

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  
ORDER NO. PSC-11-0203-PCO-GU  
ISSUED: April 22, 2011

ORDER DENYING MIAMI-DADE COUNTY'S  
MOTION TO STRIKE REBUTTAL TESTIMONY OF DAVID A. HEINTZ

Background

Florida City Gas (FCG) is an investor-owned natural gas utility company subject to our regulatory jurisdiction as prescribed in Chapter 366, Florida Statutes (F.S.). Miami-Dade County (Miami-Dade or the County) is a political subdivision of the State of Florida, and Miami-Dade Water and Sewer Department (MDWASD) is a department of the County. MDWASD owns and operates several water and wastewater treatment plants in Miami-Dade County, Florida. As part of its water treatment operations, MDWASD operates lime kilns at the Alexander Orr Plant in South Miami and at the Hialeah-Preston Plant in Hialeah, as well as a cogeneration facility at the South Dade Wastewater Treatment Plant. MDWASD uses natural gas to heat the lime kilns for the water treatment process that produces and distributes water to MDWASD's customers.

On August 28, 2008, Miami-Dade and FCG entered into a Special Gas Service Transportation Agreement (2008 Agreement). On December 14, 2009, MDWASD filed a petition for approval of the 2008 Agreement that initiated the instant docket. On March 5, 2010, FCG filed a petition for leave to intervene in this docket, which was granted by Order No. PSC-10-0261-PCO-GU, issued on April 26, 2010.

On December 7, 2010, Order No. PSC-10-0714-PCO-GU was issued establishing the procedural milestones and requirements of this proceeding. This Order was subsequently revised three times thereby modifying the requirements of this proceeding.<sup>1</sup> On December 29, 2010, FCG filed the direct testimony of witnesses Bermudez and Williams, and Miami-Dade filed the direct testimony of witnesses Ruiz, Hicks, Langer, Saffer, and Armstrong. On January 28, 2011, FCG filed the rebuttal testimony of witnesses Bermudez, Heintz, and Williams, and Miami-Dade filed the rebuttal testimony of witnesses Ruiz, Langer, Saffer and Armstrong.

<sup>1</sup> See Order No. PSC-10-0715-PCO-GU, issued December 8, 2010, in Docket No. 090539-SU; Order No. PSC-10-0729-PCO-GU, issued December 13, 2010, in Docket No. 090539-SU; and Order No. PSC-11-0110-PCO-GU, issued February 9, 2011, in Docket No. 090539-SU.

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On March 16, 2011, Miami-Dade filed a Motion to Strike Rebuttal Testimony of David A. Heintz (Motion to Strike) and a Request for Oral Argument on its Motion to Strike. On March 23, 2011, FCG filed its Response to Miami-Dade's Motion to Strike.

Miami-Dade's Motion to Strike and Request for Oral Argument

Miami-Dade seeks to strike portions of witness Heintz's rebuttal testimony as improper rebuttal testimony. In support of this request, Miami-Dade asserts that the rebuttal testimony of witness Heintz deviates from the standard for rebuttal testimony because it presents evidence relating to FCG's cost to serve Miami-Dade which should have been included in FCG's direct testimony. Miami-Dade further argues that witness Heintz's rebuttal testimony should be stricken because the cost of service study contained therein is premised upon inaccurate facts and information. Miami-Dade also asserts that witness Heintz's rebuttal testimony is improper because it seeks to bolster the direct testimony of FCG witness Bermudez, not to rebut the testimony of the Miami-Dade witnesses. Finally, Miami-Dade argues in the relief section of its Motion to Strike that the Commission should award attorney's fees and costs associated with the preparation of its Motion to Strike as well as such other relief as the Commission may deem necessary.

As noted above, Miami-Dade also filed a Request for Oral Argument. In support of this request, Miami-Dade asserts that oral argument will assist the Commission in its deliberations by providing a more complete presentation of the relevant facts and authorities as they bear on the matters at issue.

FCG's Response

FCG argues that witness Heintz's rebuttal testimony is in fact proper rebuttal testimony to the direct testimony of Miami-Dade witness Saffer. In particular, FCG asserts that in his direct testimony, Miami-Dade witness Saffer proffered his approach to determining incremental costs and the respective data that he utilized. Because witness Saffer presented his detailed approach to the calculation of incremental costs for the first time in direct testimony, FCG states that it felt compelled to provide a rebuttal witness that could properly address both the methodology and the data relied upon by witness Saffer. FCG contends that rather than offering an affirmative alternative proposal for the first time on rebuttal, witness Heintz merely testifies that if the Commission accepts witness Saffer's approach, some of his calculations and input numbers should be changed. FCG further asserts that there has been and continues to be ample time for Miami-Dade to explore witness Heintz's rebuttal testimony through discovery and, as such, there is no legal basis for striking any of witness Heintz's rebuttal testimony.

With respect to Miami-Dade's request for attorney's fees and costs, FCG responds that as an administrative body, this Commission lacks the statutory authority to assess costs and attorneys fees. Moreover, FCG contends that even disregarding the possible lack of statutory authority to award such fees and costs, there is no factual basis meriting such an award. Since Miami-Dade has not made a showing sufficient to permit

an award of attorney's fees or costs under the heightened standard found in Section 57.105, F.S., FCG asserts that the request for sanctions should be denied.

With respect to Miami-Dade's request for oral argument, FCG states that oral argument is not necessary for the disposition of this matter. However, to the extent that the Prehearing Officer determines that oral argument is appropriate, FCG requests the opportunity to equally participate in such argument.

### Analysis and Ruling

#### Request for Oral Argument on Motion to Strike

Rule 25-22.0021(1), Florida Administrative Code (F.A.C.), provides for oral argument before the Commission as follows:

Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than ten (10) days after exceptions to a recommended order are filed. Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument. The request for oral argument shall state with particularity why oral argument would aid the Commissioners, the Prehearing Officer, or the Commissioner appointed by the Chair to conduct a hearing in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

Although Miami-Dade properly filed its request for oral argument concurrently with its Motion to Strike, I find that the pleadings are clear on their face and, therefore, oral argument is unnecessary for the disposition of this matter. On the basis of the foregoing, the Request for Oral Argument is denied.

#### Motion to Strike

The rebuttal testimony offered by witness Heintz comports with the definition of rebuttal testimony as described by the Federal Courts and adopted by this Commission:

It is well settled that the purpose of rebuttal testimony is "to explain, repel, counteract, or disprove the evidence of the adverse party" and if the defendant opens the door to the line of testimony, he cannot successfully object to the prosecution "accepting the challenge and attempting to rebut the presumption asserted."

United States v. Delk, 586 F.2d 513, 516 (5th Circ. 1978), quoting Luttrell v. United States, 320 F.2d 462, 464 (5th Circ. 1963); Order No. PSC-04-0928-PCO-EI, issued September 22, 2004, in Docket No. 030623-EI, In re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., and Dillard's Department Stores, Inc. against

Florida Power and Light Company concerning thermal demand meter error. Witness Heintz's rebuttal testimony responds to the direct testimony of FCG's witness Saffer. In his rebuttal of witness Saffer, witness Heintz provided testimony that addressed both the methodology advanced by witness Saffer as well as the specific calculations and input data utilized by witness Saffer. I agree that witness Heintz's rebuttal testimony does not affirmatively advocate an alternative approach to answering the cost of service and incremental cost issues in this case that should have been included in FCG's direct testimony. Rather, the purpose of his testimony appears to be to rebut witness Saffer by pointing out changes and corrections to witness Saffer's proposal that FCG believes should be made in the event the Commission chooses his approach. Thus, witness Heintz's rebuttal testimony was properly proffered for the specific purpose of rebutting the presumptions asserted in witness Saffer's direct testimony. I note that:

A trial court has broad discretion to admit rebuttal testimony. See Dale v. Ford Motor Co., 409 So. 2d 232 (1st DCA 1982). However, a trial court abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense. See Young-Chin v. City of Homestead, 597 So. 2d 879 (3rd DCA 1992)

Mendez v. Caddell Construction Co., 700 So. 2d 439, 440-441 (3rd DCA 1997). Accordingly, the Motion to Strike is hereby denied.

#### Request for Sanctions

As noted above, in the relief portions of its Motion to Strike, Miami-Dade requests attorney's fees and costs associated with the preparation of its motion. Although Miami-Dade provides no support or authority for this request, the authority for allowing attorney's fees and costs is provided in Section 57.105, F.S. In 2003, the Legislature amended Section 57.105, F.S., Attorney's Fees, to apply to administrative proceedings under Chapter 120, F.S. Section 57.105, F.S., states that an administrative law judge shall award reasonable attorney's fees and damages to be paid to the prevailing party on any claim or defense in which it is found that the losing party or the losing party's attorney knew or should have known that the claim or defense asserted was (a) not supported by the facts or (b) not supported by an application of "then-existing" law to the facts. Section 57.105, F.S.; Boca Burger, Inc. v. Forum, 912 So. 2d 561, 570 (Fla. 2005).<sup>2</sup> Miami-Dade's request for sanctions did not set forth any factual allegations whatsoever associated with the recovery of fees and costs. Furthermore, consistent with my ruling above, FCG is the prevailing party on the Motion to Strike for which Miami-Dade has requested attorney's fees and costs. As such, Miami-Dade has failed to make a showing sufficient to permit an award under the standards set forth in Section 57.105, F.S. Miami-Dade's request for sanctions is therefore denied.

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<sup>2</sup> The Florida Supreme Court in Boca Burger, Inc. explained that the standard for granting Section 120.57 attorneys fees changed when that statute was revised in 1999. Previously, a movant had to show "a complete absence of a justiciable issue of either law or fact raised by the losing party."

Based on the foregoing, it is

ORDERED by Chairman Art Graham, as Prehearing Officer, that Miami-Dade County's Request for Oral Argument is denied, as set forth herein. It is further

ORDERED that Miami-Dade County's Motion to Strike Rebuttal Testimony of David A. Heintz is denied, as set forth herein. It is further

ORDERED that Miami-Dade County's request for attorney's fees and costs is denied, as set forth herein. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect.

By ORDER of Chairman Art Graham, as Prehearing Officer, this 22nd day of April, 2011.



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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, except the request for attorney's fees and costs which is final in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action on the request for attorney's fees and costs may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.