

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint petition for  
declaratory statement with  
respect to applicability and  
effect of a portion of  
366.02(1), Florida Statutes, by  
Chesapeake Utilities Corporation  
and Citrosuco North America,  
Inc.

DOCKET NO. 990710-GU  
ORDER NO. PSC-99-1592-DS-GU  
ISSUED: August 16, 1999

The following Commissioners participated in the disposition  
of this matter:

JOE GARCIA, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JULIA L. JOHNSON  
E. LEON JACOBS, JR.

**DECLARATORY STATEMENT**

BY THE COMMISSION:

INTRODUCTION

On June 3, 1999, the joint petitioners, Chesapeake Utilities Corporation (Chesapeake) and Citrosuco North America, Inc. (Citrosuco), filed this Petition for a declaratory statement. They ask us to declare that Citrosuco will not be subject to the Commission's jurisdiction as a public utility if it constructs a natural gas pipeline and only leases that pipeline to Chesapeake to provide natural gas service. Our declaratory statement to that effect is set forth below.

DECISION

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any

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rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

According to Rule 28-105.001, Florida Administrative Code;

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

The facts that form the basis of the petition are as follows: Citrusuco owns and operates a citrus processing plant in Lake Wales, Florida, within the service territory of Chesapeake, a natural gas utility regulated by the Commission. Citrusuco plans to construct an eight-inch natural gas pipeline from its processing plant to Chesapeake's Lake Wales Gate Station. Citrusuco will construct the pipeline to transport natural gas that it will purchase from various suppliers and receive through Chesapeake's Lake Wales Station for use in its plant. Citrusuco has no experience in the operation and maintenance of a natural gas pipeline, and intends to lease the pipeline to Chesapeake, which does have the requisite experience.

Under the parties' Pipeline Lease Agreement, Chesapeake will pay Citrusuco a fixed annual rent for the pipeline for an initial term of 10 years. Chesapeake will operate and maintain the pipeline subject to all applicable statutes and regulations. Chesapeake will receive certain quantities of natural gas at its Lake Wales Gate Station for Citrusuco's account and transport the natural gas through the pipeline to Citrusuco's plant. Chesapeake

will also use the pipeline to provide natural gas service to other customers located in the vicinity of the pipeline's 10-mile route. The parties are not affiliated, and Citrosuco will not transport, distribute or otherwise supply natural gas to any customers.

On the basis of these facts, the joint Petitioners have asked us to declare that Citrosuco will not be considered a "public utility" subject to our regulation, as that term is defined in section 366.02(1), Florida Statutes. Section 366.02(1) states, in pertinent part;

"Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term "public utility" does not include either a cooperative now or hereafter organized under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof; any dependent or independent special natural gas district; any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial customers; any entity selling or arranging for sales of natural gas which neither owns nor operates natural gas transmission or distribution facilities within the state . . .

The petitioners assert that the statute is not applicable to Citrosuco under the particular circumstances they have described, because Citrosuco will only construct and own the pipeline. It will not "supply" or sell natural gas to the public. It will lease the pipeline to Chesapeake, and Chesapeake, the regulated utility, will operate and maintain the pipeline to provide natural gas to Citrosuco and other members of the public for compensation. Because Citrosuco will not supply natural gas to the public, the petitioners conclude that it will not be subject to the Commission's jurisdiction.

This analysis is consistent with court and Commission precedent interpreting section 366.02(1), Florida Statutes, which have focused on the sale of electricity or natural gas service to the public to determine jurisdiction. See, e.g., P.W. Ventures v. Nichols, 533 So. 2d 281 (Fla. 1999), where the Supreme Court held that under section 366.02(1), a sale of electricity to any member

of the public would subject the seller to the Commission's jurisdiction. Likewise, in Order No. PSC-94-0197-DS-EQ, issued February 16, 1994 in Docket No. 931190, In re: Petition for a Declaratory Statement Concerning Financing and Ownership Structure of a Cogeneration Facility in Polk County, by Polk Power Partners, L.P., the Commission found that Polk would be subject to its jurisdiction for the supply of electricity to an unrelated customer. The Commission interpreted section 366.02(1) as follows;

In our view, what is dispositive for jurisdictional purposes is the contemplated generation of electric power by one entity, Polk, for consumption by an unrelated entity . . . in return for payment. Such an arrangement is encompassed by Sec. 366.02(1), Florida Statutes . . .

See also, In Re: Petition for Declaratory Statement Regarding Public Utility Status of Affiliates Involved in Gas Supply Arrangements, by Tampa Electric Company, Docket No. 951347-PU. In Order No. PSC-95-1623-DS-PU, issued December 29, 1995, where the Commission found that the gas supply arrangements for Tampa Electric Company's electric plant would not subject the company's gas supply affiliate to regulation as a public utility, because it would not be supplying gas to or for the public.

Relying solely on the facts asserted by the petitioners, we will grant Citrosuco and Chesapeake's petition and issue the declaratory statement they request. The petitioners have satisfied the statutory and regulatory requirements for issuance of a declaratory statement. The statement they request applies only to their particular circumstances, as they have adequately described in their account of the facts.

We find adequate support in court and Commission precedent for the petitioners' legal position that Citrosuco will not be subject to our jurisdiction by constructing and leasing the natural gas pipeline to Chesapeake. Citrosuco will not be "supplying natural gas to or for the public," the key determinant for jurisdiction under the statute. Furthermore, as the petitioners suggest, there is no compelling public policy reason to assert jurisdiction over Citrosuco, because Chesapeake is a regulated natural gas utility. Chesapeake has agreed in the Lease Agreement and asserted in the Joint Petition that it will adhere to all statutory and regulatory requirements in the operation and maintenance of the pipeline in question. For these reasons, we find that Citrosuco will not be

ORDER NO. PSC-99-1592-DS-GU  
DOCKET NO. 990710-GU  
PAGE 5

considered a "public utility" under section 366.02(1), Florida Statutes, for the construction and lease of a natural gas pipeline to Chesapeake.

It is therefore,

ORDERED by the Florida Public Service Commission, for the reasons stated in the body of this Order, that Citrosuco North America, Inc. will not be considered a "public utility" under section 366.02(1), Florida Statutes, for the construction and lease of a natural gas pipeline to Chesapeake Utilities Corporation. It is further

ORDERED that this Docket may be closed.

By ORDER of the Florida Public Service Commission this 16th day of August, 1999.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

( S E A L )

MCB

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.

ORDER NO. PSC-99-1592-DS-GU  
DOCKET NO. 990710-GU  
PAGE 6

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 Director, Division of Records and Reporting, 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 Director, Division of Records and reporting 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.

FLORIDA PUBLIC SERVICE COMMISSION - RECORDS AND REPORTING

Requisition for Photocopying and Mailing

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 Number of Originals 6 Copies Per Original 12  
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Item Presented \_\_\_\_\_  
 Agenda For (Date) \_\_\_\_\_ Order No. 99-1592 In Docket No. 990710  
 Notice of \_\_\_\_\_ For (Date) \_\_\_\_\_ In Docket No. \_\_\_\_\_  
 Other \_\_\_\_\_

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State of Florida



# Public Service Commission

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

DATE: August 13, 1999  
 TO: BLANCA BAYO, DIRECTOR OF RECORDS AND REPORTING  
 FROM: MARTHA BROWN, DIVISION OF APPEALS *MCB*  
 RE: DOCKET NO. 990710-GU AND 990869-TL

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AUG 13 PM 2:42

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*99-1592-DS*

FILE NAMES: 990710.ORD AND 990869.ORD

*6 pages*

Attached are two orders to be issued as soon as possible.

MCB

Attachment

cc: Wanda Terrell

*See 1.5.6*

*faxed - 3/1*

*DKP*