



# Public Service Commission

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**DATE:** JULY 15, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYCO)

**FROM:** DIVISION OF APPEALS (BROWN) *MCB DES*  
DIVISION OF ELECTRIC AND GAS (MAKIN, MILLS) *[Signature]*

**RE:** DOCKET NO. 990710-GU - JOINT PETITION FOR DECLARATORY STATEMENT BY CHESAPEAKE UTILITIES CORPORATION AND CITROSUCO NORTH AMERICA, INC.

**AGENDA:** JULY 27, 1999 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTIES MAY PARTICIPATE AT THE DISCRETION OF THE COMMISSION

**CRITICAL DATES:** SEPTEMBER 1, 1999 - BY STATUTE, AN ORDER MUST BE ISSUED BY THIS DATE

**SPECIAL INSTRUCTIONS:** SHOULD NOT BE DEFERRED

**FILE NAME AND LOCATION:** S:\PSC\APP\WP\990710.RCM

### CASE BACKGROUND

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 the Commission 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. Staff's recommendation to grant the petition is set out below.

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**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant the joint petition for a declaratory statement?

**RECOMMENDATION:** Yes, the Commission should issue the declaratory statement the joint petitioners request.

**STAFF ANALYSIS:** 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 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.

Rule 28-105.001, Florida Administrative Code explains;

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 this declaratory statement petition are as follows: Citrosuco 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. Citrosuco plans to construct an eight-inch natural gas pipeline from its processing plant to Chesapeake's Lake Wales Gate

Station. Citrosuco 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. Citrosuco 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 Citrosuco 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 Citrosuco's account and transport the natural gas through the pipeline to Citrosuco's plant. Chesapeake will also use the pipeline to provide natural gas service to Citrosuco and 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 the Commission to declare that Citrosuco will not be considered a "public utility" subject to the Commission's 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 Citrusuco and other members of the public for compensation. Because Citrusuco will not supply natural gas to the public, the petitioners conclude that it will not be subject to the Commission's jurisdiction.

The petitioners explain that this analysis is consistent with Court and Commission precedent interpreting section 366.02(1), 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 in the Joint Petition, staff recommends that the Commission should grant Citrusuco 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 factual account of those circumstances. The petitioners have also adequately supported their legal position that Citrusuco will not be subject to the Commission's jurisdiction by constructing and

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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 Joint Petitioners explain, 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 staff recommends that the Commission issue the declaratory statement that Citrosuco 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.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** Yes. If the Commission accepts staff's recommendation in Issue 1, this docket should be closed.

**STAFF ANALYSIS:** If the Commission accepts staff's recommendation in Issue 1, a final order will be issued disposing of the petition and the docket can be closed.

MCB