

**Diamond Williams**

090539-GU

**From:** Ann Bassett [abassett@lawfla.com]  
**Sent:** Thursday, March 24, 2011 4:38 PM  
**To:** Filings Electronic <Filings@PSC.STATE.FL.US  
**Cc:** Melvin Williams; Shannon Pierce; Floyd Self; David Hope; Henry Gillman; Anna Williams; Martha Brown  
**Subject:** Docket No. 090539-GU  
**Attachments:** 2011-03-24, 090539, FCG's Response to MDWASD's Motion to Compel.pdf

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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' Response to Miami-Dade County's Motion to Compel Discovery and Impose Sanctions

Total Number of Pages is 13

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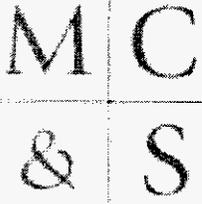
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DOCUMENT NUMBER-DATE

01970 MAR 24 =

FPSC-COMMISSION CLERK

3/24/2011



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March 24, 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'
Response to Miami-Dade County's Motion to Compel Discovery and Impose Sanctions in the above
referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

[Handwritten signature of Floyd R. Self]

Floyd R. Self

FRS/amb
Enclosure

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

DOCUMENT NUMBER - DATE
01970 MAR 24 =
FPSC - COMMISSION CLERK

**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 Miami-Dade Water and Sewer Department. | DOCKET NO. 090539-GU  
Date Filed: March 24, 2011

**FLORIDA CITY GAS' RESPONSE TO MIAMI-DADE COUNTY'S MOTION TO COMPEL DISCOVERY AND IMPOSE SANCTIONS**

Florida City Gas ("FCG"), pursuant to Rule 28-106.204, hereby responds to the Motion to Compel ("Motion") served on March 17, 2011 by Miami-Dade Water and Sewer Department ("MDWASD"), requests that the Commission deny the Motion to Compel, and states:

1. MDWASD has moved to compel the production of documents from FCG putatively aimed at determining FCG's incremental cost to provide natural gas to its Alexander Orr Water Treatment Plant and the Hialeah Water Treatment Plant. MDWASD's Motion, which is framed in false and inflammatory descriptions of FCG's responses, is wholly without merit, misapprehends the appropriate scope of discovery, and seeks, for all practical purposes, legal advice from FCG as to cases and orders that might facilitate the presentation of MDWASD's case.<sup>1</sup>

2. FCG has fully and completely responded to the discovery sought. In fact, FCG has gone beyond the normal scope by providing information, documents, and responses even when an objection alone would have complied with the language and intent of the discovery rules. Thus, the Motion should be denied.

<sup>1</sup> As has become increasingly common in its motions, MDWASD spends considerable time falsely claiming that FCG has acted in bad faith, misled the MDWASD and the Commission, or otherwise violated various Commission rules. Those claims do not have anything to do with the appropriate standards for discovery under the Rules of Civil Procedure and the Uniform Rules. Therefore, FCG will not address those statements.

3. Moreover, because some of the information sought by MDWASD's discovery is not readily kept in the form and manner requested, FCG has gone to great lengths to retrieve boxes from storage in a good faith effort to obtain the requested information. Some of these original cost records are decades old and not used in the routine course of business and therefore not readily accessible. Despite their potential lack of relevance, FCG in good faith has undertaken the time and expense of retrieving these ancient documents and on March 23, 2011 supplemented its prior discovery responses with these and other materials. The process of supplementation is still ongoing.

4. MDWASD has claimed that responses served by FCG (i) evaded answering the questions or (ii) failed to provide complete answers, or (iii) provided legally insufficient objections. MDWASD failed to indicate which objection applies to which response. Thus, the basis for the Motion as to each disputed response is unknown. Nonetheless, FCG will respond as though the Motion was properly pled.

5. Responses to Interrogatories. FCG's responses to the Motion to Compel as to each identified interrogatory are as follows:

a. Response to Interrogatory 1 – the response to Interrogatory 1 is appropriate and responsive to the question asked. The question seeks information regarding FCG's largest customers, the incremental cost to serve these customers, and how said incremental costs were determined. FCG provides that it does not perform customer-specific incremental cost studies and accordingly such records do not exist. There is nothing in the rules of discovery that requires a litigant to create documents in any form other than as kept in the normal course of business. Accordingly, no such documents are required to be produced.

However, FCG did provide information responsive to this request in connection with its responses to Staff discovery, which is referenced in later FCG responses to MDWASD.

b. Response to Interrogatory 2 – the response to Interrogatory 2 is perfectly responsive to the question asked. The question seeks information regarding the maintenance of FCG’s pipelines. There is no issue in this proceeding that questions the quality or upkeep of pipelines serving MDWASD. Nonetheless, the response states that the maintenance is performed by FCG. The response is adequate, and no additional response is required.

c. Response to Interrogatory 18 – the response to Interrogatory 18 is perfectly responsive to the question asked. The question seeks information about depreciation of individual assets. The response states that assets are not individually depreciated, and the information does not, therefore, exist in the form requested. There is nothing in the rules of discovery that requires a litigant to create documents in any form other than as kept in the normal course of business. Individual depreciation records and information are not kept in the normal course of business. However, FCG has recently developed some information on depreciation in response to Staff discovery requests regarding depreciation. This information may be further responsive to this request. Although firm in its belief that no additional response is required, FCG will supplement to identify this additional information.

d. Response to Interrogatory 19 – the response to Interrogatory 19 is perfectly responsive to the question asked. The question asks who paid for the construction of certain assets. The response states the contractual requirements of payment, and indicates that FCG has no contrary information. However, FCG has recently identified some additional information that has been produced in response to Staff discovery that is responsive to this

request. Although firm in its belief that no additional response is required, FCG will supplement to identify this additional information.

e. Response to Interrogatory 21 – the response to Interrogatory 21 is perfectly responsive to the question asked, and incorporates previous responsive and applicable answers. It is not necessary to completely restate answers when a reference will meet the request. No additional response is required.

f. Response to Interrogatory 23 – the response to Interrogatory 23 is perfectly responsive to the question asked. The answer notes that the information requested is not in the possession or control of FCG. However, the answer goes beyond that required by the discovery rules in that it directs MDWASD to the public depository in which records responsive to the request are maintained. The burden of obtaining the records is the same between FCG and MDWASD. No additional response is required.

g. Response to Interrogatories 30 and 31 – the responses to Interrogatories 30 and 31 are appropriate. MDWASD asks FCG to conduct legal research on its behalf, and provide the results of that research to MDWASD. The rules of discovery are aimed at allowing for the discovery of facts. They are not for the purpose of obtaining free legal research or of obtaining the mental impressions and litigation strategy of opposing counsel. Further, such information, if any, is protected by the work product privilege, as FCG's legal counsel would have conducted such research to make legal argument in the post-hearing briefs. MDWASD has not, and can not, make a showing, pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure, that it "has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The objection to the interrogatories is correct. No additional response is required.

h. Response to Interrogatory 32 – the response to Interrogatory 32 is appropriate. The testimony of the witnesses has been filed. Further information as to a particular witness is, under the procedures established by the prehearing officer, to be obtained through cross examination and rebuttal. No additional response is required.

i. Response to Interrogatories 34 and 35 – the responses to Interrogatories 34 and 35 are complete. The questions ask if a witness conducted an incremental cost study. The witness has provided testimony describing what she did and did not do. The answer references her testimony. No additional response is required. FCG notes that subsequent responses to discovery and FCG's response to MDWASD's Motion to Strike Rebuttal Witness Heintz provide further information and illumination on the cost study/incremental cost dispute and why MDWASD does not understand FCG's position and evidence on this issue. FCG incorporates into this response such additional discovery responses and FCG's response to MDWASD's Motion to Strike Portions of Mr. Heintz' rebuttal filed on March 23, 2011.

j. Response to Interrogatory 37 - The response to Interrogatory 37 is complete. The question asks for a witnesses reasoning as to an issue. Her reasoning is set forth in her testimony. The answer provides the specific pages and lines, and provides specific references to other discovery responses in which the reasoning is set forth. No additional response is required.

k. Response to Interrogatories 44, 46, and 48 - The responses to Interrogatories 44, 46, and 48 are appropriate. The questions essentially ask why FCG's discovery responses are incomplete. FCG has responded to each and every discovery response in full compliance with the Rules of Civil Procedure and the Uniform Rules. MDWASD's interrogatories are argumentative and reflect its opinion of FCG's evidence or legal position.

Snide aspersions are an inappropriate means for discovery of such factual evidence. The responses are adequate, and no additional responses are required.

l. Response to Interrogatory 45 - The response to Interrogatory 45 is complete. The interrogatory asks questions regarding the maintenance of documents. The answer accurately answers the question posed. No additional response is required. FCG notes that subsequent pleadings and discovery responses have further expanded on this subject and FCG would suggest that MDWASD read those subsequent materials.

m. Response to Interrogatory 50 - The response to Interrogatory 50 is appropriate. MDWASD asks for FCG's litigation strategy regarding retaining expert witnesses. The interrogatory has absolutely no relevance to the substance of the testimony of the witness, and is in no way calculated to lead to the discovery of admissible evidence. Nonetheless, FCG noted that information applicable to the question was contained in the expert witness's testimony. The response is adequate, and no additional response is required. FCG notes that this request is based upon MDWASD not understanding the purpose and context of Mr. Heintz' rebuttal and FCG incorporates herein its response to MDWASD's Motion to Strike Portions of Mr. Heintz' Rebuttal Testimony filed on March 23, 2011.

n. Response to Interrogatories 58 and 59 - The responses to Interrogatories 58 and 59 are appropriate. MDWASD asks for FCG's opinion of what action, if any, the Commission should take in this case. The questions are designed for nothing more than annoyance. *See*, Rule 1.280(c), Fla. R. Civ. P. Questions regarding the Commission's intent are not capable of being answered by FCG, and should be directed to the Commission. The responses are adequate, and no additional responses are required.

o. Response to Interrogatory 62 – the response to Interrogatory 62 is appropriate. The question asks for information about the investment in two miles of incremental pipe serving MDWASD. The response states the numbers were not corroborated at the time of answering the interrogatory. However, FCG has recently identified some additional information that has been produced in response to Staff discovery that is responsive to this request. Although firm in its belief that no additional response is required, FCG will supplement to identify this additional information.

p. Response to Interrogatory 63 – the response to Interrogatory 63 is perfectly responsive to the question asked. The question asks about an exhibit used by a witness in her testimony. The answer describes her reasoning, and further provides specific reference to other responsive discovery answers. No additional response is required. FCG notes that subsequent FCG responses to Staff discovery may provide additional information on this subject and FCG would suggest that MDWASD review such responses.

q. Response to Interrogatory 64 – the response to Interrogatory 64 is perfectly responsive to the question asked. The question asks about an exhibit used by a witness in her testimony. The answer describes her reasoning for using particular pages of an exhibit in her testimony, and further provides the complete document. No additional response is required.

r. Response to Interrogatories 66 and 67 - The responses to Interrogatories 66 and 67 are perfectly responsive to the question asked, and incorporate and provide specific references to responsive and applicable discovery responses. The discovery rules do not require a party to completely restate answers when a reference will meet the request. The responses are adequate and responsive, and no additional responses are required.

6. Responses to Requests for Production. FCG's responses to the Motion to Compel as to each identified Request for Production of Documents are as follow:

a. Response to POD 1 – The response to POD 1 is appropriate. MDWASD has requested all records for the maintenance of pipelines serving the plants, without any limitation on time or scope. Such a broad, unlimited and open-ended request is clearly subject to the objections posed. Further, there is no issue in this proceeding that questions the quality or upkeep of pipelines serving MDWASD. Given the request, the response was appropriate.

b. Responses to POD 2 and 5 – The responses to POD 2 and 5 are appropriate. MDWASD has requested all documents related to the 1998 Agreement, the 2008 Agreement (there was no 2008 “Agreement” since the TSA was prepared in non-compliance with the Commission’s requirements for such an “Agreement”) and the withdrawn 2008 petition. Despite the broad, unlimited and open-ended request, FCG has agreed to produce the documents as they are kept in the normal course of business. FCG has provided additional information through responses to Staff discovery and the supplementation of previous responses as additional documents have been identified. FCG has not, however, and will not provide privileged materials. Those responses are appropriate and responsive.

c. Response to POD 7 – The response to POD 7 is appropriate. MDWASD has requested all CRA reports, without any reasonable limitation on time. Despite the broad, unlimited and open-ended request, FCG has agreed to produce the documents since the last rate case in 2004, which is a reasonable time frame. That response is appropriate and responsive.

d. Response to POD 8 – The response to POD 8 is appropriate. The response incorporates and provides specific reference to a responsive and applicable discovery response, including the documents produced in that response. The discovery rules do not require a party to

completely restate answers when a reference will meet the request. The response is adequate and responsive.

e. Response to POD 9, 25 and 26 – The response to POD 9, 25 and 26 are appropriate. MDWASD asks FCG to conduct legal research on its behalf, and provide the results of that research to MDWASD. The rules of discovery are aimed at allowing for the discovery of facts. They are not for the purpose of obtaining free legal research or of obtaining the mental impressions and litigation strategy of opposing counsel. The objection to the PODs is correct. No additional response is required.

f. Response to POD 13 – The response to POD 13 is appropriate. MDWASD has requested all surveillance reports since 1998, without any suggestion of their relevance. Despite the broad, unlimited and open-ended request, FCG has agreed to produce the documents since the last rate case in 2004, which is a reasonable time frame. That response is appropriate and responsive.

g. Response to POD 20 and 21 – The responses to POD 20 and 21 are appropriate. MDWASD has requested all documents related to the construction of the pipe serving MDWASD. The response noted the volume, but nonetheless made reasonable efforts to obtain the documents and produce them as they are kept in the normal course of business. Given the age and nature of the documents, along with other factors including ownership changes, FCG noted that it could not guarantee their completeness. That response is appropriate and responsive. However, note that on March 23, 2011, FCG has filed a supplemental discovery response with documents discovered as a result of its efforts to be cooperative and compliant with MDWASD's broad and unlimited requests.

h. Response to POD 23 – The response to POD 23 is appropriate. The response incorporates and provides specific reference to a responsive and applicable discovery response, including the documents produced in that response. The discovery rules do not require a party to completely restate answers when a reference will meet the request. The response is adequate and responsive.

i. Response to POD 27 – The response to POD 27 is appropriate. The response incorporates and provides specific reference to a responsive and applicable discovery response, including the documents produced in that response. The discovery rules do not require a party to completely restate answers when a reference will meet the request. The response is adequate and responsive.

7. As a supplement to the responses set forth herein, FCG requests that the Commission grant a protective order preventing the disclosure of answers and documents that call for the undersigned's legal research and analysis, mental impressions, litigation strategies on the basis that MDWASD has failed to demonstrate reasonable necessity for those documents to resolve the docket issues.

MDWASD's Request for Penalties and Sanctions

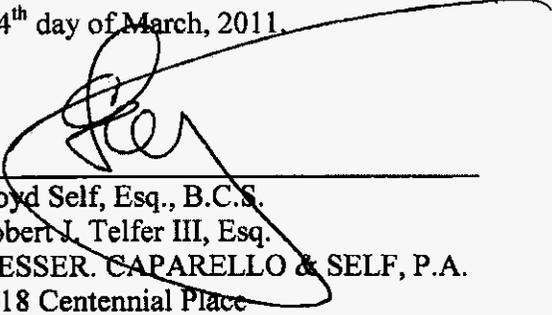
8. Rule 1.380(2), Florida Rules of Civil Procedure, as adopted by Rule 28-106.206, Florida Administrative Code, requires that any Motion to Compel "must include a certification that the movant, in good faith, has conferred or attempted to confer with the person or party failing to make discovery in an effort to secure the information or material without court action." Rule 1.380(4), Florida Rules of Civil Procedure, provides that an award of expenses, including attorney's fees, is not available in cases in which the required effort at informal disposition has been made, and the statement required by Rule 1.380(2), Fla. R. Civ. P. has not been included in

the motion.” The Motion does not include the required statement, and the request for an award of expenses, including attorney’s fees, must be denied.

9. Moreover, in an effort to reach an amicable resolution to MDWASD’s purported issues surrounding the discovery, counsel for MDWASD and the undersigned counsel had conferred regarding MDWASD’s request for additional materials. During such communications, counsel for MDWASD and the undersigned agreed to an additional, set time within which the undersigned would provide said additional materials. However, despite such agreement and without conferring with the undersigned, Counsel for MDWASD proceeded to file the Motion well before the end of the agreed upon time period. Such bad faith and unprofessional conduct alone should be a sufficient basis on which the Motion should be denied.

WHEREFORE, for the reasons set forth herein, Florida City Gas requests that the Commission deny the Motion to Compel filed by Miami-Dade Water and Sewer Department.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of March, 2011.



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**CERTIFICATE OF SERVICE**

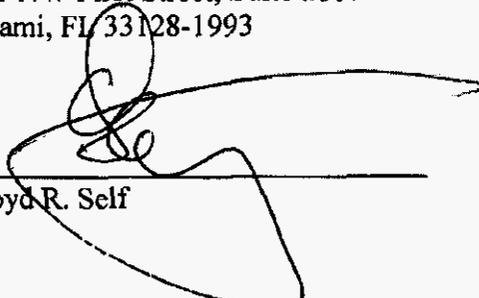
I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U.S. Mail this 24<sup>th</sup> day of March, 2011.

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