Diamond Williams 090539-GU

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

Subject: Docket No. 090539-GU

Attachments: 2011-03-28, 090539, FCG's Response in Opp. to MDWASD's Motion for Summary Final Order.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 in Opposition to Miami-Dade County's Motion for Summary Final Order
Total Number of Pages is 29

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March 28, 2011

VIA ELECTRONIC FILING
Ms. Ann Cole, Commission Clerk
Office of Commission Clerk
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 090539-GU

Dear Ms. Cole:

Enclosed for filing on behalf of Florida City Gas is an electronic version of Florida City Gas' Response In Opposition to Miami-Dade County's Motion For Summary Final Order in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

, For

Floyd R. Self

FRS/amb
Enclosure
cc: Shannon O. Pierce, Esq.
Parties of Record

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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 the Miami-Dade Water and Sewer Department	)	Docket No.: 090539-GU
	)	Filed: March 28, 2011

FLORIDA CITY GAS' RESPONSE IN OPPOSITION TO MIAMI-DADE COUNTY'S MOTION FOR SUMMARY FINAL ORDER

Florida City Gas ("FCG"), by and through its undersigned counsel, hereby responds in opposition to the Miami-Dade Water and Sewer Department's ("MDWASD") Motion for Summary Final Order Approving Special Gas Transportation Service Agreement and Imposing Sanctions on Florida City Gas and Incorporated Memorandum of Law ("Motion"). The Commission should deny this Motion based on the memorandum below and for the following reasons: (1) the Motion is premature, as discovery in this docket is still ongoing; (2) the Motion fails to meet the standard for the Commission to grant a summary final order, as the vast majority of "undisputed facts" contained in the Motion are, in fact, disputed; and (3) MDWASD cites to no rule or statute authorizing the imposition of sanctions in this docket, and there is no basis for doing so. Further, because the Motion is completely untimely and without foundation, there is no need for the Commission to conduct the separately requested oral argument.

I. INTRODUCTION

MDWASD's Motion presents a biased, incomplete, inaccurate, and one-sided view of the facts and issues in this docket that ignores FCG's position and the fundamental dispute between the parties that is clearly reflected in the current evidentiary record to date. Further, the Motion ignores vast Commission precedent concerning the timing of such motions, as well as the very high standard the Commission utilizes in considering such motions. The Commission must not

be swayed by MDWASD's emotionally exaggerated statements and arguments. In fact, MDWASD devotes much of its Motion to invective and diatribe against FCG that, if presented succinctly and dispassionately, can be honed to the following single point:

> FCG has not provided MDWASD with information regarding the incremental cost of providing service, including the original capital investment costs and operating costs.

As will be discussed below, this is a hotly disputed contention that is completely false and in no way provides authority for the grant of a summary final order.

But that is not all. MDWASD further attempts to distract the Commission from the record evidence by repeatedly stating that this issue has been disputed for 2 1/2 years, and that FCG has ignored its requests for disputed cost records. In reality, this case was filed with the Commission on December 14, 2009. MDWASD's *first request* for cost data was served on August 19, 2010. MDWASD's exaggeration as to the time frame is but one glaring example of its substitution of emotional hyperbole, aspersions, and twisted half-truths that it promotes as a basis for a summary decision.

In its Motion, MDWASD has presented a selective and, more importantly, disputed series of facts to support its distorted story of the history of the 2008 Agreement. The disputed facts are headed by the most fundamental issue – that being the measure of the cost of service. MDWASD believes such cost can be measured only through a customer specific, rate base form of an incremental cost study. FCG believes such cost can and should be measured by a class of service analysis based upon the Commission's approved incremental cost methodology from the last rate case. This difference arises because Rule 25-9.034, Florida Administrative Code, requires a utility, as part of its request to the Commission to approve a non-tariffed rate, to provide a "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.*** What is sufficient under the rule to establish a "completed and detailed justification" is clearly a mixed question of law and fact.[1] Each party fundamentally disputes the factual basis upon which the other relies. On the basis of this highly disputed issue, and for other reasons detailed below, the Commission must deny the Motion.

II. LEGAL STANDARD

MDWASD moves for a summary final order pursuant to Rule 28-106.204(4), Florida Administrative Code, and Rule 1.510, Florida Rules of Civil Procedure. Section 120.57(1), Florida Statutes, provides, in pertinent part, that:

> Any party to a proceeding . . . may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the [finder of fact] determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

Rule 28-106.024(2) is consistent with this statute.

The Commission has considered motions for summary final orders on several occasions. For example, in *In re: Qwest Communications Co., LLC against MCImetro Access Transmission Servs. (d/b/a Verizon Access Transmission Servs.), et al.*, the Commission stated:

> The standard for granting a summary final order is very high. The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.
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> Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." . . . The burden is on the movant to demonstrate

[1] The rule requires more than just the completed and detailed cost justification, which is also the subject of intense dispute. For example, much is made by MDWASD that there is a signed contract between the parties when in fact the rule prohibits the execution of any agreement until ***after*** the Commission has approved it.

> that the opposing party cannot prevail . . . . "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law . . . . "Even where the facts are undisputed, issues as the interpretation of such facts may be such as to preclude the award of summary judgment." . . . If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper . . . .[2]

In addition, this Commission has acknowledged that policy considerations should be taken into account in ruling on a motion for summary final order. For example, the Commission has held:

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of the Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that
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> > [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. *Coastal Caribbean Corp. v. Rawlings,* 361 So. 2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. *Page v. Staley,* 226 So. 2d 129, 132 (Fla. 4th DCA 1969). The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.[3]

When analyzed under this well-established standard, MDWASD's Motion must fail because disputed issues of material fact pervade this docket and all ten of the issues assigned for hearing. MDWASD's Motion falls short of the very high burden to demonstrate that FCG cannot prevail

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[2] Docket No. 090538, Order No. PSC-10-0296-FOF-TP (May 7, 2010).

[3] Docket No. 070126-TL, Order No. PSC-07-1008-PAA-TL (Dec. 19, 2007) (*quoting* Docket Nos. 970657-WS and 980261-WS, Order No. PSC-98-1538-PCO-WS (Nov. 20, 1998) at n.8).

in this docket as well. Finally, MDWASD has failed to demonstrate that it is entitled to judgment as a matter of law. But first and foremost, and dispositive of the Motion in its entirety, is the fact that the case is not yet at the point where the Commission can properly entertain such a motion.

III. ANALYSIS

A. The Motion is Premature.

The Commission has clearly stated:

> The appropriate time to seek summary final order is after the testimony has been filed and discovery has ended. . . . However, once a movant has tendered competent evidence through discovery to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is *not* enough to merely assert that an issue exists. . . . Until the parties have had the opportunity to proceed with discovery and file testimony, it is premature to decide whether a genuine issue of material fact exists.[4]

While direct and rebuttal testimony has been filed, the discovery process is currently very actively underway. Only the first deposition in the case was taken last week of one of MDWASD's witnesses. This week, FCG's three witnesses are being deposed and the remaining four MDWASD witnesses are being deposed over the following two weeks. The *Second Order Establishing Procedure*[5] in this case has the discovery cutoff set for May 5, 2011. This cutoff is still some 5 weeks away, meaning there is plenty of time to serve additional discovery. In fact, on March 16, 2011, the Commission Staff served its fifth set of interrogatories and fifth request for production of documents on FCG, and a sixth set of interrogatories and fifth request for production of documents to MDWASD; responses are due April 11, 2011. MDWASD has filed a motion to compel discovery which FCG responded to March 24, 2011. MDWASD has also filed a motion to strike part of the rebuttal testimony of one of FCG's witnesses which FCG

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[4] *Id.* at 7-8 (citations omitted).
[5] Order No. PSC-11-0110-PCO-GU (February 9, 2011).

responded to on March 23, 2011. FCG on March 18, 2011 filed a motion to disqualify and strike the direct and rebuttal testimony of Brian Armstrong for appearing in this proceeding as both a lawyer and as a witness; MDWASD's response is due March 28th. As of the date of the filing of this Response, the Commission has not ruled upon any of these motions. To say that the case is joined and susceptible to a motion for summary final order because there is no genuine issue as to any material fact, and that the record is settled, is simply not true. In this docket, virtually every issue remains in dispute. In addition, the facts are continuing to be discovered, and are subject to disclosure at least until the discovery cutoff on May 5, 2011.

The importance of the extent to which ongoing discovery can either generate or dispose of disputed issues of fact is revealed in the real complaint MDWASD raises in this proceeding – the original cost data for the facilities. FCG believes these records are unnecessary to dispose of the case if the Commission utilizes the class of service approach advocated by FCG and contested by MDWASD. As FCG detailed in its March 24, 2011, response to MDWASD's motion to compel:

> because some of the information sought by MDWASD's discovery is not readily kept in the form and manner requested, FCG has gone to great lengths to retrieve boxes from storage in a good faith effort to obtain the requested information. Some of these original cost records are decades old and not used in the routine course of business and therefore not readily accessible. Despite their potential lack of relevance, FCG in good faith has undertaken the time and expense of retrieving these ancient documents and on March 23, 2011 supplemented its prior discovery responses with these and other materials. The process of supplementation is still ongoing.[6]

Thus, the claims in Mr. Langer's affidavit that FCG was being unresponsive with respect to the cost data are now moot.

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[6] FCG Response to MDWASD's Motion to Compel, at ¶ 4 (March 24, 2011).

Discovery is an ongoing part of the process through which the parties discern facts and confirm or refine their positions. It is precisely for this reason that the Commission requires that "the appropriate time to seek summary final order is after testimony has been filed and discovery has ended."[7] Since the discovery cutoff in this case is not until May 5, 2011, MDWASD's Motion is premature which by itself is a proper and complete basis for the Commission to deny it.

B. Disputed Issues of Material Fact Preclude Summary Final Order.

If, contrary to the clear precedents, the Commission does not dismiss the Motion, then it is clear from the pleadings and the face of its Motion that MDWASD has failed to conclusively demonstrate the nonexistence of all issues of material fact and consequently has failed to demonstrate that as a matter of law it is entitled to a summary disposition of this case without any hearing.

MDWASD claims, in its Motion, some 51 separate paragraphs of "undisputed facts" in this proceeding. However, the vast majority of these so-called "undisputed facts" are a selective and, more importantly, disputed series of points to support MDWASD's distorted history of the 2008 Agreement. Many of these alleged "undisputed facts" are the opinion of MDWASD and its view of the evidence. As the law makes clear, every possible inference must be drawn in favor of FCG and ***against*** MDWASD as the moving party. As a matter of law, the Commission must reject MDWASD's opinion and interpretation of the facts developed thus far. To demonstrate

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[7] *Qwest Communications*, Docket No. 090538, Order PSC-10-0296-FOF-TP (May 7, 2010), at 7-8. *See also In re: Complaint of Florida Competitive Carriers Ass'n against BellSouth Telecommunications, Inc.*, Docket No. 020507-TL, Order No. PSC-02-1464-FOF-TL (Oct. 23, 2002) ("We believe that the suitable time to seek summary final order, if otherwise appropriate, is after testimony has been filed and discovery has ceased."); *In re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., & Dillard's Dep't Stores, Inc. against Florida Power & Light Co.*, Docket No. 03023-EI, Order No. PSC-04-0992-PCO-EI (Oct. 11, 2004) ("Moreover, a summary final order should not be entered . . . because good faith discovery on the issue was still pending at the time of the vote.").

just how far MDWASD has gone in twisting and spinning the facts, FCG offers the following disputed issues of material fact as counter-evidence to establish that the Commission should not grant a summary final order in MDWASD's favor.[8] FCG will examine each of MDWASD's alleged "undisputed facts," which can be found at paragraphs 4 through 55 of MDWASD's Motion:

4. Undisputed. However, MDWASD asserts that because FCG signed the document the Commission can ignore all of its governing law and enforce the agreement. However, as a creature of statute, the Commission cannot ignore fundamental law. At the outset, both FCG and MDWASD were not authorized to sign the document since Rule 9.034(1), Florida Administrative Code specifically requires that "such contract must be approved by the Commission prior to its execution." Thus, the document never should have been signed since it was not first submitted to the Commission for approval. Moreover, a non-tariff rate agreement, under applicable Commission laws, rules, and regulations, as well as under the express language of the 2008 Agreement itself, cannot become effective until first approved by the Commission. *See* Williams Direct, p. 8, lines 3-9; p. 20, lines 1-6. Thus, while there may be no dispute about the signatures on the page, by both FCG and MDWASD, the legal effect of such signatures is a key legal issue that will not be resolved until the post-hearing briefs.

5. Disputed. Whether and to what extent the document was negotiated is certainly a contested matter. Moreover, there is also a dispute as to the types and quality of internal review that was conducted of the document.

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[8] FCG has attached to this response, as Exhibits A, B and C, the Affidavits of Melvin Williams, Carolyn Bermudez and David A. Heintz, that attest to the truth and accuracy of their testimony. *See* Docket No. 030623-EI, Order No. PSC-04-0992-PCO-EI (Oct. 11, 2004) (reviewing, on motion for summary final order, relevant testimony prefiled in the docket for which affidavits had been provided attesting to the truth and accuracy of the testimony); *see also Booker v. Sarasota, Inc.*, 707 So. 2d 886, 889 (Fla. 1st DCA 1998) (finding that "a Florida Court may not consider an unauthenticated document in ruling on a motion for summary judgment, even where it appears that such document, if properly authenticated, may have been dispositive.").

6. Undisputed. However, FCG subsequently determined that the statements made in the petition were not correct. MDWASD attempts to ignore subsequent events and to force this Commission to approve the agreement on the basis of a statement that is now known to be false and in violation of the Commission's rules and FCG's tariff. Thus, while the fact is undisputed, the effect of this fact is very highly disputed and an insufficient basis for summary disposition.

7. Disputed. Upon submission of the 2008 TSA to the Commission, the Commission Staff, on December 2, 2008, submitted six questions regarding the 2008 TSA, one of which specifically asked for information about the cost of service calculation that led to the rate. *See* Williams Direct, p. 10, lines 7-13; Bermudez Direct, p. 6, line 12, through p. 7, line 14. FCG then conducted further analysis of the cost to provide the service and the derivation of the proposed rate, which showed that the 2008 TSA did not cover the cost of service attributable to service to MDWASD. *See* Bermudez Direct, p. 6, line 12, through p. 7, line 14. As a consequence of this evaluation, FCG determined that the rates in the agreement were not lawful and that it would not be appropriate for the company to pursue an agreement it knew could not be approved due to is illegality. After determining that the rates in the agreement did not recover their costs, FCG met with MDWASD in an effort to explain the situation. FCG left the meeting believing MDWASD was going to work with the company to develop a rate that could be approved. MDWASD has a very different view of the meeting and subsequent events.

8. Disputed. FCG, as early as the receipt of the first Staff data request in December 2009, notified MDWASD that it was concerned about the rate. As the data request and rate analysis process progressed, FCG communicated with MDWASD regarding its ongoing discussions with Commission Staff. FCG met with MDWASD, and specifically, Jack Langer, on February 11, 2009 to discuss in detail the situation and how the parties should move forward.

See Williams Direct, p. 11, line 3, through p. 12, line 12. MDWASD's statement that FCG withdrew the petition "without prior explanation or notice" is inaccurate.

9. Disputed. See the response to paragraph 8. With regard to MDWASD's contention that FCG has provided *no* documentation concerning incremental cost, there is a huge difference of opinion between MDWASD and FCG, as has been previously discussed. FCG has provided a class of service methodology to calculate incremental costs. *See* Bermudez Direct, p. 11, lines 10-18, and exhibits thereto; *see also* Bermudez Rebuttal, p. 3, lines 2-22.

10. Disputed. Mr. Williams and FCG met with representatives from MDWASD on March 16, 2009, to discuss the situation and to negotiate a month-to-month extension until the parties could develop a new, compliant rate. *See* Williams Direct, p. 13, lines 11-14. FCG determined, based upon communications with Commission Staff, that the rates reflected in the 2008 TSA would not cover the cost of service attributable to service to MDWASD. Mr. Williams left the February 2009 meeting believing that MDWASD was going to work with FCG to develop a rate that could be approved by the Commission and he continued to believe that until June. *See* Williams Rebuttal, p. 5, lines 20-22 and p. 8, lines 13-19.

11. Disputed. FCG exchanged letters with Jack Langer and MDWASD concerning the 2008 TSA and an extension. As Mr. Williams testified, it appeared that MDWASD would work cooperatively to resolve the situation. *See* Williams Direct, p. 13, lines 15-20. However, FCG received a telephone call from Brian Armstrong, an attorney who represented himself as representing MDWASD, who indicated that MDWASD preferred to litigate the 2008 TSA rather than negotiate a new, compliant rate. *See* Williams Direct, p. 14, lines 13-17.

12. Undisputed. However, as noted previously, the rates in the 2008 Agreement were subject to Commission approval and do not meet the requirement that they recover their costs.

13. Disputed. FCG is providing service to MDWASD under the terms of its filed tariff as a GS 1,250K customer. MDWASD is thus being billed under the approved tariff for this class of service just like any other such large user. *See* Williams Direct, p. 7, lines 6-9. In the absence of a Commission approved agreement, FCG's obligation as a regulated public utility is to charge its tariff rates. The tariff rate currently being charged, and which MDWASD is not paying, is the lowest available rate in the tariff.

14. Disputed. Since MDWASD is admitting that it has questioned FCG's rate analysis, this legally cannot be a fact upon which MDWASD can base a motion for summary final order. Further, Ms. Bermudez's rebuttal testimony, at pages 7, line 5 through page 9, line 11, directly rebuts MDWASD's contention that FCG is somehow attempting to recover more than it should. As FCG has previously discussed, this is the heart of the dispute between the parties.

15. Disputed. See the response to paragraphs 10 and 14.

16. Disputed. FCG first disputes that any such requests were made "long ago." This case was filed with the Commission on December 14, 2009. MDWASD's first request for cost data was served on August 9, 2010. FCG has gone to great lengths to retrieve boxes from storage in a good faith effort to obtain the requested information. Some of these original cost records are decades old and not used in the routine course of business and therefore not readily accessible. Despite their potential lack of relevance, FCG in good faith has undertaken the time and expense of retrieving these ancient documents and on March 23, 2011 supplemented its prior discovery responses with these and other materials. The process of supplementation is still ongoing. However, in connection with Section III-A above, this statement provides further basis for denial of the Motion, as the time for discovery has not concluded.

17. Disputed. See the response to paragraph 16. Further, MDWASD's March 23, 2011 supplement to its prior discovery renders paragraphs 14 and 15 of Langer's Affidavit inaccurate and thus moot. While we do not yet know MDWASD's opinion regarding the completeness or quality of the cost records produced, the record thus far would suggest a lack of agreement on what these materials may mean for the case, thus further demonstrating the lack of undisputed facts and thus the lack of any legal basis for a summary disposition.

18. Disputed. See the response to paragraphs 16 and 17. Further, MDWASD's repeated reference to the dispute lasting 2 1/2 years is inaccurate.

19. Disputed. See the response to paragraphs 16, 17, and 18. Further, this is the fundamental issue to this case, which is hotly disputed – the measure of the cost of service. MDWASD believes such cost can be measured only through an incremental cost study. FCG believes such cost can and should be measured by a class of service analysis. *See* Bermudez Direct, p. 11, line 10 through p. p. 16, line 8; Bermudez Rebuttal, p. 3, lines 2-22; Heintz Rebuttal, p. 6, lines 1-12. The difference between FCG and MDWASD arises because Rule 25-9.034, Florida Administrative Code, requires a utility, as a part of its request to the Commission to approve a non-tariffed rate, to provide a "complete 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. What is sufficient under the rule to establish a "completed and detailed justification" is clearly a mixed question of law and fact. Further, each party fundamentally disputes the factual basis upon which the other relies.

The factual nature of this issue is underscored by the prehearing rulings that have been issued in this proceeding. MDWASD advocated including the issue of "[h]ow should

'incremental costs' be defined for purposes of this proceeding?"[9] In rejecting the inclusion of that issue as seeking the establishment of a legal definition, the prehearing officer ruled that "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."[10] The ruling demonstrates the importance that the prehearing officer placed on the factual discovery and the fact-finding hearing to develop the information necessary to determine the scope of the "completed and detailed justification" required by rule, and the fact that the incremental cost of service is but a part of the more comprehensive "global issues" involved in this case.

20. Disputed. See the responses to paragraphs 16, 17, 18 and 19.

21. Disputed. See the responses to paragraphs 16, 17, 18 and 19. See also FCG's Response to MDWASD's Motion to Compel.

22. Disputed. See the responses to paragraphs 16, 17, 18, 19 and 21.

23. Disputed. As has become increasingly common in MDWASD's motions, it has falsely accused FCG of bad faith, misleading the MDWASD and the Commission, or otherwise violating various Commission rules. These accusations are patently false, and have no place in a purported statement of undisputed facts accompanying a motion for summary final order. Sadly, the intensity of such statements only further demonstrates the heightened level at which this case is disputed by the parties.

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[9] *See* Notice of Status Conference, Dec. 1, 2010, Appendix B, Disputed Issues.

[10] Docket No. 090539-GU, Status Conference Transcript, at 73-74 (recorded Dec. 1, 2010, and filed as Document No. 09084, Dec. 13, 2010) (*hereinafter*, "Transcript").

24. Undisputed that MDWASD filed the instant petition. Its approval is very seriously disputed by FCG.

25. Undisputed. This being an undisputed fact certainly does not entitle MDWASD to a summary disposition of the case.

26. Disputed. FCG contends that the Commission should not approve the 2008 TSA because the rate charged to MDWASD is below the cost of service. *See* Williams Direct, p. 16, lines 4-12; Bermudez Direct, p. 19, lines 17-20. FCG has also contended that the Commission should ratify the approved tariff charges that remain unpaid since August 2009. *See* Williams Direct, p. 16, lines 13-19.

27. Disputed. See the responses to paragraphs 8 and 9.

28. Disputed. This is argumentative and not an undisputed fact and thus not a basis for a summary final order.

29. Disputed. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order. MDWASD was responsible for ensuring its rights, not FCG. The document was the product of both parties' efforts, and MDWASD had a very experienced consultant monitoring the docket and advising MDWASD. MDWASD could have immediately filed the agreement a second time but did not – it waited some 10 months before filing.

30. Undisputed. However, such public meetings do not give rise to a summary final order.

31. Disputed. Again, this paragraph in no way can be considered an undisputed fact supporting entry of a summary final order. Rather, it is a recapitulation of arguments that

MDWASD has made in many of its recent motions and filings. See FCG's responses to the prior paragraphs.

32. Undisputed. Again, the Commission's prehearing orders are not a basis for a summary final order.

33. Undisputed as to the quotation, but it is out of context. Again, this is the fundamental issue in this case that is, obviously, disputed – the measure of the cost of service. See the response to paragraph 19.

34. Undisputed that the parties filed the testimony. A read of the testimony only confirms that the parties do not agree on virtually anything.

35. Disputed. FCG disputes much of the testimony of MDWASD's witnesses, and Saffer and Armstrong specifically, and has filed rebuttal testimony to that effect.

36. Undisputed that FCG prefiled the direct testimony of two witnesses, but even a superficial reading of it reveals that they disagree significantly with the MDWASD witnesses' prefiled direct. Again, MDWASD attempts to manipulate the fundamental issue in this case regarding the measure of the cost of service. See the response to paragraph 19.

37. Undisputed that FCG filed rebuttal testimony, but since this is rebuttal it disputes most of the MDWASD direct testimony. FCG again rejects the contention that it has somehow withheld information for "2 1/2 years." The fact that MDWASD acknowledges FCG's cost expert as filing rebuttal should alone be a sufficient basis for denying MDWASD's Motion.

38. Disputed. See the response to paragraph 19. FCG is not and has not been trying to prove the original cost of the facilities to serve MDWASD because under the class of service approach FCG has used, the original cost of the facilities dedicated to serving MDWASD is

irrelevant. The fact that FCG takes this approach once again demonstrates the extent to which the parties contest this issue.

39. FCG disputes this, and all other, attempts by MDWASD to characterize the testimony of FCG witnesses. The testimony of the witnesses speaks for itself. This is another example of MDWASD not reading the entire testimony together.

40. Undisputed as to whether the documents referenced are attached to the Motion, but FCG disputes the interpretation MDWASD is attempting to impose on them.

41. Disputed. Again, FCG does not believe original costs are necessary to a resolution of the case, which MDWASD contests. To the extent original costs are relevant; Ms. Bermudez used the only information she had at the time. Since then, FCG has located the original cost documents which speak for themselves.

42. Disputed. MDWASD has taken testimony out of context. Moreover, the original cost documentation has now been produced and it speaks for itself.

43. Disputed. The thrust of this lengthy discussion of the evidence that FCG presented is MDWASD's conclusion that FCG has not provided any evidence. As has already been discussed at length, FCG and MDWASD have very different ideas about what cost means and what is relevant to such costs, which again mean there is no basis for a summary final order in this matter.

44. FCG disputes MDWASD's depiction of what happened at the March 11, 2011 informal meeting. As of the date of the filing of this response, FCG has responded to 105 Commission Staff Interrogatories and 96 MDWASD Interrogatories and Production of Document Requests. Because some of the information sought by MDWASD's discovery is not readily kept in the form and manner requested, FCG has gone to great lengths to retrieve boxes

from storage in a good faith effort to obtain requested information. Some of these original cost records are decades old and not used in the routine course of business and therefore are not readily accessible. FCG has undertaken the time and expense of retrieving these boxes and documents, and on March 23, 2011, supplemented its prior discovery responses with these and other materials. The commentary here is commentary – opinion and more opinion about the state and quality of evidence, none of which supports a summary final order.

45. Disputed. See the response to paragraph 44.

46. Disputed. See the response to paragraph 44.

47. Disputed. This is pure argument wrapped in fiction and fantasy. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order.

48. Disputed. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order. FCG further incorporates its response to paragraph 44, as well as its Response to MDWASD's Motion to Compel.

49. Disputed. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order. FCG further incorporates its response to paragraph 19.

50. Disputed. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order. FCG further incorporates its response to paragraph 19.

51. Disputed. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order. FCG further incorporates its response to paragraph 19.

52. Disputed. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order. FCG further incorporates its response to paragraph 19.

53. Disputed. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order. FCG further incorporates its response to paragraph 19.

54. Disputed. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order. FCG further incorporates its response to paragraphs 41 to 44.

55. Disputed. This is MDWASD's opinion of the case and in no way can be considered an undisputed fact supporting entry of a summary final order. FCG further incorporates its response to paragraph 19.

C. MDWASD is not Entitled to Judgment as a Matter of Law.

The legal standard for a summary final order under Rule 28-106.204(4) and Section 120.57(1) is, according to the Commission, "very high."[11] MDWASD has fallen short of this standard. As demonstrated in Section III-B above, virtually every so-called undisputed fact posited by MDWASD is heavily disputed or, as is often the case, MDWASD's biased opinion of the case. The case has involved FCG providing hundreds of responses to interrogatories and requests for production of documents. FCG has filed the testimony of three witnesses. MDWASD clearly disagrees with their testimony, which they are entitled to do. However, those

[11] Docket No. 090538, Order No. PSC-10-0296-FOF-TP (May 7, 2010).

disagreements are no indication of a lack of disputed issues of fact. Rather these disagreements underscore the very reason for a proceeding to weigh competing facts and resolve the disputes. The arguments of MDWASD, which are delivered with great invective, do not come close to meeting the heavy burden for obtaining a summary final order.

FCG disputes that the information it has submitted is insufficient to demonstrate the cost of providing service to MDWASD. FCG disputes that just because both FCG and MDWASD signed a document they were not legally permitted to enforce entitles MDWASD to the benefit of that illegal contract. FCG disputes that an error in the preparation of the unadopted TSA must be perpetuated by approving the contract, contrary to the substance and procedures required for such an agreement. FCG disputes that the 2008 TSA contains rates sufficient to recover its costs of service. Thus, the issue of whether FCG can serve the area in dispute under the 2008 TSA, or must fall back on the approved tariff, has factual and legal elements to be resolved. There is no single issue of fact or law that is, by itself, dispositive of this dispute. Since all inferences must be drawn against MDWASD, as the moving party, the selective facts, inferences, opinions, positions, assumptions, and conclusions MDWASD makes are highly inappropriate for a motion for summary final order and must be read contrary to the way MDWASD would prefer, thus once again providing no basis for a summary final order. Moreover, discovery has not been completed in this docket and such discovery may reveal further differences on issues. Clearly, the Motion does not meet the standards in the law as articulated by the Commission and should be denied.

Further, MDWASD argues that it is entitled to a summary final order under the "prevention of performance" doctrine. Again, the acts that MDWASD purports caused

prevention of performance of the 2008 TSA are disputed by FCG, and thus, MDWASD is not entitled, as a matter of law, to the entry of a summary final order.

D. MDWASD Offers No Basis for Sanctions.

MDWASD styled its Motion as a "Motion for Summary Final Order Approving Special Gas Transportation Service Agreement and Imposing Sanctions on Florida City Gas and Incorporated Memorandum of Law." Yet, MDWASD provides no legal basis to this Commission for the imposition of sanctions against FCG, except, in the "wherefore" clause of its Motion, it states, "(i) impose such sanctions as fit and proper to penalize FCG for the pattern of egregious mismanagement and misrepresentation in which it has engaged[.]"

MDWASD has not cited to any Commission rule, order, or statute that would authorize the Commission to impose sanctions against FCG. Regardless, MDWASD's request for sanctions is baseless as there is no factual predicate meriting the award of sanctions. FCG's response to MDWASD's Motion demonstrates that MDWASD's allegations are baseless and disputed. FCG's response to the Motion further demonstrates that it should not be sanctioned under the heightened standard found in Section 57.105, Florida Statutes, which MDWASD has not cited in its Motion. Therefore, there is no reason for the Commission to entertain the imposition of sanctions.

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. MDWASD's Motion is premature under clear Commission precedents so on that basis alone the Motion can be dismissed without any argument. As for the substantive claims, if ever there was a case that demonstrated disputes issues of very material fact, this is it. The extensive

pleadings just in the last two week prove there is a very real dispute here. 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

Based on the foregoing, the facts surrounding both the substance and the procedure of the 2008 TSA are in dispute, starting with the fundamental issue of the nature and extent of the "completed and detailed justification for the deviation from the utility's filed regulations and standard approved rate schedules." Those disputes must be resolved through a fact-finding hearing. That hearing has been set, the parties are moving forward expeditiously, and those efforts should not be derailed by MDWASD's meritless Motion. For the reasons set forth herein, MDWASD has failed to demonstrate that a summary final order is appropriate, and FCG respectfully requests that the Commission deny the Motion.

Respectfully submitted this 28th day of March, 2011.

Floyd R. Self, Esq., B.C.S.
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Tel. 404-584-3394

Counsel for Florida City Gas

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 the Miami-Dade Water and Sewer Department	)	Docket No.: 090539-GU Filed: March 28, 2011

AFFIDAVIT OF MELVIN WILLIAMS

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

BEFORE ME, the undersigned authority, this day did personally appear MELVIN WILLIAMS, who being first duly sworn, deposes and states:

1. My name is Melvin Williams. I am over 21 years of age and am competent to testify. At all times relevant to the above-captioned matter, I was the Director, State Regulatory Affairs for AGL Resources and am presently the Vice President and General Manager of Florida City Gas and Atlanta Gas Light Company. As such, I have personal knowledge of the matters set forth in this affidavit.

2. I prepared and caused to be filed Direct Testimony, with Exhibits, on behalf of Florida City Gas, on December 29, 2010. I also prepared and caused to be filed Rebuttal Testimony, with Exhibits, on behalf of Florida City Gas, on January 28, 2011.

3. The Direct Testimony, Rebuttal Testimony, and Exhibits I submitted on behalf of Florida City Gas, as stated in paragraph 2 above, are truthful and accurate. At this time, I have no changes or revisions to my Direct or Rebuttal Testimony.

[Remainder of page intentionally left blank]

EXHIBIT "A"

FURTHER AFFIANT SAYETH NOT.

Melvin Williams

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

The foregoing instrument was acknowledged before me this 28th day of March, 2011, by Melvin Williams, who is personally known to me or has produced _____ as identification.

Signature

Print or Type Name

NOTARY PUBLIC
Commission Number:
My commission expires:

ODALYS CLAVIJO
Notary Public - State of Florida
My Comm. Expires Feb 17, 2015
Commission # EE 65796

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 the Miami-Dade Water and Sewer Department	)	Docket No.: 090539-GU Filed: March 28, 2011

AFFIDAVIT OF CAROLYN BERMUDEZ

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

BEFORE ME, the undersigned authority, this day did personally appear CAROLYN BERMUDEZ, who being first duly sworn, deposes and states:

1. My name is Carolyn Bermudez. I am over 21 years of age and am competent to testify. At all times relevant to the above-captioned matter, I was the Director, Strategic Business and Financial Planning, AGL Services Company, and am presently the Region Manager for Florida City Gas. As such, I have personal knowledge of the matters set forth in this affidavit.

2. I prepared and caused to be filed Direct Testimony, with Exhibits, on behalf of Florida City Gas, on December 29, 2010. I also prepared and caused to be filed Rebuttal Testimony, with Exhibits, on behalf of Florida City Gas, on January 28, 2011.

3. The Direct Testimony, Rebuttal Testimony, and Exhibits I submitted on behalf of Florida City Gas, as stated in paragraph 2 above, are truthful and accurate. At this time, I have no changes or revisions to my Direct or Rebuttal Testimony.

[Remainder of page intentionally left blank]

EXHIBIT "B"

FURTHER AFFIANT SAYETH NOT.

Carolyn Bermudez

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

The foregoing instrument was acknowledged before me this 28th day of March, 2011, by Carolyn Bermudez, who is personally known to me or has produced _____ as identification.

Signature

ODALYS CLAVIJO
Print or Type Name

NOTARY PUBLIC
Commission Number:
My commission expires:

ODALYS CLAVIJO
Notary Public - State of Florida
My Comm. Expires Feb 17, 2015
Commission # EE 65793

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 the Miami-Dade Water and Sewer Department	)	Docket No.: 090539-GU Filed: March 28, 2011

AFFIDAVIT OF DAVID HEINTZ

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

BEFORE ME, the undersigned authority, this day did personally appear DAVID HEINTZ, who being first duly sworn, deposes and states:

1. My name is David Heintz. I am over 21 years of age and am competent to testify. At all times relevant to the above-captioned matter, I was the Vice President at Cocentric Energy Advisers. As such, I have personal knowledge of the matters set forth in this affidavit.

2. I prepared and caused to be filed Rebuttal Testimony, with Exhibits, on behalf of Florida City Gas, on January 28, 2011. I further prepared and caused to be filed a revised page 11 of my direct testimony and a revised Exhibit __ (DAH-2) on or about March 7, 2011, to correct for a mathematical error in the exhibit and supporting testimony.

3. The Rebuttal Testimony and Exhibits, including the revisions, I submitted on behalf of Florida City Gas, as stated in paragraph 2 above, are truthful and accurate. At this time, I have no changes or revisions to my Rebuttal Testimony.

[Remainder of page intentionally left blank]

EXHIBIT "C"

FURTHER AFFIANT SAYETH NOT.

David A. Heintz

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

The foregoing instrument was acknowledged before me this 28th day of March, 2011, by David A. Heintz, who is personally known to me or has produced DRIVER'S LICENSE as identification.

Signature

ODALYS CLAVIJO
Print or Type Name

NOTARY PUBLIC
Commission Number:
My commission expires:

ODALYS CLAVIJO
Notary Public - State of Florida
My Comm. Expires Feb 17, 2015
Commission # EE 68795

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 28th day of March, 2011.

Anna Williams, Esq.
Martha Brown, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mr. Melvin Williams
Florida City Gas
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Hialeah, FL 33013

Shannon O. Pierce
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111 NW First Street, Suite 2800
Miami, FL 33128-1993

For
Floyd R. Self