Diamond Williams 100315-GU

From: Ann Bassett [abassett@lawfla.com]

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To: Filings@psc.state.fl.us

Subject: Docket No. 100315-GU

Attachments: 2010-06-24, 100315-GU, FCG's Motion to Dimiss With Prejudice Miami-Dade County's Complaint.pdf

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The Docket No. is 100315-GU - Complaint for Order Requiring Florida City Gas to Show Cause Why Tariff Rate Should Not be Reduced and for Public Service Commission to Conduct a Rate Proceeding, Overearnings Proceeding or Other Appropriate Proceeding Regarding Florida City Gas' Acquisition Adjustment
This is being filed on behalf of Florida City Gas

Total Number of Pages is 13

Florida City Gas' Motion to Dismiss Miami-Dade County's Complaint

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June 24, 2010

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. 100315-GU

Dear Ms. Cole:

Enclosed for filing on behalf of Florida City Gas are Florida City Gas' Motion To Dismiss With Prejudice Miami-Dade County's Complaint and Florida City Gas' Request for Oral Argument 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

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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint for Order Requiring Florida City Gas to Show Cause Why Tariff Rate Should Not be Reduced and for Public Service Commission to Conduct a Rate Proceeding, Overearnings Proceeding) or Other Appropriate Proceeding Regarding Florida City Gas' Acquisition Adjustment	)	Docket No. 100315-GU Filed: June 24, 2010

FLORIDA CITY GAS MOTION TO DISMISS MIAMI-DADE COUNTY'S COMPLAINT

Florida City Gas ("FCG") hereby moves, pursuant to Rule 28-106.24, Florida Administrative Code, for the Florida Public Service Commission ("Commission") to dismiss the Complaint filed on June 4, 2010, by Miami-Dade County ("Miami-Dade") in this docket because it fails to state a cause of action, it is duplicative with the issues in Docket No. 090539-GU, and it is, at best, premature. In support of this Motion to Dismiss, FCG states as follows.

I. INTRODUCTION

1. This action is Miami-Dade's attempt to create a collateral attack on Docket No. 090539-GU, the other proceeding involving FCG and Miami-Dade on the exact same issue that Miami-Dade seeks action on here – the rate that Miami-Dade must pay FCG for natural gas transportation. Miami-Dade's fundamental objection is that it does not want to pay the FCG's lawfully approved and applicable tariff rate because it is significantly higher than the old contract rate for natural gas transportation. To challenge the tariff rate and the subsequent positive acquisition order amounts to an out of time motion for reconsideration that must be denied. Docket No. 910486-TL, Order No. 25269 (Oct. 30. 1991); Docket No. 001097-TP, Order No. PSC-01-0493-FOF-TP (Feb.

27, 2001); Docket No. 070691-TP and Docket No. 080036-TP, Order No. PSC-08-0450-FOF-TP (July 16, 2008).

2. FCG acknowledges that in 2008 the parties negotiated a successor transportation agreement ("2008 Agreement") that continued the former contract rate that is lower rate than the otherwise applicable tariff rate. However, that agreement did not become effective per its terms and the rates in that agreement fail to meet the minimum statutory requirements for a contract rate under FCG's tariff and governing law. This Commission in Docket No. 090539-GU is currently scheduled to determine the effectiveness and legality of the 2008 Agreement and the otherwise applicable rate that Miami-Dade must pay in the absence of a contract, and Docket No. 090539-GU is the proper forum for the Commission to address that dispute. To re-litigate that issue here would be duplicative and a waste of Commission and party time and resources.

3. On multiple occasions FCG has offered to Miami-Dade to negotiate a successor agreement that would comply with Florida law, or even an interim agreement pending the outcome of the other docket, and that offer to negotiate remains open. But Miami-Dade has chosen to litigate, and through the instant Complaint to re-litigate, the failed transportation agreement instead of negotiating an appropriate contract rate. There is absolutely no legal basis for re-litigating those issues again in this new docket. Miami-Dade's Complaint is completely without merit and it should be dismissed.

4. Together, Miami-Dade's request for the Commission to enter an order requiring FCG to show cause why its tariff rate should not be reduced and for the Commission to conduct a rate proceeding, overearnings proceeding or other appropriate proceeding regarding FCG's acquisition adjustment fails to state any claim for which the

Commission can provide relief. The Complaint's allegations rest on several false premises and Miami-Dade is unable to allege how its substantial rights are affected, what rules or statutes require reversal or modification of this Commission's actions, or a precise statement of relief. Accordingly, the Complaint should be dismissed.

5. Read in the light most favorable to Miami-Dade, at best this Complaint is premature. To the extent Miami-Dade is not attempting to re-litigate the issues in Docket No. 090539-GU, it is asking this Commission to conduct an overearnings case without any evidence. The fact that Miami-Dade is paying a higher rate by paying the tariff rate is not evidence of the utility earning in excess of it authorize rate of return. Any alleged overearnings associated with Miami-Dade paying FCG's tariff rate cannot begin to be established until after the Commission decides the issues in the other docket. However, under any of the possible outcomes in Docket No. 090539, FCG is not and would not be in an overearnings situation that would merit a review at this or any other time. Accordingly, this Complaint should be dismissed.

II. STANDARD OF REVIEW

6. FCG's undersigned counsel received a copy of Miami-Dade's Complaint in this matter via email at approximately 3:57 PM on June 4, 2010. Pursuant to Rule 28-106.204(2), FCG is timely responding to the Complaint through this Motion to Dismiss.

7. A motion to dismiss in an administrative adjudicatory proceeding before the Commission tests the sufficiency of a complaint. In *Sprint-Florida/LTD Holding*, the Commission granted a motion to dismiss an administrative Complaint.[1] The Commission

[1] *In re: Joint application for transfer of control of Sprint-Florida, Inc., holder of ILEC Certificate No. 22, and Sprint Payphone Services, Inc., holder of PATS Certificate No. 3822, from Sprint Nextel Corp. to LTD Holding Co., and for acknowledgment of transfer of control of Sprint Long Distance, Inc., holder of IXC*

described the petitioner's pleading obligation under Rule 28-106.201(2), Florida Administrative Code, and described the function of a motion to dismiss as, "its basic function is therefore to test the sufficiency of the Complaint with respect to (1) substantial injury, (2) statutory right and (3) requested relief."[2] The Commission further stated:

> In determining the sufficiency of the Complaint, we confine our consideration to the Complaint and the grounds asserted in the motion to dismiss. Moreover, we construe all material facts and allegations in the light most favorable to [the petitioner] in determining whether the Complaint is sufficient.[3]

As is further demonstrated below, Miami-Dade's Complaint fails to state a cause of action and its Complaint should be dismissed with prejudice.

III. ARGUMENT

A. Miami-Dade's Complaint Should Be Dismissed Because There Are No Overearnings by FCG.

8. Without offering any evidence of FCG's earnings, Miami-Dade asserts that FCG is in an overearnings situation merely because the utility has billed its water and sewer department ("MDWASD") for transportation service under its Commission approved tariff. Such naked assertions, unsupported by any earnings evidence, do not meet the minimal pleading requirements for invoking Commission action.

9. In order to establish a prima facie case for relief due to an overearnings situation, Miami-Dade as the petitioning party "shall demonstrate that the public utility is earning outside the range of reasonableness on rate of return calculated in accordance

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Registration No. TK001, from Sprint Nextel Corp. to LTD Holding Col, Docket No. 050551-TP, Order No. PSC-06-0033-FOF-TP (Jan. 10, 2006).

[2] *Id.*

[3] *Id.*

with subsection (5)." Section 366.071(1), Florida Statutes. Within the four corners of Miami-Dade's Complaint, there is absolutely no statement as to FCG's earnings or its rate of return – achieved, actual, or otherwise. Absent such prima facie allegations, the Complaint on this basis alone must fail.

10. It is well established that the statutory prerequisite is met when the utility's surveillance reports indicate that the company's achieved return on equity exceeds its authorized return.[4] Miami-Dade failed to include such prima facie allegations in its Complaint because in fact there is absolutely no evidence to support or indicate an overearnings situation. This is because a review of the FCG surveillance reports on file with this Commission for the last year indicates that FCG does not meet the minimal threshold statutory requirements for the initiation of any overearnings investigation.[5]

11. Miami-Dade has tried to predicate its request on an alleged increase in earnings due to FCG charging Miami-Dade FCG's lawfully approved tariff rate. Miami-Dade's argument is that the tariff rate, as opposed to the rate in the 2008 Agreement, results in an annual additional charge to Miami-Dade of $800,000.[6] Miami-Dade further contends that FCG will receive an $8,000,000 windfall if it is permitted to charge the tariff rate.[7] Accepting these figures for purposes of this motion, the fact that Miami-Dade

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[4] *See, e.g.*, Docket No. 920729-GU , Order No. PSC-92-0817-FOF-GU (Aug. 14, 1992), where the utility's return on equity as reported in its surveillance report exceeded its authorized ceiling thus creating an overearnings situation. *See also*, Docket No. 070107-GU; Order No. PSC-07-0671-PAA-GU (Aug. 21, 2007); Docket No. 970023-GU; Order No. PSC-97-0136-FOF-GU (Feb. 10, 1997); Docket No. 960930-GU, Order No. PSC-96-1188-FOF-GU (Sept. 23, 1996).

[5] FCG's surveillance reports for the June 2009, September 2009, December 2009, and March 2009 quarters, which includes revenues prior to and currently for FCG's billing of Miami-Dade the tariff rate, indicates that FCG is below 7.36% rate of return authorized by the Commission. Docket No. 030569-GU, PSC-04-0128-PAA-GU (Feb. 9, 2004), and consummated by Order No. PSC-04-0240-CO-GU (Mar. 3, 2004).

[6] Compl. at ¶ 23.

[7] Compl. at ¶ 34.

may be paying a higher rate does not automatically result in an increase in net revenues to FCG, which is what would impact the overall rate of return of the company.

12. Charging a customer a lawfully approved tariff rate in and of itself is not evidence of overearnings. Customers are added and removed from service throughout the year just as the volumes of gas consumed or transported change over time as well. Under Miami-Dade's theory, daily changes in customers and volumes would result in daily and never ending rate cases. That is not the case because the issue is not those daily revenues to the utility because of changes in customers, services, or volumes but rather the ***net cumulative change*** in revenues based upon the utility's overall operations and the impact of such revenues on the company's rate of return.

13. Contrary to Miami-Dade's perspective, net revenues to FCG are *unchanged* since FCG began billing Miami-Dade the tariff rate. This is true because FCG stopped charging its end users the Competitive Rate Adjustment ("CRA") rider in its tariff as soon as it began charging Miami-Dade the tariff rate on August 1, 2009.[8] The CRA rider provides that if FCG's contract customers are not paying the tariff rate, the difference between the contract rate and the tariff rate is recovered by a surcharge paid by the general body of ratepayers. The public policy served is that there are more customers paying for the utility's overhead when that contract customer pays a contract rate that is greater than the incremental cost of service, with the utility's remaining revenue requirement made up by the CRA. But once FCG began charging MDWASD the tariff rate, FCG ceased charging the CRA rider for the Miami-Dade differential since FCG was

[8] The CRA is set forth in Rider "C" at page 66 of the company's tariff.

recovering its revenue requirements through Miami-Dade paying the tariff rate. *Thus, charging Miami-Dade the tariff rate has been revenue neutral to FCG.*[9]

14. Because Miami-Dade has failed to provide any evidence for its contention that charging the tariff rate has resulted in an overearnings proceeding, its Complaint should be dismissed. Moreover, because Miami-Dade cannot prove, nor provide even a prima facie case of overearnings because there is no evidence meriting an earnings investigation, the Complaint must be dismissed.

B. The Positive Acquisition Adjustment Order authorizes the Commission to analyze the cost savings from AGL Resources Inc's acquisition of FCG only during a rate proceeding.

15. Miami-Dade contends that the November 13, 2007 Notice of Proposed Agency Action Order Approving Positive Acquisition and Adjustment and Regulatory Assets ("Positive Acquisition Adjustment Order"), which found, *inter alia,* that the acquisition of FCG by AGL Resources, Inc., resulted in cost savings to FCG's customers, compels the Commission to initiate an overearnings proceeding given FCG's utilization of its tariff rates with MDWASD.[10] However, Miami-Dade has not shown in its Complaint that FCG is in an overearnings situation because it cannot – the books and records of the company show that it FCG is earning below its authorized rate of return. Absent the necessary factual predicate, Miami-Dade has not offered any legal basis for reexamining the Commission's determinations in the Positive Acquisition Adjustment Order or for initiating a rate case.

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[9] It must be noted for the record that while FCG has charged Miami-Dade the tariff rate and ceased charging its end user customers the CRA rate, Miami-Dade has not actually paid FCG the tariff rate but only the old contract rate with Miami-Dade holding the difference between the contract and tariff rates "in escrow" pending the outcome of Docket No. 090539-GU. However, for regulatory reporting purposes and calculation of the utility's rate of return, FCG has booked the billed revenue and accounts for the "escrow" amounts as a receivable on its books, so the full billed amount is included in the rate of return calculation.

[10] Compl. at ¶ 35.

16. In the Positive Acquisition Adjustment Order, the Commission concluded that the acquisition of FCG by AGL Resources Inc. resulted in a benefit to FCG's customers.[11] It further found that it was appropriate for the Commission to revisit the effect of the adjustment in the future. However, the Positive Acquisition Adjustment Order explicitly states,

> The permanence of the cost savings supporting FCG's request shall be reviewed in the Company's next rate proceeding. The Company shall file its earning surveillance reports without the effect of the acquisition adjustment. If it is determined that the cost savings no longer exist, the acquisition adjustment may be partially or totally removed as deemed appropriate by this Commission.

Thus, any review of the cost savings from AGL Resources Inc.'s acquisition of FCG should occur in FCG's next rate proceeding.[12]

17. The Positive Acquisition Adjustment Order does not provide an independent cause of action that would allow Miami-Dade to petition the Commission to initiate a rate or overearnings proceeding, especially in the absence of any overearnings. Only if FCG was already in a rate proceeding would it be appropriate to reexamine the acquisition adjustment. Miami-Dade has not cited to any rule, order, or statute that would permit the Commission to initiate a rate case proceeding solely to again review the appropriateness of the prior Commission decision. FCG has not undertaken any action that would violate the terms of the Positive Acquisition Adjustment Order and Miami-Dade does not in fact allege any such violations except to charge its lawfully approved tariff rate. Moreover, as is reflected in the company's surveillance reports for the last

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[11] Docket No. 060657-GU, Order No. PSC-07-0913-PAA-GU, Compl. Ex. A.

[12] The Commission noted in the Positive Acquisition Adjustment Order that in previous acquisition adjustment dockets it had ruled that the projected savings would be analyzed in *future rate cases. See In re: Complaint of Central Florida Gas Co. to increase its rates and charges*, Docket No. 870118-GU; *In re: Application of Peoples Gas Systems, Inc. for a rate increase*, Docket No. 891353-GU, Order No. 23858.

year, there is nothing to indicate that with or without the positive acquisition adjustment that FCG is in an overearnings situation or that the public policy considerations underlying that decision merit review. Since FCG is not currently in a rate case, and there is no basis for initiating any kind of rate case proceeding, Miami-Dade's Complaint should be dismissed.

C. Miami-Dade's contention that the Commission should reduce the tariff rate due to overearnings proceeding is meritless.

18. Miami-Dade contends that the Commission "should order FCG to show cause why its base rates should not be reduced for all customers in light of FCG's billings to the County which provides FCG an additional $8,000,000 ($800,000 annually for 10 years); and the Commission should conduct a rate proceeding, overearnings proceeding or other appropriate proceeding regarding FCG's acquisition adjustment."[13] However, Miami-Dade has provided this Commission without any basis for changing its transportation tariff rate simply because FCG has lawfully applied FCG's Commission-approved tariff rate to Miami-Dade.

19. A tariff rate is subject to adjustment either through a final order in a rate case or through such other appropriate rate adjustment proceeding as is provided for by law. Very generally, if as a result of a rate proceeding earnings exceed the authorized rate of return, then rates are reduced. Here, Miami-Dade has not provided any evidence of any excess earnings meriting a change in rates or any other rate relief. The mere application of a Commission approved tariff rate to a customer does not in and of itself create an overearnings situation. Indeed, as has been previously discussed, the evidence

[13] Compl. at ¶ 37.

is to the contrary due to the elimination of the CRA surcharge to the general body of ratepayers.

20. Reading the Complaint in the light most favorable to Miami-Dade, it is highly charitable to say that the relief sought by Miami-Dade is at best premature – there would have to be a final order of the Commission in Docket No. 090539-GU that requires Miami-Dade to continue to pay the tariff rate, and for there to be a net increase in revenues to FCG, and for such increased revenues to place FCG in an overearnings situation meriting a review of FCG's rates. This is all highly speculative at this time, and certainly not legally sufficient to merit the initiation of a rate investigation. In Docket Number 090539-GU, the Commission will determine, *inter alia,* whether the tariff rate charged by FCG to MDWASD is appropriate. However, until that decision is made, Miami-Dade has established no legal right or factual basis to ask this Commission to conduct a rate or overearnings proceeding. If Miami-Dade wants immediate relief from the tariff rate, FCG remains open to negotiating a new transportation rate that meets the requirements of Florida law and which adequately protects all of FCG's rate payers. But this Complaint does not present even a prima facie case for a tariff amendment or any other action. The appropriate course is to dismiss this Complaint and allow the other docket to proceed.

IV. CONCLUSION

Based on the foregoing, and pursuant to 366.071(1), Florida Statutes and Rule 28-106.204, Florida Administrative Code, Florida City Gas respectfully requests that the Commission dismiss the Complaint of Miami-Dade County filed on behalf of the Miami-Dade Water and Sewer Department.

Respectfully submitted this 24th day of June, 2010.

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Counsel for Florida City Gas

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 24th day of June, 2010.

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