FBEFORE 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: 10-25-19

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

COMES NOW, Petitioner, PEOPLES GAS SYSTEM ("PGS"), pursuant to Rule 28-106.217, Florida Administrative Code ("F.A.C."), and hereby submits its Responses to South Sumter Gas Company, LLC's ("SSGC") Exceptions to the Recommended Order ("RO") dated September 30, 2019, in the above captioned matter and states:

STANDARD OF REVIEW

1. Section 120.57(1)(*l*), Florida Statutes, governs the Florida Public Service Commission's ("Commission") review of the Administrative Law Judge's ("ALJ") Recommended Order. With respect to an ALJ's findings of fact, the Commission may not reject them or modify them unless the Commission "first 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 on which the findings were based did not comply with the essential requirements of law."

2. With regard to conclusions of law, the Commission 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" and in doing so the Commission must make a finding "that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which is rejected or modified."

3. The Commission has no authority to reject or modify a conclusion of law relating to laws outside is substantive jurisdiction, such as rulings on evidentiary matters.

4. None of the exceptions made by South Sumter Gas Company, LLC. ("SSGC") in its Exceptions to the Recommended Order filed on October 15, 2019, meet the standards required for rejection or modification.

Exception No. 1

5. SSGC has taken exception to Paragraphs 127, 128, and 129 of the RO based on two theories. The first of which is based upon newly adopted Article 5, Section 21 of the Florida Constitution. The second is that Leesburg has not uneconomically duplicated the facilities of PGS and consideration of uneconomic duplication is not an appropriate factor in resolving territorial disputes involving natural gas utilities. Both theories are wrong.

Article V, Section 21 of the Florida Constitution states:

> 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.

SSGC's position is that this section means that an ALJ in an administrative action can never look to an administrative agency's interpretation of a statute or rule. That is clearly an overbroad reading of this newly adopted constitutional provision. The purpose of Section 21, and the issue it was intended to remedy, was to address situations where an ALJ felt compelled to defer to the administrative agency's interpretation of a statute or rule even when the ALJ believed that interpretation was in error. The referenced constitutional amendment does not prevent an ALJ from citing to an agency's interpretation of a statute or a rule which is consistent with his own. What is proscribed is an ALJ having to adopt the agency position when the ALJ believes it is not a proper interpretation of statute. That is clearly not what the ALJ has done in this case.

6. Paragraph 127 in the RO begins by pointing out that neither Section 366.04(3), nor Rule 25-7.0472, F.A.C., expressly identifies consideration of "uneconomic duplication of facilities." The ALJ then points out that Rule 25-7.0471, *Territorial Agreements,* requires the Commission to consider whether a territorial agreement will "eliminate existing or potential uneconomic duplication of facilities." The RO then cites Commission orders on territorial agreements that discuss the potential for uneconomic duplication of facilities and that the agreements will eliminate the potential uneconomic duplication.

7. In Paragraph 128, the RO references a Commission order that addresses uneconomic duplication of facilities in territorial disputes. There is no indication that the ALJ would have taken a contrary position in the absence of these previous Commission orders. In fact, if the ALJ had not mentioned any of the orders, and instead simply said that in light of the consideration of uneconomic duplication of facilities found in Rule 25-7.0471, F.A.C., he interpreted Rule 25-7.0472, F.A.C., as being read consistently with 25-7.0471, there would be no argument of impermissible deference to an agency interpretation. There is no evidence in the RO that the ALJ felt compelled to defer to the cited orders. Instead, it appears the orders are referenced because they are consistent with the ALJ's interpretation of the statute or rule.

8. SSGC argues that the avoidance of uneconomic duplication is not a criterion to be considered in natural gas territorial disputes. That argument fails for several reasons. The avoidance of uneconomic duplication of facilities to provide utility service is the basis for, and the foundation of, the state policy of displacing competition in the utility arena and replacing it with a policy of regulated monopolies: i.e., that one provider of utility service can more economically provide utility service than separate providers vying for the same customers. An essential element of that policy is the establishment of service territories within which each utility has the right and

obligation to serve all customers thus avoiding the uneconomic duplication of facilities that would result from two utilities vying to serve the same customers. Furthermore, neither the statute regarding the Commission's jurisdiction over territorial disputes between gas utilities (Section 366.04(3), Florida Statutes) nor the statute regarding the Commission's jurisdiction over electric utility territorial disputes (Section 366.04(2), Florida Statutes) specifically uses the phrase "uneconomic duplication," but the listed criteria to be considered clearly have that end in mind.[1] Finally, as pointed out by the ALJ, the Commission has routinely used that criteria in approving agreements that resolve territorial disputes (Paragraph 127 of RO).

9. SSGC's argument that there is no evidence of uneconomic duplication is simply without merit. PGS already had an extensive distribution system in Sumter County (PGS. Ex. 4) and in the specific area, already had a line along County Road ("CR") 468 that could provide service to the developments known as Bigham North, Bigham West, and Bigham East (collectively the "Bigham Developments") which predated the Bigham Projects. Those lines were already sized to serve the Bigham Developments and any other developments in the area (T-149-154, 198, 199). Leesburg City Manager, Mr. Alfred Minner, admitted that at the time of the Agreement, PGS could serve the area off its already existing line on CR 468 and that in order for Leesburg to serve the area it had to build its line along CR 501 and along State Road ("SR") 44 and CR 468 (T-454, 455). The maps placed into evidence (PGS. Exs. 5, 6, 7) show that Leesburg's CR 468 line runs parallel to PGS' CR 468 line, the very definition of duplication. The overwhelming, uncontroverted evidence is that Leesburg had to build the lines along CR 501 and along SR 44 and CR 468 in order to duplicate what PGS already had in place along CR 468.

[1] The statute that does specifically reference "uneconomic duplication" has as its focus the statewide electric grid which makes it clear that the avoidance of uneconomic duplications is to apply to the statewide grid (Section 366.04(5), Florida Statutes.

10. The evidence is similarly overwhelming in that this duplication of facilities by Leesburg is uneconomic when compared to PGS. Mr. Jack Rogers, director of Leesburg's gas department, testified that the total cost thus far of the CR 501 line and the CR 468 line was $1.94 million (T-554, 555). That cost is essentially what Leesburg has paid in order to put itself in a position to serve the Bigham Developments at the time the Agreement was executed.

11. SSGC ignores this cost in its exceptions to Paragraphs 127-129 of the RO and instead refers to Leesburg's expert Dr. Dismukes to argue that no uneconomic duplication will occur. At the outset it must be pointed out that Dr. Dismukes' testimony was that no uneconomic duplication would result if Leesburg ***continued*** to service the disputed area (SSGC's Exceptions to Recommended Order at 9), not whether Leesburg's extending facilities to serve the territory in the first place was uneconomic. Dr. Dismukes ignores the fact that Leesburg has spent $1.94 million (with an agreement to spend up to $2.2 million) in order to duplicate PGS' already existing ability to serve customers in the Bigham Developments. SSGC's reliance on Dr. Dismukes' testimony is further flawed because Dr. Dismukes conducts a rate analysis rather than comparison of the incremental costs to serve. Rates are not costs as that term is used in Rule 25-7.0472, F.A.C., and are irrelevant to determining which utility should serve a territory.[2] Dr. Dismukes admits that he did not attempt to analyze what the incremental cost was for Leesburg as compared to PGS (T-768, 769) and he conceded that he had no reason to disagree with the numbers that had been put forth as to the cost of Leesburg's spending on the CR 501 and CR 468 (T-770), and had no reason to disagree with the approximate cost of PGS to tie into its CR 468 line which was around $10,000.00 (T-771). Dr. Dismukes simply ignores this differential which is the most clear cut and

[2] See *Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute with Florida Power Corporation, an Area Located in Lafayette County*, Order No. 12324, issued August 4, 1983, in Docket No. 830271-EU, at 2.

obvious additional cost for Leesburg to serve the Bigham Developments. In Dr. Dismukes' report (Leesburg Ex. 9), he states on page 13, paragraph 49, that "regulation helps to assure that the cost decreasing aspects of scale (i.e., declining average costs) are harnessed to benefit rate payers. These benefits arise when the capacity of utility systems is more fully utilized. End-user growth can assist in driving down unit costs, since this growth often results in far better utility system capacity utilization." What this means is that Leesburg, by building miles of pipe in order to serve an area literally within a few feet of PGS' lines is preventing the full utilization of PGS' infrastructure. Dr. Dismukes' conclusions are consistent with the testimony of PGS President T.J. Szelistowski, who explained how full utilization of lines lowers costs to customers and how PGS' customers are impacted by denying PGS the ability to fully utilize existing infrastructure (T-81-82).

12. For the reasons stated above, the Commission should reject SSGC's exception to the findings of fact in Paragraphs 127-129 of the RO.

Exception No. 2

13. SSGC's Exception No. 2 addresses the ALJ's use of the $1,800 per home cost as SSGC's cost of installing the distribution infrastructure in the Bigham Developments. This exception is the same as Leesburg's Exception No. 1 and this exception should be rejected on the same basis as provided in PGS' response to Leesburg's exceptions.

14. The Commission is without authority to change the ALJ's finding of fact regarding SSGC's costs because the Commission would first have to reject the ALJ's evidentiary ruling excluding the testimony that supports Leesburg's argument that the alternative figure of $1,219 should be used. Furthermore, as explained below, the $1,219 amount is the cost to SSGC of installing the distribution infrastructure, it is not the cost to Leesburg to purchase the infrastructure,

and it is not clear that the $1,219 figure included all the relevant costs outlined in Rule 25-7.0472, F.A.C.

15. The genesis of this exception is the ALJ's decision to grant PGS' motion to strike the testimony of Mr. Thomas McDonough that SSGC's cost to serve was $1,219 per residence rather than the $1,800 per residence that was contained in SSGC's interrogatory answers. The ALJ concluded that "it would be a surprise and unfairly prejudicial to PGS to allow the newly created information to be received into evidence in lieu of the figure provided by Mr. McDonough as the corporate representative and in response to written discovery" (RO at 9). The ALJ correctly found that because Mr. McDonough testified that the additional calculations were done after the deposition deadline even if PGS had taken an additional deposition of Mr. McDonough, the calculations would not have been completed and therefore they would not have been discoverable. Accordingly, the ALJ concluded that "PGS had no ability to know of these calculations, and opinions derived therefrom, through depositions, written discovery, or otherwise, short of SSGC voluntarily providing the new calculations and advising PGS of their intent to rely on them" (RO at 8). It clearly would have been prejudicial to PGS to allow the additional undiscoverable testimony to come into evidence on the final day of trial.

16. As a matter of law, the Commission is powerless to reject the ALJ's evidentiary ruling excluding Mr. McDonough's testimony through its final order. Under Section 120.57(1)(*l*), Florida Statutes, the Commission "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***." (Emphasis Supplied). Rulings on ***evidentiary matters*** are not conclusions of law over which the Commission has ***substantive jurisdiction*** so it is without authority to allow Mr.

McDonough's testimony to come into the record and be relied on as the basis for finding SSGC's cost per home is $1,219.[3]

17. Ultimately, the issue of whether the cost per home for SSGC was $1,800 or $1,219 is irrelevant, because the proper per customer cost comparison is between PGS and Leesburg rather than between PGS and SSGC. That is the comparison that must be made under Rule 25-7.0472(2):

> (2) In resolving territorial disputes, the Commission **shall** consider…:
> (c) the cost of each **utility** to provide natural gas service to the disputed area presently and in the future. (Emphasis Supplied).

SSGC has maintained throughout these proceedings that it is not a natural gas utility and the ALJ concluded that SSGC was not a natural gas utility[4] (RO Paragraph 140). Therefore, SSGC's cost per home is not what the Commission is mandated under 25-7.0472 to consider in resolving this territorial dispute. SSGC's costs are irrelevant. What is relevant, and what the Commission "**shall**" consider is Leesburg's costs compared to PGS' costs. Every witness who has testified about the Agreement between Leesburg and SSGC has said that the purchase price for the distribution infrastructure in the Bigham Developments is the formula that is contained in the Agreement. Mr. Rogers, in his deposition at page 19 (PGS Ex. 78) stated that the cost for infrastructure is what Leesburg would pay under the Agreement:

> **Q. (By Mr. Brown)** 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, etc., I assume your answer would be that it is whatever we are paying under the Agreement for all that.

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[3] See *Barfield v Department of Health*, 805 So. 2d 1008, 1011-1012 (Fla. 1st DCA 2001), finding the Board of Dentistry "lacked substantive jurisdiction to reject the ALJ's conclusion of law that the grading sheets were inadmissible hearsay" and reversing the Department's order in that regard. See also, *G.E.L. Corporation v Department of Environmental Protection*, 875 So. 2d 1257, affirming the Department's conclusion that the department "did not have substantive jurisdiction to correct what it believed to be an erroneous ruling by the ALJ" which ruling related to the ALJ's conclusion that a full evidentiary hearing on the merits was a prerequisite to awarding attorney's fees under Section 120.595, Florida Statutes.

[4] As explained in PGS' Exceptions to the Recommended Order, filed October 15, 2019. PGS believes the conclusion that SSGC is not a natural gas utility is clearly erroneous, but certainly it is contradictory to conclude SSGC is not a natural gas utility and simultaneously use its costs as the "utility's" cost under the rule.

A. That … would be correct.

At the hearing, Mr. Rogers confirmed that testimony at page 545 of the transcript:

> **Q. (By Mr. Brown)** 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.

Mr. Brian Hudson, the corporate representative for The Villages, testified consistent with Mr. Rogers.

> **Q. (By Mr. Brown)** So all the money that is being paid is for purchasing that infrastructure?
>
> **A.** I believe that is how the formula works. It is based on we build it, they buy it. There is a formula for what the price is. (PGS Ex. 77, Hudson 11-15-18 deposition pg. 22).

More significant is the testimony of Al Minner, Leesburg's City Manager. At page 81 of his deposition (PGS Ex. 79), Mr. Minner conceded the critical point that the amount paid under the Agreement is independent of SSGC's cost to install the infrastructure.

> **Q. (By Mr. Brown)** So if the City – in other words, the City is making these payments regardless of what it actually cost 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.

Mr. Minner further confirmed that in his testimony at the hearing:

> **Q. (By Mr. Brown)** The agreement provides this formula under which a certain amount of revenue from the sale of gas is going to The Villages as an enticement for them to allow Leesburg to be the natural gas supplier.
> (Objection omitted)
>
> **A.** Yes.
>
> **Q.** Alright, and that amount of money is going to be based on the amount of gas sold and the amount of revenue derived by the City from customer charges and other charges.
>
> **A.** Essentially yes.

Q. And that is based on the formula set forth in the agreement.
A. Yes.

Q. And there is nowhere in the agreement that ties the amount of those payments to any amount that has been spent on the construction of the infrastructure?
A. That is correct.

Q. And there is nothing in the formulaic approach that takes into account how much money was spent by SSGC in building the infrastructure?
A. There is an underlying assumption on some of the stuff that, from a business approach, that we thought about; but, no, there is nothing in the agreement that specifically ties it.

Q. And for thirty years The Villages will be receiving revenue from the sale of gas in The Villages Developments under this agreement?
A. Yes.

Q. And that will be – and so - - and the total revenue amount that The Villages will be receiving is roughly 52%, approximately, of the total revenue from the sale of gas in The Villages Developments?
A. Yes.

Q. And that is how The Villages was incentivized?
A. Yes.

(Minner, T-456-458).

Mr. Minner later characterized part of the cost as a "pay to play deal" (Minner, T-460).

18. SSGC's cost per home to install the infrastructure is irrelevant because the Commission is **required** to consider the cost of each **utility** to serve the disputed area and the ALJ concluded that SSGC was not to be a utility. SSGC's cost for installation of the infrastructure is irrelevant because it has no bearing on what Leesburg is paying under the Agreement. The only relevant comparison is Leesburg's costs to serve compared with PGS' costs to serve. And, the only evidence that addressed that issue was the testimony of Dr. Stephen Durham showing that Leesburg's cost for the distribution infrastructure would be $186,530,100 compared to PGS' cost for the same infrastructure of $92,800,000. There is no testimony that rebutted that number.

19. The only relevant analysis is that one utility, Leesburg, is required to make payments under the Agreement in order to be able to serve customers in The Villages Development. The other utility, PGS, would not have to make such payments. The unrebutted testimony is that Leesburg's payments under that agreement are approximately double what PGS would pay for the infrastructure over a thirty (30) year period, $186,530,100 as compared to a cost for the same infrastructure of $92,800,000[5] (See testimony of Stephen Durham, T-279-321).

20. The only possible relevance of the SSGC cost per customer of $1,800 was that it is fairly close to the PGS cost of just under $1,600 per customer and to the extent Leesburg challenged the PGS number, which they did not, it would have been relevant to show that PGS was in the ballpark with SSGC.

21. Furthermore, the testimony of Mr. McDonough regarding the $1,219 figure is flawed because there was ample testimony from Mr. McDonough as to the limitations of that number. Mr. McDonough testified that the notes to which he was referring (which had not been provided previously) did not indicate the number of feet of pipe that had been installed, the type of pipe that had been installed, the cost of any of the pipe, the cost of the associated materials, such as fittings and valves, materials cost, or any listing of labor other than to install the meter (McDonough, T-864, 865).

22. For all the reasons set forth above, SSGC's exceptions to findings of fact Nos. 118 and 120 should be rejected.

[5] As noted in PGS' Proposed Recommended Order, filed September 6, 2019 (Paragraph 90) and again in PGS' Exceptions to the Recommended Order, filed October 15, 2019 (Paragraph 25) looking only at the first seven years of the Agreement, the cost to Leesburg for the distribution infrastructure is slightly more than three times PGS' cost.

Exception No. 3

23. SSGC's Exception No. 3 is to Paragraph 39 of the RO in which the ALJ found that the cost for PGS to extend service into Bigham Developments would have been minimal. According to SSGC, there was no competent, substantial evidence to support that conclusion. SSGC's position ignores the unrefuted testimony of Mr. Rick Wall, Vice President of Operations for PGS, that Bigham West was "literally within 5-10 feet of the end of our (PGS) distribution system" (T-152). Mr. Wall also testified that the developments were literally 10 feet to 100 feet from PGS' lines along CR 468 (T-154). SSGC also ignores Mr. Wall's testimony that it would be $100.00-$200.00 to tie into Bigham West (T-156). There is ample competent and substantial evidence to support the ALJ's finding that PGS' cost to serve the Bigham Developments was minimal.

24. SSGC further argues that the cost of PGS' line along CR 468 should have been included in the estimate of PGS' cost to extend service to the Bigham Developments. As the ALJ noted throughout the RO (Paragraphs 70, 74, 91, 95, 129,130, 151, 154, and 162) those lines predated the Bigham Developments, they were **existing** facilities that were not built to specifically serve the Bigham Developments and were therefore properly excluded from any calculation of the incremental cost to serve the Bigham Developments.

25. There is competent substantial evidence to support the ALJ's finding of fact in Paragraph 39 and therefore SSGC's exception to that paragraph must be rejected.

Exception No. 4

26. SSGC's Exception No. 4 takes exception to Paragraphs 74, 85, 86, 88, 130, and 151 of the RO claiming there is no basis for the ALJ to conclude that the starting point for determining whether each utility had existing facilities capable of serving the disputed area were

those that existed at the date the PGS filed its petition to resolve a territorial dispute. This exception is the same as Leesburg's Exception No. 4 and should be rejected on the same basis as provided in PGS' response to Leesburg's exceptions.

27. SSGC argues that the starting point should be the facilities that existed at the time of the *hearing*. Interestingly, SSGC cites no Commission decision or case law to support this theory. But more importantly, evaluating the capability of each utility to serve a territory by what facilities exist at the time of the hearing, rather than at the time the dispute arose or at the time the utility built facilities that were duplicative of another utility's facilities, would condone and encourage "races to serve" and defeat the very purpose of assigning service territories which is to prevent the needless and reckless duplication of facilities. There is no Commission or court decision holding that the starting point for determining whether a utility has facilities capable of serving a territory as of the hearing.

28. Similar to Leesburg's arguments, SSGC takes the position that Leesburg had "lawful obligations" to serve The Villages and that The Villages needed to quickly and efficiently construct homes. But that was not the only option available to SSGC and Leesburg. An option that was available before signing the contract, and the option that was recommended to Leesburg and SSGC, was to obtain a territorial agreement with PGS before embarking on extending Leesburg's lines to serve Bigham Developments, which developments Leesburg and SSGC already knew were closer to PGS' already existing line along CR 468 (Minner, T-451, 454 – 455). Rather than openly and transparently negotiating a territorial agreement, SSGC and Leesburg instead decided to needlessly and recklessly extend lines along CR 501 and CR 468.

29. In September 2017, Mr. Rogers discussed via email the fact that when Leesburg went north of CR 468, it would be infringing on PGS' territory (T- 569-571, PGS Ex. 27). The

topic of a need for a territorial agreement was also discussed between Mr. Rogers and Mr. Tom Geoffroy in November, 2017 (PGS Ex. 29). In the September, 2017 email, (PGS Ex. 27) Mr. Geoffroy writes back to Mr. Rogers stating that Leesburg will ultimately need a territorial agreement between with PGS. Despite that fact, no effort was made prior to the litigation to obtain a territorial agreement (Rogers, T-576).

30. All of the RO paragraphs included in Exception No. 4 are supported by the facts in evidence. SSGC and Leesburg knew that PGS was fully capable of serving the developments in question, that PGS' lines were substantially closer to the Bigham Developments than were any lines from Leesburg, and that Leesburg would have to run miles of pipe along CR 501 and CR 468 in order to serve those customers. Leesburg was aware that it would be encroaching into PGS' territory by extending those lines, and despite Leesburg's own consultant recommending that a territorial agreement with PGS be entered into before the agreement was entered into, SSGC and Leesburg instead chose to sign the Agreement and build the lines along CR 501 and CR 468. These facts clearly substantiate the accuracy of the ALJ's findings regarding the paragraphs contained in Exception No. 4, and because there is competent substantial evidence to support the findings the Commission is powerless to reject them.

31. Fundamentally SSGC argues Leesburg and its reckless actions should be rewarded, that it should reap the benefit of continuing to push forward with construction during the pendency of the territorial dispute, and that the Commission should ignore all of its actions done prior to the date of the hearing. The absurdity of that position is plainly evident.

32. While SSGC has cited no cases in support of this exception, Leesburg has cited cases which support the concept that the determination of which utility should serve is based on what facilities had to be constructed to provide service to the disputed area. In *In re: Petition to*

Resolve Territorial Dispute Between Talquin Electric Cooperative, Inc. and Town of Havana, Order No. PSC-92-1474-FOF-EU, issued December 21, 1992, in Docket No. 920214-EU, the Town of Havana built lines and facilities to serve a new middle school site, which lines and facilities were in existence at the time the dispute arose and prior to the time of the hearing. The Commission found that Havana had engaged in a "race to serve" and that Talquin could serve the disputed area at a substantially less cost. The territory was awarded to Talquin and the Commission stated that because Talquin was awarded the territory the lines Havana built to serve the territory should be dismantled (Order at 2).

33. The Okefenokee order is in accord with the Talquin Order. *In re: Petition to Resolve Territorial Dispute Between Okefenokee Rural Electric Cooperative and Jacksonville Electric Authority*, Order No. PSC-92-1213-FOF-EU, issued October 27, 1992, in Docket No. 911141-EU. At the time of the hearing in the case, JEA had facilities in place and was serving the customer in the disputed area, a Holiday Inn. JEA had unilaterally displaced the service provided by Okefenokee to the Holiday Inn because the customer was within Jacksonville's city limits. JEA had engaged in similar conduct throughout northern Duval County which the Commission determined amounted to "cream skimming," taking the best customers, and the practice had "harmed JEA's and Okefenokee's ratepayers and led to widespread duplication of facilities, adverse to the public interest" (Order at 8). Despite having put in facilities to serve the Holiday Inn at a cost of $53,000, JEA was ordered to return the customer to Okefenokee.

34. Finally, in the Sebring case, *In re: Petition to Resolve Territorial Dispute with Peoples Gas Sys., Inc. by Sebring Gas Sys., a Div. of Coker Fuels, Inc.*, Order No. 25809-GU, issued February 25, 1992, in Docket No. 910653-GU, neither utility had facilities in place to serve the disputed area and the testimony at the hearing was with respect to how long it would take each

utility to put in the facilities to serve the disputed area (Order at 2). That was of concern to the Commission because Sebring had a history of delay in converting its propane gas service to natural gas service. Sebring was able to provide serve to the disputed territory at a cost that was less than Peoples, so Sebring was awarded the territory with the requirement that they begin providing that service at a time specified in the order (Order at 4).

35. SSGC concludes by saying that the RO rewards PGS and "punishes" Leesburg. Such a conclusion indicates a fundamental misunderstanding of how territories in the gas business are expanded. PGS has expanded its lines to reach customers and, in the manner consistent with natural gas utilities throughout Florida, filled in the areas along its lines as customers in those areas came on line. PGS has done so in areas where there were no other natural gas utilities positioned to serve. Leesburg/SSGC on the other hand, has expanded to the edge of PGS' already existing lines, and in some cases crossing those lines, and has done so in the hope that PGS would not object, and that the Commission would ignore its blatant "race to serve" ignoring the close proximity of PGS' already existing infrastructure. Leesburg is not being punished but is instead suffering the consequences of its own hubris in believing that it could ignore the existence of PGS already existing infrastructure and could "pay to play" its way to a more favorable arrangement.

36. SSGC's arguments in Exception 4 are clearly spurious. There is ample competent substantial evidence from Leesburg's witnesses that Leesburg and SSGC engaged in a "race to serve," and there is no case law supporting its arguments that the starting point for assessing the need for additional facilities is as the facilities exist at the time of the hearing. Rather the case law supports the ALJ's finding that Leesburg's had to deploy lines along CR 501 and CR 468 in order to serve the Bigham Developments at a cost that far exceeded the costs to PGS to serve the same

territory. Accordingly, the Commission should reject SSGC's exceptions to the findings of fact in Paragraphs 74, 85, 86, 88, and 130, and Conclusion of Law 151.

Exception No. 5

37. SSGC's Exception No. 5 is closely related to Exception No. 4, and references four of the six paragraphs in the RO that are referenced in Exception No. 4, Paragraphs 85, 88, 130, and 151. PGS' arguments regarding Exception No. 4 apply here as well. The only addition in this exception is that SSGC objects to the term "race to serve" claiming it is not referenced in any statute or rule. While it may be true it is not referenced in rule or statute, "race to serve" is routinely referred to by the Commission and the Florida Supreme Court to describe the needless and reckless duplication of utility facilities that is detrimental to the public interest and which the Commission has a duty to prevent. It is a useful term because it conveys its meaning without having to go into a long explanation of the specifics of what is meant (much like the term "pay to play"). The term "race to serve" is a very descriptive shorthand for the activity a utility (in this case SSGC/Leesburg) engages in when it extends its lines into the territory of another utility (in this case PGS) and then argues that it should not be punished for extending its lines into the other utilities' territory and, since it now has infrastructure in the disputed area, it should be allowed to serve the disputed area. In this case, the "race to serve" went further because the encroaching utility (Leesburg/SSGC) continued its encroachment by continuing to build infrastructure during the pendency of the territorial dispute.

38. The RO accurately characterizes the activity of Leesburg as a "race to serve" and SSGC's exceptions to Paragraphs 85, 88, 130, and 151 of the RO should be rejected.

Exception No. 6

39. SSGC's exception No. 6 relates to Paragraph 162 of the RO taking issue with the ALJ's conclusion that Leesburg's extension of service to Bigham "involved substantial and significant duplication of existing PGS facilities." PGS adopts its analysis of Exception No. 1 above in response to Exception No. 6.

40. SSGC's exception to Paragraph 162 of the RO should be rejected.

Exception No. 7

41. In Exception No. 7, SSGC takes exception to Paragraph 166 of the RO, arguing that there is no substantial evidence to support the conclusion that the factors in Rule 25-7.0472(2)(a)-(d) favor PGS. SSGC is essentially asking that the Commission ignore the vast evidence in the form of exhibits, maps and testimony which show that the costs to serve for Leesburg exceed PGS' cost to serve by millions and millions of dollars: the cost to extend service to the Bigham Developments for PGS was at most $11,000 (T-194, T-200-201) and the cost for Leesburg was $1.94 million (T-555), with an agreement to spend up to $2.2 million; and PGS' cost for the distribution infrastructure (over the 30-year term of the Agreement) was $92,800,000 as compared to Leesburg's cost of $186,530,100 (PGS Ex. 9).

42. SSGC further argues that because this case involves The Villages as the developer, The Villages preference should be given substantial weight. This argument is clearly at odds with Rule 25-0472, F.A.C. The cost for Leesburg to serve the area is significantly more that the cost to PGS. Moreover, the evidence shows Leesburg was selected because it agreed to "pay to play," sharing 52% of the revenues from gas sales with The Villages.

43. SSGC's exception to Paragraph 166 of the RO should be rejected.

Exception No. 8

44. In Exception No. 8, SSGC takes exception to Paragraph 129 of the RO. SSGC argues that the substantial cost differential between Leesburg and PGS should be ignored because the rates Leesburg will charge to Villages customers will be capped by the PGS rate. SSGC cites to no Commission rule or statute in support of its position. In fact, the term "rates" does not appear in Rule 25-7.0472, F.A.C. Rates are not costs as that term is used in Rule 25-7.0472, and are irrelevant to determining which utility should server a territory. SSGC, in this Exception, is doing nothing more than asking the Commission to ignore what Rule 25-7.0472 requires it to consider which is the various costs of each utility. In addition, SSGC argues that by adjudicating this territorial dispute, the Commission would in some form or fashion expand its jurisdiction over Leesburg to an extent greater than Florida law allows. This is simply untrue. The Legislature has, in its wisdom, given authority over territorial disputes to the Commission regardless of whether the disputes involve municipal or an investor owned gas utility. The Commission has rules for how those disputes are to be adjudicated and they do not include consideration of rates.

45. SSGC's exception to Paragraph 129 of the RO should be rejected.

Exception No. 9

46. SSGC's 9^{th} Exception is simply a request that the Commission ignore the ample and overwhelming weight of the competent and substantial evidence that the Commission used to conclude that PGS should serve Bigham Developments.

47. The Commission should reject Leesburg's exception to the ALJ's Conclusion and Recommendation.

CONCLUSION

All of SSGC's Exceptions to the RO should be rejected by the Commission. None of the bases on which SSGC requests the Commission reject the findings of fact or conclusion of law meet the standards outlined in Section 120.57 (1)(*l*), Florida Statutes.

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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 25th day of October, 2019.

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