

State of Florida



# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** May 23, 2018

**TO:** Office of Commission Clerk (Stauffer)

**FROM:** Office of the General Counsel (Trierweiler, Harper)  
Division of Economics (Draper, Guffey, Merryday)  
Division of Engineering (Moses) *ESD* *TH*

**RE:** Docket No. 20180055-GU – Petition to resolve territorial dispute in Sumter County and/or Lake County with City of Leesburg and/or South Sumter Gas Company, LLC, by Peoples Gas System.

**AGENDA:** 06/5/18 – Regular Agenda – Motion to Dismiss – Oral Argument Requested – Participation is at the Commission’s Discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Polmann

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** Place this item immediately prior to Docket No. 20180085-GU

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## Case Background

On February 23, 2018, Peoples Gas System (Peoples) filed a petition pursuant to Section 366.04(3)(b), Florida Statutes (F.S.), and Rule 27-7.0472, Florida Administrative Code (F.A.C.), (Petition), requesting that the Commission resolve a territorial dispute between Peoples and City of Leesburg (Leesburg) and South Sumter Gas Company, LLC (SSGC).

On April 2, 2018, SSGC and Leesburg filed separate motions to dismiss Peoples’ Petition (Petition) and requests for oral argument. On April 9, 2018, Peoples filed separate responses to SSGC and Leesburg’s motions to dismiss and requests for oral argument.

Docket No. 20180055-GU

Date: May 23, 2018

This recommendation addresses SSGC's and Leesburg's motions to dismiss. The Commission has jurisdiction pursuant to Chapter 366.04, F.S.

### Discussion of Issues

**Issue 1:** Should oral argument on SSGC's and Leesburg's Motions to Dismiss be granted?

**Recommendation:** Yes. Oral argument on SSGC's and Leesburg's Motions to Dismiss should be granted. The parties should be allowed 5 minutes per side to make their arguments. (Trierweiler)

**Staff Analysis:** Rule 25-22.0022(1), F.A.C., provides that a request for oral argument should be timely filed and must state with particularity why oral argument would aid the Commission in understanding and evaluating the issues to be decided. Rule 25-22.0022(7), F.A.C., states that oral argument at Agenda Conference will be entertained for dispositive motions, such as a motion to dismiss. SSGC's and Leesburg's requests for oral argument on their motions were timely filed. SSGC believes that oral argument will aid the Commission in fully comprehending the deficiencies of the Petition, the underlying factual situation involving the various parties, and the very significant policy issues raised by PGS. SSGC and Leesburg requested 10 minutes each party for oral argument.

Peoples filed a response in opposition to the requests for oral argument, stating that oral argument would not assist the Commission in its ruling on the motions. However, Peoples asks that if the Commission decides to grant oral argument that Peoples be given an amount of time equal to the time granted to both SSGC and Leesburg combined.

Rule 25-22.0022(3), F.A.C., provides that granting or denying a request for oral argument is within the sole discretion of the Commission. Staff believes that oral argument will assist the Commission in understanding and evaluating the issues and arguments raised in the motions. If oral argument is granted, 5 minutes for each side appears to be reasonable.

**Issue 2:** Should the Commission grant SSGC and Leesburg's Motions to Dismiss?

**Recommendation:** The Commission should deny the Motions to Dismiss Peoples' Petition because Peoples' Petition contains a sufficient statement of the ultimate facts as required by Rule 28-106.201, F.A.C. (Initiation of Proceedings) and the specific pleading requirements of Rule 25-7.0472, F.A.C. (Territorial Disputes for Natural Gas Utilities). (Trierweiler)

**Staff Analysis:**

**Standard of Review for Motion to Dismiss**

Unless otherwise provided by law, a petition or request for hearing must include all items required by Rule 28-106.201, F.A.C., if the hearing involves disputed issues of material fact. A petition filed under Chapter 120, F.S., that is in substantial compliance with the applicable uniform rule requirements need not be dismissed. Rule 25-7.0472, F.A.C., lists the considerations that the Commission is required to evaluate when resolving territorial disputes for natural gas utilities.

The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The applicable standard for disposing of a motion to dismiss is whether, with all factual allegations in the petition taken to be true, the petition states a cause of action upon which relief may be granted. *Id.*

In making this determination, all reasonable inferences drawn from the petition must be made in favor of the petitioner. *Id.* Consideration of a motion to dismiss "may not properly go beyond the four corners of the complaint in testing the legal sufficiency of the allegations set forth therein." *Stubbs v. Plantation Gen. Hosp. Ltd. P'ship*, 988 So. 2d 683, 684 (Fla. 4th DCA 2008) (internal quotation omitted). All of the elements of a cause of action must be properly alleged in a pleading seeking affirmative relief. If the elements are not properly alleged, the pleading should be dismissed. *Kislak v. Kreedian*, 95 So. 2d 510 (Fla. 1957).

**Peoples Gas System's Petition**

The Petition states that Peoples is a natural gas local distribution company (LDC) providing sales and transportation delivery of natural gas throughout most of Florida to a total of approximately 380,000 customers, and is a "natural gas utility" as defined by Section 366.04(3)(c), F.S., subject to the Commission's statutory jurisdiction to resolve territorial disputes. The Petition states that Leesburg is a Florida municipality that operates a natural gas distribution system in portions of Lake and Sumter Counties as a "natural gas utility" as defined by Section 366.04(3)(c), F.S. Leesburg is also subject to the Commission's statutory jurisdiction to resolve territorial disputes.

The Petition states that SSGC is a Florida limited liability company formed on or about March 22, 2017. Peoples asserts that SSGC does not currently provide natural gas service and does not

have customers. SSGC, on behalf of the Villages (a large Central Florida Community that spans 3 counties), is constructing natural gas infrastructure in the service area at issue.

The Petition describes Peoples' natural gas distribution facilities in Sumter County to be "extensive" while Leesburg's are "limited." Peoples contends that virtually all of Leesburg's facilities and customers are in Lake County and Leesburg. Virtually all of Peoples' customers in Sumter County are located within The Villages. Peoples states that its employees observed natural gas construction materials at the intersection of County Roads 468 and 501 in Sumter County, in late December 2017. In January 2018, Peoples states that it met with the Director of the Leesburg Gas Department to determine what was being constructed and to avoid a territorial dispute. Peoples was directed by Leesburg to contact The Villages for details.

According to the Petition, in August 2009, Peoples was granted by the City of Wildwood, a non-exclusive franchise to provide natural gas service (the service areas in question all appear to fall within the Wildwood City limits). Peoples alleges that the City of Wildwood is in the process of establishing a non-exclusive franchise agreement with SSGC to provide natural gas to the same service area.

The Petition also contains a copy of an Agenda Memorandum recommending approval of the Ordinance by Leesburg that would ratify a franchise agreement between Leesburg and SSGC. The Leesburg and SSGC Agreement concerns the construction, purchase, and sale of certain natural gas distribution facilities, for the purpose of providing natural gas service to customers located within the service area in question. The Agreement states that upon completion of each section in the development, SSGC has agreed to convey ownership of the system to Leesburg in exchange for receiving a portion of the gas revenues charged to natural gas customers within the service area. Exhibit B of Peoples' Petition (pg. 21) contains a map where SSGC has depicted its proposed natural gas infrastructure within the service area in question. *See* Exhibit A.

According to Peoples' Petition, Leesburg has submitted construction notices to the Commission as required by Rule 25-12.082, F.A.C. Peoples argues the notices reflect planned construction of natural gas facilities in Sumter County which is taking place immediately adjacent to Peoples' existing natural gas facilities. Peoples alleges that some of the facilities to be constructed would cross an existing Peoples' distribution main.

Peoples wants to provide natural gas services to the customers in the service area in question. Peoples graphically depicts the disputed area in two color coded maps attached to its Petition. The first map contains Peoples' rendition of the SSGC's proposed natural gas construction projects in reference to the City of Wildwood's municipal boundaries. *See* Exhibit B The second map depicts SSGC's and Leesburg's proposed natural gas infrastructure to be constructed in the service area, against a backdrop of the existing Peoples' natural gas distribution system and its claimed service area. *See* Exhibit C.

### **South Sumter Gas Company's and the City of Leesburg's Motions to Dismiss**

South Sumter Gas Company, LLC: SSGC asserts that Peoples' Petition does not properly state a cause of action because it has not complied with an essential pleading requirement. Specifically,

SSGC asserts that the Petition fails to plead a statement of all disputed issues of material fact, and characterizes the Petition as a collection of insufficient conclusory allegations.

SSGC states that the Petition fails to sufficiently allege minimum pleading requirements necessary to sustain a territorial dispute. SSGC asserts that the proximity of the new and planned Leesburg natural gas facilities to those operated by Peoples does not create a dispute; that Peoples did not allege that it has construction notices that conflict with those of Leesburg; that Peoples failed to allege that there is a race of competing facilities; and that Peoples did not allege that it has facilities within the locations identified by the construction notices.

SSGC suggests that the mere fact that the new Peoples' natural gas distribution facilities within the Village of Fenney are located near the separately noticed Leesburg facilities within Southern Oaks is not evidence that a dispute exists. SSGC seeks to rely upon Commission Order No. PSC-98-0174-FOF-EU, issued January 28, 1998, in Docket No 930885-EU, *In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power*, Docket No. 930885-EU, *affirmed on appeal, Gulf Coast Electric Cooperative v. Johnson*, 727 So. 2d 259 (1999), where the Commission held that territorial disputes will be resolved on a case-by-case basis. SSGC argues that unlike the situation in *Gulf Coast-Gulf Power*, Peoples has not provided evidence or allegations of its legal right to serve the area, that the mere physical proximity of one utility's infrastructure to another does not make for duplicative facilities, and that Peoples failed to allege uneconomic duplication of facilities.

SSGC also relies upon *Gulf Coast-Gulf Power* to support its assertion that the Petition should be dismissed for ripeness, citing the two-prong test for ripeness in *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 807, 123 S. Ct. 2026, 155 L.Ed.2d 1017, (2003). SSGC challenges the premise that the Petition is based upon a prima facie dispute by declaring that there is no dispute and that therefore the matter is not ripe for adjudication. SSGC asserts that the facts do not support a request for a sweeping determination for a service provider to serve all future portions of the Villages Community over many years. SSGC argues that this issue is not yet fit for a judicial decision and that the Commission's ability to adjudicate this matter would be enhanced by allowing more time for these events to unfold. SSGC states that the second part of the ripeness test would be the hardship that Peoples would suffer if the Commission "withholds a decision" (fails to act). SSGC asserts that Peoples will not suffer a hardship and that Peoples has not alleged any direct harm.

SSGC's final argument is that Peoples has not alleged that its service to the customers in the disputed area would be in the public interest. SSGC also suggests that the developer, with decades of experience, is in the best position to determine who the best service provider would be for the community within this service area.

The City of Leesburg: Leesburg claims that Peoples has failed to plead sufficient facts for the matter to move forward. Leesburg summarizes its argument by stating that Peoples has merely asserted a territorial dispute without pleading all disputed facts as required. Leesburg asserts that Peoples has not made sufficient factual allegations that warrant the Commission's involvement in determining which utility should serve the disputed area. Leesburg alleges that the facts supporting the alleged dispute are missing from the pleadings because they do not exist.

Leesburg also states that the Commission should be hesitant to inject itself into a business dispute. Leesburg suggests that where market forces are at work to determine the manner in which the expansion of facilities is going to take place, the Commission is not required to step in and conduct centralized planning. Leesburg states that there is no need in the present situation for the Commission to respond to the request to resolve the territorial dispute, this is because customer choice and market forces are already at work to select the utility to serve this area.

### **Peoples' Response to the Motions to Dismiss**

Peoples disagrees with SSGC's assertion the Petition must comply with the general pleading requirements in Rule 28-106.201, F.A.C, which applies primarily to petitions requesting a hearing on a proposed agency action (PAA). However, Peoples does state that if this case were decided under Rule 28-106.201, F.A.C., then its petition meets the pleading requirements in accordance with Commission Order No. PSC-06-0260-PCO-EI, issued March 28, 2006, in Docket No. 060038-EI, *In re Petition for Issuance of a Storm Recovery Financing Order*, where the Commission held that "A petitioner filing an original request for relief cannot reasonably be expected to identify all disputed issues of material fact that might arise."

According to Peoples, its Petition contains a statement of the ultimate facts that satisfy the specific pleading requirements within Rule 25-7.0472, F.A.C. (Territorial Disputes for Natural Gas Utilities), which provides that a territorial dispute may be initiated by a petition and that each utility that is a party to a territorial dispute shall provide a map and written description of the disputed area along with the conditions that caused the dispute. Peoples argues that SSGC's natural gas infrastructure is being installed immediately adjacent to infrastructure belonging to Peoples and that Leesburg is building a 6-inch main line to serve the area in question. The Petition also contains a written agreement between SSGC and Leesburg for natural gas service in the area adjacent to the community where Peoples already provides service. Peoples asserts that a common sense reading of its Petition, the attached agreements, building permits, and maps establish that Peoples is the utility who can best serve the adjacent community. Peoples asserts that it has met the burden of providing a sufficient statement of facts upon which the Commission can evaluate the territorial dispute.

Peoples also takes exception to SSGC's and Leesburg's interpretation of the Commission's ruling in *Gulf Coast-Gulf Power* and points out that on appeal, the court held that the Commission was not required as a matter of law to "establish territorial boundaries in order to resolve a territorial dispute that does not involve service to current or future identifiable customers." *Gulf Coast-Gulf Power*, 727 So. 2d at 264. Peoples distinguishes the scenario in *Gulf Coast-Gulf Power*, which involved disparate locations that had no customers, by pointing out that customers within the disputed service area were easily identifiable as the homeowners within those specific developments that the Villages is constructing immediately adjacent to its prior developments being served by Peoples.

Peoples argues that SSGC's and Leesburg's positions that the Villages has found a better financial arrangement with another gas company, indicates that there is a bona fide territorial dispute. Peoples states that it is the conduct of SSGC and Leesburg that has created a territorial dispute and that the Commission should allow Peoples' Petition to move forward.

### **Staff's Analysis and Recommendation**

Peoples' petition states a cause of action upon which relief can be granted, and it meets the requirements of Rules 28-106.201 and 25-7.0472, F.A.C. The Petition sets forth that a gas infrastructure is being installed by SSGC in a People's natural gas service area, that the area in question is adjacent to Peoples' natural gas infrastructure, that Peoples already has a non-exclusive franchise with the City of Wildwood to provide natural gas service to the area, and that there is an agreement between Leesburg and SSGC in which Leesburg is to supply gas to the area.

The Petition and its attachments indicate that Leesburg is in the process of building a 6-inch main line that is 6.25 miles in length to the service area from its distribution line serving Coleman Prison, and that together with SSGC, the overall length of all proposed natural gas piping being constructed in the service area is approximately 29 miles.

When viewed within the "four corners of the complaint" exclusive of all affirmative defenses/responses, assuming all alleged facts are true, and in the light most favorable to Peoples, staff believes that the Petition states a cause of action that would invoke the Commission's jurisdiction and permit the Commission to grant the relief requested. Specifically, the Petition contains sufficient allegations such as customer preference and cost to serve, to allow the Commission to review the Petition to Resolve the Territorial Dispute in accordance with Rule 25-7.0472, F.A.C.

Section 366.04(3)(b), F.S., grants jurisdiction to the Commission to resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among natural gas utilities. In the instant case, Peoples' Petition establishes that a territorial dispute exists pursuant to Section 366.04(3)(b), F.S. The Petition contains adequate information in the form of an agreement, construction notices, ordinance, permits, and maps to indicate that an active dispute exists as to who will provide natural gas to the disputed service area. A review of the maps attached to the Petition further illustrates that this is a fully formed territorial dispute over the contested service area. *See Exhibits A-C.*

Rule 25-7.0472(2)(c-e), F.A.C., requires the Commission, when resolving territorial disputes, to consider the cost of each utility to provide natural gas service to the disputed area presently and in the future. Among the many factors that the Commission considers in a territorial dispute, customer preference is considered if all other factors related to the costs are substantially equal.

### **Conclusion**

For the reasons set forth above, the Commission should deny SSGC and Leesburg's motions to dismiss Peoples' Petition.

**Issue 3:** Should this docket be closed

**Recommendation:** If the Commission denies SSGC's and Leesburg's motions to dismiss, the docket should remain open to address Peoples' petition to resolve the territorial dispute. Alternatively, if the Commission votes to grant the motions to dismiss, the docket should be closed upon the issuance of a final order. (Trierweiler)

**Staff Analysis:** If the motions are denied, this docket should remain open to address Peoples' petition to resolve the territorial dispute. If the motions are granted, the docket should be closed after issuance of the final order.

PEOPLES GAS SYSTEM  
 EXHIBIT A  
 PAGE 3 OF 3  
 AREA 4 OF EXHIBIT E





