutes and rules and that Chesapeake had options to advise and seek the PSC's assistance "prior to the execution of

⁴ Docket No. 050835-GU, Order No. PSC-06-0143, *In re: Petition for Approval of Amendment No. 2 to gas transportation agreement (special contract), master gas transportation service agreement, delivery point lease agreement and letter agreement: CFG Transportation Aggregation Service between Florida Division of Chesapeake Utilities Corporation and Polk Power Partners, L.P.* (February 27, 2006) ("*Chesapeake Utilities Order*").

the special contract, not promptly thereafter.”⁵ Based upon the facts Chesapeake presented, the PSC did not show cause or impose any fine or penalty. As is demonstrated in the Petition and this Response, while the facts associated with the execution of the GTA are different from those in the Chesapeake docket, like in the *Chesapeake Utilities Order* the overall situation with the GTA is sufficiently unique and meritorious as to demonstrate that a show cause is inappropriate and also unnecessary against FCG.

9. First and foremost, the ultimate question for the PSC in connection with any review of noncompliance with Rule 9.034 should be the potential impacts, if any, on the Company’s general body of ratepayers. In this context, it is very important to state that FCG’s other customers have not been adversely impacted by the GTA. FCG has not sought a rate increase since the 2003 rate case nor have customers otherwise been subjected to any kind of alternative cost recovery through the CRA, or any other provision of the Company’s tariff. This is especially significant because as Confidential Exhibit No. 2A and Confidential Exhibit No. 3A(2016) to 3A(2031) filed in response to the Staff’s First Set of Data Requests demonstrate, service to Florida Crystals has been provided at a significant loss over past years. Notwithstanding the GTA’s failure to meet its revenue requirements, other customers have not been harmed. In order to continue to ensure that there are no negative consequences to the general body of ratepayers in the coming years under the GTA’s Extended Term rates, the PSC should grant the relief FCG has requested in its Petition.

10. Further, a show cause order, fine, or other penalty against FCG would not serve any public policy. The ultimate purpose of a show cause proceeding is to take some kind of

⁵ Docket No. 050835-GU, Order No. PSC-06-0143-PAA-GU, at 6.

negative action against a regulated utility in order to seek the utility's compliance with the applicable regulations and to obtain the clear attention of the utility's management regarding the importance of timely regulatory compliance. In the present situation, the GTA is a problem AGL bought when it acquired NUI and City Gas. The only possible notice regarding the GTA was in the City Gas 2003 rate case where the testimony called the GTA an "approved contract" and there was no reason for AGL to look behind those representations. The former management of NUI are long gone and there is no lesson left to teach them about proper regulatory compliance.

11. Current FCG management unquestionably understands the relevant requirements of Rule 9.034 – it is FCG management that discovered this problem and that initiated these proceedings in order to obtain the Commission's review and determination of the GTA and what action FCG should take on a going forward basis. FCG has a strong culture of compliance and wants nothing more than to be in compliance with applicable law. This is evidenced by its transparency with the customer and in bringing forth this matter to the Commission for its review. FCG is not an unwilling utility that requires a penalty to get its attention. FCG's full attention is on this matter and getting this service arrangement into compliance is a serious priority for the Company.

12. The fact that this proceeding was instituted some 15 years after the GTA was executed by former management does not compel any penalty as it has taken time to uncover the problem, investigate it, and process the complex issues and consequences associated with the long standing service to this customer. The complex issues in the Miami-Dade docket, the subsequent desire and work to obtain a business solution through a new and expanded service arrangement, and the eventual time and effort to understand the GTA reflect a desire to bring a

problem and a solution to the Commission. Unfortunately, FCG could not reach an agreement with the customer and provide the Commission with a solution in time before the third phase of the GTA takes effect and the extremely adverse rates set forth in the Extended Term become effective. Given the totality of circumstances, the Company should not be penalized for taking the time to investigate, understand, and now bring this matter to the PSC for its action.

13. Florida Crystals has argued in its pleadings that the Commission effectively approved the GTA during the City Gas 2003 rate case. It would be easy for FCG to take this position in order to avoid any possible show cause proceeding. But as FCG has stated in its response to the Florida Crystals Motion to Dismiss, to accept such a position is contrary to a plain reading of Rule 9.034 as well as the governing provisions of Chapter 366 which mandate that any rate charged by a public utility must first be approved by the Commission. As FCG has related both in its Petition and in its Response to the Motion to Dismiss, prior to this docket, the GTA was never submitted to the PSC, there is nothing in the 2003 rate case that indicates any substantive review of the GTA, and the 2003 rate case order is void of any approval of the rates actually contained in the GTA. While being honest has properly subjected the Company to this Notice of Apparent Violation, as FCG has demonstrated both in the Miami-Dade docket and in this case, management is committed to being fair, open, and truthful in attempting to resolve these bad deals that were inherited when the AGL acquitted NUI/City Gas.

14. The management of FCG deeply regrets the Commission being in the position of having to again address another NUI-era City Gas transportation agreement that had never previously been submitted for approval. FCG has thoroughly and comprehensively reviewed service to any and every commercial customer to determine whether there are any other potential service arrangements from any point in time that require Commission review and approval.

After an exhaustive search, FCG can confidently state to this Commission that there are no more unapproved special contracts subject to Rule 9.034.

WHEREFORE, based upon the foregoing, Florida City Gas respectfully requests that there are sufficient mitigating facts and circumstances that would support a decision to not show cause the Company for the GTA, and that the Florida Public Service Commission should not issue an order to show cause or take any other action that would result in a fine or other penalty due to the execution of the GTA prior to the PSC's review and approval.

Respectfully submitted,

/s/ Floyd R. Self

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by E-

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