

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-11-0218-PCO-GU
ISSUED: May 12, 2011

ORDER DENYING MOTION IN LIMINE

Florida City Gas (FCG), formerly City Gas Company of Florida, executed a Natural Gas Transportation Services Agreement with Miami-Dade County on behalf of the Miami-Dade Water and Sewer Department (MDWASD) in 1998 (1998 Agreement). FCG and MDWASD negotiated a successor agreement to the 1998 Agreement, dated August 28, 2008 (2008 Agreement). By petition dated November 13, 2008, FCG requested that the Commission approve the 2008 Agreement.¹ Thereafter, FCG voluntarily withdrew its petition on February 17, 2009, and the Commission administratively closed the docket. On December 14, 2009, MDWASD filed its own petition for approval of the 2008 Agreement that initiated the present docket. By Order No. PSC-10-0671-PCO-GU,² the Commission determined that it has jurisdiction to consider the 2008 Agreement. The matter has been scheduled for a formal administrative hearing on June 1-3, 2011.

On April 22, 2011, MDWASD filed a Motion in Limine to exclude from introduction at hearing the revised testimony and exhibits of Carolyn Bermudez,³ the revised testimony and exhibits of David Heintz,⁴ and all FCG responses to discovery served by Commission staff or MDWASD that provide new, supplemental, revised or corrected information or documents. MDWASD also states that the Commission should “prohibit the introduction at hearing of information produced by FCG after its filing of direct and rebuttal testimony,” which seems to broaden MDWASD’s request.⁵ In the alternative, MDWASD requests an order allowing ten days within which to file supplemental testimony to respond to FCG’s revisions. FCG filed a Response in

¹ See Docket No. 080672-GU, In re: Petition for approval of Special Gas Transportation Service agreement with MDWASD by Florida City Gas.

² Issued on November 5, 2010, in Docket No. 090539-GU, 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.

³ The Bermudez testimony MDWASD seeks to bar consists of: (i) revised direct testimony, pages 12 and 15; (ii) revised rebuttal testimony, pages 2 and 7; (iii) direct Exhibit CB-2 Supplemental, consisting of 1 page; Exhibit CB-3 Supplemental, consisting of 1 page; and Exhibit CB-4 Revised, consisting of 7 pages; and (iv) rebuttal Exhibit CB-6 Revised, consisting of 7 pages, 2 of which are title pages.

⁴ The Heintz testimony MDWASD seeks to bar consists of: (i) revised rebuttal testimony, page 11; and (ii) Exhibit DAH-2 Revised, consisting of 2 pages.

⁵ Motion in Limine at 30.

DOCUMENT NUMBER-DATE

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Opposition on April 29, 2011. The parties presented oral arguments on MDWASD's Motion in Limine at the Prehearing Conference on May 5, 2011.

MDWASD Motion in Limine

MDWASD asserts that the parties were required to prefile direct and rebuttal testimony on December 29, 2010, and January 28, 2011, respectively, pursuant to the Order Establishing Procedure issued in this case.⁶ MDWASD argues that although FCG timely prefled testimony, it made "wholesale and substantial changes" to that testimony through the revisions identified above.⁷ MDWASD contends that allowing a party to change facts asserted in its prefled testimony because errors discovered through the discovery process have revealed that such facts are incorrect would defeat the purpose of establishing a testimony filing deadline. MDWASD also asserts that it would be prejudiced by the admission of these revisions into the record because they were filed after the prefled testimony deadline. Accordingly, MDWASD requests that any evidence produced by FCG after the filing of its direct and rebuttal testimony be excluded.

FCG Response in Opposition

FCG states that the Commission should not exclude its revisions because it would be inappropriate for MDWASD or the Commission to rely on prefled testimony that FCG now knows and believes to be inaccurate. FCG contends that prefled testimony is subjected to the critical eye of Commission staff and opposing counsel through the discovery process in order to determine which facts should ultimately be presented to the Commission at hearing. According to FCG, this investigative process makes the hearing run more quickly and efficiently by avoiding "endless useless [cross-examination] questions regarding numbers that everyone agrees are wrong,"⁸ and ensures that the Commission can make an informed decision based upon a complete and up to date record. FCG also noted in oral argument that witnesses are required to affirm under oath at hearing that their prefled testimony is accurate and that they have no changes to their testimony, which FCG asserts they cannot do with the knowledge they have now.

FCG explains that an error in FCG's original cost estimates and two computational errors were identified through discovery. Accordingly, FCG filed revised exhibit pages, as well as the corresponding revised textual references in its prefled testimony, to correct the original cost estimates, correct the computational errors, and flow through those changes into the resulting rate numbers. FCG insists that while some of its numbers have been revised for accuracy, its analyses, methodologies, and ultimate conclusions remain unchanged. Finally, FCG notes that it provided these revisions to

⁶ See Order No. PSC-10-0714-PCO-GU, issued on December 7, 2010, as revised by Order No. PSC-10-0715-PCO-GU, issued on December 8, 2010 and Order No. PSC-10-0729-PCO-GU, issued on December 13, 2010.

⁷ Motion in Limine at 30.

⁸ Response in Opposition at 5.

MDWASD and the Commission two months prior to hearing, allowing ample opportunity for additional discovery on the revisions.

Analysis and Ruling

Upon review of the parties' arguments and the evidence sought to be excluded, MDWASD's Motion in Limine is denied. The purpose of a motion in limine is to allow a party to obtain an advance ruling, outside the presence of a jury, that certain evidence will be excluded where the mere mention of such evidence at trial would be unfairly prejudicial.⁹ MDWASD has failed to show how it would be unfairly prejudiced by introduction at hearing of the evidence it identifies. FCG's revisions did not result in wholesale or substantial changes to its prefiled testimony. FCG did not change its methods or ultimate conclusions, but merely corrected its original cost estimates, corrected the computational errors, and flowed those changes through to get the resulting rate numbers. These revisions were provided well in advance of the hearing, giving MDWASD sufficient time to conduct additional discovery. Accordingly, MDWASD's request to exclude this information or, in the alternative, file supplemental testimony, shall be denied on this basis.

In addition, Section 120.569(2)(g), Florida Statutes (F.S.), which provides the evidentiary standard for admissibility in administrative hearings, states:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in the courts of Florida.

MDWASD has failed to show that the evidence it seeks to exclude is irrelevant, immaterial, unduly repetitious, or that it otherwise fails to meet the admissibility standard in Section 120.569(2)(g), F.S. To the contrary, these revisions appear highly relevant to resolution of the issues presented in this case because they provide the most accurate and up to date information. Allowing them at hearing will save time, eliminate the need for extensive cross-examination on information known to be incorrect, and ensure that the Commission can make an informed decision based upon a complete and accurate record. MDWASD's Motion in Limine is therefore denied, and this evidence shall not be excluded from hearing.

Based on the foregoing, it is

⁹ Dailey v. Multicon Development, Inc., 417 So. 2d 1106 (Fla. 4th DCA 1982); 55 Fla Jur 2d, Trial § 71 (2003). See also Devoe v. Western Auto Supply Co., 537 So. 2d 188 (Fla. 2d DCA 1989), cited in Order No. PSC-98-1089-PCO-WS, issued August 11, 1998, in Docket No. 970657-WS, Application for certificates to operate a water and wastewater utility in Charlotte and DeSoto Counties by Lake Suzy Utilities, Inc. (stating that the purpose of a motion in limine is to exclude evidence when its probative value is outweighed by the danger of unfair prejudice).

ORDERED by Chairman Art Graham, as Prehearing Officer, that Miami-Dade County's Motion in Limine to exclude introduction of revised or supplemental evidence of Florida City Gas Company is hereby denied.

By ORDER of Chairman Art Graham, as Prehearing Officer, this 12th day of May, 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, 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.