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February 16, 2010

Ms. Ann Cole
 Commission Clerk
 Office of the Commission Clerk
 Florida Public Service Commission
 Capital Circle Office Center
 2540 Shumard Oak Blvd.
 Tallahassee, FL 32399-0850

Re: 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

Dear Ms. Cole:

Attached for filing is the original and five copies of Miami-Dade Water and
 Sewer Department's Responses to PSC Staff Data Request No. 1.

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

Sincerely,

Henry N. Gillman
 Assistant County Attorney

- COM _____
- APA _____
- ECR _____
- GCL 2 _____
- RAD _____
- SSC _____
- ADM _____
- OPC _____
- CLK _____

C: All Parties of Record and
 Interested Persons

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BEFORE THE PUBLIC SERVICE COMMISSION

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

Docket No. 090539-GU

**MIAMI-DADE WATER AND SEWER DEPARTMENT'S RESPONSES TO PSC
STAFF DATA REQUEST NO. 1**

Miami-Dade Water and Sewer Department ("MDWASD" or "Miami-Dade")

hereby files its Responses to PSC's Staff Data Request No. 1 as follows:

1. MDWASD has indicated that if the contract is not approved, it may bypass the Florida City Gas (FCG) system completely. Please discuss in detail and provide costs of all actions necessary to implement such a bypass option.

RESPONSE: In 1998, the Federal Energy Regulatory Commission ("FERC") approved a request by Florida Gas Transmission ("FGT"), Miami-Dade's interstate transportation gas provider, to perform a bypass to Miami-Dade's Alexander Orr Plant. This approval is still effective. FGT's estimated cost to complete a bypass to Orr is \$914,252.00. However, such cost includes a 32% tax gross-up. FGT has advised Miami-Dade that it will not object to another company performing the by-pass using FGT specifications. Miami-Dade has had discussions with a company to perform a bypass to Orr for approximately \$600,000 with no up-front payments. Miami-Dade is also exploring bypass options to the Hialeah Plant with several companies that will use FGT specifications.

2. Has MDWASD informed FCG of any bypass options the Company may elect to use? If so, please provide any data provided to FCG supporting that option.

RESPONSE: Prior to the execution of the 2008 Agreement, Miami-Dade verbally informed FCG on several occasions, as early as October 31, 2007, that the option of bypass is a very strong possibility. Following FCG's withdrawal of its Petition, Miami-Dade again informed FCG that it can bypass. After FCG began billing at the tariff rate, Miami-Dade's consultant, Jack Langer, informed Hank Linginfelter (Exec. VP of AGL Resources and President of Pivotal Holdings) that due to the high tariff rate, Miami-Dade will by-pass if the rate dispute is not resolved. On August 31, 2009, Mr. Langer again informed Mr. Linginfelter that the high tariff rate will cause FCG to lose its largest account to bypass. The reason FCG's predecessor, FCG/NUI, agreed to the substantial discounted rates in the 1998 Agreement is because Miami-Dade filed and received approval of a bypass application for the Orr Plant from the FERC.

3. Under which rate schedule is FCG currently billing MDWASD?

RESPONSE: The rate schedule that FGT is currently billing MDWASD is GS-1250K.

4. What is the difference on an annual basis, between MDWASD's current bill under the tariffed rate, and what MDWASD would pay under the proposed contract?

RESPONSE: The difference between MDWASD's gas bill under FCG's tariff versus what it would be under the contract is \$896,000.00 per year calculated as follows:

The blended contract rate is \$0.019 per therm (\$0.01/Orr and \$0.03/Hialeah)

FCG tariff rate (GS-1250K), including meter charge (\$500/mo), demand charge (\$.289/therm) and CRA (\$.0103/therm) = average of \$0.147/therm

7,000,000 therms x \$0.019 = \$133,000.00 – Contract Rate

7,000,000 therms x \$0.147 = \$1,029,000.00 – Tariff Rate

5. Is MDWASD current on its bills received from FCG? Please provide a detailed discussion.

RESPONSE: FCG ceased honoring the contract rates, effective July 23, 2009, and began billing a combination of per therm charges, demand charge, margin rate, and CRA rate. Since July 23, 2009, Miami-Dade has received and paid in full FCG invoices for the months of July, August and September 2009. Miami-Dade paid the invoices for these months under protest and requested that FCG place all funds into an escrow account pending resolution of the rate dispute. FCG never replied to Miami-Dade's requests that the funds be placed in an escrow account.

On the invoices received for the months of October, November and December 2009, MDWASD paid only the portion of the bill at the previously agreed to 2008 Agreement rates, and placed the remainder of the funds into an escrow account (Liability Account #381207 and Interest Account #6891306).

6. Has MDWASD escrowed any portion of the payments for services rendered from FCG? Please provide a detailed discussion and documented support of any monies escrowed as result of the pending dispute with FCG.

RESPONSE: In addition to response to #5 above, MDWASD states:

On the October 2009 invoices, MDWASD was billed demand, margin rate, and CRA charges on 453,956.10 therms equaling \$69,295.54, and WASD paid \$8,674.77 based on 2008 Agreement rates and placed \$60,620.77 into escrow account # 381307.

On the November 2009 invoices, MDWASD was billed demand, margin rate, and CRA charges on 424,159.00 therms totaling \$65,158.60, and WASD paid \$8,116.11 based on 2008 Agreement rates and placed \$57,042.49 into escrow account # 381307.

On the December 2009 invoices, MDWASD was billed demand, margin rate, and CRA charges on 462,360.80 therms totaling \$71,219.71 and WASD paid \$8,640.76 based on the 2008 Agreement rates and placed \$62,578.95 into escrow account # 381307.

The total amount in MDWASD's escrow account is \$180,242.21.

7. Please discuss and provide detailed calculations of refund claims MDWASD is seeking from FCG.

RESPONSE: On the July 2009 monthly invoices, MDWASD paid demand, margin rate, and CRA charges on 133,764.1 therms equaling \$20,084.40. Under the 2008 Agreement rates, 69,097.3 therms would be billed at \$.01 per therm totaling \$690.97 and 64,666.8 therms times \$.03 cents totaling \$1,940.00. Therefore, WASD will be seeking a refund of \$17,453.43 or the difference between \$20,084.40 and \$2630.97.

On the August 2009 and September 2009 monthly invoices, MDWASD paid demand, margin rate, and CRA charges on 476,801.70 therms equaling \$76,392.35. Under the 2008 Agreement rates, 45,289.30 therms would be billed at \$.01 per therm totaling \$452.89 and 431,512.40 therms times \$.03 cents totaling \$12,945.37. Therefore, MDWASD will be seeking a refund of \$62,994.09 or the difference between \$76,392.35 and \$13,398.26.

The total amount of the refund claim is \$ 80,447.52.

8. Please explain why the Commission has authority to approve the 2008 Agreement, given the provisions included in Paragraph 1 of the 2008 Amendment and Article I, Paragraph 1 of the 2008 Agreement.

RESPONSE: Both of the cited provisions provide that the 2008 Agreement will not become effective if the Public Service Commission does not approve it "subject to terms and conditions satisfactory to the parties." As set forth in the Petition, FCG did not give the Public Service Commission the opportunity to approve the 2008 Agreement or to attach "terms and conditions" to such approval. FCG also did not provide Miami-Dade any opportunity to address what may have been the Public Service Commission's "terms and conditions" for approval in such manner that Miami-Dade could determine whether such terms and conditions would have been "satisfactory." Instead, FCG unilaterally decided to withdraw the 2008 Agreement from Public Service Commission consideration. FCG thus made it impossible for the Public Service Commission to approve the 2008 Agreement.

As indicated in Paragraph 40 of the Petition, FCG is liable to Miami-Dade for failing to use due diligence to present the 2008 Agreement to the Public Service Commission and

to secure, at a minimum, Public Service Commission consideration of its terms. Miami-Dade suggests that it is inconceivable for a party to be relieved of the enforcement of a contract by willfully breaching a contract's terms in the manner FCG has breached the 2008 Agreement.

Prior to the expiration of the 180-day period and prior to the FCG Petition ever being presented to a single Commissioner for a decision, FCG unilaterally withdrew the Petition on February 17, 2009. By withdrawing the Petition and thereby preventing the Public Service Commission from any ability to approve the Agreement, FCG, by its own actions, waived the condition precedent of Public Service Commission approval.

A condition precedent is one which is to be performed before the contract becomes effective. It is a well-established principle of law that one who prevents the happening of a condition precedent upon which his liability is made to depend, cannot avail himself of his own wrong and thereby be relieved of his responsibility to perform under the contract. Florida law is clear on this point, "a party who, by his own acts, prevents performance of a contract provision cannot take advantage of his own wrong." *North Am. Van Lines v. Collyer*, 616 So. 2d 177, 179 (Fla. 5th DCA. 1993); *See Ward v. Branch*, 429 So. 2d 71 (Fla. 4th DCA 1983); *Paparone v. Lake Placid Holding Co.*, 438 So. 2d 155, 157 (Fla. Dist. Ct. 1983); *See also Restatement (Second) of Contracts* § 245 ("Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.").

For these reasons, the 2008 Agreement remains effective.

9. Given specific provisions in the 2008 Agreement requiring Commission approval, please explain why MDWASD believes Commission approval would not be required even if Rule 25-9.034(1), Florida Administrative Code (F.A.C.), were interpreted to exempt the 2008 Agreement from the requirement that special agreements be approved by the Commission.

RESPONSE: The 2008 Agreement is exempt from the Public Service Commission's jurisdiction, therefore the Commission possesses no authority to address it. The Commission has issued several orders rejecting applications from utilities which requested that the Commission consider agreements which are exempt from the Commission's jurisdiction (the same fact pattern presented here). Please see "Order Declining to Rule upon Application for Approval of Bulk Wastewater Service Agreement," Order No. PSC-04-0199-FOF-SU, issued February 24, 2004 in Docket No. 030517-SU; Application by United Water Florida, Inc. for approval of Tariff Sheets for Wholesale Water and Wastewater Service in St. Johns County, Order No. 00-1238-FOF-WS, issued July 10, 2000 in Docket No. 000315-WS; Application for Amendment of Certificate No. 226-S to add territory in Seminole County by Florida Water Services Corporation, Order No. 00-1902-AS-SU issued October 17, 2000 in Docket No. 971638.

In each of the Orders identified above, the Public Service Commission declined to rule upon the respective utility applications (or otherwise consider the terms of the utility's

agreements with government entities) on the basis that the specific entities and activities were exempt from Commission regulation. The Commission's order in the North Ft. Myers Utility proceeding is particularly instructive. The utility filed a bulk wastewater agreement with the Commission, as such filing was required pursuant to the agreement's terms. The Commission declined to assert jurisdiction over the agreement as the agreement involved an exempt sale of wastewater service to a government authority.

As confirmed by these Commission Orders, the fact that parties to a contract may attempt to invoke the Commission's jurisdiction through contract terms does not override the fact that the contract is exempt from such jurisdiction. The Commission should find the 2008 Agreement exempt and enter an Order declining to rule upon the Petition upon such finding. Additionally, as stated in Miami-Dade's response to Staff Interrogatory number 8, the condition precedent in the 2008 Agreement requiring Commission approval was either waived by FCG or excused as a result of FCG's actions.

10. Please explain why FCG's approved tariff rates applicable to MDWASD's class of service should not apply to MDWASD pursuant to Section 366.06, Florida Statutes (F.S.), in the absence of an effective agreement between MDWASD and FCG.

RESPONSE: The 2008 Agreement remains in effect as it cannot be rendered ineffective through the unilateral, bad faith actions of FCG. Please see Miami-Dade response to Staff interrogatory number 8.

11. Please explain whether MDWASD believes that FCG's June 22, 2009, letter (Exhibit J to MDWASD's Petition), wherein FCG purported to give MDWASD 30 days' notice, effectively terminated the 2008 Amendment.

RESPONSE: This letter did not terminate the 2008 Agreement. FCG cannot terminate the 2008 Agreement by willfully failing to present the 2008 Agreement to the Commission and failing to undertake all actions necessary to obtain formal Commission action. Please see Miami-Dade's response to Staff interrogatory number 8.

12. If MDWASD's answer to Number 11 is affirmative, please identify and explain what rates MDWASD believes it should have been charged given that the 2008 Amendment had been terminated and no new agreement (2008 Agreement) had become effective?

RESPONSE: Not applicable. Miami-Dade's response to PSC Staff Interrogatory number 11 was not in the affirmative.

13. When, if at all, did MDWASD become aware that FCG filed a Petition for Approval of the 2008 Agreement with the Commission on November 13, 2008 in Docket No. 080672-GU?

RESPONSE: Since FCG neither sent a copy of the November 13, 2008 Petition to Miami-Dade, nor included a contact person from Miami-Dade in the Petition, Miami-

Dade became aware of FCG's filing only by calling FCG on November 26, 2008 to inquire about the status of PSC approval.

14. If MDWASD was aware that FCG had filed a Petition for Approval of the 2008 Agreement in Docket No. 080672-GU, why did MDWASD not intervene prior to FCG's February 17, 2009, Notice of Withdrawal of its Petition?

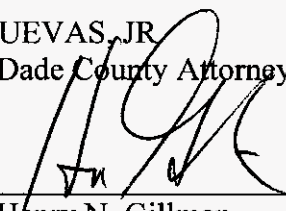
RESPONSE: Miami-Dade was not required to intervene in the Commission docket to have the Commission consider and approve the 2008 Agreement or to retain the ability to enforce the terms of the 2008 Agreement. FCG did not provide Miami-Dade with a copy of its Petition nor give Miami-Dade any notice of intent to withdraw the Petition from Commission consideration. Please see Miami-Dade response to Staff interrogatory number 8 regarding the obligation of FCG to exercise due diligence to obtain formal Commission action regarding the 2008 Agreement.

As a supplement to all responses, see Chronology of Material Events and additional information which is attached hereto as Attachment 1.

Respectfully submitted,

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

By: _____


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by email and U.S. Mail this 16th day of FEBRUARY, 2010 to:

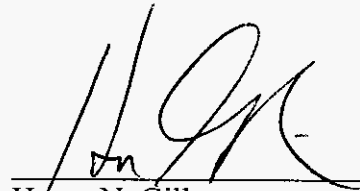
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By: _____


Henry N. Gillman
Assistant County Attorney

Chronology of Material Events

January 1998 – Florida Gas Transmission (“FGT”) requested Federal Energy Regulatory Commission (“FERC”) approval to construct a tap, meter station and lateral for the Orr Plant

April 1998 - FERC approves by-pass for the Orr Plant

June 1998 - City Gas/NUI agrees to substantial discount for transportation rates to MDWASD

July 1, 1998-June 30, 2008 – 10-year transportation service agreement between City Gas/NUI and Dade County (no contract provision requiring PSC approval)

1998-2008 – City Gas/NUI/Florida City Gas/Pivotal Utility Holdings/AGL Resources submitted Annual Reports to PSC

2000 – PSC recognized benefit of large customer like MDWASD (Order PSC-01-0316)

2001 - AGL Resources acquired NUI

2004 – City Gas changed name to Florida City Gas

2005 – NUI changed name to Pivotal Utility Holdings, Inc.

May 31, 2007 – MDWASD notified FCG that it intends to renew agreement for additional 10 years

October 31, 2007 - MDWASD’s natural gas consultant, Jack Langer of Langer Energy Consulting Inc, met with representatives of FCG, who agreed to renew agreement at same terms and conditions

November 26, 2007 – Ed Delgado, Major Accounts Representative of FCG, advised Langer that renewal letter should be sent to him

March 6, 2008 – Renewal letter sent from John Renfrow, MDWASD Director, to Ed Delgado

March 13, 2008 – Renewal letter agreed and accepted by Delgado on behalf of FCG

April 2008 – Langer was advised that 2008 Agreement would be forwarded to legal department in Atlanta for review

May 8, 2008 - Letter from Errol West, Manager, Market Development, FCG, to Langer advising that FCG has granted Delgado permission to sign the 2008 Agreement for MDWASD accounts

May 29, 2008 – Joanne Abrams, AGL corporate counsel, requested copy of 2008 Agreement

May 30, 2008 – Copy of 2008 Agreement sent to Ms. Abrams

June 25-26, 2008 – Emails between corporate counsel and outside counsel regarding “special agreements”

June 26, 2008 – Langer advised MDWASD that FCG’s Atlanta office has accepted the terms of the Agreement, including rates, but wants Agreement approved by PSC

July 21, 2008 - Agreement with FCG revisions is sent to MDWASD (draft requires PSC approval within 120 days)

July 31, 2008 - Abrams provides additional marked changes to Agreement and “strongly encourages the parties to resolve and execute the extension amendment since parties are operating under an expired contract”

August 4, 2008 - August 21, 2008 – communication between Abrams and Sarah Davis, Assistant County Attorney, regarding contract language through which Abrams and other FCG personnel represent that PSC approval is required under the Tariff

August 28, 2008 - Agreement executed by parties including Hank Linginfelter, President, Pivotal Utility Holdings, Inc. and duly authorized to execute the Agreement

October 7, 2008 – Agreement ratified by Miami-Dade Board of County Commissioners

November 13, 2008 – FCG’s Petition for Approval of Agreement filed with PSC (several months after contract was executed and digging well into the 180 days allocated for PSC approval)

December 2008 - February 2009 – Communications between FCG and PSC

February 17, 2009 – PSC withdrew Petition (96 days after Petition was submitted to PSC)

February 25, 2009 – PSC closed docket

Between ~~November~~ ^{June} 2007 and August 2008, FCG and its parent company, AGL Resources, had ample opportunity to thoroughly review every contract provision. In fact, the contract was reviewed by FCG and AGL executives including corporate counsel and outside counsel. Changes were requested and made to certain provisions of the Agreement but not to the rates. During this time period, no one from FCG or AGL ever informed MDWASD that the rates may be too low or that FCG could not recover its costs to serve Miami-Dade County at the proposed rates.

On June 26, 2008, the eve of the expiration of the 1998 Agreement, FCG insisted that the renewal include contract language requiring PSC approval. Although the 1998 Agreement was not subject to PSC approval and MDWASD was not aware of any law or regulation requiring PSC approval of the renewal, MDWASD agreed that the 2008 Agreement ("Agreement") would not become effective until approved by the Public Service Commission ("PSC). MDWASD did not object to this requirement because FCG informed MDWASD that the PSC approval was a formality. The Agreement was conditioned upon the approval of the PSC and such approval was to occur within 180 days from the date the Agreement was entered.¹ Since the Agreement was entered into on August 28, 2008, the 180-day period to have the Agreement approved was February 25, 2009.

Although FCG placed a time limit on obtaining PSC approval, FCG did not file a petition requesting PSC approval until November 13, 2008, which is almost 3 months after the Agreement was entered thereby leaving approximately 90 days of the 180 days allocated for the process before the PSC to be completed. FCG did not seek any input from MDWASD before filing the petition. In fact, FCG did not notify MDWASD that the petition was filed. FCG did not state that MDWASD was an interested party or provide a contact person from MDWASD to receive notices of the proceeding. MDWASD only found out about the filing by contacting FCG to inquire about the approval. It is clear that FCG undertook the responsibility and duty to have the Agreement approved by the PSC and did not desire any involvement by MDWASD.² Each of these actions, or absence of action, is consistent with FCG's representation to MDWASD that the filing of the 2008 Agreement was a mere formality. Based on FCG's representations and since FCG is regulated by the PSC and regularly interacts with the PSC and its staff, MDWASD relied on FCG to exercise due diligence to obtain PSC approval of the 2008 Agreement.

¹ If the County had agreed to FCG's initial draft contract language which provided for only 120 days to obtain PSC approval, the PSC would actually have had approximately one month to approve the 2008 Agreement based on the November 13, 2008 filing date.

² Upon learning that the Petition was filed, MDWASD's consultant also contacted the PSC staff to inquire whether MDWASD needed representation in these proceedings and was advised that no representation was necessary because it was a procedural matter.