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-11-0244-FOF-GU ISSUED: June 2, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING MOTION FOR SUMMARY FINAL ORDER

BY THE COMMISSION:

Background

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

FCG, formerly City Gas Company of Florida, executed a Natural Gas Transportation Services Agreement with Miami-Dade County[1] in 1998 (1998 Agreement). Pursuant to the agreement, FCG receives natural gas for MDWASD and transports the gas on the FCG distribution system to MDWASD's facilities at rates significantly below the otherwise applicable tariff rate. The 1998 Agreement had a ten-year term, expiring July 1, 2008, with no automatic renewal. It appears that FCG's predecessor never submitted the 1998 Agreement to the Commission for approval as required by Rule 25-9.034, Florida Administrative Code (F.A.C.).

Before the 1998 Agreement expired, FCG and MDWASD agreed to an amendment dated August 28, 2008 (2008 Amendment), which temporarily extended the term of the 1998 Agreement on a month-to-month basis as of July 1, 2008. Pursuant to the terms of the 2008

[1] Although Miami-Dade County entered into the agreement on behalf of MDWASD, we refer to both entities as "MDWASD" for brevity and consistency.

Amendment, either party could terminate with thirty (30) days' notice.[2] Also on August 28, 2008, FCG and MDWASD executed a successor to the 1998 Agreement, the 2008 Agreement. The 2008 Agreement contains the same pricing provisions as the 1998 Agreement and, like its predecessor, provides that FCG will transport natural gas to Miami-Dade's facilities at below-tariff rates. The most significant distinction between the 1998 and 2008 Agreements is the provision that if we do not approve the 2008 Agreement within 180 days, or by February 24, 2009, the 2008 Agreement will not become effective and the parties will either renegotiate or terminate the contract service arrangement.

By petition dated November 13, 2008, FCG requested that we approve the 2008 Agreement between FCG and MDWASD pursuant to Rule 25-9.034, F.A.C.[3] FCG learned through communications with our staff that staff's preliminary analysis indicated that the rates in the 2008 Agreement did not comply with the KDS tariff cited in the contract, because the KDS tariff requires that special contract rates shall not be set lower than the incremental cost the company incurs to serve the customer. Based on its belief that staff's review of the 2008 Agreement's terms would likely lead to an unfavorable recommendation, FCG voluntarily withdrew its petition on February 17, 2009, and the docket was closed administratively. MDWASD never intervened in Docket No. 080672-GU.

By letter dated June 22, 2009, FCG advised MDWASD that it was invoking the thirty (30) day termination notice provided in the 2008 Amendment and began charging MDWASD what it believes is the otherwise applicable General Service (GS) 1,250k tariff rate on August 1, 2009. MDWASD remitted payment of the full tariff rates to FCG until October 2009, at which time MDWASD began withholding the balance between the 2008 Agreement rates and the higher tariff rate. According to MDWASD, it has been placing the difference between the 2008 Agreement rates and the tariff rate in a separate account since that time.

On December 14, 2009, MDWASD filed its own petition for approval of the 2008 Agreement that initiated the instant docket. In its petition, MDWASD requests that we either recognize that the 2008 Agreement is not subject to our regulatory jurisdiction or, in the alternative, approve the terms of the 2008 Agreement. In addition, if we approve the 2008 Agreement, MDWASD requests that we order FCG to refund the difference between the 2008 Agreement rates and the tariff rates FCG has been charging MDWASD. By Order No. PSC-10-0671-PCO-GU,[4] we determined that we have jurisdiction to consider the 2008 Agreement. On March 5, 2010, FCG filed a petition for leave to intervene in this docket, which was granted by Order No. PSC-10-0261-PCO-GU, issued on April 26, 2010.

This matter has been scheduled for a formal administrative hearing on June 1-3, 2011, and the issues for hearing were established by Order No. PSC-10-0730-PCO-GU, issued on

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[2] Paragraph 2, 2008 Amendment.
[3] See Docket No. 080672-GU, In re: Petition for approval of Special Gas Transportation Service agreement with MDWASD by Florida City Gas.
[4] 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.

December 13, 2010.[5] The parties prefiled direct testimony on December 29, 2010, and rebuttal testimony on January 28, 2011. On March 21, 2011, MDWASD filed a Motion for Summary Final Order Approving Special Gas Transportation Service Agreement and Imposing Sanctions on FCG and Incorporated Memorandum of Law (Motion for Summary Final Order or Motion) and a Request for Oral Argument on its Motion. FCG filed its Response in Opposition to MDWASD's Motion for Summary Final Order on March 28, 2011 (Response in Opposition or Response).

This Order addresses MDWASD's Motion for Summary Final Order and Request for Oral Argument. We have jurisdiction over this matter pursuant to Sections 366.04, 366.05, and 366.06, F.S.

Request for Oral Argument

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

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

Although MDWASD properly filed its request for oral argument concurrently with its Motion for Summary Final Order, we did not believe that oral argument would aid in our disposition of this matter. We found that oral argument was unnecessary because MDWASD's arguments were adequately contained in its Motion. Accordingly, we denied MDWASD's Request for Oral Argument at the May 24, 2011 Agenda Conference.

Motion for Summary Final Order

Legal Standard

Section 120.57(1)(h), F.S., provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that (1) no genuine issue as to any material fact exists, and (2) the moving party is entitled as a matter of law to the entry of a final summary order.[6] Rule 28-

[5] The issues, attached to this Order as Attachment 1, are also reflected in Prehearing Order No. PSC-11-0219-PHO-GU, issued on May 12, 2011, in Docket No. 090539-GU.

[6] In 1998, the Florida Legislature amended Chapter 120, F.S., to make summary judgment available in administrative proceedings through "summary final order." Ch. 98-2000, Fla. Laws. Accordingly, "summary final order" is analogous to "summary judgment," and case law and orders addressing "summary judgment" are generally

106.204(4), F.A.C., states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact." The purpose of a summary final order is to avoid the expense and delay of trial when no dispute exists concerning the material facts.

The standard for granting a summary final order is very high.[7] Under Florida law, the burden is on the party moving for summary judgment to conclusively demonstrate that an issue of material fact does not exist and that the opposing party cannot prevail.[8] In determining whether the moving party has met this burden, the fact finder must draw every possible inference in favor of the party against whom summary judgment is sought.[9] Summary judgment should not be granted unless "the facts are so crystallized that nothing remains but questions of law."[10] However, even if the facts are not in dispute, "issues as to the interpretation of such facts may be such as to preclude the award of summary judgment."[11] If the record reflects the existence of any issue of material fact, possibility of an issue, or raises even the slightest doubt that an issue might exist, summary judgment is improper.[12] Once the party moving for summary final order has tendered competent evidence to support its motion, the burden shifts to the opposing party to produce counter-evidence sufficient to show that a genuine issue exists.[13]

MDWASD's Arguments

MDWASD argues that it is entitled as a matter of law to the entry of a summary final order approving the 2008 Agreement because no genuine issue as to any material fact exists. According to MDWASD, the pivotal issue in dispute in this proceeding is whether the rates in the 2008 Agreement are sufficient to cover FCG's incremental cost to serve MDWASD.[14] MDWASD contends that FCG has failed to present any evidence that the rates in the 2008 Agreement are insufficient to recover FCG's incremental cost to serve MDWASD. In support of this contention, MDWASD asserts that FCG has failed to conduct a proper incremental cost of service study because its study does not use the same type of customer-specific operation and maintenance estimates that other regulated utilities have provided in prior petitions for approval

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applicable to "summary final order." See Order No. PSC-07-1008-PAA-TL, issued on December 19, 2007, in Docket No. 070126-TL, In re: Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Section 364.025(6)(d), F.S., for Villages of Avalon, Phase II, in Hernando County, by BellSouth Telecommunications, Inc. d/b/a AT&T Florida. We use these terms interchangeably.

[7] Order No. PSC-10-0296-FOF-TP, issued on May 7, 2010, in Docket No. 090538-TP, In re: Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Cox Florida Telcom, L.P.; Broadwing Communications, LLC; and John Does 1 through 50 (CLECs whose true names are currently unknown) for rate discrimination in connection with the provision of intrastate switched access services in alleged violation of Sections 364.08 and 364.10, F.S. (Order No. PSC-10-0296-FOF-TP) at 7.

[8] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996); Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977).

[9] Id.

[10] Moore v. Morris, 475 So. 2d 666 (Fla. 1985).

[11] Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

[12] Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).

[13] Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979). See also Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).

[14] See Issues 2 and 3 in Attachment 1.

of special gas transportation service contracts filed with this Commission. MDWASD also states that FCG has failed to present proof of FCG's original capital investment in the facilities used to provide service to MDWASD or FCG's incremental operations, maintenance, customer service, billing or other costs necessary to provide service to MDWASD. MDWASD insists that without such evidence, FCG cannot prove that the rates in the 2008 Agreement are insufficient to cover FCG's incremental cost. Accordingly, MDWASD contends that the contract should be approved as a matter of law.

In addition to seeking a summary final order approving the 2008 Agreement, MDWASD asks us to (1) make the 2008 Agreement effective retroactively to the date FCG terminated the 2008 Amendment; (2) order FCG to refund to MDWASD any amounts previously paid to FCG in excess of the 2008 Agreement rates; (3) order FCG to reimburse MDWASD for all attorneys fees and costs incurred in this and related proceedings; (4) find that FCG breached the 2008 Agreement; (5) find that FCG acted in bad faith with respect to the 2008 Agreement and violated principles of good faith and fair dealing; (6) find that FCG made material misrepresentations to Commission staff and MDWASD in this and related proceedings; (7) find that FCG violated our recordkeeping rules; and (8) impose sanctions to penalize FCG for engaging in mismanagement and misrepresentation.

FCG's Arguments

Motion for Summary Final Order

FCG argues that MDWASD's Motion should be denied because it is premature. According to FCG, we have consistently held that the appropriate time to request entry of a summary final order is after testimony has been filed and discovery completed.[15] FCG asserts that because the discovery cut-off date is not until May 5, 2011, MDWASD's Motion should be denied as untimely.

FCG asserts that summary final order is also improper because the parties vehemently disagree as to how FCG's costs to serve MDWASD should be determined, which is a fundamental issue in this docket. FCG claims that this dispute between the parties arises because Rule 25-9.034, F.A.C., requires that a utility provide "completed and detailed justification for the deviation from the utility's filed regulations and standard approved rate schedules" as part of its request for approval of a non-tariff rate. FCG contends that because these terms are not defined in our rules, it is not clear what method should be used to establish a "completed and detailed

[15] Order No. PSC-10-0296-FOF-TP, supra note 7, at 7-8. See also Order No. PSC-02-1464-FOF-TL, issued on October 23, 2002, in Docket No. 020507-TL, Complaint of Florida Competitive Carriers Association against BellSouth Telecommunications, Inc. regarding BellSouth's practice of refusing to provide FastAccess Internet Service to customers who receive voice service from a competitive voice provider, and request for expedited relief ("We believe that the suitable time to seek summary final order, if otherwise appropriate, is after testimony has been filed and discovery has ceased."); Order No. PSC-04-0992-PCO-EI, issued on October 11, 2004, in Docket No. 030623-E1, In re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., and Dillard's Department Stores, Inc. against Florida Power & Light Company concerning thermal demand meter error ("[A] summary final order should not be entered . . . because good faith discovery on the issue was still pending at the time of the vote.").

justification" for the 2008 Agreement. According to FCG, MDWASD believes that such costs can only be measured through a customer specific, rate base form of incremental cost study, whereas FCG believes incremental cost can and should be measured by the class of service methodology we approved in FCG's last rate case. FCG states that entry of a summary final order would be improper because this issue presents a mixed question of fact and law.

In addition to the disagreement over which methodology for determining incremental cost is appropriate in this case, FCG asserts that there is a material dispute as to the relevance of FCG's original investment in the facilities serving MDWASD. FCG claims that it has not and will not attempt to prove such costs because they are irrelevant under the class of service methodology advocated by FCG for calculating incremental cost. FCG also contends that there is a material dispute over what FCG's incremental cost is, whether FCG has provided evidence sufficient to support its incremental cost estimate, and whether the 2008 Agreement rates cover FCG's incremental cost.

FCG asserts two additional bases upon which we should deny MDWASD's Motion for Summary Final Order. First, FCG argues that there is a material dispute over the legal effect of the execution of the 2008 Agreement. While FCG acknowledges that both parties signed the contract, FCG insists that pursuant to Rule 9.034(1), F.A.C., which provides that a special contract "must be approved by the Commission prior to its execution," the parties improperly entered into the 2008 Agreement. FCG asserts that applicable Commission laws, rules, regulations, and the express language of the 2008 Agreement itself prohibit the non-tariff rates from becoming effective until this Commission approves them. According to FCG, MDWASD is not entitled to the benefit of a contract which it is not legally permitted to enforce simply because FCG and MDWASD signed it. According to FCG, the legal effect of such signatures is a key legal issue that will not be resolved until the parties file their post-hearing briefs.

Second, FCG claims that MDWASD's accusations against FCG of engaging in bad faith, misleading MDWASD and Commission staff, and violating various Commission rules are false. It is FCG's position that these allegations merely represent MDWASD's biased opinion of the evidence and thus "have no place in a purported statement of undisputed facts" accompanying a motion for summary final order.

In sum, FCG argues that every "undisputed" fact identified by MDWASD is, in fact, heavily disputed in this proceeding. Since we must draw all inferences against the party moving for summary final order, FCG states that the facts, inferences, opinions, positions, assumptions and conclusions made by MDWASD must be read contrary to the way MDWASD would prefer. FCG contends that reviewing MDWASD's Motion in FCG's favor, MDWASD has failed to show that no issues of material fact exist, thus MDWASD is not entitled to judgment as a matter of law. FCG states that we should therefore deny the Motion for Summary Final Order.

Requested Relief

FCG states that MDWASD has not provided any legal or factual predicate to merit an award of attorneys fees and costs or the imposition of sanctions. FCG contends that MDWASD has not cited any Commission rule, order, or statute that authorizes us to award such fees or to

impose sanctions. Nevertheless, FCG asserts that even under Section 57.105, F.S., MDWASD has not made a showing sufficient to justify its request, and we should deny MDWASD's request on that basis.

Analysis and Decision

Summary Final Order

We reviewed the pleadings, depositions, answers to interrogatories, and prefiled testimony for which authenticating affidavits have been provided to determine whether any genuine issue of material fact exists in this proceeding.[16] We agree with FCG that the issue of whether the 2008 Agreement's deviation from FCG's tariff rates is "justified" pursuant to Rule 25-9.034, F.A.C., necessarily presents a mixed question of fact and law that will depend on the specific factual determinations and policy considerations relevant to this case. Because special agreements are unique to the parties and fact-specific, we review them on a case-by-case basis; MDWASD cannot show that any one factor compels approval of the 2008 Agreement. Accordingly, we find that genuine issues of material fact exist and that MDWASD has failed to show that it is entitled to a summary final order approving the 2008 Agreement as a matter of law.

Summary judgment is improper here because the incremental cost issue central to this case presents a mixed question of fact and law. The rule which provides for special contracts, Rule 25-9.034(1), F.A.C., requires that a utility provide "completed and detailed justification for the deviation from the utility's filed regulations and standard approved rate schedules" as part of its request for approval of a special agreement. As noted by FCG, our rules, statutes, or orders do not delineate what is necessary or sufficient to satisfy this standard. However, we have traditionally evaluated special agreement rates to determine whether, at a minimum, they cover the utility's incremental cost to serve the special agreement customer.[17]

We promulgated Rule 25-9.034(1), F.A.C., in recognition of the fact that a public utility should have the flexibility to offer below tariff rates in order to retain a large volume customer who might otherwise opt to bypass the utility or leave the system. We have allowed such a

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[16] See Booker v. Sarasota, Inc., 707 So. 2d 886, 889 (Fla. 1st DCA 1998) (stating that a court may not consider an unauthenticated document in ruling on a summary judgment motion, even where it appears that such document, if properly authenticated, may be dispositive). See also BiFulco v. State Farm Mut. Auto. Ins. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997). We did not consider the unauthenticated testimony of MDWASD's witnesses. However, we did take into consideration these witnesses' sworn deposition transcripts.

[17] See Order No. PSC-06-0143-PAA-GU, issued on February 27, 2006, in Docket No. 050835-GU, In re: Petition for approval of Amendment No. 2 to gas transportation agreement (special contract), master gas transportation service termination agreement, delivery point lease agreement and letter agreement: CFG Transportation Aggregation Service between Florida Division of Chesapeake Utilities Corporation and Polk Power Partners, L.P. at 4; Order No. PSC-93-1330-FOF-GU, issued on September 9, 1993, in Docket No. 930714-GU In Re: Petition by the Florida Division of Chesapeake Utilities Corporation for Approval of a Gas Transportation Agreement with Auburndale Power Partners, L.P. at 2; and Order No. PSC-00-1882-PAA-GU, issued on October 16, 2000, in Docket No. 000922-GU, In re: Joint petition for approval of gas transportation agreement, request for authority to accrue allowance for funds used during construction (AFUDC), and request for expedited treatment, by Florida Public Utilities Company and Lake Worth Generation, LLC. at 3.

utility to collect the difference between the special contract rate and the tariff rate that would otherwise apply to the large customer from the utility's general body of ratepayers through the CRA mechanism.[18] The justification for allowing this subsidization has been that as long as the large customer is paying a rate which covers the utility's incremental cost to serve the customer and makes some contribution to the utility's fixed cost, it is better for the utility's general body of ratepayers if the utility retains the customer at a below-tariff rate than if the utility loses the customer altogether.[19] If the utility were to lose the large volume customer, and thus all the revenue that it generates, that customer's contributions to the utility's recovery of its fixed costs would disappear, and those costs would be shifted to the utility's general body of ratepayers. Accordingly, we have reviewed special contracts such as this one to ensure that the subsidy paid by the utility's general body of ratepayers to keep the large volume customer on the system does not exceed the cost for which the utility's general body of ratepayers would otherwise be responsible if that customer left the system. If the subsidy exceeds the cost for which the general body of ratepayers would be responsible if the customer left the system, the utility's general body of ratepayers may be better off if the customer bypasses.

There is a material dispute as to whether the 2008 Agreement rates cover FCG's incremental cost. This dispute arises, in part, because the parties use different methodologies for calculating such cost. FCG believes incremental cost can be measured by the class of service methodology approved in FCG's last rate case, whereas MDWASD believes that incremental cost can only be measured through a customer specific, rate base form of incremental cost study. In support of its method, MDWASD has relied on several cost of service studies provided in petitions for approval of special gas transportation service contracts filed by Chesapeake Utilities Corporation and FCG's predecessor, City Gas Company of Florida.[20] MDWASD's reliance on these petitions is unpersuasive, however, because MDWASD has not established that the method for determining incremental cost used in these petitions is the only acceptable means by which a utility can justify its "deviation" from approved tariff rates under Rule 25-9.034(1), F.A.C. Nor has MDWASD established that those petitions are in any way authoritative or binding on this Commission. MDWASD has not shown, and in our opinion cannot show, that it is entitled as a matter of law to judgment in its favor on this basis.

FCG's incremental cost is also disputed because the parties disagree as to what type of costs should be included and which dollar amounts should properly be assigned to those costs. There is no one "laundry list" of items that we must consider in determining incremental cost. As noted by the prehearing officer in determining the issues for this hearing, if we attempted to "articulate every possible element that might go into incremental cost," we might "inadvertently omit something, or could not anticipate everything, or one size of shoe might not fit every

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[18] See Order No. PSC-04-0128-PAA-GU, issued on February 9, 2004, in Docket No. 030569-GU, In re: Application for rate increase by City Gas Company of Florida.

[19] See id. at 60-61. See also Order No. PSC-10-0029-PAA-GU, issued on January 14, 2010, in Docket No. 090125-GU, In re: Petition for increase in rates by Florida Division of Chesapeake Utilities Corporation at 31-32, and Order No. PSC-05-0208-PAA-GU, issued on February 22, 2005, in Docket No. 040956-GU, In re: Petition for authorization to establish new customer classifications and restructure rates, and for approval of proposed revised tariff sheets by Florida Division of Chesapeake Utilities Corporation at 5.

[20] For the Chesapeake petitions, see Docket Nos. 930714-GU, 940830-GU, 011620-GU, 021174-GU, 050327-GU and 050835-GU. For the FCG petition, see Docket No. 960920-GU.

particular situation."[21] MDWASD's contention that FCG has failed to present any evidence that the rates in the 2008 Agreement are insufficient to recover FCG's incremental cost is merely its opinion of the case. The conflicting evidence filed thus far reveals that there is a material factual dispute over the exact amount of incremental cost we should use in evaluating the 2008 Agreement. For example, FCG believes that its original investment in the facilities used to serve MDWASD is irrelevant to the determination of its incremental cost, while MDWASD believes such costs are crucial. These are precisely the type of factual disputes a hearing is designed to resolve. After hearing, we will weigh the conflicting evidence and determine which party's arguments are more persuasive. MDWASD has failed to show that the facts are undisputed, much less that they are so crystallized that FCG's cannot legally prevail.

Finally, even if no disputed facts existed, MDWASD would not be able to show that it is entitled to the type of relief it seeks, namely an order approving the contract. MDWASD contends that FCG has not presented sufficient evidence to prove that the rates in the 2008 Agreement do not cover its costs. MDWASD then leaps to the legally illogical conclusion that the rates in the 2008 Agreement do cover FCG's cost, thus we must approve the agreement as a matter of law. We disagree. First, it has not been established whether the rates cover FCG's incremental cost. If the evidence fails to show that the 2008 Agreement rates are sufficient to cover FCG's incremental cost to serve MDWASD, the justification for our allowance of special agreements would suggest that the agreement should, in fact, *not* be approved, because it would be better for FCG's general body of ratepayers if MDWASD left FCG's system. Second, incremental cost is just one of the many factual, legal and policy considerations that we will take into account in determining whether to approve this particular contract. Summary judgment is inappropriate in this case because we will determine whether, based on the totality of the circumstances, the contract should be approved. Accordingly, MDWASD is not entitled to judgment as a matter of law.

Requested Relief

MDWASD requests that we order FCG to reimburse MDWASD for all attorneys fees and costs incurred in this and related proceedings. Although MDWASD provides no support or authority for its request, the authority for allowing attorney's fees and costs is provided in Section 57.105, F.S.[22] Section 57.105, F.S., states that an administrative law judge shall award reasonable attorney's fees and damages to be paid to the prevailing party on any claim or defense in which it is found that the losing party or the losing party's attorney knew or should have known that the claim or defense asserted was (a) not supported by the facts or (b) not supported by an application of "then-existing" law to the facts.[23] MDWASD did not set forth any legal basis or factual allegations which would warrant the award of attorney's fees and costs. Furthermore, FCG is the prevailing party on the Motion for Summary Final Order for which MDWASD has requested attorney's fees and costs. Accordingly, MDWASD has failed to make

[21] Transcript of Status Conference to Determine Issues for Hearing held on December 8, 2010, in Docket No. 090539-GU, at 35.
[22] In 2003, the Legislature amended Section 57.105, F.S., to apply to administrative proceedings under Chapter 120, F.S.
[23] See also Boca Burger, Inc. v. Forum, 912 So. 2d 561, 570 (Fla. 2005).

a showing sufficient to permit an award under the standards set forth in Section 57.105, F.S., and MDWASD's request for attorney's fees and costs is therefore denied.

MDWASD also requests that we impose a penalty on FCG for engaging in mismanagement, making misrepresentations to MDWASD and Commission staff, and violating our recordkeeping rule, Rule 25-7.014, F.A.C. MDWASD provides no legal or factual basis in support of this request. Accordingly, MDWASD's request to impose sanctions on FCG is denied.

In light of our denial of MDWASD's Motion for Summary Final Order, we do not address MDWASD's remaining requests for relief, all of which are either contingent upon our granting MDWASD's Motion for Summary Final Order or not supported by adequate legal or factual grounds.

Conclusion

MDWASD has failed to meet the very high standard in Section 120.57(1)(h), F.S., for the granting of a Motion for Summary Final Order. The key issue in this case is whether we should approve the 2008 Agreement as a special contract between MDWASD and FCG. In the absence of express statutory standards governing our consideration of special contracts, we have discretion to decide whether it is in the public interest to approve the 2008 Agreement based on the record evidence presented at hearing. Accordingly, MDWASD has failed to make a conclusive showing that there is no genuine issue of material fact in dispute and that it is entitled to judgment as a matter of law. Therefore, we hereby deny MDWASD's Motion for Summary Final Order, and the hearing process shall proceed as set forth in the orders establishing procedure issued in this docket.[24]

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Miami-Dade Water and Sewer Department's Request for Oral Argument on its Motion for Summary Final Order is hereby denied. It is further

ORDERED that Miami-Dade Water and Sewer Department's Motion for Summary Final Order approving the 2008 Agreement is denied. It is further

ORDERED that this docket shall remain open and proceed to hearing as scheduled.

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[24] See Order No. PSC-10-0714-PCO-GU, issued on December 7, 2010; Order No. PSC-10-0715-PCO-GU, issued on December 8, 2010; Order No. PSC-10-0729-PCO-GU, issued on December 13, 2010; and Order No. PSC-11-0110-PCO-GU, issued on February 9, 2011.

By ORDER of the Florida Public Service Commission this 2nd day of June, 2011.

ANN COLE
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
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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.

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

Attachment 1

1. Did FCG perform an incremental cost of service study prior to entering into the 2008 Agreement with MDWASD?

2. What are FCG's incremental costs to serve MDWASD's gas transportation requirements for the Alexander Orr, Hialeah-Preston, and South Dade Wastewater Treatment plants, respectively?

3. Does the contract rate in the 2008 Agreement allow FCG to recover FCG's incremental cost to serve MDWASD?

4. Does MDWASD have a viable by-pass option?

5. What, if any, FCG tariff schedule applies to the 2008 Agreement for gas transportation services to MDWASD?

6. In the absence of a special agreement, what existing FCG tariff schedule applies to the natural gas transportation service provided to MDWASD?

7. Should the 2008 Agreement between MDWASD and FCG be approved as a special contract?

8. If the 2008 Agreement is approved, should FCG be allowed to recover the difference between the contract rate and the otherwise applicable tariff rates through the Competitive Rate Adjustment (CRA) factor for the period August 1, 2009, forward? How should any such recovery occur?

9. Should the Commission disallow cost recovery for the differential, if any, between FCG revenue under the 2008 Agreement and FCG's incremental cost to serve MDWASD?

10. Based on the Commission's decisions in this case, what monies, if any, are due MDWASD and/or FCG, and when should such monies be paid?