

Marguerite McLean

090539-GU

From: Ann Bassett [abassett@lawfla.com]
Sent: Friday, March 18, 2011 4:51 PM
To: Filings Electronic <Filings@PSC.STATE.FL.US>
Cc: Melvin Williams; Shannon Pierce; David Heintz; Floyd Self; David Hope; Henry Gillman; Anna Williams; Martha Brown
Subject: Docket No. 090539-GU
Attachments: 2011-03-18, 090539, Motion to Disqualify.pdf

The person responsible for this electronic filing is:

Floyd R. Self
Messer, Caparello & Self, P.A.
P.O. Box 15579
Tallahassee, FL 32317
(850) 222-0720
fself@lawfla.com

The Docket No. is 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

This is being filed on behalf of Florida City Gas

Florida City Gas' Motion to Disqualify Miami-Dade Water and Sewer Department's Counsel and Witness Brian P. Amrstrong and to Exclude this Testimony and, in the alternative, to Strike Testimony

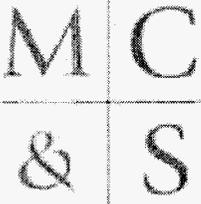
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Ann Bassett
Messer, Caparello & Self, P.A.
2618 Centennial Place (32308)
P.O. Box 15579
Tallahassee, FL 32317
Direct Phone: 850-201-5225
Fax No. 850-224-4359
Email Address: <abassett@lawfla.com>
Web Address: <www.lawfla.com>

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MESSER CAPARELLO & SELF, P.A.

Attorneys At Law
www.lawfla.com

March 18, 2011

VIA ELECTRONIC FILING

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

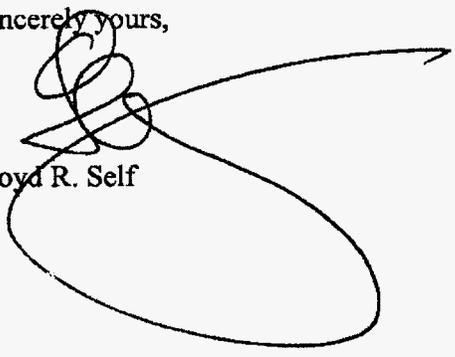
Re: Docket No. 090539-GU

Dear Ms. Cole:

Enclosed for filing on behalf of Florida City Gas is an electronic version of Florida City Gas' Motion to Motion to Disqualify Miami Dade Water And Sewer Department's Counsel and Witness Brian P. Armstrong and to Exclude This Testimony and, in the Alternative, to Strike Testimony in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,


Floyd R. Self

FRS/amb
Enclosure

cc: Shannon O. Pierce, Esq.
Parties of Record

DOCUMENT NUMBER-DATE

01848 MAR 18 =

Regional Center Office Park / 2618 Centennial Place / Tallahassee, Florida 32308

Mailing Address: P.O. Box 15579 / Tallahassee, Florida 32317

Main Telephone: (850) 222-0720 / Fax: (850) 224-4359

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CERTIFICATE OF SERVICE

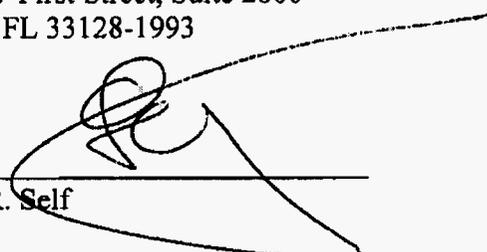
I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U.S. Mail this 18th day of March, 2011.

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

Mr. Melvin Williams
Florida City Gas
933 East 25th Street
Hialeah, FL 33013

Shannon O. Pierce
AGL Resources, Inc.
Ten Peachtree Place, 15th Floor
Atlanta, GA 30309

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



Floyd R. Self

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Approval of Special Gas)
Transportation Service Agreement with)
Florida City Gas by Miami-Dade County)
Through the Miami-Dade Water and)
Sewer Department)
_____)

Docket No.: 090539-GU
Filed: March 18, 2011

MOTION TO DISQUALIFY MIAMI-DADE WATER AND SEWER DEPARTMENT'S COUNSEL AND WITNESS BRIAN P. ARMSTRONG AND TO EXCLUDE THIS TESTIMONY AND, IN THE ALTERNATIVE, TO STRIKE TESTIMONY

Florida City Gas ("FCG"), pursuant to Rule 28-106.24, Florida Administrative Code, hereby moves to disqualify Miami-Dade Water and Sewer Department's ("MDWASD") counsel and witness Brian P. Armstrong ("Mr. Armstrong") since MDWASD has impermissibly used Mr. Armstrong as both an attorney and a witness in this proceeding in violation of the Rules Regulating the Florida Bar, and to accordingly exclude this direct and rebuttal testimonies. In the alternative, Florida City Gas moves to strike portions of Armstrong's direct and rebuttal testimony pursuant to Rule 1.140(f), Florida Rules of Civil Procedure, as being outside the scope of the issues and otherwise as impertinent, immaterial, redundant, and scandalous. In further support of this motion, Florida City Gas states:

I. INTRODUCTION

1. In this docket, the Commission is considering whether the 2008 Natural Gas Transportation Agreement ("2008 TSA") between FCG and the MDWASD, concerning FCG's transportation of natural gas to MDWASD's facilities, should be approved.

2. At its Agenda Conference on October 26, 2010, the Commission considered the threshold legal issue of whether the Commission had the jurisdiction to consider the 2008 TSA. A copy of the transcript from the October 26, 2010 Agenda Conference, in which the

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01848 MAR 18 =
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Commission considered its jurisdiction to consider the 2008 TSA at Item Number 19, is attached hereto as Exhibit “A.”

3. At that Agenda Conference, counsel for MDWASD, Assistant County Attorney, Mr. Henry Gillman, introduced Mr. Armstrong to give MDWASD’s legal argument. Mr. Armstrong appeared as “Special Counsel” and identified himself as an attorney and member of the law firm of Nabors, Giblin & Nickerson, P.A.¹ Mr. Armstrong, and only Mr. Armstrong, made MDWASD’s legal argument that the Commission lacked the jurisdiction to consider the 2008 TSA.² Mr. Armstrong, and only Mr. Armstrong, offered MDWASD’s rebuttal legal argument as well.³ The Commission ultimately decided that it had the jurisdiction and authority to consider the 2008 TSA in its *Order Determining Jurisdiction*, issued November 5, 2010.⁴ In the subsequent order on procedure, none of the issues identified for this docket include any of the legal issues decided by the *Order Determining Jurisdiction*.⁵ MDWASD neither sought reconsideration of nor appealed the *Order Determining Jurisdiction*.

4. MDWASD’s formal appearance of Mr. Armstrong as an attorney at the Agenda Conference is consistent with his prior involvement in the case. In June 2009 Mr. Armstrong called FCG’s counsel and represented that MDWASD still wanted to proceed with the Commission approving the 2008 TSA. In those communications, he specifically referred to MDWASD as “My client” and the context and tone of these communications, including his presentation of a draft petition, clearly indicate that MDWASD was using his services as an attorney. See the attached Exhibit “B.” In the subsequent meeting involving the parties and Commission Staff on March 3, 2010, MDWASD’s representatives included Mr. Armstrong who

¹ See Exhibit A, P. 3, lines 15-18.

² See Exhibit A, p. 3, line 21 through p. 8, line 12.

³ See Exhibit A, p. 19, line 12 through p. 23, line 4.

⁴ Order No. PSC-10-0671-PCO-GU.

⁵ Order No. PSC-10-0730-PCO-GU. (Dec. 13, 2010), Order Determining Issues for Hearing.

was known to be and identified himself as an attorney. MDWASD's utilization of Mr. Armstrong as an attorney providing legal counsel and representation to MDWASD has been confirmed through discovery in this matter. Mr. Jack Langer, another MDWASD witness in this docket and consultant to MDWASD, through his consulting firm, specifically retained Mr. Armstrong to provide "legal advice" on behalf of Mr. Langer's work for MDWASD. See MDWASD Exhibit "C," Response to FCG Production of Documents Request No. 6.

5. MDWASD's reliance on Mr. Armstrong's continuing service as an attorney for MDWASD was demonstrated again most recently during an informal conference call of the parties on March 11, 2011. The purpose of this meeting was to allow FCG to ask and receive clarification regarding three Staff interrogatories. At the end of the call Mr. Armstrong launched into a brief speech in which, like his prefiled testimony, he accused FCG of failing to provide certain information and stated that FCG should not be allowed to provide such information "this late" in the case. Mr. Armstrong asserted that MDWASD would file an appropriate motion to strike such evidence. MDWASD's two attorneys of record on the call were silent and did not respond or make any comment in response to Mr. Armstrong's promised legal motion by MDWASD. The promise or threat of legal action is something that would be said by an attorney, not a witness.⁶

6. On December 29, 2010, MDWASD submitted the direct testimony of Mr. Armstrong. In this testimony, Mr. Armstrong states that MDWASD asked him to "advise them in its dealings with FCG."⁷ Mr. Armstrong then provides testimony concerning, *inter alia*: (a) his policy recommendations to the Commission; (b) his belief that the 2008 TSA should be exempt from Commission jurisdiction; (c) his comments regarding the testimony of other

⁶ The Motion was filed through Mr. Armstrong's law firm on March 16, 2011, on behalf of the Miami-Dade County Attorney.

⁷ See Armstrong Direct, p. 2, lines 12-14.

MDWASD witnesses; (d) his comments regarding documents provided by FCG and Commission Staff; (e) his view on the Commission's discretion to approve the 2008 TSA; (f) his belief that the "Incremental Cost Rates" identified by FCG in Exhibit JL-9 are inflated; (g) his views on how the Commission should consider the funds FCG recovers under the Competitive Rate Adjustment ("CRA"); (h) his views on FCG's tariff; and (i) his opinion on what he believes the Commission should do with regard to the 2008 TSA. In his testimony Mr. Armstrong discloses his background as an attorney with utilities experience, but he does not state whether his prefiled testimony is being offered as an expert or as an attorney for MDWASD. In the absence of proffering him as an expert, he can only be considered a fact witness, especially since there are no legal or policy issues identified in this case requiring expert testimony from an attorney.

7. On January 28, 2011, MDWASD submitted the rebuttal testimony of Mr. Armstrong. Although this testimony is couched as rebutting the direct testimony of FCG witnesses Bermudez and Williams, his testimony is actually dominated by legal argument. In his rebuttal, Mr. Armstrong: (a) suggests cross-examination of FCG witness Williams⁸; (b) offers legal analyses on how the Commission should proceed⁹; (c) argues the applicability of other Commission decisions with regard to the instant proceeding¹⁰; (d) offers his opinion on the behavior of FCG and its management¹¹; and (e) essentially argues a motion *in limine* to exclude a hypothetical future filing by FCG in this docket.¹²

8. These facts together conclusively demonstrate that before and after the filing of direct and rebuttal testimony that MDWASD has used and continues to use Mr. Armstrong as an

⁸ See Armstrong Rebuttal, p. 2, lines 4-8 ("I would ask Mr. Williams to consider whether the Commission can order FSG to refund, retroactively, revenue received over the past few years")

⁹ See Armstrong Rebuttal, pp. 2, line 9, through p.3, line 11.

¹⁰ See Armstrong Rebuttal, p. 3, line 12, through p. 4, line 5.

¹¹ See Armstrong Rebuttal, p. 5, line 20, through p. 8, line 11.

¹² See Armstrong Rebuttal, p. 8, line 17, through p. 9, line 19.

attorney and legal counsel to MDWASD. Mr. Armstrong has represented himself to FCG as an attorney. He has formally appeared and acted before the Commissioners as an attorney. He continues to act as counsel and to provide legal argument on behalf of MDWASD. MDWASD's utilization of Mr. Armstrong in this dual role, as both an attorney and as a witness is not permitted. The only remedy to MDWASD's conduct is to dismiss Mr. Armstrong both as a lawyer and as a witness and to exclude his testimony.

II. ARGUMENT

9. The Rules Regulating The Florida Bar, Rules of Professional Conduct, govern how attorneys conduct themselves in proceedings before tribunals as well as in certain other contexts. Rule 1-10.1 states that all members of The Florida Bar "shall comply with the terms and the intent of the Rules of Professional Conduct as established and amended by this [Florida Supreme] court." Mr. Armstrong is unambiguously a member of the Florida Bar and his obligations as an attorney in good standing to follow such rules cannot be disputed, whether as counsel or otherwise.

10. It is a matter of public record in this docket that MDWASD has introduced and utilized Mr. Armstrong as a lawyer representing MDWASD at the Commission Agenda Conference on October 26, 2010. This conduct as an attorney is consistent with his statements and conduct in his communications with FCG counsel in June 2009, the Staff workshop in March 2010, and the informal conference call on March 11, 2011. Notwithstanding MDWASD's use of Mr. Armstrong as an attorney, MDWASD has filed both direct and rebuttal testimony of Mr. Armstrong.

11. Is MDWASD using Mr. Armstrong as a witness or a lawyer in this case, or is he both? Subject to narrow and specific exceptions not applicable here, it is well settled that an attorney can appear in a case only as an attorney or only a witness but never both. As is

discussed more fully below, Rules 4-3.4(e) and 4-3.7 of the Rules Regulating the Florida Bar and the authorities and caselaw construing these rules, require that the Commission disqualify MDWASD's use of Mr. Armstrong as both counsel and as a witness and strike his testimony. In the alternative, MDWASD's prefiled direct and rebuttal testimony of Mr. Armstrong should be stricken as improper testimony.

A. The Commission Should Disqualify Mr. Armstrong as Counsel.

12. Pursuant to Chapter 120, Florida Statutes, hearing officers in administrative proceedings have the same power that courts exercise to disqualify a lawyer from representing a party to the proceeding if that representation would be in violation of law or the Rules of Professional Conduct applicable to lawyers.¹³ Rule 4-3.7(a), Rules Regulating The Florida Bar, Rules of Professional Conduct, "Lawyer as Witness," states as follows:

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

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- (3) the testimony relates to the nature and value of legal services rendered in the case; or
- (4) disqualification of the lawyer would work substantial hardship on the client.

13. The comment to Rule 4-3.7 states that "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." It further states:

The trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The combination of roles may prejudice another party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by

¹³ See Docket No. 090478-WS, Order No. PSC 10-0222-PCO-WS (April 7, 2010). See also *Lee v. Fla. Dep't of Ins.*, 586 So. 2d 1185, 1188 n. 3 (Fla. 1st DCA 1991); *Prof'l Practices Council v. Green*, DOAH Case No. 79-2275, 1980 WL 14909.

others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

In *Scott v. State*,¹⁴ the Florida Supreme Court stated that a purpose of Rule 4-3.7 “is to prevent the evils that arise when a lawyer dons the hat of both an advocate and witness for his or her own client. Such a dual role can prejudice the opposing side” In *Alliedsignal Recovery Trust v. Alliedsignal, Inc.*,¹⁵ the Second District Court of Appeal noted that “the dual role could prejudice the opposing party by bolstering the lawyer’s testimony for his client because it comes from an advocate.” Regardless of whether there is any actual or perceived prejudice when the attorney becomes a witness (not subject to an exception), the result is clear and direct – the attorney is disqualified from the proceeding.

14. Rule 4-3.7 clearly proscribes what MDWASD has attempted – using Mr. Armstrong as both lawyer and witness. The policy reasons behind the Florida Bar’s prohibition against such dual roles ring equally true in a proceeding before the Commission. Mr. Armstrong’s attempt to wear two hats – one as the attorney for MDWASD, the other as a witness who advocates various legal positions and offers his bolstering opinion on the evidence and testimony of other MDWASD witnesses in the same proceeding – is precisely the justification for such a prohibition contained in the comments to Rule 4-3.7, approved by the Florida Supreme Court. The comment states that a “witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others.” It further states that “[i]t may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.” That is exactly what MDWASD has attempted in

¹⁴ 717 So. 2d 908, 910 (Fla. 1998).

¹⁵ 934 So. 2d 675, 678 (Fla. 2d DCA 2006).

this proceeding. The bright line in Rule 4-3.7 has been crossed by MDWASD and there is only one remedy – complete disqualification.

15. There is no dispute: MDWASD has had Mr. Armstrong appear in this docket as an attorney for MDWASD. Mr. Armstrong was clearly retained as legal counsel. MDWASD had him provide argument as legal counsel on behalf of MDWASD at the October 26, 2010 Agenda Conference. MDWASD has filed his direct and rebuttal testimony in anticipation of being a witness for MDWASD at the final hearing in June. As recently as March 11, 2011, Mr. Armstrong advocated for the exclusion of FCG evidence and asserted that appropriate legal motions would be filed against such evidence. This dual role is contrary to the Florida Bar's rules and ethical obligations of attorneys. Accordingly, the only remedy is for the Commission to disqualify Mr. Armstrong from further representation and participation on behalf of MDWASD as an attorney.¹⁶

B. The Commission Should Exclude Mr. Armstrong as a Witness.

16. As discussed above, Mr. Armstrong has appeared in this proceeding as an attorney representing MDWASD, and yet MDWASD has now also proffered Mr. Armstrong as witness through prefiled direct and rebuttal testimony. In disqualifying Mr. Armstrong as an attorney the Commission should also disqualify and exclude him as a witness for the same reasons.

¹⁶ Disqualification of Mr. Armstrong will not leave MDWASD without legal counsel as both Mr. Gillman and Mr. Hope from the County Attorney's office would remain as counsel of record.

17. This dual role as lawyer and witness clearly and unquestionably runs afoul of Rule of Professional Conduct 4-3.4(e), "Fairness to Opposing Party and Counsel," which provides:

A lawyer shall not:

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

Contrary to this rule, Mr. Armstrong offers his opinion on the factual testimony of other MDWASD witnesses, he states his opinion on the credibility of the FCG witnesses, and he offers his legal analysis on issues already decided by the Commission.

18. Mr. Armstrong is not and should not be considered a "witness" as that term is defined and understood by law. Section 90.604, Florida Statutes, states that "[A] witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter." Mr. Armstrong has not admitted any personal knowledge of the events that led to the petition in this proceeding, other than in his capacity and work as legal counsel for MDWASD. He does not testify to any personal experience in the events associated with the 1998 TSA or the negotiation, drafting, review, submission, or withdrawal of the 2008 TSA in either his direct or rebuttal testimonies. Since MDWASD has not identified Mr. Armstrong as an expert witness and there is no legal or other issue identified requiring expert legal testimony, his opinion testimony also falls outside the scope of Section 90.701, Florida Statutes, which permits a lay witness to draw inferences or offer an opinion "about what he or she perceived."

19. MDWASD's proffer of a witness lacking such personal knowledge or an expert to address issues requiring expert testimony is compounded by the self-serving witness bolstering employed by this testimony. Florida courts have followed Rule 4-3.4(e), holding that "[i]t is improper for an attorney to give a personal opinion as to the justness of the cause" ¹⁷ "A lawyer's expression of his personal opinion as to the credibility of a witness, or his personal knowledge of facts, is fundamentally improper."¹⁸ Courts have further held that it is improper for an attorney to attempt to bolster the credibility of his or her party's own witnesses by offering his or her personal opinion on the witness.¹⁹

20. As an attorney Mr. Armstrong's testimony, like most of the testimony, violates Rule 4-3.4(e) and the persuasive authority construing it. For example, Mr. Armstrong in his Direct Testimony attempts to bolster the credibility of Mr. Shaffer this way:

Q. DOES MIAMI-DADE'S COST OF SERVICE WITNESS SAFFER AGREE WITH THE POSITIONS OF MIAMI-DADE AS YOU HAVE JUST EXPRESSED THEM?

A. Yes. Mr. Saffer testifies that he concurs in each of these positions based upon his many years of service in many proceedings and in several states as a cost of service expert. Mr. Saffer further presents evidence that the revenue derived by FCG under the 2008 Agreement rates does indeed cover FCG's true incremental costs.²⁰

In an example of multiple testimony violations, Mr. Armstrong is attempting to both acknowledge his own lack of personal knowledge of the facts under the guise of "policy" testimony:

Q. MIAMI-DADE WITNESS HICKS HAS TESTIFIED THAT REGARDLESS OF WHETHER THE COMMISSION APPROVES THE RATES IN THE 2008 AGREEMENT, THE COMMISSION SHOULD APPLY NEW RATES IT MAY DETERMINE ONLY PROSPECTIVELY FROM THE DATE A COMMISSION ORDER BECOMES FINAL. DO YOU AGREE WITH HIS PROPOSAL AS A MATTER OF GOOD POLICY?

¹⁷ *Servis v. State*, 855 So. 2d 1190, 1194 (Fla. 5th DCA 2003).

¹⁸ *Muhammad v. Toys "R" Us, Inc.*, 668 So. 2d 254, 258 (Fla. 1st DCA 1996).

¹⁹ *See Servis*, 855 So. 2d at 1194-95.

²⁰ Armstrong Direct Testimony, p. 18, lines 15-22.

A. Yes. Mr. Hicks proposes that if the 2008 Agreement and associated rates are not approved that they should remain in place at least until a new rate is established. Therefore, he proposes that the Commission order FCG to refund the payments which Miami-Dade paid to FCG, under protest, in excess of the payments which would have been required under the rates in the 1998 Agreement, Amendment to the 1998 Agreement and the 2008 Agreement which are all identical rates. I concur with Mr. Hicks that based on the facts presented by Miami-Dade and a simple matter of equity, FCG should be required to refund such over-payments to Miami-Dade.²¹

Various Florida courts have reversed lower tribunals for permitting attorneys to offer opinions on evidence, testimony, and witness credibility during closing arguments.²² A brief review of Mr. Armstrong's direct and rebuttal testimonies show that his testimony is comprised of his opinion on the case, his legal analysis of matters before this Commission, including matters previously decided by this Commission,²³ his commentaries and support for MDWASD's witnesses, his comments on the credibility of FCG's witnesses, and inflammatory accusations against FCG. Attorneys who try to be witnesses in the same case are clearly prohibited by Rule 4-3.4(e) and Florida courts. In fact, Florida courts have warned trial judges to take appropriate measures to prevent lawyers from such a dual role during closing arguments.²⁴ If such opinions are improper by lawyers during closing, they cannot become proper by dressing up the lawyer as a witness.

21. There is no current rule or caselaw authority that authorizes an attorney to simultaneously make these kinds of statements regarding evidence, witnesses credibility, legal analysis, friendly bolstering, and other such non-fact-based testimony as MDWASD has prefiled

²¹ *Armstrong Direct Testimony*, p. 29, line 16 through p. 30, line 6.

²² *See Servis*, 855 So. 2d at 1197 (reversing and remanding conviction based on prosecutor's stating personal opinion during closing argument); *Muhammad*, 668 So. 2d at 258-59 (reversing and remanding matter for new trial because of the collective import of counsel's personal injections, and irrelevant and inflammatory remarks); *Pippin v. Latoskyński*, 622 So. 2d 566, 569 (Fla. 1st DCA 1993) (reversing and remanding for new trial based, in part, on counsel's expression of personal outrage).

²³ At pages 4-7 of his Direct Testimony, Mr. Armstrong's testimony concerns the issue of the Commission's jurisdiction to approve the 2008 Agreement, which the Commission previously decided in its Order Determining Jurisdiction, Order No. PSC-10-0671-PCO-FU (Nov. 5, 2010). Miami-Dade neither sought reconsideration nor appealed the Order Determining Jurisdiction.

²⁴ *See Muhammad*, 668 So. 2d at 259 n.1.

in this matter through Mr. Armstrong's testimony. To the contrary, Florida law is clear that such conduct by attorneys is to not be tolerated by any tribunals including this Commission acting in its quasi-judicial capacity under Chapter 120. Accordingly, given his dual role as an attorney and witness, the Commission should not permit MDWASD to offer Mr. Armstrong's testimony and the only appropriate remedy is for MDWASD's witness Mr. Armstrong to be disqualified and excluded as a witness in this case.²⁵

C. The Commission Should Strike Portions of Armstrong's Direct and Rebuttal Testimonies.

22. In the event the Commission does not disqualify and exclude MDWASD's witness, Mr. Armstrong, and his testimony, FCG respectfully requests that it strike portions of Mr. Armstrong's direct and rebuttal testimonies. While Rule 28-106.204, Florida Administrative Code, provides for the filing of motions, it does not specifically set forth the grounds upon which a motion to strike may appropriately be granted. Section 120.569(2)(g), Florida Statutes, provides that "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." Rule 1.140(f), Florida Rules of Civil Procedure, provides that a party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time. This Commission has followed Rule 1.140(f)'s requirements in considering motions to strike testimony of witnesses.²⁶ In addition, the Commission has stricken testimony that is beyond the scope of permissible testimony.²⁷ Presiding officers in Commission proceedings have significant discretion when ruling on motions to strike testimony, but the party

²⁵ While exclusion of a witness may seem to be a harsh result, such exclusion does no disservice to MDWASD. MDWASD has four other witnesses in this case, including two county employees who were involved in the process associated with the 2008 TSA, the County's outside consultant who was also involved in the 2008 TSA process, and a cost of service witness to address the cost and other financial issues in this case.

²⁶ See Docket No. 971220-WS, Order No. PSC-99-1809-PCO-WS (Sept. 20, 1999).

²⁷ Order No. PSC-06-0261-PCO-TP (March 28, 2006).

filing testimony has an obligation to show that the testimony is legally proper upon a challenge by another party to the case.²⁸

23. As discussed above, Mr. Armstrong has appeared in this proceeding as MDWASD's attorney. As a preliminary matter, it is not clear from his testimony whether MDWASD is relying on Armstrong as a lay witness or expert witness. To the extent he appears as a lay witness, the Commission should strike Mr. Armstrong's testimony because he was not a fact witness to the issues before this Commission and therefore lacks personal knowledge, pursuant to Section 90.604, Florida Statutes. Further, his testimony is in the form of an opinion, and pursuant to 90.701, Florida Statutes, a lay witness is only permitted to offer opinion testimony based upon "what he or she perceived" and if such opinion testimony will not mislead the trier of fact to the prejudice of the objecting party, and the opinion does not require a special knowledge, skill, experience or training. Mr. Armstrong's testimony is almost entirely his opinion on the evidence presented in this petition, and the quality and competence of evidence, friendly self-serving bolstering of MDWASD witnesses testimonies, legal analysis and rebuttal to the Commission's *Order on Jurisdiction*, and other inflammatory and outrageous opinion testimony regarding FCG's motions and actions that are prejudicial and highly inappropriate for testimony before this Commission.²⁹ Together, the Commission should strike Mr. Armstrong's direct and rebuttal testimonies pursuant to Rule 1.140(f) because these portions are outside the scope of the issues in the case and are redundant, immaterial, impertinent, and/or scandalous, for the reasons that follow.

²⁸ See *Id.*

²⁹ FCG is aware that, in past decisions, the Commission has permitted some lay witness opinion testimony that may not be based on personal knowledge, and has further allowed some expert witness testimony that may appear to be beyond the expert's purview. In those decisions, the Commission has generally concluded that it is in the position to view particular testimony in toto with all other record evidence in reaching its decision. See Docket No. 060658-EI, Order No. PSC-07-0270-PCO-EI (March 30, 2007). However, FCG will demonstrate that Mr. Armstrong's testimony is so infected with irrelevant, immaterial, impertinent, redundant and scandalous matters that it must be stricken from this docket and Commission consideration.

1. **Mr. Armstrong's Direct Testimony.**

(a) **Policy recommendations to the Commission**

24. At pages 2-4, and pages 29-30, MDWASD offers Mr. Armstrong's "policy recommendations" to the Commission regarding the 2008 TSA. Mr. Armstrong's policy recommendations to this Commission are irrelevant to the instant proceeding and should be stricken. This is not a case of general applicability where the Commission is going to be setting policy affecting all natural gas public utilities. Moreover, this testimony is not based on personal knowledge or testimony that can aid the Commission in rendering a decision. Therefore, this testimony should be stricken as irrelevant pursuant to Section 120.569(2)(g) and Rule 1.140(f).

(b) **Reargument of Jurisdictional Issues**

25. At pages 4-7 of his direct, MDWASD has Mr. Armstrong testifying in response to the following question: "Do you believe the 2008 Agreement should be exempt from Commission consideration under the Rule you mentioned?" Mr. Armstrong's testimony concerns the issue of the Commission's jurisdiction to approve the 2008 TSA. However, the Commission, in its *Order Determining Jurisdiction*, issued November 5, 2010, ruled that it had jurisdiction to consider the 2008 TSA pursuant to these statutes and rules.³⁰ Any objections MDWASD may have to this legal determination may be appropriate for an appeal but not the evidentiary hearing, especially since there are no legal jurisdictional questions identified for hearing. Mr. Armstrong even admits that the Commission has already decided this issue, stating:

Although the Commission has issued an order finding that it has jurisdiction to address the 2008 Agreement and that Miami-Dade is not entitled to an exemption,

³⁰ Order No. PSC-10-0671-PCO-GU.

these unique facts presented in an agreement between a government-owned utility, like Miami-Dade, and an investor-owned utility, like FCG, should be considered by the Commission when deciding whether to approve such an agreement.³¹

It is simply not appropriate for MDWASD to offer a witness to testify on a purely legal issue especially when there is no legal jurisdictional issue in the case. Further testimony and argument on this issue, after the Commission clearly disposed of it in a previous Order, is improper. Accordingly, the Commission should strike any and all portions of Armstrong's testimony concerning the Commission's jurisdiction to consider the 2008 TSA, as outside the scope of the case and irrelevant, impertinent, and scandalous pursuant to Section 120.569(2)(g) and Rule 1.140(f).

(c) Comments regarding the testimony of other MDWASD witnesses

26. MDWASD has Mr. Armstrong testify at numerous points about the testimony of the other MDWASD witnesses. For example, at pages 7-10 of his direct, Mr. Armstrong comments on documents that were analyzed by MDWASD witnesses Ruiz and Hicks. He continues to reiterate Ruiz's testimony at pages 12-14 of his direct. At page 18, he testifies that MDWASD witness Saffer agrees with the position of MDWASD as he (Armstrong) has expressed. At pages 20-23, his testimony is duplicative of other MDWASD witnesses. At pages 29-30, he testifies that he agrees with the testimony of MDWASD witness Hicks. And at pages 30-31, Mr. Armstrong summarizes the testimony of the other MDWASD witnesses with regard to their position regarding the 2008 TSA.

27. These portions of MDWASD's testimony offer little more than Mr. Armstrong's rubber stamp of approval to the testimony of other MDWASD witnesses. Mr. Armstrong's recanting of their testimony is redundant and impertinent, and should thus have no bearing or

³¹ Armstrong Direct Testimony, p. 5, lines 13-18.

influence on the Commission's decision.³² It is self-serving. It is friendly bolstering by a witness with no personal knowledge. FCG requests that the Commission strike these portions of MDWASD's testimony of Mr. Armstrong as being irrelevant and unduly repetitious pursuant to Section 120.569(2)(g) and Rule 1.140(f).

(d) Comments regarding documents provided by FCG and Commission Staff

28. At pages 10-14, 16, 18-20, 24-25, and 27-29, MDWASD has Mr. Armstrong opine on documents provided by FCG and Commission Staff in this proceeding. This testimony again echoes the testimony of the other MDWASD witnesses who also discuss these same documents but based upon their experience with them. Mr. Armstrong's opinion on these documents is irrelevant and impertinent to this proceeding. It is again cumulative and is further support for the testimony of the other MDWASD witnesses. Accordingly the Commission should strike these portions of his testimony as being irrelevant and unduly repetitious pursuant to Section 120.569(2)(g) and Rule 1.140(f).

(e) Views of the CRA, the Tariff, and what the Commission should do with regard to the 2008 TSA

29. At pages 16-18, 20-23, and 23-24, Mr. Armstrong offers his opinions and views on the Competitive Rate Adjustment ("CRA"), FCG's Tariff and, ultimately, that the Commission should approve the 2008 TSA. MDWASD offers Mr. Armstrong's biased and one-sided views of these controlling documents, stating, for example, that based on his own calculations under the CRA, "it is clear that FCG has been collecting a large windfall of hundreds of thousands of dollars each year."³³ Again, as a lay witness without personal knowledge, Mr. Armstrong's opinion on these documents and issues is irrelevant, unnecessarily

³² See *Rice-Lamar v. City of Ft. Lauderdale*, 853 So. 2d 1125, 1133-34 (Fla. 4th DCA 2003) (holding that a motion to strike under Rule 1.140(f) should be granted "if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision.").

³³ Armstrong Direct, p. 18, lines 7-10.

cumulative, and impertinent to this proceeding. Accordingly the Commission should strike these portions of his testimony pursuant to Section 120.569(2)(g) and Rule 1.140(f).

(f) Scandalous material

30. At numerous points in his direct testimony, Mr. Armstrong makes scandalous accusations against FCG that are unprofessional, unnecessary, self-serving, and not probative of any issue in the case. The Commission should not allow a MDWASD witness to make such impertinent and scandalous accusations and should strike them. For example:

- Page 9, lines 2-14: Mr. Armstrong states that “[i]nexplicably, FCG suggests that its ‘O&M Expenses’” have increased,” and later accuses FCG of changing its method for calculating its incremental operating cost;
- Page 13, lines 12-21, Mr. Armstrong accuses FCG of engaging in “bad acts” including FCG’s allegedly “incredible claim to Miami-Dade that the 2008 Agreement is null and void” because of the delay in Commission consideration, accusing FCG of “mismanagement”;
- Page 17, lines 5-18, Mr. Armstrong analyzes the cost of service in light of the CRA, and opines that that the calculation “is highly inequitable for FCG’s customers and an unjustified windfall to FCG”;
- Page 22, lines 10-22, Mr. Armstrong attempts to frame the issue with regard to the Tariff, while ignoring MDWASD’s own confirmation and giving of express warranties that its service is subject to and in compliance with the tariff, by stating, “FCG failed to comply with its obligations and responsibilities to this Commission and to Miami-Dade under the KDS Rate Schedule. If FCG management and counsel identified the wrong rate schedule, if FCG entered a service agreement with Miami-Dade but failed to comply with special condition 4 or the requirements of section 1 of the Rate Schedule relating to the

distribution charge, is Miami-Dade to be held culpable? Is Miami-Dade to be forced to pay FCG higher rates if FCG is guilty of these transgressions? Is FCG to be permitted to escape the obligations and responsibilities it agreed to perform in the 2008 Agreement and which were incumbent upon it to perform under the KDS Rate Schedule, and instead be permitted to select another rate schedule to charge Miami-Dade, unilaterally, and in direct conflict with its KDS Rate Schedule which provides that the customer, in this proceeding, Miami-Dade, shall make the selection?";

- Page 25, lines 9-18, Mr. Armstrong states, "FCG's response to Miami-Dade's very first interrogatory in this proceeding tells the entire story. FCG has not fulfilled its obligations to this Commission or to Miami-Dade under its KDS Rate Schedule. FCG has acted in total disregard of the requirements of its own tariff. FCG failed to perform the incremental cost of service study required by the KDS Rate Schedules which FCG selected and included in the 2008 Agreement. Even after Miami-Dade was forced to take the unusual step to file the 2008 Agreement for approval, FCG remained obstinate in its refusal to do what this Commission, through FCG's authorized tariff, requires. Miami-Dade should not be forced to suffer from such outrageous conduct and mismanagement by FCG";
- Page 26, lines 24-25, Mr. Armstrong accuses FCG of violating its own tariff obligations;
- Page 27, lines 18-21, Mr. Armstrong states, "I am truly surprised by this response. Based upon my 25 years of experience advising and managing both public and private utilities, it is inconceivable that FCG would exercise such nonchalance in entering a long-term gas transportation agreement with its largest natural gas transportation customer"; and
- Page 28, lines 9-25, Mr. Armstrong accuses FCG of failing to reexamine its cost to serve Miami-Dade, which is states is "shocking[,]" and further states that, in what he considers

“is perhaps most disturbing, FCG admits that its cavalier attitude toward calculating the cost it has incurred and will continue to incur to serve Miami-Dade is founded upon its ability to recover any costs above the amount Miami-Dade pays from FCG’s other customers through the CRA mechanism. This is unacceptable conduct and reflects poor management.”

These comments are comprised of nothing more than accusatory rhetoric that is intended to evoke an emotional response as opposed to the recitation of facts, of which he has no personal knowledge. Moreover, he has apparently failed to read the documents he questions, especially when MDWASD has made affirmative statement of compliance and warranted its conduct. This testimony is also irrelevant as well; it serves no purpose in this proceeding other than a cheap attempt to discredit FCG through name calling. The comments do not assist the Commission in arriving at a decision in this matter, and should be stricken as scandalous, irrelevant and impertinent pursuant to Section 120.569(2)(g) and Rule 1.140(f).

2. Mr. Armstrong’s Rebuttal Testimony

31. MDWASD’s rebuttal testimony of Mr. Armstrong is dominated by legal argument and additional scandalous statements. The Commission should strike this rebuttal testimony under Rule 1.140(f) as well for the following reasons.

(a) Cross-examination of FCG witness Williams

32. At page 2, lines 2-8 of his rebuttal, Mr. Armstrong, in commenting on FCG witness Williams’ direct testimony, states:

I would ask Mr. Williams to consider whether the Commission can order FCG to refund, retroactively, revenue received over the past few years from the FCG customers through the CRA mechanism if such revenues were above FCG’s costs and/or the receipt of such funds was not justified.

The Commission should not permit MDWASD, through Mr. Armstrong’s rebuttal testimony, to cross or to suggest cross examination of another witness. That is the role of MDWASD’s

attorneys, not its witnesses. Further, there is no relevance to testimony that suggests a question of another witness. The Commission should strike this portion of Mr. Armstrong's rebuttal testimony pursuant to Section 120.569(2)(g) and Rule 1.140(f).

(b) Legal analyses and suggestion on Commission procedure

33. At page 2, line 9, through page 3, line 11, Mr. Armstrong suggests how the Commission should proceed in this docket, and the ramifications of a ruling that is negative to FCG. MDWASD's attempt to influence this Commission, by having Mr. Armstrong suggest the appropriate procedure for considering particular allegations in this case, is completely irrelevant and should have no influence on this Commission's decision. Mr. Armstrong's testimony in this section is scandalous and inflammatory, as it repeatedly accuses FCG of mismanagement based upon his own limited knowledge of the facts and self-serving spin. The Commission should strike this portion of Mr. Armstrong's rebuttal testimony pursuant to Section 120.569(2)(g) and Rule 1.140(f).

(c) Argument of other decisions of the Commission

34. At page 2, line 25, through p. 4, line 5, MDWASD offers Mr. Armstrong's arguments on the applicability of several decisions of the Commission to the instant proceeding. This is pure legal argument disguised as testimony. The parties will have the opportunity to make legal argument and discuss the applicability or inapplicability of past Commission and court precedent in the post-hearing briefs. The Commission should not permit MDWASD to make such an argument through Mr. Armstrong's testimony. The Commission should strike this portion of Mr. Armstrong's rebuttal testimony as being irrelevant, impertinent, and immaterial, pursuant to Section 120.569(2)(g) and Rule 1.140(f).

(d) Opinion on the behavior of FCG's management

35. Mr. Armstrong makes numerous scandalous statements concerning the behavior of FCG's management. He states that that William's testimony concerning FCG's attempts to terminate the Amendment to the 1998 Agreement "defies belief."³⁴ He further states that, in his opinion, FCG's recovery under the CRA "constitute[s] an abuse of those customers . . . ," and further states that "[t]his abuse should be considered by the Commission when evaluating how to respond to FCG's numerous admissions of bad management, mistakes, flawed analyses, and omissions with regard to Miami-Dade and the 2008 TSA."³⁵ He continues to accuse FCG of "abuse" of its customers, as well as mismanagement and violations. He then, in a self-serving statement, says:

I can think of no reasonable explanation for such path and the corresponding mismanagement, admitted by FCG, which would permit FCG to retroactively recover from other customers phantom costs in such a manner as would violate the prohibition against retroactive ratemaking.³⁶

As argued in relation to scandalous material contained in Mr. Armstrong's direct testimony, this type of testimony is inappropriate and improper. The Commission should not tolerate such inflammatory tone and language. This is opinion testimony outside the purview of even an expert witness that serves no probative value for the Commission's analysis of the facts or law. There is no evidentiary basis for such inappropriate language or charges. These comments by MDWAD's witness do not assist the Commission in arriving at a decision in this matter, and should be stricken as scandalous, irrelevant and impertinent pursuant to Section 120.569(2)(g) and Rule 1.140(f).

³⁴ Armstrong Rebuttal, p. 6, line 10.

³⁵ Armstrong Rebuttal, p. 6, lines 10-16.

³⁶ Armstrong Rebuttal, p. 8, lines 7-11.

(e) **Hypothetical motion *in limine***

36. At pages 8-9 of his Rebuttal, Mr. Armstrong argues that the Commission should preclude FCG from filing any incremental cost of service information or study. He goes so far as to state:

It is my opinion and experience in utility regulatory matters, generally, and before this Commission, specifically, that Commission precedent and notions of procedural due process and fairness requires that FCG be foreclosed from attempting to provide such information at the hearing to be held in this proceeding.³⁷

MDWASD again offers Mr. Armstrong's legal argument as well as his opinion on Commission procedure, which is improper.

37. What is more outrageous is that MDWASD, through this rebuttal testimony, is asking this Commission what is tantamount to a motion *in limine*, to exclude evidence that has not been presented by FCG. This is indicative and demonstrative of why the Commission should disqualify Mr. Armstrong and strike his testimony: he now purports to appear on behalf of MDWASD as a "witness," masquerading as an unqualified expert offering the Commission legal advice. This "testimony" that is actually legal argument is at best premature, and at its core designed to prejudice FCG's ability to get a fair hearing. This testimony does not aid the Commission in making a decision in this docket, is irrelevant, and should be stricken in accordance with Section 120.569(2)(g) and Rule 1.140(f).

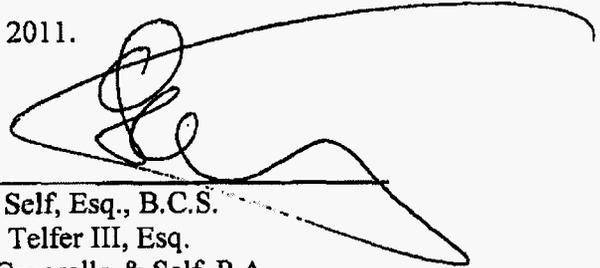
38. Based on the foregoing and in the alternative, FCG respectfully requests that the Commission strike the above-referenced portions of MDWASD's witness Mr. Armstrong's direct and rebuttal testimonies, pursuant to Section 120.569(2)(g) and Rule 1.140(f).

³⁷ Armstrong Rebuttal, p. 9, lines 15-19.

III. CONCLUSION

39. Based on the foregoing, FCG respectfully requests that the Commission reject MDWASD's attempt to have Mr. Armstrong appear in this docket as both a lawyer and a witness and disqualify Mr. Armstrong as both attorney and witness in this proceeding, in violation of Rule 4-3.7(a), Rule 4-3.4(e) of the Rules Regulating The Florida Bar. In the alternative, FCG respectfully requests that the Commission strike portions of Mr. Armstrong's direct and rebuttal testimonies for being in contravention of Sections 90.604 and 90.701, Florida Statutes, and for being impertinent, irrelevant, immaterial, redundant and scandalous, pursuant to pursuant to Section 120.569(2)(g), Florida Statutes, and Rule 1.140(f), Florida Rules of Civil Procedure.

Respectfully submitted this 18th day of March, 2011.



Floyd R. Self, Esq., B.C.S.
Robert J. Telfer III, Esq.
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308
Tel. 850-222-0720
Fax. 850-558-0656

Shannon O. Pierce, Esq.
AGL Resources Inc.
Ten Peachtree Place, 15th Floor
Atlanta, GA 30309
Tel. 404-584-3394

Counsel for Florida City Gas

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 090539-GU

PETITION FOR APPROVAL OF SPECIAL
GAS TRANSPORTATION SERVICE
AGREEMENT WITH FLORIDA CITY GAS
BY MIAMI-DADE COUNTY THROUGH
MIAMI-DADE WATER AND SEWER
DEPARTMENT.

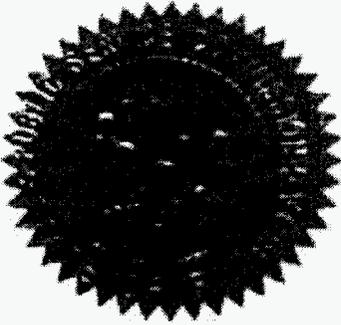
PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 19

COMMISSIONERS
PARTICIPATING: CHAIRMAN ART GRAHAM
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER NATHAN A. SKOP
COMMISSIONER RONALD A. BRISÉ

DATE: Tuesday, October 26, 2010

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

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



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FLORIDA PUBLIC SERVICE COMMISSION (CONT)

PROCEEDINGS

* * * * *

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2
3 CHAIRMAN GRAHAM: Item 19. Ms. Williams,
4 you're up.

5 MS. WILLIAMS: Good morning, Commissioners.
6 Anna Williams on behalf of Commission Staff.

7 Item 19 is Staff's recommendation addressing
8 the threshold legal issue in Docket 090539-GU of whether
9 the Commission has authority to approve the 2008 Special
10 Gas Transportation Service agreement between Florida
11 City Gas and Miami-Dade Water and Sewer Department.
12 Staff believes that the Commission does have authority
13 to consider this agreement.

14 Representatives from Florida City Gas and
15 Miami-Dade County are available, and Staff is also
16 available, should you have any questions.

17 CHAIRMAN GRAHAM: Thank you, Ms. Williams.

18 Let's start with Florida City Gas. Any
19 opening comments? Yes, sir.

20 MR. SELF: Thank you, Mr. Chairman. Floyd
21 Sell of the Messer, Caparello & Self Law Firm, appearing
22 on behalf of Florida City Gas. Also with me is Shannon
23 Pierce, who is Senior Counsel with AGL Resources, an
24 affiliate of Florida City Gas.

25 Mr. Chairman, we agree with the Staff rec --

1 excuse me. We agree with the Staff recommendation, and
2 it might be more efficient if Miami-Dade would speak,
3 and then I would provide any response that may be
4 necessary.

5 **CHAIRMAN GRAHAM:** They're next. Miami-Dade.

6 **MR. ARMSTRONG:** Thank you, Mr. Chair. And
7 congratulations on your vote.

8 **CHAIRMAN GRAHAM:** Thank you, sir.

9 **MR. ARMSTRONG:** Best of luck to you. I do,
10 will go out of order with the provision, and I know the
11 Commission will allow me to be able to address FCC's
12 arguments, if they differ from my own.

13 **CHAIRMAN GRAHAM:** Sir, I just need your name
14 for the record, please.

15 **MR. ARMSTRONG:** Sure. It's Brian P.
16 Armstrong, Law Firm of Nabors, Giblin & Nickerson,
17 appearing today as special counsel for Miami-Dade
18 County.

19 **CHAIRMAN GRAHAM:** Please continue.

20 **MR. ARMSTRONG:** Thank you.

21 Commissioners, to Miami-Dade this is a simple
22 issue. This Commission has a rule which exempts
23 contracts between a municipal utility and a regulated
24 utility from its jurisdiction. Only three things are
25 necessary for the exemption to apply: A contract, a

1 regulated public utility and a municipal utility. These
2 three things exist in the case before you today.

3 Miami-Dade is a special political subdivision
4 in Florida explicitly established and recognized in
5 Florida's Constitution. Miami-Dade's charter and the
6 Florida Constitution recognize Miami-Dade's special
7 character as a government entitled to all powers and
8 privileges of any Florida municipality, which would
9 include applicable exemptions. Staff identifies no
10 court or Commission precedent that addresses the rule
11 before you and the exemption that it provides for the
12 Miami-Dade/FCG contract, yet Staff's recommendation
13 appears to go out of its way to assert jurisdiction over
14 this contract.

15 Why? In meetings with Miami-Dade
16 representatives, Staff has reminded Miami-Dade that it
17 must protect the financial integrity of the utilities
18 which this Commission regulates. Fine. What about the
19 customers of Miami-Dade, Florida's largest local
20 government?

21 What is before you is a contract that FC&G and
22 Miami-Dade signed. FCG's president and Miami-Dade's
23 mayor signed it. Miami-Dade wishes to be clear; we do
24 not want the Commission to make FCG's other customers
25 pay anything as a result of our contract with FCG.

1 The contract at issue in this proceeding is
2 exempt from your jurisdiction, and this exemption should
3 not be construed to harm FCG's other customers at all.
4 We emphasize this fact because Staff has focused on a
5 potential adverse impact on those other customers which
6 Staff presumes would occur if the Commission does not
7 reject this contract. There should be no adverse impact
8 on other customers.

9 This Commission can deny FCG recovery and
10 rates of any contract expense which the Commission deems
11 unreasonable or imprudent. FCG's shareholders absorb
12 disallowed expenses in every rate case filed with this
13 Commission.

14 The same concept should hold true as a result
15 of the contract before you. In FCG's next rate case, if
16 the evidence shows that FCG should have bargained for a
17 higher contract price for Miami-Dade, this Commission
18 should impute additional revenue to FCG's revenues. You
19 do this all the time under similar circumstances in rate
20 cases.

21 The bottom line, this Commission is not
22 required to allow FCG to recover the difference from
23 other customers. FCG shareholders should absorb the
24 difference, if any. On this point, you, Commissioners,
25 should also know that FCG originally filed this contract

1 with the Commission in an application which included
2 FCG's assertion that the contract price covered its cost
3 of service. FCG then changed its mind after discussions
4 with Staff and informed Staff that the contract price
5 will result in revenue below its incremental cost of
6 service. But under oath and in response to Miami-Dade's
7 interrogatories, FCG has now admitted that it never
8 conducted any incremental cost of service study at all.
9 This is no surprise to Miami-Dade, as the incremental
10 cost to maintain the short distribution lines used to
11 serve Miami-Dade, a portion of which Miami-Dade paid for
12 and contributed to FCG, would be far below the alleged
13 cost of service which FCG has identified to date for
14 this Commission.

15 If you approve Staff's recommendation, you'll
16 be interpreting your own rule in such a way that it is a
17 nullity. Staff is saying that the exemption in the rule
18 is trumped by this Commission's general rate setting
19 authority over FCG. If this argument is true,
20 Miami-Dade can think of no contract which would be
21 exempt under Staff's interpretation of the rule's scope.

22 What purpose does the rule's exemption serve
23 if Staff's interpretation is correct? There would be no
24 exemption available to any contract between any
25 government utility and a regulated public utility if

1 Staff's interpretation holds.

2 To conclude, we have a contract signed by
3 FCG's president, Hank Linginfelter, binding FCG to serve
4 Miami-Dade at a designated rate. FCG's arguments to
5 this Commission and its conflicting assertions as to
6 whether the contract price covers its incremental cost
7 of service, when it finally admitted to Miami-Dade and
8 to you that it did not even perform a typical
9 incremental cost of service study, leads only to the
10 conclusion that FCG simply wishes to use this Commission
11 and to abuse the regulatory process to get a higher
12 price than its own president agreed to.

13 As a former general counsel and senior vice
14 president of what was then Florida's largest water
15 utility, I represent to this Commission that no utility
16 should attempt to use this Commission in such a way.
17 FCG signed a contract with Miami-Dade, and a reputable
18 utility would live by its terms.

19 Miami-Dade requests that this Commission apply
20 its rule and exempt the FCG/Miami-Dade contract from PSC
21 jurisdiction. Let the contract stand. Let FCG, a
22 multimillion dollar utility owned by a huge multistate
23 utility conglomerate, be bound by the contract terms its
24 own president agreed to with Miami-Dade's mayor and
25 governing body. Do not take out of the pockets of

1 Miami-Dade residents any money in excess of the funds
2 which their elected representatives bargained for with
3 FCG. Do not force this Commission, Miami-Dade and FCG
4 to unnecessarily spend significant funds, which would be
5 required if you send this case to a hearing, a likely
6 appeal and the associated brief writing, testimony
7 drafting, pleadings, discovery and other costs which
8 everyone in this room and ultimately our customers would
9 incur.

10 Apply your rule, exempt the contract and we
11 are done. Thank you, Commissioners. I appreciate your
12 time.

13 **CHAIRMAN GRAHAM:** Thank you, sir.

14 A question to Staff. The question before us,
15 the only question before us is do we have the authority
16 to, to approve this agreement; correct?

17 **MS. WILLIAMS:** Yes, Chairman, that's correct.

18 **CHAIRMAN GRAHAM:** Okay. Commission board, do
19 you have any questions of Miami-Dade before I get the
20 reply from Florida City or from Staff?

21 Commissioner Skop.

22 **COMMISSIONER SKOP:** Thank you.

23 A question for Staff. With respect to the
24 issue before us as to whether the Commission has
25 jurisdiction or authority to approve the 2008 agreement

1 between Miami-Dade and Florida City Gas, what are the
2 ramifications of the Commission adopting the Staff
3 recommendation?

4 MS. WILLIAMS: To clarify, do you mean the
5 ramifications for this docket in particular or in
6 general?

7 COMMISSIONER SKOP: What are the ramifications
8 for this docket in general of adopting the Staff
9 recommendation as to whether the Commission has the
10 authority to approve a contract that was executed
11 apparently two years ago?

12 MS. WILLIAMS: From -- as it should have been,
13 in Staff's opinion, all along, when parties enter into
14 these type of service contracts with municipalities,
15 they would still be required to submit them for
16 Commission approval in accordance with Rule 25-9.0341.

17 COMMISSIONER SKOP: Okay. So if the
18 Commission were to exercise its jurisdiction over the
19 contract, what would happen in the event that the
20 Commission ultimately denied approval of the contract?
21 What would happen?

22 MS. WILLIAMS: If the Commission ultimately
23 denied, if we found that we had jurisdiction and then
24 went forward and denied approval of the contract, either
25 the parties could go back, renegotiate and come up with

1 something that may be better to the Commission's liking,
2 or the, they could continue service to Miami-Dade County
3 under an otherwise applicable tariff rate.

4 **COMMISSIONER SKOP:** Okay. And I understand
5 that the tariff rate, that's a separate issue. Again,
6 it seems to me, based on what I've read, that the
7 contract is below incremental cost based on Staff's
8 analysis. Is that correct, Ms. Kummer?

9 **MS. KUMMER:** Based on the preliminary numbers
10 that we've seen, sir, it appears so, yes. But, again,
11 those are preliminary.

12 **COMMISSIONER SKOP:** Okay. All right. Thank
13 you for that clarification.

14 If the Commission were ultimately to deny
15 approval of the contract, again, the tension here is
16 Commission jurisdiction as we should have jurisdiction,
17 but there's also a potential legal issue regarding
18 enforcement of a contract, a legally binding document
19 that's outside the jurisdiction of the Commission. So
20 we're kind of in the crossfire between, you know, should
21 we exercise jurisdiction and ultimately deny approval of
22 the contract? Does that, in Staff's opinion, not
23 deprive Miami Dade of the benefits of its bargain under
24 the existing contract?

25 **MS. WILLIAMS:** I'm sorry. Could you repeat

1 the question about --

2 **COMMISSIONER SKOP:** Assuming the, assuming the
3 Commission has jurisdiction and the Commission adopts
4 the Staff recommendation today, which is to exercise its
5 jurisdiction to have authority to approve or deny the
6 2008 agreement, okay, which is two years after the fact
7 that we're now getting involved in this, what would
8 happen ultimately if the Commission denied the contract
9 because the contract, in the Commission's view, as
10 Ms. Kummer has mentioned, is currently below incremental
11 cost, which results in a cross-subsidy to a certain
12 class of ratepayers? I think I'm saying this correctly.

13 The fallout question of that is that the
14 Commission interjects itself into a contract, which
15 obviously there's concurrent jurisdiction here, then --
16 and denies that contract. I'm trying to understand the
17 ramifications to the extent that if we deny the
18 contract, does that not put Miami-Dade in the position
19 of effectively denying Miami-Dade the benefit of the
20 bargain it made when it entered into such agreement two
21 years ago?

22 **MS. WILLIAMS:** Thank you. I have a better
23 understanding now of what you're getting at.

24 I think the controlling case law, specifically
25 the *H. Miller & Sons* case, demonstrates where the

1 Supreme, Florida Supreme Court determined that contracts
2 made with regulated public utilities are made subject to
3 the reserved power of the state via the Public Service
4 Commission to make sure that rates are set in the
5 benefit of the public interest and for the public
6 welfare.

7 In that case, the Commission had ordered a
8 utility to change the rates that had been agreed to in a
9 private contract, and the Supreme Court upheld the
10 Commission's doing that because this Commission does
11 have the power granted by the Legislature to look out
12 for that public interest.

13 **COMMISSIONER SKOP:** Okay. And I'm not going
14 to dispute that we have that power or that jurisdiction.
15 But what I am looking at is we're now asked to approve
16 or deny a contract that's been in effect for at least
17 two years, if not more, depending upon when it was
18 executed. Do we know the execution date of the
19 contract, the 2008 agreement?

20 **MS. KUMMER:** I believe it was in August of
21 2008. Somebody can correct me, if I'm wrong.

22 **COMMISSIONER SKOP:** Okay. So it's been in
23 effect for a little bit over two years apparently,
24 assuming, subject to check. Okay.

25 I guess what I'm trying to, you know, before

1 we leave, obviously, you know, there's a case to be
2 made, as Staff has indicated in the Staff
3 recommendation, the Commission has jurisdiction. If we
4 exercise that jurisdiction, I'm trying to gain a better
5 appreciation of the benefits and peril. Obviously we
6 desire to protect the ratepayers. But if we're
7 effectively intervening late in the game due to Florida
8 City Gas not providing us with a contract to approve
9 until very late in the game, then, you know, how do you
10 reconcile, you know, the two instances?

11 I mean, if I understand Staff's analysis,
12 they're using Supreme Court precedent to come in and
13 trump any contractual rights that the parties may have
14 in a civil court of law, thereby giving the Commission
15 complete scope of jurisdiction on this, which seems to,
16 if the Commission were to reject, ultimately reject the
17 contract and deny it, then it seems to me that, you
18 know, at least one party suffers potential harm.

19 **MS. KUMMER:** I hesitate to jump in here
20 because I am not a lawyer, but from a purely practical
21 standpoint this contract is nothing more than a customer
22 specific rate schedule.

23 **COMMISSIONER SKOP:** Okay.

24 **MS. KUMMER:** And that's the way I treat it
25 from my perspective, that it is a special rate for this

1 customer designed on their specific circumstances. And
2 as such, the Commission always approves rates for
3 regulated utilities. Again, that's not a legal
4 analysis, but from a technical perspective, that's how I
5 see it.

6 **COMMISSIONER SKOP:** Okay. What does Staff
7 intend to do -- and, again, generically, because this is
8 getting down the path -- but with respect to Florida
9 City Gas not providing the Commission with a contract
10 for approval until two years after the fact, how does
11 Staff intend to analyze or address that fact in this
12 chain of events?

13 **MS. KUMMER:** I believe at this point, I think
14 Ms. Williams could probably address it better than I
15 can, but they did submit the contract at the point it
16 was being, was up for renewal in 2008. It was
17 subsequently withdrawn. And then Miami -- it is
18 Miami-Dade's petition to require that that contract that
19 was withdrawn now be enforced.

20 So it wasn't that the Commission -- that the
21 Utility didn't present it for approval; they did in a
22 timely manner. But because of the other events that
23 have taken place, we're now at the point we are.

24 **COMMISSIONER SKOP:** All right. Well, again,
25 looking at the Staff recommendation, I think the gist of

1 it, beyond what the Commission chooses to do or not to
2 do here, seems to be a very complicated legal issue of
3 how to properly balance the exercise of the Commission's
4 jurisdiction to protect ratepayers and ensure that the
5 contract is one that is -- hold on for one second -- not
6 priced below incremental cost.

7 But on the flip side too, if the Commission
8 were to take action to deny the contract, obviously that
9 sends the parties back to the, you know, negotiating
10 table. And arguably in a legal sense, absent the
11 Commission being involved, that would implicate a whole
12 different body of law to which the Commission doesn't
13 have jurisdiction.

14 But it seems under the precedent cited that if
15 the Commission has jurisdiction to approve contracts
16 between utilities that are in the public interest, then
17 the Commission has exclusive jurisdiction, in which case
18 the contractual remedies probably aren't going to be
19 available. Is that correct?

20 MS. WILLIAMS: Yes.

21 COMMISSIONER SKOP: Okay. All right.

22 CHAIRMAN GRAHAM: Thank you, Mr. Skop.

23 COMMISSIONER SKOP: Thank you.

24 CHAIRMAN GRAHAM: The, and the way I'm looking
25 at this, the question that's before us is do we have the

1 authority to, to approve this contract? And we still
2 have to hear from Florida City, but from the things that
3 I see, we do have that authority. We have to make sure
4 that, I guess our job is to protect the ratepayers that
5 are out there, and our job is to make sure that there is
6 no cross-subsidy that's out there where the ratepayer is
7 going to be picking up for lost revenue that Miami-Dade
8 is not paying, or if the rate is just too low. But
9 before I continue, let's hear from Mr. Self.

10 **MR. SELF:** Thank you, Mr. Chairman.

11 Commissioner Skop, I think your fundamental
12 questions that you're going to are right on point. And
13 unfortunately this is a difficult factual issue, but
14 don't let that distract you from the Florida
15 Legislature's fundamental and primary policy decision
16 that this Commission has the exclusive and superior
17 jurisdiction to address the rates that Florida City Gas
18 provide its customers. And in this particular
19 situation, Miami-Dade Water and Sewer Department is, in
20 fact, a customer.

21 And I think the Commission -- the Staff
22 recommendation did a good job in kind of connecting the
23 dots on the full effect, scope and meaning of the
24 exemption that's in your rule, and that in fact the
25 exemption for a municipality does indeed relate back to

1 the fact that exempt from the Commission's jurisdiction
2 are municipal, electric and gas utilities. Well, in
3 this particular case, Miami-Dade is not an electric or
4 gas utility. It's simply a customer of the
5 transportation service.

6 And, again, looking at the plain language of
7 your rule, which talks about a commodity or product,
8 that that's what's exempt, contracts for a commodity or
9 product with a municipality. And in this particular
10 instance what you have is a transportation service.
11 We're not selling them gas, we're not selling them
12 electricity. We're simply selling them the
13 transportation for the gas that they purchase elsewhere.

14 With respect to Miami-Dade County's unique
15 status as a home rule charter under the Florida
16 Constitution, again, as we point out in our brief and
17 the staff as well addresses, within that authority in
18 the Florida Constitution is an express recognition that
19 that exemption or that constitutional authority is
20 subject to this Commission's jurisdiction. So while
21 Miami-Dade County does, in fact, possess some unique and
22 special powers, when it comes to matters that are within
23 the jurisdiction of the Public Service Commission, the
24 setting of rates for public utilities, that authority
25 is, in fact, preeminent with this Commission.

1 And in addition to the Miller case that the
2 staff discussed with you, Commissioner Skop, the Florida
3 Power Corporation versus Seminole County case in 1991 by
4 the Florida Supreme Court, I think also reinforces the
5 fact that this Commission has that exclusive and
6 superior authority to address these things.

7 A lot of the issues that Mr. Armstrong
8 addressed are matters that fortunately or unfortunately
9 will be addressed in -- I think will be the eventual
10 substantive hearing on whether or not the contract rate
11 is appropriate, and if it's not what happens after that.

12 So we would urge you to adopt the staff recommendation.

13 Thank you.

14 **CHAIRMAN GRAHAM:** Thank you, Mr. Self.

15 What I plan on doing is letting staff finish
16 up, give Miami-Dade and Mr. Armstrong time to reply and
17 then come back to the board.

18 Staff.

19 **MS. WILLIAMS:** Thank you.

20 Commission staff agrees with Florida City Gas,
21 all the statements that Mr. Self just made. In response
22 to Mr. Armstrong's statements, again, I want to
23 emphasize, and I think you have already made this point
24 that we are only here to address the jurisdictional
25 issue. If we do end up determining that we have

1 jurisdiction over the contract, in going forward to a
2 hearing we will address all the issues raised by the
3 parties here today.

4 And, second of all, staff's interpretation of
5 the rule is not that it's trumped by the Commission's
6 general ratemaking authority, but simply that it does
7 not apply in this situation to this contract present
8 here.

9 **CHAIRMAN GRAHAM:** Thank you.

10 **MS. WILLIAMS:** That's all we have.

11 **CHAIRMAN GRAHAM:** Mr. Armstrong.

12 **MR. ARMSTRONG:** Thank you, Mr. Chair. Just
13 three brief rebuttal points.

14 First, both staff and FCG are absolutely
15 misinterpreting the holding in the H. Miller & Sons
16 case. There are three very clear distinctions between
17 that case and this one. That case did not involve a
18 government utility. That case did not involve an
19 applicable rule of the Commission that exempts the
20 contract that was at issue. There is no limitation, in
21 that proceeding, regarding the utility's ability to
22 recover its incremental cost of service under the rates
23 that were approved. None of those situations apply, and
24 none of those facts apply in H. Miller & Sons, so it
25 really is inapposite and distinguishable from this case.

1 The second point, Commissioners, it's easy to
2 protect ratepayers. It's easy. You do it all the time
3 in every rate case. If FCG signed a contract where they
4 agreed to pay a million dollars, which is the amount at
5 issue here, under the tariffed rate Miami-Dade would be
6 paying a million dollars to FCG for this transportation
7 service. If we were in a rate case and FCG signed a
8 contract that said they would pay a million dollars to a
9 vendor, and they went to a rate case and this
10 Commission, based on the evidence, determined that the
11 proper price was only \$100,000, you could deny them
12 recovery of the \$900,000 which they would be
13 contractually obligated to the pay to the vendor. They
14 don't get out that million dollar payment.

15 The same thing applies here, the same concept
16 applies here. They agreed to take \$100,000 from my
17 client, Miami Dade County, after a year plus of
18 negotiations. If this Commission says you should have
19 taken more, then you deny them recovery from the
20 ratepayers. You make their shareholders pay for that.
21 That's what you do when it's an expenses; you do the
22 same thing for revenue. Constantly you guys impute
23 revenue when you find a situation like that in rate
24 cases, constantly. The third point, staff's
25 interpretation does render this exemption a nullity.

1 There is no fact pattern we could think of, and we tried
2 to say if they interpret it this way so say the general
3 rulemaking authority trumps this exemption, that there
4 is any kind of exemption available to any utility in the
5 state of Florida. There is not.

6 The fourth issue raised by Florida City Gas,
7 now -- and, again, I have to point out, they are trying
8 to get in out of a contract that they sign. The
9 president of that company signed this contract, and they
10 are trying to get out of it. But the fourth point about
11 the commodity or service, the capacity on their
12 distribution line is the commodity they are selling to
13 Miami-Dade. The capacity on that line. That line, a
14 substantial portion of which was paid for by Miami-Dade,
15 now why are we talking about impact on customers?
16 Because staff's recommendation refers to this. Staff
17 has repeatedly referred to Miami-Dade and the need to
18 protect the financial integrity of Florida City Gas and
19 protect other customers.

20 You can certainly protect other customers as
21 we have mentioned, you do it all the time. In a rate
22 case, a subsequent rate case, impute the revenue if you
23 think there is a problem. Commissioners, right now I
24 haven't heard anybody acknowledge the fact that what we
25 are dealing with and why we are here today is because

1 Florida City Gas originally said in their application
2 that the revenue collected on this contract meets its
3 costs of service. After they have communication, which
4 we have possession of with your Staff, they decided, no,
5 it doesn't meet our incremental cost of service, that's
6 far in excess of what we will get under this contract,
7 you're right, maybe you should have disapproved this
8 contract, and they withdrew it from your consideration.
9 On their own they withdraw it from you and your
10 consideration. That's why we are here today.

11 Now, we have an interrogatory. Because we
12 filed an application, Miami-Dade had the ability to ask
13 questions, and so we asked. Give us a copy of your
14 incremental cost of service study, an easy cost of
15 service study done all the time in utility ratemaking.
16 They didn't do one, and they admitted under oath, after
17 all the issues that your staff was provided, an
18 incremental cost of service study far in excess of the
19 contract rate, your Staff says we can't allow that to
20 happen because the customers might have to pay it, we've
21 got two very simple issues: One, your other customers
22 do not have to pay it; and, two, they didn't even do an
23 incremental cost of service study.

24 Commissioners, I don't think we can avoid
25 addressing those facts and applying an exemption which

1 exists in a very simple way. We have a contract between
2 a regulated public utility and a municipal utility. The
3 contract is exempt under your rule. And I thank you for
4 your time.

5 **CHAIRMAN GRAHAM:** Thank you, Mr. Armstrong.

6 Commission board? Mr. Brisé, did you have --

7 **COMMISSIONER BRISÉ:** Yes. Thank you, Mr.

8 Chairman. When I look at this, I think it boils down to
9 whether we have the ability to address this issue.

10 However, I think when you look at the backdrop
11 of it, there's a whole lot more involved with it. And I
12 certainly agree with Miami-Dade County that there is a
13 contract. And the terms that that contract stipulates
14 should be adhered to. And maybe we should look at the
15 circumstances, as to why a set amount was agreed to.

16 But when we move out of that, and simply ask
17 the question that is before us today, which is do we
18 have the right to address this issue, I can't, even
19 though I think that in terms of the merits of the other
20 issues, we might want to address them, but with the
21 question before us today, I think there is, we have very
22 few options in terms of that. So I'm very concerned
23 about some of the issues that are raised, but I think
24 that we probably do have the ability to address whether
25 we have the right to address the contract or not.

1 **COMMISSIONER GRAHAM:** Thank you, Commissioner
2 Brisé.

3 Commissioner Skop.

4 **COMMISSIONER SKOP:** Thank you.

5 I just agree with Commissioner Brisé. Again,
6 clearly the Commission has jurisdiction over the
7 contract. What appears to be unfortunate is that the
8 contract, for whatever reason, was never brought before
9 the Commission for official approval two years ago, and
10 the contract has been in force and effect until
11 Commission staff pointed out that the contract may be,
12 on a preliminary basis, below incremental cost of
13 service thereby resulting in a cross-subsidy to other
14 ratepayers which is not a good thing, because the
15 Commission needs to ensure that rates are fair, just,
16 and reasonable.

17 It seems to me that the case law cited the
18 Florida Supreme Court case in Miller allows the
19 Commission, reserves the authority of the state to
20 modify a contract in the interest of public welfare, and
21 then looking at the United States Supreme Court case
22 that's cited, arguably the Commission has jurisdiction
23 there also. So I don't think jurisdiction is at issue,
24 but I think both of the controlling cases that are cited
25 by Staff give the Commission some ultimate discretion of

1 when we go to hearing of how to view the facts as they
2 are adduced at hearing and make a decision on the merits
3 in a fair and impartial manner to both parties. So at
4 this point, if there are no further questions, I'd move
5 the staff recommendation on Item 19.

6 **COMMISSIONER GRAHAM:** It has been moved and
7 seconded?

8 **COMMISSIONER BRISÉ:** Second.

9 **CHAIRMAN GRAHAM:** Let the record show that it
10 has been moved and seconded that we move the staff
11 recommendation on Item 19.

12 That all being said, all in favor signify by
13 saying aye.

14 (Vote taken.)

15 **CHAIRMAN GRAHAM:** Those opposed?

16 By your action you have approved Item 19.

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STATE OF FLORIDA)

CERTIFICATE OF REPORTERS

COUNTY OF LEON)

WE, JANE FAUROT, RPR, and LINDA BOLES, RPR, CRR, Official Commission Reporters, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that we stenographically reported the said proceedings; that the same has been transcribed under our direct supervision; and that this transcript constitutes a true transcription of our notes of said proceedings.

WE FURTHER CERTIFY that we are not a relative, employee, attorney or counsel of any of the parties, nor are we a relative or employee of any of the parties' attorneys or counsel connected with the action, nor are we financially interested in the action.

DATED THIS 1st DAY OF NOVEMBER, 2010.


JANE FAUROT, RPR
Commission Reporter
(850) 413-6732


LINDA BOLES, RPR, CRR
Commission Reporter
(850) 413-6734

From: "Armstrong, Brian" <barnstrong@mgn-tally.com>
To: "Feil, Matthew (OC-Th)" <IMCEAEX-
_O=AKERMAN+20SENTERFITT_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=MFEIL@gunster.co
m>
Date: 10/30/2009 11:28 AM
Subject: Draft of Proposed Petition to Florida Public Service Commission ByMiami-Dade Water and Sewer
Department
Attachments: pet. for gas trans. srv agrmt.draft 5.doc

Matt,

As we discussed a couple of days ago, attached is a draft of a petition to the FPSC concerning the Florida City Gas/Miami-Dade transportation agreement.

MDWSD would like to get the petition filed as soon as possible. The petition has been drafted for the purpose of getting formal PSC action on the existing agreement. Without such action, MDWSD is unable to explain to the Miami-Dade Board of County Commissioners why the agreement reached between the parties has not been placed into effect as no PSC action has occurred to date.

My client believes, and I expect that yours does as well, that Florida City Gas management and MDWSD entered an agreement in good faith and with knowledge that the agreement's terms were in the best interests of both parties. We wish to pursue Commission approval of the agreement together with FCG officials even if PSC staff deems its judgment of the best interest of the parties to be superior to the considered judgment of FCG managerial personnel who entered the agreement. It is our desire that MDWSD and FCG present our position as a unified front and that all steps taken from this point forward be taken together.

You will note that we request, first, a PSC concession that the agreement is exempt from its scrutiny (as MDWSD is the utility department for Miami-Dade County, not a separate and distinct entity and thus the rule exemption applies). In the alternative, we request that the agreement be approved as a special contract and we list terms that deviate from the rate schedule invoked in the agreement.

We have addressed the potential expiration issue with paragraph 23 with the expectation that FCG/MDWSD cooperation from this point forward would avoid anything further having to be done in that regard.

Please review the attached with your client and respond to me at your earliest convenience. We would be pleased to modify the attached draft to add FCG as a joint petitioner.

Thank you for your assistance.

Brian

EXHIBIT "B"

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. _____ - GU

Filed: November _____, 2009

**PETITION FOR APPROVAL OF SPECIAL
GAS TRANSPORTATION SERVICE AGREEMENT**

Pursuant to Section 366.06, Florida Statutes and Rules 25-9.034 and 25-22.036, Florida Administrative Code, the Miami-Dade Water and Sewer Department of Miami-Dade County (MDWSD) petitions the Commission for approval of a special gas transportation service agreement with Florida City Gas ("FCG" or "Company"). In support of this petition, MDWSD states:

1. The name of the petitioner and the mailing address of its principal office in Florida are:

Miami Dade Water and Sewer Department
3071 Southwest 38th Avenue
Suite 514
Miami, FL 33146-1520

2. The names and mailing addresses of the persons authorized to receive notices and communications with respect to this petition are:

On Behalf of MDWSD:

Joseph A. Ruiz, Jr.
Deputy Director - Operations
Miami-Dade County
Water and Sewer Department
3071 SW 38 Avenue, Suite 514
Miami, FL 33146-1520

On Behalf of FCG:

Matthew Feil
Akerman Senterfitt
106 E. College Avenue, Suite 1200
Tallahassee, FL 32301
(850) 425-1614

Elizabeth Wade
AGL Resources, Inc.
Location 1470
Ten Peachtree Plaza
Atlanta, GA 30309

3. The Miami Dade Water and Sewer Department is the public utility department of Miami-Dade County government responsible for the provision of water and wastewater service to approximately 2,300,000 residents of the County. MDWSD purchases natural gas to power certain facilities used to produce high quality water and distribute the water to MDWSD customers. MDSWD's substantial interests will be affected by the Commission's disposition of this Petition in that MDWSD purchases transportation service from FCG and the cost of such service has increased more than tenfold as a result of FCG actions to date, as described later in this Petition. Favorable Commission consideration of the requests made in this Petition is required to avoid a bypass by MDWSD of FCG facilities and the concomitant loss by FCG of associated revenues.

4. FCG, formerly known as City Gas Company of Florida ("City Gas"), currently is an operating division of Pivotal Utility Holdings, Inc. (which itself is a subsidiary of AGL Resources, Inc.). FCG is an investor-owned natural gas utility

company subject to the regulatory jurisdiction of the Commission as prescribed in Chapter 366, Florida Statutes.

5. FCG's predecessor, City Gas, by and through NUI Corporation (its parent), executed a Natural Gas Transportation Service Agreement with Miami-Dade County on October 29, 1999 the terms of which became effective on July 1, 1998 (the "1998 Agreement"), a copy of which is attached hereto as Exhibit A. The 1998 Agreement had a ten-year term expiring on July 1, 2008, with no automatic renewal.

6. When the 1998 Agreement neared expiration, MDWSD and FCG signed a First Amendment to the 1998 Agreement (the "Amendment"). The Amendment extended the term of the 1998 Agreement on a month-to-month basis as of July 1, 2008. A copy of the Amendment is attached hereto as Exhibit B.

7. FCG and MDWSD simultaneously negotiated a successor agreement to the 1998 Agreement which was signed and dated August 28, 2008 (the "2008 Agreement"), a copy of which is attached hereto as Exhibit C. The 2008 Agreement contains the same pricing provisions as the 1998 Agreement, and many of the other provisions in the 2008 Agreement are similar if not identical to those in the 1998 Agreement.

8. Under the 2008 Agreement, FCG is to receive natural gas for MDWSD at the same Points of Receipt with Florida Gas Transmission Company in Miami and Hialeah, Florida as currently in use; transport such quantities on the FCG distribution system; and redeliver such gas to Points of Delivery at the same three MDWSD facilities currently served, with a maximum annual contract quantity ("MACQ") per site as follows: (1) Alexander Orr Water Treatment Plant, 4,200,000 therms; (2) Hialeah Lime

Reclamation Facility, 3,300,000 therms; (3) South District Wastewater Treatment Plant, 400,000 therms.

9. FCG, by and through its attorney, initially filed the 2008 Agreement with the Commission by petition dated November 13, 2008 (the "FCG Petition"). The FCG Petition identified several benefits for FCG customers arising from the 2008 Amendment. These benefits were identified in paragraph 11 of the FCG Petition which is repeated in its entirety as follows:

The agreement provisions are justified, are in the best interest of FCG and do not harm FCG's ratepayers because (a) FCG will recover its cost to serve Miami-Dade County via the rates charged to Miami-Dade County, (b) serving Miami-Dade County removes from the general body of ratepayers costs that would otherwise be allocated to those ratepayers in the absence of the agreement, (c) losing Miami-Dade County as a customer would be detrimental to the general body of ratepayers, and (d) Miami-Dade County negotiated the agreement at arm's length with FCG and Miami-Dade County approved the agreement as being in the best interest Miami-Dade County and its citizenry."

Indeed, MDWSD's purchase of services from FCG has long been recognized as of material significance to FCG. In a 2000 FCG general rate increase proceeding, the Commission's order notes that services to large customers like MDWSD (then known as the Miami-Dade Water and Sewer Authority) allowed FCG to spread the cost of FCG's recent purchase of the Homestead lateral "over a larger customer base, and provide the higher reliability and degree of safety..." (Order PSC-01-0316 issued February 5, 2001 in Docket No. 000768).

10. MDWSD did not receive notice of the filing of the FCG Petition or a copy thereof at the time of its filing with the Commission.

11. Subsequent to the filing of the FCG Petition, Commission Staff presented FCG with certain data requests. In response to Staff Data Request No. 1, FCG suggested that it had mis-stated in paragraph 11 of the FCG Petition that FCG “will recover its cost to serve [MDWSD] via the rates charged to [MDWSD].” FCG, however, repeated and elaborated upon the several benefits to FCG and its customers from the continuation of service to MDWSD at the rates agreed upon in the 2008 Agreement. A copy of the FCG response to Staff Data Request No. 1 is attached hereto as Exhibit D.

12. On February 17, 2009, after receiving and responding to additional Staff data requests, FCG unilaterally, and without notice to MDWSD, withdrew the 2008 Amendment from the Commission’s consideration.

13. Upon information and belief, the Commission docket opened to consider the FCG Petition, Docket 080672-GU, was closed administratively by the Commission on or about February 25, 2009.

14. By this Petition, MDWSD requests that the Commission either recognize that the 2008 Agreement is not subject to the Commission’s regulatory jurisdiction or approve the terms of the 2008 Agreement. In addition, MDWSD requests that the Commission order FCG to refund to MDWSD the difference between the 2008 Agreement rates and the rates which FCG has been charging, and MDWSD has been paying to FCG under protest, for service rendered on and after July 21, 2009. In support of these requests, MDWSD states as follows:

15. **The 2008 Agreement is Exempt from Commission Jurisdiction.** In footnote 2 on page 4 of the FCG Petition, FCG cites the exemption contained in Rule 25-9.034(1), Florida Administrative Code, which exempts contracts “by or between a public

utility and a municipality or R.E.A. cooperative.” FCG renders its interpretation of the exemption language to suggest that the exemption may apply only to a “municipal utility” but notes that FCG does not oppose an interpretation of the exemption which would include Miami-Dade County and thus “obviate the need for the instant petition.”

16. MDWSD and FCG agree that the 2008 Agreement falls within the exemption in Rule 25-9.034(1) as Miami Dade County is a “municipality” and the transportation service being rendered by FCG is rendered on behalf of the utility department of Miami-Dade County, MDWSD. For this reason, MDWSD asserts that the 2008 Agreement is exempt from Commission rate-setting jurisdiction in the same manner that other transportation service agreements between natural gas transmission companies and municipalities are exempt.

17. **The 2008 Agreement is a special contract not specifically covered by FCG’s standard approved rate schedules which provides cost benefits to FCG customers and avoids the loss of MDWSD as a transportation customer.** As indicated earlier in this Petition, FCG withdrew the FCG Petition without consulting with MDWSD. Such withdrawal was not in accordance with the terms of the 2008 Agreement. This Petition is filed to request recognition of the exemption of the 2008 Agreement from Commission rate consideration¹ or, in the alternative, to obtain Commission authorization for FCG to provide transportation services to MDWSD pursuant to the terms of the 2008 Agreement as a special contract, in recognition of the significant potential for loss of MDWSD as a FCG transportation customer.

¹ MDWSD notes that the 1998 Agreement was not presented for Commission approval and revenue for the past ten (10) years from the rendition of transportation services by

18. MDWSD and FCG confirmed the applicability of FCG's Contract Demand Service Rate Schedule in Article I, section 1 of the 2008 Agreement. The 2008 further recognizes that "[e]xcept to the extent expressly modified by the terms of this Agreement, all service rendered by [FCG] under this Agreement shall be provided pursuant to the terms and conditions of [FCG's] tariff, ..." The terms in the 2008 Agreement which expressly modify terms in the above-referenced tariff rate schedule and thus are not specifically covered by such schedule are as follows:

- Article V provides FCG certainty of the recovery of a minimum level of revenue by establishing a minimum annual volume of 1,250,000 therms per year and a maximum daily quantity of 24,500 therms, subject to increases as may be negotiated between the parties;
- transportation rates are identified in Article VII as (1) \$.01/therm for the Alexander Orr Water Treatment Plant; (2) \$.03/therm for the Hialeah Lime Reclamation Facility, and (3) \$.03/therm for the South District Wastewater Treatment Plant;
- Article IX contains full requirements commitments whereby MDWSD commits to using only FCG for the transportation of natural gas to the above-described facilities;
- Article I provides a ten year term; and
- the agreement is required to retain existing transportation services and associated revenue for FCG and its customers.

FCG on behalf of MDWSD, one of FCG's largest customers (if not the largest) was included in annual reporting to the Commission.

19. Since the date of withdrawal by FCG of the FCG Petition, MDWSD and FCG endeavored to reach a new agreement, however, such efforts were unsuccessful largely due to the fact that MDWSD remains convinced that the 2008 Agreement either is exempt from Commission jurisdiction, as was the 1998 Agreement, or FCG should not have withdrawn the 2008 Agreement prior to formal Commission consideration of the FCG Petition.

20. By letter dated June 22, 2009, FCG advised MDWSD that FCG was invoking the thirty (30) day termination notice provided in the Amendment. Further, FCG advised MDWSD that it would charge MDWSD "the approved tariff rates applicable to Miami-Dade's class of service." See FCG letter dated June 22, 2009, attached hereto as Exhibit E. The new rates being charged by FCG increased MDWSD bills by more than 1000%, including the assessment of demand and service rate charges never before assessed to MDWSD.

21. It hardly needs to be stated that MDWSD is now an extremely dissatisfied customer of CGT. Bills have been rendered by FCG and paid by MDWSD, under protest and subject to refund, pending the Commission's response to this Petition. MDWSD has initiated discussions with a competing natural gas transmission company with the expectation that service can be obtained much cheaper than the current tariff rate being charged by FCG.

22. It is clear to MDWSD that FCG withdrew the FCG Petition prior to the Commission ever having had the opportunity to consider it due to some proverbial reading of the Commission Staff tea leaves. According to FCG, the tea leaves indicated that Staff would not recommend that the Commission approve the rate set forth in the

2008 Agreement. MDWSD presents the 2008 Agreement to the Commission once again, with FCG concurrence, to request either Commission recognition that its terms are not subject to Commission jurisdiction or the issuance of Commission authorization to FCG to continue to provide service to MDWSD pursuant to its terms. MDWSD notes that the Miami-Dade County Board of County Commissioners has not authorized MDWSD to use FCG's services under any terms inconsistent with the 2008 Agreement. Since FCG withdrew the FCG Petition prior to any official Commission action, FCG and MDWSD remain in a quandary to this date. In short, Commission action is required and MDWSD requests Commission action consistent with one of the alternative remedies presented in this Petition.

23. MDWSD acknowledges that the terms of the 2008 Agreement suggest that the 2008 Agreement may no longer be in force and effect since the Commission has not approved the Agreement and 180 days have expired since it was signed by the parties. However, as noted in this Petition, neither Miami-Dade County or its utility department, MDWSD, were consulted regarding FCG's unilateral decision to withdraw the Agreement from Commission consideration. MDWSD does not wish to pursue civil action at this time against FCG in light of what may be considered FCG's bad faith and breach of Article XII of the 2008 Agreement which provides, in pertinent part: "(1) Neither [FCG] nor [MDWSD] or its agents, shall be liable for damages to the other for any act, omission, or circumstance occasioned by or in consequence of ... the binding order of any court or governmental authority, which has been resisted in good faith by all reasonable legal means; ... (2) Such cause or contingencies affecting the performance by [FCG], Third Party Supplier, or [MDWSD], however, shall not relieve [FCG] or

[MDWSD] of liability in the event of its concurrent negligence, or in the event of its failure to use due diligence to remedy the situation and remove the cause in an adequate manner” MDWSD has consulted with FCG representatives and is confident that FCG will sign any document necessary to confirm the effectiveness of the terms of the 2008 Agreement upon favorable Commission reaction to this Petition.

WHEREFORE, MDWSD requests that the Commission either recognize that the 2008 Agreement is exempt from Commission jurisdiction pursuant to Rule 25-9.034(1), F.A.C. or approve the gas transportation arrangements contained in the 2008 Agreement as a special contract under the same rule.

Dated: November _____, 2009

Joseph A. Ruiz, Jr.
Deputy Director - Operations
Miami-Dade County
Water and Sewer Department
3071 SW 38 Avenue, Suite 514
Miami, FL 33146-1520
Telephone: (786) 552-8200
Facsimile: (786) 552-8513

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email and U.S. mail to Mary Anne Helton, Office of the General Counsel, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL32399-0850; Matthew Feil, Akerman Senterfitt, 106 E. College Avenue, Suite 1200, Tallahassee, FL 32301; and Elizabeth Wade, AGL Resources, Inc., Location 1470, Ten Peachtree Plaza, Atlanta, GA 30309, this _____ day of November, 2009.

Joseph A. Ruiz, Jr.

EXHIBIT A

1998 Natural Gas Transportation Service Agreement Between
NUI Corporation represented by City Gas Company of Florida and
Miami-Dade County

EXHIBIT B

First Amendment to Natural Gas Transportation Service Agreement Between
Florida City Gas and Miami-Dade County

EXHIBIT C

Natural Gas Transportation Service Agreement between Pivotal Utility Holdings, Inc.
d/b/a Florida City Gas and Miami-Dade County for the Miami-Dade Water and Sewer
Department dated August 28, 2008 ("2008 Agreement")

EXHIBIT D

FCG response to Staff Data Request No. 1

EXHIBIT E

FCG letter to Miami-Dade Water and Sewer Department dated June 22, 2009

Jack Langer

From: Armstrong, Brian [barmstrong@ngn-tally.com]
Sent: Monday, August 31, 2009 5:25 PM
To: Jack Langer
Subject: RE: subcontract work for Langer Energy Consulting, Inc.

Jack,

I hereby accept the arrangement indicated on behalf of Nabors, Giblin & Nickerson, PA with the understanding that work to be performed shall be on behalf of government utilities or utility authorities. As we discussed, NGN prides itself in representing only government owned utility systems. Please provide me with the documents indicated for my review. Thank you and we look forward to working with you. Brian

From: Jack Langer [mailto:jlanger1@bellsouth.net]
Sent: Thu 8/27/2009 11:04 AM
To: Armstrong, Brian
Cc: 'Rutz, Joseph A. (WASD)'
Subject: subcontract work for Langer Energy Consulting, Inc.

Dear Brian,

As a follow up of our phone conversation this morning, this will advise that LEC wishes to hire you in a sub-contractor basis to assist in legal work that may come before the PSC. This arrangement can be a very simple agreement where you agree to perform certain duties as directed from time to time at the rate of \$200 per hour. You may send your invoice to my attention on a monthly basis, along with notation of activities performed and you will be reimbursed directly by us. At this point in time we do not know how long the project will take but we would like to have your acceptance as soon as possible so that we may send data for your review. If you agree with the above, please send your acceptance email at your earliest. As soon as acceptance is received we will fill you in on details and share all information with you.

Our information is as follows:

Langer Energy Consulting, Inc.
913 Andalusia Avenue
Coral Gables, FL 33134

Phone: 305.444.1731
Cell: 305.216.1315
Fax: 305.444.1731
Email: jlanger1@bellsouth.net

I may also be reached at my N. C. residence @ 828.526.9151

Thank you for your attention to this matter. I look forward to working with you as we get this PSC related issue resolved. Should you have any questions concerning this agreement please call at your convenience.

Sincerely,

EXHIBIT "C"

1

Docket No. 090539-GU
MDC Response to FCG First POD
Item No 6
MDWASD-1