BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

PEOPLES GAS SYSTEM,

Petitioner,
v.

Case No. 18-004422
Docket No.: 20180055-GU

SOUTH SUMTER GAS COMPANY, LLC
AND CITY OF LEESBURG,

Respondents.
_____/

SOUTH SUMTER GAS COMPANY, LLC'S
EXCEPTIONS TO RECOMMENDED ORDER

Respondent, South Sumter Gas Company, LLC, respectfully submits the following exceptions to the September 30, 2019 Recommended Order in the above-identified matter, pursuant to § 120.57(1)(K), Fla. Stat., and Rule 28-106.217, Fla. Admin. Code.

STANDARD OF REVIEW

Findings of Fact

The Commission should reject or modify a finding of fact if it determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent, substantial evidence or that the proceedings did not comply with essential requirements of law. § 120.57(1)(l), Fla. Stat.; *See Prysi v. Department of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002). Competent, substantial evidence means "such evidence as will establish a substantial basis of fact from which a fact at issue can be reasonably inferred," and evidence which "should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912,916 (Fla. 1957).

The fact findings of an ALJ are not binding upon an agency if they are not supported by competent, substantial evidence as raised in the exceptions. *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). An agency has no authority to make independent or supplemental findings of fact. *See*, e.g., *City of N. Port, Fla. v. Consol. Minerals, Inc*., 645 So. 2d 485, 487 (Fla. 2d DCA 1994) ("The agency's scope of review of the facts is limited to ascertaining whether the (ALJ's) factual findings are supported by competent, substantial evidence."); *Manasota 88, Inc. v. Tremor*, 545 So. 2d 439, 441 (Fla. 2d DCA 1989). Similarly, an agency has no authority to make independent and supplemental findings of fact to support conclusions of law in the agency final order. *Friends of Children v. Dep't of Health & Rehabilitative Servs*., 504 So. 2d 1345 (Fla. 1st DCA 1987).

An agency may reject findings of fact if the proceedings on which the findings were based did not comply with the essential requirements of law. *See* Section 120.57(1)(l), Fla. Stat. and *Bradley* at 1123.In this context, the First District has characterized a failure "to comply with the essential requirements of the law" as "a procedural irregularity." *Beckett v. Dep't of Fin. Servs.,* 982 So. 2d 94, 102 (Fla. 1st DCA 2008); see also *Flo-Ronke, Inc. v. State of Fla., Agency for Health Care Admin.*, DOAH No. 15-0982, 2016 WL 299743, (2016 Final Order) (noting that although the "essential requirements of the law" phrase is in the section of the statute dealing with rejecting or modifying findings of fact, the ALJ's incorrect determination as to the burden of proof was "a procedural issue that affects the proceedings as a whole" and failed to comply with the essential requirements of law).

It would be a due process violation for an agency to enter a final order based on a recommended order that lacks the necessary factual findings on which the agency's ultimate action depends. See *State v. Murciano*,163 So. 3d 662, 665 (Fla. 1st DCA 2015).

Conclusions of Law

Section 120.57(1)(l), Fla. Stat., also authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction. *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1143 (Fla. 2d DCA 2001). An agency's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. See, *e.g., IMC Phosphates Co*., 18 So. 3d at 1089; *G.E.L. Corp. v. Dep't of Envtl. Prot.,* 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. See, e.g. *Battaglia Properties v. Fla. Land and Adjudicatory Commission*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). When an ALJ's determination is infused with overriding policy considerations, the agency in its discretion may reject it. *Pilsbury v. State, Dept. of Health and Rehabilitative Services,* 744 So.2d 1040 (Fla. 2d DCA 1999); *Baptist Hosp., Inc. v. State, Dep't of Health & Rehabilitative Servs.,* 500 So.2d 620 (Fla. 1st DCA 1986); *Leapley v. Board of Regents,* 423 So.2d 431 (Fla. 1st DCA 1982) citing *McDonald v. Department of Banking & Fin.*, 346 So.2d 569, 579 (Fla. 1st DCA 1977).

Conclusions of law must be based on valid and written findings of fact, which in turn must be based on competent, substantial evidence. See, e.g., *B.R. v. Dep't of Children & Families,* 200 So. 3d 236, 236 (Fla. 5th DCA 2016); *D.J.v. Dep't of Health & Rehab. Servs.*, 565 So. 2d 863, 863 (Fla. 2d DCA 1990).

PRELIMINARY STATEMENT

As set forth herein, this 68 page Recommended Order contains several findings of fact which are not supported by competent, substantial evidence; relies upon conclusions of law

which are not reasonable interpretations of the statute and rule applicable to natural gas territorial disputes; and contains mixed findings of fact and conclusions of law which suffer the same lack of support or reasonable interpretation. Be that as it may, two ultimate conclusions by the Administrative Law Judge (ALJ), as reflected in several findings of fact and/or conclusions of law, each unsupported by competent, substantial evidence and/or unreasonable interpretations of the statute and rule, are the foundational conclusions upon which the ALJ's recommendation rests. The first is that service by Leesburg to the disputed area would result or has resulted in an uneconomic duplication of facilities. The second is that the costs of PGS, both on-site and off-site to the disputed area, would be materially lower than those of Leesburg. Both conclusions are erroneous, both conclusions are not supported by competent, substantial evidence, both conclusions fail to comply with the essential requirements of law, and both conclusions are fundamental to the ALJ's recommendation that PGS should serve the disputed area.

- For the ready reference of the reader, the exceptions to any particular Finding of Fact (FOF) or Conclusion of Law (COL) include selected excerpts (in italics) from that particular FOF or COL. However, in the case of each exception, the entirety of the referenced FOF or COL is excepted to.
- By this reference, SSGC incorporates the City of Leesburg's Exceptions to recommended Order, filed on 10/15/19, as if fully set forth herein.

Exception No. 1:

127. *Neither section 366.04(3), nor rule 25-7.0472, pertaining to natural gas territorial disputes, expressly require consideration of "uneconomic duplication of facilities" as a factor in resolving territorial disputes. The Commission does consider whether a natural gas territorial agreement "will eliminate existing or potential uneconomic duplication of facilities" as provided in rule 25-7.0471. A review of Commission Orders indicates that many natural gas territorial dispute cases involve a discussion of uneconomic duplication of facilities because disputes are frequently resolved by negotiation and entry of a territorial agreement.*

128. There are Commission Orders that suggest the issue of uneconomic duplication of facilities is an appropriate field of inquiry in a territorial dispute even when it does not result in a territorial agreement

129. The evidence in this case firmly establishes that Leesburg's extension of facilities to the Bigham developments, both through the CR 501 line and the CR 468 line, constituted an uneconomic duplication of PGS's existing gas facilities. As set forth in the Findings of Fact, PGS's existing gas line along CR 468 is capable of providing safe and reliable gas service to the Bigham developments at a cost that is negligible. To the contrary, Leesburg extended a total of roughly six miles of high-pressure distribution mains to serve the Bigham developments at a cost of at least $1,212,207, with persuasive evidence to suggest that the cost will total closer to $2,200,000. This difference in cost, even at its lower end, is far from de minimis, and constitutes a significant and entirely duplicative cost for service.

SSGC takes exception to FOF Nos.127-129, each of which address and reflect the ALJ's consideration and disposition of whether an uneconomic duplication of facilities has, could, or would occur in this case. The ALJ's erroneous determination that an uneconomic duplication of facilities would result if Leesburg continues to serve the Bigham developments is a foundational error in the Recommended Order. This consideration should not have been an issue in this case, by virtue of its omission from the statutory factors to be considered. In the alternative, even if consideration of the issue was appropriate, the only competent, substantial evidence supports that no uneconomic duplication of facilities will result.[1]

In FOF 127, the ALJ correctly notes that "(n)either section 366.04(3), nor rule 25-7.0472, pertaining to natural gas territorial disputes, expressly require consideration of "uneconomic duplication of facilities" as a factor in resolving territorial disputes". The ALJ also noted this same fact on the record at the beginning of the hearing. (T. 15). However, the Recommended Order then notes that the Commission has sometimes considered whether disposition of a dispute by agreement avoids uneconomic duplication of facilities. FOF 127 then references three cases (one of which involves a natural gas utility and two of which involve electric utilities – which are

[1] Notably, the Recommended Order only appears to focus on duplication, and never addresses the concept of whether any alleged duplication is "uneconomic".

under a different statute) in which the Commission was considering proposed settlement agreements. In each case, the ALJ noted that the Commission had referenced this factor, although not found in the statute addressing the resolution of a natural gas territorial disputes (which is in and of itself a Commission interpretation of the statute). Initially, there is a fundamental difference between the Commission effectively musing about the advantages of accepting a settlement agreement and the application of the statute in an administrative litigation to resolve a territory dispute, and the ALJ's conflation of these two statutes in these two contexts is clear error.

The error is compounded (in this mixed finding of fact and conclusion of law) by the ALJ's deference to the Commission's implicit interpretation of statute (to the effect that the uneconomic duplication of facilities should be considered in a gas territorial dispute despite its clear and intentional omission from the applicable statute).[2] That deference is contrary to both the plain language of the statute and to Section 21 of Article V of the Florida Constitution. Prior to the voters of Florida approving this Constitutional Amendment in 2018, for decades courts in Florida had held that courts and administrative tribunals should defer to an agency's interpretation of statute, if based on a permissible construction.[3] Now, Section 21 of Article V does not merely negate the need and propriety of such deference, it expressly declares that an

[2] The omission is characterized as clearly intentional because while the statute on the resolution of electric disputes and the statute on the resolution of gas disputes have obviously been drafted to practically mirror each other, the electric dispute resolution statute contains the language on uneconomic duplication of facilities while the gas dispute resolution statute does not. It would not be logical or proper to infer this differential was meaningless or in error.

[3] In the past, agencies were afforded substantial deference, and agency interpretations of statutes and rules within their regulatory jurisdiction did not have to be the only reasonable interpretation. It was enough if such agency interpretations were "permissible" ones. See, e.g., *Suddath Van Lines, Inc. v. Dep't of Envtl. Prot*., 668 So.2d 209, 212 (Fla. 1st DCA 1996).

ALJ may not defer to an administrative agency's interpretation of such statute or rule and instead must interpret such statute or rule *de novo*. In this case, the ALJ did not consider the issue *de novo*. Rather, the ALJ expressly relied upon (and deferred to) an administrative agency's interpretation of the statute here at issue, to effectively read the statute to include a non—statutory uneconomic duplication of facilities standard as a factor to be considered and weighed in the resolution of this dispute. This approach failed to comply with the essential requirements of law, and resulted in consideration and weighting of numerous findings of facts which were unsupported by competent or substantial, evidence because the issue which they addressed was improperly considered.

FOF 127, and any other FOF or COL which approach or address this issue as a factor to be considered and/or which do not address this issue *de* novo, should be rejected as contrary to law, and unsupported by any competent, substantial evidence.

Furthermore, to adjudicate this case based upon a concept not found in statute or rule violates the Administrative Procedures Act. A "rule" is "each agency statement of general applicability that implements, interprets, or prescribes law or policy. § 120.52(16) Fla. Stat. A "final order" is a "written final decision" that results from a proceeding under section 120.56, 120.569, and 120.57, among other statutes, and that is not a rule. An agency only acts by rule or order. *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 577 (Fla. 1st DCA 1977). The progressive development of policy that ultimately finds expression as a rule, as endorsed in *McDonald* and its progeny, has been legislatively circumscribed by the mandate that "rulemaking is not a matter of agency discretion", so that any agency statement meeting the definition of a rule must be adopted as a rule "as soon as feasible and practicable." § 120.54(1)(a), Fla. Stat. In this case, if the Commission has a "policy" to the effect that an

uneconomic duplication of facilities is a factor to be considered in resolving gas territorial disputes, such a policy can only be lawful and effective if it is promulgated in the form of a rule. No such rule exists for gas territorial disputes. In this case, the ALJ applied an illegal rule - an agency statement of general applicability never promulgated as a rule - when he considered whether an uneconomic duplication of facilities would result. This was contrary to the essential requirements of law and violative of a core precept of the Administrative Procedure Act.

In FOF 128, the ALJ similarly relies on a case in which the parties jointly petitioned for approval of a stipulation to resolve a territorial dispute (in which one party agreed to purchase another party). The ALJ noted that the Commission's order found that approval of the joint stipulation would avoid unnecessary and uneconomic duplication of facilities (assumedly because the end result of the dispute was that only one of the gas utilities continued to exist). Similar to the analysis in FOF 127, in FOF 128 the ALJ is bootstrapping a non-statutory and non-rule uneconomic duplication of facilities analysis - employed by the Commission in addressing a settlement - to the present natural gas territorial dispute. Once again, the ALJ's reliance upon the cited Commission decisions constitutes improper deference to the Commission's interpretation of the applicable statute.[4] While such deference may have been previously appropriate, it is now violative of the Florida Constitution. SSGC incorporates by this reference its further argument on this point in its exception to FOF 127.

Even assuming, *arguendo*, that whether an uneconomic duplication of facilities exists or will exist is an appropriate factor for consideration in this case, there was no competent, substantial evidence that continued service of the territory by Leesburg would result in such an uneconomic duplication of facilities. While the ALJ's conclusion regarding uneconomic

[4] As well as, in some cases, reliance on electric territorial disputes, which are resolved under a different statute.

duplication of facilities appears to have been based upon his own calculations and comparison of the total cost of certain facilities, the only comparative evidence directly on the point came from Leesburg expert Dismukes, who addressed that issue and whether any of the assets of PGS would be "stranded" by Leesburg's continued service. Dismukes explained why, in such a case, the rates of PGS would not go up; why customers in The Villages are no worse off in either case; and that whether PGS serves or does not serve this area, its investment will not be uneconomic nor will its facilities be underutilized. (Dismukes, T. 784). PGS did not rebut this evidence, and presented no evidence or testimony quantifying or attempting to quantify any specific PGS cost or capacity which would be unutilized or underutilized by Leesburg's continued provision of service within the disputed area. (Szelistowski, T. 110). PGS put on no evidence about how any alleged duplication would be uneconomic and the Recommended Order is silent on the issue.

The Recommended Order substantially rewards PGS for what can only be construed as constructing facilities on spec, and punishes Leesburg for the fact that it has not similarly engaged in previously expanding its facilities and capacity with no apparent immediate customers in mind. PGS witnesses testified that none of the facilities PGS would use to serve the area in dispute were sized or located with the intent of serving The Villages. (Szelistowski, T. 110). When PGS designed and extended its facilities in Sumter County, its only developer agreement was specifically limited to Fenney; there was no verbal deal or handshake deal with The Villages for any areas outside of Fenney; PGS was fully aware that The Villages had developed a significant number of homes already without natural gas; and there was no deal beyond Fenney. (Szelistowski, T. 101; Wall, T. 186) Likewise, every main PGS constructed in Sumter County was constructed with no order from the PSC establishing any of the area therein as PGS territory and there is no PSC order recognizing any part of The Villages as PGS territory.

(Szelistowski, T. 100). PGS has no territorial agreements for Sumter County. (Szelistowski, T. 114). When deciding to extend those various facilities, PGS witness Wall testified that he was not sure whether Bigham was even considered developable property at the time of any particular decision. (Wall, T. 188).

Conversely, there is no duplication, let alone uneconomical duplication, of PGS facilities if Leesburg serves Bigham. It was Dismukes' opinion that duplicate facilities does not necessarily mean uneconomic facilities particularly in the natural gas business. It was his opinion that the facilities of PGS continue to have value even if they are duplicative - which they are not in his opinion - for actual operational reasons (Dismukes, T. 785). Even if whether an uneconomic duplication of facilities is an appropriate issue in this case - which it is not - the only competent, substantial evidence on the point was that no uneconomic duplication of facilities would result by Leesburg's continued service to the disputed area.

Exception No. 2:

118. The cost-per-home for Leesburg and SSGC is $1,800 (see ruling on Motion to Strike). In addition, Leesburg will be installing automated meters at a cost of $72.80 per home.

120. The cost-per-home is a factor -- though slight -- in PGS's favor.

SSGC excepts to that portion of the Recommended Order in which the ALJ strikes evidence of the actual cost-per-home to serve Bigham, based on invoice data that was admitted, without objection, into the record as SSGC Ex. 9. SSGC further excepts to FOFs 118 and 120.

The ALJ committed error ruling on the Motion to Strike. (pp. 7-9 of the Recommended Order). The exclusion of competent, substantial evidence on the cost per home for the installation of natural gas in Bigham - evidence which demonstrated (based on actual real-world data rather than an estimate) that the cost per home for PGS was significantly higher than the cost per home for SSGC - undeniably resulted in an incomplete record; skewed certain key

findings of fact; was contrary to the essential requirements of law, and ultimately resulted in the ALJ engaging in an erroneous comparison of those costs. For all of the reasons argued in SSGC's Memorandum in Opposition to Petitioner's Motion to Strike, filed on September 6th, 2019, and incorporated by this reference as if fully set forth, the ALJ should have admitted and considered the stricken evidence.

There are two key misapplications of law in this ruling. First, the ALJ has *de facto* created a new discovery rule that places upon a party the obligation to respond to discovery that was not propounded. The second is that the ruling entirely disregards and ignores the fact that SSGC timely provided extensive cost documentation within its pretrial exhibit disclosures which was the foundational basis of the testimony which was ultimately stricken.

In this case, the ALJ expressly found that there should be "no implication that there was wrongdoing" because he was "not finding that there was anything legally incorrect". Despite this, he found (with no evidence of record to support such a finding or conclusion) "unfair prejudice." The ALJ made no findings of any actual prejudice, and erred by applying § 90.403, Fla. Stat. to exclude this evidence without a basis for a finding of unfair prejudice. *State v. Gad*, 27 So. 3d 768, 770 (Fla. 2d DCA 2010) ("Absent a basis for a proper finding of unfair prejudice, the trial court abused its discretion in excluding the evidence.").

Rather than find actual prejudice, the ALJ stated that PGS was "surprised" by the testimony presented by SSGC, and suggests that PGS could not have discovered the information. The reality is (and the record reflects) that PGS could have discovered the information at issue had it taken the deposition of the witness previously identified by SSGC as the witness who would be presenting testimony and evidence relating to the cost to serve. For six months PGS never made the effort to take the deposition of the witness whom SSGC had disclosed it would

call to testify as to cost to serve, Mr. Tommy McDonough (from the date of SSGC's disclosure of the witness on January 28, 2019, to the date of commencement of the final hearing on June 24, 2019).

Despite the fact that the ALJ found, as a matter of fact, that the rules of discovery contain no continuing obligation to supplement responses that were complete when given, and that the information given in the corporate deposition in November 2018 was complete when given, and that PGS did not seek to depose the witness as an expert before the close of the time for taking expert depositions, the ALJ imposed, *de facto*, a "voluntary" obligation on SSGC to reveal undiscovered evidence when no such obligation exists in law or under any order or procedure applicable to this case. The holding that a never deposed expert must form his final opinions by the last date his deposition *could* have been taken - under the auspices of a procedure order requiring the formation of final opinions by the date that expert's deposition *was* taken - has no basis in law or fact. This ruling effectively relieves PGS from the obligation to close the door for the formation of expert opinions by the taking of a deposition of the witness, and imposes a highly prejudicial *ex post facto* obligation upon SSGC where none exists.

Exception No. 3:

39. *The cost to PGS to extend gas service into Bigham would have been minimal, with "a small amount of labor involved and a couple feet of pipe."*

SSGC excepts from FOF 39. There is no competent, substantial evidence to support FOF 39. The conclusion, apparently limited to the 'extension' of facilities (to the exclusion of all on-site costs) necessarily ignores 100% of any off-site PGS expenditures for costs. PGS did not provide an actual analysis of projected costs for service to Bigham. PGS suggested that the costs of providing service to Bigham would not be significantly higher than its rough approximation of its cost to serve Fenney. There were, however, significant cost variables that were omitted such

as the number and footage of certain lines that would affect the cost estimate, meters and meter installation; and the cost of PGS's pipeline on State Road 468 and associated gate stations that would be necessary to serve Bigham, which were not included in the PGS "cost to serve" figure. (Stout, T. 240, 242, 244-245, 248; Wall, T. 174-175, 179). PGS did not include any costs for its main line on County Road 468 that was installed to provide service to industrial customers to the west of Bigham, even though that main line would be used to serve Bigham. (Stout T. 242, l. 3-19).

SSGC incorporates by this reference and response to Exception No. 8, as it relates to consideration of this cost factor without the appropriate contextual consideration of the relationship between rates and "costs" in this case.

Exception No. 4:

74. As set forth herein, the location of PGS's existing infrastructure, vis-a-vis the disputed territory, weighs strongly in its favor.

85. To allow Leesburg to take credit for its facilities in the disputed territory, thus prevailing as a fait accompli, would be contrary to the process and standards for determining a territorial dispute. The territory must be gauged by the conditions in the disputed territory prior to the disputed extension of facilities to serve the area.

86. The existing facilities were not sufficient to serve the disputed territory without substantial extension.

88. As discussed herein, the "starting point" for determining the necessity of facilities is the disputed territory property before the installation of site-specific interior distribution and service lines. To find otherwise would reward a "race to serve."

130. The fact that Leesburg, with advance knowledge and planning, was able to successfully race to serve Bigham, incurring its "financial impact" after the territorial dispute was filed, does not demonstrate either that PGS meets the standards to prevail in this proceeding, or that PGS should be prevented from serving development directly adjacent to its existing facilities in the disputed territory.

151. The evidence clearly establishes that Leesburg knew of the proximity of PGS's existing infrastructure to Bigham, and rather than work with PGS, embarked on a race to serve the Bigham developments with as little notice to PGS as was possible.

SSGC excepts from FOF 74,86,86,88.130 and COL 151. These findings and this conclusion rest upon the ALJ's legal determination that the "existing facilities" were those that existed on the date of the filing of the Petition. There is no statute, rule, or case law which supports this determination upon the facts in this case. On the date the petition was filed, the Agreement had been executed between SSSG and Leesburg (*see* PGS Ex. 1), triggering lawful obligations on the part of Leesburg. SSGC had specifically entered into negotiations with Leesburg in primary part because of well-founded concerns that PGS could not install and provide service as required by the Villages pace of development. (PGS Ex. 77, Hudson depo., pp.147-53). The Villages needed to get on about its business of efficient and fast-paced development, and Leesburg's natural gas presence and capability was a perfect fit. Importantly and fundamentally, the Recommended Order does not find that the Leesburg service in Bigham falls within or is adjacent to any pre-existing PGS service territory, despite PGS's position in this case to the contrary. Leesburg had no option to walk away from the Agreement. While Leesburg may not have had all the necessary facilities in place to serve Bigham when the Agreement was executed - an entirely common circumstance in the provision of utility services - Leesburg had the full and complete duty to serve Bigham as of the date of the petition. The Villages had no option to accommodate a lengthy period of uncertainty in its imminent construction in Bigham. To compare the availability of facilities of each natural gas provider based on a snapshot taken on a remote date in the past is an approach that finds no support in any applicable law or precedent. This finding of fact is neither supported by competent, substantial evidence nor does it comply with the essential requirements of law. Any FOF or COL which implicitly or explicitly relies on this key determination is contrary to law and unsupported by any competent, substantial evidence.

Finally, as the ALJ appropriately found at COL 140, the petition of PGS and the facts of this case must be considered *de novo*. The approach of the Recommended Order is totally contrary to *de novo* review by simultaneously discounting all PGS off-site costs, while considering all Leesburg on-site and off-site costs, and concluding that Leesburg's facilities are inadequate to provide service to Bigham when those facilities are viewed as they existed on an arbitrarily past and distant date. Not only is this approach under these facts obviously not *de novo,* it has no support in any rule, order, or statute.

The Recommended Order arbitrarily excludes the facilities constructed by Leesburg by which it was actually supplying natural gas as of the date of the hearing. There is no basis in statute or rule for the "findings" in these FOFs (and particularly FOF 88, which should be treated as a conclusion of law) that the "starting point" for determining the necessity of facilities is the time prior to Leesburg's installation of its CR 501 line. As a matter of law, the determination of which party best meets the criteria applicable to natural gas territorial disputes should be decided based on the facts and circumstances as they exist at the time of hearing. Accordingly, the "starting point" for assessing the need for additional facilities and the cost to serve should be the facts and circumstances as they exist at the time of the final hearing. To use any other date under these facts and circumstances is to engage in evidentiary fiction in the face of established facts to the contrary. The ALJ's erroneous finding and conclusion that PGS's "existing" distribution lines "weigh heavily in PGS's favor" is wholly based on the ALJ's turning a blind eye toward Leesburg's existing distribution lines and service lines within Bigham.

The exclusion of this evidence is contrary to any law or authority on point and does not comply with the essential requirements of law.

Exception No. 5:

85. PGS filed its territorial dispute on February 23, 2018, 10 days from the entry of the Agreement, and three days prior to the adoption of Ordinance 18-07. Construction of the infrastructure to serve Bigham occurred after the filing of the territorial dispute. Given the speed with which The Villages builds, hundreds of homes have been built, and gas facilities to serve have been constructed, since the filing of the territorial dispute. To allow Leesburg to take credit for its facilities in the disputed territory, thus prevailing as a fait accompli, would be contrary to the process and standards for determining a territorial dispute. The territory must be gauged by the conditions in the disputed territory prior to the disputed extension of facilities to serve the area.

88. Prior to commencement of construction at Bigham, the area consisted of undeveloped rural land. As discussed herein, the "starting point" for determining the necessity of facilities is the disputed territory property before the installation of site-specific interior distribution and service lines. To find otherwise would reward a "race to serve."

130. The fact that Leesburg, with advance knowledge and planning, was able to successfully race to serve Bigham, incurring its "financial impact" after the territorial dispute was filed, does not demonstrate either that PGS meets the standards to prevail in this proceeding, or that PGS should be prevented from serving development directly adjacent to its existing facilities in the disputed territory.

151. The evidence clearly establishes that Leesburg knew of the proximity of PGS's existing infrastructure to Bigham, and rather than work with PGS, embarked on a race to serve the Bigham developments with as little notice to PGS as was possible. In doing so, the Commission has, in the context of electrical disputes, established that "[w]e always consider whether one utility has uneconomically duplicated the facilities of the other in a 'race to serve' an area in dispute, and we do not condone such action."

SSGC excepts from FOF 85,88,130, and COL 151. These findings improperly, and without any support in competent, substantial evidence, characterize Leesburg's construction activities in anticipation and furtherance of service to Bigham - many of those construction activities actually undertaken on by SSGC - as a race to serve. In FOF 85, the ALJ finds, in an interrelated concept, and without any competent, substantial evidence for support, that *"(t)he territory must be gauged by the conditions in the disputed territory prior to the disputed extension of facilities to serve the area".*

The Recommended Order does not find that any portion of Bigham was the service area of PGS either at the time Leesburg began to provide service therein, or at the time PGS filed its

petition. As the Recommended Order finds, The Villages desired service from Leesburg, (*see* Recommended Order, FOF 10, FOF 14, FOF 32). The Villages development is fast-paced and high-volume, which takes lots of coordination to make it come together successfully. (PGS Ex. 77, Hudson depo., p. 34). The Villages has already developed to a population of over 125,000. (McCabe, T. 790). By the date the petition was filed, Leesburg had a contractual obligation to provide service in Bigham. (Compare PGS Ex. 1 to Petition). As argued in exception No. 4, incorporated by this reference as if fully set forth, neither Leesburg nor The Villages had either the legal or practical option to stand down simply because PGS formed its 11th hour desire to serve Bigham. The petition of PGS in this matter requested expeditious resolution, and PGS subsequently filed a Motion to Expedite the Resolution of the Territorial Dispute indicating that Leesburg's construction of the 501 main was continuing. The Commission issued no order on the Motion, and PGS did not renew the motion at DOAH. Accordingly, the Commission itself was aware that Leesburg was moving forward to provide service to the Bigham developments, and took no action in relation to the same.

The concept of "race to serve" is not found in any applicable rule or statute of the Commission. In this case, there is no competent, substantial evidence that Leesburg engaged in a race to serve. The question is begged: if a large successful developer approaches a gas utility (in an area that is not within the service territory of any other gas utility) and contracts with it to receive service and then proceeds with its development activities (as does the utility who has obligated itself to provide service), must all construction cease by both parties to the contract if another utility alleges a dispute based on a formed desire to serve the area? Surely not. Despite the fact that there is no finding that either SSGC or Leesburg did anything wrong, improper, or even ill-advised by entering into the Agreement, these FOFs and this COL would force Leesburg

into an impossible and untenable decision: either breach the contract, or move forward and fulfill its contractual obligations in a timely fashion - exposing Leesburg to a claim that its actions were a race to serve. To find that Leesburg engaged in a race to serve in this case is to support that illogical and unworkable result.

The Recommended Order's implicit and explicit deference to electric territorial disputes is inappropriate and fails to comply with the essential requirements of law. While the statutory provision on the resolution of territorial disputes between electric utilities in §366.04(2), Fla. Stat., is worded similarly to the statutory provision on the resolution of disputes between natural gas utilities in § 366.04(3), Fla. Stat. PSC cases involving territorially disputes between electric utilities must be read in their greater context because of the significant regulatory and factual distinctions between electric service - which is essential for development - and the optional and competitive nature of natural gas service. The legislature could easily have combined the statutes on territorial disputes such that each service was covered by a single statutory provision, but elected not to do so. The ALJ should not have relied upon past electric cases when interpreting, evaluating, applying the applicable criteria in this natural gas territorial dispute, including this concept of so-called race to serve.

SSGC incorporates by this reference the discussion under Exception No. 1 regarding PGS expansion of its system. To effectively reward PGS for constructing facilities capable of serving Bigham with no commitment whatsoever from The Villages (that PGS would be allowed to serve *any* future areas of development) and to effectively punish Leesburg for timely constructing the facilities necessary to comply with its contractual obligations and the needs of The Villages is unsupported in law or by competent, substantial evidence.

Exception No. 6:

162. To the extent the Commission, in the exercise of its exclusive jurisdiction in natural gas territorial disputes arising from chapter 366, determines that the issue of uneconomic duplication of facilities is relevant under the circumstances of this case, the evidence, as described in detail in the Findings of Fact, establishes that the extension of service to Bigham by Leesburg involved substantial and significant duplication of existing PGS facilities. The uneconomic duplication of PGS facilities by Leesburg weighs in favor of PGS.

SSGC excepts from COL 162. For all of the reasons set forth in Exception No. 1, incorporated by this reference as if fully set forth, COL 162 erroneously applies a factor (the issue of uneconomic duplication of facilities) to this case without statutory basis or reasonable interpretation of any provision of law. It is notable that the ALJ in the wording of COL 162 itself manifests his own doubt about the applicability of the factor as a matter of law. There is nothing exceptional about this case, as reflected on the record, that would make consideration of this factor uniquely appropriate. In the absence of such, and in the absence of any language in the statute by which this factor may be applied to gas territorial disputes as a rule of general applicability, this factor should not be considered absent a legislative change to the statute. All discussions of this point elsewhere within these exceptions are incorporated by this reference as if fully set forth

Exception No. 7:

166. The factors set forth in rule 25-7.0472(2)(a)-(d), on the whole, strongly favor PGS's right to serve Bigham. Thus, customer preference plays no role.

SSGC excepts from COL 166. For all of the reasons set forth herein, incorporated by this reference, there is no competent, substantial evidence to support the conclusion that the factors in rule 25-7.0472(2)(a)-(d) strongly favor PGS, nor does the record support the relevance of such a conclusion - because of the way the Agreement sets rates in the Villages - in any case. The Commission should reject the two essential and overriding conclusions upon which the ultimate

recommendation of the ALJ rest: that continued service to the disputed area by Leesburg would result in an uneconomic duplication of facilities, and that there was a material and/or relevant difference in the costs to serve, both on-site and off-site, in favor of PGS.

Additionally, SSGC excepts to the conclusion that customer preference should play no role. Both the statute and the rule recognize the potential for the necessity of flexibility in applying these factors, not only by the statute's admonition that the PSC "may" consider the delineated factors, but also by the express inclusion in the statutory language that other factors may be considered when appropriate.[5] In this case, the preference and position of The Villages should be considered, as an additional factor, because of the scope and breadth of the development; its economic importance to the region; and its track record of consistent success. In this instance, in the absence of any established PGS territory in the disputed area, the choice made by The Villages to receive natural gas service from Leesburg in the disputed area (and beyond), where the evidence has shown such a choice will have *no* adverse effects on the end-user, should be given significant weight in the resolution of this dispute. In the alternative, to the extent the record reflects that by all factors appropriately considered and weighed, the case of each utility to serve is substantially equal, the preference of The Villages for service from Leesburg is clear and accordingly must be considered.

Exception No. 8:

129. This difference in cost, even at its lower end, is far from de minimis, and constitutes a significant and entirely duplicative cost for service.

SSGC further excepts from FOF 129 to the extent that it finds differences in cost are not *de minimis*. The only competent, substantial evidence on the point in this case was that the

[5] Obviously, such 'other factors' must be particular to the case, and not a rule of general applicability, which would require promulgation as an administrative code rule under the Administrative Procedure Act.

differences in cost arguments are *de minimis*. The very phrase, *de minimis*, refers to a difference which does not merit consideration. While in most PSC territorial dispute cases each utility's cost to serve might be highly relevant, in this case cost of service is not a factor because the Agreement effectively caps the rates that will be charged to customers at The Villages at a level that is no more than what will ever be charged by PGS. (Leesburg Ex. 9, p 23). By linking The Villages' rates to PGS's rates, the cost of serving those future Leesburg gas customers in The Villages is essentially the same as PGS. (Rogers, T. 539). This type of unique pricing arrangement makes an individual comparison of costs between the utilities less important since, regardless of their respective cost structures, the natural gas service customers in The Villages will not pay any more than what is currently in the PSC-approved rates offered by PGS. Thus, even if Leesburg's incremental costs of installing distribution mains or service lines or meters were in fact higher than PGS, this would be less relevant, if relevant at all, in evaluating the public interest considerations of this territorial dispute since ratepayers in The Villages are insulated against any cost increases that are above current and future retail distribution rates offered by PGS. Leesburg Ex. 9, p. 23. In cross-examination, PGS counsel made the point that as far as the rates the customers will be paying, the effect of cost of service was identical, and Dismukes agreed. (Dismukes, T. 767). The only competent, substantial evidence in the record on this point, evidence which is not contested, is that the cost of service to customers was materially equal because of the rate restrictions in the Agreement.

The legislature has not, in its wisdom, created parallel regulatory schemes for municipal gas utilities and investor-owned gas utilities. In this case, Leesburg's approach to service in Bigham (and in The Villages in the areas yet to be constructed) was creative and flexible and entirely consistent with its lawful authority. The Commission should recognize those

fundamental differences - particularly as they relate to consideration of, and weight given to, the concept of cost of service in this case - and not effectively seek to exercise jurisdiction over Leesburg to a greater extent than contemplated by Florida law. Leesburg is the authority (and the *de facto* regulator) in this case to determine, in its sole and considered discretion, whether its proposed cost to serve is consistent with the best interest of its customers, and it exercised that authority in this case with care and caution and due deliberation.

Exception No. 9

SSGC excepts to the ALJ's Conclusion and Recommendation that the Commission enter a Final Order awarding Peoples Gas System the right to serve Bigham by acquiring Leesburg's property on terms and conditions as deemed appropriate by the Commission. The weight of the competent, substantial evidence and appropriate construction and application of applicable law should result in a recommendation that Leesburg may continue to serve Bigham.

Respectfully submitted this 15th day of October, 2019.

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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 e-mail transmission this 15th day of October, 2019 to:

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