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. 18-04422

CITY OF LEESBURG'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, City of Leesburg ("City"), hereby submits the following exceptions to the September 30, 2019 Recommended Order in the above-identified matter, pursuant to section 120.57(1)(k), Florida Statutes (2019), and Rule 28-106.217, Florida Administrative Code.

AUTHORITY

Section 120.57(1)(*l*), Florida Statutes (2019), sets forth the scope of an agency's authority to adopt, reject, or modify the recommended findings of fact and conclusions of law contained in recommended order:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

EXCEPTIONS[1]

EXCEPTION NO. 1.

City excepts to that portion of the Recommended Order in which the Administrative Law Judge ("ALJ") erroneously strikes evidence of the City's actual cost-per-home to serve the Bigham West, Bigham East, and Bigham North developments of $1,219 per home. City further excepts to related Findings of Fact Nos. 118 and 120 which incorporate the error, as set forth below:

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

The ALJ's erroneous determination to strike the evidence of the City's actual cost per home is set forth at page 9 of the Recommended Order, where the ALJ states:

> Under the circumstances, the undersigned finds and concludes that it would be a surprise and unfairly prejudicial to PGS to allow the newly created information to be received in evidence in lieu of the figure provided by Mr. McDonough as the corporate representative and in responses to written discovery. See § 90.403, Fla. Stat.

The authority expressly relied on by the ALJ, section 90.403, Florida Statutes, provides the following parameters for a determination to exclude relevant evidence:

> 90.403 Exclusion on grounds of prejudice or confusion.— Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

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[1] In addition to the exceptions set forth herein, the City of Leesburg adopts and incorporates by reference the exceptions filed by Respondent, South Sumter Gas Company.

There is no evidence of record to support a finding of "unfair prejudice" that "substantially outweighs" the probative value of the relevant evidence of the City's actual cost to serve. The ALJ erred by applying § 90.403 to exclude relevant evidence without a basis for a finding of unfair prejudice.[2] *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 "unfair prejudice," the ALJ accepted PGS's argument that it was surprised by the updated information presented by SSGC. The ALJ also suggests that PGS could not have discovered the information. The record reflects that PGS could have discovered the information had PGS served discovery or taken a deposition of Mr. Tommy McDonough, the witness identified by SSGC as the individual that SSGC intended to call to testify, in detail, about the cost to serve. For six months, 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, PGS never made any effort to take Mr. McDonough's deposition in his individual capacity, nor to seek updated cost data.

The ALJ's assertion that "discovery closed altogether on March 22, 2019," (Recommended Order, p. 8) is not the whole picture. The record reflects that, pursuant to the order of the presiding ALJ issued April 3, 2019, all parties were entitled to seek additional

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[2] The Florida Supreme Court has held that the Evidence Code is not strictly applicable to administrative proceedings. *Florida Industrial Power Users Group v. Graham*, 209 So.3d 1142 (2017). Moreover, even if the Code is determined applicable here, the record of this case does not support a finding of "unfair prejudice" that "substantially outweighs" the probative value of relevant evidence. The evidence excluded consists of an update of a prior cost estimate by providing invoice-based actual cost data, and was not a change or repudiation of prior testimony. The mere fact that evidence does not favor PGS does not make the evidence "unfairly prejudicial." Moreover, the evidence should not be excluded because PGS declined to conduct discovery when it had a fair opportunity to do so.

discovery after that date, by agreement of the parties or by motion. Notwithstanding this opportunity, PGS made no effort to discover any updated or actual cost data.

The Florida Supreme Court has observed that it is improper to exclude relevant evidence solely on the basis of "surprise" when, as here, there is no wrongdoing by any party. The Court has held that trier of fact must balance the objective of avoiding surprise against the objective of getting to the truth, and that there are key factors that should be considered prior to entering an order of exclusion, including the objecting party's ability to cure the prejudice and his knowledge of the existence of the witness:

> Prejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony. Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases). [footnote omitted]. If after considering these factors, and any others that are relevant, the trial court concludes that use of the undisclosed witness will not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure should be modified and the witness should be allowed to testify.

Binger v. King Pest Control, 401 So. 2d 1310, 1314 (Fla. 1981); see also *Florida Peninsula Ins. Co. v. Newlin*, 273 So. 3d 1172, 1176 (Fla. 2d DCA 2019) (a trial court should not exercise discretion to exclude "surprise" evidence "blindly" but should focus on the actual prejudice that the admission of the evidence "would visit upon the objecting party.") .

Applying the *Binger* factors to the case at hand, (i) PGS, to the extent it perceived it was prejudiced, could have cured its prejudice by conducting discovery; (ii) there is no allegation or finding of any violation of the prehearing order or any rule of discovery; and finally, (iii) PGS had an opportunity during trial to cure any perceived prejudice by conducting a deposition

limited to the issue at hand, presenting a rebuttal witness, or briefly continue the proceeding, but PGS declined to do so.

The ALJ erred in excluding the updated evidence of the City's cost to serve. There is no basis in the record for a finding of "unfair prejudice" that "substantially outweighs" the probative value of the evidence particularly when, as here, the ALJ's ultimate recommendation is based on the erroneous finding that the City's infrastructure was "uneconomic."

As discussed below, the evidence of the City's actual (as opposed to "estimated") cost to serve demonstrates that the City's cost to serve is lower than PGS's cost to serve. Because there is no basis in the record for a finding of any actual "unfair prejudice" to PGS other than prejudice of its own making, and because the probative value of the evidence of the City's actual cost to serve is significant, the ALJ erred by excluding the evidence of the City's actual cost to serve.

The ALJ's determination to grant PGS's motion to strike should be rejected and Mr. McDonough's final hearing testimony that the City's actual cost-per-home for the Bigham developments is $1,219 (based on invoices admitted into the record without objection) should be admitted into the record. Findings of Fact Nos. 118 and 120 should be corrected as follows:

> 118. The cost-per-home for Leesburg and SSGC is $1,219 ~~$1,800 (see ruling on Motion to Strike)~~. In addition, Leesburg will be installing automated meters at a cost of $72.80 per home.
>
> 119. The preponderance of the evidence indicates that the PGS cost-per-home is $1,579, which was the cost-per-home of extending service in the comparable Fenney development.
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> 120. The cost-per-home is a factor ~~-- though slight --~~ in ~~PGS's~~ City's favor.

EXCEPTION NO. 2.

City excepts to the ALJ's Findings of Fact Nos. 97 and 129, and related Conclusions of Law Nos. 155, 156 and 157, to the extent that the ALJ found that the City's cost of construction

of natural gas infrastructure on county roads 468 and 501 "could be" as much as $2.2 million, as speculative and contrary to the substantial competent evidence of record. The ALJ further erred by relying on the higher, speculative cost of $2.2 million to conclude that the City's infrastructure was "uneconomic." The Recommended Order reflects that the ALJ found that the City's cost of installing its CR 468 and CR 501 lines, which were in existence at the time of the final hearing, was approximately $1,212,207 (Finding of Fact No. 129). Rather than rely on the evidence of actual cost presented at the final hearing, the ALJ instead erroneously chose to use a higher, estimated figure provided by the City in early answers to interrogatories and referenced in the contract between the City and South Sumter Gas Company as a "not to exceed" number. The ALJ then used this higher estimated figure to erroneously conclude that the City's installation of its CR 501 and CR 468 lines was "uneconomic."

The ALJ's error was compounded by his erroneous exclusion of the evidence of the City's actual (as opposed to estimated) cost to serve. See Exception No. 1 above. By erroneously excluding the testimony reflecting the City's actual cost-per-home of $1,219, the ALJ excluded an ultimate finding that the City's actual cost per home of $1,219 results in a cost-per-home differential between the City and PGS of $360 (or $287.20, after taking into account the City's installation of automated meters as referenced in Finding of Fact 118), in City's favor. When this cost savings is multiplied by the 4,200 homes estimated to be built within the Bigham developments (Finding of Fact No. 34), the savings amounts to $1,206,240 which offsets the $1,212,207 cost of the City's installation infrastructure lines, even without taking into account the related commercial development within Bigham. The evidence reflecting the City's actual cost to serve of $1,219 per home demonstrates that the installation of the City's lines is not "uneconomic."

The ALJ's error of using an "estimated" cost of construction of the CR 501 and CR 468 lines and erroneous exclusion of City's actual cost-per-home from evidence formed the basis for the ALJ's erroneous conclusion that City's construction of its CR 501 and CR 468 lines was "uneconomic." Findings of Fact Nos. 97 and 129, and Conclusions of Law Nos. 155, 156, and 157 should be corrected as follows:

> 97. In addition to the foregoing, Leesburg, in its response to interrogatories, indicated that it "anticipates spending an amount not to exceed approximately $2.2 million dollars for gas lines located on county roads 501 and 468." Furthermore, Leesburg stated that "[a]n oral agreement exists [between Leesburg and SSGC] that the amount to be paid by Leesburg for the construction of natural gas infrastructure on county roads 468 and 501 will not exceed $2.2 million dollars. This agreement was made . . . on February 12, 2018." That is the date on which Leesburg adopted Resolution 10,156, which authorized the Mayor and City Clerk to execute the Agreement on Leesburg's behalf. The context of those statements suggests that the City originally estimated that the total cost of constructing the gas infrastructure to serve Bigham could be as much as $2.2 million; however, the cost of constructing the CR 501 and CR 468 lines was approximately $1,212,207. When one considers the savings of the per home cost of $287.20 multiplied by the projected buildout in the Bigham developments of 4,200 homes, i.e., $1,206,240, the infrastructure cost differential between the City and PGS is de minimis.
>
> 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, did not constitut~~ed~~ 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~~ approximately $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~~.
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> 155. The evidence demonstrates that Leesburg could not provide reliable natural gas service to the disputed territory through its existing facilities. In order to reliably serve Bigham, Leesburg had to construct distribution mains along CR 501 for a distance of 2.5

> miles, and along SR 44/CR 468 for a distance of 3.5 miles, at a cost of approximately ~~between~~ $1,212,207~~ and $2,200,000~~.
>
> 156. The cost differential -- ~~at least~~ approximately $1,200,000 ~~and possibly as much as a million dollars more -- is far from de minimis~~ is offset by the City's lower cost-per-home of $1,219 (or $1,291.80 taking into account the City's installation of automated meters)." ….
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> 157. This factor and weighs strongly in favor of ~~PGS~~ City.

EXCEPTION NO. 3.

City excepts to Conclusion of Law No. 162, which states:

> 162. To the extent that 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 weighs in favor of PGS.

The ALJ erred as a matter of law in applying the criteria of "uneconomic duplication" to this territorial dispute and further erred, as set forth in Exception No. 2 above, in finding that the City's extension of service to Bigham was "uneconomic."

Neither the Commission's governing statute nor the Commission's rules authorize the Commission to include "uneconomic duplication of facilities" as a criteria when resolving natural gas territorial disputes. Construing general language in the statute or the Commission's rules to authorize consideration of "uneconomic duplication" contravenes established law that an agency may not act, whether by rule or otherwise, without a grant of specific statutory authority. The authority to act "must be based on an *explicit* power or duty identified in the enabling statute." *Sw. Water Mgmt. Dist. v. Save the Manatee Club,* 773 So.2d 594, 599 (Fla. 1st DCA 2000).

The resolution of this natural gas territorial dispute must be governed by § 366.04(3), Florida Statutes. In the Recommended Order, the ALJ discusses at length the statutory criteria for resolving electric utility service territorial disputes, and at hearing specifically noted that § 366.04(5), Florida Statutes, requires the Commission to consider whether there has been or will be an "uneconomic duplication" of facilities or services for electric facilities. (See Tr. 15). There is, however, no parallel statutory language in § 366.04 Florida Statutes or elsewhere, which sets forth "uneconomic duplication" statutory criteria for resolution of natural gas services territorial disputes. The Legislature's express exclusion of the "uneconomic duplication" criteria for natural gas infrastructure from § 366.04(3) and express inclusion of the "uneconomic duplication" criteria in § 366.04 (5) indicates that such exclusion is deliberate and must be given effect. *Leisure Resorts, Inc. v. Frank J. Rooney, Inc*., 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term, as it has here, in one section of the statute, but omits it in another section of the same statute, we will not imply it where it has been excluded."). Thus, the ALJ erred by relying on a criteria that is not included within applicable statute or rule in resolving this territorial dispute.

The ALJ's erroneous inclusion of "uneconomic duplication" in his analysis of this territorial dispute requires rejection of his ultimate recommendation. As noted by the ALJ in recommended Conclusion of Law No. 140, "Petitioner, PGS, has the burden of proving, by a preponderance of the evidence, that it is entitled to serve Bigham *under the standards applicable to territorial disputes for natural gas utilities.*" (emphasis added). Here, the ALJ relied heavily, if not exclusively, on a criterion that is not applicable to natural gas utility territorial disputes, for his ultimate recommendation.

Nor does the evidence of record support the ALJ's erroneous conclusion that the City's infrastructure, at the time of installation, was "duplicative." As discussed in more detail in

Exception No. 4 below, the ALJ correctly found that PGS's facilities were installed to serve industrial anchor customers and not specifically for future Villages developments, and that PGS had only speculated as to potential future residential development when installing its industrial lines. (Finding of Fact 23). In contrast, the City's construction of natural gas infrastructure was not speculative, but was in performance of its obligations under a lawful contract entered into between The Villages and the City.

The ALJ further erred in concluding that the City's infrastructure was "uneconomic duplication," by failing to take into account additional future development that may be served by the City. It is well-established that the mere "duplication" of infrastructure in an area does not, in itself, render the additional infrastructure "uneconomic." The Commission previously has considered "whether the facilities that might initially be perceived as duplicative would have a reasonable prospect for future use in addition to just serving the area in dispute," and concluded that a reasonable expectation of future use supports a conclusion that the facilities are not "uneconomic." *Choctawhatchee Electric Cooperative v. Graham*, 132 So.3d 208, 217 (Fla. 2014) (Commission concluded that "reasonable future use" test "demonstrated that uneconomic duplication would not occur if Gulf Power was awarded the right to serve Freedom Walk.") .

The ALJ correctly found that the City's CR 468 line was constructed not to serve the Bigham Developments, but to provide a redundant loop in the City's natural gas distribution system, and that both the CR 501 and CR 468 lines were intended to serve future development (Findings of Fact Nos. 68, 69), but erred in ignoring these substantial benefits and additional value when ascribing the entirety of the cost of the lines to the Bigham development in order to find the lines "uneconomic."

Finally, the ALJ erred in concluding that the issue of "uneconomic duplication" was dispositive in this proceeding. The prior Commission decisions in cases involving territorial

agreements are of questionable relevance in this territorial dispute case, and their weight as authority is further in question in light of Article V, Section 21 of the Florida Constitution.[3] Moreover, as a practical matter, the issue of "uneconomic duplication" has no relevance to the facts and circumstances of this case because, as the ALJ found, the City's rates for Villages customers will not exceed the rates charged by PGS, thus residents of The Villages cannot be adversely affected by any asserted "duplication."

Accordingly, Conclusion of Law 162 should be corrected as follows:

> 162. Neither the governing statute, § 366.04(3), Florida Statutes, nor the Commission's Rule 25-7.0472 authorize the Commission to apply the criteria of "uneconomic duplication" to resolution of this natural gas territorial dispute. To the extent that 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 was in performance of the City's obligations pursuant to a lawful contract between The Villages and the City, and was not an uneconomic duplication of PGS's existing facilities. ~~involved substantial and significant duplication of existing PGS facilities. The uneconomic duplication of PGS facilities weighs in favor of PGS.~~

EXCEPTION NO. 4.

City excepts to those portions of the ALJ's Findings of Fact 74, 85, 86, 130, and Conclusion of Law 151 which state:

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

[3] Section 21. Judicial interpretation of statutes and rules. – In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

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

There is no competent, substantial evidence of record supporting a finding of a "race to serve," or that the City did not conduct its actions publicly and in good faith, consistent with its obligations as a public entity and pursuant to a lawful contractual agreement.

There is no evidence that the City sought to prevent PGS from serving the Bigham developments by "racing" to serve. There is no evidence of record that PGS intended or had interest in serving the Bigham development prior to this proceeding. The ALJ correctly found that "none of the PGS lines were extended specifically for future Villages developments." (Finding of Fact No. 23). The ALJ correctly found that "PGS had no territorial agreement, and had no discussion with The Villages about serving any development along the mains." (Finding of Fact No. 23). The ALJ correctly found that PGS constructed its "gate station at the intersection of CR 468 and CR 501 . . . to serve the anchor industrial facilities" and not for the purpose of serving The Villages. (Finding of Fact No. 24).

There is no evidence of record that PGS ever approached The Villages seeking to serve the Bigham Developments or otherwise had any interest in such service. The competent, substantial evidence of record is that the City acted in good faith in seeking to extend natural gas services to the Bigham Developments, pursuant to a contractual agreement, and that there was no "race to serve."

The ALJ correctly found that, prior to PGS bringing this territorial dispute, both the City of Leesburg and PGS previously had provided natural gas services to The Villages developments. The competent substantial evidence of record, as found by the ALJ, is that the City entered into a lawful contract with The Villages to provide natural gas services within the Bigham Developments, adopted a rate for service through a public process, and began performing its obligations under the contract. To characterize the City's lawful actions as a "race to serve," is inappropriate, and to penalize the City for its lawful actions by disregarding its existing infrastructure currently in place when comparing the City's ability to serve to PGS' ability to serve, is error.

De novo administrative proceedings are conducted to formulate final agency action and should be based on facts as they exist at the time of the agency's final action. *McDonald v. Department of Banking and Finance*, 346 So.2d 569, 584 (Fla. 1st DCA 1977). In a de novo proceeding, the ALJ correctly considers evidence as it exists at the time of the final hearing. *Department Of Financial Services, Division Of Workers' Compensation v. Ron's Custom Screen, Inc.,* 2009 WL 4099147, at *4; DOAH Case No. 09-0959; (DOAH Nov. 24, 2009) (DFS Feb. 26, 2010). See also, *Adult Family Care Home v. Agency For Health Care Administration,* 1997 WL 1052634 at *4 (DOAH Case No. 96-4099) (DOAH Feb. 21, 1997) (AHCA April 1, 1997) ("In formulating final agency action, the undersigned may consider evidence of relevant facts that exist at the time of the administrative hearing."); *Berger v. Kline*

and Department of Environmental Protection and Citrus County, 1994 WL 75879 at *18; DOAH Case No. 93-0264 (DOAH Nov. 29, 1993) (DEP Jan. 11, 1994) ("The Hearing Officer thus must accept evidence of circumstances as they exist at the time of hearing); ; *In re: Petition to Resolve Territorial Dispute with Peoples Gas Sys., Inc. by Sebring Gas Sys., a Div. of Coker Fuels, Inc.*, No. 910653-GU, 1992 WL 12595887 (Fla. P.S.C. Feb. 25, 1992) (Sebring's efforts to convert its underground gas piping lines from propane to natural gas as of the time of hearing relevant to final outcome, as were gas costs on September 30, 1991, while the petition was filed on June 4, 1991); *In re: Petition to Resolve Territorial Dispute between Okefenoke Rural Elec. Membership Corp. & Jacksonville Elec. Auth.*, No. 911141-EU, 1992 WL 12596508 (Fla. P.S.C. Oct. 27, 1992) (Okefenoke's [1992] revenues relevant consideration when the petition was filed on November 19, 1991, and the hearing was held on June 17, 1992); and *In re: Petition to Resolve Territorial Dispute between Talquin Elec. Coop., Inc. & Town of Havana*, No. 920214-EU, 1992 WL 12597257 (Fla. P.S.C. Dec. 21, 1992) (school board's steps toward purchasing property that occurred subsequent to the filing of the petition in the case relevant factor to outcome).

There is no basis in statute or rule for the ALJ's conclusion of law (labeled as Finding of Fact No. 88) that the "starting point" for determining the necessity of facilities is the time prior to the City's installation of its CR 501 line. Governing law states that 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. There is no statute or rule authorizing the disregard of lawfully constructed infrastructure existing at the time of hearing. The "starting point" for assessing the need for additional facilities and the cost to serve should be the facts and circumstances as they existed at the time of the final hearing. 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 disregard of the City's existing distribution lines and should be rejected.

Accordingly, the contested portion of Finding of Fact No. 74, and Findings of Fact Nos. 85, 86, 88, and 130, and Conclusion of Law 151 should be rejected as unsupported by the competent, substantial evidence of record and contrary to law.

EXCEPTION NO. 5.

City excepts to Conclusion of Law No. 166, which states:

> 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.

The ALJ found that the majority of the applicable statutory and rule criteria do not favor one party over the other, and that both parties are equally capable of providing reliable service to the disputed territory. (Findings of Fact Nos. 74, 75, 103, 108, 113, 114, 121, 122, 123, 125, and 126).

The ALJ found that the City's ability to provide other utility services to The Villages in addition to gas service is a factor in the City's favor. (Finding of Fact No. 110). The ALJ found that the criteria relating to cost-per-home is a "slight" factor in PGS' favor, however, this finding wholly arises from the ALJ's erroneous exclusion of relevant evidence of the City's actual cost-per-home, which is substantially lower than PGS's cost.

The only other factor, and the single factor to which the ALJ gave the greatest weight, is the matter of "uneconomic duplication," a factor that is not even a criterion specified in either the governing statute or the Commission's rules as applicable to natural gas territorial disputes. Moreover, as discussed in detail in Exception No. 2 above, even if a criterion of "uneconomic duplication" were applied, the ALJ erred in its application by erroneously concluding that the

City's infrastructure, constructed pursuant to its obligations under the written contract with The Villages, is "uneconomic." Finally, the ALJ erred as a matter of law in concluding that his conclusion of "uneconomic duplication" in this natural gas territorial dispute should be given great weight, as there is no specific statutory authority authorizing the application of the criterion to this dispute, and no statutory, rule, or decisional authority that would render the criterion, if applied, dispositive when all of the other myriad criteria are found to be a tie.

Applying the criteria set forth in the governing statute and the Commission's rule to the facts and circumstances of this case reflect that the parties are substantially equal with respect to satisfaction of the applicable criteria and that customer preference thus should be the determining factor, consistent with Rule 25-7.0472(2)(e). The ALJ erred by refusing to apply the criteria of customer preference to this case.

Recommended Conclusion of Law No. 166 should be corrected as follows:

> The factors set forth in rule 25-7.0472(2)(a)-(d), on the whole, favor neither party over the other, and establish that the parties are substantially equal in their ability ~~strongly favor PGS's right to~~ serve Bigham. Thus, customer preference ~~plays no role~~ is the determining criteria, pursuant to rule 27-7.0472(2)(e), and must be resolved in the City's favor in light of The Villages' express preference for the City as its provider of natural gas services to the Bigham developments.

EXCEPTION NO. 6.

City excepts to the ALJ's Conclusion and Recommendation that the Commission enter a final order awarding Peoples Gas System the right to serve Bigham North, Bigham West, and Bigham East by acquiring the City's property on terms and conditions as deemed appropriate by the Commission. Any divestiture of the City's property rights to facilities and infrastructure the City lawfully owns should be in accord with due process, and Florida constitutional and statutory law that address a taking of property.

DATED THIS 15th day of October 2019.

RESPECTFULLY SUBMITTED,

/s/ Jon C. Moyle

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ATTORNEYS FOR CITY OF LEESBURG

CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing was served on the following counsel this 15th day of October via email transmission to:

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