

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for issuance of an order to the City)
of Leesburg and South Sumter Gas Company,) Docket No. 20180085-GU
LLC, to show cause why they should not be)
regulated by the Commission as a public utility as) Submitted for filing: 5-3-18
defined in Section 366.02(1), *Florida Statutes*, etc.)
_____)

PEOPLES GAS SYSTEM'S RESPONSE TO LEESBURG'S MOTION TO DISMISS

Peoples Gas System ("Peoples"), by its undersigned counsel and for its response to the City of Leesburg's ("Leesburg"), Motion to Dismiss states:

STANDARD OF REVIEW

Under Rule 28-106.201(2), F.A.C., a motion to dismiss is to test the sufficiency of the complaint. When determining the sufficiency of the complaint, the Commission should look only at the complaint and construe all material facts and allegations in the light most favorable to the petitioner.

PEOPLES' PETITION STATES A CAUSE OF ACTION TO SHOW CAUSE

Leesburg's begins its Motion by ignoring significant aspects of operating a gas utility that Leesburg has ceded to SSGC under the Agreement. Leesburg ignores the fact that SSGC will determine when and where future expansion of Leesburg's gas system will take place. Leesburg ignores that SSGC's Agreement with Leesburg will create two classes of rate payers in Leesburg's system. Leesburg ignores that SSGC is paid based upon how much gas is sold to its customers in The Villages Development rather than a fixed monthly payment. Leesburg ignores that SSGC will determine the rates being charged not only to The Villages' customers, but the rates that will be charged to Leesburg's other customers (the "Native Rate") as alleged in Peoples' Petition. In

short, Leesburg forfeited its status as a municipal utility by giving significant control of its operation to SSGC and creating a new joint venture, partnership or lease that creates a public utility. Under the Agreement, Leesburg pays SSGC by the therm and pays SSGC a portion of the monthly customer charge fees for each customer. Leesburg also must obtain approval from SSGC to change its rates. By ceding control of those aspects of the business to a public utility, Leesburg is no longer operating as a municipal gas company.

Leesburg then argues that the request for declaratory statement is improper because it addresses the same subject matter as contained in Docket No. 20180055-GU. While it is true that Docket No. 20180055-GU addresses a territorial dispute between Peoples and one or both of the intervenors in this action, a resolution of the territorial dispute does not require a resolution of the issues raised in this Petition. For example, the Commission could determine who is to provide gas service to the future developments contemplated by The Villages without having to determine whether the Agreement between SSGC and Leesburg subjects those entities to being regulated as a gas utility. Depending upon the scope of the Commission's ruling in the territorial dispute, and depending on whether the Commission decides to consolidate these Petitions, the issues raised in the instant docket may or may not be adjudicated. Given that both matters are before the Commission, there is little chance of inconsistent rulings and unless the Commission declares that it intends to resolve the issues raised by Peoples' Petition in this docket, Docket 20180055-GU, it would be appropriate for the Commission to issue a show cause order or a declaratory statement in this docket.

Leesburg relies on *In re: Joint Petition for Declaratory Statement with Respect to Applicability and Effect of Apportion 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) (hereinafter the “Chesapeake Order”), for the proposition that even if the Agreement were deemed a lease, it would not give rise to regulation by the Commission. In the Chesapeake Order, the Commission determined that under the terms of the lease agreement between Citrusuco and Chesapeake, there was no need for Citrusuco to be regulated by the Commission. However, there are a number of critical differences between the agreement in the Chesapeake Order and the Agreement at issue in this Petition.

First, unlike Leesburg, Citrusuco was not a gas company, it was a citrus processing plant. Second, the annual rent in the Chesapeake Order was a fixed sum over a set term of years. In this case under the Agreement, Leesburg is paying SSGC based on the amount of gas being sold. In other words, SSGC is making money directly from the sale of gas and the more gas that is sold, the more money it will make. Leesburg also allows SSGC to determine when and at what time the system will expand and also creates separate rate classes under the Agreement. Under the Agreement between SSGC and Leesburg, SSGC determines who the customers will be, and has final say over the rates of the rest of Leesburg’s customers. In short, SSGC is directly involved in supplying gas to the public in a way that was not remotely contemplated in the agreement between Citrusuco and Chesapeake. Moreover, the Commission in the Chesapeake Order also noted that Chesapeake was a fully regulated utility which Leesburg is not. In the Chesapeake Order, there was no effort being made by a gas company or the lessor, Citrusuco, to evade the benefit to the public derived from regulation. The Commission noted that because Chesapeake was a fully regulated utility, the transaction would be subject to regulation through one of the parties to the transaction. Under the Agreement between Leesburg and SSGC, none of the customers in The Villages Developments being added to the system will have the protections afforded by the statewide regulatory structure contemplated by Chapter 366, Florida Statutes.

Other Commission rulings have used a similar rationale to approve leases solely when the lessor solely received a fixed monthly fee approving leases. In *In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility*, Order No. 17009, (December 22, 1986) (the “Monsanto Order”), the lease in question did not involve a public or municipal utility. However, the Order’s description of lease financing is instructive. The Monsanto Order begins by noting that the lease will be a turn-key contract which means Monsanto will not be involved in the operation of the co-generation facility that it proposes leasing from an unnamed contractor. As outlined above, SSGC will be intimately involved in the operation of the gas system contemplated by the Agreement and in the supplying of gas to customers pursuant to the Agreement. The Monsanto Order then notes why the lease payments in that case would not constitute supplying gas to the public, at Page 2 of the Order:

“Monsanto’s lease payments would be fixed throughout the term of the lease. These payments would be independent of electric generation, production rates, or any operational variable and would include a negotiated rate of return on the lessor’s investment comparable to the interest rate in traditional financing. Lease payments would continue to be due during either planned or unplanned outages of the facility.”

Leesburg’s payments to SSGC under the Agreement are completely different. Those payments will be dependent on gas sales, and do not appear to be tied to a negotiated rate of return on SSGC’s investment in installing the distribution lines in The Villages Developments. The payments do not appear to be comparable to any interest rate in traditional financing and it appears that payments would not be made if no gas was being provided to customers in The Villages.

In *P.W. Ventures v. Nichols*, 522 So.2d 281 (Fla. 1988), the Commission found that the sale of electricity from a cogeneration plant to a single tower constituted the sale of electricity to the public. However, in its analysis and as part of the rationale for its decision, the Commission addressed the impact of such an arrangement:

What *P.W. Ventures* proposes is to go into an area served by a utility and take one of its major customers. Under *P.W. Ventures*' interpretation other ventures could enter into similar contracts with other high use industrial complexes on a one to one basis and drastically change the regulatory scheme in this state. The effect of this practice would be that revenue that otherwise would have gone to the regulated utilities which serve the affected areas would be diverted to unregulated producers. This revenue would have to be made up by the remaining customers of the regulated utility since the fixed costs of the regulated systems would not have been reduced, *P.W. Ventures v. Nichols*, 533 So.2d 281 (Fla. 1988) at 283.

If one were to substitute "SSGC" for "PW Ventures" and substitute "large scale residential developments" for "high use industrial complexes", the same analysis would apply. Peoples has sufficiently alleged that under the Agreement, SSGC and Leesburg are jointly selling gas to the public and as such are a public utility.

**PEOPLES' PETITION IS SUFFICIENT TO STATE A REQUEST FOR A
DECLARATORY STATEMENT**

Peoples' request for a declaratory statement clearly states that it is asking for interpretations of Florida Statute § 366.04(3.66.02(1)) and Florida Statute § 180.06, thus meeting the requirements of Florida Statute § 120.565 and Chapter 28-105 F.A.C.

While it is true that the underlying facts alleged in the Petition involve SGGC and Leesburg, the request for declaratory statement seeks guidance from the Commission concerning which entity Peoples would need to negotiate with to resolve the dispute and which entity would be responsible for seeking consent from Peoples for operating a system immediately adjacent to Peoples under Florida Statute § 180.06. Peoples seeks a statement from the Commission based on its unique circumstance of being the utility that is attempting to resolve a territorial dispute in specific areas of planned development and is the only entity, gas utility, that is involved in these issues with SSGC and Leesburg.

Leesburg has also moved to dismiss that portion of the declaratory relief request related to the consent provision of Florida Statute § 180.06. Peoples' concedes that the definition of private

company under Florida Statute § 180.05 does not include operating a gas system. However, under Florida Statute § 180.06(8), private companies and municipalities are allowed “to construct, operate and maintain gas plants and distribution systems for domestic, municipal and industrial uses;”. That section broadens the definition of what a private company is allowed to do and expands the definition of private company beyond the Florida Statute § 180.05 definition. It should be noted that Florida Statute § 180.06 creates a whole range of activities that private companies are allowed to do that are far beyond what are contained in Florida Statute § 180.05. Therefore, the consent portion of Florida Statute § 180.06, by any reasonable reading, applies to all of the activities listed in that section which would include building a gas distribution system. If anything, the argument raised by Leesburg heightens the need for a statement from the Commission to clarify this issue.

WHEREFORE, Peoples urges this Court for an Order denying the Motion to Dismiss the Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished to the following by means of the following, this 3rd day of May, 2018:

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