Marguerite McLean

090539-GU

From: Ann Bassett [abassett@lawfla.com]

Sent: Wednesday, March 23, 2011 4:46 PM

To: Filings Electronic <Filings@PSC.STATE.FL.US

Cc: Melvin Williams; Shannon Pierce; David Heintz; Floyd Self; David Hope; Henry Gillman; Anna Williams; Martha Brown

Subject: Docket No. 090539-GU

Attachments: 2011-03-23, 090539, FCG Response to MDWASD Motion to Strike Heintz testimony.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 Water and Sewer Department Motion to Strike Rebuttal Testimony of David A. Heintz

Total Number of Pages is 18

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March 23, 2011

VIA ELECTRONIC FILING
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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 Water and Sewer Department Motion to Strike Rebuttal Testimony of David A. Heintz 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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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, Hand Delivery (*), Overnight Delivery (**) and/or U.S. Mail this 23rd day of March, 2011.

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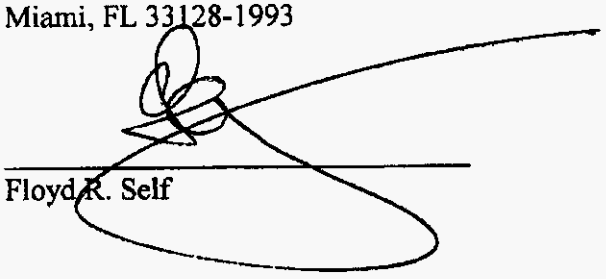

Floyd R. Self

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department.	DOCKET NO. 090539-GU Date Filed: March 23, 2011

FLORIDA CITY GAS RESPONSE TO
MIAMI-DADE WATER AND SEWER DEPARTMENT
MOTION TO STRIKE REBUTTAL TESTIMONY OF DAVID A. HEINTZ

Florida City Gas ("FCG"), pursuant to Rule 28-106.204(1), Florida Administrative Code, hereby responds to the Miami-Dade Water and Sewer Department ("MDWASD") Motion to Strike Rebuttal Testimony of David A. Heintz ("Motion") filed in this docket on March 16, 2011, and respectfully requests that the Florida Public Service Commission ("Commission") deny this Motion because MDWASD has failed to demonstrate that the portions of the rebuttal testimony of Mr. Heintz it seeks to strike are improper rebuttal testimony. Further, FCG requests that the Commission deny MDWASD's request for attorneys' fees and costs because there is nothing improper regarding FCG's rebuttal testimony of Mr. Heintz and because the Commission lacks any authority to grant attorneys' fees and cost. As is demonstrated herein, because the appropriateness of Mr. Heintz' rebuttal testimony is clear on the face of such testimony, FCG does not believe that oral argument is necessary, but if the Prehearing Officer grants the separate request for oral argument then FCG will attend and participate in such oral argument. In support of this response, FCG states as follows:

I. INTRODUCTION

MDWASD's Motion reflects a highly selective and self serving reading of the history of this matter that ignores facts inconsistent with its revisionist interpretation of events. The Motion further ignores the reality that an evidentiary record is developed over time –

MDWASD's Motion seems to assume that every relevant fact and document be delivered with the filing of a party's prefiled direct testimony and that information developed and produced through interrogatories, the production of documents, depositions, the evidentiary hearing, as well as prefiled rebuttal testimony are irrelevant. If this approach was correct, then cases would be over with the filing of direct testimony. This is not, however, the process.

For purposes of responding to the Motion, it is not necessary to respond to paragraphs 2 through 19 of the Motion as these paragraphs simply recite yet again MDWASD's selective choice of facts that support the distorted story it is constantly reciting at every opportunity. MDWASD's view of the history of this matter is irrelevant for addressing the substance of the Motion. Instead, FCG shall rely upon the complete record as it stands today and the actual context for the rebuttal testimony of Mr. Heintz.

With respect to the legal grounds for a motion to strike rebuttal, FCG certainly agrees that under the prevailing precedents, some of which are cited in paragraph 1 of the Motion, that it is improper to present direct testimony in rebuttal testimony. The challenge to a witness' rebuttal testimony usually arises, as it does here, when a witness appears for the first time as only a rebuttal witness. However, even a cursory reading of Mr. Heintz's rebuttal testimony will demonstrate that it is in fact proper rebuttal testimony to the direct testimony of MDWASD's witness Mr. Fred Saffer. Accordingly, as is discussed more fully below, there is no basis for striking any of the rebuttal testimony of Mr. Heintz, and MDWASD's motion should be denied. Furthermore, MDWASD has not properly cited any basis for the awarding of attorneys' fees and costs nor is there any other basis for any other relief from the Motion.

II. ARGUMENT

A. The Record Developed To Date.

The essence of MDWASD's argument in striking parts of the rebuttal testimony of Mr. Heintz is that since there are at least three issues identified in this docket that address the cost of service or incremental costs, FCG should have included all of its cost of service evidence in its direct testimony. FCG agrees that to the extent it is offering an affirmative proposal regarding the cost of service, then that should in fact be in the Company's direct testimony, which it is. But Mr. Heintz' rebuttal testimony is not an affirmative proposal – in other words, FCG is not advocating that the incremental cost study discussed in his testimony be used. Rather, in rebuttal to Mr. Saffer, Mr. Heintz has testified that *if* the Commission decides to utilize the approach discussed in Mr. Saffer's testimony, then there are changes and corrections to it that need to be made.

Also, within context, it appears that MDWASD is taking the position that every shred of evidence relevant to a party's position is to be presented in its direct testimony. While a party presents what it believes is relevant to its position, testimony is prefiled specifically so that the other parties and Commission Staff can conduct discovery to develop and examine the supporting and other reasonably related information necessary for the Commission to ultimately make an informed decision. This process is currently ongoing – FCG has responded to 105 Staff interrogatories and production of documents requests so far (additional requests are pending) and 96 MDWASD interrogatories and production of documents requests, with depositions of the witnesses of both parties scheduled to begin this week on March 24th. The discovery cut off is not until May 5th, still six weeks away.

To the extent MDWASD is frustrated with the process of developing a full evidentiary record in this matter, FCG shares some of that frustration – the fundamental issue in this case is whether the 2008 Transportation Service Agreement ("2008 TSA") should be approved. But in addressing the 10 specific issues identified for disposition in this case that relate to this core issue, the information required and requested has far exceeded what any party may have originally conceived. In addressing its position that the 2008 TSA should not be approved, FCG has been called upon to reach back in time to not only produce records that relate to the actual negotiation of the 2008 TSA but which in fact predate the 2008 TSA. Indeed, the evolution of this case has required FCG to reach back to the Company's 2003 rate case, back to the Company's 2000 rate case, back to the original 1999 Transportation Service Agreement ("1999 TSA"), back to the Company's acquisition of Miller Gas in 1991 (it appears that MDWASD's Alexander Orr plant was first a customer of Miller Gas), and, in fact, as far back as the Company's 1989 rate case. The Company has searched its electronic records for some of the information, but a significant amount of the documentation being sought predates FCG's electronic systems. In an effort to be responsive, FCG has undertaken the process of searching boxes retrieved from storage that literally date back decades – boxes that are not always labeled correctly or which do not include the documents that the labeling purports to include. The personnel engaged in these activities are not dedicated solely to this litigation but must also tend to the day to day operations of serving the Company's 100,000 plus customers. FCG is only today supplementing its previous discovery responses to include recently obtained information, a process which is still ongoing.

B. Two Different Approaches.

With respect to the specific case that FCG put on in its direct testimony, MDWASD does not understand that Mr. Heintz is not affirmatively advocating for FCG a different approach to answering the cost of service/incremental cost questions. FCG's affirmative case is set forth in the direct testimony of Ms. Bermudez. The purpose of Mr. Heintz' rebuttal testimony is to rebut Mr. Saffer by pointing out changes and corrections to Mr. Saffer's proposal in the event the Commission chooses that approach, which is completely proper rebuttal.

MDWASD's objections also reflect a disagreement between the parties regarding the difference between the best and most appropriate methodology for calculating the cost of service. This difference arises because Rule 25-9.034, Florida Administrative Code, requires that if FCG wants to enter into a non-tariffed rate, FCG must, as a part of its request to the Commission to approve such rate, provide "completed and detailed justification for the deviation from the utility's filed regulations and standard approved rate schedules." These terms are not defined in the Commission's rule and the rule does not specify a specific cost standard that must be met.

The lack of definition in the rule is further exacerbated by the fact that the tariff section that is identified in the 2008 TSA as the tariff authority for the agreement does not accurately meet the facts and circumstances associated with the service to MDWASD.[1] So really, there is no tariff standard by which to evaluate the requirements in the rule or some cost standard. But even if the Commission relies upon the tariff cited in the 2008 TSA, that tariff (the Contract Demand Service, Original Sheet 49) requires that "the rate shall not be set lower than the incremental cost the Company incurs to serve the Customer. The charge shall include any capital

[1] *See, e.g.*, FCG's witness Melvin Williams Direct Testimony, at 17; FCG's Response to Staff's Fourth Set of Interrogatories, No. 72.

recovery mechanism." Similar to the Commission's rule, the term "incremental cost" is not defined in the tariff.

In setting forth the issues for hearing in this matter, MDWASD advocated for including a specific issue that would define incremental cost, which was identified as Disputed Issue 13.[2] In rejecting the inclusion of Issue 13, the prehearing officer ruled that the definition of incremental cost was subsumed within the other incremental cost issues. In announcing this decision, his comments are especially well taken given the instant Motion: "Well, it, it seems essential to establish what the incremental cost of service is to, to be able to obtain the incremental parts of, of developing that, that cost number. And so, again, defining those as separate issues I think is overkill, noting that we have the discovery process, the prefiled testimony, the cross-examination process, the evidentiary hearing, the post-hearing briefs, as well as the, the global issues that these are all subsumed under." [3] In view of this ruling, counsel for MDWASD, Mr. Gillman, said, "Commissioner, based on your comments, the County would withdraw 13 through 18."[4] The Order Determining Issues for Hearing reflected that MDWASD specifically withdrew its request to include Disputed Issue 13, the definition of incremental costs.[5]

Given the clear understanding of MDWASD that the definition of incremental cost is at issue although subsumed within the cost issues, the parties filed their direct testimony on December 29, 2010. In the direct testimony of Ms. Carolyn Bermudez, FCG offered what it believed is the correct approach and costs necessary to determining whether the rates in the 2008 TSA should be approved. This is the same approach Ms. Bermudez has utilized since first

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[2] *See*, Notice of Status Conference, December 1, 2010, Appendix B, Disputed Issues. Disputed Issue No. 13, proposed by MDWASD, read, "How should "incremental costs" be defined for purposes of this proceeding?"
[3] Docket No. 090539-GU Status Conference Transcript, at 73-74 (recorded December 1, 2010, and filed as Document No. 09894, December 13, 2010) (*hereinafter*, "Transcript")
[4] Transcript, at 74.
[5] Order No. PSC-10-0730-PCO-GU, at 2 (Dec. 13, 2010).

analyzing this question in December 2008, and which was shared with MDWASD in February 2009 (this is further discussed below).

As Ms. Bermudez sets forth in her direct testimony, FCG believes the incremental cost for evaluating the 2008 TSA should be based upon a class of service approach utilizing the cost of service methodology approved by the Commission in the Company's last rate case.[6] A class of service approach recognizes that "FCG does not conduct customer specific or site specific cost studies,"[7] which is what would be required in a more traditional cost of service approach undertaken in a full rate case. More importantly, "you cannot look at our rate case, our surveillance reports and other filings with the PSC, or the books and records of the company to obtain a specific cost of service for MDWASD collectively or specifically their three plants that we serve."[8] Thus, there is no button to press or piece of paper to look at that readily contains a customer specific cost of serving MDWASD. This is why FCG utilized the class of service approach, which looks at groups of costs by customer class.

The approach Ms. Bermudez advocates on behalf of FCG is not the same approach that MDWASD advocates in its testimony, principally that provided by MDWASD's witness Mr. Fred Saffer. Mr Saffer claims that he has determined FCG's "true incremental costs" based upon the best available data at the time he filed his direct testimony.[9] However, even he acknowledges that there are no universal rules with respect to defining incremental costs: "***Typically,*** incremental costs represent only variable costs or, in the case of the Company's service to the Department, increased Operation and Maintenance ("O & M") as a result of the service."[10] He then goes on to say that in addition to his "true" incremental costs he also "calculated the costs

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[6] *See*, Bermudez Direct Testimony, at 11-16.
[7] *Id.*, at 11.
[8] *Id.*
[9] Saffer Direct Testimony, at 5.
[10] *Id.* (emphasis added).

and resulting unit rates associated with or linked to the direct investment in the Company's service to Miami-Dade." So even in its own witness' testimony, MDWASD was offering two different approaches for evaluating whether the rates in the 2008 TSA recovered their "costs."

It is well settled that the purpose of rebuttal testimony is to explain, repel, counteract, or disprove the evidence of the adverse party, and FCG has done just that. If MDWASD opens the door to a specific line of testimony, it cannot be allowed to object to FCG accepting that challenge and attempting to rebut the presumption asserted. Because MDWASD presented Mr. Saffer and his approaches and the respective data that he utilized, FCG felt compelled to provide a rebuttal witness that could properly address both the methodology and the data relied upon by Mr. Saffer. Since Ms. Bermudez took the approach she did based upon the data available to her, after FCG received and reviewed Mr. Saffer's testimony, FCG retained Mr. David Heintz for the specific purpose of rebutting Mr. Saffer. In his rebuttal of Mr. Saffer, Mr. Heintz provided testimony that addressed both the methodology advanced by Mr. Saffer as well as the specific calculations and input data, offering not an affirmative alternative proposal by FCG but rather rebuttal to the fact that if the Commission accepts Mr. Saffer's approach, then certain calculations and input numbers need to be changed.

C. Specific Responses Addressing Appropriateness of Heintz Rebuttal.

The following paragraphs will address the specifics of Mr. Heintz's testimony within the framework of MDWASD's Motion.

Page 1, Line 1 through Page 2, Line 18. MDWASD has proposed striking this testimony. This testimony provides the witness' name, business address, and employer, the business of his employer, his education and experience, the identification of the party sponsoring his testimony, and his prior experience as a witness. Since MDWASD agrees that at least part of Mr. Heintz's

testimony is proper rebuttal (Motion, at 10, acknowledging that Page 6, Line 14 through Page 9, Line 18, should remain), so this part of the testimony must remain in order to properly identify the witness since he did not file direct testimony. There is no substantive information in this section of the testimony regarding any of the issues in the case, just witness background.

Page 3, Line 1 through Page 3, Line 9. MDWASD has proposed striking this testimony. This single question and answer provides a very brief, two sentence summary of the purpose of his testimony. The answer is very clear and establishes that while retained for the purpose of rebutting Mr. Saffer, it will be necessary for him to address the testimony of Ms. Bermudez since Mr. Saffer's direct analyzed the cost analysis that Ms. Bermudez performed in 2008 that led FCG to withdraw the 2008 TSA:

> The Company has asked me to review and comment on the direct testimony and cost of service analysis presented by Mr. Fred Saffer regarding the cost to serve one of FCG's transportation customers, Miami-Dade Water and Sewer Department ("MDWASD'). In responding to Mr. Saffer's testimony, I will also address the direct testimony of Ms. Carolyn Bermudez since Mr. Saffer's testimony evaluates the analyses Ms. Bermudez did in 2009 that led to FCG withdrawing the parties' transportation agreement from Commission consideration.

There is no departing from the proper scope of rebuttal by Mr. Saffer briefly explaining the purpose of his testimony, and so this section should also remain and not be stricken.

Page 3, Line 10 through Page 4, Line 9. MDWASD has proposed striking this testimony. This section provides a short, half page summary of Mr. Heintz' understanding of what Ms. Bermudez and Mr. Saffer said in their direct testimonies. This is foundation testimony and provides insight as to the witness' understanding of the two testimonies that he is going to address. The second part of this section identifies the issues that Mr. Heintz is not going to address in his rebuttal. Again, this is appropriate foundation or background information by the

witness in order to set up what is going to be discussed in the rebuttal. There is no basis for striking this part of the testimony.

Page 4, Line 11 through Page 5, Line 4. MDWASD has proposed striking this testimony. This question/answer describes the cost of service study performed by Ms. Bermudez. As has been previously discussed, FCG believes that the methodology, calculations, and input numbers identified by Ms. Bermudez in her testimony is the proper and correct means of ascertaining whether the rates in the 2008 TSA comply with the Commission's rule and FCG's tariff. Part of the direct testimony of Mr. Saffer is his arguments as to why the class of service methodology advanced by FCG should be rejected. Mr. Saffer is able to respond to Ms. Bermudez' methodology and data because as Ms. Bermudez and Mr. Williams address in their direct testimonies, this cost study was submitted to the Commission Staff on December 30, 2008 in response to a Staff Data Request and it became the basis for FCG's decision to withdraw the 2008 TSA from Commission review on February 17, 2009. However, before withdrawing the petition, FCG met with representatives of MDWASD in a face to face meeting on February 11, 2009 and the information in this cost study was shared with MDWASD.[11] The analysis performed by Ms. Bermudez has been the focus of extensive discussion, discovery, and legal argument since that time. It was certainly appropriate for Mr. Saffer to address this document in his direct testimony as FCG has consistently advocated that it is the appropriate methodology to be used in circumstances such as this. Thus, Mr. Heintz must discuss Ms. Bermudez' analysis in his rebuttal testimony because Mr. Saffer discussed it in his direct. It is not additional direct testimony but rather context for rebutting Mr. Saffer, and so highly appropriate rebuttal testimony that should not be stricken.

[11] *See* Docket No. 080672-GU.

Page 5, Line 17 through Page 6, Line 12. MDWASD has proposed striking this testimony. This testimony expressly and directly rebuts two critical points raised by Mr. Saffer. The first question/answer goes to whether the analysis performed by Ms. Bermudez is a cost of service study that would be completed in a full rate case. It is surprising that MDWASD would move to strike this testimony since here Mr. Heintz is agreeing with Mr. Saffer – and Ms. Bermudez – that the approach used by Ms. Bermudez is not a traditional rate case cost of service analysis. It is important for the Commission to understand the context of a witness' testimony, especially where witnesses agree. The next question/answer provides further context for understanding that while the parties may agree that the analysis presented by Ms. Bermudez may not be a cost of service analysis as would be used in a rate case, Mr. Heintz explains why Ms. Bermudez' approach is appropriate in the absence of a rate case cost of service approach.

FCG acknowledges that without context this discussion may look like direct testimony – indeed, Ms. Bermudez makes a similar point in her direct testimony. However, because Mr. Saffer specifically testified that this approach is not an appropriate approach for determining the cost of service in this case, it is entirely appropriate in rebutting Mr. Saffer for Mr. Heintz to state why he believes Ms. Bermudez' approach is appropriate *under these facts and circumstances*. Accordingly, this is proper rebuttal of Mr. Saffer and should not be stricken.

Page 6, Line 14 through Page 9, Line 18. MDWASD agrees that this is proper rebuttal testimony and so there is no objection to this rebuttal testimony.

Page 10, Line 1 through Page 12, Line 5. MDWASD has proposed striking this testimony. MDWASD seeks to strike this testimony because "FCG witness Heintz presents for the first time a new and completely different analysis by FCG." Motion, at 10. This argument reflects a complete misreading of the rebuttal testimony of Mr. Heintz. Without the prior context

of the other questions/answers that MDWASD seeks to strike this testimony may superficially seem to be a new position for FCG. But MDWASD is entirely wrong in its interpretation of this testimony. FCG is not offering this testimony as an affirmative position as to how the cost to serve should be calculated. FCG's affirmative position is in the direct testimony of Ms. Bermudez. Rather, FCG is offering Mr. Heintz' testimony to make the point that ***if*** the Commission determines that Mr. Saffer's approach is the preferred methodology over that offered by Ms. Bermudez, then Mr. Heintz's testimony provides the Commission with corrections to some of the inputs, numbers, and calculations used by Mr. Saffer so that a proper result can be obtained. In other words, Mr. Heintz's testimony is that if a full rate case cost of service approach is to be used then use the right data/calculations and not the wrong data/calculations as were utilized by Mr. Saffer.

For example, the question/answer that starts Page 10, Line 1 and runs through Page 11, Line 3 provides background into the circumstances when an incremental cost-based rate may be appropriate. It is important to have this information for understanding the results that Mr. Heintz provides beginning on Page 11, Line 4. In the single question/answer that runs from Page 11, Line through Page 12, Line 5 Mr. Heintz describes the specific numbers he has used in the updated analysis contained in his Exhibit __ (DAH-2). FCG acknowledges that this testimony does not say, "For this cost, Mr. Saffer used X and I am using Y." However, the Commission can readily lay down Mr. Heintz' exhibit beside that of Mr. Saffer (Exhibit FRS-3), which when combined with the supporting testimony enables a comparison of the cost categories deemed relevant by each witness, the order by which the figures should be calculated, and the specific number inputs used by each. In short, this is classic rebuttal and not some spring trap FCG is springing at the last minute. FCG is not offering this information as its affirmative

recommendation for Commission action – FCG's proposed and recommended methodology is set forth in Ms. Bermudez' testimony. Rather, Mr. Heintz' purpose through this testimony and the supporting exhibit is to rebut the cost categories, methodology, and specific input numbers relied upon by Mr. Saffer and to show the correct categories, methodology, and input numbers. This is proper rebuttal and should not be stricken.

Page 12, Line 6, through Line 7. MDWASD has proposed striking this testimony. This is the question/answer as to whether the witness' rebuttal testimony is concluded. Every witness has this and it should remain in the testimony.

In summary, as this analysis reflects, all of the testimony offered by Mr. Heintz is proper rebuttal testimony – it is testimony "brought out" by MDWASD in its direct. FCG had no previous notice or ability to anticipate the approach and compilation of information that Mr. Saffer would use until he filed his direct testimony. There was no laying in wait here as Mr. Heintz' testimony is not an affirmative proposal for analyzing the cost questions. Moreover, the assertion in the Motion that the appearance of this information in rebuttal testimony has some how deprived MDWASD the opportunity to seek appropriate discovery and has violated their right to due process is unfounded. The rebuttal was filed on January 28, 2011 and this Motion was filed March 16, 2011, more than 6 weeks after the testimony was filed. The Commission Staff, almost immediately after the filing of rebuttal testimony, served on FCG specific discovery regarding the rebuttal testimony of Mr. Heintz which FCG has responded to. MDWASD, in its third set of discovery to FCG, propounded a series of interrogatory questions regarding Mr. Heintz' rebuttal testimony that have also been responded to. Furthermore, MDWASD has scheduled Mr. Heintz for deposition on April 1, 2011. Finally, the discovery cut off is not until May 5, 2011. MDWASD ***has had and still has*** sufficient time to pursue any necessary

discovery regarding Mr. Heintz' testimony. Accordingly, Mr. Heintz' testimony is proper rebuttal, there has been and continues to be sufficient time for MDWASD to explore such testimony through discovery, and there is no basis for striking any of it. Accordingly, MDWASD's Motion should be denied.

III. ATTORNEYS' FEES AND COSTS; OTHER RELIEF

In the relief sections of the Motion, MDWASD has asked the Commission to award attorneys' fees and cost associated with the preparation of its motion as well as such other relief as the Commission may deem necessary. There is no basis for either.

At the outset it must be said that MDWASD has not cited to any Commission rule, order, or statute that would authorize the Commission to award attorneys' fees and cost in this instance. Likely, this is because the law in this area is well settled that without such specific authority, the Commission lacks the ability to award such fees and costs. The Commission itself has recognized this and "has consistently held that as an administrative body, it lacks statutory authority to assess costs and attorneys fees."[12]

Even disregarding the Commission's inability to award such attorneys fees and costs, MDWASD's claim is baseless as there is no factual predicate meriting the awarding of such claim. As FCG's substantive response above states, all of the rebuttal testimony of Mr. Heintz is proper rebuttal testimony. There is, therefore, no substantive reason to award attorneys' fees and cost.

Further, MSWASD has not made a showing sufficient to permit an award of attorneys' fees or costs under the heightened standard found in Florida Rule of Civil Procedure Rule 57.105

[12] *In re: Amended Petition for verified emergency injunctive relief and request to restrict or prohibit AT&T from implementing its CLEC OSS-related releases by Saturn Telecommunication Services, Inc.*, Docket No. 090430-TP, Order No. PSC-09-0799-PAA-TP (December 2, 2009).

(2010). The Motion does not make any of the factual allegations that are usually associated with the recovery of fees and costs due to frivolous, untimely, or otherwise knowingly inappropriate pleadings being filed. If there is any frivolous effort here to waste the time of the parties and Commission it is MDWASD's Motion seeking to challenge rebuttal testimony that, if MDWASD would only read all of the testimony, is clear that it is rebutting both the fundamental methodology as well as the specific calculations and input numbers relied up by Mr. Saffer. Thus, there is no basis in the Motion itself that would support the awarding of any attorneys' fees and costs, and such request should be denied.

Finally, with respect to such other relief as the Commission may deem appropriate, there is no other relief asserted or necessary. Accordingly, any other such other relief should equally be denied.

IV. REQUEST FOR ORAL ARGUMENT

By separate pleading, MDWASD has requested oral argument. FCG believes that the pleadings are clear on their face and that oral argument is unnecessary to the disposition of this matter. Substantively, Mr. Heintz has properly filed rebuttal testimony that rebuts both the methodology utilized by Mr. Saffer as well as the specific calculations and input numbers relied upon by Mr. Saffer. This is rebuttal and not an affirmative advocacy by FCG of an alternative methodology as argued by MDWASD. Accordingly, FCG does not believe oral argument would be productive. However, to the extent the prehearing officer determines that oral argument may be appropriate, then FCG would request the opportunity to equally participate in such argument.

V. CONCLUSION

WHEREFORE, Florida City Gas respectfully requests that the prehearing officer deny the Motion of MDWASD to strike portions of the rebuttal testimony of FCG's witness Mr. David Heintz all of his testimony is proper rebuttal of Mr. Saffer. Further, Florida City Gas requests that there be no award of attorneys' fees and costs because there is no affirmative authority for the Commission to make such an award and no substantive basis pled or demonstrated that would warrant the award of such fees and costs. Finally, Florida City Gas believes that the prehearing officer can dismiss MDWASD's Motion based upon these pleadings, making oral argument unnecessary. However, if the prehearing officer determines that such oral argument is necessary, then Florida City Gas would respectfully request that it be permitted to participate in such oral argument on the same basis as MDWASD's counsel may be permitted.

Respectfully submitted this 23rd day of March, 2011.

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