

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Counter Petition of the City of)
Leesburg to resolve a territorial dispute with)
Peoples Gas System)
_____)

Docket No. 20180185-GU

**CITY OF LEESBURG’S RESPONSE IN OPPOSITION TO PEOPLES GAS SYSTEM’S
MOTION TO DISMISS LEESBURG’S COUNTER PETITION**

The City of Leesburg (“The City”), by and through its undersigned counsel, files this response in opposition to the Motion to Dismiss Leesburg’s Counter Petition filed by Peoples Gas System (“Peoples”) on October 18, 2018.

A. Peoples Already Filed a Response to The City’s Counter Petition; Peoples’ Motion to Dismiss is Untimely and Unauthorized by the Uniform Rules of Procedure.

1. Peoples filed a Territorial Dispute Petition against The City on February 23, 2018 in Docket No. 20180055-GU. Peoples’ petition alleged in pertinent part that a territorial dispute exists between Peoples and The City “with respect to the rights of each to serve customers in Sumter County, including those areas included in the Villages.” See Peoples petition, paragraph 16.

2. Peoples attached a map to its Territorial Dispute Petition as Exhibit E. This map claims as Peoples’ service area a blue box shown on Exhibit E. Included within this blue box is the disputed American Cement plant, a fact admitted by Peoples during the October 25, 2018 corporate representative deposition of Peoples’ Vice President of Operations, Rick Wall, which Commission staff monitored. According to the Florida Public Service Commission’s (“Commission” or “PSC”) website, a prehearing officer was assigned to the case on March 13, 2018.

3. To more clearly put at issue which natural gas utility is best able to serve the American Cement Plant, an issue which was nevertheless part and parcel of Peoples’ Territorial Dispute Petition filed February 23, 2018, The City filed a Counter Petition with the Commission

on July 5, 2018. The Counter Petition set forth specific allegations about the American Cement plant and explained why The City contends that it is best able to serve that large customer.

4. Matters involving disputed issues of fact before the PSC are governed by the Uniform Rules of Procedure, Chapter 28-106, Florida Administrative Code (“F.A.C.”). Rule 28-106-204, F.A.C., entitled “Motions,” applies to the dispute between Peoples and The City.

5. After The City filed its Counter Petition on July 5, 2018, Peoples filed its Response to The City’s Counter Petition on July 25, 2018, twenty (20) days after The City filed its Counter Petition. Rule 28-106.204(2), F.A.C. provides:

Unless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after assignment of the presiding officer, unless the motion is based upon a lack of jurisdiction or incurable errors in the petition.

6. Peoples failed to file a motion to dismiss within 20 days as required by Rule 28-106.204(2) F.A.C. Accordingly, Peoples’ motion to dismiss is unauthorized, untimely and contrary to Rule 28-106.204(2) of the Uniform Rules of Procedure.¹

B. The City’s Counter Petition Meets the Applicable Statutory and Rule Requirements for Initiation of an Administrative Proceeding.

7. Put simply, The City’s Counter Petition states a cause of action for a territorial dispute upon which relief can be granted. An agency shall grant a formal evidentiary hearing when the petition satisfies the requirements of section 120.569, Florida Statutes, and Rule 28-106.201, F.A.C. Section 120.569(2)(c), Florida Statutes, directs the agency’s authority with respect to the determination of whether to grant or deny a hearing:

¹ The unexplained October 8, 2018 administrative creation of a new docket for The City’s pending Counter Petition filed on July 5, 2018 does not somehow make Peoples’ untimely motion to dismiss The City’s Counter Petition now timely. “It is a fundamental principle of law that a person will not be permitted to do indirectly what he is not permitted to do directly.” *Clermont-Minneola Country Club v. Loblaw* 106 Fla. 122, 134 (Fla. 1932).

Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable. This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition.

Section 120.569(2)(c), Florida Statutes.

8. All allegations set forth in The City's Counter Petition must be taken as true when considering Peoples' Motion to Dismiss. *Platte' v. Whitfield Realty Company, Inc.*, 511 So. 2d 720 (Fla. 1st DCA 1987) (In considering a motion to dismiss, all material allegations of the complaint must be taken as true and the tribunal must confine itself strictly to the allegations within the complaint's four corners.)

9. Florida jurisprudence and courts accept and rely upon notice pleading. *See Brown v. Gardens by the Sea South Condominium Ass'n*, 424 So.2d 181, 183 (Fla. 4th DCA 1983) ("Florida uses what is commonly considered as a notice pleading concept and it is a fundamental rule that the claims and ultimate facts supporting same must be alleged. The reason for the rule is to appraise [sic] the other party of the nature of the contentions that he will be called upon to meet, and to enable the court to decide whether same are sufficient."). Thus, a pleading must put a counter-party on sufficient notice for it to understand the nature of the complaint against it. The City's Counter Petition squarely does this. Surely, Peoples is on notice

and adequately understands the nature of The City's allegations, as demonstrated by Peoples' having filed a substantive Response to The City's Counter Petition on July 25, 2018.

10. Further, Rule 28-106.201, F.A.C. entitled "Initiation of Proceedings," addresses the key elements of a written request for an evidentiary hearing. Here, many of those requirements were already identified in Peoples Territorial Dispute Petition and are redundant in the context of The City's Counter Petition. Nevertheless, The City's Counter Petition substantially complies with the pleading requirements of section 120.569(2)(c), Florida Statutes, and Rule 28-106.201, F.A.C.

In particular, The City's petition states a specific request for relief; identifies the parties to the dispute; identifies the nature of the dispute; identifies the key disputed issues of material fact, including the ultimate fact in dispute, i.e., which utility is better able to serve the American Cement plant; identifies applicable statutes and the Commission rule addressing a natural gas territorial dispute; identifies the petitioner and its representative; details the substantial interests of The City and how the issue at hand will affect those interests, and identifies the factual and legal basis for relief. The City's Counter Petition substantially complies with the requirements of section 120.569(2)(c), Florida Statutes and Rule 28-106.201, F.A.C. Tellingly, Peoples does not contend otherwise.²

11. Peoples does not really take issue as to whether The City satisfied the statutory or Uniform Rule pleading requirements. It did. Instead, Peoples quibbles with:

² Even if the Commission were to determine that The City's Counter Petition was somehow lacking, which is not the case, section 120.569(c), F.S., expressly directs that the Commission provide an opportunity for an amended petition to be filed unless it appears from the face of the petition that the defect cannot be cured. The City can cure any pleading defect.

- the details of a map attached to The City’s Counter Petition (Paragraphs 2 and 3 of Motion to Dismiss);
- the details of the anticipated load of the American Cement plant (Paragraph 5 of the Motion to Dismiss); and
- the description of the alleged duplication of natural gas facilities by and amongst Peoples and The City to serve American Cement (Paragraph 4 of the Motion to Dismiss).

12. Peoples’ complaints are off-base and do not rise to the level of warranting dismissal of The City’s Counter Petition. A map detailing the area of the dispute is attached to The City’s Counter Petition as Exhibit 2. The map clearly depicts County Road 470, an area in which Peoples has filed permit applications with Sumter County to build natural gas infrastructure. Any suggestion that the map fails to put Peoples on notice of the claimed dispute is disingenuous. Further Rule 25-7.0472, F.A.C., requires that each party shall “provide a map and written description of the disputed area.” The rule does not state that this information must be provided contemporaneously with the initial pleading, just that it be provided. Thus, a party could produce the map and written description as exhibits at trial and satisfy this rule requirement. Nevertheless, The City attached a map to its Counter Petition and in addition narratively described the area of dispute in its Counter Petition. See Counter Petition paragraphs 6-12 and Exhibit 2.

13. Similarly, the anticipated load of the American Cement facility is not something that is required to be set forth in The City’s Counter Petition. As Peoples recognizes, the exact nature of load to be served is not necessarily readily obtainable. American Cement is the best source of information about its own potential natural gas load, and such information very well may be viewed as proprietary, since a competitor of American Cement could use such

information to determine production output of the American Cement facility, and other information that may be commercially sensitive. Additionally, the requisite usage information may be obtained during discovery and introduced into evidence at hearing. Again, as with the map and written description of the disputed area, Rule 25-7.0472 does not require that such natural gas usage information be provided with The City's Counter Petition.

14. The Counter Petition sets forth sufficient allegations about the duplication of natural gas facilities. The location of the American Cement plant is clearly identified, and is significantly closer to The City's existing natural gas infrastructure than similar infrastructure of Peoples. The City points out that Peoples is racing to install additional natural gas infrastructure along County Road 470, despite Peoples having asked the Commission to resolve a pending territorial dispute. As noted *supra*, Peoples' Petition expressly seeks an evidentiary determination "with respect to the rights of each to serve customers in Sumter County, including the Villages." See Peoples Territorial Dispute Petition, paragraph 16. The City states in its Counter Petition that, among other things, the American Cement plant is adjacent to its current customer, Coleman Federal Prison, and thus, given this close proximity, The City is better able to serve the American Cement plant.

15. Peoples notes that The City makes no allegations of Peoples' natural gas infrastructure being alongside or crossing over The City's natural gas infrastructure. See Paragraph 4 of Peoples' Motion to Dismiss. Those allegations are not required to put the Commission and Peoples' on notice of the nature of the dispute and do not cause The City's pleading to be deficient. The territorial dispute statute, section 366.04(3), Florida Statutes, directs that the ability of respective utilities vying to serve a particular area be reviewed in accord with "the ability of the utilities to expand services within their own capabilities and the nature of

the area involved” The City’s pleading sufficiently describes the nature of the dispute and the respective efforts of both the City and Peoples to provide additional natural gas service to the American Cement facility.³

16. Finally, Peoples’ contention that The City filed its Counter Petition for harassment and dilatory purposes is far-fetched, and hardly worthy of comment. See paragraph 7 of Motion to Dismiss. Peoples conveniently ignores the fact that Peoples’ Territorial Dispute Petition put at issue the natural gas service in all of Sumter County, that The City already serves the customer adjacent to the American Cement Plant, namely, the Coleman Federal Prison, that The City’s existing natural gas infrastructure was much closer to the American Cement plant than Peoples’ natural gas infrastructure when the Counter Petition was filed, and that Peoples is racing/raced to install additional natural gas infrastructure to serve the American Cement plant, despite filing a territorial dispute and knowing of the Commission’s discouragement of such races to serve.

Peoples offers no evidence of harassment (because none exists) and illogically suggests that The City’s Petition is “a way of delaying adjudication of Peoples’ Petition for territorial dispute filed in Docket No. 20180055-GU.” See paragraph 7 of Motion to Dismiss. To the contrary, The City filed an appropriate counter petition for efficiency and clarity to resolve the issue related to the American Cement plant along with Peoples’ pending proceeding. Peoples’ baseless assertion of “delay” ignores that fact that when The City reasonably and fairly sought to present its interests as part of Peoples’ pending proceeding at the Division of Administrative

³ Peoples also seems to question whether The City’s Counter Petition may properly identify a single customer as constituting the territorial dispute. It can, as past territorial disputes handled by this Commission have involved only one customer. See *Gulf Coast Electric Cooperative, Inc. v. Clark*, 674 So. 2d 120 (Fla. 1996) in which this Commission decided which electric provider was best suited to serve one property, a state prison in Washington County, Florida.

Hearings (“DOAH”), Peoples then filed a motion to dismiss the Counter Petition from the DOAH proceeding. Peoples’ motion was granted because the Commission did not refer The City’s related Counter Petition to DOAH along with Peoples’ original petition. At bottom, The City seeks to have the American Cement plant issue efficiently decided in a single evidentiary proceeding in January of 2019; Peoples appears to oppose this request. Thus, how The City’s actions lead Peoples to its ill-founded and fanciful allegation that The City seeks delay is confounding.

17. For the foregoing reasons, The City respectfully asks that Peoples’ Motion to Dismiss The City’s Counter Petition be denied and that its petition immediately be forwarded to the Division of Administrative Hearings for an evidentiary proceeding. If Peoples’ Motion to Dismiss is granted, The City should be given leave to amend its Counter Petition as required by section 120.569(c), Florida Statutes.

DATED this 29th day of October 2018.

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CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing was served on the following counsel via email transmission this 29th day of October 2018 via email transmission to:

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