

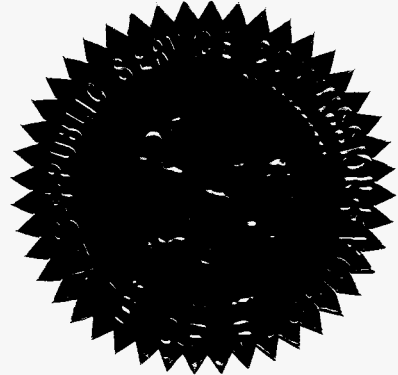
BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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.

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PROCEEDINGS: PREHEARING CONFERENCE

COMMISSIONER  
PARTICIPATING: CHAIRMAN ART GRAHAM  
PREHEARING OFFICER

DATE: Thursday, May 5, 2011

TIME: Commenced at 9:30 a.m.  
Concluded at 10:20 a.m.

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

REPORTED BY: JANE FAUROT, RPR  
Official FPSC Reporter  
(850) 413-6732

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## 1 APPEARANCES:

2 FLOYD R. SELF, ESQUIRE, and ROB TELFER,  
3 ESQUIRE, Messer Law Firm, Post Office Box 15579,  
4 Tallahassee, Florida 32301, and SHANNON PIERCE, ESQUIRE,  
5 appearing on behalf of Florida City Gas.

6 HENRY N. GILLMAN, ESQUIRE, and DAVID STEPHEN  
7 HOPE, ESQUIRE, 111 Northwest 1st Street, Suite 2800,  
8 Miami, Florida 33128-1993, appearing on behalf of  
9 Miami-Dade County.

10 ANNA WILLIAMS, ESQUIRE and MARTHA BROWN,  
11 ESQUIRE, Florida Public Service Commission, 2540 Shumard  
12 Oak Boulevard, Tallahassee, Florida 32399-0850,  
13 appearing on behalf of the Florida Public Service  
14 Commission Staff.

15 SAMANTHA CIBULA, ESQUIRE, Florida Public  
16 Service Commission, 2540 Shumard Oak Boulevard,  
17 Tallahassee, Florida 32399-0850, Advisor to the Florida  
18 Public Service Commission.

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## P R O C E E D I N G S

1  
2           **CHAIRMAN GRAHAM:** Good morning, everyone. Let  
3 the record show it's Thursday, May 5th, 2011, about  
4 9:30 a.m., and this is the prehearing for Docket Number  
5 090539-GU.

6           Let's call the meeting order, and see if I can  
7 get staff to read the notice.

8           **MS. WILLIAMS:** By notice issued April 15th,  
9 2011, the time and place was set for this Prehearing  
10 Conference in Docket Number 090539-GU, petition for  
11 approval of special gas transportation service agreement  
12 with Florida City Gas by Miami-Dade County through  
13 Miami-Dade Water and Sewer Department.

14           The purpose of this prehearing conference is  
15 set forth in that notice.

16           **CHAIRMAN GRAHAM:** Let's take appearances.  
17 Who's here for Miami-Dade?

18           **MR. GILLMAN:** Henry Gillman on behalf of  
19 Miami-Dade County.

20           **MR. HOPE:** David Stephen Hope, Assistant  
21 County Attorney, on half of Miami-Dade County.

22           **MR. SELF:** Good morning, Mr. Chairman. Floyd  
23 Self and Rob Telfer of the law firm Messer Caparello and  
24 Self, appearing on behalf of Florida City Gas. Also  
25 with us today is the in-house counsel, Shannon Pierce,

1 with AGL Resources, the parent of Florida City Gas.

2           **CHAIRMAN GRAHAM:** And one more time, I missed  
3 your last name.

4           **MR. SELF:** Telfer, T-E-L-F-E-R.

5           **CHAIRMAN GRAHAM:** Thank you.

6 Commission staff.

7           **MS. WILLIAMS:** Anna Williams, Commission legal  
8 staff.

9           **MS. BROWN:** And Martha Carter Brown,  
10 Commission legal staff.

11           **MS. CIBULA:** Samantha Cibula, Commission  
12 Advisor.

13           **CHAIRMAN GRAHAM:** Okay. Staff, is there any  
14 preliminary matters that we need to address?

15           **MS. WILLIAMS:** Yes, Mr. Chairman. Staff would  
16 like to note that there are several pending motions,  
17 including Miami-Dade's motion in limine, and Florida  
18 City Gas's motion to disqualify Miami-Dade's lawyer and  
19 witness, Brian Armstrong.

20           Staff recommends that the Prehearing Officer  
21 hear oral argument on these motions when we get to the  
22 pending motion section, and allow each party five  
23 minutes per motion for argument.

24           **CHAIRMAN GRAHAM:** Okay. Then we'll wait until  
25 we get to the pending motions, and we'll be giving each

1 side five minutes. Sounds good.

2 All right. Let's go through the draft  
3 prehearing order. I'll call the sections out, and I  
4 want for the parties to tell me if there's any  
5 corrections or changes that need to happen. I will be  
6 moving pretty quickly, so keep up.

7 Section I, case background. Section II,  
8 conduct of proceedings. Section III, jurisdiction.

9 **MR. SELF:** Mr. Chairman, I don't know if it's  
10 appropriate or not, but perhaps under the jurisdiction  
11 section it may be appropriate to reference the  
12 Commission's order regarding jurisdiction in this  
13 matter.

14 **CHAIRMAN GRAHAM:** Staff.

15 **MS. WILLIAMS:** I don't believe that's  
16 appropriate, but -- I don't think it's necessary, but --

17 **CHAIRMAN GRAHAM:** Why so?

18 **MS. WILLIAMS:** We note in the case background,  
19 I believe, that the Commission determined it had  
20 jurisdiction, and we cite the order therein, so I don't  
21 think it's necessary under the jurisdiction section. It  
22 just lays out the relevant statutes.

23 **CHAIRMAN GRAHAM:** So you think this is going  
24 to make it duplicative?

25 **MS. WILLIAMS:** Exactly.

1                   **CHAIRMAN GRAHAM:** Is that a bad thing?

2                   **MS. WILLIAMS:** I don't like to repeat myself,  
3 but, yes, I do think it's unnecessary down there,  
4 because it has been established. But usually in the  
5 jurisdiction section, we merely mention the governing  
6 statutes. But if it's your preference, we could include  
7 it in there.

8                   **CHAIRMAN GRAHAM:** Mr. Self, are you fine with  
9 that, or do you want to see it again?

10                  **MR. SELF:** I'm fine either way. I just didn't  
11 know if you wanted it in there for additional  
12 completeness.

13                  **CHAIRMAN GRAHAM:** Well, we'll keep it simple.

14                  **MR. SELF:** That's fine. Thank you.

15                  **CHAIRMAN GRAHAM:** We'll give staff an easy  
16 one.

17                               Section IV, any questions? Section V,  
18 prefiled testimony. Section VI, order of witnesses.  
19 Section VII, basic positions.

20                  **MR. SELF:** Mr. Chairman, if I may.

21                  **CHAIRMAN GRAHAM:** Sure.

22                  **MR. SELF:** I know Florida City Gas, and I  
23 believe Miami-Dade Water and Sewer Department also filed  
24 some revised shorter positions. I think this version  
25 does not reflect those shorter versions, or does it?

1           **MS. WILLIAMS:** This version does include those  
2 shorter versions.

3           **MR. SELF:** Okay. Thank you.

4           **CHAIRMAN GRAHAM:** Okay. Section VIII. I'll  
5 go through these one-by-one, and I guess all I want to  
6 know is to see if there's any change in your positions.  
7 So, let's see, under Section VIII -- Issue Number 1, any  
8 change?

9           **MR. GILLMAN:** I would understand that Issue  
10 Number 1 was just going to be simply no, the position  
11 for both parties. I believe that was the stipulation.  
12 We're fine with the way it is written, but I thought --

13           **MS. WILLIAMS:** That is going to be a proposed  
14 stipulation, when we get down to that section about  
15 proposed stipulations. But just for now I left in those  
16 basic positions.

17           **MR. GILLMAN:** Okay. Because I thought that is  
18 where we were under Number VIII now.

19           **CHAIRMAN GRAHAM:** No, that's down in Section  
20 Number X, proposed stipulations.

21           **MR. GILLMAN:** Sorry. Thank you.

22           **CHAIRMAN GRAHAM:** Okay. Issue 2. Issue 3.  
23 Issue 4. Issue 5. Issue 6. Issue 7. Issue 8.  
24 Issue 9. Issue 10. And, last, Issue 11.

25           I'm glad to see you guys hammered most of this

1 out; it makes my job a lot easier.

2 Okay. Section IX, exhibit list.

3 **MS. WILLIAMS:** Mr. Chairman, staff would like  
4 to remind the parties that staff will be preparing a  
5 Comprehensive Exhibit List which will include all of the  
6 exhibits that staff wants to have entered into the  
7 record at hearing, and it will also include the prefiled  
8 exhibits for purposes of identifying those at hearing.

9 Staff has informed the parties that we will  
10 provide a copy of that Comprehensive Exhibit List to  
11 them prior to the hearing so they can determine whether  
12 or not they have any objection to those exhibits. Staff  
13 has also prepared a cover sheet that it would like the  
14 parties to use for any additional exhibits at hearing,  
15 and I have already distributed a copy and e-mailed a  
16 copy of that to the parties for use at the hearing.

17 **CHAIRMAN GRAHAM:** What does the cover sheet  
18 do?

19 **MS. WILLIAMS:** It's a uniform way of  
20 identifying exhibits for easy reference, so that we all  
21 use the same terminology in referring to different  
22 documents.

23 **CHAIRMAN GRAHAM:** So it helps everything move  
24 a little quicker. I like quicker.

25 Section X.



1           **MS. WILLIAMS:** Staff would note here, also,  
2 that as Mr. Gillman stated, there is a proposed  
3 stipulation on Issue 1, and that will be reflected in  
4 the prehearing order.

5           **CHAIRMAN GRAHAM:** Does that cover your issue,  
6 Mr. Gillman?

7           **MR. GILLMAN:** Yes. Thank you.

8           **CHAIRMAN GRAHAM:** Okay. Section XI.

9           **MS. WILLIAMS:** Mr. Chairman, staff notes that  
10 there are several pending motions, as I mentioned  
11 earlier. Miami-Dade has an outstanding motion for  
12 summary and final order approving the 2008 agreement.  
13 That motion will be considered by the full Commission at  
14 the May 24th Agenda Conference, so we won't be  
15 discussing that motion today. But Miami-Dade also has a  
16 motion to compel discovery and impose sanctions  
17 outstanding. The parties are currently working with  
18 staff on that to get that outstanding request resolved,  
19 and I believe that they have indicated they would be  
20 willing to stay after the prehearing conference today to  
21 meet with us to work through and see if we can work  
22 through some of those issues.

23           Also, there are two other motions, the two I  
24 mentioned at the beginning. The motion in limine filed  
25 by Miami-Dade as well as Florida City Gas's one

1 outstanding motion, which is the motion to disqualify.  
2 And as staff indicated before, we recommend that you  
3 hear oral argument on both of those motions and that we  
4 do that at this time, starting with the motion in  
5 limine, five minutes per side.

6 **CHAIRMAN GRAHAM:** Okay. Let's start with the  
7 first one. The motion in limine.

8 **MR. HOPE:** Good morning, Mr. Chair. David  
9 Stephen Hope, Assistant County Attorney. Our papers are  
10 pretty express, but in a nutshell let me tell you what  
11 is going on here and why this is so important. It is  
12 Florida City Gas's burden here to prove that, as it has  
13 alleged, the rates in the 2008 agreement don't meet its  
14 costs. And under the tariff which was reflected in the  
15 2008 agreement, there was a requirement to do an  
16 incremental cost study. And what Florida City Gas has  
17 put forward in the guise of, and through discovery, what  
18 it is calling an incremental cost study, it has changed  
19 the basis of the analysis which results in the original  
20 cost information, which starts any analysis.

21 What happened here was, first, numbers were  
22 used which came from a redacted memo. That memo in  
23 discovery shows clearly that those initial numbers for  
24 two plants, the Alexander Warren and Hialeah plants,  
25 those numbers that they used initially and proposed as

1 initial costs were by-pass estimates from engineers in  
2 1997. Through discovery it was found that the full memo  
3 said that these were by-pass costs. Florida City Gas  
4 then went back and now in its response says that it has  
5 original cost information which Miami-Dade is trying to  
6 exclude via this motion.

7 Those numbers are not original cost numbers.  
8 The problem that Miami-Dade has had all along is there  
9 is no original continuing property records which Florida  
10 City Gas was required to keep pursuant to Florida  
11 Administrative Code. Even more so, there are no  
12 corroborative documents to show any of the numbers that  
13 they are using in their analysis.

14 As Florida City Gas has said, and as they have  
15 attached in their response to this motion, they have  
16 shown, one, illegible general ledgers which show asset  
17 classes associated with either Miller Gas, which was the  
18 entity that was required of which the Alexander Orr  
19 assets were part of, and also the Hialeah plant.

20 The problem still is they are required by law  
21 to have the continuing property records, and those  
22 records will show what the original investment were for  
23 the Miami-Dade assets, and then from there you go and  
24 you can do your depreciable life and your other sorts of  
25 allocations.

1                   Here what also isn't being said by Florida  
2 City Gas is they do not have the continuing property  
3 records, they do not have an original investment, and  
4 instead of saying, okay, we don't have an original  
5 investment, so we are going to do an original investment  
6 cost study and use engineers to come back and  
7 interpolate what those numbers are via Handy Whitman or  
8 other techniques, they have now used a purchased price  
9 allocation method which is also unverifiable, it's  
10 uncorroborated, and it allocates at the end of the day  
11 over 50 percent of the purchase price cost to Miami-Dade  
12 for assets which contributed -- which were just one mile  
13 of pipe of a system that was purchased where there were  
14 4,500 residents and 75 customers, and it just goes into  
15 the overall methodology of these are our numbers, we  
16 don't have any real backup to show you these numbers,  
17 but these are our numbers, this is our methodology, take  
18 it or leave it. And these numbers prove out that the  
19 rates in the agreement don't satisfy our costs.

20                   In addition, the overall analysis that was  
21 done, which purports to be an incremental cost analysis,  
22 was also revised. That analysis, indeed, is also an  
23 analysis which does, a, cost allocation, which ends up  
24 doing a cost allocation and allocating the same exact  
25 costs to two facilities with different depreciable

1 lives, different asset classes, and it just doesn't make  
2 any sense.

3 Florida City Gas has also refused through this  
4 when it was shown that the allocation that was being  
5 done wasn't a customer specific or a customer-by-class  
6 specific allocation, but a class allocation, and shown  
7 that that was wrong, they have refused to change those  
8 numbers, because that would, indeed, change the rate and  
9 prove that the 2008 agreement does satisfy that cost.

10 The reason that it is imperative that these  
11 revisions not be allowed is because, one, as I stated  
12 initially, it is their burden to prove that the rates in  
13 the 2008 agreement do not meet their costs. They have  
14 not that burden, but Florida City Gas does not get to  
15 use discovery as a means of trying to focus in and  
16 sharpen their pencil and adjust their analyses time  
17 after time after time. Discovery is used as a vehicle  
18 for proving the credibility of witnesses --

19 **CHAIRMAN GRAHAM:** Mr. Stevens (sic), just to  
20 let you know, you hit five minutes. I'll give you a  
21 minute to conclude.

22 **MR. HOPE:** Thank you.

23 It is there for proving the credibility of the  
24 witnesses, testing ones facts, and verifying their data.  
25 That has not been done here. It's denying the county as

1 well as Commission staff the ability to do what should  
2 be done in discovery to debunk what they are saying, and  
3 the county is being prejudiced. And, therefore, the  
4 revisions to the direct and rebuttal testimony of  
5 Carolyn Bermudez and their expert, the rebuttal  
6 testimony of David Heintz and any supporting documents  
7 should be denied and not allowed to come into this  
8 proceeding. Thank you.

9 **CHAIRMAN GRAHAM:** Thank you very much.

10 Florida City.

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

12 Really, I just have three responses. First,  
13 we dispute Mr. Hope's statement that Florida City Gas  
14 bears the burden in demonstrating that the rates don't  
15 meet costs. The petition in this docket was filed by  
16 the water and sewer department, and they bear at least  
17 the burden of going forward with respect to  
18 demonstrating that the rates do meet costs.

19 But there's really two -- but the next two  
20 issues are really the key issues here. First is the  
21 fact that Florida City Gas is not required to do  
22 customer-specific cost studies, nor are we required to  
23 maintain our records segregated on a per customer basis.

24 The Commission periodically audits the  
25 company's records. They have had rate cases in the past

1 in which there have been full-blown audits. There has  
2 never been any indication that any of the company's  
3 records have been anything except kept in the manner in  
4 which they were supposed to be kept.

5 The problem is not that we don't have the  
6 records. The problem is we don't have the records in  
7 the way that Miami-Dade would like for us to have the  
8 records, but that's because we're not required to keep  
9 them that way. But notwithstanding that, what the  
10 company attempted to do when this issue of the rates  
11 came up two years or so ago is the company attempted to  
12 use the information that it had at the time that it  
13 thought was the original cost information for the Orr  
14 and Hialeah plants. And it was on the basis of that  
15 that the analysis was conducted at that time that led to  
16 the company's decision to withdraw the petition from the  
17 Commission's consideration, and it has also driven the  
18 process since with respect to the discussions that the  
19 parties have had, and ultimately the direct and rebuttal  
20 testimony that was filed in this case.

21 Notwithstanding the company's belief in the  
22 original cost information for those two plants, the  
23 company has nevertheless been searching for the last two  
24 years to try and ascertain what is, in fact, to verify  
25 and corroborate that information. Subsequent to the

1 filing of rebuttal testimony, but before the depositions  
2 of Carolyn Bermudez, who was FCG's witness on this  
3 matter, we identified the actual records and filed a  
4 supplemental discovery response with the Commission that  
5 provided spreadsheets and copies of the actual work  
6 order sheets that tie back to the spreadsheets that we  
7 provided where you can track those costs, and we  
8 determined that we, in fact, had the wrong numbers.

9           Once we ascertained that we had the wrong  
10 numbers, in our mind it was inappropriate to try and  
11 proceed on the basis of the testimony that had been  
12 filed with the incorrect numbers. When we go to the  
13 hearing, the witnesses are going to be asked to swear  
14 that the testimony they are giving is truthful, and the  
15 company could no longer do that. And so what we did was  
16 we substituted those two cost numbers for the Orr and  
17 Hialeah plants in the analysis and in the testimony, as  
18 well.

19           Well, the cost numbers are only the beginning,  
20 not the end of the process. And so by inserting those  
21 original cost numbers, they have to be flowed through to  
22 the rest of the analysis to get to the rates that are  
23 the crux of the issue here. And so there were, in fact,  
24 on the analysis that the company had performed, some  
25 changes, flow-throughs of those numbers. Also through



1 the discovery process, we had learned that some of the  
2 mathematical calculations were wrong, and so we  
3 corrected those. And so for Ms. Bermudez, the revised  
4 package that we filed on April 5th, it's about 28 pages,  
5 but, in fact, the number of pages of her direct and  
6 rebuttal testimony that had been affected, there were  
7 two pages of her direct and one page of her rebuttal  
8 testimony. And we even provided a strike and replace  
9 version so you could see what the changes were, and then  
10 we provided a complete set of the exhibits reflecting  
11 the changes.

12 The cost information was filed two weeks  
13 before Ms. Bermudez' deposition. And on the eve of what  
14 was supposed to be her scheduled deposition date, we  
15 identified the fact that we had these updated numbers  
16 based upon the original cost numbers. And we, in fact,  
17 postponed her deposition a week so that the department  
18 would have the opportunity to review and question her  
19 about those changes, which is what they did. Her  
20 deposition was nearly 12 hours long. The Commission  
21 staff participated and asked questions for several  
22 hours, as obviously did the department.

23 **CHAIRMAN GRAHAM:** Mr. Self, you are at five  
24 minutes. I'll give you a minute to conclude.

25 **MR. SELF:** So the bottom line here is it's

1 imperative to us that the Commission have the full and  
2 complete and accurate information. We dispute most of  
3 the contentions they have. Really their arguments go to  
4 either misunderstanding what the evidence is or  
5 arguments about the weight of the evidence. But the  
6 bottom line is is that through the discovery process we  
7 found the correct documents. We have made a few  
8 targeted corrections. We haven't changed the  
9 methodology. We are not introducing new witnesses.  
10 It's just the correction to those two numbers and the  
11 flow-through effects of that through the testimony, and  
12 we think the Commission needs that because that's the  
13 crux of the issue in this case. Thank you.

14 **CHAIRMAN GRAHAM:** Thank you. You know, it  
15 would have been a lot easier if you guys made this  
16 easier on me.

17 **MR. SELF:** I should add, Mr. Chairman, I wish  
18 we had had the numbers two years ago. This would have  
19 been a lot less painful, but, you know, it is what it  
20 is.

21 **CHAIRMAN GRAHAM:** There's a lot of detail to  
22 this. I'm going to reserve my ruling until the  
23 prehearing order, is that possible?

24 **MS. WILLIAMS:** Yes, Mr. Chairman, that's  
25 possible.

1                   **CHAIRMAN GRAHAM:** Okay. We'll do that.

2                   Let's move on to the other motion. Florida  
3 City, when you get a chance. Take your time.

4                   **MR. SELF:** Just one second.

5                   **CHAIRMAN GRAHAM:** If you guys will just give  
6 me five minutes. I should take a quick five-minute  
7 recess.

8                   **MR. SELF:** Sure.

9                   (Recess.)

10                  **CHAIRMAN GRAHAM:** Okay. Let's bring this back  
11 to order.

12                  Mr. Self, when you're ready.

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

14                  Our motion to disqualify and exclude Brian  
15 Armstrong as a lawyer and as a witness, there's really  
16 three aspects to this. The first argument pertains to  
17 disqualifying him as an attorney. The fact of the  
18 matter is is Mr. Armstrong has appeared in this case,  
19 and actually prior to this case as a lawyer. He has  
20 offered legal argument at the Commission's agenda  
21 conference with respect to the jurisdictional issue. He  
22 also appeared at the status conference and argued with  
23 Mr. Gillman with respect to issues that should be  
24 included and excluded. Even before the case started, he  
25 represented himself as an attorney in an attempt to

1 negotiate this matter. But, most importantly, in this  
2 docket he has appeared as an attorney.

3 Now, Miami-Dade says that Mr. Armstrong will  
4 not be entering an appearance at the hearing as a  
5 lawyer, but the fact of the matter is once he has  
6 appeared in the case as a lawyer, you can't unring that  
7 bell. You're either all in as a lawyer, or you're not  
8 in at all as a lawyer. And so once he has appeared in  
9 the case as a lawyer, he is a lawyer and he is subject  
10 to the rules regulating the professional practice of the  
11 Florida Bar as an attorney.

12 Now, one of those rules, and this kind of gets  
13 us to the second point, the first two arguments are  
14 really kind of linked; the second point is he has  
15 clearly filed, or Miami-Dade has filed his testimony as  
16 a witness in this case. And the Bar rule says that a  
17 lawyer shall not act as an advocate at trial if he or  
18 she becomes a witness. Well, Miami-Dade would say,  
19 well, at trial he's not going to be acting and appearing  
20 as a lawyer. But I disagree with that. It's clear from  
21 reading his testimony that he is, in fact, acting as an  
22 advocate. He provides extensive argument and analysis  
23 regarding the Commission's jurisdiction and other legal  
24 issues. He does things like suggest a potential motion  
25 in limine, potential cross-examination of witnesses, and

1 these are all the kinds of functions that a lawyer  
2 performs at the trial. So he is, in fact, performing as  
3 a lawyer, as an advocate, and as a witness in the case.

4 He comments on the credibility of witnesses,  
5 which Rule 4-3.4E is very clear that lawyers are not  
6 supposed to be stating their opinion, asserting personal  
7 knowledge of facts they don't have, and those sorts of  
8 things. Mr. Armstrong has no personal knowledge of any  
9 of the facts leading up to this case. He was clearly  
10 retained by the department's consultant in this matter  
11 to provide legal advice and counsel, and that is, in  
12 fact, what he has been doing.

13 And the only remedy that is appropriate in  
14 these circumstances is to disqualify him both as a  
15 lawyer and as a witness in the case. Now, that remedy  
16 may strike you as a bit severe, but the fact of the  
17 matter is is Miami-Dade has four other people who are in  
18 this case as witnesses. You've got their expert  
19 consultant with respect to rates. You have got their  
20 consultant that helped negotiate the contract, and then  
21 you've got the two department people that are in the  
22 case that are involved in how all of this evolved over  
23 time. So by disqualifying Mr. Armstrong, you are not  
24 putting the department at any kind of disadvantage.

25 We've looked and we can't actually find a case

1 that is at all like the present situation where you have  
2 a person who has been a lawyer in the case who is now  
3 also being a witness. And I think the reason for that  
4 is because it just doesn't happen, and so the  
5 appropriate thing is to disqualify him and to strike all  
6 of his testimony.

7 Our third argument in the alternative is that  
8 we believe that certain portions of Mr. Armstrong's  
9 testimony should be stricken. Fundamentally, there's  
10 two basic issues. One is he is providing a lot of legal  
11 commentary and analysis. And, secondly, he is providing  
12 friendly -- basically, friendly cross-examination and  
13 bolstering of the other Miami-Dade witnesses in this  
14 case. For example, at Page 18 of his direct testimony:

15 "Question: Does Miami-Dade's cost of service  
16 Witness Saffer, agree with the position of Miami-Dade as  
17 you have just expressed them?

18 "Answer: Yes. Mr. Saffer testifies that he  
19 confers in each of these positions based upon his many  
20 years of service in many proceedings and in several  
21 states as the cost of service expert. Mr. Saffer  
22 further presents evidence that the revenue derived by  
23 FCG under the 2008 agreement rates does, indeed, cover  
24 FCG's true incremental costs."

25 That is pure bolstering. He hasn't provided

1 any analysis or anything regarding that testimony. He  
2 said -- Mr. Armstrong said in his deposition that, well,  
3 he's not in this case as an expert witness to provide  
4 legal commentary, but to provide his utility management  
5 experience. Well, an expert is supposed to provide  
6 independent analysis and research, not simply saying,  
7 yes, I have read the other witness' testimony and I  
8 agree it's correct. None of his testimony has any of  
9 that level of analysis or detail.

10 Our motion goes through line-by-line and  
11 paragraph-by-paragraph and specifically itemizes for you  
12 each provision that we believe should be stricken and  
13 the reason for that, and I think that's pretty clear  
14 from the face of our pleading. So thank you for your  
15 consideration.

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

17 Miami-Dade.

18 **MR. GILLMAN:** Mr. Chair, thank you.

19 Let me make it very clear. Mr. Armstrong is  
20 not Miami-Dade County's attorney or Miami-Dade Water and  
21 Sewer Department's attorney, and he will not be the  
22 attorney at the trial at the hearing on this matter.  
23 Mr. Armstrong has never filed a notice of appearance; he  
24 has not signed any pleadings in this matter; he is  
25 simply not the attorney for Miami-Dade County.

1           Mr. Armstrong was deposed by Mr. Self, and, in  
2 fact, Mr. Self will also have an opportunity to  
3 cross-examine Mr. Armstrong at the hearing. There is  
4 absolutely no prejudice to Florida City Gas to have  
5 Mr. Armstrong testify in this matter. Mr. Armstrong has  
6 expertise and knowledge in utility management as a  
7 senior utility manager. He knows and has expertise in  
8 the processes, procedures, and regulations of a  
9 regulated utility. None of the other witnesses, such as  
10 Mr. Ruiz, has that experience or expertise.

11           In addition, the Commission here will not be  
12 misled by Mr. Armstrong testifying, which is the concern  
13 of the Florida Rules of Professional Conduct, the rules  
14 that Mr. Self cites to in his motion. Those rules refer  
15 to when an attorney both acts as an attorney at trial  
16 and also testifies as a witness at the same time.

17           Again, Mr. Armstrong has not done this and is  
18 not doing this. And, in fact, the Commission here has  
19 the experience, and expertise, and professional  
20 background, and advanced education different from a lay  
21 jury. So we do not believe, again, that the Commission  
22 at all would be misled by the testimony.

23           With regard to Mr. Self's argument about  
24 advocating on behalf of a party, every single witness  
25 advocates when he takes the stand on behalf of a party.



1 Mr. Armstrong is no different, but Mr. Armstrong has  
2 been designated as the expert with regard to utility  
3 management, and these are all issues that are relevant  
4 in this proceeding. And the past prehearing officer  
5 specifically stated that we can bring in through  
6 testimony, argument, briefs, cross-examination, these  
7 types of arguments, and that's exactly what we have  
8 done. We have followed the Prehearing Officer's order.

9 With regard to Mr. Self's argument about  
10 slanderous and inflammatory comments, the words that  
11 Mr. Armstrong has used, such as inexplicably, bad acts,  
12 mismanagement, inequitable, unjustified windfall,  
13 outrageous conduct, poor management, these are neither  
14 slanderous nor inflammatory. And, in fact, these words  
15 that he used is only because of the fact that FCG  
16 itself, Florida City Gas, has openly and expressly  
17 admitted to a long list of mismanagement. So all Mr.  
18 Armstrong was doing was citing to what Florida City Gas  
19 had said, and that's all. So there's nothing in there  
20 that is slanderous or inflammatory, and none of his  
21 testimony should be stricken.

22 And with regard to Mr. Self's argument about  
23 bolstering, Mr. Heintz, who is the expert for Florida  
24 City Gas, does the same thing with Ms. Bermudez in  
25 bolstering her testimony. So all of these arguments I

1 think should fail. Again, there is no prejudice.  
2 Mr. Armstrong will not be and is not the attorney. He  
3 is a witness. We prefiled his testimony. He has been  
4 deposed and Mr. Self will, again, have the opportunity  
5 to cross-examine him.

6 To the extent there is any type of legal  
7 argument or legal testimony, I believe there is  
8 precedent set by the Commission where the Commission  
9 will consider the testimony for what it's worth, and  
10 give it the weight that it is worth. And I would just  
11 cite to Docket Number 020129, Order Number  
12 PSC-02-0876-PCO-TP dated June 28th, 2002, and that was  
13 involving BellSouth, and the Commission specifically  
14 allowed for legal argument in the testimony itself.

15 **CHAIRMAN GRAHAM:** Mr. Gillman, you're at five  
16 minutes. I'll give you a minute to conclude.

17 **MR. GILLMAN:** And in the alternative, we would  
18 state that none of Mr. Armstrong's testimony should be  
19 stricken in this matter. Thank you very much.

20 **CHAIRMAN GRAHAM:** Staff, I have a question for  
21 you. Mr. Self in his argument said he was talking about  
22 the case, and then he also talked about at trial. What  
23 is the defined time difference between the case and at  
24 trial? Like when did one start and when did one end,  
25 because what I heard was you can't be a lawyer and a

1 witness at trial, but it didn't say in the case. Can  
2 you give me a definition?

3 **MS. WILLIAMS:** I can give you my opinion of  
4 the definition. I tend to agree personally on that  
5 point with Mr. Gillman that at trial means at hearing.  
6 During the process of presenting testimony, having  
7 cross-examination, entering exhibits, opening arguments,  
8 that is my definition of at trial as opposed to the  
9 trial process, the pretrial, and post-trial.

10 I think that's the crux, the distinction  
11 between the two parties is one believes that if he has  
12 participated at all in the case, then he can't appear as  
13 a witness; whereas Miami-Dade's position, I believe, is  
14 so long as he doesn't appear before the Commission as an  
15 advocate at the hearing on June 1 through 3, then there  
16 is no problem with him being a witness.

17 **CHAIRMAN GRAHAM:** Guys, I'm going to hold off  
18 on the ruling on this one, as well. We will do this in  
19 the prehearing order.

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

21 **MR. GILLMAN:** Thank you.

22 **CHAIRMAN GRAHAM:** All right. Let's mush on.  
23 Section XII, pending confidentiality motions.  
24 Are there any?

25 **MS. WILLIAMS:** There are no pending

1 confidentiality requests at this time.

2 **CHAIRMAN GRAHAM:** Section XIII, objection to  
3 witnesses qualifications.

4 **MS. WILLIAMS:** Staff notes that Miami-Dade has  
5 notified the Commission of it's objection to the  
6 qualifications of City Gas's witnesses Carolyn Bermudez  
7 and David Heintz as experts. However, I let the parties  
8 know that the appropriate time to address those  
9 objections will be at hearing.

10 **CHAIRMAN GRAHAM:** Okay. Post-hearing  
11 procedures.

12 **MR. GILLMAN:** Mr. Chair, before we address the  
13 post-hearing procedures, at the hearing itself we may  
14 have some demonstrative exhibits, so Ms. Williams wanted  
15 me to just let you know that we may have some  
16 demonstrative exhibits.

17 **CHAIRMAN GRAHAM:** Now, let's be more specific.  
18 Are we talking about an easel, are we talking about a  
19 chalkboard, are we talking about a PowerPoint  
20 presentation?

21 **MR. GILLMAN:** Probably an easel with a board.

22 **CHAIRMAN GRAHAM:** I've got you.

23 **MR. GILLMAN:** That's all.

24 **CHAIRMAN GRAHAM:** I just wanted to make sure.

25 **MR. GILLMAN:** Nothing too high tech.

1           **CHAIRMAN GRAHAM:** I just wanted to make sure  
2 we weren't sitting here watching a PowerPoint  
3 presentation for awhile. Okay.

4           Anything else?

5           **MR. SELF:** Mr. Chairman, if I may.

6           **CHAIRMAN GRAHAM:** Yes.

7           **MR. SELF:** With respect to Section XIII, I  
8 appreciate what Ms. Williams said. At the time we did  
9 this, we didn't -- that we filed our prehearing  
10 statements, we didn't understand that Mr. Armstrong was  
11 being proffered as a, quote, expert witness. So she  
12 indicated we would reserve our right to address any of  
13 their, quote, experts at the appropriate time at the  
14 hearing.

15          **CHAIRMAN GRAHAM:** Okay.

16          **MS. BROWN:** Mr. Chairman, I think it's an  
17 appropriate time for both parties to identify exactly  
18 which witnesses whose qualifications they object to.  
19 That is what the OEP says. By the prehearing conference  
20 we need to know exactly who is going to be objected to.  
21 So that should happen. Mr. Self should make that  
22 announcement now.

23          **CHAIRMAN GRAHAM:** Isn't that what he just did?

24          **MS. BROWN:** No, he said any witnesses. It was  
25 much broader.

1           **MR. SELF:** I believe she wants me to identify  
2 by name, which I will be happy to do.

3           **CHAIRMAN GRAHAM:** So more than just the one  
4 you just mentioned, you have a list of them?

5           **MR. SELF:** Yes. We would at the appropriate  
6 time at the hearing, Mr. Langer, Mr. Saffer, and Mr.  
7 Armstrong.

8           **CHAIRMAN GRAHAM:** Langer, Saffer, and  
9 Armstrong?

10          **MR. SELF:** Langer.

11          **CHAIRMAN GRAHAM:** Langer.

12          **MR. SELF:** Yes, because I believe Miami-Dade  
13 is proffering them as experts.

14          **MR. HOPE:** That is correct, Mr. Chair, those  
15 are our three experts in this matter.

16          **CHAIRMAN GRAHAM:** Staff.

17          **MS. WILLIAMS:** We will reflect what Mr. Self  
18 has said here today in the prehearing order and indicate  
19 in there that City Gas does object to those three expert  
20 witnesses.

21          **CHAIRMAN GRAHAM:** Okay. Are there any other  
22 objections to witnesses?

23                 Okay, seeing none. Go ahead.

24          **MR. GILLMAN:** (Inaudible; microphone off.)

25          **CHAIRMAN GRAHAM:** Yes, the ones you've got

1 listed.

2 Post-hearing procedures.

3 **MS. WILLIAMS:** Mr. Chairman, staff suggests  
4 that post-hearing position statements of the parties be  
5 limited to 50 words, and that post-hearing briefs be  
6 limited to 40 pages.

7 **CHAIRMAN GRAHAM:** Does either party have a  
8 problem with that?

9 **MR. HOPE:** No, Mr. Chair.

10 **CHAIRMAN GRAHAM:** Florida City?

11 **MR. SELF:** We certainly have no objection to  
12 the 50-word positions. At the moment it's hard to tell  
13 whether 40 pages -- I guess we are going to end up with  
14 nine issues. There's a great deal of information. I  
15 don't know, necessarily, whether 40 pages would be  
16 reasonable in order to address those, because there are  
17 some big issues here.

18 **CHAIRMAN GRAHAM:** Just remember some of the  
19 Commissioners up here aren't lawyers.

20 **MR. SELF:** I know. And, quite frankly, Mr.  
21 Chairman, that kind of creates a little bit of a  
22 problem, because I think there are certain assumptions  
23 that I might otherwise make that I would want to perhaps  
24 explain in a little more detail or explain differently.  
25 You know, maybe it's appropriate to ask now to say 50

1 pages. I mean, I agree fewer words is better.

2 **CHAIRMAN GRAHAM:** I do not have a problem with  
3 bumping it to 50 pages, but briefer is better. Being an  
4 engineer, I like efficient.

5 **MR. SELF:** I would rather ask for 50 and end  
6 up at 40.

7 **CHAIRMAN GRAHAM:** I would much rather you ask  
8 for 50, too, than show up with 45.

9 Staff.

10 **MS. WILLIAMS:** Staff has no problem with that.

11 **CHAIRMAN GRAHAM:** Okay.

12 Section XV, rulings.

13 **MS. WILLIAMS:** Mr. Chairman, staff suggests  
14 that you can allow opening statements at the hearing,  
15 that you do so and that you state that those should not  
16 exceed ten minutes per side.

17 **CHAIRMAN GRAHAM:** Ten minutes is a long time.

18 **MS. WILLIAMS:** Or five. Five minutes would  
19 work.

20 **CHAIRMAN GRAHAM:** Miami-Dade.

21 **MR. GILLMAN:** I believe there are, I think,  
22 ten issues, so we are talking about a minute an issue.  
23 It seems reasonable to us.

24 **CHAIRMAN GRAHAM:** Florida City.

25 **MR. SELF:** I had suggested ten minutes. I



1 think it would be very helpful to the Commissioners to  
2 allow each party to kind of capture where they are at  
3 the beginning the hearing. I think that will be --  
4 while the prehearing order is certainly a useful roadmap  
5 on an issue-by-issue basis, there are some big picture  
6 perspectives here as well as some very detailed and  
7 specific issues, and I think it would provide some  
8 better context if we could have up to ten minutes.  
9 Again, briefer being the operative word, but --

10 **CHAIRMAN GRAHAM:** Well, I don't have a problem  
11 with giving you guys a lot of latitude, especially to  
12 lay the groundwork, but I can just tell you from some of  
13 these other hearings, you know, there are people that  
14 can get to the point and there is people that will just,  
15 you know, belabor the point. And I guess that would be  
16 my only recommendation to you. I mean, I don't have a  
17 problem giving you ten minutes.

18 **MR. GILLMAN:** Thank you.

19 **MR. SELF:** Thank you.

20 **CHAIRMAN GRAHAM:** Okay. Other matters. Are  
21 there any other matters that we need to address in this  
22 prehearing conference? We did talk about Miami-Dade is  
23 going have some display items for demonstrative  
24 purposes. Are there any other things that need to come  
25 up that we have not addressed? Staff.

1           **MS. WILLIAMS:** Staff has no other matters.

2           **CHAIRMAN GRAHAM:** All right. What is this we  
3 have down here about close of business on the 9th?

4           **MS. WILLIAMS:** That was in case there were any  
5 changes, which we didn't have any changes today  
6 thankfully. So I believe this prehearing order is  
7 scheduled to be issued on May 16th, but I intend to get  
8 it out much earlier than that and incorporate all the  
9 changes and the rulings that you have made today and try  
10 to get it to you as soon as possible.

11           **CHAIRMAN GRAHAM:** Are there any other  
12 questions on where we go from here, or procedures, or  
13 anything else? Well, seeing none, then we are going to  
14 adjourn this meeting. I thank both of you guys for your  
15 time.

16           **MR. HOPE:** Thank you, Mr. Chair.

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

18           **MR. GILLMAN:** Thank you, Mr. Chair.

19           **CHAIRMAN GRAHAM:** And have a safe trip home.

20           (The prehearing conference concluded at  
21 10:20 a.m.)

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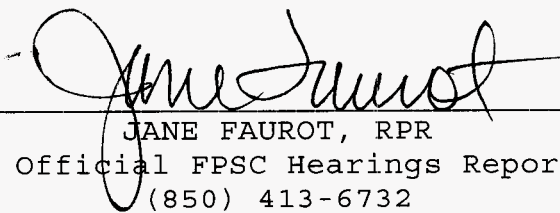
COUNTY OF LEON )

I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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

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

DATED THIS 12th day of May, 2011.

  
\_\_\_\_\_  
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