BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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	)	DOCKET NO.: 20180055-GU DOAH CASE NO. 18-004422 FILED: 10-15-19

PEOPLES GAS SYSTEM'S EXCEPTIONS TO THE RECOMMENDED ORDER

Pursuant to Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, Peoples Gas System ("PGS") hereby submits its exceptions to the Recommended Order ("RO") entered by the Administrative Law Judge ("ALJ") on September 30, 2019. Specifically, PGS takes exception to Paragraphs 147 and 160 of the RO for the reasons set forth below.

INTRODUCTION

1. PGS fully supports the ALJ's conclusion that consideration of the factors set out in Rule 25-7.0472(2)(a)-(d), Florida Administrative Code ("F.A.C."), strongly favors PGS's right to serve the disputed areas, specifically the developments known as Bigham North, Bigham West, and Bigham East (collectively the "Bigham Developments")[1]. However, as more fully explained below, the ALJ's conclusion of law relative to the question of whether the Natural Gas System Construction, Purchase and Sale Agreement ("Agreement")[2] between the City of Leesburg ("Leesburg") and South Sumter Gas Company ("SSGC") creates a natural gas utility subject to the Florida Public Service Commission's ("FPSC" or "Commission") jurisdiction should be rejected as clearly erroneous and inconsistent with the purposes of Chapter 366, Florida Statutes, and because it sets a dangerous precedent.

[1] The location of the Developments is contained on PGS' Exhibits 2, 5, 6 and 7.
[2] The Agreement is in PGS Exhibit 1.

2. In addition, the ALJ has made a conclusion of law regarding Leesburg's cost for the distribution infrastructure within the Bigham Developments that is contrary to Rule 25-7.042, F.A.C., is inconsistent with his conclusion of law that SSGC is not a public utility subject to the FPSC's jurisdiction and is clearly erroneous based on evidence presented at the hearing.

EXCEPTION TO CONCLUSION OF LAW IN PARAGRAPH 147

4. The ALJ's RO contains no finding of fact or conclusion of law regarding the issue whether the Agreement entered into by Leesburg and SSGC creates an entity that meets the definition of a "public utility" under Section 366.02(1), Florida Statutes, and is thereby subject to the Commission's jurisdiction. As noted by the ALJ that was first assigned to the case, J.R. Alexander, this case was referred to the Division of Administrative Hearings ("DOAH") "with the expectation that the issue of (whether the Agreement creates a public utility within the meaning of Section 366.02(1), Florida Statutes) would be addressed in this proceeding."[3] The RO is devoid of any analysis or conclusions on whether the Agreement creates an entity that falls within the definition of "public utility" under 366.02(1).

5. The ALJ's conclusion in paragraph 147 that SSGC is not a natural gas utility as defined in Section 366.04(3)(c), Florida Statutes, does not answer the question of whether the Agreement creates a "public utility" as defined in Section 366.02(1), Florida Statutes. The definition provided in 366.04(3)(c) is for purposes of that subsection ***only*** to make clear that the Commission's jurisdiction to approve territorial agreements and resolve territorial disputes extends beyond Commission-regulated natural gas utilities. Further, the ALJ apparently focused on the

[3] Order on Pending Motions denying Leesburg's and SSGC's joint motion to exclude testimony and evidence on whether their agreement creates a public utility within the meaning of Section 366.02, Florida Statutes, issued May 21, 2019.

question of whether there was any statute or rule that would prevent Leesburg and SSGC from entering into such an agreement, not whether the Agreement created an entity that was subject to the Commission's jurisdiction (Paragraph 57 of the RO).

6. Despite its title, the Agreement between SSGC and Leesburg creates an arrangement that is more appropriately characterized as a partnership or other legal entity and, as such, is subject to the Commission's jurisdiction as a "public utility." Under Section 366.02(1), Florida Statutes, a public utility is defined as "every person, corporation, ***partnership***, association, or ***other legal entity*** ... supplying electricity or gas ... to or for the public within this state." (emphasis supplied)

7. The terms of the Agreement between Leesburg and SSGC go far beyond a mere purchase and sale agreement and are evidence of the creation of a ***partnership*** or ***other legal entity*** the purpose of which is to supply natural gas services to the public within the Villages developments. Most notable is the fact that there is no stated price for the distribution system, rather SSGC is to receive approximately 52% to 55% of the gas revenues from the gas sold within the Villages for providing the infrastructure to deliver the gas within those developments over the 30-year life of the Agreement (Minner T 457-458). The acknowledged purpose of the Agreement was to provide for the provision of gas service in the developments "while allowing the Villages to collect revenues generated from monthly customer charges and monthly 'per therm' charges (Paragraph 44 of RO)".[4] In addition, the Agreement gives SSGC control over the rates, terms, and

[4] This sharing of revenues addressed the Villages' dissatisfaction with a "business model" that allowed a public utility to "serve the residential customers and collect the gas service revenues for 30 or 40 years" (Paragraphs 41, 43, and 44 of RO, Wall T 172). Clearly the Villages wants the benefit of monopoly revenues from the provision of gas service but none of the attendant regulatory oversight.

conditions of service and the expansion of service by Leesburg, and provides that at the expiration of the Agreement or early termination of the Agreement, Leesburg must convey the infrastructure back to SSGC.

8. There are several provisions in the Agreement that evince an intent by the parties to create an entity that is ***separate*** from the existing Leesburg municipal gas utility. Specifically, the Agreement:

A. Does not set a fixed purchase price for the infrastructure but instead provides that SSGC shares in the revenues from the provision of service within the Villages. (Sections 9. and 10.)

B. Establishes rates that are separate and different from the rates Leesburg otherwise charges (Village Rate). (Section 7.A.)

C. Specifies the services to be provided by Leesburg in the Villages and prohibits Leesburg from offering a transportation rate to customers within the Villages or including certain notices in bills to customers within the Villages. (Sections 7.A. and B.)

D. Limits the circumstances under which Leesburg can increase rates, and gives SSGC the "sole and absolute discretion" to approve or deny any requested increase. (Section 7.C.)

E. Provides the term of the Agreement is 30 years, and Leesburg has no right or obligation to continue to provide service at the expiration of the term. (Sections 12. And 13.)

F. Allows Leesburg to terminate the Agreement at any time if SSGC has failed to approve a rate increase and the differences between the Village Rate and the rates charged to all other Leesburg customers (Native Rate) required by the Agreement are not maintained. If Leesburg terminates the Agreement it must convey the distribution system back to SSGC without consideration and free and clear of all liens and encumbrances. (Section 11.B.)

G. Allows SSGC to terminate the Agreement for Leesburg's failure to perform under the terms of the Agreement and Leesburg must convey the distribution system back to SSGC without consideration and free and clear of all liens and encumbrances. (Section 11.B.)

H. Gives SSGC control over the area which Leesburg will be required to provide service by requiring amendments to the Agreement to add systems in areas not

covered in the original agreement. Leesburg cannot refuse to provide service if SSGC builds the distribution facilities. (Section 6.)

9. While Leesburg is ostensibly the utility providing the natural gas service, it is SSGC, a private entity, that maintains ultimate control over critical aspects of the services provided and rates paid for that service, and receives the majority of revenues from the provision of that service.[5]

10. The Agreement creates an entity that is clearly very different from Leesburg's municipal gas utility that provides gas service to the residents of Leesburg and areas adjacent to Leesburg. The Agreement-created entity is not municipally owned or controlled.[6] It is a separate entity created to serve the disputed area and is, at bottom, an unregulated monopoly.

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[5] Commission decisions in declaratory statements involving the leasing of equipment to generate electricity are relevant to this case. Those cases involved the issue of whether the terms of the lease for the generating equipment would result in the lessor of that equipment being subject to the FPSC's jurisdiction as a public utility. A crucial factor in the FPSC's decision that the lessors would not be subject to the FPSC's jurisdiction was the fact that the lessee was obligated to make fixed lease payments independent of the electricity produced. *In re petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility*, Order No. 17009, issued December 22, 1986, Docket No. 860725-EU, *and In re Petition of Sunrun Inc. for a Declaratory Statement Concerning the Leasing of Solar Equipment*, Order No. PSC-2018-0251-DS-EQ issued May 17, 2018, Docket No. 20170273-EQ. Likewise in this case the fact that the payment for the infrastructure is not fixed but is tied to revenues from the sale of gas service is indicative not of a purchase and sale arrangement but an on-going ownership interest in the facilities used to deliver gas service.

[6] It is instructive to compare the ownership rights and control Leesburg exercises over service by its municipal utility as compared to its ownership and control over the same aspects of service to customers in the Villages. With respect to its existing municipal utility, Leesburg: 1) controls the rates for service and can unilaterally change those rates, increasing or decreasing the rates; 2) controls the types of services that are provided to customers, including allowing gas transportation service; 3) controls the terms of service and communications with customers; and 4) controls its service territory including the decision to expand or not expand the service territory. Under the terms of the Agreement, SSGC controls all these aspects of utility service in the Villages. Regarding the distribution infrastructure, Leesburg's ownership of the infrastructure of the existing utility is not time-limited. Under the terms of the Agreement Leesburg's ownership of the infrastructure in the Villages is for the 30-year term of the Agreement.

11. Florida law does not contemplate the existence of such unregulated monopolies in the gas utility arena. Unregulated monopolies are contrary to the public interest because control over the service provided and the price paid for such services, is by a private party and is not subject to regulation either by free and fair competition or a governmental entity. There is no recourse for customers if the service is inadequate or the prices unreasonable either through changing to another service provider or complaint to a regulatory body. Further, there is no protection to customers against unjust, unreasonable, arbitrary, or unduly discriminatory charges.[7]

12. The Commission has previously addressed the provision of monopoly utility services outside of either FPSC or municipal oversight. In Order No. 17251, issued March 5, 1987, in Docket No. 861621-EU, *In Re: Petition of Timber Energy Resources, Inc. for a Declaratory Statement Concerning Sales as "Private Utility" Status*, the FPSC succinctly addressed the notion of providing monopoly services outside any regulatory oversight:

> Perhaps the most basic function of this agency is to ensure that captive customers of monopoly utility services are protected from abuses sometimes occasioned by the lack of competition in that market. We are frequently cited as a substitute for competition. In those instances where our jurisdiction is exempted, there is some other substitute. For example, customers control the management and policies of both municipal and co-operative utilities by means of ballot. In the instant case there is no such substitute (1987 WL 1372334, at 2 [Fla. P.S.C.]).

13. Allowing this arrangement for the provision of utility service to exist outside the FPSC's regulatory ambit would have an adverse effect not only on the customers served under the

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[7] The ALJ noted these adverse consequences that would result from allowing Leesburg to provide service in the disputed area pursuant to the Agreement: "In this case, the end-user customers are outside the municipal limits. If served by Leesburg pursuant to the Agreement, the residents of Bigham are served by a gas provider over which they have no control, either by 'voting the rascals out,' or by a system of rate regulation. The Commission's decision in this case will, thus, determine the extent to which a municipality may arrange to be the 'choice' of the developer in exchange for providing the developer with a share of the revenues from higher-than-municipal rates charged to the non-citizen end-users" (RO endnote 1, page 64-65).

Agreement, but also on the electric and gas industries throughout Florida and the customers they serve. The precedent opens the door for other municipalities or other types of governmental or special districts to enter into similar arrangements with developers in exchange for a portion of the utility's revenues, resulting in the propagation of unregulated monopolies throughout Florida. These arrangements would leave customers without the protection of the FPSC's regulatory authority and, because the customers are outside the municipal limits, without the ability to control the rates or terms of service through the electoral process. It would also seriously undermine the FPSC's ability to address the needless duplication of facilities and other inefficiencies that ultimately would increase costs to customers.

14. The Commission must apply the provisions of Section 366.02(1) in a manner that is consistent with the purposes of Chapter 366, Florida Statutes, which is to protect the public welfare through the exercise of its regulatory authority (Section 366.01, Florida Statutes). To that end, the Commission should conclude that the Agreement between Leesburg and SSGC creates a *partnership* or *legal entity* supplying natural gas to public and thereby falls within the definition of a "public utility" under 366.02(1). Such a conclusion is "more reasonable" than the ALJ's conclusion in Paragraph 147 that the Agreement does not create "a 'hybrid utility'[8] of which SSGC is a part" because: it applies the correct statutory provision, Section 366.02(1), not 366.04(3)(c), for determining whether Agreement creates a "public utility"; it does not condone the "pay-to play deal" between Leesburg and SSGC which would have the effect of encouraging other developers to seek similar arrangements with municipalities to the detriment of utility customers; and it is consistent with the purposes of Chapter 366, which is the protection of the public welfare through the regulation of monopoly utility service.

15. The Commission may decide that it is not necessary to conclude the Agreement does or

[8] It should be pointed out that the ALJ failed to make any findings on significant material facts, i.e., regarding the terms of the Agreement, which undermines his conclusion that the Agreement did not create a hybrid utility.

does not create a public utility as defined in Section 366.02(1), Florida Statutes, because the ALJ concluded that PGS should be awarded the right to serve the Bigham Developments. Despite that conclusion, the Commission must nonetheless reject the ALJ's conclusion that the Agreement does not create a "hybrid utility."

EXCEPTION TO CONCLUSION OF LAW IN PARAGRAPH 160

16. In Paragraph 160 of the RO, the ALJ concludes that the "cost-per-home for Leesburg and SSGC to provide service in Bigham is $1,800." That conclusion can only be correct if SSGC was found to be the utility providing service to customers in the development, which the ALJ said it was not in Paragraph 147.[9] Instead, the ALJ found that "SSGC is, nominally,[10] a gas system construction contractor building gas facilities for Leesburg's ownership and operation." Rule 25-7.0472(2)(c), F.A.C., is clear that the costs to be evaluated are the costs of the ***utility,*** not a contractor hired by a utility to construct the physical facilities: "In resolving territorial disputes, the Commission shall consider; ... [t]he cost to ***each utility*** to provide natural gas service to the disputed area...."

17. Under the terms of the Agreement, and as testified to by Mr. Rogers and Mr. Minner on behalf of Leesburg, and by Mr. Hudson on behalf of SSGC, the cost to Leesburg for the distribution infrastructure in the Bigham Developments is measured in the revenue payments made to SSGC under the Agreement.

18. The Agreement is unequivocal with respect to the cost to Leesburg of the distribution infrastructure needed to provide service to customers within the disputed area. Section

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[9] If the Commission rejects the ALJ's conclusion in Paragraph 147, as it should, it would still be incorrect to use SSGC's construction costs in comparison the PGS's costs. Under the Agreement the cost to the utility created by the Agreement is measured in the share of the revenues paid to SSGC over the 30-year period.

[10] The ALJ apparently uses the word "nominally" in recognition of the fact that it is Hamlet Construction, not SSGC, that is actually constructing the facilities, see Paragraph 55 of the RO.

9 of the Agreement provides:

> **Purchase Price.** In consideration of SSGC's significant investment in the design, engineering and construction of the System,[11] and conveying the same to the City … the City shall pay to SSGC the following purchase price for the System (collectively the "Purchase Price").

Page 7-8.

What follows this paragraph is the formula for the payment of revenues from the sale of natural gas in the disputed area, which pays SSGC 52%-55% of those revenues.

19. The testimony of Leesburg's and SSGC's witnesses confirms that Leesburg's costs for the infrastructure to provide service to customers is as specified in the Agreement. At page 19 of his deposition (PGS Exhibit 78), Mr. Rogers stated Leesburg's cost for the infrastructure is what Leesburg would pay under the Agreement:

> Q. Well, if … if I were to ask you what it cost the City of Leesburg for the labor and the cost of the mains and pipes and meters and gauges and regulators, et cetera, I assume your answer would be that it's whatever we're paying under the agreement for all that.
> A. That … would be correct.

20. At page 545 of the hearing transcript Mr. Rogers confirms it is the Agreement that specifies Leesburg's costs:

> Q. Right. But the amount that Leesburg is paying for the infrastructure within those developments is whatever the formula in the agreement says it is?
> A. It is set out in the agreement, yes, sir.

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[11] Section 1 of the Agreement defines the System: "Generally, the system shall include the distribution lines that run along the streets and roads within the Service Area along with such other necessary service lines, pressure regulator stations, individual meters and regulators for each customer, communications systems and other natural gas appurtenances by which natural gas will be locally distributed to the City's individual natural gas customers within the Service Area. The System shall not include any City-owned distribution and/or transmission lines upstream of the point of demarcation."

21. Mr. Minner's testimony (PGS Exhibit 79, Minner Deposition, page 81) agrees with Mr. Rogers' stating Leesburg's cost for the distribution infrastructure has nothing to do with SSGC's costs in putting in the infrastructure:

> Q. (By Mr. Brown) So if the City – in other words, the City is making these payments regardless of what it actually costs SSGC to install the system.
> A. We have a formulaic approach that the City developed, and we pay that portion pursuant to the agreement.
> Q. And there is nothing in the formulaic approach that takes into account how much money is actually spent for the infrastructure.
> A. That is correct.

22. Testimony by Mr. Hudson, in-house counsel for the Villages, confirms SSGC's agreement with Mr. Minner's and Mr. Rogers' statements that Leesburg's cost for the distribution infrastructure is as specified in the Agreement.

> Q. So all the money that is being paid is for purchasing that infrastructure?
> A. I believe that is how the formula works. It's based on we build it, they buy it. There's a formula for what the price is.

(PGS Exhibit 77, Hudson 11/15/18 Deposition, page 22)

23. The only competent substantial, and unrefuted, evidence regarding Leesburg's cost for the distribution infrastructure within the developments was provided by Dr. Stephen Durham.[12]

24. Dr. Durham provided an estimate of the revenues that would be paid to SSGC/Villages by Leesburg over the 30-year life of the Agreement, based on the addition of 2,000 new residences per year which was the Villages' estimate of how many homes would be added per year (McCabe T-793, 804-805). Dr. Durham estimated that the payments made by Leesburg

[12] Leesburg had ample opportunity to engage its own expert to quantify the costs of the distribution system under the Agreement, but chose not to.

for the infrastructure would total $186,530,100. PGS's cost for the same infrastructure was estimated at $92,800,000[13] (PGS Exhibit 9). Pursuant to the terms of the Agreement, Leesburg's cost will be approximately twice that of PGS, which costs will be paid by the customers within the Villages. It is important to note that the payments by Leesburg under the Agreement escalate as more gas is sold within areas subject to the Agreement. Further, payments under the Agreement do not end even after the actual cost to SSGC of the infrastructure is recouped (Rogers T-577, P. Ex. 30).

25. Looking only at the Bigham Developments and the estimate of 14,000 customers within that area over the next seven years of the Agreement, the cost to Leesburg would be triple that of PGS for the same infrastructure. Using the estimate of an additional 2,000 customers per year (T-795, 804-805), PGS's cost is $22,400,000 ($1,600[14] × 14,000) paid over seven years. For Leesburg, the first seven years' payment to SSGC/Villages would be $6,046,656, shown on column 7 of PGS Exhibit 9, which includes the customer charge (column 4) and base therm rate charges (column 6). The yearly payments to SSGC/Villages would then continue for another 23 years for a total of $26,777,520 for the customer charge ($1,164,240 × 23) and $34,768,272 for the base therm rate charges ($1,511,664 × 23) for a total cost to Leesburg of $67,592,448 ($6,046,656 + $26,777,520 + $34,768,272) (P. Ex. 9, T-319-321). That would make Leesburg's cost per customer slightly over three times the cost to PGS for the same infrastructure, or $4,828.[15]

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[13] To put the calculations for the revenues paid to SSGC's and PGS's costs for infrastructure on an equal footing, Dr. Durham assumed both PGS's costs and the billings for gas remain flat for the 30-year period.

[14] PGS's cost per customer was determined to be $1579, which rounds up to $1600.

[15] The calculation of Leesburg's cost per customer would be $67,592,448 ÷ 14,000 = $4,828.

These amounts do not include excess charges (PGS Exhibit 9, column 8). If those amounts were included, an additional $3,566,052 would be added to the infrastructure costs being paid by Leesburg.

26. The ALJ's use of SSGC's construction costs rather than the price Leesburg is required to pay under the Agreement is contrary to Rule 25-7.0472(2), Florida Statutes, and renders his conclusion of law as to the cost comparison between Leesburg and PGS incorrect. The correct comparison is that of Leesburg's cost for the infrastructure of $67,592,448 to PGS's cost of $22,400,000, or $4,828 per customer for Leesburg and $1,600 for PGS.[16]

27. The Commission should therefore reject the ALJ's conclusion of law on this issue. A conclusion based on the correct cost comparison required under the Rule is as to Leesburg's cost of $67,592,448 to PGS's cost of $22,400,000. Not only is such a conclusion "as reasonable or more reasonable" (Section 120.57(1)(l), Florida Statutes) than the ALJ's, it is the only reasonable conclusion under Rule 25-7.0472(2), F.A.C.[17] Further the ALJ's conclusion that the cost comparison to be made is with respect to SSGC's constructions costs is inconsistent and incompatible with his conclusion in paragraph 147 of the RO that SSGC is not a natural gas utility and it is Leesburg that is the utility providing service.

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[16] The payments made to SSGC/Villages under the Agreement are clearly costs to Leesburg to serve the customers in the Villages which are relevant to "the circumstances of this particular case." So whether the payments are viewed as the cost for the infrastructure to serve the customers (cost per customer) or characterized as some other costs, it is still a cost that must be considered under subparagraph (2)(c)9. or paragraph (2)(d) of Rule 25-7.0472, F.A.C.

[17] Paragraph 118 under the ALJ's Findings of Fact contains the statement "The cost-per-home for Leesburg and SSGC is $1,800." That finding is incompatible with his finding in Paragraph 63 that Leesburg is the utility, not the Leesburg/SSGC utility created by the Agreement, and ignores the plain terms of the Agreement and the testimony of the parties to the Agreement.

28. The cost differential per customer between PGS's and Leesburg's further buttresses the ALJ's conclusion of a substantial cost differential between the two utilities and further illustrates the egregious nature of Leesburg's actions in "racing to serve" the disputed area. When the cost for the infrastructure within the developments is considered the cost differential between Leesburg and PGS grows to $47,381,448: Leesburg's cost is $69,792,448 ($2,200,000 + $67,592,448) and PGS's cost is $22,411,00 ($11,000 + 22,400,00).

ALJ'S RECOMMENDED ACTION REGARDING CONCLUSION THAT PGS HAS THE RIGHT TO SERVE BIGHAM DEVELOPMENTS

29. PGS fully supports the ALJ's recommendation that PGS be awarded the right to serve the Bigham Developments and that the award "should be on such terms and conditions regarding the acquisition of rights to facilities and infrastructure within the Bigham developments by Peoples Gas from the City of Leesburg or South Sumter Gas Company, LLC, as deemed appropriate by the Commission." Those terms and conditions should include a requirement that the customers be transferred to PGS within 90 days of the Commission's final order and that PGS pay SSGC or Leesburg no more than $1,200[18] per resident/customer within the Bigham Developments. Additionally, consistent with the ALJ's statement in Paragraph 151 of the RO that the Commission "may accept the [ALJ's] findings and conclusions and apply its policies as [the Commission] believes to be in the best interest of the public," the Commission's order in this case should apply its policies regarding disputes involving a "race to serve" and prohibit Leesburg from serving customers using the lines along CR 501 and along SR 44 and CR 468 that were built to serve the disputed area.

[18] The $1,200 figure is the amount SSGC's witness, Mr. Thomas McDonough, testified to as SSGC's "actual cost of service per residence" (Page 7 of the RO).

30. As the ALJ pointed out: Leesburg knew "PGS was the closest provider to the three Bigham developments" (Paragraph 66 of the RO); Leesburg's costs to extend service to the developments was "substantially greater for Leesburg than for PGS" (Paragraph 111 of the RO); and the difference in cost to Leesburg of between $1,212,207 and $2,200,000 (Paragraph 129 of RO) and PGS's cost of "at most $11,000" (Paragraph 93 of RO) represented a "significant and entirely duplicative cost for service." The ALJ concluded Leesburg engaged "in a race to serve the Bigham developments" (Paragraph 151 of the RO).

31. The facts in this case mirror those in *Gulf Power v. Public Service Commission,* 480 So. 2d 97 (Fla. 1985). In that case Gulf Power Company expended significantly more than Gulf Coast Electric Cooperative to provide power lines to reach the subdivision that was the subject of the dispute, (a cost differential of $200,480 to $27,000). The Commission found that Gulf's expenditures were not only uneconomic, they were also reckless and irresponsible (*Gulf Power,* 489 So. 2d at 98). The Commission's order prohibited Gulf Power "from serving any new retail customers along the route of the facilities built to serve Leisure Lakes [the disputed area] or along the route by which these facilities will be connected to Gulf Power Company's transmission system." Order No. 13668 issued September 10, 1984, in Docket No. 830484–EU, at 8. Leesburg's expenditures are even more reckless and irresponsible given the cost difference in just the lines to reach the disputed area is $2,200,000 to $11,000, so Leesburg should also be prohibited from serving customers along the route of the lines along 501 and along SR 44 and CR 468.

32. The Commission's policy of prohibiting a utility from benefitting from its "race to serve" a disputed area was again applied in *In re: Petition of Gulf Coast Cooperative, Inc. Against Gulf Power Company to Refrain from Offering Electrical Service or Constructing Duplicate Facilities Into Disputed Areas in Washington County,* Order No. 16106, issued May 13, 1986, in

Docket No. 850087–EU. Similar to this case, there was no territorial agreement between Gulf Power Company and Gulf Coast Electric Cooperative, but Gulf Power knew Gulf Coast was serving the area and Gulf Power's extension line crossed Gulf Coast lines. The Commission found Gulf Power had uneconomically duplicated the distribution facilities of Gulf Coast so Gulf Power was prohibited "from offering electric service along the route of its extension into the disputed territory." In this case there also was no territorial agreement between Leesburg and PGS, but Leesburg knew PGS was serving in the vicinity of the area, and Leesburg's line on CR 468 crosses the PGS line along CR 468 in places (Paragraph 70 of RO).

33. Following these precedents, the Commission should include in its final order an ordering Paragraph that prohibits Leesburg from serving, either temporarily or permanently, any customers along the route of its facilities built along CR 501 and along SR 44 and CR 468. To do otherwise would allow Leesburg to benefit from its race to serve the disputed area and encourage similar incursions into territories that are currently being served by another utility or areas that could be better served by another utility.[19]

CONCLUSION

None of PGS's exceptions to the ALJ's Recommended Order change the ultimate conclusion of the ALJ that PGS should be awarded the right to serve the disputed area. However, the corrections to the conclusions of law noted above are important for the Commission to make to reflect the proper application of Rule 25-7.042, F.A.C., and Commission's policies to the facts in this case, and most importantly, to reject the ALJ's conclusion that the Agreement has "not created a 'hybrid utility' of which SSGC is a part." That conclusion sets a dangerous precedent

[19] As noted by the ALJ in Paragraph 88 of the RO, Leesburg should not be rewarded for its actions in racing to serve the disputed area.

of allowing private parties to set up unregulated utility monopolies through the ruse of partnering with a municipality leaving customers of that utility without any protection from unreasonable rates of inadequate service through the municipal electoral process or FPSC regulation.

Respectfully submitted this 15th day of October 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail to the following, this 15th day of October, 2019.

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