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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for issuance of an order to the City of Leesburg and South Sumter Gas Company, LLC, to show cause why they should not be regulated by the Commission as a public utility as defined in Section 366.02(1), Florida Statutes, etc.	)	Docket No.20180085-GU Filed: April 26, 2018

MOTION TO DISMISS PEOPLES GAS SYSTEM'S PETITION

South Sumter Gas Company, LLC ("SSGC"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby files with the Florida Public Service Commission ("Commission") this Motion to Dismiss Petition ("Motion") filed by Peoples Gas System ("PGS") requesting issuance of an order to the City of Leesburg and South Sumter Gas Company, LLC, to show cause why they should not be regulated by the Commission as a public utility as defined in Section 366.02(1), Florida Statutes and in the alternative requesting a declaratory statement ("Show Cause Petition") which was filed on April 2, 2018. In support of this Motion, SSGC states:

I. INTRODUCTION

1. PGS's Show Cause Petition action constitutes another baseless attempt by PGS in its ongoing effort to challenge SSGC's lawful construction and financing agreement ("Agreement") with the City of Leesburg ("City"). Under this Agreement, SSGC will construct and finance the natural gas local distribution gas lines and related facilities ("System"), to be owned and operated by the City to supply natural gas to certain portions of The Villages community (those certain portions referred to herein as the "Community"). In Docket No. 20180055-GU, PGS filed a "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" ("Territorial Petition," and collectively with the Show Cause Petition, the "Petitions") in an effort to frustrate the Agreement and usurp the City's right to provide natural gas to the Community, and by so doing, insert itself as the Community's natural gas provider, despite having failed in recent prior attempts to timely construct, install, and provide competent natural gas service to other residential subdivisions within the Community. Without question, this new petition – while filed as a standalone action which has duly been assigned to a separate docket by Commission staff – is an attempt by PGS to better its position in the "territorial dispute" docket.

2. Under the Agreement, SSGC will construct the System as directed by the City and in conformance with applicable industry construction and safety standards for natural gas local distribution systems. As sections of the System are completed, conveyed to, and accepted by the City, the City will be solely responsible for the maintenance, upkeep, and operation of the System, including compliance with any applicable safety and other requirements. Prior to the flow of natural gas within such portions of the System, the City shall purchase sections of the System as completed, and pay SSGC pursuant to the terms of the Agreement. Once the System is turned over to the City, the residents of the Community will receive natural gas service from the City, including a natural gas utility bill with all payments being made to the City. SSGC will not send a bill to, nor will it receive payment from any of the Community's residents. SSGC shall not in any manner supply natural gas to the residents and businesses of the Community, it shall not hold itself out to the public as a natural gas utility, nor shall it have any relationship with the residents in connection with them receiving natural gas services. The City shall for all purposes serve as and will be the natural gas utility for the Community.

3. While the City will be the natural gas utility provider for the Community, it will not itself be a "public utility." Pursuant to Section 366.02(1), Florida Statutes, the term "public utility" does not include "a municipality or an agency thereof."

4. In addition, the Agreement is simply a financing vehicle to construct the System, and SSGC cannot be deemed a "public utility" because it will not be "supplying" natural gas "to or for the public." Utilities historically and routinely subcontract work out to third parties to construct their utility systems. Under PGS's convoluted view, any entity behind the actual service supplier, such as a subcontractor, could be found to be a utility, which is completely inconsistent with Chapter 366 and this Commission's orders, infra.

5. In PGS's Territorial Petition, PGS acknowledges that SSGC does not have any customers and does not provide natural gas service. [Territorial Petition at p. 2]. Thus, as a collateral action, seeking essentially the same result, PGS is taking an inconsistent position between the Petitions.

6. It is clearly evident from the Petitions that PGS is attempting to usurp the City's rightful authority to be the Community's natural gas provider by raising meritless claims and alleging a nefarious relationship between the City and SSGC. Distilled to their essence, the detailed filings of PGS in both dockets are little more than the manifestation of PGS' frustration that a major developer found a far more efficient and competent natural gas provider than PGS.

7. This Show Cause Petition amounts to nothing more than a collateral attack on the Territorial Petition, and is a waste of the Commission's time and resources as well as those of SSGC and the City. Both Petitions involve PGS's belief that SSGC and the City will be providing natural gas service to the Community and not just the City. PGS asks the Commission to deviate from its prior decisions, misconstrue its own statute over which it has jurisdiction and

conclude that SSGC be deemed a "public utility" because it has entered into the Agreement with the City to construct and finance the System. There is simply nothing in the Agreement or the actions of the City and SSGC that merit initiation of a show cause order or the alternative declaratory statement now being sought. Accordingly, this matter should be dismissed.

8. Rule 28-106.204(2), Florida Administrative Code, provides in part that "motions to dismiss the petition or request for hearing shall be filed no later than 20 days after assignment of the presiding officer." The usual context for the "assignment of the presiding officer" is the receipt of a petition by an agency, the agency's referral of that petition to the Division of Administrative Hearings ("DOAH") for a hearing, and the assignment by DOAH of an Administrative Law Judge to hear the matter, at which time the 20-day clock starts. However, the Commission usually hears its own petitions, and on April 6, 2018, the Commission's docket management system was updated to reflect the assignment of this docket to the full panel of Commissioners and the assignment of Commissioner Polmann as the prehearing officer. Accordingly, the 20-day clock for Rule 28-106.204(2) purposes started on April 6, 2018, and this Motion is timely filed within the authorized 20-day window for motions to dismiss.[1] In addition, on April 5, 2016, the Commission published in the Florida Administrative Register its formal notice of the alternative request for declaratory statement. Pursuant to that notice, the Commission directed that "motions to intervene in Docket 20 180085-GU pursuant to Rule 28-105.0027, F.A.C., must be filed within 21 days after publication of this notice." By separate document SSGC has timely filed its motion to intervene. While the PSC's Florida Administrative Register notice for the alternative declaratory statement did not specific that

[1] *Order Denying Summertree Water Alliance and Ann Marie Ryan's Motion to Dismiss and Denying Request for Oral Argument*, Docket No. 160101-WS, Order No. PSC-17-0157-PCO-WS (May 5, 2017).

petitions for an administrative hearing or other responsive pleadings were due by any date certain, SSGC is nevertheless filing this motion to dismiss the alternative declaratory statement request in order for the Commission to consider SSGC's arguments on both the PGS show cause and alternative declaratory statement requests together.

II. STANDARD OF REVIEW

9. A motion to dismiss in an administrative adjudicatory proceeding before the Commission rests on the sufficiency of a complaint. In *In re: Joint application for transfer of control of Sprint-Florida, Inc., holder of ILEC Certificate No. 22, and Sprint Payphone Services, Inc., holder of PATS Certificate No. 3822, from Sprint Nextel Corp. to LTD Holding Co., and for acknowledgement of transfer of control of Sprint Long Distance, Inc., holder of IXC Registration No. TK001, from Sprint Nextel, Corp. to LTD Holding Col,* Docket No. 050555-TP, Order No. PSC-06-0033-FOF-TP (Jan. 10, 2006) ("*Sprint-Florida/LTD Holding*"), the Commission granted a motion to dismiss an administrative complaint, and in so doing described both a Petitioner's pleading obligation under Rule 28-106.201(2), Florida Administrative Code, and the function of a motion to dismiss as, "to test the sufficiency of the Complaint with respect to (1) substantial injury, (2) statutory right and (3) requested relief."

10. The Commission stated:

> In determining the sufficiency of the Complaint, we confine our consideration to the Complaint and the grounds asserted in the motion to dismiss. Moreover, we construe all material facts and allegations in the light most favorable to [Petitioner] in determining whether the complaint is sufficient. Id.

11. As detailed below, PGS's Show Cause Petition fails to state a cause of action and should be dismissed with prejudice.

12. Even viewed in the light most favorable to PGS, its Show Cause Petition fails -- as it seeks to invoke the "show cause order" jurisdiction of the Commission, which it is expressly prohibited from so doing; and it fails to state a cause of action for which relief may be granted.

III. COMMISSION'S SHOW CAUSE JURISDICTION

13. Contrary to PGS's Show Cause Petition, invoking the Commission's show cause procedure lies squarely and solely within the jurisdiction of the Commission, and such actions may not be initiated by the parties to a proceeding. On this basis alone, the Commission should decline the invitation of PGS to issue the requested show cause order.

14. In Docket No. 110315-GU *In re: Complaint by Miami-Dade County for order requiring Florida City Gas to show cause why tariff rate should not be reduced and for the Commission to conduct a rate proceeding, overearnings proceeding, or other appropriate proceeding regarding Florida City Gas' Acquisition adjustment*, Docket No. 100315-GU; Order No. PSC-10-0425-PCO-GU (2010), the Commission stated unequivocally that, "the decision to invoke the Commission's show cause order is ultimately ours."

15. Furthermore, in order for the Commission to initiate a show cause order proceeding, it must clearly identify "a statutory section, rule or order that has been violated, as well as the facts or conduct relied upon to establish the violation." Id.

16. Assuming, *arguendo*, that the request itself is appropriate, it would be incumbent upon PGS to plead facts sufficient to make a prima facie showing that SSGC is a "public utility," as alleged in the Show Cause Petition and that SSGC has somehow violated the Commission's orders, rules, or governing statutes. There are no such allegations here. There are no indications from the Agreement that SSGC is or will be a natural gas distributor to the Community. Even if the statutory definition of "public utility" in Section 366.02(1), Florida Statutes, could be

interpreted to mean that any entity performing construction on behalf of a public utility becomes a public utility, PGS still has not sufficiently alleged sufficient facts to demonstrate a rule, order, or statute violation.

17. It is unfortunate that SSGC has had to expend time and energy responding to PGS's unfounded and spurious claims raised in the Petitions. There is already a docket open to address the desire of PGS to force the Community to accept its service, and the filing of the petition in this docket for strategic advantage in the "territorial dispute" docket is redundant, unnecessary, and inappropriate.

IV. SSGC IS NOT A "PUBLIC UTILITY"

18. PGS has based its entire Show Cause Petition on the false premise that SSGC is a "public utility," but in so doing has offered no proof other than what can be simply characterized as an uninformed hunch, borne of PGS's fear that it will not be the utility providing natural gas service to the Community. The City will in fact be the natural gas service provider for the Community.

19. In spite of the Agreement and other evidence to the contrary, and with no supporting evidence of its own, PGS stubbornly adheres to a fabricated belief that SSGC will be the natural gas service provider for the Community. It is both disturbing and insulting that PGS suggests that SSGC and the City are engaging in some sort of subterfuge, and in so doing, PGS has concocted an elaborate scheme wherein the City and SSGC hope to dupe the Community (and the Commission) into believing that the City will be providing natural gas service to the Community, when in fact it will be SSGC that will be so doing. This argument, which is the fruit of PGS obvious frustration that the Community intends to receive gas from the City or not at all, borders on the absurd.

20. PGS may be better served concerning itself with its own historic shortfalls in natural gas service than making wild accusations which cost significant time and money, and only frustrate and delay the Community from being provided natural gas service by the City. Similarly, the PGS actions in initiating the Petitions have the potential to adversely impact innocent third parties, such as the developer of the Villages communities, with construction delays caused by unnecessary disputes over natural gas service posing significant financial consequences for this master planned community, or the risking of building "all electric homes."

21. To clarify the confusing and misleading argument being made by PGS, one need look no further than the Commission's jurisdiction over natural gas local distribution public utilities set forth in Section 366.02(1), Florida Statutes, which 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; . . . (Emphasis added.)

22. The key jurisdictional consideration for determining the Commission's authority is the phrase "supplying" natural gas "to or for the public." Based upon the facts presented, it is clear that SSGC will not be supplying natural gas to the public within the scope of the statute, and is merely a vehicle for constructing the System.

23. In *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-DAS-GU (August 16, 1999) ("Chesapeake Order"), the Commission squarely addressed the issue of interpreting the meaning and intent of the stature's reference to "supplying" natural gas. In that request, Citrosuco, the owner and operator of a citrus processing plant in Lake Wales, Florida,

agreed to build an 8-inch natural gas pipeline from its processing plant to Chesapeake Utilities' Lake Wales gate station. Chesapeake Utilities was the natural gas local distribution utility serving the area where Citrosuco's plant was located.

24. Under the lease agreement between Chesapeake and Citrosuco, Citrosuco would construct a natural gas distribution pipeline and then lease it to Chesapeake. Chesapeake would then pay Citrosuco a fixed annual rent for the pipeline, and would operate and maintain the pipeline subject to all applicable statutes and regulations. Utilizing the pipeline, Chesapeake would provide natural gas service to Citrosuco as well as to other customers along the pipeline route that would not be affiliated with Citrosuco. Citrosuco would not at any time transport, distribute, or otherwise supply natural gas to anyone, including to itself. [Id. at 2-3].

25. In analyzing the scope of its jurisdiction under Section 366.02(1), Florida Statutes, the Commission found that constructing and then leasing the distribution pipeline to Chesapeake did not constitute "supplying" natural gas. In addition, the Commission noted that there was no compelling public policy reason to assert jurisdiction over Citrosuco since Chesapeake was a regulated natural gas utility and that Chesapeake's operation and maintenance of the leased pipeline would ensure compliance with all applicable statutory and regulatory requirements. [Id at 4].

26. The proposed Agreement between SSGC and the City is similar to the construction-lease agreement between Citrosuco and Chesapeake, because in both situations the party constructing the natural gas pipeline will not supply natural gas, but the natural gas service would be provided instead by a designated natural gas utility. SSGC will not market the sale of natural gas or have any customer relationship with those in the Community that choose to purchase natural gas service from the City. The fact that Chesapeake was a fully Commission-

regulated natural gas utility and the City is only partially regulated by the Commission, does not change the analysis.[2] Likewise, the fact that Citrosuco-Chesapeake involved a lease, and SSGC-Leesburg involves a long term sale and financing agreement leads to the same result.

27. From a purely public policy perspective, in this case an authorized local distribution utility with the necessary knowledge and experience of applicable statutory and regulatory requirements (the City) will be supplying the natural gas to customers. This should provide comfort to PGS as it asserts that it has initiated both Petitions to safeguard the public interest.

28. The Commission's decision in the Chesapeake Order is consistent with the Commission's 1986 decision in *In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility*, Order No. 17009, at 4 (December 22, 1986). In that decision, which involved a question of the supply of electric power, the Commission made the distinction and determined that "supplying a means of producing electricity" did not constitute "supplying electricity" under the statute. In addition, "The lessor would hold legal title to the equipment, receive Investment Tax Credits (ITC) and depreciation benefits associated with its investment, and receive the fixed lease payments throughout the term of the lease." [Id. at 2]. The Commission ultimately found that reliance on a turnkey arrangement to finance the construction of facilities did not constitute the supplying of electricity or subject the lessor to the jurisdiction of the PSC. [Id. at 5]. Here, SSGC would be

[2] Under Section 366.02(1), there are essentially two classifications of natural gas utilities. There are "public utilities," which are essentially investor owned utilities such as Chesapeake Utilities, Florida City Gas, and TECO Peoples Gas, and which are fully regulated by the PSC for all purposes, including rates and services. The other group of natural gas utilities consists of cooperatives, special natural gas districts, and municipalities, and for these utilities the PSC has limited authority only with respect to territorial agreements and disputes and safety, which is discussed further below.

supplying the means of providing natural gas, and would not be actually supplying natural gas. Thus the distinction holds true here as it did in the Monsanto Company Order above.

29. The majority of the Commission's decisions involving questions of jurisdiction usually center on the second part of the jurisdictional test – whether the electric or gas service is supplied "to the public." The leading case on service to the public was decided by the Florida Supreme Court in 1999. In *P.W. Ventures v. Nichols,* 533 So. 2d 281 (Fla. 1999), the Florida Supreme Court affirmed a Commission order that held the sale of electricity to any member of the public would cause the seller to fall under the Commission's jurisdiction. In other words, supplying electricity or natural gas to an unrelated entity, even to a single entity, constitutes service to the public within the Commission's jurisdiction. Clearly in the Agreement, it is the City and not SSGC that has the "to the public" or customer relationship with those receiving natural gas service. There is simply no "to the public" violation by SSGC's construction and sale of the System to the City, for the City's supply of natural gas to the public.

30. PGS provided no evidence to refute that SSGC was simply constructing and financing the System to be used by the City for the benefit of the Community. In fact, PGS even makes the statement in its Show Cause Petition that, "…SSGC currently provides no natural gas service and has no customers." [Show Cause Petition at 2-3]. Instead however, PGS relies on innuendos such as "SSGC and Leesburg have entered into the Agreement which, by its title and certain of its provisions, *purports*, to be an agreement for construction, purchase and sale of certain natural gas facilities, for the purpose of providing natural gas service to customers to be located within the "Service Area… ." [Id. at 3]. It is difficult to fathom how PGS is able to claim that the parties are purporting something other than what is stated in great detail in the

Agreement, which is that, SSGC is building the System to be sold to, and used by the City. It is a basic tenet of contract law that a contract by its terms is to be construed as drafted.

31. PGS then argues, again without any evidence, that the Agreement creates a *partnership* between the City and SSGC, which would, it also argues, necessitate SSGC to be regulated as a "public utility." In furtherance of this argument, PGS provides an extensive analysis of what constitutes a partnership under federal tax law. However, federal tax law definitions are irrelevant when the Florida Legislature has provided clear and unambiguous statutory language on what constitutes "public utility service" – and the Agreement, Leesburg and SSGC do not meet the plain meaning of Section 366.02(1), Florida Statutes, no matter how obtuse of an argument PGS may raise.

32. The only cognizable reason why PGS would go to such extreme lengths has to be because it has no valid argument at all, and would rather frustrate a plain reading of Section 366.02(1), Florida Statutes, and obscure the issue with such a far-fetched and irrelevant argument. Section 366.02, Florida Statutes, is clear – SGGC is not a public utility because under the Agreement, it simply does not, and will not provide natural gas services to the public.

33. Wherefore, and in consideration of the foregoing, SSGC respectfully requests that the Commission dismiss the requested show cause proceeding.

V. THE NATURE OF A REQUEST FOR DECLARATORY STATEMENT

34. In addition to the request for a show cause order as addressed hereinabove, the Petition initially requests, in paragraph A on page 1, the issuance of a declaration "in the alternative". However, paragraph 30 and the prayer for relief on page 17 of the Petition both request a declaration "whether or not the Commission issues" an order or orders to show cause.

To resolve any possible ambiguity, it is important to clearly set forth the declaratory statements which PGS requests that the Commission issue. The actual declarations requested are as follows:

> - *which utility (Leesburg or SSGC, or a partnership or other legal entity created by the Agreement between the two) PGS should negotiate with in an effort to resolve the territorial dispute*
> - *which utility (Leesburg or SSGC, or a partnership or other legal entity created by the Agreement between the two) should have sought PGS's consent to the construction of the System*

35. As addressed in more detail below, a petition for declaratory statement seeks a precisely specified type of administrative relief whose form and purpose are clearly set forth in the Administrative Procedure Act and the administrative code rules which govern the Commission's practices. The Petition and its declaratory request is aberrant to the statute and rules governing declaratory statements in several ways.

36. Declaratory statements are addressed by Section 120.565, Florida Statutes, and the Uniform Rules of Procedure in Chapter 28-105, F.A.C.

Section 120.565, Florida Statutes, states in pertinent part:

> (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, F.A.C. provides:

> 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 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.

Rule 28-105.002 (5), F.A.C. requires that the petition contain:

> A description of how the statutory provisions or orders on which a declaration is sought may substantially affect the petitioner in the petitioner's particular set of circumstances.

37. A party seeking a declaratory statement must not only show that it is in doubt as to the existence or nonexistence of some right or status, but also that there is a bona fide, actual, present, and practical need for the declaration. *State Department of Environmental Protection v. Garcia*, 99 So. 2d 539, 544-45 (Fla. 3rd DCA 2011). The declaratory statement procedure is intended to enable members of the public to definitively resolve ambiguities of law arising in the planning of their future affairs and to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts. *Department of Business and Professional Regulation, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999).

38. In accordance with Rule 28-105.003, F.A.C., the Commission "may" rely on the facts alleged in the petition without taking "any position" on the validity of those facts. The declaratory statement, if indeed one is issued in this case, is controlling only as to the facts relied upon and not as to other, different or additional facts. The Commission's conclusions, if any, are limited to the facts described therein, and any alteration or modification of those facts could materially affect the conclusions reached. See, e.g., *In re: Petition for Declaratory Statement or Other Relief Regarding the Expiration of The Vero Beach Electric Service Franchise Agreement, by The Board of County Commissioners, Indian River County, Florida*, Docket No. 140142-EM, Order No.PSC-15-0101-DS-EM (2015). A declaratory statement is not appropriate where the alleged doubt or uncertainty is not about statutory provisions, rules, or orders and where the statement will not resolve the alleged controversy. *Id.*

VI. THE REQUESTED RELIEF

39. While the Show Cause Petition references and/or relies upon a complex set of alleged facts, the requested declarations rest upon two seemingly simple propositions: the alleged uncertainty of PGS as to "which utility" (Leesburg or SSGC, or a partnership, joint venture or other legal entity created by the agreement between the two) it should negotiate with in an effort to resolve the territorial dispute addressed in the Territorial Petition, and the (clearly self-serving) request that the Commission declare which of those same entities "should have sought *PGS*'s consent" prior to undertaking their activities as alleged in the Petition. However, the Petition then goes on to exponentially complicate the requested declarations by stating "(t)his will involve the Commission's determination as to whether the Agreement creates a separate entity which is a "public utility" as defined in Section 366.02(1), Florida Statutes, and - if no such separate entity is created by the Agreement – a determination as to whether *PGS* must resolve the dispute with Leesburg or SSGC pursuant to the Commission's jurisdiction under Section 366.04(3)(b), Florida Statutes". This seemingly simple proposition – which is actually a candid admission of the underpinnings of the requested declarations – would require a resolution of many of the issues, and the facts related to those issues, raised by PGS in its Territorial Petition. As argued in more detail below, the requested declarations are inconsistent with the purpose and intent of the statutes and rules governing an agency's issuance of declaratory statements in limited and specified circumstances. For those reasons, the Request for Declaratory Statement should be dismissed.

VII. THE PETITION'S REQUEST FOR A DECLARATION IS NOT LIMITED TO PGS's PARTICULAR SET OF CIRCUMSTANCES

40. Rule 28-105.001, F.A.C., specifically provides that "[a] declaratory statement is not the appropriate means for determining the conduct of another person." In the case of *In re:*

Petition for Declaratory Statement by Mediterranean Manors, Inc., Regarding Applicability of Progress Energy Tariff Provisions, Docket No. 110085-EI, Order No. PSC-11-0311-DS-EI (2011), Mediterranean Manors sought a declaration concerning the responsibilities of Progress Energy under the F.A.C. and its tariff. Noting the clear language in the rule, the Commission found that "Mediterranean Manors' request … does not conform to Rule 28-105.001, F.A.C., in that it asks us to determine the responsibilities, or appropriate conduct, of Progress. As previously expressed, any declaratory statement issued by us should pertain to Mediterranean Manor, not Progress". In this case, the declarations sought by PGS pertain solely to the conduct of third persons: SSGC and the City of Leesburg.

41. Illustratively, even though the Request for Declaratory Statement is only four paragraphs long, SSGC, the City, a possible "partnership, joint venture or other legal entity", and Docket No. 20180055-GU are expressly referred to more than 15 times, and inferentially referred to several other times. The requested declarations on their face improperly request that the Commission determine the conduct of third parties.

VIII. THE PETITION'S REQUEST FOR A DECLARATION IS NOT LIMITED TO HOW A COMMISSION STATUTE, RULE, OR ORDER APPLIES TO THE PARTICULAR CIRCUMSTANCES OF PGS

42. While the Show Cause Petition repeatedly references the Commission's enabling statutes and numerous Commission orders, the actual declarations requested entirely fail to properly frame the requested relief as required by statute and rule. At the heart of the declaratory statement process is the requirement of the statute and the rule that a declaratory statement must be limited to *an agency's opinion regarding 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*. Neither of the requested declarations mention any statute, rule, or order. Both of the requested

declarations do mention SSGC, the City, and/or "any other partnership or legal entity" which the Commission may find exists. The entire declaratory statement process is dependent upon a petitioner limiting its allegations to facts regarding its own "particular set of circumstances", which lends an inherent reliability to those allegations. In this case, as argued elsewhere herein, PGS seeks to secure an advantage in the related litigation by the two declarations it seeks, one disingenuously suggesting that it does not know who to negotiate with (when in fact PGS is in active litigation with both parties who are mentioned by name in PGS's own petition); and the second which is founded upon a false premise which would essentially decide the litigation in PGS's favor – that either the City and/or SSGC was somehow lawfully compelled to have "sought *PGS*'s consent" with regard to their proposed activities.

43. Under the right circumstances, and used in the right way, the declaratory statement process can be a very useful tool for avoiding litigation with an agency or to avoid making decisions or taking actions that a particular agency later determines were improper or ill-advised. However, declaratory statements were never intended to be utilized in the manner or method employed by PGS in this instance.

IX. THE PETITION REQUESTS A DECLARATORY STATEMENT ON THE SAME SUBJECT MATTERS AS THOSE ADDRESSED IN DOCKET NUMBER 20180055-GU

44. A declaratory statement should not be issued where another proceeding is pending that addresses the same question or subject matter. *In Re: Petition for Declaratory Statement Concerning Urgent Need for Electrical Substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc., Pursuant to Section 366.04, Florida Statutes*, Docket No. 020829-EC; Order No.PSC-02-1459-DS-EC (2002), citing *Suntide Condominium Association, Inc. v. Division of Land Sales, Condominiums and Mobile Homes, Department of Business Regulations*, 504 So. 2d 1343 (Fla.1st DCA 1987); Couch v. State, 377 So. 2d 32 (Fla. 1st DCA 1979); *Novick*

v. Department of Health, Board of Medicine, 816 So. 2d 1237 (Fla. 5th DCA 2002) (a declaratory statement is not an appropriate remedy where there is related pending litigation). In the *Florida Keys Electric Cooperative Association* order, the Commission noted that the petitioner was engaged in a matter before DOAH, and found that "(a)lthough it appears that the legal issue before DOAH is different than the issue presented here, the subject matter of that proceeding… is the same."

45. In this case, the subject matter of the declaration requested by PGS is undeniably the subject matter at issue in Docket Number 20180055-GU. Indeed, the Request for Declaratory Statement expressly references Docket Number 20180055-GU five times in the five paragraphs which comprise the request, including the prayer for relief; was no doubt filed in an attempt to gain a strategic advantage in Docket Number 20180055-GU; and candidly states that PGS is asking the Commission to resolve "a doubt which of SSGC, Leesburg, or other entity created by the Agreement, should have sought PGS's consent" prior to engaging in the exact same activities which PGS seeks to litigate in Docket Number 20180055-GU. As PGS knows full well, the resolution of this issue – whether PGS has some existing right or obligation to serve a particular area such that the City or SSGC were compelled to seek its permission to act – would require the Commission to resolve the principal issue raised in Docket Number 20180055-GU in favor of PGS. Such an implicit request is inappropriate in a request for declaratory statement.

46. Finally, the relief being sought here – i.e., with which entity should PGS negotiate – is exactly the same issue PGS raised in the Territorial Petition. For the Commission to find that there is a territorial dispute, it can do so only if it finds two utilities serving the same area under the statutory criteria. So, if the Commission finds that there is a territorial dispute, it will identify the other utility. If there is no territorial dispute, then there is no utility with which PGS

can negotiate. Thus the issues here are the same as in the Territorial Petition, and there is no basis for a declaratory statement.

X. THE PETITION'S REQUEST FOR A DECLARATION IS RELIANT UPON SPECULATIVE AND HYPOTHETICAL FACTS AND FUTURE EVENTS

47. The requested declaration relies in significant part on a hypothetical state of facts which are both uncertain and speculative. As discussed elsewhere herein, the requested declaration is less an attempt to resolve a genuine present controversy than it is a preemptive shot to have the Commission adjudicate issues which are raised in an existing and somewhat parallel proceeding.

48. Declaratory statements cannot be rendered when the petitioner provides only speculative allegations of circumstances that may someday occur and that might result in certain actions that might impact the petitioner or unspecified third parties. *In re: Petition for Declaratory Statement or Other Relief Regarding the Expiration of The Vero Beach Electric Service Franchise Agreement, by The Board of County Commissioners, Indian River County, Florida*, Docket No. 140142-EM;Order No. PSC-15-0101-DS-EM (2015). A party seeking a declaratory statement must show that there is an "actual present and practical need" for the requested declaratory statement, and that the declaration addresses a "present controversy." *Sutton v. Dep't of Envtl. Protection*, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995); *In Re: Request for Declaratory Statement by Tampa Electric Company Regarding Territorial Dispute with City of Bartow in Polk County*, Docket No. 031017-EU, Order No. PSC-04-0063-FOF-EU (Jan. 22, 2004). A declaratory statement should not be issued if it "amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain [and] rest in the future."' *In Re: TECO Territorial Dispute* at 4 (citing *Santa Rosa County v. Administration Comm'n*, 661

So. 2d 1190, 1192-93 (Fla. 1995), (quoting *Williams v. Howard*, 329 So. 2d 277, 283 (Fla. 1976)). Additionally, it is well settled that, "Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain, [and] rest in the future.' " *LaBella v. Food Fair, Inc.*, 406 So.2d 1216, 1217 (Fla. 3rd DCA 1981) (quoting *Williams v. Howard*, 329 So.2d 277, 283 (Fla.1976)); *see also American Indemnity Co. v. Southern Credit Acceptance, Inc.*, 147 So.2d 10, 11 (Fla. 3rd DCA 1962) (holding that, in a declaratory action case, "courts may not be required to answer a hypothetical question or one based upon events which may or may not occur"), *Santa Rosa County v. Administrative Commission*, 661 So. 2d 1190 (Fla. 1995).[3]

49. In this case, although only four numbered paragraphs in the Petition are set forth under the Request for Declaratory Statement, the request itself is undeniably dependent upon the 14 pages of allegations which precede paragraph 30. When the Petition is necessarily read *in toto*, it is replete with, and founded upon, a plethora of contingent, speculative, and uncertain facts or events. While it would be unnecessarily redundant to set forth the full extent of the speculative nature of the Petition entirely within this Motion, some illustrative examples readily demonstrate the proposition. In paragraph 16 of the Petition, after a discussion of provisions of the Internal Revenue Code and a federal memorandum addressing those same federal provisions, the Petition, in paragraph 17, recites a litany of allegations to support the argument that Leesburg and SSGC may be a partnership, or engaged in a joint venture (an issue necessarily required to be addressed by the requested declarations). Paragraph 17 is replete with such speculative and

[3] It is well-settled that when determining the availability of a declaratory statement under Section 120.565, Florida Statutes, the agency may be guided by the law of declaratory judgments in civil proceedings. See *Couch v. State*, 377 So. 2d 32, 33 (Fla. 1st DCA 1979); *In Re: TECO Territorial Dispute* at 3.

conjectural allegations such as that the agreement between Leesburg and SSGC "does not appear to be" what it purports to be; that certain alleged facts are "indicative" of a long-term relationship; that "it appears" SSGC will undertake certain actions; that "there is no evidence" Leesburg and SSGC have attempted evaluation, which if undertaken "would indicate" an asset sale; that Leesburg "likely controls" the capital of the venture, while SSGC has "some control"; that SSGC and Leesburg "will not likely" file a partnership return; that Leesburg is "unlikely" to make certain representations to customers, etc.

50. The high degree of speculation as to the future actions of third parties present in the Petition is the very reason that the law of declaratory statements requires that the declaration sought should be with regard to one's own particular facts and situation. Representing a fact about one's own unique and particular situation, and requesting an agency determination as to how its rules or statutes apply to that unique and particular situation, is precisely what declaratory statements were designed to accomplish. Requesting a declaratory statement based on a one-sided litany of facts, many of which are the same facts which are in dispute in a parallel and ongoing administrative proceeding brought by the same party requesting the declaration, is an inappropriate and untenable attempt to accomplish a barely hidden agenda – to achieve a declaration which can be used offensively in the parallel litigation.

51. Wherefore, and in consideration of the above, SSGC respectfully requests that the Commission dismiss the Request for Declaratory Statement and/or decline to issue the requested declarations.

CONCLUSION

Based on the foregoing, and pursuant to Rule 28-106.204, Florida Administrative Code, SSGC respectfully requests that the Commission dismiss PGS's Show Cause Petition in its entirety, with prejudice.

Respectfully submitted this 26th day of April, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 26th day of April, 2018, to the following:

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