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Commission Conference Agenda
January 14, 2020

Item 1

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 2, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of Industry Development and Market Analysis (Wendel)
Office of the General Counsel (Passidomo)

RE: Application for Certificate of Authority to Provide Telecommunications Service

AGENDA: 1/14/2020 - Consent Agenda - Proposed Agency Action - Interested Persons May Participate

SPECIAL INSTRUCTIONS: None

Please place the following Application for Certificate of Authority to Provide Telecommunications Service on the consent agenda for approval.

DOCKET NO.	COMPANY NAME	CERT. NO.
20190212-TX	Compu-Design USA Inc. dba Dade Institute of Technology	8944

The Commission is vested with jurisdiction in this matter pursuant to Section 364.335, Florida Statutes. Pursuant to Section 364.336, Florida Statutes, certificate holders must pay a minimum annual Regulatory Assessment Fee if the certificate is active during any portion of the calendar year. A Regulatory Assessment Fee Return Notice will be mailed each December to the entity listed above for payment by January 30.

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 2, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Accounting and Finance (Richards, D. Buys, Cicchetti)
Office of the General Counsel (Lherisson, Schrader)

RE: Docket No. 20190205-GU - Application for authorization to issue common stock, preferred stock and secured and/or unsecured debt, and to enter into agreements for interest rate swap products, equity products and other financial derivatives in 2020, by Chesapeake Utilities Corporation.

AGENDA: 1/14/2020 - Consent Agenda - Final Action - Interested Persons May Participate

SPECIAL INSTRUCTIONS: None

Please place the following debt security application on the consent agenda for approval.

Docket No. 20190205-GU – Application for authorization to issue common stock, preferred stock and secured and/or unsecured debt, and to enter into agreements for interest rate swap products, equity products and other financial derivatives in 2020, by Chesapeake Utilities Corporation.

Chesapeake Utilities Corporation (Chesapeake or Utility) seeks authority to issue during calendar year 2020: up to 8.8 million shares of Chesapeake common stock; up to 2 million shares of Chesapeake preferred stock; up to $650 million in secured and/or unsecured debt; to enter into agreements for up to $200 million in interest rate swap products, equity products and other financial derivatives; and to issue short-term obligations in an amount not to exceed $370 million.

Chesapeake allocates funds to the Chesapeake Utilities Corporation – Florida Division, Florida Public Utilities Company (FPUC), FPUC – Indiantown Division, and FPUC – Fort Meade Division on an as-needed basis. Chesapeake acknowledges that in no event will such allocations to the Florida Divisions exceed 75 percent of the proposed equity securities (common stock, and preferred stock), long-term debt, short-term debt, interest rate swap products, equity products, and financial derivatives issued by Chesapeake.

Pursuant to Section 366.04, Florida Statutes (F.S.), the Commission shall have jurisdiction to regulate and supervise each public utility in the issuance and sale of its securities, except a security which is a note or draft maturing not more than one year after the date of such issuance

and sale, and aggregating not more than 5 percent of the par value of the other securities of the public utility then outstanding.

The amount requested by Chesapeake exceeds its expected capital expenditures of $268.4 million for Chesapeake Utilities Corporation ($153 million for the Florida Divisions). The additional amount requested exceeding the projected capital expenditures allows for financial flexibility for the purposes enumerated in the Utility's petition, as well as, unexpected events such as hurricanes, financial market disruptions, and other unforeseen circumstances. Staff believes the requested amounts are appropriate. Staff recommends the Utility's petition to issue securities be approved.

For monitoring purposes, this docket should remain open until May 7, 2021, to allow the Utility time to file the required Consummation Report.

Item 2

REVISED

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 6, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Trierweiler, Harper)
Division of Economics (Coston, Draper, Guffey)
Division of Engineering (Ballinger)

RE: Docket No. 20180055-GU – 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.

AGENDA: 01/14/2020 – Regular Agenda – Post Hearing Decision – Participation is limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Polmann

CRITICAL DATES: The Commission's final order must be furnished to DOAH no later than February 20, 2020

SPECIAL INSTRUCTIONS: None

Case Background

On February 23, 2018, Peoples Gas System (PGS) filed a petition pursuant to Section 366.04(3)(b), Florida Statutes (F.S.), and Rule 25-7.0472, Florida Administrative Code (F.A.C.), (Petition), requesting that the Commission resolve a territorial dispute between PGS and the City of Leesburg (Leesburg) and South Sumter Gas Company, LLC (SSGC). The Petition alleged that PGS and Leesburg or SSGC were in a dispute as to the rights of each to provide natural gas services to the customers in Sumter County, Florida, including The Villages. The area in dispute is characterized by residential areas of varying density, interspersed with commercial support areas, and is referred to in the evidence as Bigham North, Bigham West, Bigham East (collectively "Bigham" or the "disputed area").

On August 21, 2018, the Commission Chairman directed the Commission Clerk to refer the case to the Division of Administrative Hearings (DOAH). DOAH accepted a letter from the Clerk and assigned an Administrative Law Judge (ALJ) for the purpose of conducting an administrative hearing and issuing a Recommended Order[1] on the territorial dispute filed on the same day. On August 22, 2018, the ALJ's procedural Initial Order was filed in the docket under DOAH Case No. 18-004422.

Administrative law judge (ALJ) Gary Early conducted the three-day hearing which began on June 24, 2019. Following the evidentiary proceedings on June 24, 2019, the ALJ held a public comment period. No customers or other members of the public appeared. At the hearing, PGS called six witnesses and entered 34 exhibits into the record. Leesburg called five witnesses and entered 20 exhibits into the record. SSGC called three witnesses and entered 18 exhibits into the record. The hearing concluded on June 27, 2019. Each party timely filed its proposed recommended orders. The ALJ issued his Recommended Order awarding the disputed territory to PGS on September 30, 2019. The Recommended Order is attached to this recommendation as Attachment A.

On October 15, 2019, the parties submitted exceptions to the Recommended Order. The exceptions are attached to this recommendation as Attachment B. On October 25, 2019, each party filed a Response to Exceptions, which are found as Attachment C to the staff's recommendation.

Section 120.57(1)(l), F.S., establishes the standards an agency must apply in reviewing a Recommended Order following a formal administrative proceeding. The statute provides that the agency may adopt the Recommended Order as the Final Order of the agency or may modify or reject the Recommended Order. An agency may only reject or modify an ALJ's findings of fact if, after a review of the entire record, the agency determines and states with particularity 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]

Section 120.57(1)(l), F.S., also states that an agency in its final order may reject or modify conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction. When rejecting or modifying a conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying the 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.[3]

In regard to parties' exceptions to the ALJ's Recommended Order, Section 120.57(1)(k), F.S., provides that the Commission does not have to rule on exceptions that fail to clearly identify the disputed portion of the Recommended Order by specific page numbers or paragraphs or that do

[1] "Recommended Order" is defined in Section 120.52(15), F.S., as the official recommendation of the ALJ assigned by DOAH or of any other duly authorized presiding officer, other than the agency head or member thereof.
[2] Section 120.57(1)(l), F.S.
[3] *Id.*

not identify the legal basis for the exception, or those that lack appropriate and specific citations to the record.[4] Section 120.57(1)(l), F.S., requires the Commission's final order to include an explicit ruling on each exception and sets a high bar for rejecting an ALJ's findings.

Overview of the Recommended Order

As a public gas utility, PGS began construction in August of 2017 to provide natural gas services to the Fenney residential development as part of The Villages in the northwest corner of the City of Wildwood, in Sumter County. One month later, The Villages began exploring other options to provide gas services to its next phase of residential developments, to be constructed immediately adjacent to Fenney. The Villages then formed SSGC to serve as its construction affiliate. The ALJ determined that SSGC is a construction company, not a gas utility. SSGC began searching for an alternate natural gas service provider for the yet to be constructed Bigham development. SSGC entered into a contractual agreement (Agreement) with Leesburg, a municipal gas utility, with an effective date of February 13, 2018. Under the Agreement, SSGC would construct the gas infrastructure necessary to serve Bigham and then sell the system to Leesburg. In accordance with their "pay to play" arrangement under the Agreement, Leesburg was also obligated to remit a significant share of its gas revenues back to SSGC.[5] The Agreement set the initial rates for Bigham at the same rates that were being paid by PGS customers.

The distance from PGS's preexisting distribution line into any of the Bigham developments was between 10 to 100 feet. PGS's total cost of connecting to the Bigham interior service lines were determined to be, at most, $10,000, and its cost of extending gas distribution lines was, at most, $11,000. The Recommended Order found that the cost differential between Leesburg's and PGS's costs to serve was far from de minimis. The Recommended Order also found that Leesburg embarked upon a "race to serve" Bigham, with knowledge of PGS's presence and service to the adjacent area. In order to reliably serve Bigham, Leesburg had SSGC 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 between $1,212,207 and $2,200,000. The miles of gas distribution lines that SSGC built and sold to Leesburg under the Agreement, resulted in an uneconomic duplication of facilities. Leesburg's new County Road (CR) 468 line runs parallel along the preexisting PGS line for its entire route and crosses the PGS line in places.

In his Recommended Order, the ALJ detailed the relevant facts and legal precedent required to conduct the cost-to-serve-comparison based on the factors in Rule 25-7.0472, F.A.C. In his conclusion, the ALJ recommended that the right to serve Bigham be awarded to PGS on such terms as deemed appropriate by the Commission.

This recommendation, which is based upon review of the entire record of the hearing and post-hearing submissions, addresses whether the Commission should adopt the ALJ's Recommended Order as filed, make any changes to the order, or act on any of the matters raised in the parties' exceptions to the Recommended Order. Issues 1-2 address the post-hearing submissions by PGS,

[4] Section 120.57(1)(k), F.S.
[5] Although significant to PGS, the "pay to play" amounts do not play a role in the analysis of the territorial dispute, as "pay to play" amounts are not identified as a factor in Rule 25-7.0472, F.A.C. The ALJ does note that under the Commission's cost-based rate setting oversight, PGS, as a public utility, could not "pay to play."

SSGC, and Leesburg. Issue 3 addresses the adoption of the ALJ's Recommended Order. The Commission has jurisdiction pursuant to Sections 120.57 and 366.04, F.S.

The Commission's Legal Authority over Natural Gas Territorial Disputes and the Underlying Role or Consideration of Uneconomic Duplication of Facilities

Before the Legislature provided the Commission with explicit authority to approve territorial agreements and resolve territorial disputes in 1974, the Commission determined it had implicit authority to eliminate or minimize uneconomic duplication of facilities constructed by investor-owned electric and natural gas utilities. When it approved a territorial agreement between City Gas Company and Peoples Gas System in 1960, the Commission stated:

> It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest. Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic regulation, in such cases, is better than, and takes the place of competition. A public utility is entitled under the law to earn a reasonable return on its investment. If two similar utilities enter the same territory and compete for the limited business of the area, each will have fewer customers, but there inevitably will be excess facilities which must earn a reasonable return. The rates in such a situation will be higher than the service is worth, or customers in more remote areas will bear some of the unjustified expense necessary to support such economic waste.

Order No. 3051, issued November 9, 1960, in Docket No. 6231-GU, *In re: Territorial Agreement between Peoples Gas System, Inc., and City Gas Company of Florida*, p.1. The avoidance or elimination of uneconomic duplication of facilities is one of the cornerstones that has governed the Commission is its decision making over territorial matters since it approved the first territorial agreement brought before it in 1958. *Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida*, Richard Bellak and Martha Carter Brown, 19 *Fla. St. U. L. Rev.* 407, 410 (1991).

The Legislature gave the Commission explicit authority over electric territorial agreements and disputes when it enacted certain revisions to Chapter 366, F.S., in 1974. *Id.* at 414-416. "Under [these revisions], the Commission's jurisdiction to ensure the adequacy of the grid and to prevent uneconomic duplication of facilities included ... authority [in part] ... to review and approve territorial agreements and resolve territorial disputes involving all types of utilities, not just investor-owned utilities." *Id.* at 415. Section 366.04, F.S., which provides for the Commission's jurisdiction over electric territorial agreements and disputes, was further amended in 1989 to provide the Commission with authority over natural gas territorial agreements and disputes.[6]

[6] Ch. 89-292, 1989 Fla. Laws

With respect to the resolution of territorial disputes between electric or natural gas utilities, Section 366.04, F.S., provides the Commission may consider:

> the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

Section 366.04(2)(e) and (3)(b), F.S.

To capture all types of utilities supplying gas, the Legislature broadened the Commission's authority over natural gas utilities to:

> any utility which supplies natural gas or manufactured gas or liquefied gas with air admixture, or similar gaseous substance by pipeline, to or for the public and includes gas public utilities, gas districts, and natural gas utilities or municipalities or agencies thereof.

Section 366.04(3)(c), F.S.

To implement its authority, the Commission adopted Rule 25-7.042, F.A.C., to govern territorial disputes between natural gas utilities. The rule provides:

> 25-7.0472 Territorial Disputes for Natural Gas Utilities.
>
> (1) A territorial dispute proceeding may be initiated by a petition from a natural gas utility, requesting the Commission to resolve the dispute. Additionally the Commission may, on its own motion, identify the existence of a dispute and order the affected parties to participate in a proceeding to resolve it. Each utility which is a party to a territorial dispute shall provide a map and written description of the disputed area along with the conditions that caused the dispute. Each utility party shall also provide a description of the existing and planned load to be served in the area of dispute and a description of the type, additional cost, and reliability of natural gas facilities and other utility services to be provided within the disputed area.
>
> (2) In resolving territorial disputes, the Commission shall consider:
>
> (a) The capability of each utility to provide reliable natural gas service within the disputed area with its existing facilities and gas supply contracts and the extent to which additional facilities are needed;
>
> (b) The nature of the disputed area and the type of utilities seeking to serve it and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;
>
> (c) The cost of each utility to provide natural gas service to the disputed area presently and in the future; which includes but is not limited to the following:
>
> 1. Cost of obtaining rights-of-way and permits.
>
> 2. Cost of capital.

3. Amortization and depreciation.

4. Labor; rate per hour and estimated time to perform each task.

5. Mains and pipe; the cost per foot and the number of feet required to complete the job.

6. Cost of meters, gauges, house regulators, valves, cocks, fittings, etc., needed to complete the job.

7. Cost of field compressor station structures and measuring and regulating station structures.

8. Cost of gas contracts for system supply.

9. Other costs that may be relevant to the circumstances of a particular case.

(d) Other costs that may be relevant to the circumstances of a particular case.

(e) Customer preference if all other factors are substantially equal.

(3) The Commission may require additional relevant information from the parties of the dispute if so warranted.

The Commission also adopted a rule to govern territorial agreements. The rules governing territorial agreements for both electric and natural gas utilities provide the Commission may consider "[t]he reasonable likelihood that the agreement will eliminate existing or potential uneconomic duplication of facilities." Rules 25-6.0440(2)(c) and 25-7.0471(2)(c), F.A.C.

Every territorial issue that comes before the Commission is fact specific. When resolving a dispute, the Commission looks at the location of the lines and the abilities of the utilities to serve before a dispute is commenced. Where one utility takes action to serve a territory that could be more easily be served by another utility, the Commission has found a race to serve. *See* Order No. PSC-92-1474-FOF-EU, issued December 21, 1992, in Docket No. 920214-EU, *In re: Petition to Resolve Territorial Dispute Between Talquin Elec. Coop., Inc. & Town of Havana* (The Commission awarded Talquin Electric the disputed area because "Havana's actions to construct service lines to the disputed area constituted a race to serve." Havana never approached the other utility about service arrangements and constructed lines to cut off the other utilities ability to serve.)

Whether a utility "raced to serve" a disputed area is but one of the factors the Commission and Florida Supreme Court have considered when evaluating whether uneconomic duplication exists and determining how to resolve a territorial dispute. In particular, the Supreme Court.observed:

> certain factors are relevant to a determination of whether uneconomic duplication is likely to occur. These factors, which are not exclusive, include the utilities' costs to provide service, "lost revenues for the non-serving utility, aesthetic and safety problems, proximity of lines, adequacy of existing lines, whether there has been a 'race to serve,' and other concerns ..." *Clark*, 674 So. 2d at 123. A utility's historical presence in an area may also be relevant to the Commission's analysis. *W. Fla. Elec. Coop. Ass'n, Inc. v. Jacobs*, 887 So. 2d 1200, 1205 (Fla. 2004).

Choctawhatchee Elec. Co-op., Inc. v. Graham, 132 So. 3d 208, 216 (Fla. 2014).

Discussion of Issues

Issue 1: Should the Commission accept any of the exceptions filed by PGS?

Recommendation: No. PGS has failed to present any legally justifiable basis for rejecting or modifying any portion of the Recommended Order. Therefore, staff recommends that the Commission deny PGS's exceptions to Conclusion of Law 147 and 160 and disregard its request for additional requested conditions. (Trierweiler, Harper)

Staff Analysis: PGS filed exceptions with respect to the ALJ's Conclusions of Law 147 and 160.

PGS Exception to Conclusion of Law 147

PGS takes exception with the ALJ's conclusion of law in Conclusion of Law 147, which states:

> Conclusion of Law 147. The Agreement between Leesburg and SSGC does not confer duties on SSGC that would cause it to become a supplier of natural gas. Thus, SSGC is not a "natural gas utility" as defined in section 366.04(3)(c). Furthermore, the evidence establishes that the relationship between Leesburg and SSGC has not created a "hybrid utility" of which SSGC is a part.

PGS asserts that the Agreement entered into by Leesburg and SSGC created a "hybrid utility" or "public utility" under Section 366.02(1), F.S. PGS reiterates its arguments from the hearing that the SSGC is acting as a hybrid or public utility that should be regulated by the Commission due to the number of responsibilities taken and decisions made by SSGC in the construction of gas infrastructure and providing natural gas services to Bigham.

PGS argues the ALJ's Conclusion of Law 147, which holds that SSGC is not a natural gas utility as defined in Section 366.04(3)(c),[7] F.S., does not answer the question of whether the Agreement creates a "public utility" as defined in Section 366.02(1),[8] F.S. PGS states that the definition provided in 366.04(3)(c), F.S., is only to make clear that the Commission's jurisdiction to approve territorial agreements and resolve territorial disputes extends beyond Commission-

[7] Section 366.04(3)(c), F.S., provides as Follows: "For purposes of this subsection, 'natural gas utility' means any utility which supplies natural gas or manufactured gas or liquefied gas with air mixture, or similar gaseous substance by pipeline, to or for the public and includes gas public utilities, gas districts, and natural gas utilities or municipalities or agencies thereof."

[8] Section 366.02(1), F.S., provides as follows: "'Public utility' means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term "public utility" does not include either a cooperative now or hereafter organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof; any dependent or independent special natural gas district; any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial consumers; any entity selling or arranging for sales of natural gas which neither owns nor operates natural gas transmission or distribution facilities within the state; or a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, or owning or operating facilities beyond the outlet of a meter through which natural gas is supplied for compression and delivery into motor vehicle fuel tanks or other transportation containers, unless such person also supplies electricity or manufactured or natural gas."

regulated natural gas utilities. PGS essentially argues that the ALJ legal conclusion is erroneous in the absence of addressing the question of whether the Agreement between Leesburg and SSGC creates a public utility within the meaning of Section 366.02, F.S.

SSGC's and Leesburg's Reponses

SSGC and Leesburg argue there is no evidence or case law supporting PGS's "hybrid utility" argument. Leesburg is acting as the sole utility and will maintain the natural gas system and manage and operate the system. Because SSGC will play no role in supplying natural gas to customers, SSGC and Leesburg assert PGS's argument was properly rejected by the ALJ.

Leesburg's witness Rogers testified that the Commission, recognizing Leesburg as the sole utility, has interacted with Leesburg with respect to the construction of Bigham from the very beginning.[9] Likewise, Leesburg bills the customers; Leesburg is responsible for the safety of the system including the customers within The Villages; and Leesburg provides the safety reports to and interacts with the Commission.[10]

Leesburg also offers several arguments in opposition to PGS's attempt to reargue the "hybrid utility" conclusion in Conclusion of Law 147. Leesburg notes there is competent, substantial evidence of record to support Conclusion of Law 147,[11] and that PGS failed to file an exception to the ALJ's Findings of Fact 7, 9, 57, and 63, which directly support Conclusion of Law 147. Significantly, Leesburg notes that Conclusion of Law 147 is supported by the ALJ's Finding of Fact 63.

Leesburg also addresses PGS's assertion that the ALJ did not properly consider the broader definition of a utility in Section 366.02(1), F.S. Leesburg argues that PGS ignores the ALJ's Conclusions of Law 136 and 137 which indicate, by virtue of citing both sections of law, that the ALJ did consider the two statutes:

> Conclusion of Law 136. The Commission regulates "public utilities," as that term is defined in section 366.02(1), which are entities that "supply" natural gas to or for the public.
>
> Conclusion of Law 137. The Commission has "authority over natural gas utilities," pursuant to section 366.04(3), for the resolution of "any territorial dispute involving service areas between and among natural gas utilities."

SSGC adds that "an agency has no authority to make independent or supplemental findings of fact."[12] In other words, if PGS's exception was granted, several supplemental findings of fact would be required to support the substituted conclusion of law, and the Commission has no such authority to make independent or supplemental findings of fact. For that reason alone, SSGC contends that the exception should be denied. For the above reasons, SSGC and Leesburg assert that Conclusion of

[9] Rogers, TR 532.
[10] Rogers, TR 547.
[11] Rogers, TR 440-443, 547-548, 623-624, and 545-548.
[12] *Friends of Children v. Dep't of Health and Rehabilitative Servs.*, 504 So. 2d 1345, 1347-48 (Fla. 1st DCA 1987).

Law 147 is supported by competent, substantial evidence and may not be modified or rejected by the Commission.

Staff Analysis and Conclusion

In its exception to Conclusion of Law 147, PGS argues if the ALJ had used the broader public utility definition contained within Section 366.02(1), F.S., the ALJ would have found that the business Agreement between Leesburg and SSGC resulted in the creation of a "hybrid utility." To reach this conclusion, PGS invites the Commission to reevaluate the contract between Leesburg and SSGC concerning the construction and operation of the gas lines to serve Bigham and to reach a contrary conclusion regarding this contract.

As Leesburg provided in its response to PGS's exceptions, the ALJ analyzed the definitions in both statutes, in conjunction with the factual record of the case, before reaching his conclusion of law. PGS neglected to file an exception to Finding of Fact 63, which directly supports the ALJ's Conclusion of Law:

> Finding of Fact 63. The evidence establishes that, under the terms of the Agreement, Leesburg is the "natural gas utility" as that term is defined by statute and rule. The evidence establishes that SSGC is, nominally, a gas system construction contractor building gas facilities for Leesburg's ownership and operation. The evidence does not establish that the Agreement creates a "hybrid" public utility.

PGS failed to demonstrate that the ALJ erred in Conclusion of Law 147. The ALJ's conclusion is based upon Findings of Fact that are supported by uncontroverted competent, substantial evidence after conducting a detailed analysis. PGS failed to offer sufficient justification that the ALJ ignored Section 366.02(1), F.S.

In addition, the Commission's jurisdiction over municipalities is limited to rate structure, safety oversight and territorial disputes.[13] PGS is asking the Commission to go beyond its jurisdiction to interpret a contract between a municipality and a private company.[14] While a territorial agreement or dispute triggers the Commission's jurisdiction, it does not, in and of itself, provide the Commission with new or additional regulatory authority over a municipal utility's contractual agreements.[15] Leesburg is a municipal utility and SSGC is a private construction company.

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[13] Section 366.06(2), F.S.

[14] Section 171.208, F.S., establishes that municipalities have the authority to provide services and facilities in areas outside of their municipal boundaries "subject to the jurisdiction of the Public Service Commission to resolve territorial disputes under s. 366.04."

[15] There is no evidence in the record of a rule, order, or statute that gives the Commission authority to regulate how or when a municipal utility provides service to its customers. If on the other hand, there was evidence a company was acting as a public utility under the statute, the Commission would have ratemaking and service authority over that utility. In this case, staff believes there is insufficient record evidence that SSGC was acting as a utility.

PGS made the "SSGC is a hybrid public utility" argument at hearing, and the ALJ addresses the arguments in the Recommended Order.[16] Conclusion of Law 147 is supported by competent, substantial evidence in the record. As noted in uncontested Finding of Fact 63, PGS has failed to support a contrary conclusion that is as or more reasonable than the one reached by the ALJ.[17] For the above stated reasons the Commission should deny PGS's exception to Conclusion of Law 147.

PGS Exception to Conclusion of Law 160

PGS also takes exception with the ALJ's Conclusion of Law 160, which states:

> Conclusion of Law 160. The cost-per-home for Leesburg and SSGC to provide service in Bigham is $1,800. In addition, Leesburg will be installing automated meters at a cost of $72.80 per home. The preponderance of evidence indicates that PGS cost-per-home is $1,579.

PGS takes issue with Conclusion of Law 160 because the ALJ determined Leesburg's cost to serve by deriving the cost evidence put forth by SSGC. PGS asserts that the evidence of the cost to serve cannot come from SSGC, but must come from Leesburg as the utility.[18] PGS argues that Leesburg's total costs are not simply SSGC's costs, but should include other total costs as provided under the Agreement. PGS also resurrects its arguments from its exception to Conclusion of Law 147, by suggesting that if the ALJ accepts the information from SSGC, that would mean that SSGC is a public utility.

SSGC's and Leesburg's Reponses

SSGC and Leesburg argue PGS is asking the Commission to revisit and reevaluate certain evidence and expert testimony and to substitute its own findings. SSGC and Leesburg argue PGS made this argument at hearing and it was properly rejected by the ALJ. Leesburg specifically highlights Finding of Fact 123:

> Finding of Fact 123. There was considerable evidence and testimony as to the revenues that would flow to SSGC under the 30-year term of the Agreement. SSGC's revenues under the Agreement are not relevant as they are not identified as such in rule 25-7.0472, and are not directly related to the rates, which will likely not exceed PGS's regulated rate.

Leesburg argues that in Finding of Fact 123, the ALJ rejected the testimony of PGS witness Durham by holding that the revenues generated by SSGC under the Agreement with Leesburg were not relevant as to the "pay to play deal" and did not fall within one of the factors for consideration under the Territorial Dispute Rule, 25-7.0472, F.A.C.

Staff Analysis and Conclusion

PGS asks the Commission to reweigh the evidence and use a different analysis to compute Leesburg's costs to serve. The ALJ relied upon SSGC's cost to serve evidence in order to make the determination on Leesburg's costs to serve Bigham. The record shows that SSGC was the

[16] Findings of Fact 3, 7, and 63.
[17] Section 120.57(1)(1), F.S.

contractor responsible for constructing the natural gas infrastructure required to serve the Bigham Developments, and that the Agreement between SSGC and Leesburg requires SSGC to bill Leesburg for its construction of the gas infrastructure and that Leesburg would purchase the infrastructure from SSGC after construction was completed. The ALJ's reliance upon SSGC's costs to construct the gas infrastructure necessary for Leesburg to serve Bigham, particularly in absence of contrary evidence from Leesburg, is not erroneous, and is supported by competent, substantial evidence. In Finding of Fact 123, the ALJ clearly rejected the evidence offered by PGS witness Durham, and declared that the revenues that would flow under the Agreement to SSGC were not relevant to the determination of Leesburg's cost to serve.

Moreover, Conclusion of Law 160 was derived directly from the factual findings addressed in Findings of Fact 118 and 119 of the Recommended Order, neither of which were challenged by PGS:

> Finding of Fact 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.
>
> Finding of Fact 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.

PGS's failure to object to Findings of Fact 118, 119, and 123 precludes it from taking exception with Conclusion of Law 160. A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact."[19] The ALJ's unchallenged factual findings support the conclusion of law in Conclusion of Law 160 and PGS has waived the right to challenge it.

The ALJ assesses the weight of evidence and the Commission may not reweigh Findings of Fact absent a showing that the finding was not based on competent, substantial evidence.[20]

Further, PGS did not offer a compelling legal basis for its contention that its proffered substitution is as or more reasonable than the ALJ's conclusion of law on the topic of Leesburg's cost per home. When an agency rejects or modifies a 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 the ALJ's conclusion or interpretation.[21] Therefore, based on the foregoing reasons, the Commission should deny this exception.

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[19] *Envtl. Coalition of Fla., Inc.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc.*, 847 So. 2d 540, at 542 (Fla. 4th DCA 2003).
[20] *Rogers v. Department of Health*, 920 So. 2d at 30.
[21] Section 120.57(1)(1), F.S.

PGS's Request for Additional Conditions

In paragraphs 29-33 of its exceptions, PGS requests that the Commission, in support of the ALJ's Recommended order awarding PGS the right to serve the disputed area, order the following additional conditions:

- Customers must be transferred to PGS within 90 days of the Commission's final order.
- PGS must pay SSGC or Leesburg no more than $1,200 per resident customer within the Bigham Developments.
- The Commission should apply its policies regarding disputes involving a race to serve and prohibit Leesburg from serving customers using the lines along CR 501 and along SR 44 and CR 468 that were built to serve the disputed area.
- Leesburg should be prohibited from serving, either temporarily or permanently, any customers along the route.

PGS states that Commission precedent supports its additional requested conditions and encourages the Commission to apply its policies to grant these requested remedies to PGS as the prevailing party in the territorial dispute and against Leesburg for its failed race to serve and uneconomic duplication.

SSGC's and Leesburg's Reponses

SSGC and Leesburg argue that the Commission may not act on PGS's requests based upon a variety of reasons which include a lack of jurisdiction, that the actions would constitute an improper taking, and that to do so would go beyond the ALJ's findings and conclusions of law.

SSGC characterizes PGS's request for additional conditions as proposed "exceptions" that fail scrutiny under the requirements of the Administrative Procedure Act (APA). Specifically, SSGC refers to Section 120.57(1)(k), F.S., which provides that an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. Additionally, Section 120.57(1)(1), F.S., expressly provides that rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

Staff Analysis and Conclusion

The ALJ concludes the Recommended Order as follows:

> Based on the Findings of Fact and Conclusions of Law set forth herein, it is RECOMMENDED that the Public Service Commission enter a final order awarding Peoples Gas System the right to serve Bigham North, Bigham West, and Bigham East. *The award should be on such terms and conditions regarding the acquisition of rights to facilities and infrastructure within the Bigham*

> *developments by Peoples Gas from the City of Leesburg or South Sumter Gas Company, LLC, as deemed appropriate by the Commission.*

[emphasis added][22]

As the prevailing party in the dispute, PGS appears to seize upon the ALJ's invitation, stated in italics above, to support its request for additional conditions. For this reason, PGS specifically asserts that it would be appropriate for the Commission to make an additional finding that PGS pay no more than $1,200 per resident/customer within the Bigham Developments. PGS also argues that the Commission should adopt all of the conditions because doing so would be consistent with the Commission's actions taken in prior territorial disputes which involve uneconomic duplication or a "race to serve" where the Commission awarded the prevailing party similar conditions.

However, any request for additional conditions must be supported by evidence in the record. Section 120.57(1)(k), F.S., states that an agency need not rule on an exception that does not clearly identify the disputed potion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. The condition related to the $1,200 cap on payment per home amount was supported by evidence that was rejected by the ALJ's ruling in a Motion to Strike and is inconsistent with the $1,800 per home amount in Finding of Fact 118. The Commission may not disturb the ALJ's evidentiary ruling or make additional or alternate findings of fact.

The additional conditions sought by PGS in Paragraphs 29-33 of its exceptions should have been made during hearing and were not. Further they are beyond the scope of consideration made by the ALJ in Conclusion of Law 152:

> Conclusion of Law 152. The area subject to this territorial dispute is that of the three Bigham Developments, Bigham North, Bigham West, and Bigham East.

As such, PGS's request for additional conditions is improper comment and does not qualify as proper exceptions. For the reasons stated above, staff recommends that the Commission disregard PGS's request for additional conditions found in Paragraphs 29-33 of its exceptions.

Conclusion

PGS has failed to present any legally justifiable basis for rejecting or modifying any portion of the Recommended Order. Therefore, for the above stated reasons, staff recommends that the Commission deny PGS's exceptions to Conclusions of Law 147 and 160 and disregard its request for additional conditions.

[22] Recommended Order, page 63.

Issue 2: Should the Commission accept any exceptions filed by SSGC or Leesburg?

Recommendation: No. SSGC and Leesburg have failed to present any legally justifiable basis for rejecting or modifying any portion of the Recommended Order. Therefore, staff recommends that the Commission deny all of SSGC's and Leesburg's filed exceptions. (Trierweiler, Harper)

Staff Analysis: SSGC and Leesburg took issue with several of the ALJ's findings and conclusions that led to awarding the disputed territory to PGS. Where the arguments and positions of SSGC and Leesburg are aligned, they are addressed together below:

Cost-Per-Home – Exceptions to Findings of Fact 118 and 120

One of the issues raised in the territorial dispute is the cost-per-home for Leesburg to install the distribution infrastructure in the Bigham developments. SSGC and Leesburg argue that the cost-per-home is $1,219; however, the ALJ found the cost to be $1,800. The ALJ found in Findings of Fact 118 and 120:

> Finding of Fact 118. The cost-per-home for Leesburg and SSGC is $1800 (*see* ruling on Motion to Strike). In addition, Leesburg will be installing automatic meters at a cost of $72.80 per home.
>
> Finding of Fact 120. The cost-per-home is a factor -- though slight -- in PGS's favor.

Before making these findings, the ALJ struck testimony of SSGC witness McDonough concerning his updated figure for the cost-per-home. The ALJ determined that the revised $1,219 figure as testified to by McDonough was created so late in the proceeding that PGS had no opportunity to discover or learn of the revised amount.

According to SSGC and Leesburg, the ALJ committed error by granting PGS's Motion to Strike and excluding evidence on Leesburg's cost-per-home. SSGC argues this ruling created a *de facto* new discovery rule because SSGC timely provided cost documentation to PGS in pretrial discovery, which provided the foundational basis for witness McDonough's testimony. SSGC argues PGS could have discovered the facts at issue if it had taken depositions of SSGC's witness. SSGC and Leesburg also argue that the ALJ failed to correctly apply Section 90.403, F.S., because the ALJ made no finding of prejudice.[23]

PGS's Response

PGS asserts $1,800 is SSGC's cost-per-home of installing distribution infrastructure, but not the total cost to Leesburg to purchase the infrastructure. PGS argues it is not clear whether the $1,800 figure includes all the relevant costs outlined in Rule 25-7.0472, F.A.C. PGS also argues that SSGC's costs are not Leesburg's costs, unless SSGC is in fact a hybrid utility.

[23] Section 90.403, F.S., provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.

According to PGS, the genesis of these exceptions is the ALJ's decision to strike witness McDonough's testimony that SSGC's cost to serve was $1,219 per residence. 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." The ALJ found that because Mr. McDonough testified the additional calculations were completed 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. PGS argues, as a matter of law, that the Commission is powerless to reject the ALJ's evidentiary ruling excluding Mr. McDonough's testimony. The Commission does not have the authority to change the ALJ's finding of fact regarding the cost-per-home 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.

Staff Analysis and Conclusion

SSGC and Leesburg failed to file additional exceptions to the ALJ's Findings of Fact that are central to his determination of the cost to serve. For example, no exceptions were filed to Finding of Fact 89, which places PGS's facilities required to serve Bigham in a location directly adjacent to Bigham with no additional facilities needed, or to Finding of Fact 91, which estimates PGS's cost to reach the disputed territory from its existing facilities in Fenney to be from $500 to $1,000. Nor were exceptions filed to the ALJ's findings that Leesburg required substantial additional facilities to serve the disputed territory (Finding of Fact 93) and would incur significantly more cost to serve the disputed area (Finding of Fact 96). By failing to file exceptions to these findings, SSGC and Leesburg waived their objections to the ALJ's determination of the cost to serve.[24]

The Commission should not substitute the alternate $1,219 amount because this amount was stricken from the record by the ALJ. The Commission may reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.[25] Staff agrees with PGS that the ALJ's evidentiary ruling to strike this evidence falls outside of the Commission's substantive jurisdiction and should not be disturbed.

In addition, staff recommends that SSGC and Leesburg are seeking to have the Commission reweigh the evidence, and their request for the Commission to make exceptions to Findings of Fact 118 and 120 should be denied.[26]

Cost (To Serve) Differential – Exceptions to Findings of Fact 39, 97, and 129 and Conclusions of Law 155, 156, and 157

The ALJ also made several findings with respect to the cost differential for Leesburg to serve Bigham versus PGS. SSGC took issue with Findings of Fact 39 and 129; Leesburg took issue

[24] *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; see also *Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542.
[25] Section 120.57(1)(1), F.S.
[26] *Rogers v. Department of Health*, 920 So. 2d at 30.

with Findings of Fact 97 and 129 and Conclusions of Law 155, 156, and 157. The findings for which they seek exceptions are quoted below, in pertinent part:

> Finding of Fact 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."
>
> Finding of Fact 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 total cost of constructing the gas infrastructure to serve Bigham could be as much as $2.2 million.
>
> Finding of Fact 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.
>
> Conclusion of Law 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 between $1,212,207 and $2,200,000.
>
> Conclusion of Law 156. The cost differential -- at least $1,200,000 and possibly as much as a million dollars more -- is far from *de minimis*. For example, as stated by the Florida Supreme Court:
>
> > In [*Gulf Coast Electric Cooperative v. Clark*, 674 So. 2d 120, 123 (Fla. 1996)], the Gulf Coast cooperative spent $14,583 to upgrade a single-phase line to a three-phase line to enable it to provide service to a new prison. . . . This Court concluded that competent substantial evidence did

> not support, among other findings, that the $14,583 difference in costs was considerable. Id. This Court said:
>
> Compare, for instance, the costs incurred for the upgrade in this case with the costs incurred in *Gulf Power Co. v. Public Service Commission*, 480 So. 2d 97 (Fla. 1985)(difference between Gulf Coast's $27,000 cost to provide service and Gulf Power's $200,480 cost to provide service *found to be considerable*). The cost differential in this case is *de minimis* in comparison to the cost differential in that case. (emphasis added).
>
> *Choctawhatchee Elec. Coop. v. Graham*, 132 So. 3d 208, 214-215 (Fla. 2014).
>
> Conclusion of Law 157. This factor and weighs strongly in favor of PGS.

Although neither Leesburg nor SSGC filed an exception to Conclusion of Law 154, Conclusion of Law 154 is important to the staff analysis discussed below. Conclusion 154 provides:

> Conclusion of Law 154. The evidence demonstrates the PGS could provide reliable natural gas service to the disputed territory through its existing facilities at a cost of, at most, $11,000, and requires no additional facilities.

SSGC argues the ALJ should have considered PGS's preexisting infrastructure as part of PGS's cost to serve. SSGC contends that the ALJ's decision to exclude PGS's costs for preexisting infrastructure prejudiced Leesburg.

SSGC claims that there is no competent and substantial evidence to support the ALJ's finding that PGS's cost to extend service to Bigham would have been minimal, or that the cost differential between PGS and Leesburg is *de minimis*. SSGC asserts that several cost factors were not considered by the ALJ, such as the number and footage of several lines, meters and meter installations, the cost of PGS's pipeline on State Road 468 and associated gate stations, and the main line on County Road 468.

SSGC further argues there is no competent, substantial evidence to support the ALJ's conclusion that PGS's cost to extend gas service into Bigham would be minimal. SSGC states it made an arrangement with The Villages for Leesburg to be its natural gas utility, and the Agreement provided that Leesburg would charge a rate equal to the fully regulated PGS rate. Because The Villages customers would never be charged rates higher than those charged by PGS, the costs to the customers are essentially same.

Leesburg argues that these findings and conclusions are speculative and contrary to the record. Leesburg also argues that the ALJ relied upon the amount $2,200,000 (Finding of Fact 97) to find Leesburg's infrastructure costs necessary to serve Bigham to be "uneconomic." Leesburg renews its arguments concerning the ALJ's exclusion of the $1,219 cost-per-home figure for Leesburg in the Motion to Strike and suggests that rejection of the $1,219 amount and reliance upon an estimated cost of construction of the CR 501 and CR 468 led to an erroneous conclusion that Leesburg's construction was "uneconomic."

PGS's Response

PGS states that SSGC's exception to Finding of Fact 39 ignores the testimony of Witness Wall that Bigham West was "literally within 5 to 10 feet of the end of our (PGS) distribution system."[27] Mr. Wall also testified that the developments were 10 to 100 feet from PGS's lines along CR 468.[28] SSGC also ignores Mr. Wall's testimony that it would only cost $100 to $200 to tie into Bigham West.[29] PGS argues that there is ample competent, substantial evidence to support the ALJ's finding that PGS's cost to serve the Bigham Developments was minimal.

In addition, PGS disputes SSGC's contention that the cost of PGS's lines along CR 468 should have been included in the estimate of PGS's cost to extend service to the Bigham Developments. As the ALJ noted throughout his Recommended Order (Findings of Fact 70, 74, 91, 95, 129, 130, and Conclusions of Law 151, 154, and 162), those lines predated the Bigham Developments. The lines were preexisting 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.

PGS argues that Finding of Fact 129 is supported by competent, substantial evidence that establishes the total cost of Leesburg's lines along CR 501 and CR 468. PGS argues that while the total cost of infrastructure that was necessary for Leesburg to serve Bigham may not have been known at the time of the hearing, the record supports the range of costs identified by the ALJ. PGS asserts that the unrefuted testimony of witness Rogers supports the ALJ's Finding of Fact 129 that Leesburg's total cost to serve would be at least $1,212,207, with persuasive evidence to suggest that the cost would total closer to $2,200,000. PGS also argues that Leesburg's exceptions fail to provide citations to the record as required by Rule 28-106.271, F.A.C., and should therefore be denied as insufficient.

Finally, SSGC's exception to Finding of Fact 129 is an argument that the substantial cost differential between Leesburg and PGS should be ignored because the rates Leesburg will charge customers in the Villages will be capped by the PGS rate. SSGC cites to no Commission rule or statute to support its position. 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, F.A.C., and are irrelevant to determine which utility should serve a territory.

Staff Analysis and Conclusion

In Finding of Fact 129, the ALJ found the cost differential between PGS and Leesburg to be "far from *de minimis*." The term "*de minimis*" arises from *Gulf Coast Electric Cooperative, Inc. v. Clark*, 674 So. 2d 120 (Fla. 1996), where the Florida Supreme Court found the cost differential of $14,583 to be "*de minimis* in comparison" to the cost differential of $173,480 at issue in *Gulf Power Co. v. Public Service Commission*, 480 So. 2d 97 (Fla. 1985). In *Gulf Power*, the Commission described the $173,480 cost differential as "relatively extravagant expenditures" by one of the competing utilities that resulted in "an uneconomic duplication of electrical facilities." *Id.* In a more recent dispute, a $89,738 cost differential was also determined to be *de minimis*.[30]

[27] Wall TR 152.
[28] Wall TR 154.
[29] Wall TR 156.
[30] *Choctawhatchee Electric Cooperative, Inc. v. Graham*, 132 So. 3d at 215-215.

With these opinions serving as a guideline, the ALJ found that a cost differential of at least $1,212,207 between Leesburg and PGS was far from *de minimis*.

The $1,219 cost-per-home amount that Leesburg seeks to use as its cost-per-home to serve was stricken from the record by the ALJ. There is no support for Leesburg's assertions that the $1,219 cost-per-home for Leesburg should replace the $1,800 figure provided in SSGC's discovery response, or that the low end of the range of Leesburg's cost to construct gas mains to serve Bigham of $1,212,207 has as much or more support in the record than the $2,200,000 figure in Findings of Fact 97 and 129 and Conclusion of Law 155 and 156.

Finding of Fact 129 is the ALJ's factual summary of the evidence of the preexisting infrastructure and costs to serve Bigham by PGS and Leesburg. Witness Rogers' testimony supports the ALJ's finding that Leesburg's total cost to serve would be at least $1,212,207, with persuasive evidence to suggest that the cost would total closer to $2,200,000.

In Conclusions of Law 154-156, the ALJ further captures the considerable disparity in costs between the two utilities to construct gas mains to reach Bigham. In Conclusion of Law 154, which is supported by Findings of Fact 70, 74, 91, 95, 129, and 130, the ALJ concluded that PGS could provide reliable natural gas service to the disputed territory through its existing facilities at a cost of, at most, $11,000 with no additional facilities. In Conclusion of Law 155, the ALJ determined that Leesburg could not provide similar service without building 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 between $1,212,2017 and $2,200,000. Conclusion of Law 155, is supported by Findings of Fact 35-37, 64-69, 85-86, and 94-97. The ALJ's Conclusion of Law 156 cites to Commission precedent in the form of a prior Florida Supreme Court decision to support his ultimate conclusion that the cost differential to Leesburg to provide reliable natural gas service to the disputed territory is far from *de minimis*. Conclusions of Law 154-156 are well supported by competent, substantive evidence and application of relevant legal authority.

In Leesburg's use of the type and strike method to reword the ALJ's findings it purports to suggest that there is evidence to support contrary Findings of Fact 97 and 129 and Conclusions of Law 155, 156, and 157. Leesburg, however, provides no citation to the record to support for these contrary findings. Leesburg attempts to change the outcome of Conclusion of Law 157 by striking the word "PGS" and replacing it with "City," without providing support. Notwithstanding Leesburg's failure to support its alternative findings, the existence of contrary evidence would be insufficient for the Commission to act to select an alternative finding of fact because the Commission is bound by the hearing officer's reasonable inference when conflicting inferences are presented by the record.[31]

Section 120.57(1)(l), F.S., requires the Commission's final order to include an explicit ruling on each exception and sets a high bar for rejecting an ALJ's findings. In order to reject or modify the ALJ's conclusions of law, the Commission must make a finding that its substituted conclusion of law is as or more reasonable than that which it replaced.[32] Leesburg has failed to

[31] *Greseth*, 573 So. 2d at 1006-1007.
[32] Section 120.57(l)(l), F.S.

provide support for replacing or modifying these findings of fact or conclusions of law. SSGC and Leesburg failed to provide specific references to the record to support their exceptions. In addition, Conclusions of Law 155, 156, and 157 are clearly supported by the evidence and the application of the applicable rules, statutes, and legal precedent. Staff recommends that the Commission deny SSGC's and Leesburg's exceptions to Findings of Fact 39, 97, and 129 and related Conclusions of Law 155, 156, and 157.

Starting Point to Determine Preexisting Infrastructure – Exceptions to Findings of Fact 74, 85-86, and 88

The ALJ made findings with respect to PGS and Leesburg's existing infrastructure, the date of filing of the territorial dispute, and the starting point to consider preexisting facilities. The Findings of Fact in question are provided below:

> Finding of Fact 74. As set forth herein, the location of PGS's existing infrastructure, vis-a-vis the disputed territory, weighs strongly in its favor. As to the other reliability factors identified by Leesburg, both parties are equally capable of providing reliable service to the disputed territory.
>
> Finding of Fact 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.
>
> Finding of Fact 86. Leesburg's existing facilities, i.e., those existing prior to extension to the disputed territory, were sufficient to serve the needs of Leesburg's existing service area. The existing facilities were not sufficient to serve the disputed territory without substantial extension.
>
> Finding of Fact 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."

SSGC and Leesburg take exception to the ALJ's legal determination that PGS had existing infrastructure in the disputed area before Leesburg and SSGC. SSGC states Leesburg was supplying natural gas in the disputed area as of the date of the hearing, and thus, the ALJ incorrectly analyzed the "starting point" for assessing the need for additional facilities. Leesburg likewise asserts that the start point should be determined according to the facilities that existed at the time of the hearing, not when the dispute arose. SSGC also argues that the Recommended

Order lacks evidentiary support and mischaracterizes Leesburg's construction activities in anticipation and furtherance of service to Bigham.

PGS's Response

PGS argues that there is ample competent, substantial evidence from Leesburg's witnesses that Leesburg and SSGC engaged in a "race to serve." No case law supports SSGC's arguments that the hearing date is the starting point for assessing the need for additional facilities; rather, case law supports the ALJ's finding that Leesburg had to deploy lines along CR 501 and CR 468 in order to serve the Bigham Developments, and did so at a cost that far exceeded PGS's cost to serve the same territory.

PGS asserts that Leesburg failed to provide particular citations to the record as required by Rule 28-106.217, F.A.C., and on that basis alone Leesburg's exceptions to the findings of fact should be rejected. PGS further argues that there is no support for Leesburg's argument that the starting point for determining whether each utility had existing facilities capable of serving the disputed area should be the start of the hearing, rather than at the time that the dispute arose. PGS highlights that Leesburg witness Rogers testified that Leesburg would be infringing on PGS territory and recognized the need for a territorial agreement with PGS as far back as September 2017.[33]

Staff Analysis and Conclusions

There is competent, substantial evidence to support the ALJ's findings. SSGC and Leesburg are asking the Commission disregard the relative starting positions of the two competing utilities in the dispute and to reweigh the evidence. Florida case law holds that an agency reviewing a recommended order is not authorized to reevaluate the quantity and quality of the evidence presented at a DOAH hearing.[34] Rather an agency can only make a determination of whether the evidence is competent and substantial.[35] Further, SSGC's failure to file exceptions to Findings of Fact 89, 91, 93, and 96, which establish the starting positions for the two utilities and the resulting costs to serve, results in a waiver of any exceptions to objecting to the issue of "existing facilities."[36] Findings of Fact 74, 85, 86, and 88 are based upon competent, substantial evidence and therefore Leesburg's argument that there may also be competent and substantial evidence to support a contrary finding is not persuasive.[37] For these reasons, staff recommends that SSGC's exceptions to Findings of Fact 74, 85-86, and 88 should be denied.

Uneconomic Duplication of Facilities – Exceptions to Findings of Fact 127-129 and Conclusion of Law 162

The ALJ found that Leesburg's extension of lines to serve Bigham constituted an uneconomic duplication of PGS's existing facilities. SSGC and Leesburg disagreed and thus they filed exceptions to the following Findings of Fact and Conclusions of Law, in relevant part:

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[33] TR 569-571, 576.
[34] *Rogers v. Department of Health*, 920 So. 2d at 30.
[35] *Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996).
[36] *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; see also *Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542.
[37] *Greseth*, 573 So. 2d at 1006-1007.

> Finding of Fact 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 faculties as provided in rule 25-7.041. A review of Commission Orders indicates that many natural gas territorial dispute cases involved a discussion on uneconomic duplication of facilities because disputes are frequently resolved by negotiations and entry of a territorial agreement....
>
> Finding of Fact 128. There are Commission Orders that suggest the issue of uneconomic duplication of facilities is an appropriate field of inquiry in a territorial dispute event when it does not result in a territorial agreement. See, *In re: Petition to Resolve Territorial Dispute with South Florida Natural Gas Company and Atlantic Gas Corporation by West Florida Natural Gas Company*, 1994 Fla PUC Lexis 1332, Docket No. 940329-GU: Order No. PSC-94-13-1310-S-GU (Fla. PSC Oct. 224, 1994).
>
> Finding of Fact 129. The evidence in this case firmly establishes that Leesburg's extension of facilities to the Bigham developments, both through CR 501 line and the CR 468 line, constituted an uneconomic duplication of PGS's existing gas facilities....
>
> Conclusion of Law 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 and Leesburg argue the ALJ erred in reading the statute to include non-statutory criteria, i.e., the uneconomic duplication of facilities, as a factor to be considered and weighed. SSGC argues that the ALJ is "bootstrapping a non-statutory and non-rule uneconomical duplication of facilities analysis – employed by the Commission in addressing a settlement – to the present natural gas territorial dispute." SSGC and Leesburg further contend that the ALJ's reliance on Commission decisions to insert uneconomic duplication as a factor for consideration in a gas territorial dispute is contrary to Article V, Section 21 of the Florida Constitution, and thus constitutes improper deference. Article V, Section 21 of Florida's Constitution provides that "[i]n 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 and Leesburg also object to the ALJ's reliance upon Commission precedent in electric territorial disputes as improper because those rulings were decided under a different statute.

SSGC also claims that even if consideration of the issue of uneconomic duplication of facilities is appropriate, PGS did not offer evidence that uneconomic duplication of facilities will result from SSGC's activities. SSGC argues the Commission should reject the ALJ's conclusions that continued service to the disputed area by Leesburg would result in uneconomic duplication of facilities and that there is a material difference in the cost to serve.

PGS's Response

According to PGS, the arguments regarding Article V, Section 21 of the Florida Constitution are an overbroad application of this newly adopted constitutional provision designed to remedy the situation where a hearing officer or judge feels compelled to defer to the administrative agency's interpretation of a statute or rule. The new 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. PGS agues there is no evidence in the Recommended Order that indicated that the ALJ felt compelled to defer to the Commission.

In Finding of Fact 127, the ALJ points out that neither Section 366.04(3), F.S., nor Rule 25-0472, F.A.C., expressly identifies consideration of "uneconomic duplication of facilities." The ALJ then points out that Rule 25-7.0471, F.A.C., concerning territorial agreements for natural gas utilities, requires the Commission to consider whether a territorial agreement will "eliminate existing or potential uneconomic duplication of facilities." The ALJ further cites to Commission orders on territorial agreements that discuss the potential for uneconomic duplication of facilities and that the Commission finds agreements will eliminate potential uneconomic duplication.

PGS also argues that although Finding of Fact 128 contains a reference to 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. Rather, it appears the Commission precedent is referenced because it is consistent with the ALJ's interpretation of the statute or rule.

PGS also addresses SSGC's assertion that it is inappropriate to consider uneconomic duplication of facilities in natural gas territorial disputes. PGS argues that 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. The establishment of service territories within which utilities have a right to serve avoids the uneconomic duplication of facilities.

PGS argues that while neither the statute regarding the Commission's jurisdiction over territorial disputes between gas utilities (Section 366.04(3), F.S.) nor the statute regarding the Commission's jurisdiction over electric utility territorial disputes (Section 366.04(2), F.S.) specifically uses the phrase "uneconomic duplication," the criteria listed in the statute clearly have that end in mind. In Conclusions of Law 127 and 128, the ALJ cites to a Commission orders that address the relevance of uneconomic duplication of facilities in territorial disputes in electric and gas cases. PGS states that the ALJ also interpreted that Rule 25-7.0472, F.A.C. must be read

consistently with Rule 25-7.0471, F.A.C., which would make uneconomic duplication relevant in territorial disputes involving gas utilities. PGS concludes that there is no indication that the ALJ would have taken a contrary position in the absence of these previous Commission orders, but that he cited to the orders because they are consistent with the ALJ's interpretation of statute and rule.

PGS states that any argument that PGS presented no evidence of uneconomic duplication of facilities is without merit, and the uncontroverted evidence is that Leesburg had to build lines along CR 501, SR 44, and CR 468 in order to duplicate what PGS already had in place along CR 468. PGS also argues that while witness Dismukes testified that no uneconomic duplication would result if Leesburg continued to service the disputed area, he did not testify regarding whether Leesburg's extending facilities to serve the territory was, in the first place, uneconomic. Witness Dismukes did not disagree with amounts put forth as Leesburg's costs or PGS's cost to tie in to its CR 468 line of approximately $10,000. PGS concludes that Leesburg, by building miles of pipe in order to serve an area literally within a few feet of PGS's lines, is preventing the full utilization of PGS's infrastructure.

Staff Analysis and Conclusion

SSGC's and Leesburg's constitutional deference argument is without merit. The amendment does not prohibit an ALJ from citing to an agency's interpretation of a statute or rule to support the ALJ's independent analysis. The ALJ acknowledges that Section 366.04(3), F.S., and Rule 25-7.0472, F.A.C., do not expressly require consideration of "uneconomic duplication of facilities" as a factor in resolving territorial disputes. He appropriately found adequate support to evaluate "uneconomic duplication of facilities" in his review of the statute, rule, and Commission Orders. The ALJ expressly recognized that the Commission resolved gas territorial disputes by promoting the "longstanding policy of avoiding unnecessary and uneconomic duplication of facilities."[38] The ALJ cites Commission orders where a utility that caused uneconomic duplication or that had considerable costs to provide utility service in a disputed area was not permitted to serve customers in the disputed area.[39] The ALJ was not in conflict with the Florida Constitution when he considered previous Commission orders and statutory interpretations on uneconomic duplication.

SSGC and Leesburg failed to provide support for rejecting the ALJ's determination that the direction to consider uneconomic duplication of facilities when considering whether to approve a territorial agreement under Rule 25-7.0471(2)(c), F.A.C. (the Territorial Agreement Rule) can be read consistently with Rule 25-7.0472, F.A.C. (the Territorial Dispute Rule). Under Section 366.04(3)(b), F.S., when the Commission resolves territorial disputes for natural gas utilities, it may "consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services." This language contemplates uneconomic duplication as a factor in resolving territorial disputes.

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[38] For example, Findings of Fact 127-128 contain a history of prior Commission decisions wherein uneconomic duplication of facilities was a consideration in territorial disputes between natural gas utilities that were resolved by Territorial Agreements.

[39] For example: *Gulf Coast Elec. Coop v. Clark*, 674 So. 2d 120, 122 (Fla. 1996); *Gulf Power Co. v. Public Service Commission*, 480 So. 2d 987 (Fla. 1985).

Any argument that PGS presented no evidence of uneconomic duplication is without merit when considering the unrefuted testimony of Witness Wall, Vice President of Operations for PGS, that Bigham West was "literally within 5 to 10 feet of the end of our (PGS) distribution system."[40] Witness Wall also testified that the Bigham developments were 10 to 100 feet from PGS's lines along CR 468.[41] SSGC also ignores Witness Wall's testimony that it would cost only $100 to $200 to tie into Bigham West.[42]

Staff agrees with PGS that in Findings of Fact 127-129, the ALJ determined that the consideration of uneconomic duplication of gas facilities can be read consistently with Rule 25-7.0472, F.A.C., and is supported by ample Commission precedent. Leesburg failed to provide adequate support to disturb these findings. Staff recommends that the Commission deny SSGC's and Leesburg's exceptions to Findings of Fact 127-129 and acknowledge the ALJ's application of facts to the relevant legal precedent to find considerations of uneconomic duplication relevant to the dispute.

Conclusion of Law 162 is the summary to Findings of Fact 127-129, where the ALJ concludes based on the evidence in the record that Leesburg's construction of gas facilities to serve Bigham involved substantial and significant duplication of existing PGS facilities. The record does not support a finding of no uneconomic duplication. Therefore, staff recommends that the Commission deny SSGC's and Leesburg's exception to Conclusion of Law 162.

Race to Serve – Exceptions to Finding of Fact 130 and Conclusion of Law 151(b)[43]

The ALJ found that Leesburg raced to serve the Bigham Development. SSGC and Leesburg filed exceptions to the ALJ's "race to serve" findings, as reflected in pertinent part below:

> Finding of Fact 130. Leesburg argues that if uneconomic duplication of facilities is a relevant factor, "the evidence of record demonstrates that the City will suffer significant financial impact if it is not permitted to continue to serve the Bigham Developments." 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.
>
> Conclusion of Law 151(b). 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

[40] Wall TR 152.
[41] Wall TR 154.
[42] Wall TR 156.
[43] There are two sequential Conclusion of Law paragraphs 151 in the Recommended Order, so they are referred to herein as Conclusions of Law 151(a) and (b). Conclusion of Law 151(a) concerns the "pay to play" Agreement between Leesburg and SSGC. 151(b) deals with Leesburg's race to serve. Conclusion of Law 151(b) is the focus of SSGC's exception that is being addressed here.

> uneconomically duplicated the facilities of the other in a 'race to serve' an area in dispute, and we do not condone such action." *Gulf Coast Elec. Coop. v. Clark*, 674 So. 2d 120, 122 (Fla. 1996). There is no reason that it should be condoned here.

SSGC states it made an Agreement with The Villages for Leesburg to be its natural gas utility, and that Leesburg's contract with the Villages did not create a "race to serve" situation. SSGC and Leesburg object to the ALJ's use of the term "race to serve" as it is not found in statute or rule. According to SSGC, the ALJ improperly relied on the electric statute when he concluded there was a "race to serve." SSGC asserts that the impact characterizing Leesburg's construction as a "race to serve" punishes Leesburg for the timely construction of facilities necessary to comply with its contractual obligation and the needs of the Villages. Leesburg asserts there is no competent, substantial evidence to support 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. Leesburg also contends that because the infrastructure required to serve Bigham was constructed by the time of the hearing, it should be on equal footing as to cost to serve with PGS, even though PGS's infrastructure predated the dispute.

PGS's Response

SSGC's Exceptions to Findings of Fact 130 and Conclusion of Law 151(b) are closely related to the starting point of existing facilities exceptions by SSGC and Leesburg to Findings of Fact 74, 85-86, and 88, discussed above, and PGS's response to those findings apply here as well.

In addition, PGS argues that even though "race to serve" is not referenced in rule or statute, the term 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.

PGS argues that 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 utility's territory. Since it now has infrastructure in the disputed area, the "racing utility" argues it should be allowed to serve the disputed area. PGS asserts that 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. PGS argues that the Recommended Order accurately characterizes the activity of Leesburg as a race to serve.

PGS argues that the cases Leesburg offers in its exceptions fail to support the positions advocated by Leesburg. For example, Leesburg relies upon the holding in *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), to stand for the proposition that de novo administrative hearings should be based on the facts as they exist at the time of the agency's final action. PGS asserts that while *McDonald* does stand for the proposition that the court should permit evidence of circumstances as they exist at the time of the hearing, the case does not suggest that in a territorial dispute, one party may take advantage of

the delay during the adjudication of a dispute in order to improve its position. PGS asserts that the other cases cited by Leesburg are equally irrelevant to determining the starting point for uneconomic duplication of facilities in the adjudication of territorial disputes between utilities or a "race to serve."

PGS also argues that the actual territorial disputes cases cited for authority by Leesburg fail to support the positions taken by Leesburg. None of the cited cases provide any guidance for determining when the start time for making uneconomic duplication of facilities determinations is, or relate to a race to serve in such a way that would support Leesburg's cost to serve position as being equal with PGS. These cases do not assist Leesburg's position regarding uneconomic duplication of facilities in its "race to serve" Bigham.

Staff Analysis and Conclusion

SSGC's and Leesburg's arguments that Leesburg will suffer significant financial impact if not permitted to serve Bigham are rejected by the ALJ. This alleged adverse financial impact was incurred by Leesburg after the filing of the petition. Leesburg built its facilities with knowledge of PGS's preexisting infrastructure, but that does not mean Leesburg was entitled to do so. The record is replete with examples of Leesburg's advanced knowledge of PGS's preexisting infrastructure and service immediately adjacent to this area. (Findings of Fact 34-38) SSGC's and Leesburg's disagreements with the ALJ's determination disregard the entirety of the law on "race to serve" as well as the Commission's precedent and authority to adjudicate territorial disputes and is akin to their assertions that The Villages should be able to select its gas service provider.

Leesburg's contention that its completion of the facilities required to serve Bigham prior to the date of the hearing should have removed the considerations of "uneconomic duplication of facilities or "race to serve" from the ALJ's determination of cost to serve is unsupported. The ALJ cannot ignore the competent, substantial evidence in the record concerning PGS's preexisting gas infrastructure in the area or Leesburg's substantial cost to serve the same area. Leesburg witness Rogers testified that Leesburg, as far back as September 2017, recognized it would be infringing on PGS territory, and as such, it needed a territorial agreement with PGS, but declined to raise the matter with PGS.[44]

Further, SSGC disputes Finding of Fact 130, by referring to evidence that is not in the record (PGS's original costs to serve the area adjacent to Bigham) and further argues that the ALJ failed to consider that evidence. Section 120.57(1)(k), F.S., establishes the standards by which an agency shall consider exceptions to finding of fact, stating in pertinent part:

> The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number and paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

[44] TR 569-571, 576.

SSGC's and Leesburg's exceptions to Finding of Fact 130 were deficient in that each failed to include appropriate and specific citations to the record.

The alleged adverse financial impact upon Leesburg that the ALJ's "race to serve" finding would have upon Leesburg is not a compelling argument. Leesburg offers no citations to the record sufficient to overcome the ALJ's extensive findings regarding Leesburg's deliberate actions that resulted in uneconomic duplication of facilities in its "race to serve" Bigham. The Commission cannot reject or modify the findings of fact unless the Commission first determines that the findings of fact were not based upon competent and substantial evidence, or that the proceedings upon which the findings were based did not comply with the essential requirements of law.[45] Further, financial need is not a relevant factor to be considered by the Commission in resolving a territorial dispute. Therefore, staff recommends that the Commission deny SSGC's exception to Finding of Fact 130, as it is supported by competent and substantial evidence.

As to Conclusion of Law 151(b), SSGC's and Leesburg's failures to file exceptions to the ALJ's Findings of Fact 34-38, which detail SSGC's and Leesburg's actual knowledge and responsibility to acknowledge that PGS was serving the area immediately adjacent to Bigham, are facts that support a finding of a "race to serve," and cannot be ignored as inconvenient. As these findings directly support Conclusion of Law 151(b), regarding Leesburg's "race to serve," a party that files no exceptions to certain underlying findings of fact has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.[46]

Staff agrees with PGS's response to Leesburg's argument that the starting point for consideration of uneconomic duplication and a "race to serve" is not the hearing date and that the cases cited by Leesburg do not support its argument. Staff agrees that the holding in *McDonald*, 346 So. 2d at 584, stands for the proposition that the ALJ should consider relevant evidence that exists at the time of the agency's final action. However, there is no support for the argument that facts associated with the amount of infrastructure that Leesburg was able to build before the date of the hearing should be disregarded in a territorial dispute. To the contrary, the concept of a "race to serve" is a well-established factor to be considered in a territorial dispute and facts underlying a "race to serve" argument are appropriately raised at the time of hearing. The proposition for which *McDonald* was cited by Leesburg actually supports the notion that "race to serve" evidence that exists at the time of the agency's final action should be considered. As such, the ALJ confirmed that the amount of infrastructure that Leesburg was able to build before the date of the hearing is a relevant factor in a territorial dispute. He did so by concluding:

> ...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."[47]

SSGC makes a similar argument that the ALJ's Finding of Fact 88 ignored the financial needs of The Villages by arbitrarily selecting a starting point; however, SSGC failed to provide a specific

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[45] Section 120.57(1)(l), F.S.
[46] *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc.*, 847 So. 2d 540, at 542 (Fla. 4th DCA 2003).
[47] Finding of Fact 88.

reference to legal authority that might support its position. As noted above, financial need is not a relevant factor to be considered by the Commission in its resolution of a territorial dispute. On the other hand, a "race to serve" is a factor to be considered at the time of hearing and the facts underlying a "race to serve argument are appropriately raised at the time of hearing.

SSGC makes an additional argument that the ALJ did not make a specific finding 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. However, SSGC again failed to provide any legal support for its second exception to Conclusion of Law 151(b)(and Findings of Fact 85, 88 and 130), other than to repeat its argument that The Villages should have been permitted to select its own provider. The argument that Bigham was completely unclaimed territory until The Villages chose to build there and the developer could therefore choose its own gas service provider, has no support in the record and is contrary to the law. SSGC has failed to provide a basis to disturb the ALJ's Findings of Fact or Conclusions of Law concerning Leesburg's "race to serve" Bigham.

Leesburg and SSGC failed to provide a basis upon which the Commission should substitute Leesburg's assertions that it should benefit from its construction efforts during the pendency of this hearing, for the ALJ's Conclusion of Law 151(b).

Staff recommends that the Commission deny the request for exceptions to Finding of Fact 130 and Conclusion of Law 151(b).

Customer Preference – Exception to Conclusion of Law 166

The ALJ found that customer preference should not play a role in the resolution of this dispute. In Conclusion of Law 166 he found:

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

Both SSGC and Leesburg took exception with this finding. They argue that the customer's preference (that is The Villages' preference) is for Bigham to be served by Leesburg, and that the ALJ should have considered this.[48]

Leesburg encourages the Commission to reweigh the evidence by arguing that under a majority of the factors, both parties were equally capable of serving Bigham. Leesburg, as a municipal utility, highlights that it prevailed under one category, the ability to provide other utility services to the area in addition to gas. PGS, a public utility that provides only natural gas service, was never a viable contender in this category. Ignoring that PGS prevailed under the other factors, Leesburg seeks a substitute ruling that the parties' cost to serve was substantially equal and therefore customer preference is relevant, and would break the tie.

[48] At the conclusion of the evidentiary proceedings on June 24, 2019, the hearing was recessed, and the public comment period was convened as noticed. No non-party customers or other members of the public appeared. The public comment period was then adjourned.

PGS's Response

PGS argues that SSGC and Leesburg are asking the Commission to ignore the large number of findings of fact, conclusions of law, and evidence in the form of exhibits, maps, and testimony, that show that Leesburg's costs to serve greatly exceed those of PGS by millions of dollars. PGS asserts the cost to extend service to the Bigham Developments for PGS was at most $11,000,[49] while the cost to extend service for Leesburg was $1.94 million.[50] PGS further argues that the Agreement between SSGC and Leesburg would cause Leesburg to spend up to $2.2 million in additional costs.[51] In view of this overwhelming evidence on cost to serve and other factors, the ALJ determined that the factors strongly supported PGS, and therefore, customer preference plays no role in determining which utility should serve the disputed area.

Staff Analysis and Conclusion

Staff disagrees with the assertions that there is no competent, substantial evidence to support the ALJ's conclusion that customer preference should not be a factor in this dispute. The ALJ supported his Conclusion of Law 166 by laying out the factors contained in Rule 25-7.0472(2)(a)-(d), F.A.C., that favor PGS. The final factor in a cost to serve determination in a territorial dispute is found in Rule 25-7.0472(2)(e), F.A.C., which provides the Commission may consider "Customer preference if all other factors are substantially equal." Because all of the factors are not substantially equal, customer preference should not be considered.

Conclusion of Law 166, is supported by a multitude of findings, including Findings of Fact 20-30, 64-65, 89, 91, 93, and 96. These findings establish the starting positions for the two utilities and the resulting costs to serve, the distance of Leesburg's mains at the time that Leesburg entered the Agreement, and Leesburg's awareness that PGS was the closest provider to the three Bigham developments. Thus, SSGC and Leesburg waived any exceptions concerning PGS's preexisting facilities and service to the area adjacent Bigham. SSGC and Leesburg's failure to object to the Findings of Fact that supported the ALJ's Conclusion precludes them from taking exception with Conclusion of Law 166. A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact."[52]

For the reasons stated above, staff recommends that SSGC's and Leesburg's exceptions to Conclusion of Law 166 to the Recommended Order be denied.

General Exceptions to the ALJ's Ultimate Conclusion

The ALJ concluded his Recommender Order by finding PGS should be awarded the disputed territory:

> [I]t is recommended that the Public Service Commission enter a final order awarding People's Gas System the right to serve Bigham North, Bigham West,

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[49] TR 194, 200-201
[50] TR 555
[51] *See* Finding of Fact 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."
[52] *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; see also *Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542

> and Bigham East. The award should be on such terms and conditions regarding the acquisition of rights to facilities and infrastructure within the Bigham developments by People's Gas form the City of Leesburg or South Sumter Gas Company, LLC, as deemed appropriate by the Commission.[53]

SSGC and Leesburg reject the ALJ's conclusion and recommendation awarding the disputed territory to PGS. In their opinions, the weight of competent, substantial evidence and appropriate construction and application of applicable law should result in a recommendation that Leesburg may continue to serve Bigham. SSGC and Leesburg take further exception that the ALJ's ultimate conclusion may result in PGS's acquisition of Leesburg's property, which SSGC argues would be a taking. According to Leesburg, neither the ALJ or the Commission have the right to divest Leesburg's property rights to facilities and infrastructure owned by Leesburg without due process.

PGS's Response

PGS argues that SSGC's and Leesburg's final exceptions are requests that the Commission ignore the ample and overwhelming weight of the competent and substantial evidence that the ALJ used to conclude that PGS should serve the Bigham Developments.

Staff Analysis and Conclusion

SSGC's and Leesburg's general exceptions are devoid of the required legal citation or support to qualify as an exception. Exceptions must identify the disputed portion of the recommended order by page number or paragraph, must identify the legal basis for the exception, and include any appropriate and specific citations to the record.[54] Staff recommends that the Commission reject and deny SSGC's and Leesburg's general exceptions.

Conclusion

Neither SSGC or Leesburg have presented any legally justifiable basis for rejecting or modifying any portion of the Recommended Order. Therefore, staff recommends that the Commission deny all of SSGC or Leesburg's filed exceptions.

[53] Recommended Order pages 63, 64.
[54] Rule 28-106.217(1), F.A.C.

Issue 3: Should the Commission approve the Recommended Order submitted by the Administrative Law Judge?

Recommendation: Yes. The Commission should approve and adopt the attached Recommended Order (Attachment A) as the Final Order in this docket. (Trierweiler, Harper)

Staff Analysis: Staff recommends that the Commission adopt the ALJ's findings of fact. According to Section 120.57(1)(l), F.S., the Commission may not reject or modify the recommended findings unless it first determines from a review of the entire record that the findings of fact were not based upon competent, substantial evidence or that the proceeding on which the findings were based did not comport with the essential requirements of law.

Staff has reviewed the Recommended Order and believes that the findings of fact are based upon competent, substantial evidence that is consistent with the evidence presented by the staff and parties' witnesses. Further, staff believes that the proceedings before the ALJ comported with the essential requirements of law. Consistent with staff's recommendations in Issues 1-2, staff recommends that the Commission adopt the findings of fact without modification.

The Commission may reject or modify the conclusions of law or the interpretation of administrative rules over which it has substantive jurisdiction. When doing so, the Commission must state with particularity its reasons for modifying or rejecting the conclusion or interpretation. In addition, the Commission must make a finding that its substituted conclusions of law or interpretations of rule are as, or more reasonable than, that of the Administrative Law Judge. Section 120.57(1)(l), F.S. Commission staff recommends that the conclusions are consistent with prior Commission interpretations and decisions.

Based on the foregoing, staff recommends that the Commission adopt the ALJ's Recommended Order, found in Attachment A, as its Final Order, regarding this petition. Accordingly, Peoples Gas System should be awarded the right to provide natural gas service to Bigham North, Bigham West, and Bigham East.

Issue 4: Should this docket be closed?

Recommendation: Yes the Docket should be closed upon the issuance of a final order after the time for filing an appeal has run. (Trierweiler, Harper)

Staff Analysis: The docket should be closed upon the issuance of a final order and after the time for filing an appeal has run.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PEOPLES GAS SYSTEM,

Petitioner,

vs. Case No. 18-4422

SOUTH SUMTER GAS COMPANY, LLC,
AND CITY OF LEESBURG,

Respondents,
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 24 through 27, 2019, in Tallahassee, Florida, before E. Gary Early, a designated administrative law judge of the Division of Administrative Hearings ("DOAH").

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STATEMENT OF THE ISSUES

This proceeding is for the purpose of resolving a territorial dispute regarding the extension of gas service to areas of The Villages of Sumter Lake ("The Villages") in Sumter County, Florida, pursuant to section 366.04(3)(b), Florida Statutes, and Florida Administrative Code Rule 25-7.0472; and whether a Natural Gas System Construction, Purchase, and Sale Agreement ("Agreement") between the City of Leesburg ("Leesburg") and South Sumter Gas Company ("SSGC") creates a "hybrid" public utility subject to ratemaking oversight by the Public Service Commission ("Commission").

PRELIMINARY STATEMENT

On February 23, 2018, Peoples Gas System ("PGS" or "Petitioner") filed a Petition of Peoples Gas System ("Petition"), with the Commission which alleged that a territorial dispute exists between PGS and Leesburg or SSGC (collectively "Respondents"), or a combination thereof, with

respect to the rights of each to serve customers in Sumter County, Florida, including The Villages.

On June 28, 2018, The Commission entered an Order Denying [Respondents'] Motions to Dismiss Peoples Gas System's Petition to Resolve Territorial Dispute ("Order"), which denied Respondents' separately filed motions to dismiss and recognized "our statutory responsibility to resolve any territorial dispute upon petition and . . . to consider the cost of each utility to provide natural gas service to the disputed area presently and in the future."

The Petition was referred to DOAH on August 21, 2018, assigned to Administrative Law Judge ("ALJ") Donald R. Alexander, and set for a final hearing on January 28 through 31, 2019.

On September 7, 2018, Leesburg filed a Counter Petition, which objected to efforts by PGS to serve the American Cement facility in Sumter County. After a series of motions and responses were filed, an Order on Counter Petition was entered on September 28, 2018, which noted that the subject matter of the Counter Petition was in the jurisdiction of the Commission and, until such time as the American Cement dispute is referred by the Commission, DOAH has no authority to address that issue.

On September 20, 2018, the Commission filed a Notice of Participation by the staff of the Commission.

On December 20, 2018, SSGC, on behalf of the parties and after consultation with the ALJ's office, filed an Unopposed Motion for a Continuance to a Date Certain. The motion was granted on December 21, 2018, and the final hearing was rescheduled for April 1 through 5, 2019.

On January 10, 2019, SSGC filed an Unopposed Motion for Entry of Confidentiality and Protective Order which sought protection from public disclosure of certain trade secret and confidential business information, which motion was granted on January 14, 2019. On January 15, 2019, SSGC moved to amend the Confidentiality and Protective Order, which was granted on January 24, 2019.

On March 25, 2019, SSGC filed a Stipulated Motion for Continuance of the April 1 through 5, 2019, final hearing, which was granted on March 28, 2019. A Third Notice of Hearing was entered on April 3, 2019, which rescheduled the hearing for June 24 through 28, 2019.

Between April 3, 2019, and the commencement of the final hearing, a series of evidentiary and procedural motions were filed, disposition of which are as reflected in the docket.

On June 11, 2019, this case was transferred to the undersigned, and a telephonic pre-hearing conference was held on June 14, 2019. At the conclusion of the hearing, an addendum to Notice of Hearing was entered that established a public comment

period during the final hearing for any non-party customer to receive oral or written communications regarding the territorial dispute pursuant to section 366.04(4).

On June 21, 2019, the parties filed their Joint Pre-hearing Stipulation, which included stipulated issues of fact and law. Among the stipulated facts was that "[t]he issues of cost of capital and amortization and depreciation are not applicable to this dispute."

The final hearing was convened as scheduled on June 24, 2019. At the conclusion of the evidentiary proceedings on June 24, 2019, the hearing was recessed, and the public comment period was convened as noticed. No non-party customers or other members of the public appeared. The public comment period was then adjourned.

Petitioner called as witnesses: Thomas J. Szelistowski, PGS's President; Rick Wall, PGS's Vice President for engineering and operations; Bruce Stout, PGS's gas design Project Manager; Dr. Stephen Durham, who was accepted as an expert in economics; James Caldwell, a PGS engineer in research and planning; Terry Deason, a former Public Service Commissioner, who is recognized as an expert in energy policy; and Richard Moses, Bureau Chief of the Commission's Bureau of Safety. PGS Exhibits 1, 2, 4 through 13, 16, 19 through 21, 27, 29 through 32, 44 through 46, 49, 51, and 71 through 80 were received in evidence.

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Leesburg called as witnesses: Al Minner, Leesburg's City Manager; Jack Rogers, Director of Leesburg's natural gas department, who was tendered and accepted as an expert in natural gas operations, construction and safety; Joe Garcia, a former Public Service Commissioner, who was tendered and accepted as an expert in energy policy; Thomas Geoffroy, General Manager and Chief Executive Officer for Florida Gas Utility ("FGU"), who was tendered and accepted as an expert in natural gas supply and operations; and Dr. David Dismukes, who was tendered and accepted as an expert in economics and regulatory policy. Leesburg Exhibits 1 through 6a, 8 through 12, 16, and 19 through 28 were received in evidence. Leesburg Exhibit 7 was included as an attachment to Leesburg Exhibit 24, and, thus, was not separately introduced.

SSGC called as witnesses: Ryan McCabe, Operations Manager for The Villages; Matthew Lovo, Purchasing Director for The Villages; and Thomas McDonough, Director of Development for The Villages. SSGC Exhibits 1 through 18 were received in evidence.

The seven-volume Transcript of the final hearing, along with a separate Transcript of the public comment portion of the final hearing, was filed on July 25, 2019. The time for submission of post-hearing submissions was set at 30 days from the date of the filing of the transcript. Each party was allowed 50 pages for their post-hearing submissions. In

addition, each party was allowed to file a separate memorandum not to exceed 10 pages to address a motion to strike certain testimony from Mr. McDonough regarding cost of extending residential service that was developed between March 15 and March 30, 2019.

Motion to Strike

During the lead-up to the final hearing, the cost-per-home for SSGC to extend service to customers in The Villages' Bigham North, Bigham West, and Bigham East developments (collectively "Bigham" or the "Bigham developments") of $1,800 -- an estimated amount -- was provided by Respondents in their written discovery responses and corporate representative deposition, was accepted by the parties as the representative cost-per-home figure, and was relied upon by experts in the development of their opinions. That $1,800 figure formed the basis for most of the economic evidence and testimony offered by PGS and Leesburg.

In the final hours of the third and final day of the hearing, Mr. McDonough testified that he was asked to develop a more refined calculation of costs incurred by SSGC to run the service lines to the residences in the Bigham developments. Starting around March 15 and continuing through March 30, 2019, Mr. McDonough conferred with SSGC's accountants; reviewed invoices generated for the work; and determined that the actual cost of service was $1,219 per residence.

PGS made an *ore tenus* motion to strike, arguing that the information regarding Mr. McDonough's calculations and opinions were based on new figures that had not been provided to PGS prior to Mr. McDonough's testimony at hearing.

SSGC argued that, although Mr. McDonough had been deposed as a corporate representative fact witness of SSGC in November 2017, he was not subsequently deposed as an expert during the expert witness deposition window created by Judge Alexander in his January 11, 2019, Order Granting Unopposed Motion for Modification of Discovery Schedule. That argument fails to recognize that the deposition window for expert witnesses closed on March 15, 2019, the very day Mr. McDonough started his work, and that discovery closed altogether on March 22, 2019. By the time Mr. McDonough completed the new calculations around March 30, 2019, PGS had no ability to know of those calculations, and opinions derived therefrom, through deposition, written discovery, or otherwise, short of Respondents voluntarily providing the new calculations and advising PGS of their intent to rely upon them. Despite the breadth of the October 2, 2018, Modified Order of Pre-hearing Instructions, Respondent made no effort to disclose the newly created cost-per-home figures.

SSGC correctly noted that, although the $1,800 figure was provided by SSGC in responses to interrogatories served on

November 2, 2018, the rules of discovery contain no continuing obligation to supplement responses that were complete and accurate at the time. SSGC also noted that the information was correct when Mr. McDonough was deposed in November 2018 as the corporate representative in a rule 1.310(b)(6) deposition, and that PGS had not sought to re-depose him as an expert before the close of the time for taking expert deposition. Nonetheless, the information developed by Mr. McDonough was not subject to discovery, and could not have been elicited in a second deposition, since discovery was closed by the time he performed his calculations.

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. Therefore, the motion to strike is granted, and Mr. McDonough's testimony and evidence designed to establish a cost to extend service to Bigham residences that differs from the $1,800 cost previously provided by SSGC and relied upon by the parties will not be considered.

On August 16, 2019, Leesburg filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders. The Motion was granted, and the time for filing proposed recommended

orders was extended to and including September 6, 2019. Each party timely filed a Proposed Recommended Order ("PRO"), which has been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2018), unless otherwise noted.

FINDINGS OF FACT

The Parties and Stipulated Issues

1. PGS is a natural gas local distribution company providing sales and transportation delivery of natural gas throughout many areas of the State of Florida, including portions of Sumter County. PGS is the largest natural gas provider in Florida with approximately 390,000 customers, over 600 full-time employees, and the same number of construction contract crews. PGS's system consists of approximately 19,000 miles of distribution mains throughout Florida. PGS operates systems in areas that are very rural and areas that are densely populated. PGS currently serves more than 45,000 customers in Sumter and Marion counties. PGS is an investor-owned "natural gas utility," as defined in section 366.04(3)(c), and is subject to the Commission's statutory jurisdiction to resolve territorial disputes.

2. Leesburg is a municipality in central Florida with a population of approximately 25,000 within the city limits, and a

broader metropolitan service area ("MSA") population of about 50,000. Leesburg provides natural gas service in portions of Lake and Sumter counties. Leesburg is a "natural gas utility" as defined in section 366.04(3)(c). Leesburg has provided natural gas service to its customers since 1959, and currently serves about 14,000 residential, commercial, and industrial customers both within and outside its city limits via a current system of approximately 276 miles of distribution lines. Leesburg is subject to the Commission's statutory jurisdiction to resolve territorial disputes.

3. SSGC is a Florida limited liability company and an operating division of The Villages. SSGC is the entity through which The Villages has entered into a written contract with Leesburg authorizing Leesburg to supply natural gas services to, initially, the Bigham developments.

4. The issues of cost of capital and amortization and depreciation are not applicable to this dispute.

The Dispute

5. A territorial dispute is a disagreement over which natural gas utility will serve a particular geographic area. In this case, the area in dispute is that encompassed by the Bigham developments.

6. PGS argued that the dispute should be expanded to include areas not subject to current development, but that are

within the scope of anticipated Villages expansion. The extension of this territorial dispute beyond the Bigham developments is not warranted or necessary, and would have the effect of establishing a territorial boundary in favor of one of the parties.

7. As a result of the Agreement to be discussed herein, SSGC has constructed residential gas infrastucture within Bigham, and has conveyed that infrastructure to Leesburg. Leesburg supplies natural gas to Bigham, bills and collects for gas service, and is responsible for upkeep, maintenance, and repair of the gas system. The question for disposition in this proceeding is whether service to Bigham is being lawfully provided by Leesburg pursuant to the standards applicable to territorial disputes.

Natural Gas Regulation

8. PGS is an investor-owned public utility. It is subject to the regulatory jurisdiction of the Commission with regard to rates and service. Its profits and return on equity are likewise subject to regulation.

9. Leesburg is a municipal natural gas utility. The Commission does not regulate, or require the reporting of municipal natural gas utility rates, conditions of service, rate-setting, or the billing, collection, or distribution of revenues. The evidence suggests that the reason for the "hands-

off" approach to municipal natural gas utilities is due to the ability of municipal voters to self-regulate at the ballot box. PGS argues that customers in The Villages, as is the case with any customer outside of the Leesburg city limits, do not have any direct say in how Leesburg sets rates and terms of service.[1/] That may be so, but the Legislature's approach to the administration and operation of municipal natural gas utilities, with the exception of safety reporting and territorial disputes, is a matter of legislative policy that is not subject to the authority of the undersigned.

History of The Villages

10. The Villages is a series of planned residential areas developed under common ownership and development. Its communities are age-restricted, limited to persons age 55 and older. It has been the fastest growing MSA for medium-sized and up communities for the past five years.

11. The Villages started in the 1970s as a mobile home community known as Orange Blossom Gardens in Lake County. That community proved to be successful, and the concept was expanded in the 1980s to include developments with golf courses and clubhouses. Residents began to customize their mobile homes to the point at which the investment in those homes rivaled the cost of site-built homes.

12. In the 1990s, The Villages went to site-built home developments. By then, one of the two original developers had sold his interest to the other, who proceeded to bring his son into the business. They decided that their approach of building homes should be more akin to traditional development patterns in which growth emanates from a central hub. Thus, in 1994, the Spanish Springs Town Center was built, with an entertainment hub surrounded by shopping and amenities. It was a success.

13. By 2000, The Villages had extended southward to County Road ("CR") 466, and a second town center, Lake Sumter Landing, was constructed. The following years, to the present, saw The Villages continue its southward expansion to State Road ("SR") 44, where the Brownwood Town Center was constructed, and then to its southernmost communities of Fenney, Bigham North, Bigham West, and Bigham East, which center on the intersection of CR 468 and CR 501.

14. The Villages currently constructs between 200 and 260 residential houses per month. Contractors are on a computerized schedule by which all tasks involved in the construction of the home are set forth in detail. The schedule was described, aptly, as rigorous. A delay by any contractor in the completion of the performance of its task results in a cascading delay for following contractors.

Gas Service in the Area

15. Gas mains are generally "arterial" in nature, with relatively large distribution mains operating at high distribution pressure extending outward from a connection to an interstate or intrastate transmission line through a gate station. Smaller mains then "pick up" growth along the line as it develops, with lower pressure service lines completing the system.

16. In 1994, Leesburg constructed a gas supply main from the terminus of its existing facility at the Lake County/Sumter County line along CR 470 to the Coleman Federal Prison.

17. In August 2009, PGS was granted a non-exclusive franchise by the City of Wildwood to provide natural gas service to Wildwood. SSGC Exhibit 6, which depicts the boundaries of the City of Leesburg, the City of Wildwood, and the City of Coleman, demonstrates that most, if not all, of the area encompassed by the Bigham developments is within the Wildwood city limits.

18. In 2015, the interstate Sabal Trail transmission pipeline was being extended south through Sumter County. The line was originally expected to run in close proximity to Interstate 75. Even at that location, Leesburg decided that it would construct a gate station connecting to the Sabal Trail

pipeline to provide backfill capabilities for its existing facilities in Lake County, and for its Coleman prison customer.

19. In 2016, the Sabal Trail pipeline was redirected to come much closer to the municipal limits of Leesburg. That decision made the Leesburg determination to locate a gate station connecting to the Sabal Trail pipeline much easier. In addition, construction of the gate station while the Sabal Trail pipeline was under construction made construction simpler and less expensive. By adding the connecting lines to the Sabal Trail pipeline while it was under construction, a "hot tap" was not required.

20. In May 2016, PGS began extending its gas distribution facilities to serve industrial facilities south of Coleman. It started from the terminus of its existing main at the intersection of SR 44 and CR 468 -- roughly a mile and a half west of the Lake County/Sumter County line and the Leesburg city limit -- along CR 468 to the intersection with U.S. Highway 301 ("US 301"), and extending along US 301 to the town of Coleman by January 2017. The distribution line was then extended south along US 301 to Sumterville.[2/] In addition, Sumter County built a line off of the PGS line to a proposed industrial customer/industrial park to the south and west of Coleman, which was assigned to PGS.

21. It is common practice for investor-owned utilities to extend service to an anchor customer, and to size the infrastructure to allow for the addition of customers along the route. By so doing, there is an expectation that a line will be fully utilized, resulting in lower customer cost, and a return on the investment. Nonetheless, PGS has not performed an analysis of the CR 468/US 301 line to determine whether PGS would be able to depreciate those lines and recover the costs.

22. The CR 468/US 301 PGS distribution line is an eight-inch line, which is higher capacity in both size and pressure. The entire line is ceramic-coated steel with cathodic protection, which is the most up-to-date material.

23. PGS sized the CR 468/US 301 distribution line to handle additional capacity to serve growth along the corridor. Although PGS had no territorial or developer agreement relating to any area of The Villages when it installed its CR 468/US 301 distribution line, PGS expected growth in the area, whether it was to be from The Villages or from another developer. Although it did not have specific loads identified, the positioning of the distribution line anticipated residential and commercial development along its route. Nonetheless, none of the PGS lines were extended specifically for future Villages developments. PGS had no territorial agreement, and had no discussion with The Villages about serving any development along the mains.

24. PGS constructed a gate station at the intersection of CR 468 and CR 501 connecting to the Sabal Palm pipeline to serve the anchor industrial facilities. The Sabal Trail gate station was not constructed in anticipation of service to The Villages.

Gas Service to The Villages

25. In 2017, The Villages decided to extend gas service to its Fenney development, located along CR 468. Prior to that decision, The Villages had not constructed homes with gas appliances at any residential location in The Villages.

26. The Villages has extended gas to commercial facilities associated with its developments north of SR 44, which had generally been provided by PGS.

27. The Villages' development in Fruitland Park in Lake County included commercial facilities with gas constructed, installed, and served by Leesburg.

28. Prior to the time in which the Fenney development was being planned, The Villages began to require joint trenching agreements with various utilities contracted to serve The Villages, including water, sewer, cable TV, irrigation, and electric lines. Pursuant to these trenching agreements, The Villages' contractors excavate a trench to serve residential facilities prior to construction of the residences. The trenches are typically four-feet-wide by four-feet-deep. Each of the utilities install their lines in the trench at a

designated depth and separation from the other utility lines in order to meet applicable safety requirements. Using a common trench allows for uniformity of installation and avoids installation mishaps that can occur when lines are installed after other lines are in the ground. The trenching agreements proved to be effective in resolving issues of competing and occasionally conflicting utility line development.

29. The PGS CR 468 distribution line runs parallel to CR 468 along the northern boundary of the Fenney development. Therefore, PGS was selected to provide service when the decision was made to extend gas service into Fenney. PGS entered into a developer agreement with The Villages that was limited to work in Fenney.

30. PGS was brought into the Fenney development project in August 2017, after four development units had been completed. Therefore, PGS had to bring gas service lines into residences in those units as a retrofitted element, and not as a participant to the trenching agreements under which other utilities were installed.

31. There were occasions during installation when the PGS installation contractor, R.A.W. Construction, severed telephone and cable TV lines, broke water and sewer lines, and tore up landscaped and sodded areas. As a result, homes in the four completed Fenney development units were delayed resulting in

missed closing dates. However, since PGS was not brought in until after the fact for the four completed developments, it is difficult to assign blame for circumstances that were apparently not uncommon before joint trench agreements were implemented, and which formed the rationale for the creation of joint trench agreements.[3/]

32. The Villages was not satisfied with the performance of PGS at its Fenney development. The problems described by The Villages related to construction and billing services. The Villages also complained that PGS did not have sufficient manpower to meet its exceedingly rigid and inflexible construction requirements.

33. Mr. McDonough indicated that even in those areas in which PGS was a participant in joint trenching agreements, it was incapable of keeping up with the schedule. Much of that delay was attributed to its contractor at the time, R.A.W. Construction. After some time had passed, PGS changed contractors and went with Hamlet Construction ("Hamlet"), a contractor with which The Villages had a prior satisfactory relationship. After Hamlet was brought in, most of the construction-related issues were resolved. However, Mr. Lovo testified that billing issues with PGS were still unsatisfactory, resulting in delays in transfer of service from

The Villages to the residential home buyer, and delays and mistakes in various billing functions, including rebates.

34. In late 2017, as the Fenney development was approaching buildout, The Villages commenced construction of the Bigham developments. The three Bigham developments were adjacent to one another. The Bigham developments will collectively include 4,200 residential homes, along with commercial support facilities.

35. By September 27, 2017, Leesburg officials were having discussions with Mr. Geoffroy, a representative of its gas purchasing cooperative, Florida Gas Utility ("FGU"), as to how it might go about obtaining rights to serve The Villages' developments. Mr. Rogers inquired, via email, "[w]hat about encroachment into [PGS] territory north of 468, which is where they plan to build next? [PGS] has a line on 468 that is feeding the section currently under development." Some 15 minutes later, Mr. Geoffroy described the "customer preference" plan that ultimately became a cornerstone of this case as follows:

> Yes, the areas that the Villages "plans" to build is currently "unserved territory", so the PSC looks at a lot of factors, such as construction costs, proximity of existing infrastructure and other things; however, the rule goes on to state that customer preference is an over-riding factor; if all else is substantially equal. In this case, simply having the Villages say they will

only put gas into the homes if Leesburg serves them, but not TECO/PGS, will do it. (emphasis added).

36. On November 16, 2017, Leesburg was preparing for a meeting with The Villages to be held "tomorrow." Among the topics raised by Mr. Rogers was "territorial agreement?" to which Mr. Geoffroy responded "[d]epends on which option [The Villages] choose. If they become the utility, then yes. If not, you will eventually need an agreement with [PGS]."

37. During this period of time, PGS had no communication with either Leesburg or The Villages regarding the extension of gas service to Bigham.

38. PGS became aware that Hamlet was installing gas lines along CR 501 and CR 468 in late December 2017. PGS had not authorized those installations. Bigham West adjoined Fenney, and PGS had lines in the Fenney development that could have established a point of connection to the Bigham developments without modification of the lines. In addition, each of the three Bigham developments front onto CR 468 and are contiguous to the CR 468 PGS distribution line. The distance from the PGS line directly into any of the Bigham developments was a matter of 10 to 100 feet.

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."

40. PGS met with Leesburg officials in January 2018 to determine what was being constructed and to avoid a territorial dispute. PGS was directed by Leesburg to contact The Villages for details.

41. Thereafter, PGS met with representatives of The Villages. PGS was advised that The Villages was "unappreciative" of the business model by which The Villages built communities, and a public utility was able to serve the residential customers and collect the gas service revenues for 30 or 40 years.

The Agreement

42. The Villages was, after the completion of Fenney, unsure as to whether it would provide gas service to Bigham, or would continue its past practice of providing all electric homes. The Villages rebuffed Leesburg's initial advances to extend gas service to The Villages' new developments, including Bigham.

43. Thereafter, The Villages undertook a series of discussions with Leesburg as to how gas service might be provided to additional Villages' developments in a manner that would avoid what The Villages' perceived to be the inequity of allowing a public utility to serve The Villages' homes, with the public utility keeping the revenues from that service.

44. Leesburg and The Villages continued negotiations to come to a means for extending gas service to The Villages' developments, while allowing The Villages to collect revenues generated from monthly customer charges and monthly "per therm" charges. SSGC was formed as a natural gas construction company to engage in those discussions. SSCG was, by its own acknowledgement, "an affiliate of The Villages, and the *de facto* proxy for The Villages in this proceeding."

45. On January 3, 2018, Leesburg internally discussed how to manage the issue of contributions in aid of construction ("CIAC"). It appeared to Mr. Rogers that gas revenues would continue to be shared with The Villages after its infrastructure investment, with interest, was paid off, with Mr. Rogers questioning "is there a legal issue with them continuing to collect revenue after their capital investment is recovered? Admittedly that may not occur for 15 years." A number of tasks to be undertaken by The Villages "justifying the continued revenue stream" were proposed, with Mr. Geoffroy stating that:

> While this may seem a large amount for very little infrastructure, I think it would probably be okay. Because [PGS] distribution is so close, and the Villages has used them previously, it would be relatively easy for the Villages to connect to [PGS] and disconnect from [Leesburg], at any point in the future. In order to get and retain the contract, this is what [Leesburg] has to agree to win the deal.

> Not sure anyone has rate jurisdiction on this anyway, other than [Leesburg].

46. Those discussions led to the development of the Agreement under which service to Bigham was ultimately provided.

47. The Agreement was a formulaic approach to entice The Villages into allowing Leesburg to be the gas provider for the residents that were to come.

48. The Agreement governs the construction, purchase, and sale of natural gas distribution facilities providing service to residential and commercial customers in The Villages' developments.

49. On February 12, 2018, the Leesburg City Commission adopted Resolution 10,156, which authorized the Mayor and City Clerk to execute the Agreement on the Leesburg's behalf. The Agreement was thereupon entered into between Leesburg and SSGC, with an effective date of February 13, 2018. Then, on February 26, 2019, the Leesburg City Commission adopted Ordinance 18-07, which enacted the Villages Natural Gas Rate Structure and Method of Setting Rates established in the Agreement into the Leesburg Code of Ordinances.

50. The Agreement has no specific term of years, but provides for a term "through the expiration or earlier termination of [Leesburg]'s franchise from the City of Wildwood." Mr. Minner testified that "the length of the

agreement is 30 years from when a final home is built, and then over that overlay is the 30-year franchise agreement from the City of Wildwood." However, SSGC's response to interrogatories indicates that the Agreement has a 30-year term. Though imprecise, the 30-year term is a fair measure of the term of the Agreement.

51. For the Bigham developments, i.e., the Agreement's original "service area," facilities are those installed into Bigham from the regulator station at the end of Leesburg's new CR 501 distribution line, and include distribution lines along Bigham's roads and streets, all required service lines, pressure regulator stations, meters and regulators for each customer, and other appurtenances by which natural gas will be distributed to customers.

52. The Agreement acknowledges that Leesburg and SSGC "anticipate that the service Area will expand as The Villages® community grows, and thus, as it may so expand, [Leesburg and SSGC] shall expand the Service Area from time to time by written Amendment to this Agreement."

53. SSGC is responsible for the design, engineering, and construction of the natural gas facilities within Bigham. SSGC is responsible for complying with all codes and regulations, for obtaining all permits and approvals, and

arranging for labor, materials, and contracts necessary to construct the system.

54. Leesburg is entitled to receive notice from SSGC prior to the construction of each portion of the natural gas system, and has "the right but not the obligation" to perform tests and inspections as the system is installed. The evidence indicates that Leesburg has assigned a city inspector who is on-site daily to monitor the installation of distribution and service lines.

55. SSGC has, to date, been using Hamlet as its contractor, the same company used by PGS to complete work at Fenney.

56. Upon completion of each section in the development, SSGC provides Leesburg with a final inspection report and a set of "as-built" drawings. SSGC then conveys ownership of the gas distribution system to Leesburg in the form of a Bill of Sale.

57. Upon the conveyance of the system to Leesburg, Leesburg assumes responsibility for all operation, maintenance, repairs, and upkeep of the system. Leesburg is also responsible for all customer service, emergency and service calls, meter reading, billing, and collections. Upon conveyance, Leesburg operates and provides natural gas service to Bigham through the system and through Leesburg's facilities "as an integrated part of [Leesburg's] natural gas utility operations."

58. In order to "induce" SSGC to enter into the Agreement, and as the "purchase price" for the system constructed by SSGC, Leesburg will pay SSCG a percentage of the monthly customer charge and the "per therm" charge billed to Bigham customers.

59. Leesburg will charge Bigham customers a "Villages Natural Gas Rate" ("Villages Rate"). The "per therm" charge and the monthly customer charge for each Bigham customer are to be equal to the corresponding rates charged by PGS. If PGS lowers its monthly customer charge after the effective date of the agreement, Leesburg is not obligated to lower its Villages Rate.

60. Bigham customers, who are outside of Leesburg's municipal boundaries and unable to vote in Leesburg municipal elections, will pay a rate for gas that exceeds that of customers inside of Leesburg's municipal boundaries and those inside of Leesburg's traditional service area.

61. A preponderance of the evidence indicates that for the term of the agreement, The Villages will collect from 52 percent (per Mr. Minner at hearing) to 55 percent (per Mr. Minner in deposition) of the total gas revenues paid to Leesburg from Bigham customers. The specific breakdown of revenues is included in the Agreement itself, and its recitation here is not necessary.

62. The mechanism by which The Villages, through SSGC, receives revenue from gas service provided by Leesburg, first to

its "proxy" customer and then to its end-user customers, is unique and unprecedented. It has skewed both competitive and market forces. Nonetheless, PGS was not able to identify any statute or rule that imposed a regulatory standard applicable to municipal gas utilities that would prevent such an arrangement.

63. The evidence establishes that, under the terms of the Agreement, Leesburg is the "natural gas utility" as that term is defined by statute and rule. The evidence establishes that SSGC is, nominally, a gas system construction contractor building gas facilities for Leesburg's ownership and operation. The evidence does not establish that the Agreement creates a "hybrid" public utility.

Extension of Service to the Bigham Developments

64. Leesburg's mains nearest to Bigham were at SR 44 at the Lake County/Sumter County line, a distance of approximately 3.5 miles from the nearest Bigham point of connection; and along CR 470, a distance of approximately 2.5 miles to the nearest Bigham point of connection.

65. When the Agreement was entered, neither the Leesburg 501 line nor the Leesburg 468 line were in existence.

66. At the time the Agreement was entered, Leesburg knew that PGS was the closest provider to the three Bigham developments.

67. In order to serve Bigham, Leesburg constructed a distribution line from a point on CR 470 near the Coleman Prison northward along CR 501 for approximately 2.5 miles to the southern boundary between Bigham West and Bigham East.

68. Leesburg constructed a second distribution line from the Lake County line on SR 44 eastward to its intersection with CR 468, and then southward along CR 468 to the Florida Turnpike, just short of the boundary with Bigham East, a total distance of approximately 3.5 miles.

69. The Leesburg CR 468 line will allow Leesburg to connect with the Bigham distribution line and "loop" or "backfeed" its system to provide redundancy and greater reliability of service to Bigham and other projects in The Villages as they are developed.

70. The new Leesburg CR 468 line runs parallel to the existing PGS CR 468 line along its entire CR 468 route, and crosses the PGS line in places. There are no Commission regulations that prohibit crossing lines, or having lines in close proximity. Nonetheless, having lines in close proximity increases the risk of, among other things, complicating emergency response issues where fire and police believe they are responding to one utility's emergency when it is the other's emergency.

Safety

71. Although PGS was the subject of a Commission investigation and violation related to a series of 2013-2015 inspections, those violations have been resolved to the satisfaction of the Commission. Mr. Szelistowski testified that PGS has received no citations or violations from the Commission, either from a construction standpoint or an operation and maintenance standpoint, for the past three years. Mr. Moses testified that both PGS and Leesburg are able to safely provide natural gas service to customers in Sumter County. His testimony is credited. Given the differences in size, geographic range, nature, and density of areas served by the PGS and Leesburg systems, the prior violations are not so concerning as to constitute a material difference in the outcome of this case.

72. All of the distribution and service lines proposed by Leesburg and PGS to serve and for use in the disputed territory are modern, safe, and state-of-the-art.

Reliability

73. As stated by Leesburg in its PRO, "[t]he reliability of a natural gas distribution system to serve a designated area depends on the nature, location and capacity of the utility's existing infrastructure, the ability of the utility to secure

the necessary quantities of natural gas, and the ability of the natural gas utility to supply gas in a safe manner."

74. As set forth herein, the location of PGS's existing infrastructure, vis-a-vis the disputed territory, weighs strongly in its favor. As to the other reliability factors identified by Leesburg, both parties are equally capable of providing reliable service to the disputed territory.

75. Both PGS and Leesburg demonstrated that they have the managerial and operational experience to provide service in the disputed area.

76. There was no evidence to suggest that end-user customers of either Leesburg or PGS, including PGS's Fenney customers, are dissatisfied with their service.

Regulatory Standards for Territorial Disputes

77. Rule 25-7.0472 establishes the criteria for the resolution of territorial disputes regarding gas utilities.

Rule 25-7.0472(2)(a)

78. Rule 25-7.0472(2)(a) includes the following issues for consideration in resolving a territorial dispute regarding gas utilities:

1. The capability of each utility to provide reliable natural gas service within the disputed area with its existing facilities and gas supply contracts.

79. Leesburg currently obtains its natural gas supply from the Florida Gas Transmission ("FGT") distribution system, and

purchases natural gas through FGU, a not-for-profit joint action agency, or "co-op" for purchasing natural gas. FGU's membership consists of city or governmental utility systems in Florida that distribute natural gas to end-user customers, or that use natural gas to generate electricity. FGU purchases and provides gas and manages interstate pipeline capacity for its members.

80. FGU's members contractually reserve space in interstate transmission lines. FGU aggregates its members' contracts into a single consolidated contract between FGU and the interstate pipelines and collectively manages its members' needs through that contract. FGU has flexibility to transfer pipeline capacity from one member to benefit another member.

81. Leesburg currently takes its natural gas through a "lateral" pipeline from the FGT transmission line. Gas travels through one of two gate stations, one in Haines Creek, and the other near the Leesburg municipal airport, both of which are located in Leesburg's northeast quadrant. At the gate stations, transmission pressure is reduced to lower distribution pressure, and the gas is metered as it is introduced into Leesburg's distribution system.

82. The FGT transmission capacity is fully subscribed by FGU. Leesburg has not fully subscribed its lateral pipeline and has sole access to its lateral line capacity.

83. Prior to the entry of the Agreement, and Leesburg/SSGC's extension of distribution lines along CR 501 and CR 468, Leesburg's distribution lines extended into Sumter County only along CR 470 to the Coleman Federal Prison. One other Leesburg line extended to the county line along SR 44, and then north to serve a residential area in Lake County.

84. Leesburg argues that it has already extended lines, and is providing service to thousands of homes in Bigham, and that those facilities should be considered in determining whether it can "provide reliable natural gas service within the disputed area with its existing facilities." PGS did not know of Leesburg's intent to serve Bigham until late December 2017, when it observed PGS's Fenney contractor, Hamlet, installing lines along CR 468, lines that it had not approved. PGS met with Leesburg officials in January 2018 to determine what was being constructed and to avoid a territorial dispute. PGS was directed by Leesburg to contact The Villages for details.

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.

86. Leesburg's existing facilities, i.e., those existing prior to extension to the disputed territory, were sufficient to serve the needs of Leesburg's existing service area. The existing facilities were not sufficient to serve the disputed territory without substantial extension.

2. The extent to which additional facilities are needed.

87. Both PGS and Leesburg have sufficient interconnections with transmission pipelines.

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."

89. PGS demonstrated that it is capable of serving the disputed territory with no additional facilities needed. Its distribution mains are located directly adjacent to the disputed

territory from the Fenney development from the west, and are contiguous to each of the Bigham developments from CR 468.

90. The PGS CR 468 line was not constructed in specific anticipation of serving Bigham, and its cost is not fairly included in PGS's cost to provide natural gas service to the disputed area presently and in the future.

91. PGS's existing distribution mains are capable of providing service to Bigham literally within feet of a point of connection. PGS's cost to reach the disputed territory from its existing facilities in Fenney was estimated at $500 to $1,000. The cost of connecting the interior Bigham service lines to PGS's CR 468 line is, at most, $10,000.

92. PGS's total cost of extending gas distribution lines to serve Bigham is, at most, $11,000.

93. The evidence demonstrated that Leesburg required substantial additional facilities to serve the disputed territory.

94. In order to meet the needs for reliable service to Bigham established in the Agreement, Leesburg constructed a new high-pressure distribution line from the existing CR 470 line north along CR 501 to Bigham for a distance of 2.5 miles at a cost of $651,475. The CR 501 line was constructed in specific anticipation of serving Bigham and is fairly included in

Leesburg's cost to provide natural gas service to the disputed area presently and in the future.

95. In order to meet the needs for reliable service to Bigham established in the Agreement, Leesburg constructed a new high-pressure distribution line along SR 44 and CR 468 to Bigham for a distance of 3.5 miles at a cost of $560,732. The CR 468 segment of Leesburg's line is adjacent and parallel to PGS's existing CR 468 pipeline. Leesburg plans to connect the CR 468 line with the CR 501 line by way of a regulator station to create a system loop. Although Leesburg's CR 468 pipeline is, ostensibly, not the primary distribution line for Bigham, it is directly related to the CR 501 line, and provides desired redundancy and reliability for Bigham, as well as infrastructure for the further expansion of Leesburg's gas system to The Villages. Thus, the cost of extending Leesburg's CR 468 line is fairly included in Leesburg's cost as an "additional facility" to provide "reliable natural gas service," to the disputed area presently and in the future.

96. Leesburg's total cost of extending gas distribution lines designed as primary distribution or redundant capability to serve Bigham is a minimum of $1,212,207.

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 total cost of constructing the gas infrastucture to serve Bigham could be as much as $2.2 million.

98. PGS argues that Leesburg's cost of connecting to the Sabal Trail transmission line should be included in the cost of serving the disputed territory. Leesburg began planning and discussions to connect to Sabal Trail as early as 2015, when the construction of Sabal Trail through the area became known. Leesburg entered into a contract for the Sabal Trail connection in February 2016. The Sabal Trail connection was intended to provide Leesburg with additional redundant capacity for its system independent of service to The Villages. The cost of constructing the Sabal Trail gate station is not fairly included in Leesburg's cost to provide natural gas service to the disputed area presently and in the future.

Rule 25-7.0472(2)(b)

99. Rule 25-7.0472(2)(b) includes the following issues for consideration in resolving a territorial dispute regarding gas utilities:

1. The nature of the disputed area and the type of utilities seeking to serve it.

100. The area in dispute was, prior to the commencement of construction, essentially rural, with rapidly encroaching residential/commercial development. Although the area was generally rural at the time PGS installed its CR 468/US 301 distribution line, there was a well-founded expectation that development was imminent, if not by The Villages, then by another residential developer. The disputed territory is being developed as a master-planned residential community with associated commercial development.

101. The Bigham developments are currently proximate to the Fenney development. Other non-rural land uses in the area include the Coleman Federal Prison and the American Cement plant.

102. As indicated, Leesburg is a municipal gas utility, and PGS is a public gas utility. The utilities seeking to serve the disputed territory are both capable, established providers with experience serving mixed residential and commercial areas.

103. There is nothing with regard to this factor that would tip the balance in either direction.

2. The degree of urbanization of the area and its proximity to other urban areas.

104. As it currently stands, the disputed territory is bounded to its south and east by generally undeveloped rural property, to its south by rural property along with the Coleman Prison and American Cement plant, to its west by the Fenney development and additional undeveloped rural property, and to its north by low-density residential development.

105. The disputed territory is characterized by residential areas of varying density, interspersed with commercial support areas. The nearest of the "town centers," which are a prominent feature of The Villages development, is Brownwood Paddock Square, which is located north of SR 44, and a few miles north of Fenney and Bigham. The town center is not in the disputed territory.

106. The terms "urban" and "rural" are not defined in Florida Administrative Code chapter 25-7, or in chapter 366. Thus, application of the common use of the term is appropriate. "Urban" is defined as "of, relating to, characteristic of, or constituting a city." Merriam-Webster, https://www.merriam-webster.com/dictionary/urban. "Rural" is defined as "of or relating to the country, country people or life, or

agriculture." Merriam-Webster, https://www.merriam-webster.com/dictionary/rural.

107. The disputed territory was rural prior to the development of Bigham. The area is becoming more loosely urbanized as The Villages has moved into the area and is expected to experience further urban growth to the south and east. Fenney and Bigham are, aside from their proximity to one another, not currently proximate to other urban areas.

108. There is nothing with regard to this factor that would tip the balance in either direction.

3. The present and reasonably foreseeable future requirements of the area for other utility services.

109. Since the disputed territory is a completely planned development, there are requirements for basic utilities. Leesburg provides other utility services to the greater Leesburg MSA and the Villages Fruitland Park development, including electric, water, and sewer service, and has, or is planning to provide such services to other developments for The Villages in the area.

110. Leesburg's ability to provide other utility services to The Villages in addition to gas service is a factor in Leesburg's favor.

Rule 25-7.0472(2)(c)

111. Rule 25-7.0472(2)(c) establishes that the cost of each utility to provide natural gas service to the disputed area presently and in the future is an issue for consideration in resolving a territorial dispute regarding gas utilities. Various costs are broken out in subparagraphs 1. through 9. of the rule, and will be addressed individually. However, it is clear, as set forth in the facts related to rule 25-7.0472(2)(a) above, that the cost of extending service into Bigham was substantially greater for Leesburg than for PGS.

112. The individually identified costs include the following:

1. Cost of obtaining rights-of-way and permits.

113. There was no evidence to suggest that the cost of obtaining rights-of-way and permits for the construction of the gas infrastructure described herein varied between Leesburg and PGS.

114. There is nothing with regard to this factor that would tip the balance in either direction.

2. Cost of capital.

115. The parties stipulated that the issue of cost of capital is not applicable to this dispute.

3. Amortization and depreciation.

116. The parties stipulated that the issues of amortization and depreciation are not applicable to this dispute.

4. through 6. Cost-per-home.

117. The cost-per-home for extending service to homes in Bigham includes the costs identified in rule 25-7.0472(2)(c)4. (labor; rate per hour and estimated time to perform each task), rule 25-7.0472(2)(c)5. (mains and pipe; the cost per foot and the number of feet required to complete the job), and rule 25-7.0472(2)(c)6. (cost of meters, gauges, house regulators, valves, cocks, fittings, etc., needed to complete the job).

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.

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.

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

7. Cost of field compressor station structures and measuring and regulating station structures.

121. None of the parties specifically identified or discussed the cost of field compressor station structures and

measuring and regulating station structures in the Joint Pre-hearing Stipulation or their PROs. Thus, there is little to suggest that the parties perceived rule 25-7.0472(2)(c)7. to be a significant factor in the territorial dispute. As a result, there is nothing with regard to this factor that would tip the balance in either direction.

8. Cost of gas contracts for system supply.

122. None of the parties specifically identified or discussed the cost of the respective gas contracts for system supply in the Joint Pre-hearing Stipulation or their PROs. Thus, there is little to suggest that the parties perceived rule 25-7.0472(2)(c)8. to be a significant factor in the territorial dispute. As a result, there is nothing with regard to this factor that would tip the balance in either direction.

9. Other costs that may be relevant to the circumstances of a particular case.

123. There was considerable evidence and testimony as to the revenues that would flow to SSGC under the 30-year term of the Agreement. SSGC's revenues under the Agreement are not relevant as they are not identified as such in rule 25-7.0472, and are not directly related to the rates, which will likely not exceed PGS's regulated rate.

Rule 25-7.0472(2)(d)

124. Rule 25-7.0472(2)(d) includes that the Commission may consider "other costs that may be relevant to the circumstances of a particular case." This factor is facially identical to that in rule 25-7.0472(2)(c)9., but is, nonetheless, placed in its own rule section and must therefore include costs distinct from those to provide natural gas service to the disputed area presently and in the future.

1. Cost of service to end-user customers.

125. Due to the nature of the Agreement, Leesburg will charge a "Villages Rate" that will be equal to the fully regulated PGS rate.[4/] Thus, as a general rule, the cost of service to end-user customers will be the same for PGS and Leesburg.

126. There is nothing with regard to this factor that would tip the balance in either direction.

2. Uneconomic duplication of facilities.

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. In approving the resultant agreement, the Commission routinely considers that the disposition of the dispute by agreement avoids uneconomic duplication of facilities. See In re: Petition to Resolve Territorial Dispute with Clearwater Gas System, a Division of the City of Clearwater, by Peoples Gas System, Inc., 1995 Fla. PUC LEXIS 742, PSC Docket No. 94-0660-GU; Order No. PSC-95-0620-AS-GU (Fla. PSC May 22, 1995)("[W]e believe that the territorial agreement is in the public interest, and its adoption will further our longstanding policy of avoiding unnecessary and uneconomic duplication of facilities. We approve the agreement and dismiss the territorial dispute.); In re: Petition by Tampa Electric Company d/b/a Peoples Gas System and Florida Division of Chesapeake Utilities Corporation for Approval of Territorial Boundary Agreement in Hillsborough, Polk, and Osceola Counties, 1999 Fla. PUC LEXIS 2051, Docket No. 990921-GU; Order No. PSC-99-2228-PAA-GU181 (Fla. PSC Nov. 10, 1999)("Over the years, CUC and PGS have engaged in territorial disputes. As each utility expands its system, the distribution facilities become closer and closer, leading to disputes over which is entitled to the unserved areas. The purpose of this Agreement

is to set forth new territorial boundaries to reduce or avoid the potential for future disputes between CUC and PGS, and to prevent the potential duplication of facilities."); In re: Joint Petition for Approval of Territorial Agreement in DeSoto County by Florida Division of Chesapeake Utilities Corporation and Sebring Gas System, Inc., 2017 Fla. PUC LEXIS 163, Docket No. 170036-GU; Order No. PSC-17-0205-PAA-GU (Fla. PSC May 23, 2017)("The joint petitioners stated that without the proposed agreement, the joint petitioners' extension plans would likely result in the uneconomic duplication of facilities and, potentially, a territorial dispute . . . . [W]e find that the proposed agreement is in the public interest, that it eliminates any potential uneconomic duplication of facilities and will not cause a decrease in the reliability of gas service.").

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. See In re: Petition to Resolve Territorial Dispute with South Florida Natural Gas Company and Atlantic Gas Corporation by West Florida Natural Gas Company, 1994 Fla. PUC LEXIS 1332, Docket No. 940329-GU; Order No. PSC-94-1310-S-GU (Fla. PSC Oct. 24, 1994)("On March 31, 1994, West Florida filed a Petition to Resolve a Territorial Dispute with South Florida and Atlantic Gas . . . . On

August 26, 1994, West Florida, South Florida, and Atlantic Gas filed a Joint Petition for Approval of Stipulation, which proposed to resolve the territorial dispute by West Florida's purchase of the Atlantic Gas facilities . . . . We believe that approval of the joint stipulation is in the public interest because its adoption will avoid unnecessary and uneconomic duplication of facilities.").

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.

130. Leesburg argues that if uneconomic duplication of facilities is a relevant factor, "the evidence of record demonstrates that the City will suffer significant financial

impact if it is not permitted to continue to serve the Bigham Developments." 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.

Rule 25-7.0472(2)(e)

131. Rule 25-7.0472(2)(e) establishes that customer preference is the "tie-breaker" if all other factors are substantially equal. The Villages is the "customer" for purposes of the selection of the provider of natural gas service to Bigham.

132. There is no dispute that The Villages, as the proxy for the individual end-user customers, has expressed its preference to be served by Leesburg. The direct financial benefit to The Villages, and Leesburg's willingness to enter into a revenue sharing plan -- a plan that, if proposed by PGS, would likely not be allowed by the Commission in its rate-setting capacity -- no doubt plays a role in that decision. Gas service to end-user customers living in in Bigham will be a revenue-generating venture for The Villages if served by Leesburg, and will not if served by PGS.

133. Leesburg and SSGC have suggested that customer preference should occupy a more prominent role in the dispute since gas service, unlike electric, water, and sewer services, is an optional utility service. SSGC argued that since The Villages expressed that it would forego providing gas service to its developments if PGS is determined to be entitled to serve -- a position oddly presaged by Mr. Geoffroy in his September 27, 2017, email with Leesburg (see paragraph 35) -- and "in consideration of the business practices, size, track record of success, and economic import of The Villages," the preference of The Villages for service from Leesburg should "be a significant factor in the resolution of this dispute." Neither of those reasons can serve to elevate customer preference from its tie-breaker status as established by rule.

CONCLUSIONS OF LAW

Jurisdiction

134. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

135. The Commission has the authority to regulate natural gas utilities in the State of Florida, within the scope of its jurisdiction as set forth by law, including section 366.04.

136. The Commission regulates "public utilities," as that term is defined in section 366.02(1), which are entities that "supply" natural gas to or for the public.

137. The Commission has "authority over natural gas utilities," pursuant to section 366.04(3), for the resolution of "any territorial dispute involving service areas between and among natural gas utilities."

138. The Commission has certain additional authority over natural gas utilities under chapter 368 regarding gas transmission and distribution, as well as gas safety.

Standing

139. The facts stipulated by the parties are sufficient to demonstrate that the substantial interests of the parties would be affected by the disposition of this territorial dispute. Furthermore, standing is conferred on competing natural gas utilities as a result of section 366.04(3).

Nature of the Proceeding and Burden of Proof

140. This is a *de novo* proceeding. § 120.57(1)(k), Fla. Stat. 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. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

Standards

141. Section 171.208, Florida Statutes, establishes that municipalities have the authority to provide services and facilities in areas outside of their municipal boundaries "subject to the jurisdiction of the Public Service Commission to resolve territorial disputes under s. 366.04."

142. Section 366.11(1) establishes that "[n]o provision of this chapter shall apply in any manner, other than as specified in [s.] 366.04 . . . , to utilities owned and operated by municipalities, whether within or without any municipality . . . ." The Commission does not have jurisdiction over a municipality's natural gas rates and charges. See, e.g. In re: Joint Petition for Approval of Territorial Agreement in Orange County by Peoples Gas System and The Lake Apopka Natural Gas District, 2013 Fla. PUC LEXIS 215, Docket No. 130166-GU; Order No. PSC-13-0345-PAA-GU (Fla. PSC July 31, 2013)("Lake Apopka is not a public utility as defined by section 366.02(1), F.S., but it is a natural gas utility subject to our jurisdiction under section 366.04(3), F.S., for the purpose of resolving territorial disputes and approving territorial agreements. We do not have jurisdiction over Lake Apopka's rates and charges.")

143. Section 366.03 provides, in pertinent part, that:

> All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it,

> and each rule and regulation of such public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

"The underlying purposes of Sections 366.03 and 366.05(1), Florida Statutes, are to ensure that customers are provided with sufficient, adequate, and efficient service at fair and reasonable rates and charges; and to ensure that such service and the associated rates and charges are provided in a non-discriminatory manner." In re: Petition for Approval of a Pre-pay Residential Service Experimental Rate by Florida Power & Light Company, 2000 Fla. PUC LEXIS 837, Docket No. 000478-EI; Order No. PSC-00-1282-PAA-EI (Fla. PSC Jan. 14, 2000). As it pertains to public utilities like PGS, the Commission is "granted broad authority with Chapter 366, F.S., to interpret the term 'undue' discrimination. Adopting a non-cost base rate to achieve a public good could open the door not only to other such requests, but also charges of discriminatory treatment of those customers who would bear the increased cost not paid by the cost causer." In re: Petition for Rate Increase by Tampa Electric Company, 2009 Fla. PUC LEXIS 251, Docket No. 080317-EI; Order No. PSC-09-0283-FOF-EI (Fla. PSC Apr. 30, 2009).

144. Section 366.04(3) establishes the authority of the Commission to both approve territorial agreements between and

among natural gas utilities, and to resolve territorial disputes between natural gas utilities, and provides, in pertinent part, that:

> (3) In the exercise of its jurisdiction, the commission shall have the authority over natural gas utilities for the following purposes:
>
> (a) To approve territorial agreements between and among natural gas utilities. However, nothing in this chapter shall be construed to alter existing territorial agreements between the parties to such agreements.
>
> (b) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among natural gas utilities. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

145. Rule 25-7.0472, entitled "Territorial Disputes for Natural Gas Utilities," which is unaltered from its February 25, 1991 adoption, establishes the standards and criteria to be weighed and balanced in a territorial dispute as follows:

> (1) A territorial dispute proceeding may be initiated by a petition from a natural gas utility, requesting the Commission to resolve the dispute . . . . Each utility which is a party to a territorial dispute shall provide a map and written description

of the disputed area along with the conditions that caused the dispute. Each utility party shall also provide a description of the existing and planned load to be served in the area of dispute and a description of the type, additional cost, and reliability of natural gas facilities and other utility services to be provided within the disputed area.

(2) In resolving territorial disputes, the Commission shall consider:

(a) The capability of each utility to provide reliable natural gas service within the disputed area with its existing facilities and gas supply contracts and the extent to which additional facilities are needed;

(b) The nature of the disputed area and the type of utilities seeking to serve it and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;

(c) The cost of each utility to provide natural gas service to the disputed area presently and in the future; which includes but is not limited to the following:

1. Cost of obtaining rights-of-way and permits.

2. Cost of capital.

3. Amortization and depreciation.

4. Labor; rate per hour and estimated time to perform each task.

5. Mains and pipe; the cost per foot and the number of feet required to complete the job.

> 6. Cost of meters, gauges, house regulators, valves, cocks, fittings, etc., needed to complete the job.
>
> 7. Cost of field compressor station structures and measuring and regulating station structures.
>
> 8. Cost of gas contracts for system supply.
>
> 9. Other costs that may be relevant to the circumstances of a particular case.
>
> (d) Other costs that may be relevant to the circumstances of a particular case.
>
> (e) Customer preference if all other factors are substantially equal.
>
> (3) The Commission may require additional relevant information from the parties of the dispute if so warranted.

146. The evidence in this case establishes that Leesburg is a municipality "which supplies natural gas . . . by pipeline, to or for the public." Thus, Leesburg is a "natural gas utility" as defined in section 366.04(3)(c).

147. The Agreement between Leesburg and SSGC does not confer duties on SSGC that would cause it to become a supplier of natural gas. Thus, SSGC is not a "natural gas utility" as defined in section 366.04(3)(c). Furthermore, the evidence establishes that the relationship between Leesburg and SSGC has not created a "hybrid utility" of which SSGC is a part.

148. PGS's claims meet the requirements for it to bring a territorial dispute pursuant to section 366.004(3) and

rule 25-7.0472. As established in the Commission's Order dated June 28, 2018, the PGS Petition sets forth that SSGC and Leesburg are installing gas infrastructure in a PGS natural gas service area; the area in question is adjacent to PGS natural gas infrastructure; PGS has a non-exclusive franchise with the City of Wildwood to provide natural gas service to the area; and there is an agreement between Leesburg and SSGC for Leesburg to supply gas to the area. The Order further provides that "[t]he Petition contains adequate information in the form of an agreement, construction notices, ordinance, permits, and maps to indicate that an active dispute exists as to who will provide natural gas to the disputed service area. Our review of the maps attached to the Petition further illustrates that this is a fully formed territorial dispute over the contested service area." The findings and conclusions set forth by the Commission in its Order were substantiated by the evidence received in this case, and are accepted and adopted herein.

149. Finally, the Order reiterates the Commission's policy regarding "customer preference" by providing that "SSGC and Leesburg encouraged us to allow market forces to settle this matter and to allow the customers to select their own utility to serve this area. These arguments run counter to our statutory responsibility to resolve any territorial dispute upon petition and ignores rule 25-7.0472(2)(c-e), F.A.C., which requires us,

when resolving territorial disputes, to consider the cost of each utility to provide natural gas service to the disputed area presently and in the future. Among the many factors that we consider in a territorial dispute, customer preference is considered only if all other factors related to the costs are substantially equal."

150. Leesburg concludes its proposed findings of fact with the statement that its "provision of natural gas services to The Bigham Developments is an example of beneficial competition" and, in its proposed conclusions of law, asserts that "it appears that market forces are at work, and PGS failed to effectively compete."

151. The Commission, as the regulatory body having exclusive jurisdiction over this matter pursuant to chapter 366, may accept the undersigned's findings and conclusions and apply its policies as it believes to be in the best interest of the public. However, it should not do so in this case based on a misapprehension that the Agreement between Leesburg and SSGC was, in any way, "beneficial competition," or that The Villages' decision to select Leesburg as its natural gas provider was driven by "market forces." It was fundamentally, in the words of Leesburg's own city manager, "a pay-to-play deal."[5/] Leesburg paid, so Leesburg played. Under the Commission's cost-based rate setting oversight, PGS could not pay, so PGS did not play.

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." Gulf Coast Elec. Coop. v. Clark, 674 So. 2d 120, 122 (Fla. 1996). There is no reason that it should be condoned here.

152. The area subject to this territorial dispute is that of the three Bigham Developments, Bigham North, Bigham West, and Bigham East.

153. Based on the foregoing Findings of Fact, it is concluded that the factors set forth in rule 25-7.0472(2)(a)-(d) are substantially equal, with the following exceptions:

1. Rule 25-7.0472(2)(a) - The capability of each utility to provide reliable natural gas service within the disputed area with its existing facilities and gas supply contracts and the extent to which additional facilities are needed.

154. The evidence demonstrates the PGS could provide reliable natural gas service to the disputed territory through its existing facilities at a cost of, at most, $11,000, and requires no additional facilities.

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 between $1,212,207 and $2,200,000.

156. The cost differential -- at least $1,200,000 and possibly as much as a million dollars more -- is far from *de minimis*. For example, as stated by the Florida Supreme Court:

> In [Gulf Coast Electric Cooperative v. Clark, 674 So. 2d 120, 123 (Fla. 1996)], the Gulf Coast cooperative spent $14,583 to upgrade a single-phase line to a three-phase line to enable it to provide service to a new prison. . . . This Court concluded that competent substantial evidence did not support, among other findings, that the $14,583 difference in costs was considerable. Id. This Court said:
>
> > Compare, for instance, the costs incurred for the upgrade in this case with the costs incurred in Gulf Power Co. v. Public Service Commission, 480 So. 2d 97 (Fla. 1985) (difference between Gulf Coast's $27,000 cost to provide service and Gulf Power's $200,480 cost to provide service found to be considerable). The cost differential in this case is *de minimis* in comparison to the cost differential in that case. (emphasis added).

Choctawhatchee Elec. Coop. v. Graham, 132 So. 3d 208, 214-215 (Fla. 2014).

157. This factor and weighs strongly in favor of PGS.

2. Rule 25-7.0472(2)(b) - The present and reasonably foreseeable future requirements of the area for other utility services.

158. Leesburg provides other utility services to the greater Leesburg MSA, including electricity, water, and sewer service, and has, or is planning to provide such services to developments for The Villages in the area.

159. Leesburg's ability to provide other utility services to The Villages in addition to gas service is a factor in Leesburg's favor.

3. Rule 25-7.0472(2)(c) - The cost of each utility to provide natural gas service to the disputed area.

160. The cost-per-home for Leesburg and SSGC to provide service in Bigham is $1,800. In addition, Leesburg will be installing automated meters at a cost of $72.80 per home. The preponderance of the evidence indicates that the PGS cost-per-home is $1,579.

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

4. Rule 25-7.0472(2)(d) - Other costs that may be relevant to the circumstances of a particular case - Uneconomic duplication of facilities.

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.

5. Rule 25-7.0472(2)(e) - Customer preference.

163. Customer preference, here the preference of The Villages as the developer, is in favor of Leesburg. However, as set forth herein, all other factors are not substantially equal.

164. In analyzing the role of customer preference in cases in which the "customer" is the developer, rather than the end-user, the Commission has established that:

> Regardless of the desires of the subdivision developer, we conclude, as we have done in previous cases, that customer preference should not be decisive in the resolution of this dispute. This case is even more compelling in favor of giving little weight to customer preference because here we are dealing with the developer and not the purchaser or ultimate user of electricity. Moreover, customer preference should only be considered as a guiding factor if the facts do not weigh heavily in favor of one utility. Therefore, customer preference shall be given little weight, in light of the other facts brought out in the record.

In re: Territorial Dispute Between Gulf Power Company and Gulf Coast Electric Cooperative, Inc., 1984 Fla. PUC LEXIS 271, Docket No. 830484-EU; Order No. 13668 (Fla. PSC Sept. 10, 1984).

165. Furthermore, the Commission has determined that:

> [C]ustomer preference should not be relevant to our decision in a case such as this, where the facts are so heavily weighted in favor of one utility. Moreover, Florida case law is clear that no customer has an organic or economic right to service by a particular utility. Storey v. Mayo, 217 So. 2d 304 (Fla. 1968).

In re: Petition of Gulf Power Company Involving a Territorial Dispute with Gulf Coast Electric Cooperative, 1984 Fla. PUC LEXIS 960, Docket No. 830154-EU; Order No. 12858 (Fla. PSC Jan. 10, 1984).

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.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law set forth herein, it is RECOMMENDED that the Public Service Commission enter a final order awarding Peoples Gas System the right to serve Bigham North, Bigham West, and Bigham East. The award should be on such terms and conditions regarding the acquisition of rights to facilities and infrastructure within the Bigham developments by Peoples Gas from the City of Leesburg

or South Sumter Gas Company, LLC, as deemed appropriate by the Commission.

DONE AND ENTERED this 30th day of September, 2019, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of September, 2019.

ENDNOTES

1/ PGS's policy argument is not without merit. In this case, Leesburg customers within the Leesburg city limits and its more traditional service area will be paying the standard Leesburg rates and charges. However, the rates and charges in The Villages will be the regulated rate charged by PGS. To be sure, customers in Bigham will be paying no more regardless of which entity prevails in this proceeding. However, the suggestion that municipal rates are controlled through the ballot box does not apply when the municipality is (legally) extending service beyond its municipal, and even county, boundaries.

If Leesburg was providing service on its own, the customers of Bigham would presumably have the advantage of the lower Leesburg rate. The interjection of The Villages, as a "proxy" for the end-user customers has resulted in the imposition of a higher rate in Bigham, the sharing of rates with the "proxy" for 30 years, and no ability of the end-user customers to influence or control their rates by any means.

In In Re: Petition of Timber Energy Resources, Inc. for a Declaratory Statement Concerning Sales as "Private Utility" Status, 1987 Fla. PUC LEXIS 1314, Docket No. 861621-EU, Order No. 17251 (Fla. PSC Mar. 5, 1987), the Commission addressed the protections provided to consumers of utility services in the absence of the Commission's regulatory oversight:

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

In this case, the end-user customers are outside the municipal limits. If served by Leesburg pursuant to the Agreement, the residents of Bigham are served by a gas provider over which they have no control, either by "voting the rascals out," or by a system of rate-of-return regulation. The Commission's decision in this case will, thus, determine the extent to which a municipality may arrange to be the "choice" of a developer in exchange for providing the developer with a share of the revenues from higher-than-municipal rates charged to non-citizen end-user customers.

[2/] The supply line to Sumterville was initially extended southward along US 301 to serve industrial users in the Sumterville area. A line was then extended from that US 301 line eastward along CR 470 to the American Cement plant which abuts the western boundary of the Coleman Federal Prison. Service to the Eastern Cement plant is the subject of a proceeding at the Commission, and is not at issue in this case.

[3/] As a basis for its decision to select Leesburg to provide gas service to Bigham beyond the obvious and considerable economic benefit that was created by its relationship with the rate-unregulated municipal gas utility, SSCG asserted (correctly) that with regard to the initial delays in Fenney, "The Villages has not experienced any similar problems in the performance of Leesburg." What was left unsaid is that Leesburg was never

asked to perform work as a "retrofitted element," as was PGS, and had full advantage of operating as a participant to the trenching agreements, as PGS was not.

[4/] Leesburg devotes several pages of its PRO touting that its gas rates are among the lowest in the state, "historically [] below that of other municipalities and [] lower than the rate charged by PGS," and that its gas supply cost is considerably lower than PGS. However, that evidence is given little weight since, despite its low rates to its customers in Leesburg, the Villages' rate will be no lower than those charged by PGS and, if PGS were to lower its rate to a rate lower than that charged on January 1, 2018, the Leesburg Village rate could be higher than the PGS rate.

[5/] Tr. 4, 460:20.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

REVISED
ATTACHMENT B

FILED 10/15/2019
DOCUMENT NO. 09411-2019
FPSC - COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to resolve territorial dispute in Sumter County and/or Lake County with City of Leesburg and/or South Sumter Gas Company, LLC, by Peoples Gas System	)	DOCKET NO.: 20180055-GU DOAH CASE NO. 18-004422 FILED: 10-15-19

PEOPLES GAS SYSTEM'S EXCEPTIONS TO THE RECOMMENDED ORDER

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

INTRODUCTION

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

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

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

EXCEPTION TO CONCLUSION OF LAW IN PARAGRAPH 147

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

EXCEPTION TO CONCLUSION OF LAW IN PARAGRAPH 160

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

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

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

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

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

9 of the Agreement provides:

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

Page 7-8.

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Respectfully submitted this 15th day of October 2019.

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CERTIFICATE OF SERVICE

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

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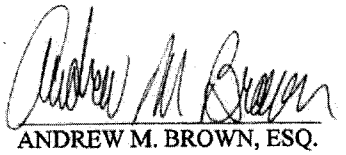

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REVISED
ATTACHMENT B

FILED 10/15/2019
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FPSC - COMMISSION CLERK

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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REVISED
ATTACHMENT B

FILED 10/15/2019
DOCUMENT NO. 09414-2019
FPSC - COMMISSION CLERK

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.
>
> 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.

---

[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.
>
> 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 constitute~~d~~ 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~~.
>
> 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)." ....
>
> 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.
>
> 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.

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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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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REVISED
ATTACHMENT C

FILED 10/25/2019
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FPSC - COMMISSION CLERK

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 9th 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.

Respectfully submitted this 25th day of October 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail to the following, this 25th day of October, 2019.

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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 RESPONSES TO PEOPLES GAS SYSTEM'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, South Sumter Gas Company, LLC, respectfully submits the following response to Peoples Gas System's Exceptions to Recommended Order:

As follows, ALJ shall mean Administrative Law Judge; FOF shall mean finding of fact; and COL shall mean conclusion of law. People's Gas System shall be referred to as PGS; the City of Leesburg shall be referred to as Leesburg; and South Sumter Gas Company shall be referred to as SSGC.

PGS has taken exception to two conclusions of law and, in a more general way as discussed below, to the ALJ's recommended action. PGS has not taken exception to any finding of fact. The Administrative Procedure Act establishes a standard of clarity for exceptions, providing that an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. While it appears that the scope of PGS's exceptions would require the modification of numerous findings of fact, SSGC has not attempted to identify those findings of fact, for the very reason that they are not identified in PGS's exceptions.

PGS exception to COL 147

PGS's exception to COL 147 is a *de facto* request for a declaration which would require the Commission to a) reject the ALJ's determinations that SSGC is not a public utility; the Agreement did not create a public utility; and the Agreement did not create a hybrid utility; b) to reject the ALJ's determination that the Agreement does not create an arrangement appropriately characterized as a partnership; c) to assume jurisdiction over the "hybrid" entity; and d) to determine how such PSC jurisdiction over the hybrid must be exercised.

There is no evidence, nor any case law, upon which SSGC and Leesburg could be found to be partners or joint venturers, a necessary prerequisite to finding the creation of a "hybrid utility". The PSC, recognizing Leesburg as the sole utility, has interacted with Leesburg with respect to the construction in Bigham from the very beginning. (Rogers, T. 532). In this case, Leesburg will maintain the natural gas system; Leesburg will handle customer complaints; Leesburg will secure gas on the wholesale market; and Leesburg will own and operate the system. Likewise, Leesburg bills the customers; Leesburg (under the watchful eye of the PSC) is responsible for the safety of the system including the customers within The Villages; Leesburg provides the safety reports to the PSC, and Leesburg interacts with the PSC. (Rogers, T. 547). The business relationship of Leesburg and SSGC, as established in the Agreement, is not a partnership nor a joint venture under Florida law. SSGC will play no role in supplying natural gas to customers. The only gas utility in this case under the Agreement is Leesburg. (Minner, T. 458).

SSGC will not further burden this Response with a rehash of the same arguments made to the ALJ in the parties' respective Proposed Recommended Orders, in which PGS devoted 6

pages and SSGC 5 pages to this same issue .[1] The current legal argument of PGS is the same argument that was rejected by the ALJ. Despite PGS's position that the ALJ somehow did not make a FOF or COL on the issue, COL 147 specifically finds as a matter of law that SSGC is not a natural gas utility as defined by statute. PGS's exception devotes multiple pages to the facts and evidence adduced on the record (including references and citations to exhibits and testimony) without excepting to any particular finding of fact on point. This is particularly notable giving the ALJ's express determination in COL 147 that the "evidence establishes" that no hybrid utility was created and that SSGC is not a natural gas utility. An agency may not create or add to findings of fact because it is not the trier of fact. See Marcus v. Department of Management Services (Final Order No. DMS-14-0067 (2014). citing Friends of Children v. Dep't of Health & Rehabilitative Servs.,504 So.2d 1345, 1347-48 (Fla. 1st DCA 1987). *Accord* Town of Hillsboro beach v. Boca Raton and DEP, No.17-2201, Final Order, (2018), "an agency has no authority to make independent or supplemental findings of fact". PGS's exception to COL 147 should be denied. The ALJ's conclusion is a reasonable application of the evidence of record to applicable law. Further, if the exception was granted, several supplemental findings of fact would be required to support the substituted conclusion of law. For that reason alone, the exception should be denied. COL 147 should not be rejected for the reasons PGS has proposed.

PGS exception to COL 160

PGS's exception to COL 160 would require the Commission to a) find that the ALJ erred in determining the cost per home for Leesburg; b) extensively revisit and reevaluate certain evidence and expert testimony and (after rejecting the ALJ's findings that Leesburg's cost to serve is not the payments from Leesburg to SSGC over a 30 year period) determine that such

[1] By this reference, SSGC incorporates pages 37-41 of its Proposed Recommended Order as if fully set forth.

payments are Leesburg's cost to serve; c) determine that the only competent, substantial evidence regarding Leesburg's cost for the infrastructure was provided by PGS expert Durham; d) reject "the ALJ's use of SSGC's construction cost rather than the price Leesburg is required to pay under the Agreement "; e) reject FOFs which are not excepted to (see footnote 17 of PGS's exceptions); and f) recalculate the "cost differential" between PGS and Leesburg.

Similar to the exception to COL 147, PGS's exception to COL 160 is highly dependent upon numerous facts, with significant citations to the record including testimony, deposition transcripts, and exhibits. Despite this fact, PGS does not except to any related FOF. In fact, this exception, to be accepted, would require that the Commission extensively reevaluate and reinterpret the factual record. The exception explicitly requests that the Commission engage in a "correct cost comparison" (see paragraph 27) which would require a rejection of certain unspecified FOFs and the substitution of new FOFs in their stead.

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See e.g., Rogers v. Dep't of Health, 920 So.2d 27, 30 (Fla. 1st DCA 2005); Belleau v. Dep't of Envtl. Prot., 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands County Sch. Bd., 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. See e.g., Tedder v. Fla. Parole Comm'n, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates

Co., 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); Collier Med. Ctr. v. State, Dep't of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n, 436 So.2d 383, 389 (Fla. 5th DCA 1983). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, an agency is bound by such factual finding in preparing the Final Order. See, e.g., Walker v. Bd. of Prof. Eng'rs, 946 So.2d 604 (Fla. 1st DCA 2006); Fla. Dep't of Corr. v. Bradley, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987).

PGS's exception to COL 160 requests that the Commission conclude that PGS's theory (that payments theoretically owed over a 30 year period are Leesburg's "cost of service") and that PGS's expert testimony on the point be accepted by the Commission. As with the prior exception, such would require the modification and adoption of numerous new FOFs. While clothed as a challenge to a COL, PGS's argument runs counter to the substantial case law that the agency may only reject or modify FOFs made by the ALJ under the most narrow of circumstances.

PGS presented, and argued, this alternative theory of the cost of service at hearing. PGS's attempts to characterize any payment from Leesburg to SSGC over the life of the Agreement (net of the cost of infrastructure to be financed, constructed, and turned over to Leesburg by SSGC) as Leesburg's 'cost to serve' was rejected by the ALJ. In support of this approach, PGS presented the testimony of Dr. Durham, despite the fact that Durham testified at deposition he would not be providing any opinions or testimony on Leesburg's or PGS's cost of service. (Durham, T. 298). Durham acknowledged that his calculations assumed 60,000 homes to be served in The Villages by Leesburg over 30 years; that he was not aware of the area which PGS considered in dispute; that he does not know how many homes are there or are projected to be

built within that area; that he was not aware of the area that Leesburg considered in dispute; that he does not know how many homes are there or are projected to be built within that area; that his calculations are not calculations of what Leesburg will pay SSGC in the disputed area; and that he had no opinion on that. (Durham, T. 299-300). Dr. Durham's calculations by his own admission are not calculations of the cost to serve the disputed area, even under the alternative theory of PGS. (Durham, T. 300). Despite all this, PGS again argues that his testimony should be accepted and relied upon in the Final Order.

Attempts by PGS to cast the Agreement as a windfall for The Villages is contrary to the calculations of its own witness, Durham. Assuming, arguendo, the correctness of PGS Ex. 10, the Durham/ PGS analysis shows that payments to The Villages do not grow above $96 million (Durham's estimated system investment by The Villages as required by the Agreement) until years 21 and 22. As such, even by Durham's calculations, The Villages has incurred significant risk under the Agreement for over 20 years, which necessarily shifts such risk away from Leesburg and its customers. At a minimum, this testimony by Durham demonstrates how fact intensive this issue is, and PGS has challenged no related FOFs on the issue.

PGS presented no evidence upon which this theory of cost of service could be tied to any adverse impacts to end-users or to present customers of Leesburg, nor that this was somehow a 'bad deal' for Leesburg. PGS's theory that payments received by SSGC under the Agreement constitute Leesburg's cost to serve should be rejected, as wholly unconnected to any adverse impacts to ultimate ratepayers in The Villages or to either Leesburg or its customer base. COL 160 should not be rejected for the reasons PGS has proposed.

6

PGS general "exception"

PGS's request that the Commission supplement and modify the ALJ's recommended action would require the Commission, in the Final Order, to a) effectively condemn certain facilities and infrastructure within Bigham on behalf of and to the benefit of PGS; b) to determine, without notice, appraisal, due process, or any of the other accoutrements of condemnation, the fair market value of such facilities and infrastructure; and c) to assume jurisdiction over Leesburg and/or SSGC and thereafter order either Leesburg or SSGC to turn the facilities and infrastructure over to PGS within 90 days.

PGS also requests that the Commission a) identify an area "along the route" of certain Leesburg facilities; b) assume jurisdiction over Leesburg; and c) "prohibit" Leesburg serving in that area. This is an abuse of this process since there is no present dispute about those areas. This is also little more than a thinly veiled attempt by PGS to have the Commission declare certain additional territory – additional to the Recommended Order – as exclusive territory of PGS.

PGS's first request is that that the Commission require "... that the customers (in Bigham) be transferred to PGS within 90 days of the Commission's final order and that PGS pay SSGC or Leesburg no more than $1200 per resident customer within the Bigham developments". PGS's suggested modification and supplement to the Recommended Order would effectively have the Commission condemn certain unspecified facilities on behalf of PGS. Article X, § 6(a) of Florida's Constitution is Florida's Taking Clause. It states: *No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured in the registry of the court and available to the owner.* The Fifth Amendment to our U.S. Constitution dictates: "*[N]or shall private property be taken for public use, without just*

compensation." Setting aside PGS's request that the PSC act as its proxy, even if the Commission determined it has (by Final Order in this case) the appropriate jurisdiction to value the infrastructure and to direct its conveyance by SSGC or Leesburg, the Commission could not exercise such power as a condemning authority – which is certainly the power PGS invites the Commission to wield – without affording all of the rights, protections, conditions precedents, and due process contemplated by Chapter 73 and 74 in the Florida Statutes. The PSC's powers and duties "are only those conferred expressly or impliedly by statute, and any reasonable doubt as to the existence of a particular power compels us to resolve that doubt against the exercise of such jurisdiction", see City of Cape Coral v. GAC Utilities, Inc, of Florida, 281 So.2d 493 (Fla. 1973).

Neither the statute nor this hearing were designed to satisfy the prerequisites to such a Commission order. Demonstrative that the fair market value and the extent and scope of such facilities was not an issue in this case, PGS's own ambivalent request is that either "SSGC or Leesburg" should be the target of the requested order. At a minimum, for the Commission to address this issue unilaterally in its Final Order, without even the benefit of any evidence on point, would be a due process violation and an *ex post facto* exercise of condemnation powers which the Commission does not have, directed at one of two entities over whom its jurisdiction is very narrow in the first case (Leesburg) and nonexistent in the second (SSGC).

If the recommendation in the Recommended Order becomes an unappealable Final Order of the Commission, there will be issues which need to be addressed regarding this the resolution of this dispute. However, the Commission should decline PGS's invitation to commit reversible error by acting as a *de facto* condemnation and valuation authority in the Final Order.

This same section of PGS's exceptions requests an additional and supplemental finding in the Final Order. Commencing at paragraph 29, page 13, PGS requests that the Commission issue

a Final Order that "prohibits Leesburg from serving, either temporarily or permanently, any customers along the route of its facilities built along CR 501 and along SR 44 and CR 468". While filed as an exception to the Recommended Order, procedurally this "exception" is nothing less than a request that the Commission substantively and unilaterally modify the recommendations in the Recommended Order without actually "excepting" to any specific FOF or COL. The Administrative Procedure Act provides that an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. § 120.57(2)(k), Fla. Stat. Certainly, this request that the Recommended Order be modified by addition also violates § 120.57(1)(l), Fla. Stat. The request of PGS would require the Commission to add additional COLs to explain the legal basis which supports this "prohibition", which would in turn require additional FOFs to determine the extent of the "prohibition". The Administrative Procedure Act expressly provides that rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. *Id.*

PGS's request effectively invites the Commission to commit error by entering a *de facto* injunction of such permanence that it is nothing less than a additional taking of a portion of Leesburg's utility system. Setting aside the obvious, that this request is a barely veiled attempt for PGS to secure by Commission order an additional area of service outside of Bigham, PGS's request neither references nor finds any support in any specific FOF, COL, or any exception to either.[2] PGS's nebulous request that the Commission "prohibit" Leesburg from serving

[2] The Petition of PGS took the position that a much larger area than Bigham was already PGS territory. The Recommended Order does not find that any of the disputed areas were previously PGS territory. Here, PGS attempts to take a second bite of that apple.

customers in perpetuity "along the route of" certain Leesburg facilities (which are not located in any established or recognized PGS service territory) is nothing less than a request that the Commission deprive Leesburg of its use as its utility assets without compensation or evidentiary basis – which will result in unquantifiable adverse impacts to Leesburg citizens – without due process, all the while extending the bounds of the Commission's jurisdiction beyond that established by statute. Additionally, for the Commission to extrapolate the concept of race to serve as PGS requests would necessarily express an un-promulgated policy of general applicability, *i.e.*, an illegal rule under the Administrative Procedure Act. The Commission should deny these "exceptions".

Conclusion

For all the reasons set forth hereinabove, the Commission should reject the exceptions of PGS.

Respectfully submitted this 25th 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 25th day of October, 2019 to:

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REVISED
ATTACHMENT C

FILED 10/25/2019
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FPSC - COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to resolve territorial dispute in Sumter County and/or Lake County with City of Leesburg and/or South Sumter Gas Company, LLC, by Peoples Gas System	)	DOCKET NO.: 20180055-GU DOAH CASE NO. 18-004422 FILED: 10-25-19

PEOPLES GAS SYSTEM'S RESPONSE TO CITY OF LEESBURG'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 City of Leesburg's ("Leesburg") 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 natters.

4. None of the exceptions made by Leesburg in its Exceptions to the Recommended Order filed on October 15, 2019, meet the standards required for rejection or modification.

Exception No. 1

5. Leesburg's First Exception addresses the ALJ's use of the $1,800 per home as SSGC's cost of installing the distribution infrastructure in the developments known as Bigham North, Bigham West, and Bigham East (collectively the "Bigham Developments"). 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.

6. 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.

7. 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.[1]

8. 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 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 through these proceedings that it is not a natural gas utility and the ALJ concluded that SSGC was not a natural gas utility[2] (RO Paragraph 140). Therefore, SSGC's cost

[1] 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.

[2] 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.

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. Jack Rogers, director of Leesburg's gas department, 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.
> **A.** That ... would be correct.

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

> **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.

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

> **Q.** 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, the 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).

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9. SSGC's cost per home to install the infrastructure is irrelevant because the Commission **shall** consider the cost of each **utility** to serve the dispute 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.

10. 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[3] (See testimony of Stephen Durham, T-279-321).

11. 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.

12. 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

[3] 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.

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).

13. For all the reasons set forth above, Leesburg's exceptions to Findings of Fact Nos. 118 and 120 should be rejected.

Exception No. 2

14. Leesburg's Exception No. 2 is based primarily on its Exception No. 1 and the arguments above to Exception No. 1 are adopted herein. Exception No. 2 adds that the ALJ's finding of fact regarding the cost of the lines along County Road ("CR") 501 and CR 468 is not supported by competent, substantial evidence, arguing the ALJ found that the cost of the lines on those roads was $1,212,201 and referencing Paragraph 129 of the RO. Leesburg misstates the finding in that paragraph but more importantly provides no record cite to support the $1,212,207 as required by Rule 28.106.217(1), F.A.C.[4]

15. The only unrefuted testimony on the cost to date of the lines along those roads at the time of the hearing, came from Leesburg's own witness, Mr. Rogers. Mr. Rogers testified that Leesburg's cost for the lines was $1.94 million:

> **Q. (By Mr. Brown)** All right. Now – so in addition to whatever that number is, what was the cost, the combined costs for the 501 line and the 468 line?
> **A.** I am going to round that, that was 1.94 million.
>
> **Q.** Okay.
> **A.** I guess we have a few more decimals, but that is what it is, 1.94.

(Rogers, T-555).

[4] Rule 28-106.271, F.A.C., requires exceptions to "include any appropriate and specific citations to the record."

16. There was no testimony or evidence that Leesburg's lines along CR 501 or CR 468 were complete at the time of the hearing so the ALJ correctly referenced to interrogatory responses stating that Leesburg and SSGC had an agreement that Leesburg's costs for those lines would not exceed $2.2 million. Furthermore, the ALJ's conclusion that the costs for those lines in total would be closer to $2,200,000 than $1,212,207 is borne out by Mr. Roger's testimony.

17. For the reasons set forth above, the Commission should reject Leesburg's exceptions to Findings of Fact Nos. 97 and 129 and Conclusions of Law Nos. 155, 156, and 157.

Exception No. 3

18. Leeburg's Exception No. 3 takes exception to the ALJ's finding of fact, Paragraph 162 of the RO, that Leesburg's extension of service (the lines along CR 501 and CR 468) "involved the substantial and significant duplication of existing PGS facilities." In Paragraph 162 the ALJ does not conclude that the Commission should adopt uneconomic duplication of facilities as a relevant criterion in this case. The ALJ simply made a factual determination that uneconomic duplication has resulted from Leesburg extension of service to the Bigham Developments. Given that this is a finding of fact which is supported by competent substantial evidence, there is no basis under Section 120.57(l)(*l*), Florida Statutes, for the Commission to reject or modify the finding.

19. Leesburg's argument in this exception includes reference to newly adopted Article V, Section 21 of the Florida Constitution arguing Commission decisions in prior cases "are of questionable relevance in this territorial dispute case." Article V, Section 21 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.

Leesburg'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 judge 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 not what the ALJ has done in this case.

20. 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.

21. In Paragraph 128, the RO cites to a Commission order that addresses uneconomic duplication of facilities in a territorial dispute. 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 referenced in Paragraphs 127 and 128, and instead simply said that in light of the consideration of uneconomic duplication of facilities found in Rule 25-7.0471, he interpreted 25-7.0472 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 required to defer to the cited orders. Instead, it appears the orders are cited because they are consistent with the ALJ's interpretation of the statute and rule.

22. Leesburg 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.[5] 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).

23. Leesburg'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). In the specific area, PGS already had a line along CR 468 which could provide service to the Bigham Developments which line predated the Bigham Developments. 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 Al Minner admitted that at the time of the Agreement, PGS could

[5] 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.

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 (Minner T-454, 455). The maps placed into evidence (PGS. Exs. 5, 6, 7) show that Leesburg's 468 line runs parallel to PGS' 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 and CR 501.

24. The evidence is similarly overwhelming in that this duplication of facilities by Leesburg is uneconomic when compared to PGS. Mr. Rogers, testified that the total cost thus far of the CR 501 line and the CR 468 line was $1.94 million (Rogers, T-554, 555). That cost is essentially what Leesburg has paid in order to put itself in the same position that PGS was in at the time the Agreement was executed.

25. Leesburg makes the additional argument that the issue of "uneconomic duplication" has no relevance because the City's rates for Villages customers will not exceed the rates charged by PGS. In fact, just the reverse of that statement is true. 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.[6] Essentially, Leesburg asks the Commission to ignore the fact it 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.

26. For the reasons stated above, the Commission should reject Leesburg's exception to Conclusion of Law Paragraph No. 162.

[6] See *Petition of Suwannee Valley Electric Cooperative, Inc. for Settlemens 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.

Exception No. 4

27. The subject of Leesburg's Exception No. 4 is the ALJ's findings that Leesburg engaged in a "race to serve" the disputed area. Leesburg takes exception to findings of fact Nos. 74, 85, 86, 88, and 130, and conclusion of law 151. Once again Leesburg has provided no citations to the record as required by Rule 28-106.217, F.A.C., and on that basis alone the exceptions to the findings of fact should be rejected.

28. Leesburg argues that there was 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 of filing the *petition*. Leesburg argues that the starting point should be the facilities that existed at the time of the *hearing*. Interestingly, Leesburg does not cite any Commission decisions relating to territorial disputes to support that argument. 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 if a utility has facilities capable of serving a territory is as of the hearing. On this basis alone, this exception should be rejected.

29. Leesburg takes the position that once it signed the Agreement with SSGC it triggered "lawful obligations" 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 knew were closer to Peoples' already existing line along CR 468 (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.

30. 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 with PGS. Despite that fact, no effort was made prior to the litigation to obtain a territorial agreement (T-576).

31. 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 be done before the agreement was entered into, SSGC and Leesburg instead chose to sign the Agreement and build 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.

32. Fundamentally Leesburg argues that its reckless actions should be rewarded and 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.

33. Leesburg, unlike SSGC, has cited a number of cases purporting to show that the Commission's decision should be based on the facts as they exist at the time of the hearing. In examining those cases, it is apparent as to why SSGC did not cite any of them in its' exceptions. Leesburg cites *McDonald v. Department of Banking and Finance*, 346 So.2d 569 (Fla. 1st DCA 1977), for the proposition that the administrative action should be "based on facts as they exist at the time of the Agency's final action" (Leesburg's Exceptions pg. 13). This is a subtle but significant misreading of the language in the case. The court's conclusion was that the decision to permit evidence of circumstances as they existed was correct. *McDonald* at 584. The Court also ruled that proceedings should freely consider relevant evidence of changing economic conditions. The case does not create a rule as to what "should" be done and to suggest otherwise is disingenuous. Importantly, *McDonald* is not a case involving a territorial dispute and does not involve one party trying to take advantage of the delay during the adjudication of a dispute in order to improve its position.

34. Other cases cited by Leesburg are equally inapposite to territorial disputes. The *Department of Financial Services, Division of Workers' Compensation v. Ron's Custom Screen, Inc.*, 2009 SL 4099149; DOAH Case No. 09-0959; (DOAH Nov. 24, 2009) (DFS Feb. 26, 2010), and *Adult Family Care Home v. Agency For Health Care Administration*, 1997 SL 1052634 at *4 (DOAH Case No. 96-4099) (DOAH Feb. 21, 1997), (AHCA April 1, 1997), are not territorial dispute cases and do not involve two competing litigants, one of which is attempting to improve

its position in the litigation by continuing to build infrastructure during the pendency of the litigation.

35. The cases cited by Leesburg that do involve territorial disputes do not support its argument that the determination of whether a utility has the capability to serve an area should be judged as those facilities exist at the time of the hearing. In fact, they support the opposite; 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).

36. 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.

37. 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).

38. As another basis for these exceptions Leesburg references actions of *PGS* that have no impact on whether *Leesburg* engaged in a race to serve arguing: nothing prevented PGS from "racing to serve;" there was no evidence that PGS had an interest in serving the disputed area or approached the Villages to serve the disputed area; that existing PGS lines were not extended specifically to the Villages; and PGS had no territorial agreement or discussions with the Villages about serving any development. None of these assertions negate the fact that Leesburg engaged in a "race to serve" and needlessly and recklessly duplicated PGS' facilities. The evidence is clear that PGS was interested in serving the territory and made that interest clear to both Leesburg and SSGC, but SSGC preferred an arrangement that benefitted it financially (Wall, T-169-172; PGS Ex. 80, Hudson 10-22-18 depo, pgs. 40,48 and Hudson 11-15-18 depo pgs. 59-60).

39. Leesburg's arguments in Exception 4 are clearly spurious. There is ample competent substantial evidence from Leesburg's own witnesses that Leesburg 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 Leesburg's exceptions to the findings of fact in Paragraphs 74, 85, 86, 88, and 130, and conclusion of law 151.

Exception No. 5

40. In Exception No. 5, Leesburg argues that there is no substantial evidence to support the conclusions that the factors in Rule 25-7.0472(2)(a)-(d), strongly favor PGS so the ALJ's conclusion in Paragraph 166 should be rejected. Yet again, Leesburg provides no citations to the record to support this exception. Leesburg 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: 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). In such circumstances, the ALJ correctly concluded that customer preference plays no role in determining who should serve the disputed area because the costs to serve for Leesburg vastly outweigh those for PGS.

41. The Commission should reject Leesburg's exception to Conclusion of Law No. 166.

Exception No. 6

42. PGS adopts its analysis of Leesburg's Exception No. 1 in response to Leesburg's Exception No. 6.

43. Leesburg's Exception No. 6 is simply a request that the Commission ignore the ample and overwhelming weight of the competent, substantial evidence that the ALJ relied on to conclude that under the statues, rules and case law that PGS should serve Bigham Developments.

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

CONCLUSION

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

Respectfully submitted this 25th day of October 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail to the following, this 25th day of October, 2019.

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Item 3

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 2, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of Industry Development and Market Analysis (Vogel, Cordell, Mtenga) DBC CH
Office of the General Counsel (Murphy, Passidomo) CM GP TP

RE: Docket No. 20190167-EI – Petition to compel Florida Power & Light to comply with Section 366.91, F.S. and Rule 25.6-065, F.A.C., by Floyd Gonzales and Robert Irwin.

AGENDA: 01/14/20 – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On August 26, 2019, Floyd Gonzales and Robert Irwin (Petitioners) filed a Petition to Compel Florida Power & Light Company (FPL) to Comply with Section 366.91, Florida Statutes (F.S.) and Rule 25-6.065, Florida Administrative Code (F.A.C.) (Petition). Petitioners assert they are permitted by law to be included in FPL's net metering program and FPL's requirement that customer-owned renewable generation must be sized not to exceed 115 percent of the customer's annual kWh consumption violates Rule 25-6.065, F.A.C.

On September 16, 2019, FPL filed a Motion to Dismiss the Petition or in the Alternative to Treat the Petition as a Request for a Declaratory Statement (FPL Motion and Alternative Request). On September 23, 2019, the Petitioners filed a Response in Opposition to FPL's Motion to Dismiss and Alternative Request.

By email dated October 21, 2019, from FPL attorney, Ken Rubin, to the Petitioners' attorney, Kyle Egger, FPL expressed that based upon a review of Petitioners' increased electricity usage, such usage was within FPL's 115% guideline and Petitioners' application for interconnection as a tier 2 net metered customer could proceed for approval. Specifically, FPL stated that "[o]ur goal is to interconnect your client's system as soon as possible so that he may begin to net meter."

Presented with the suggestion that the Petition had become moot, the attorney for the Petitioners responded to FPL's attorney on November 20, 2019, that "at this point and with all resources spent on trying to get FPL to do what it was supposed to do from the outset, [Petitioners] still want a formal opinion on their petition." Net metering for Petitioners became operational on December 5, 2019. In this recommendation, staff addresses the merits of the Petition and does not make a recommendation on the FPL Motion and Alternative Request.

Discussion of Issues

Issue 1: Should the Commission grant Floyd Gonzales and Robert Irwin's Petition to Compel FPL's Compliance with Section 366.91, F.S., and Rule 25-6.065, F.A.C., and request for a refund?

Recommendation: No. FPL is currently providing net metering to the Petitioners and granting Petitioners' request for a refund is inappropriate and not warranted under the circumstances presented. (Murphy)

Staff Analysis:

Net Metering

Petitioners argue that FPL improperly rejected their application for inclusion in FPL's net metering program in violation of Section 366.91, F.S., and Rule 25-6.065, F.A.C. Petitioners aver that the intent of both the applicable rule and statute is to encourage customers to install solar panels. Petitioners contend that, in accordance with Rule 25-6.065(4), F.A.C., the only size limit on a customer's renewable power generation is that it may not exceed 90% of the customer's utility distribution service rating. Petitioners conclude that if a customer-owned renewable generation project does not exceed 90% of that customer's utility distribution service rating, the project qualifies and should be accepted into any utility's net metering program. Petitioners argue that their anticipated renewable power generation is well within the foregoing limits and, as a result, Petitioners' application should have been immediately approved as the Rule requires.

Petitioners assert that FPL imposes limits based on a customer's historical energy consumption and not capacity. Specifically, Petitioners aver that FPL's net metering portal instructs its customers that their "[s]ystems should not be sized so large that energy produced by the renewable generator would be expected to exceed 115 percent of the customer's annual kWh consumption." Petitioners argue that FPL's arbitrary limitations violate Section 366.91, F.S., and Rule 25-6.065, F.A.C., and that FPL must be compelled to comply with same and approve Petitioners' application for inclusion in its net metering program.

Petitioners ask that the Commission order FPL to approve Petitioners' application for inclusion in FPL's net metering program and refund to Petitioners all money unnecessarily spent on electricity because of FPL's wrongful rejection of their net metering application.

Petitioners argue that the only limitation on net metering is the 90% of the customer's utility distribution service rating. However, staff recommends that Petitioners' arguments ignore the definition of "net metering" in both Rule 25-6.065(2)(c), F.A.C., and Section 366.91(2)(c), F.S. Net metering is defined as "a metering and billing methodology whereby customer-owned renewable generation *is allowed to offset the customer's electricity consumption onsite*." (Emphasis added). Customer-owned renewable generation is "an electric generating system located on a customer's premises that is primarily intended to offset part or all of the customer's electricity requirements with renewable energy." Rule 25-6.065(2)(a), F.A.C., and Section 366.91(2)(b), F.S. Thus, while "customer-owned renewable generation" *might have* a secondary

purpose other than to offset part or all of a customer's electricity requirements, "net metering" is only allowed to offset the customer's electricity consumption onsite.[1] FPL does permit net metering of 115% of consumption because each unique system is assessed on a range of values using photovoltaic watts resulting in some fluctuation.[2] Staff recommends that this is a reasonable implementation of Rule 25-6.065(2)(c), F.A.C.

In addition to the offsetting limitation for net metering, Commission Rules also limit interconnection by providing that a customer-owned renewable generation system is not to exceed 90% of the customer's utility distribution rating.[3] That is, a customer-owned renewable generation system does not qualify for expedited interconnection to the utility's facilities for net metering if it exceeds 90% of a utility's capacity to service the customer. Staff recommends that Rule 25-6.065(4)(a)1, F.A.C. is intended to provide a safety buffer for the utility distribution system, ensuring that the capacity of utility facilities interconnected to customer-owned renewable generation will not be over-loaded. For example, a customer with a load that reaches 95% of its utility distribution rating is only permitted to interconnect a customer-owned renewable generation system that reaches 90% of the customer's utility distribution rating, notwithstanding greater electric consumption on site. In sum, there are two limitations associated with net metering: (1) net metering of customer-owned renewable generation is to offset electricity consumption, and (2) customer-owned renewable generation may not exceed 90% of the customer's utility distribution rating.

Staff recommends that FPL has complied with the applicable rule and statute governing net metering, has processed the Petitioners' application for inclusion in the net metering program, and is net metering the Petitioners' usage; therefore, the Commission should deny the Petition.

Requested Refund

The Petitioners have asked the Commission to order FPL to refund Petitioners for "all money unnecessarily spent on electricity because of FPL's wrongful rejection of their net metering application, and such other relief as deemed just and proper." However, because staff recommends that FPL has not wrongfully rejected the Petitioners' net metering application, the premise underlying the request is unfounded.

In its Motion to Dismiss, FPL addressed the merits of Petitioners' demand for a refund. FPL asserts that a refund is inappropriate because FPL billed Petitioners consistent with a tariffed rate. FPL avers that the refunds Petitioners request are "purely speculative, retroactive, and

[1] In this context, staff notes that energy produced by a customer-owned renewable system may fluctuate from month to month, and that a system designed to offset a customer's usage may produce more energy than is needed in any given month. Thus, Rule 25-6.065(8)(e), F.A.C., provides that during any billing cycle, excess energy delivered to the grid shall be used to offset the customer's energy consumption in the following month. Rule 25-6.065(8)(f) and (g), F.A.C., provide that any energy credits remaining at the end of the year, or when the customer leaves the utility's system, shall be purchased at the utility's as-available energy rate. Although the rules address the reality that excess energy may be produced by a system designed to offset customer usage, pursuant to Rule 25-6.065(2)(c), F.A.C., the purpose of net metering remains to offset usage, not to purposefully create excess energy by building a system larger than needed to offset usage.
[2] FPL Motion and Alternative Request at fn. 2.
[3] Rule 25-6.065(4)(a)1, F.A.C.

uncertain" and would be "entirely dependent on a guess as to what Petitioners would have generated and what their usage would have been had they been net metering." FPL argues that while Rules 25-6.103 and 25-6.106(2), F.A.C., do provide refund mechanisms for customers impacted by ascertainable metering or billing errors, there are no metering or billing errors in this case. Staff recommends that FPL is persuasive in the foregoing arguments regarding refunds. To the extent that Petitioners intend to request damages, staff recommends that the Commission has no jurisdiction to make such an award.[4]

Staff recommends that FPL's actions do not warrant a refund, refunds are inappropriate under the circumstances presented, and the Commission has no authority to award damages; therefore, staff recommends that the Petitioners' request for a refund be denied.

[4] *See* Southern Bell Telephone & Telephone Co. v. Mobile America Corp., 291 So.2d 199 (Fla. 1974) and Order No. PSC-02-1344-FOF-TL, issued October 3, 2002, in Docket No. 20020595-TL, *In Re: Complaint of J. Christopher Robbins against BellSouth Telecommunications, Inc. for violation of Rule 25-4.073(1)(c), F.A.C., answering time.*

Issue 2: Should this docket be closed?

Recommendation: Yes, if no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued and the docket should be closed. (Murphy)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued and the docket should be closed.

Item 4

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 2, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Economics (Galloway, Coston, Draper, Guffey, Hampson, McNulty, Rogers, Smith, Ward, Wu)
Division of Accounting and Finance (D. Andrews, M. Andrews, Brown, D. Buys, Cicchetti, Higgins, Mouring, Norris, Richards, Sewards, Snyder)
Division of Engineering (Graves, King, Knoblauch, Lewis)
Office of the General Counsel (DuVal, Dziechciarz)

RE: Docket No. 20190083-GU – Application for rate increase in Highlands, Hardee, and Desoto Counties, by Sebring Gas System, Inc.

AGENDA: 01/14/20 – Regular Agenda – Proposed Agency Action (Except for Issue 29) – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: 01/14/20 (5-Month Effective Date Waived Through January 14, 2020)

SPECIAL INSTRUCTIONS: None

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Case Background

On April 1, 2019, Sebring Gas System, Inc. (Sebring or the Company) filed a test year notification letter with the Florida Public Service Commission (Commission), pursuant to Rule 25-7.140, Florida Administrative Code (F.A.C.), in which it stated its intent to use the calendar year 2020 as the projected test year for a proposed rate increase. The Company serves approximately 662 gas customers in Highlands, Hardee, and DeSoto counties.

By Order No. 24761, issued July 5, 1991, the Commission found Sebring to be a public utility subject to Commission jurisdiction. The Commission set initial rates for Sebring by Order No. PSC-92-0229-FOF-GU, issued April 20, 1992.[1] Since 1992, the Company petitioned the Commission for a rate increase in 2004 with rates effective in 2005. In that docket, the Commission approved a jurisdictional rate base of $1,100,766 for the projected year ended December 31, 2005. The Commission also approved a weighted average overall rate of return of 8.64 percent, including a cost rate for common equity of 11.5 percent, with an authorized return on equity of plus or minus 100 basis points.[2]

On June 5, 2019, Sebring filed its petition for a permanent rate increase with the Commission. The Company requested the Commission process its request as a Proposed Agency Action (PAA). In its petition filed on June 5, 2019, Sebring requested an increase of $309,847 in additional annual revenues. Its request was based on a 13-month average rate base of $5,085,214 for the projected test year ending December 31, 2020. Sebring's requested overall rate of return is 7.70 percent, including a 12.5 percent mid-point return on common equity.

In its instant petition, the Company states that there are three key drivers for its request for a rate increase. According to the Company, the three key drivers include: 1) increases to rate base associated with extensions to serve new customers and additional personnel consistent with the expansion; 2) increases in regulatory costs, particularly those associated with federal pipeline safety, as well as increases in overall operating costs, including almost 15 years' worth of inflation; and 3) income tax not currently included in customer rates and deferred income tax expense accumulated since the Company's last rate case.[3] The Company also states that it has managed to avoid seeking a base rate increase for over 15 years, but "[w]ithout the requested revenue increase...its overall rate of return will fall to 3.17%, well below its currently authorized rate of return of 8.64%."[4]

On April 3, 2019, the Office of Public Counsel (OPC) filed its Notice of Intervention in this proceeding, pursuant to Section 350.0611, Florida Statutes (F.S.). By Order No. PSC-2019-0226-PCO-GU, issued on June 12, 2019, the Commission acknowledged OPC's intervention.[5]

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[1] Order No. PSC-92-0229-FOF-GU, issued April 20, 1992, in Docket No. 19910873-GU, *In re: Petition for approval of initial rates to be established by Sebring Gas System, a division of Coker Fuels, Inc.*
[2] Order No. PSC-04-1260-PAA-GU, issued December 20, 2004, in Docket No. 20040270-GU, *In re: Application for rate increase by Sebring Gas System, Inc.*
[3] Document No. 04735-2019, Sebring's Petition, pp. 4 – 5, and Direct Testimony of Russell Melendy, p. 15.
[4] Id., p. 3.
[5] Order No. PSC-19-0226-PCO-GU, issued June 12, 2019, in Docket No. 20190083-GU, *In re: Application for rate increase in Highlands, Hardee, and Desoto Counties, by Sebring Gas System, Inc.*

A customer meeting was held on August 8, 2019. No customers attended the meeting and staff has not received any customer complaints.

In response to staff's data requests, on November 12, 2019, Sebring submitted revised MFR G-Schedules, and on November 21, 2019, Sebring submitted revised MFR H-Schedules. In its revised MFR schedules, Sebring's requested increase of $309,847 decreased to $302,041, and its requested rate base of $5,085,214 decreased to $5,044,363. By email dated August 22, 2019, Sebring waived the 5-month effective date through the December Agenda Conference. Sebring extended this waiver through the January 7, 2020 Agenda Conference by email dated November 18, 2019. After the January Agenda Conference's rescheduling, Sebring extended its waiver through January 14, 2020, by email dated December 12, 2019. The Commission has jurisdiction over this request for a rate increase under Section 366.06, F.S.

Discussion of Issues

Issue 1: Is Sebring's projected test period for the 12-months ending December 31, 2020 appropriate?

Recommendation: Yes. With the adjustments recommended by staff in the following issues, the 2020 test year is appropriate. (Wu)

Staff Analysis: Sebring proposed to use the projected test period ending December 31, 2020, as the projected test year, with the historic base year being the 12-month period ended December 31, 2018. Sebring used actual data for the 2018 base year rate base, net operating income, and capital structure.[6] The 2020 projected test year data was determined based upon the combination of 2018 data trended for customer growth, inflation, and payroll growth using the Commission-prescribed trending methodology, as well as a forecast of the Company's growth.[7] This growth includes the new service territories in the Cities of Wauchula and Arcadia as indicated in the Direct Testimony of Mr. Russell Melendy of Sebring.[8]

The purpose of the test year is to represent the financial operations of a company during the period in which the new rates will be effective. Sebring petitioned the Commission to approve the Company's proposed new tariff sheets with an effective date of January 1, 2020. The projected test year ending December 31, 2020 represents a relevant period upon which the Company's operations should be analyzed for the purpose of establishing new base rates. This test period will reflect actual conditions and be indicative of the actual investments, expenses, and revenues during the first 12 months that new rates will be in effect. Therefore, Sebring's proposed projected test year matches the timing of the Company's projected investments and expenses with its projected revenues for the period following the date on which the new base rates become effective.

In the following issues, staff is recommending that certain adjustments be made to Sebring's test year data. With the inclusion of these adjustments, staff believes that the 2020 projections of Sebring's financial operations are appropriate to use as the basis for setting new rates.

[6] Sebring's working capital had been adjusted for any disallowed items before it was combined with Sebring's net utility plant to arrive at the Company's 2018 historical total rate base. Document No. 04735-2019, Direct Testimony of Jerry Melendy, pp.13 – 14.
[7] The trending methodology used is detailed in Document No. 10856-2019, revised Minimum Filing Requirements (MFR) Schedule G-2, pp. 10 – 18.
[8] Document No. 04735-2019, Direct Testimony of Russell Melendy, pp. 2 – 4.

Issue 2: Are Sebring's forecasts of customer growth and therms by rate class appropriate?

Recommendation: Yes. Staff recommends that Sebring's forecasts of customer growth and therms by rate class for the 2020 projected test year, as contained in Document No. 10856-2019, revised Minimum Filing Requirements (MFRs) Schedule G-2, as revised on November 12, 2019, Pages 8 and 8.5 of 31, are appropriate. (Wu)

Staff Analysis: For the instant rate case, Sebring utilized the historical base year (HBY) 2018 data as a basis to develop the forecasts of customer growth and therms growth by rate class for 2019, which is the historical base year plus one (HBY+1) and the 2020 projected test year (PTY).

To achieve its forecast of customer growth, Sebring identified the potential new service areas, including the Cities of Wauchula and Arcadia. It then determined the potential customer additions related to the new service areas, as well as for the Company's existing service territory.

Sebring primarily relied upon its management's local knowledge to determine its projections of customer additions related to the new service areas.[9] In his testimony, Mr. Russell Melendy, Project Manager of Sebring, testified that "[t]he Company is well aware of construction and building activities in the area," and that he is very familiar with the proposed new service areas in the Cities of Wauchula and Arcadia.[10] Mr. Russell Melendy asserted that Coker Fuel, which is also owned by the Melendy family, provided propane service in these areas, and many of Sebring's projected new commercial and industrial customers for this rate case currently use propane provided by Coker Fuel or other competing propane companies. Mr. Russell Melendy claimed that as a local business-owner/operator and a two-term Hardee County Commissioner, his professional and public service experiences further expanded his involvement and understanding of these communities. Additionally, he indicated that Mr. Jerry Melendy, "in his capacity as [Sebring's] President, is active in the Sebring community, participating in numerous community and civic events."[11] Mr. Russell Melendy averred that these activities, coupled with the Company management's knowledge of the areas served through the ownership and participation in Coker Fuel, allow them the insight into the potential for customer growth in these areas.[12] Sebring's personnel also examined each community to identify growth potential.[13] In its response to staff's data requests, Sebring indicated that the majority of the new commercial and industrial customers in Wauchula and Arcadia projected by the Company have either requested Sebring for service, or have already paid their deposits to Sebring; and one large industrial customer has recently become an active customer of Sebring.[14]

Using its forecast of customer growth, Sebring calculated the number of customers billed each month and by rate class for HBY+1 and PTY. It then multiplied that number by the average usage per customer each month to determine the projected therm usage. Sebring assumed that the average usage per customer, by month, for each rate class, for the HBY, HBY+1 and PTY is

[9] Document No. 10721-2019, Sebring's Responses to Staff's Twelfth Data Request, p. 2.
[10] Document No. 04735-2019, Direct Testimony of Russell Melendy, p. 5.
[11] Id.
[12] Id., pp. 3 and 5.
[13] Document No. 10721-2019, Sebring's Responses to Staff's Twelfth Data Request, pp. 2 – 3.
[14] Id., p. 3 and Document No. 08680-2019, Sebring's Responses to Staff's Sixth Data Request.

unchanged from the corresponding HBY month and rate class. The Company believes that this assumption is appropriate, and is not aware of any alternate methodology that would result in a more accurate projection of therm usage.[15] Sebring explained that 2018 is a representative year, because weather is not a primary driver of usage for the Company's customers, and there were no unusual circumstances affecting customer usage; thus, year-over-year consumption patterns are consistent.[16] The Company further explained that a typical driver of therm usage for residential customers in many locations in the U.S. is cold weather. However, this is not so for Sebring due to the geographical location of the Company's service territories and the competitiveness of the electric heat pump. Sebring has very few residential customers with furnaces. Commercial usage is usually more stable as it is rare for commercial accounts to utilize natural gas for traditional space heating purposes. As a result, the driver of the therm usage, by rate class, is simply the historical average usage per customer, by month.[17]

Based on the information provided by the Company and staff's analyses, staff recommends that Sebring's forecasts of customer growth and therms by rate class as contained in MFRs Schedule G-2, as revised on November 12, 2019, pages 8 and 8.5 of 31, are appropriate for the instant rate case.

[15] Document No. 07608-2019, Sebring's Response to Staff's Fourth Data Request, pp. 1 – 3.
[16] Id.
[17] Id., pp. 2 – 3.

Issue 3: Are Sebring's estimated revenues from sales of gas by rate class at present rates for the projected test year appropriate?

Recommendation: Yes. Sebring's estimated revenues from sales of gas by rate class at present rates for the projected test year are appropriate. (Wu)

Staff Analysis: Staff has reviewed MFR Schedule E-2, Page 1, where Sebring calculated present revenues from sales of gas at present rates for the projected test year, in the amount of $1,171,865, based upon its proposed billing determinants. The proposed billing determinants are derived from the forecasts of the number of customers and the therm usage per customer, consistent with staff's recommendation in Issue 2. Staff believes that the Company's estimation of revenues, in the amount of $1,171,865, from sales of gas, by rate class, at present rates for the 2020 projected test year is appropriate. As addressed separately in Issue 13, this revenue amount, plus the amount identified as Miscellaneous Service revenue ($14,335), equals staff's recommended projected test year total operating revenue ($1,186,200) for Sebring.

Issue 4: Is the quality of service provided by Sebring adequate?

Recommendation: Yes. Sebring's quality of service is adequate. (Knoblauch, Lewis)

Staff Analysis: Pursuant to Section 366.041, F.S., in fixing rates the Commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered. As part of its review, Commission staff held a publicly noticed meeting in Sebring, Florida on August 8, 2019. The meeting was scheduled to gather information regarding customer concerns about Sebring's quality of service and its request for a rate increase. No customers attended the meeting. The Company also indicated that it received no customer complaints during the years 2017 and 2018. Staff additionally searched the Commission's Consumer Complaint Tracking System, which showed no customer complaints filed against Sebring since January 1, 2014.

Pursuant to Rule 25-7.018, F.A.C., each utility shall keep a complete record of all interruptions affecting the lesser of 10 percent or 500 or more of its division meters. Based on the Company's filing, there were no customer interruptions affecting either 10 percent or 500 meters during the historic test year ended 2018. Pursuant to Rule 25-7.064, F.A.C., the Company has tested all of its meters within 120 months of the test year, and all have been determined to be in compliance with testing requirements.

A review of Commission staff's annual safety inspections of the Company's facilities was also conducted. There were a total of 29 safety violations logged against Sebring from 2014 through 2018. The Company responded to the identified violations (which were varying in nature) and all were corrected. There were no violations logged during the 2019 safety inspection, and on October 29, 2019, the system was found in satisfactory compliance with state and federal natural gas safety rules.

Conclusion

Based on a review of information discussed above, staff recommends that Sebring's quality of service is adequate.

Issue 5: What is the appropriate amount of capital additions to be included in base rates as utility Plant in Service?

Recommendation: Staff recommends capital additions totaling $1,960,692 be included in rate base. (Graves, Knoblauch, Lewis)

Staff Analysis: Sebring's filing included capital additions of approximately $1,960,692. Staff reviewed the Company's filings as well as responses to data requests and recommends that the costs associated with the capital additions be included in rate base. Staff's review of the Company's requests is discussed in greater detail below.

Expansion Projects

The Company's traditional service territory has been the greater surroundings of the City of Sebring. In 2008, the Company developed a growth strategy that initially targeted two state prisons. The Commission approved Sebring's petitions for special contracts with these two prisons.[18] As part of the Company's MFRs, Sebring included costs related to plant additions to serve growth in its traditional service territory as well as growth in the City of Wauchula and the City of Arcadia.[19] The total estimated cost of these additions is $1,920,692.

The Company stated that the Cities of Wauchula and Arcadia are experiencing growth in the residential, commercial, and small industrial sectors. Specifically, the Company is anticipating the addition of 55 new customers, many of which are larger commercial accounts and small industrial accounts (rate classes TS-4 and TS-5).[20] Considering the growth potential in those areas, the Company stated that it believes it is making a prudent investment in the initial distribution networks in those cities.

As discussed in Issue 2, staff has reviewed the Company's projected customer additions and believes that they are appropriate for the instant case. In previous decisions addressing natural gas expansion, the Commission has recognized that all customers benefit from spreading fixed costs over a larger base of therm sales in future rate cases.[21] Additionally, the Commission has recognized that all customers benefit from large load users, such as the aforementioned large commercial and small industrial accounts, because they are able to absorb a greater portion of fixed costs necessary to provide service.[22] Giving consideration to the discussion above, it is reasonable to believe that the Arcadia and Wauchula expansion projects will benefit all customers.

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[18] Order Nos. PSC-13-0367-PAA-GU, issued August 8, 2013, in Docket No. 20130079-GU, *In re: Petition for approval of special contract with the Florida Department of Corrections, by Sebring Gas System, Inc.* and PSC-13-0366-PAA-GU, issued August 8, 2013, in Docket No. 20130130-GU, *In re: Petition for approval of special contract with the Florida Department of Corrections – DeSoto Correctional Institution, by Sebring Gas System, Inc.*

[19] Sebring's initial filing included main costs associated with a third expansion project of its existing system. In a subsequent filing, the Company amended its request and removed main costs associated with this project.

[20] Document No. 08680-2019, Sebring's Responses to Staff's Sixth Data Request.

[21] Order Nos. PSC-93-1833-FOF-GU, issued December 27, 1993, in Docket No. 19930883-GU, *In re: Petition by Peoples Gas System, Inc. to include in rate base the calculated historic cost and cost of conversion of distribution assets* and PSC-09-0375-PAA-GU, issued May 27, 2009, in Docket No 20080366-GU, *In re: Petition for rate increase by Florida Public Utilities Company.*

[22] Order No. PSC-10-0029-PAA-GU, issued January 14, 2010, in Docket No. 20090125-GU, *In re: Petition for increase in rates by Florida Division of Chesapeake Utilities Corporation.*

In response to a staff data request, Sebring explained that the costs associated with the requested additions are based on its recent experience with similar installations, as well as conversations with contractors and material vendors.[23] Staff recommends that Sebring's reliance on recent projects, as well as input from contractors and vendors, is a reasonable means for projecting these costs. Therefore, staff recommends that $1,920,692 for the discussed plant additions is appropriate for inclusion in rate base.

Bypass Re-build

In its MFRs, Sebring included $40,000 for a re-build of a regulated bypass with Peoples Gas System. Additionally, through its Distribution Integrity Management Program (DIMP) plan, Sebring has determined that the safety risk of maintaining the existing equipment is greater than the cost of replacing the equipment. Therefore, based on its DIMP plan, Sebring is required to complete the replacement as soon as is reasonable.[24] Mr. Bruce Christmas, a consultant for the Company indicated that the bypass re-build would incorporate over-pressure protection at the interconnection, and estimated that the re-build would occur in July of the projected test year.[25]

Conclusion

Based on staff's analysis of the Company's expansion projects into the City of Wauchula and the City of Arcadia, staff believes the Company's projected customer additions and costs are appropriate for the instant case. Therefore, staff recommends that $1,920,692 for the Wauchula and Arcadia plant additions is appropriate for inclusion in rate base. Additionally, staff recommends that the cost of the regulated bypass re-build also be included, resulting in capital additions totaling $1,960,692 ($1,920,692 + $40,000).

[23] Document No. 08568-2019, Sebring's Responses to Staff's Fifth Data Request.
[24] Id.
[25] Document No. 04736-2019, Direct Testimony of Bruce Christmas.

Issue 6: What is the appropriate amount of Plant in Service for the projected test year?

Recommendation: Based upon analysis of the information filed in this proceeding, staff recommends $7,928,320 (13-month average) as the appropriate amount of Plant in Service for the projected test year. (Higgins)

Staff Analysis: This issue addresses Sebring's forecasted amount of Plant in Service for the projected test year. In this case, Plant in Service can generally be described as the total installed cost of utility property that is projected to be used and useful in providing natural gas distribution service during the projected test year.

The Company's requested total amount of Plant in Service for the 2020 projected test year is $7,946,544 (13-month average).[26] Staff is recommending the Commission find $7,928,320 (13-month average), for a difference of ($18,226), as the appropriate amount of Plant in Service for the projected test year. The difference between the two figures equals staff's recommended adjustments to Account 376.1 - Mains – Plastic and Account 380.1 - Services – Plastic.[27] The adjustments relate to plant items/amounts for which sufficient supporting documentation was not identified (Audit Control No. 2019-170-1-1).[28] The corresponding proposed adjustments to Accumulated Depreciation are shown and discussed in Issue 7.

Shown in Table 6-1 below are the Company proposed and staff recommended projected test year plant amounts by function.

Table 6-1
Proposed Projected Test Year (PTY) Plant in Service Amounts

Plant Accounts	Plant Group Classification	Sebring PTY 13-Month Average	Proposed Staff Adjustment	Staff Recommended PTY 13-Month Average
301-302	Intangible Plant	$131,409	$0	$131,409
374-387	Distribution Plant	7,306,846	(18,226)	7,288,620
390-397	General Plant	508,289	0	508,289
	Total*	$7,946,544	($18,226)	$7,928,320

Source: Sebring's proposed PTY Plant in Service amounts as shown on MFR Schedule G1-10 (revised).
*May not sum due to rounding.

[26] Document No. 10856-2019, Revised MFR Schedule G-1, p. 10.
[27] Code of Federal Regulations, Title 18, Chapter I, Subchapter F, Part 201- Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act for further information regarding standardized accounting protocol and numeration.
[28] Document No. 08949-2019, Staff's Audit Report.

Conclusion

Based upon analysis of the information filed in this proceeding, staff recommends $7,928,320 (13-month average) as the appropriate amount of Plant in Service for the projected test year.

Issue 7: What is the appropriate amount of Accumulated Depreciation for the projected test year?

Recommendation: Based upon analysis of the information filed in this proceeding, staff recommends $3,041,557 (13-month average) as the appropriate amount of Accumulated Depreciation for the projected test year. (Higgins)

Staff Analysis: This issue addresses Sebring's forecasted amount of Accumulated Depreciation for the projected test year. Accumulated Depreciation can generally be described as the amount of capital recovered through depreciation expense. Accumulated Depreciation represents the measure/degree of capital recovery and is subtracted from gross plant (the difference of which represents net plant).

The Company's requested total amount of Accumulated Depreciation for the Projected Test Year is $3,036,771 (13-month average).[29] Staff is recommending the Commission find $3,041,557 (13-month average), for a difference of $4,787, as the appropriate amount. The difference between the two figures equals staff's recommended adjustments to Account 376.1 - Mains – Plastic, Account 380.1 - Services – Plastic, and Account 392 - Transportation Equipment – Light Trucks. The adjustments relate to plant and reserve amounts for which sufficient supporting documentation was not identified (Audit Control No. 2019-170-1-1).[30]

Further, Sebring, through Document No. 10856-2019, adjusted (from its petition as originally filed) Account 301 - Organizational Costs by ($4,400) due to an over-accrual which occurred in December 2019. The December 2019 accrual should have been $400, rather than the $4,800 that was booked. The adjustment results in a beginning 13-month average (December 2019) amount of Accumulated Depreciation and Amortization for Account 301 - Organizational Costs of $108,602.

Shown in Table 7-1 below are the Company's proposed and staff's recommended projected test year Accumulated Depreciation amounts by function.

[29] Document No. 10856-2019, Revised MFR Schedules G.
[30] Document No. 08949-2019, Staff's Audit Report.

Table 7-1
Proposed Projected Test Year (PTY) Accumulated Depreciation Amounts

Plant Accounts	Plant Group Classification	Sebring PTY 13-Month Average	Proposed Staff Adjustment	Staff Recommended PTY 13-Month Average
301-302	Intangible Plant	$111,002	$0	$111,002
374-387	Distribution Plant	2,645,685	(4,543)	2,641,142
390-397	General Plant	280,083	9,330	289,413
	Total*	$3,036,771	$4,787	$3,041,557

Source: Sebring's proposed PTY Accumulated Depreciation amounts as shown on MFR Schedule G1-12 (revised).
*May not sum due to rounding.

Conclusion

Based upon analysis of the information filed in this proceeding, staff recommends the Commission find $3,041,557 (13-month average) as the appropriate amount of Accumulated Depreciation for the projected test year.

Issue 8: What is the appropriate amount of Working Capital Allowance for the projected test year?

Recommendation: The appropriate amount of Working Capital Allowance for the projected test year is $147,518. (Snyder)

Staff Analysis: Sebring recorded Working Capital Allowance for the projected test year of $147,518.[31] Sebring used the balance sheet method to calculate the Working Capital Allowance which is determined by subtracting projected Current Liabilities from projected Current Assets. Current assets of $351,851, less current liabilities of $204,333, results in a Working Capital Allowance of $147,518. The Working Capital Allowance has been reviewed by staff. Staff believes that no adjustments were necessary. Schedule No. 1A reflects the working capital for the projected test year. Schedule No. 1B reflects staff's recommended Working Capital Allowance Calculation.

[31] MFR Schedule G-1, pp. 2 – 3, as revised in Document No. 10856-2019.

Issue 9: What is the appropriate amount of Rate Base for the projected test year?

Recommendation: The appropriate amount of Rate Base for the projected test year is $5,021,353. (Snyder)

Staff Analysis: Sebring recorded Rate Base of $5,044,363 for the projected test year.[32] Based upon staff's recommended adjustments in the preceding issues, Rate Base should be reduced by $23,010, resulting in a total Rate Base of $5,021,353. Schedule No. 1A reflects staff's recommended Rate Base for the projected year.

[32] MFR Schedule G-1, p. 1, as revised in Document No. 10856-2019.

Issue 10: What is the appropriate capital structure for the projected test year ending December 31, 2020?

Recommendation: The appropriate projected test year capital structure consists of 34.64 percent common equity, 54.73 percent long-term debt, 0.75 percent short-term debt, 3.10 percent customer deposits, and 6.78 percent deferred income taxes. Regarding investor capital, this recommended capital structure consists of 38.43 percent common equity and 61.57 percent debt (60.73 percent long-term debt and 0.84 percent short-term debt). (Richards, D. Buys)

Staff Analysis: For the projected test year ending December 31, 2020, Sebring filed a revised capital structure consisting of 34.63 percent common equity, 54.72 percent long-term debt and 0.75 percent short-term debt. In addition to the investor sources of capital, the Company's capital structure also includes 3.10 percent customer deposits and 6.79 percent accumulated deferred income taxes.

Staff made two adjustments to the Company's capital structure. First, staff made a specific adjustment to reduce the accumulated deferred income tax balance by $470 to recognize a decrease in the State of Florida corporate income tax rate from 5.50 percent to 4.458 percent for three taxable years beginning on or after January 1, 2019. This adjustment is explained in Issue 12. Second, staff made a pro rata adjustment to remove $22,540 to reflect adjustments to decrease the distribution plant balance. Staff made a corresponding pro rata adjustment to the capital structure to reconcile the capital structure balance with rate base for the projected test year ending December 31, 2020.

Accordingly, staff recommends that the appropriate projected test year capital structure consists of 34.64 percent common equity, 54.73 percent long-term debt, 0.75 percent short-term debt, 3.10 percent customer deposits, and 6.78 percent deferred income taxes. Regarding investor capital, this recommended capital structure consists of 38.43 percent common equity and 61.57 percent debt (60.73 percent long-term debt and 0.84 percent short-term debt).

Issue 11: What is the appropriate return on equity?

Recommendation: The appropriate return on equity is 10.00 percent with a range of plus or minus 100 basis points. (Cicchetti, D. Buys)

Staff Analysis: Sebring's current authorized return on equity (ROE) is 11.50 percent with a range of plus or minus 100 basis points. In Mr. Russell Melendy's direct testimony, the Company requested to increase its ROE to 12.50 percent to generate additional annual cash flow of approximately $17,289 to recover its deferred income tax liability of $342,671 over the next 19.8 years.[33] Mr. Melendy stated that Sebring is a small utility and a small change in revenues or expenses can affect the achieved ROE. Mr. Melendy also stated that in previous gas utility rate cases the Commission has recognized the riskiness of investing in small investor-owned natural gas utilities, and has authorized slightly higher allowed ROEs than for the larger companies.[34]

To evaluate the reasonableness of Sebring's requested ROE of 12.50 percent, staff used two widely accepted financial models to calculate the required returns on equity for a proxy group consisting of four publicly traded regulated natural gas companies: Atmos Energy Corporation, Northwest Natural Gas Company, ONE Gas, Inc., and Spire, Inc. Staff applied the discounted cash flow model (DCF) and the capital asset pricing model (CAPM) to the proxy group.

The DCF model is a valuation method used to estimate the required return on an investment based on its future cash flows. DCF analysis is used to determine the required return on equity for a company today, based on projections of how much money it will generate in the future. The simple average result for the proxy group of companies using the DCF model was 7.12 percent.

The CAPM represents the relationship between systematic risk and required ROE. The CAPM is used for pricing risky stock investments and generating required returns for investments given the risk of those investments compared to the market. The simple average result for the proxy group of companies using the CAPM method was 8.48 percent.

Staff agrees that Sebring is a very small gas utility compared to other gas utilities operating in Florida and nationwide. Sebring has just over 600 customers whereas other gas utilities have thousands of customers. Staff agrees with Mr. Melendy that due to its small size, Sebring has greater relative business and financial risk than other gas utilities. Because investors require a higher return to compensate for assuming greater risk, Sebring's greater relative business and financial risk should be reflected in the allowed return on equity. Based on the results of the DCF and CAPM models, staff believes Sebring's requested ROE of 12.50 percent is well above the required returns on equity for an investment in comparable companies and is therefore unreasonable. However, staff believes the expected returns of 7.12 percent and 8.48 percent derived from the DCF method and CAPM reflect a ROE that is too low for the investment risk associated with Sebring.

One measure of the increased risk is the variability of earnings. Earnings variability is the fluctuation of a company's net operating income over a given period. High earnings variability is

[33] Document No. 04735-2019, Direct Testimony of Russell Melendy, p. 16.
[34] Id., p. 14.

generally considered undesirable because it makes investors less certain of future earnings per share and dividends. As such, a history of earnings variability is a measure of the riskiness of an investment in a particular company. The coefficient of variation (COV) is a measure of earnings variability that allows investors to compare volatility, or riskiness between investments. As shown below, staff calculated that Sebring's net operating income (NOI) COV for the ten-year period from 2009 through 2018 was 53 percent. In comparison, the average COV for the same period for the four largest regulated natural gas companies in Florida was 23.27 percent. Additionally, the four national publicly traded natural gas companies collectively have an average COV of 22.37 percent. A summary of staff's analysis is presented in Table 11-1.

Table 11-1
Natural Gas Utilities NOI Coefficient of Variations

Florida Companies	COV
Sebring Gas System, Inc.	52.99%
Florida Division of Chesapeake Utilities Corporation	27.22%
Florida City Gas	31.83%
Florida Public Utilities Company	26.51%
Peoples Gas System	7.50%
Simple Average (excluding Sebring)	**23.27%**

National Companies	COV
Atmos Energy Corporation	20.16%
Northwest Natural Gas Company	7.37%
ONE Gas, Inc.	14.04%
Spire Inc.	47.92%
Simple Average	**22.37%**

Source: FPSC Annual Reports and Securities and Exchange Commission 10K Annual Reports

Another measure of financial risk is the amount of debt in the capital structure. The greater the amount of debt, the greater the financial risk for equity investors because equity investors are subordinate to debt investors. Sebring expects to carry a debt ratio of 61.57 percent in the projected test year as compared to only 50.18 percent on average for the proxy group. Therefore, Sebring's expected ROE should be greater than the average for the proxy group to reflect the additional financial risk.

Accordingly, staff believes a reasonable return on equity for Sebring is 10.00 percent. A ROE of 10.00 percent represents a 6.75 percent risk premium over the average forecasted 30-year U.S. Treasury Bond interest rate of 3.25 percent. The 30-year U.S. Treasury Bond is widely accepted as a risk-free rate by the financial community. The 30-year U.S. Treasury Bond interest rate as published in the October, 1, 2019 Blue Chip Financial Forecasts is forecast to be 3.00 percent in the first quarter of 2020 and increase to 3.50 percent by the first quarter of 2021 for an average of 3.25 percent.

Additionally, Regulatory Research Associates (RRA) Regulatory Focus, issued July 22, 2019, published a summary of the major rate case decisions for gas utilities from January 2019 through June 2019. The report showed that the authorized ROEs for gas utilities range from 6.00 percent to 7.00 percent above the 30-year Treasury bond interest rate.

As discussed in Issue 12, Sebring plans to add approximately $1.2 million of long-term debt to its capital structure to fund its capital projects in the projected 2020 test year. This addition of long-term debt reduces the Company's equity ratio from 51.04 percent to 38.43 percent. The RRA Regulatory Focus, issued July 22, 2019, indicated the average allowed equity ratio nationwide was 54.60 percent for the first six months of 2019, 50.09 percent in 2018, and 49.88 percent in 2017. The average allowed ROE for gas utilities as reported by RRA during the same time period was 9.63 percent for the first half of 2019 and 9.59 percent in 2018. By comparison, Sebring has a lower equity ratio than the nationwide average gas utility and therefore is riskier than the average gas utility. Consequently, it is reasonable that an investor would require a return on equity greater than 9.63 percent to make an equity investment in Sebring.

As discussed in Issue 20, staff recommends that Sebring will incur a deferred tax liability of $342,201, which is slightly lower than the Company's requested amount of $342,671. However, staff believes the deferred tax liability should be recovered as income tax expense and not through an increase in the ROE.

Based on the aforementioned analysis, staff believes 10.00 percent, with a range of plus or minus 100 basis points, is the appropriate return on equity for Sebring.

Issue 12: What is the appropriate weighted average cost of capital including the proper components, amounts and cost rates?

Recommendation: The appropriate weighted average cost of capital is 6.46 percent for the projected test year ending December 31, 2020. (Richards, D. Buys)

Staff Analysis: Based on the recommended capital structure in Issue 10, and the recommended cost rate for common equity in Issue 11, the appropriate weighted average cost of capital (WACC) is 6.46 percent. In Issue 10, staff is recommending an equity ratio of 38.43 percent based on investor sources. In its revised filing, Sebring requested a WACC of 7.72 percent for the projected test year. The Company based its request on a cost rate of 12.50 percent for common equity, 5.95 percent for long-term debt, and 6.00 percent for short-term debt. Staff recommends three adjustments to the Company's requested cost rates. In Issue 11, staff is recommending a cost rate of 10.00 percent for common equity. Additionally, the cost rates for long-term debt and short-term debt should both be reduced to 5.25 percent. In addition, staff recommends two adjustments to the cost of capital balance. One, a specific adjustment to reduce the accumulated deferred income tax balance by $470, and two, a pro rata adjustment of $23,010 to reconcile the capital structure to rate base as discussed in Issue 10.

Common Equity

Sebring requested a common equity balance of $1,746,957 at a cost rate of 12.50 percent for the revised projected test year ending December 31, 2020. In Issue 11, staff is recommending a return on equity of 10.00 percent. Staff made a pro rata adjustment to reconcile the capital structure to rate base, which decreased the amount of common equity by $7,807 to $1,739,150. Accordingly, staff recommends the appropriate amount of common equity is $1,739,150 at a cost rate of 10.00 percent.

Long-Term Debt

In its filing, the Company indicated it will require additions to its long-term debt balance to fund its capital projects and construction efforts. Sebring anticipates adding approximately $1.2 million of long-term debt in the projected 2020 test year. The total amount of long-term debt in the revised projected test year ending December 31, 2020 is $2,760,453. Staff made a pro rata adjustment to reconcile the capital structure to rate base which decreased the amount of long-term debt by $12,336 to $2,748,117. In his direct testimony, Mr. Russell Melendy stated that Sebring expects to pay 6.00 percent on its loan from Heartland National Bank and the average cost of long-term debt as reflected on MFR Schedule G-3, page 3, for the projected test year is 5.95 percent. However, the loan documents provided in the staff audit indicate the interest rate charged by the bank is a variable rate based on the Prime Rate as published in the Wall Street Journal, plus 0.50 percent.[35] As of December 3, 2019, the Prime Rate as published in the Wall Street Journal was 4.75 percent. Further, the cost rate for long-term debt in the historic base year ended December 31, 2018, was 5.45 percent. Absent any documentation to support a cost rate of 6.00 percent, staff believes a cost rate of 5.25 percent during the projected test year of 2020 is more reasonable and appropriate. Accordingly, staff recommends the appropriate amount of long-term debt is $2,748,117 at a cost rate of 5.25 percent.

[35] Document No. 11449-2019, Staff Audit ACN 2019-170-1-1, Work Papers 33-3 to 33-3.6.

Short-Term Debt

The Company included a balance of $38,077 for short-term debt on MFR Schedule G3-2, page 2 of 11, in the revised projected test year ending December 31, 2020. Staff made a pro rata adjustment to reconcile capital structure to rate base which decreased the balance by $170 to $37,907. In his direct testimony, Mr. Russell Melendy stated the appropriate cost rate for short-term debt is 6.00 percent. This is based on a $250,000 line of credit attached to the long-term debt loan agreement with Heartland National Bank.[36] The agreement is dated July 11, 2013. The agreement indicates the interest rate for a short-term line of credit is a variable rate based on Prime Rate plus 0.50 percent. However, the effective cost rate for short-term debt in the historic test year as reflected on MFR Schedule D-3 was 3.33 percent. In response to staff's eleventh data request, Sebring explained market conditions are the reason for the increase in the interest rate from 3.33 percent to an estimated 6.00 percent. Staff requested documentation supporting the Company's projected interest rate of 6.00 percent. Based on documents provided with the Company's response to staff's eleventh data request, it appears Sebring was paying 5.75 percent as recently as August 1, 2019. Prime Rate was 5.25 percent in August 2019. As of December 3, 2019, the Prime Rate as published in the Wall Street Journal was 4.75 percent. It appears Sebring's cost of short-term debt is the same as its long-term debt, Prime Rate, plus 0.50 percent. Accordingly, staff recommends the appropriate amount of short-term debt is $37,907 at a cost rate of 5.25 percent.

Customer Deposits

Sebring included a balance of $156,205 for customer deposits at a cost rate of 2.86 percent in the revised projected test year. Staff verified the Company calculated the interest rate in adherence to Rule 25-7.083, F.A.C., Customer Deposits, and agrees with the cost rate requested by the Company. Staff made a pro rata adjustment to reconcile capital structure to rate base which decreased the customer deposit balance by $698 to $155,507. Accordingly, staff recommends the appropriate amount of customer deposits is $155,507 at a cost rate of 2.86 percent.

Accumulated Deferred Income Taxes

The Company included a balance of $342,671 for accumulated deferred income taxes (ADITs) at a zero cost rate in its capital structure for the revised projected test year ending December 31, 2020. Staff recommends a reduction of $470 to recognize a decrease in the State of Florida corporate income tax rate from 5.50 percent to 4.458 percent for three taxable years beginning on or after January 1, 2019.[37] Staff calculated the effect of the reduced tax rate on the ADIT balance for the calendar years 2019 through 2021. The lower tax rate resulted in a decrease of $157 per year. For the three-year period the total decrease is $470. Further, in his direct testimony, Mr. Russell Melendy stated that the Company does not anticipate an increase in the amount of ADITs during the projected test year. Staff concurs with the Company that the pro forma projects requested by the Company should not generate additional ADITs. The Tax Cuts and Jobs Act of 2017 (TCJA) eliminated gas distribution systems from qualification for accelerated depreciation for Federal income tax purposes. Under the TCJA, certain types of property are not eligible for bonus depreciation in any taxable year beginning after December 31, 2017. One such exclusion from qualified property is for property primarily used in the trade or business of the furnishing or sale of gas or steam through a local distribution system or

[36] Document No. 11449-2019, Staff Audit ACN 2019-170-1-1, Work Papers 33-3 to 33-3.6.
[37] Section 220.1105, F.S.

transportation of gas or steam by pipeline. This exclusion applies if the rates for the furnishing or sale have to be approved by a Federal, state or local government agency, a public service or public utility commission, or an electric cooperative.[38] Staff reduced the ADITs by an additional $1,529 as a result of the pro rata adjustment to reconcile capital structure to rate base. Accordingly, staff believes the appropriate ADIT balance for the revised projected test year ending December 31, 2020 is $340,672.

Conclusion

Based on the adjustments described above, staff recommends the appropriate WACC is 6.46 percent. The recommended WACC, including the proper components, amounts and cost rates are presented in Schedule No. 2.

[38] IRS Code §1.168(k)-2 and §163(j)(7)(A)(iv).

Issue 13: Are Sebring's projected Total Operating Revenues for the projected test year appropriate?

Recommendation: Yes. Sebring's projected Total Operating Revenues for the 2020 projected test year are appropriate. (Wu)

Staff Analysis: Staff has reviewed Sebring's calculations presented in Document No. 10856-2019, revised MFR Schedules G-2, Page 1, and Schedule G-2, Pages 8 and 8.5 of 31. Sebring's projected revenues from the sales of gas, in the amount of $1,171,865, and miscellaneous service revenues, in the amount of $14,335, result in total operating revenue of $1,186,200. Staff believes that the Company's estimation of $1,186,200 total operating revenues for the 2020 projected test year is appropriate.

Issue 14: Should an adjustment be made to the number of employees in the projected test year?

Recommendation: Staff recommends no adjustment to the Company's proposed number of employees. Based on staff's recommendation in Issue 5 for approval of the expansion projects in Arcadia and Wauchula, there will be a significant increase in the territory that Sebring will be serving. Therefore, staff recommends approval of one new accounting position and two new field employees. (Knoblauch, Lewis, M. Andrews)

Staff Analysis: Sebring proposed to add one new accounting position to handle an increase in workload and complexity of the workload. As discussed in Issue 15, staff recommends approval of the new accounting position.

As discussed in Issue 5, Sebring has proposed two expansion projects into the cities of Arcadia and Wauchula. Sebring is proposing the addition of 10,640 feet of steel mains and 30,000 feet of plastic mains to construct its Arcadia distribution system, and 15,500 feet of plastic mains for its Wauchula distribution system. The potential number of new customers that the Company identified is 27 for Arcadia and 28 for Wauchula, which largely consists of commercial and industrial customers.[39] Due to the addition of these distribution systems, the Company has requested two new field employees. The field employees will be responsible for tasks such as line locates, leak surveys, meter turn-ons/offs, and inspections of mains and services installations that will be completed by contractors. Additionally, these employees will be responsible for two prisons that are served by Sebring near Arcadia and Wauchula.

Based on staff's recommendation in Issue 5 for approval of the expansion projects in Arcadia and Wauchula, there will be a significant increase in the territory that Sebring will be serving. Also, Mr. Jerry Melendy indicated that the Arcadia, Sebring, and Wauchula distribution systems are not interconnected and are therefore three separate systems. Considering the expansion of service, as well as the independent nature of the three distribution systems, staff recommends approval of the two new field employees.

[39] Document No. 08680-2019, Sebring's Response to Staff's Sixth Data Request.

Issue 15: What is the appropriate amount of salaries and benefits to include in the projected test year?

Recommendation: The appropriate amount of salaries and benefits for the projected test year is $513,255. (M. Andrews)

Staff Analysis: Sebring included $513,652 in salaries and benefits in the projected test year. Staff removed $397 related to meter readings to reclassify the expense to Account 902.

In its petition, Sebring stated that like much of the utility industry in Florida, Sebring has experienced difficulty attracting and retaining qualified personnel. In 2018, Sebring experienced turn-over in three of its six field positions. Sebring believes that keeping existing employees is more prudent because of the significant time and expense necessary to train new employees. To motivate current employees to remain and to attract qualified personnel, Sebring has plans to increase wages for employees by an average of five percent for 2019 and 2020.

Sebring projects to add two new field employees to serve customers in the previously unserved areas of Wauchula and Arcadia. The impact on Sebring's payroll expense is projected to be $97,230 for the projected test year, of which $20,241 will be capitalized.[40] With the projected growth and added complexity of managing a regulated natural gas company, Sebring proposes to add one accounting position with a projected salary of $50,000. In response to a staff data request, Sebring stated that the workload has increased to a level that requires the additional accounting position. The additional accounting position will ensure compliance with the complex accounting regulations.[41]

As discussed in Issue 14, staff recommends approval of the Company's requested positions. Also, staff believes the increase in wages to be reasonable. Therefore, the appropriate amount of salaries and benefits for the projected test year is $513,255.

[40] Document No. 04735-2019, Direct Testimony of Jerry Melendy, p. 24.
[41] Document No. 06177-2019, Sebring's Responses to Staff's Second Data Request.

Issue 16: What is the appropriate amount of Rate Case Expense to include in the projected test year and what is the appropriate amortization period?

Recommendation: The appropriate amount of Rate Case Expense is $151,295 to be amortized over four years. Therefore, the appropriate amount to be included in Rate Case Expense for the projected test year is $37,824 ($151,295 / 4). (D. Andrews)

Staff Analysis: According to the MFRs, Sebring projected Rate Case Expense of $132,500 for this proceeding. Sebring proposed a four-year amortization period, resulting in annual Rate Case Expense of $33,125.

On October 17, 2019, Sebring provided staff with an updated estimate of Rate Case Expense based on actual expense to date and an estimate to complete the case.[42] The documentation has been reviewed by staff. Sebring projected $100,000 in consulting fees. The Company provided a flat rate contract from the consultant that matched this amount for the instant case. In the prior rate case in 2004, $40,000 in Rate Case Expense was allowed for consulting service which was primarily related to the cost of service study. In the instant case, the consultant derived Sebring's capital costs for the Company's expansion, detailed capital costs related to other growth, and sponsored the cost of service study. Staff believes the increase in consulting fees is reasonable due to the additional work being provided by the consultant in the instant case and inflation since the last rate case. Therefore, staff recommends no adjustments for consulting services.

Sebring initially projected $30,000 for legal fees. The updated amount for legal expenses is $50,000, including $33,000 already incurred. The contract for legal services established a "soft" cap of $50,000.[43] Based upon the work already performed and the work expected to be performed, staff believes legal expenses of $50,000 is reasonable. Therefore, staff recommends increasing legal expenses by $20,000. Further, miscellaneous expenses were projected to be $2,500. The updated amount for miscellaneous expense is $1,295, thus miscellaneous expenses should be reduced by $1,205. The adjustments above result in an increase of $18,795 ($20,000 - $1,205). This results in a total Rate Case Expense of $151,295 ($132,500 + $18,795)

As presented in the MFRs, Sebring requested that the Rate Case Expense be amortized over a period of four years. Staff believes the four-year amortization period to be reasonable and consistent with prior Commission decisions.[44]

Based on the above, staff recommends that the appropriate amount of Rate Case Expense is $151,295 to be amortized over four years. The appropriate annual amount to be included in Rate Case Expense is $37,824 ($151,295 / 4). Therefore, Rate Case Expense should be increased by $4,699 ($37,824 - $33,125).

[42] Document No. 09458-2019, Sebring's Redacted Responses to Staff's Tenth Data Request.
[43] In the event total charges exceed $50,000, the Company and the law firm would engage in discussions to determine what changes, if any, would be appropriate.
[44] Order Nos. PSC-04-1260-PAA-GU, issued December 20, 2004, in Docket No. 040270-GU, *In re: Application for rate increase by Sebring Gas System, Inc.* and PSC-04-0565-PAA-GU, issued June 2, 2004, in Docket No. 20030954-GU, *In re: Petition for rate increase by Indiantown Gas Company.*

Issue 17: What is the appropriate amount of O&M expenses for the projected test year?

Recommendation: The appropriate amount of O&M expenses for the projected test year is $741,992. (M. Andrews)

Staff Analysis: Sebring included $739,587 in operation and maintenance (O&M) expenses for the projected test year. As discussed in Issue 15, staff decreased salaries and benefits by $397. Also, as discussed in Issue 16, staff increased Rate Case Expense by $4,699 for the projected test year. Based on staff's analysis, staff recommends the following additional adjustments to Sebring's O&M expense for the projected test year.

Operation & Maintenance Expense

Meter Reading Expense (902)

Sebring included $6,596 of meter reading expense in Account 902. In analyzing Sebring's projected test year expenses, staff determined that $397 in meter reading expense was incorrectly recorded in Account 920. Staff recommends that the projected test year meter reading expense be increased by $397, resulting in a total projected test year meter reading expense of $6,993.

Office Supplies & Expense (921)

Sebring included $35,577 in the projected test year in Account 921, Office Supplies & Expense. Included in this amount is $49 related to late payment fees, and $1,831 for lobbying activities. Staff recommends the removal of these costs, resulting in a total decrease to the projected test year Office Supplies & Expense of $1,880, resulting in staff's recommended total projected test year Office Supplies & Expense of $33,697.

Employee Pension & Benefits (926)

The Company included $43,146 for Employee Pension & Benefits expense in the projected test year. Staff recommends reducing the projected test year expense by $413 to remove costs not applicable to the period. Projected test year Employee Pension & Benefits expense recommended by staff is $42,733.

Conclusion

Based on the above adjustments and those discussed in Issues 15 and 16, staff recommends that O&M expense be increased by $2,405 resulting in a total O&M expense of $741,992 for the projected test year ending December 31, 2020.

Table 17-1 below reflects the adjustments to Operation and Maintenance Expense.

Table 17-1
O&M Adjustments

Account	Staff Adjustment
902 Meter Reading Expense	$397
920 Administrative & General Salaries	(397)
921 Office Supplies & Expense	(1,880)
926 Employee Pension and Benefits	(413)
928 Regulatory Commission Expense	4,699
Total	$2,405

Source: Staff's Audit Report of Sebring Gas System, Inc.
*May not sum due to rounding.

Issue 18: What is the appropriate amount of Depreciation and Amortization Expense for the projected test year?

Recommendation: Based upon analysis of the information filed in this proceeding, staff recommends $260,052 as the appropriate amount of Depreciation and Amortization Expense for the projected test year. (Higgins)

Staff Analysis: This issue addresses Sebring's forecasted amount of Depreciation Expense for the projected test year. Depreciation expense can generally be described as the cost of utility plant (less net salvage) recovered over the service life of the asset. In ratemaking, depreciation expense is included in the revenue requirement calculation.

The Company's requested total amount of Depreciation and Amortization Expense for the projected test year is $260,594.[45] Staff is recommending the Commission find $260,052, for a difference of ($542), as the appropriate amount of Depreciation and Amortization Expense for the projected test year. The difference between the two figures equals staff's recommended adjustments to Account 376.1 - Mains – Plastic and Account 380.1 - Services – Plastic. The expense adjustments correspond to the Plant in Service findings identified in staff's Audit Report (Audit Control No. 2019-170-1-1) filed in this proceeding.[46] Staff notes the depreciation expense amounts were calculated using the current Commission-approved depreciation rates for Sebring.[47]

Shown in Table 18-1 below are the Company proposed and staff recommended projected test year Depreciation and Amortization Expense amounts by function.

Table 18-1
Proposed Projected Test Year (PTY) Depreciation Expense

Plant Accounts	Plant Group Classification	Sebring PTY	Proposed Staff Adjustment	Staff Recommended PTY
301-302	Intangible Plant	$4,800	$0	$4,800
374-387	Distribution Plant	215,273	(542)	214,731
390-397	General Plant	40,521	0	40,521
	Total	$260,594	($542)	$260,052

Source: Sebring's proposed PTY Depreciation Expense amounts as shown on MFR Schedule G2-23 (revised).
*May not sum due to rounding.

Conclusion

Based upon analysis of the information filed in this proceeding, staff recommends $260,052 as the appropriate amount of Depreciation and Amortization Expense for the projected test year.

[45] Document No. 10856-2019, Revised MFR Schedule G-2, p. 23.
[46] Document No. 08949-2019, Staff's Audit Report.
[47] Order No. PSC-16-0574-PAA-GU, issued December 19, 2016, in Docket No. 20160174-GU, *In re: Request for approval of 2016 depreciation study by Sebring Gas System, Inc.*

Issue 19: What is the appropriate amount of Taxes Other Than Income (TOTI) for the projected test year?

Recommendation: The appropriate amount of projected test year TOTI is $22,468. (M. Andrews)

Staff Analysis: Sebring recorded a TOTI balance of $22,931, for the projected test year. In response to staff's data request, Sebring provided an updated projected tangible property tax with a reduction of $463 related to the low-income housing project that decided not to use natural gas in its facilities.[48] This adjustment results in a decrease of projected test year TOTI of $463 resulting in a TOTI balance of $22,468.

[48] Document No. 11050-2019, Sebring's Responses to Staff's Fourteenth Data Request.

Issue 20: What is the appropriate amount of deferred income tax expense for the projected test year?

Recommendation: The appropriate amount of annual income tax expense associated with the amortization of accumulated deferred income taxes for the projected test year ending December 31, 2020 is $19,011. (Smith, D. Buys)

Staff Analysis: The Company's current rates do not include a provision for income tax expense. Further, the Company's rates have never included current or deferred income tax expense. The Company explained that, in earlier years, Sebring incurred negative net income which generated loss carry-forwards which offset future Federal and State income taxes. Recently, the Company began to realize positive net income which eventually eliminated the net loss carry-forwards. During this period, the Company did not recognize its Federal or State deferred tax liability in its rate filings although it took advantage of accelerated depreciation and the reduced tax liability on its Federal and State income tax filings. Consequently, the Company incurred deferred tax liabilities from the timing differences between tax and book depreciation rates but failed to recognize the deferred taxes in its rate filings. Sebring admitted it was at fault and solely responsible for the error.

Sebring calculated it has a deferred income tax balance of $342,671 that will be reversing over the next 19.8 years, or approximately $17,307 per year. The Company proposed to recover this expense through a 1.00 percent increase to its return on equity, which equates to a net income of $17,289 per year. Staff disagrees with Sebring's proposal and believes a more appropriate method to recover the expense is to calculate the exact amount and add it to the Company's income tax expense. As discussed in Issue 12, staff recommends a $470 reduction to the deferred income tax balance to recognize a decrease in the State of Florida corporate income tax rate from 5.50 percent to 4.458 percent for three taxable years beginning on or after January 1, 2019. Accordingly, the appropriate accumulated deferred income tax balance on Sebring's books is $342,201 ($342,671 - $470). The deferred taxes are expected to fully reverse over the next 18 years ending in a zero balance in 2037. The Company used an amortization period of 19.8 years that begins in early 2018 and ends in 2037. Staff recommends an amortization period of 18 years beginning in 2020 and ending in 2037 to correspond to the period when the new rates will go into effect. This equates to an annual deferred income tax expense of $19,011 ($342,201 / 18 years). Accordingly, staff recommends the appropriate amount of annual income tax expense associated with the amortization of accumulated deferred income taxes for the projected test year ending December 31, 2020 is $19,011.

Issue 21: What is the appropriate amount of Total Operating Expense for the projected test year?

Recommendation: The appropriate amount of Total Operating Expenses for the projected test year is $1,041,548. (M. Andrews)

Staff Analysis: Sebring recorded Total Operating Expenses of $1,021,137 in the projected test year. The application of staff's adjustments in Issues 15, 16, 17, 18, 19, and 20 results in an increase of $20,411. The total adjustments increase Total Operating Expenses for the projected test year to $1,041,548. Schedule No. 4 reflects the application of staff's adjustments and staff's recommended Total Operating Expenses for the projected test year.

Issue 22: What is the appropriate amount of Net Operating Income for the projected test year?

Recommendation: The appropriate amount of Net Operating Income for the projected test year is $144,652. (M. Andrews)

Staff Analysis: Sebring recorded a Net Operating Income of $165,063 in the projected test year. Based upon staff's recommendations in the preceding issues, staff recommends Net Operating Income of $144,652. Schedule No. 3 reflects the Net Operating Income for the projected test year.

Issue 23: What is the appropriate net operating income multiplier?

Recommendation: The appropriate net income multiplier is 1.3315, as shown on Schedule No. 5. (Sewards, Norris)

Staff Analysis: The Company's calculation and staff's calculation are shown on Schedule No. 5. The only difference between the Company's calculation and staff's calculation is the state income tax rate. The Company used 5.5 percent for its state income tax rate; staff has reduced the tax rate to 4.458 percent. Effective January 1, 2019, the Florida corporate income tax rate was reduced from 5.5 percent to 4.458 percent. Staff has recalculated the net operating income multiplier to reflect this reduction. As such, staff recommends that the appropriate net income multiplier is 1.3315.

Issue 24: What is the appropriate annual operating revenue increase for the projected test year?

Recommendation: The appropriate annual operating revenue increase for the projected test year is $239,647. (M. Andrews)

Staff Analysis: Sebring requested an annual operating revenue increase of $302,041 in the projected test year. Based upon staff's recommended adjustments in the preceding issues, the annual operating revenue increase is reduced to $239,647. Schedule No. 6 reflects the revenue requirement for the projected test year.

Issue 25: What is the appropriate cost of service methodology to use to allocate costs to the rate classes?

Recommendation: The appropriate cost of service methodology to be used in allocating costs to the various rate classes is reflected in the cost of service study contained in Attachment A. (Hampson, Coston)

Staff Analysis: The purpose of a cost of service study is to allocate the approved total revenue requirement of the utility system among the various rate classes. Then, base rates are designed to recover the total revenue requirement attributable to that class. Base rates for Sebring include the fixed customer charge and the variable per-therm transportation charge, which are addressed in Issues 26 and 27, respectively. In rate design, the fixed customer charge is typically determined first and represents a portion of the overall rate requirement. The per-therm transportation charge for each class is determined by taking the remaining revenue requirement, and dividing by the projected therm volume of each rate class.

On November 21 2019, Sebring filed a revised cost of service study.[49] Staff uses Sebring's revised cost of service methodology and incorporates the staff-recommended adjustments to rate base, rate of return, operations and maintenance expenses, total depreciation and amortization, and the resulting annual operating revenue increase, as discussed in Issue 24. As such, the staff-recommended base rates are designed to recover $1,411,514 for the 2020 projected test year.[50] In addition to base rate revenues, Sebring projects to receive $14,335 in other operating revenues from miscellaneous service charges, for a total of $1,425,849. Staff's cost of service study is contained in Attachment A to the recommendation.

[49] Document No. 11050-2019, Revised MFR Schedule H-3, p. 5.
[50] $1,411,514 = $1,171,865 (Issue 3) + $239,647 (Issue 24)

Issue 26: What are the appropriate customer charges?

Recommendation: The appropriate staff-recommended customer charges for each rate class are reflected in the table below. (Hampson, Coston)

Staff-recommended Customer Charges

Rate Class	Staff-recommended Customer Charges
Transportation Service 1 (TS-1)	$12.00
Transportation Service 2 (TS-2)	$20.00
Transportation Service 3 (TS-3)	$70.00
Transportation Service 4 (TS-4)	$225.00
Transportation Service 5 (TS-5)	$1,000.00
Third Party Supplier (TPS)	$3.50
Special Contracts	$11,906.92

Staff Analysis: The customer charge is a fixed charge that applies to each customer's bill within a rate class, no matter the quantity of gas used for the month. The customer charge is typically designed to recover costs related to the meter, regulator, services, and billing that are incurred no matter whether any gas is consumed. For any given revenue requirement, any customer-related costs that are not recovered through the customer charge are recovered through the per-therm charge. For example, a higher customer charge results in a lower per-therm charge.

Table 26-1 shows current customer charges, the Company-proposed customer charges, and the staff-recommended customer charges. Sebring classifies customers based on annual therm usage and does not distinguish between residential and commercial customers.

Table 26-1
Customer Charges by Rate Class

Rate Class	Current Charges	Company-proposed Charges	Staff-recommended Charges
Transportation Service 1 (TS-1)	$9.00	$15.00	$12.00
Transportation Service 2 (TS-2)	$12.00	$30.00	$20.00
Transportation Service 3 (TS-3)	$35.00	$200.00	$70.00
Transportation Service 4 (TS-4)	$150.00	$650.00	$225.00
Transportation Service 5 (TS-5)	$500.00	$3,875.00	$1,000.00
Third Party Supplier (TPS)	$3.00	$3.50	$3.50
Special Contracts	$11,633.00	$11,913.20	$11,906.92

Source: Document No. 11050-2019, Revised MFR Schedule H-3, p 5.

As shown in the table above, staff recommends lower customer charges than the Company proposed for most rate classes. Staff has concerns that by significantly shifting cost recovery from the variable charge to the fixed customer charge, lower volume customers may see substantially higher bill increases, when compared to higher volume customers.

This shift in cost recovery may benefit large volume users who can offset the overall bill increase due to the higher customer charge with lower per-therm charges. Low-volume users, however, cannot benefit to the same extent from the lower per-therm charge. The shift to a higher fixed charge reduces the lower volume customer's ability to affect their overall bill. Additionally, a shift to higher fixed charges reduces the incentive for a customer to conserve natural gas. Staff has evaluated the Company's proposed customer charges in light of these trade-offs for different usage levels.

The Third Party Supplier rate schedule is charged to third party suppliers who sell gas to Sebring customers. Sebring performs administrative and payment processing functions on behalf of the third party suppliers. The $3.50 is a charge per customer served by the Third Party Supplier, and represents Sebring's administrative and billing cost to perform these tasks.

Sebring's Justification for Shifting Cost Recovery

In his testimony, Mr. Christmas states that Sebring's proposed customer charges are a significant shift in the recovery of its approved revenue requirement through the fixed charge component of

its proposed rate structure.[51] Mr. Christmas defines Straight Fixed Variable (SFV) rate design as recovering Sebring's fixed costs from its customers with fixed charges.

There is some merit in his argument that a Local Distribution Company (LDC) experiences little variable cost for building and maintaining infrastructure. SFV cost allocations are also consistent with the pricing schemes approved by the Federal Energy Regulatory Commission for interstate pipelines. The customer still experiences variability due to fluctuations in the cost of gas itself; however, purchased gas costs are a separate charge on customers' bills. Staff is cognizant of Mr. Christmas's arguments on behalf of shifting costs from the variable per-therm charge to the fixed customer charge, under the basis of SFV rate design.

In response to staff's tenth data request, Sebring states that a benefit of its proposed customer charges is that bills are more levelized month-to-month. Sebring finds this to be beneficial for both customer and Company, because it "simulates a budget billing program" for the customer and the Company receives a more consistent cash flow month-to-month.[52] However, staff does not believe the above argument outweighs the impacts of abnormally large increases to some customers' bills. Under the Company proposed rates, lower volume customers in most rate classes could experience a significant monthly rate increase.[53] Higher volume customers, on the other hand, may experience an overall decrease in their monthly bill, depending on usage.

Section 366.06(1), F.S., states that the Commission shall to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility. Shifting most of the Company's base rate costs from the variable per-therm charge to the fixed customer charge would unduly impact small use customers. These customers may not benefit from the correspondingly lower therm charge resulting from such a shift.

Staff believes a fairer approach is to set the customer charge to minimize the impact on low therm users and let the therm charge capture the balance of the class revenue requirement. This is consistent with the Commission's decisions in the 2004 Sebring rate proceeding,[54] the 2009 Florida Division of Chesapeake Utilities Corporation rate proceeding,[55] and the 2007 St. Joe Natural Gas Company, Inc. rate proceeding.[56] Staff is recommending rates that would recover a greater proportion of costs through the fixed customer charge, compared to Sebring's current rate design. Staff's recommended rates are an incremental shift toward recognizing the operating characteristics of LDCs while providing some stability to customer rates and minimizing impacts on low users. Attachment B shows bill comparisons between Sebring's current rates and staff-recommended rates.

[51] Document No. 04736-2019, Direct Testimony of Bruce Christmas, pp. 18-20.
[52] Document No. 09451-2019, Sebring's Responses to Staff's Tenth Data Request.
[53] Document No. 09001-2019, Sebring's Responses to Staff's Ninth Data Request, based on actual monthly customer therm usage in the 2018 Historic Base Year.
[54] Order No. PSC-04-1260-PAA-GU, issued December 20, 2004, in Docket No. 20040270-GU, *In re: Application for rate increase by Sebring Gas System, Inc.*
[55] Order No. PSC-10-0029-PAA-GU, issued January 14, 2010, in Docket No. 20090125-GU, *In re: Petition for increase in rates by Florida Division of Chesapeake Utilities Corporation.*
[56] Order No. PSC-08-0436-PAA-GU, issued July 8, 2008, in Docket No. 20070592-GU, *In re: Petition for rate increase by St. Joe Natural Gas Company, Inc.*

Issue 27: What are the appropriate per therm transportation charges?

Recommendation: The appropriate staff-recommended per therm transportation charges for each rate class are reflected in the table below. (Ward)

Staff-Recommended Transportation Charges

Rate Class	Staff Recommended Transportation Charges (dollar per therm)
TS-1	0.66965
TS-2	0.46843
TS-3	0.52481
TS-4	0.39922
TS-5	0.41589

Staff Analysis: The table below shows the transportation charges that are currently in effect, Sebring's proposed charges as contained in the revised MFR Schedule H, and the staff-recommended charges. The staff-recommended charges are subject to change based on the Commission's vote in other issues.

Table 27-1
Transportation Charges (dollar per therm)

Rate Class	Current Rate	Company-proposed	Staff-recommended
TS-1	0.57140	0.33481	0.66965
TS-2	0.49327	0.20787	0.46843
TS-3	0.46677	0.16529	0.52481
TS-4	0.33861	0.09619	0.39922
TS-5	0.38136	0.04027	0.41589

Source: Document No. 11050-2019, Revised MFR Schedule H-3, p 5.

The staff-recommended transportation charges are higher than the Company-proposed charges because staff, in Issue 26, recommended lower customer charges for certain rate classes. For any given class revenue requirement, costs not recovered through the customer charge are recovered through the per-therm transportation charge. Therefore, a lower customer charge results in higher transportation charges.

Issue 28: What is the appropriate effective date for Sebring's revised rates and charges?

Recommendation: The revised rates and charges should become effective for meter readings on or after 30 days following the date of the Commission vote approving the rates and charges. Sebring should file revised tariffs to reflect the Commission-approved final rates and charges for administrative approval within five business days after the Commission's vote. Pursuant to Rule 25-22.0406(8), F.A.C., customers should be notified of the revised rates in their first bill containing the new rates. A copy of the notice should be submitted to staff for approval prior to its use. (Ward)

Staff Analysis: All new rates and charges should become effective for meter readings on or after 30 days from the date of the Commission vote approving them. This will insure that customers are aware of the new rates before they are billed for usage under the new rates, and prevent the billing of usage under the new rates prior to their approval.

Sebring should file revised tariffs to reflect the Commission-approved final rates and charges for administrative approval within five business days after the Commission's vote. Pursuant to Rule 25-22.0406(8), F.A.C., customers should be notified of the revised rates in their first bill containing the new rates. A copy of the notice should be submitted to staff for approval prior to its use.

Issue 29: Should Sebring be required to notify the Commission, within 90 days after the date of the final order in this docket, that it has adjusted its books for all the applicable accounts as a result of the Commission's findings in this rate case?

Recommendation: Yes, Sebring should be required to notify the Commission, in writing, that it has adjusted its books in accordance with any Commission ordered adjustments. Sebring should submit a letter within 90 days of the final order in this docket, confirming that the adjustments to all the applicable accounts have been made to the Company's books and records. In the event the Company needs additional time to complete the adjustments, notice should be provided within seven days prior to deadline. Upon providing good cause, staff should be given administrative authority to grant an extension of up to 60 days. (Final Agency Action) (M. Andrews)

Staff Analysis: Sebring should be required to notify the Commission, in writing, that it has adjusted its books in accordance with any Commission ordered adjustments. Sebring should submit a letter within 90 days of the final order in this docket, confirming that the adjustments to all the applicable accounts have been made to the Company's books and records. In the event Sebring needs additional time to complete the adjustments, notice should be provided within seven days prior to deadline. Upon providing good cause, staff should be given administrative authority to grant an extension of up to 60 days.

Issue 30: Should this docket be closed?

Recommendation: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. (DuVal, Dziechciarz)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order.

Sebring Gas Systems
Docket No. 20190083-GU
Rate Base Calculation

	COMPANY ADJUSTED	STAFF ADJS.	STAFF ADJUSTED
Utility Plant			
Plant in Service	$7,946,544		$7,928,320
376.1 Mains -Plastic		($13,804)	
380.1 Services- Plastic		(4,422)	
CWIP	0		0
Total Utility Plant	$7,946,544	($18,226)	$7,928,320
Accum. Depr. And Amor. - Plant in Service	($3,036,771)		($3,041,557)
376.1 Mains - Plastic		1,767	
380.1 Services - Plastic		2,776	
392 Transportation Equip- Light Trucks		(9,330)	
Customer Advances for Constr.	($12,928)		($12,928)
Total Accum. Depr. And Cust. Adv.	($3,049,699)	($4,787)	($3,054,485)
Net Utility plant	$4,896,845		$4,873,835
Working Capital Allowance	$147,518		$147,518
Total Rate Base	$5,044,363	($23,010)	$5,021,353

Source: Sebring's proposed 2020 PTY Rate Base amount as shown on Revised MFR Schedule G1-1.
*May not sum due to rounding.

Sebring Gas Systems
Docket No. 20190083-GU
Working Capital Calculation

CURRENT & ACCRUED ASSETS	
CASH	$209,874
ACCOUNTS REC - NATURAL GAS	44,089
ACCOUNTS REC - FUEL	0
PLANT & OPER. MATERIAL SUPPL	94,018
PREPAYMENTS	3,870
TOTAL CURR. & ACCR. ASSETS	$351,851
CURRENT & ACCRUED LIABILITIES	
ACCOUNTS PAYABLE	$142,718
NP COKER - CURRENT	0
FEDERAL INCOME TAXES PAYABLE	8,540
STATE INCOME TAXES PAYABLE	2,367
ACCRUED INTEREST PAYABLE	32,912
INTEREST PAYABLE - CUST DEPOSITS	2,556
UTILITY TAX - GROSS RECEIPTS	2,937
REGULATORY ASSESSMENT	1,784
REGULATORY ASSESSMENT - ECCR	0
SALES TAX PAYABLE	642
TANGIBLE & MUT TAX PAYABLE	9,877
TOTAL CURR. & ACCRUED LIAB.	$204,333
NET WORKING CAPITAL INCLUDED IN RATE BASE	$147,518

Source: Sebring's proposed 2020 PTY Working Capital as shown on Revised MFR Schedule G1-3.
*May not sum due to rounding.

Sebring Gas System
Docket No. 20190083-GU
Projected Test Year 12/31/2020
Capital Structure – 13-Month Average

	COMPANY PROPOSED						
	PER BOOKS	Specific Adjustment	PRO RATA	ADJUSTED	RATIO	COST RATE	WEIGHTED COST
COMMON EQUITY	$1,746,957	$0		$1,746,957	34.63%	12.50%	4.33%
LONG TERM DEBT	$2,760,453	$0		$2,760,453	54.72%	5.95%	3.26%
SHORT TERM DEBT	$38,077	$0		$38,077	0.75%	6.00%	0.05%
CUSTOMER DEPOSITS	$156,205	$0		$156,205	3.10%	2.86%	0.09%
DEFERRED INCOME TAX	$342,671	$0		$342,671	6.79%	0.00%	0.00%
	$5,044,363	$0		$5,044,363	100.00%		7.72%

	COMPANY AS FILED				STAFF RECOMMENDED ADJUSTMENTS						
	PER BOOKS	Specific Adjustment	PRO RATA	ADJUSTED	Specific Adjustment	ADJUSTED BALANCE	PRO RATA	Reconciled to Rate Base	RATIO	COST RATE	WEIGHTED AVG COST
COMMON EQUITY	$1,746,957	$0		$1,746,957		$1,746,957	($7,807)	$1,739,150	34.64%	10.00%	3.46%
LONG TERM DEBT	$2,760,453	$0		$2,760,453		$2,760,453	($12,336)	$2,748,117	54.73%	5.25%	2.87%
SHORT TERM DEBT	$38,077	$0		$38,077		$38,077	($170)	$37,907	0.75%	5.25%	0.04%
CUSTOMER DEPOSITS	$156,205	$0		$156,205		$156,205	($698)	$155,507	3.10%	2.86%	0.09%
DEFERRED INCOME TAX	$342,671	$0		$342,671	($470)	$342,201	($1,529)	$340,672	6.78%	0.00%	0.00%
	$5,044,363	$0		$5,044,363			($22,540)	$5,021,353	100.00%		6.46%

Sebring Gas System
Docket No.20190083-GU
2020 Projected Test Year
Net Operating Income

	COMPANY	STAFF	
	PTY 2020	STAFF ADJS.	STAFF ADJUSTED
OPERATING REVENUES	$1,033,155	$0	$1,033,155
REVENUES DUE TO GROWTH	153,045	0	153,045
TOTAL OPERATING REVENUES	$1,186,200	$0	$1,186,200
OPERATING EXPENSES			
OPERATIONS AND MAINTENANCE	739,587	2,405	741,992
DEPRECIATION &AMORTIZATION	260,594	(542)	260,052
TAXES OTHER THAN INCOME	22,931	(463)	22,468
CURRENT FEDERAL INCOME TAX EXP.	(1,546)	0	(1,546)
CURRENT STATE INCOME TAX EXP.	(429)	0	(429)
DEFERRED FEDERAL INCOME TAX EXP.		14,906	14,906
DEFERRED STATE INCOME TAX EXP.		4,105	4,105
TOTAL OPERATING EXPENSES	$1,021,137	$20,411	$1,041,548
NET OPERATING INCOME	$165,063		$144,652

Sebring Gas System
Docket No. 00832019-GU
2020 Projected Test Year
Operating Expenses

	COMPANY ADJUSTED	STAFF ADJS.	STAFF ADJUSTED
OPERATING EXPENSES			
OPERATION &MAINTENANCE EXP.	$739,587		
902 Meter Reading Exp.		$397	
920 Admin &Gen Salaries		($397)	
921 Office Supplies Exp.		($1,880)	
926 Employee Pension & Benefits		($413)	
928 Regulatory Commission Exp.		$4,699	
TOTAL O & M EXPENSE	$739,587	$2,405	$741,992
DEPRECIATION & AMORT. EXP.	$260,594		
376.1 Mains - Plastic		($400)	
380.1 Services - Plastic		($142)	
TOTAL DEPRECIATION & AMORT.	$260,594	($542)	$260,052
TAXES OTHER THAN INCOME	$22,931		
		($463)	
TOTAL TAXES OTHER THAN INCOME	$22,931	($463)	$22,468
INCOME TAX EXPENSE			
Income Taxes - Federal	($1,546)		($1,546)
Income Taxes - State	($429)		($429)
Deferred Income Taxes - Federal	0	$14,906	14,906
Deferred Income Taxes - State	0	$4,105	4,105
TOTAL INCOME TAXES	($1,975)	$19,011	$17,036
TOTAL OPERATING EXPENSES	$1,021,137	$20,411	$1,041,548

Sebring Gas System
Docket No. 20190083-GU
2020 Projected Test Year
Net Operating Income Multiplier

DESCRIPTION	COMPANY PER FILING	STAFF
REVENUE REQUIREMENT	100.0000%	100.0000%
REGULATORY ASSESMENT RATE	0.5000%	0.5000%
BAD DEBT RATE	0.0000%	0.0000%
NET BEFORE INCOME TAX RATE	99.5000%	99.5000%
STATE INCOME TAX RATE	5.5000%	4.4580%
STATE INCOME TAX	5.4725%	4.4357%
NET BEFORE FEDERAL INCOME TAXES	94.0275%	95.0643%
FEDERAL INCOME TAX RATE	21.0000%	21.0000%
FEDERAL INCOME TAX	19.7458%	19.9635%
REVENUE EXPANSION FACTOR	74.2817%	75.1008%
NET OPERATING INCOME MULTIPLIER	1.3462	1.3315

Sebring Gas System
Docket No. 20190083-GU
2020 Projected Test Year
Revenue Deficiency Calculation

DESCRIPTION	COMPANY ADJUSTED	STAFF ADJUSTED
RATE BASE (AVERAGE)	$5,044,363	$5,021,353
RATE OF RETURN	7.72%	6.46%
REQUIRED NOI	$389,425	$324,629
OPERATING REVENUES	$1,186,200	$1,186,200
OPERATING EXPENSES	$1,021,137	$1,041,548
ACHIEVED NOI	$165,064	$144,652
NOI DEFICIENCY	$224,361	$179,977
EXPANSION FACTOR	1.3462	1.3315
REVENUE DEFICIENCY	$302,041	$239,647

SEBRING GAS SYSTEM, INC.
DOCKET NO: 20190083-GU
MINIMUM FILING REQUIREMENTS
INDEX

COST OF SERVICE STUDY SCHEDULES

SCHEDULE H-1 | COST OF SERVICE STUDY | PAGE 1 OF 4

FLORIDA PUBLIC SERVICE COMMISSION

EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY

TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

CLASSIFICATION OF RATE BASE - PLANT
SCHEDULE A: PAGE 1 OF 2

LINE NO.	DESCRIPTION	TOTAL	CUSTOMER	CAPACITY	COMMODITY	CLASSIFIER
1	INTANGIBLE PLANT	$131,409		$131,409		100% capacity
	DISTRIBUTION PLANT:					
2	LAND AND LAND RIGHTS	$22,625		$22,625		100% capacity
3	MAINS - STEEL	$613,303		$613,303		"
4	MAINS - PLASTIC	$3,331,596		$3,331,596		"
5	M & R EQUIPMENT - GENERAL	$18,003		$18,003		"
6	M & R EQUIPMENT - CITY GATE	$1,252,572		$1,252,572		"
7	SERVICES - STEEL	$350,793	$350,793			100% customer
8	SERVICES - PLASTIC	$957,522	$957,522			"
9	METERS	$347,094	$347,094			"
10	METER INSTALLATIONS	$183,764	$183,764			"
11	REGULATORS	$49,387	$49,387			"
12	REGULATOR INSTALLATIONS	$81,543	$81,543			"
13	CUSTOMER CONVERSIONS	$35,310	$35,310			"
14	OTHER EQUIPMENT	$45,109	$12,489	$32,620		a/c 374 - 386
15	TOTAL DISTRIBUTION PLANT	$7,288,620	$2,017,902	$5,270,719	$0	
16	GENERAL PLANT	$508,289	$254,145	$254,144		50% cust / 50% cap
17	GAS PLANT FOR FUTURE USE	$0	$0	$0		
18	CWIP	$0	$0	$0		
19	TOTAL PLANT	$7,928,318	$2,272,047	$5,656,272	$0	

SUPPORTING SCHEDULES: G-1 p.1, G-1 p.4, G-1 p.10

RECAP SCHEDULES: H-3 p.1

SCHEDULE H-1 | COST OF SERVICE STUDY | PAGE 2 OF 4

FLORIDA PUBLIC SERVICE COMMISSION | EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY | TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

CLASSIFICATION OF RATE BASE
ACCUMULATED DEPRECIATION
SCHEDULE A: PAGE 2 OF 2

LINE NO.	DESCRIPTION	TOTAL	CUSTOMER	CAPACITY	COMMODITY	CLASSIFIER
1	INTANGIBLE PLANT	($111,002)		($111,002)		related plant
	DISTRIBUTION PLANT:					
2	LAND AND LAND RIGHTS	$0		$0		related plant
3	MAINS - STEEL	($191,270)		($191,270)		"
4	MAINS - PLASTIC	($1,008,767)		($1,008,767)		"
5	M & R EQUIPMENT - GENERAL	($10,548)		($10,548)		"
6	M & R EQUIPMENT - CITY GATE	($306,980)		($306,980)		"
7	SERVICES - STEEL	($425,988)	($425,988)			"
8	SERVICES - PLASTIC	($294,612)	($294,612)			"
9	METERS	($216,796)	($216,796)			"
10	METER INSTALLATIONS	($67,906)	($67,906)			"
11	REGULATORS	($29,213)	($29,213)			"
12	REGULATOR INSTALLATIONS	($45,124)	($45,124)			"
13	CUSTOMER CONVERSIONS	($32,868)	($32,868)			"
14	OTHER EQUIPMENT	($11,070)	($4,683)	($6,387)		"
15	TOTAL DISTRIBUTION PLANT	($2,641,142)	($1,117,190)	($1,523,952)	$0	
16	GENERAL PLANT	($289,413)	($144,707)	($144,706)		50% cust / 50% cap
17	RETIREMENT WORK IN PROGRESS:	$0	$0	$0		
18	TOTAL ACCUMULATED DEPRECIATION	($3,041,557)	($1,261,897)	($1,779,660)	$0	
19	NET PLANT	$4,886,761	$1,010,150	$3,876,612		
20	less:CUSTOMER ADVANCES	($12,928)	($6,464)	($6,464)		50% cust / 50% cap
21	plus:WORKING CAPITAL	$147,518	$73,759	$73,759		oper & maint exp
22	TOTAL RATE BASE	$5,021,351	$1,077,445	$3,943,906	$0	

SUPPORTING SCHEDULES: G-1 p.1, G-1 p.4, G-1 p.12 | RECAP SCHEDULES: H-3 p.1

SCHEDULE H-1 | COST OF SERVICE STUDY | PAGE 3 OF 4

FLORIDA PUBLIC SERVICE COMMISSION | EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY | TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

CLASSIFICATION OF EXPENSES AND
DERIVATION OF COST OF SERVICE BY COST CLASSIFICATION
SCHEDULE B: PAGE 1 OF 2

LINE NO.	DESCRIPTION	TOTAL	CUSTOMER	CAPACITY	COMMODITY	CLASSIFIER
	OPERATIONS AND MAINTENANCE EXPENSES					
	DISTRIBUTION EXPENSES:					
1	SUPERVISION & ENGINEERING	$28,154	$15,554	$12,600		ac 871-879
2	MAINS & SERVICES EXPENSE	$54,313	$13,528	$40,786		a/c 376 + a/c 380
3	MEAS & REG - GENERAL	$0		$0		a/c 378
4	MEAS & REG - CITY GATE	$0		$0		a/c 379
5	METER & HOUSE REG EXPENSE	$10,749	$10,749			a/c 381 + a/c 383
6	CUSTOMER INSTALLATIONS	$32,981	$32,981			a/c 386
7	OTHER EXPENSES	$11,225	$3,108	$8,117		a/c 387
8	SUPERVISION & ENGINEERING	$3,732	$1,304	$2,428		ac 887-894
9	MAINTENANCE OF MAINS	$18,653		$18,653		a/c 376
10	MTCE OF MEAS & REG - GENERAL	$0		$0		a/c 378
11	MTCE OF MEAS & REG - GATE STATION	$12,754		$12,754		a/c 379
12	MAINTENANCE OF SERVICES	$3,904	$3,904			a/c 380
13	MTCE OF METERS & HOUSE REGULATORS	$13,862	$13,862			a/c 381 + a/c 383
14	MTCE OF OTHER EQUIPMENT	$8,106	$2,244	$5,861		a/c 387
15	TOTAL DISTRIBUTION EXPENSES	$198,432	$97,233	$101,199		
	CUSTOMER ACCOUNTS EXPENSES:					
16	SUPERVISION	$0	$0			100% customer
17	METER READING EXPENSE	$6,993	$6,993			"
18	CUS RECORDS & COLLECTIONS	$2,340	$2,340			"
19	UNCOLLECTIBLE ACCOUNTS	$637	$637			"
20	TOTAL CUSTOMER ACCOUNTS EXPENSES	$9,970	$9,970	$0	$0	
21	CUSTOMER SVCE & INFORMATION	$0	$0			100% customer
22	SALES EXPENSE	$0	$0			100% customer
23	ADMINISTRATIVE & GEN EXP	$533,590	$274,482	$259,109		O&M, excluding A&G
24	TOTAL O&M EXPENSES	$741,992	$381,685	$360,308	$0	

SUPPORTING SCHEDULES: G- 2 p.10-19 | RECAP SCHEDULES: H-3 p.1

SCHEDULE H-1 | COST OF SERVICE STUDY | PAGE 4 OF 4

FLORIDA PUBLIC SERVICE COMMISSION

EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY

TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

CLASSIFICATION OF EXPENSES AND DERIVATION OF COST OF SERVICE BY COST CLASSIFICATION
SCHEDULE B: PAGE 2 OF 2

LINE NO.	DESCRIPTION	TOTAL	CUSTOMER	CAPACITY	COMMODITY	REVENUE	CLASSIFIER
1	DEPRECIATION AND AMORTIZATION EXPENSE:	$260,052	$53,756	$206,297			net plant
2	TAXES OTHER THAN INCOME TAXES:						
3	REVENUE RELATED	$1,510				$1,510	100% revenue
4	OTHER	$22,156	$4,580	$17,576			net plant
5	TOTAL TAXES OTHER THAN INCOME TAXES	$23,666	$4,580	$17,576	$0	$1,510	
6	REV.CRDT TO COS(NEG.OF OTHR OPR.REV)	($14,335)	($14,335)				100% customer
7	RETURN (REQUIRED NOI)	$324,629	$69,657	$254,973	$0		rate base
8	INCOME TAXES	$75,509	$16,202	$59,306	$0		return(noi)
9	TOTAL OVERALL COST OF SERVICE	$1,411,513	$511,544	$898,460	$0	$1,510	

Total Overall Cost of Service - Required NOI - Rev. Credit 1,101,219

SUPPORTING SCHEDULES: E-1 p.3, G-2 p.1, G-2 p.23

RECAP SCHEDULES: H-3 p.1

SCHEDULE H-2 | COST OF SERVICE STUDY | PAGE 1 OF 4

FLORIDA PUBLIC SERVICE COMMISSION

EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY

TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

DEVELOPMENT OF ALLOCATION FACTORS
SCHEDULE C

LINE NO.	DESCRIPTION	TOTAL	TS-1	TS-2	TS-3	TS-4	TS-5	SPECIAL CONTRACTS	THIRD PARTY SUPPLIER
	CUSTOMER COSTS								
1	No. of Bills	8,725	6,215	608	1,284	522	72	24	0
2	Weighting	NA	1.00	1.82	6.11	13.21	22.02	22.02	0.00
3	Weighted No. of Bills	24,173	6,215	1,105	7,842	6,898	1,585	528	0
4	Allocation Factors	100.00%	25.71%	4.57%	32.44%	28.53%	6.56%	2.19%	0.00%
	CAPACITY COSTS								
5	Peak & Avg. Monthly Sales Vol.(therms)	294,898	9,166	4,473	39,149	109,041	79,847	53,223	0
6	Allocation Factors	100.00%	3.108%	1.517%	13.275%	36.976%	27.076%	18.048%	0.000%
	COMMODITY COSTS								
7	Annual Sales Vol.(therms)	1,906,511	40,641	17,628	430,636	645,684	504,685	267,237	0
8	Allocation Factors	100.00%	2.13%	0.92%	22.59%	33.87%	26.47%	14.02%	0.00%
	REVENUE-RELATED COSTS								
9	Tax on Cust,Cap,& Commod.	1,410,004	101,686	20,395	315,546	374,819	281,591	285,460	30,506
10	Allocation Factors	100.00%	7.21%	1.45%	22.38%	26.58%	19.97%	20.25%	2.16%

SUPPORTING SCHEDULES: E-2 p.3, E-4 p.1, H-2 p.6

RECAP SCHEDULES: H-3 p.1

SCHEDULE H-2 | COST OF SERVICE STUDY | PAGE 2 OF 4

FLORIDA PUBLIC SERVICE COMMISSION

EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY

TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

ALLOCATION OF RATE BASE TO CUSTOMER CLASSES
SCHEDULE D

LINE NO.	RATE BASE BY CUSTOMER CLASS	TOTAL	TS-1	TS-2	TS-3	TS-4	TS-5	SPECIAL CONTRACTS	THIRD PARTY SUPPLIER	ALLOCATOR
	DIRECT AND SPECIAL ASSIGNMENTS:									
	RATE BASE									
	Customer									
1	Services	$587,715	$151,102	$26,872	$190,648	$167,704	$38,542	$12,847	$0	wtd.cust./direct
2	Meters	$246,156	$63,287	$11,255	$79,850	$70,240	$16,143	$5,381	$0	wtd.cust./direct
3	House Regulators	$56,593	$14,550	$2,588	$18,358	$16,149	$3,711	$1,237	$0	wtd.cust./direct
4	General Plant	$109,438	$28,137	$5,004	$35,500	$31,228	$7,177	$2,392	$0	wtd.cust./direct
5	All Other	$77,543	$19,936	$3,545	$25,154	$22,127	$5,085	$1,695	$0	wtd.cust./direct
6	Total	$1,077,445	$277,012	$49,263	$349,511	$307,448	$70,659	$23,553	$0	
	Capacity									
7	Mains	$2,744,862	$129,144	$47,360	$399,403	$991,048	$651,729	$526,179	$0	peak/avg sales/direct
8	M&R Equipment - General	$7,455	$232	$113	$990	$2,757	$2,019	$1,345	$0	peak/avg sales/direct
9	M&R Equipment - City Gate	$945,592	$1,961	$957	$8,377	$23,334	$17,086	$893,876	$0	peak/avg sales/direct
10	General Plant	$109,438	$3,401	$1,660	$14,528	$40,466	$29,631	$19,751	$0	peak/avg sales/direct
11	All Other	$136,560	$4,244	$2,071	$18,129	$50,494	$36,975	$24,646	$0	peak/avg sales/direct
12	Total	$3,943,906	$138,982	$52,161	$441,427	$1,108,098	$737,440	$1,465,798	$0	
	Commodity									
13	Account #									
14	Account #									
15	Account #									
16	All Other	$0	$0	$0	$0	$0	$0	$0	$0	annual sales
17	Total	$0	$0		$0	$0	$0		$0	
18	TOTAL RATE BASE	$5,021,351	$415,994	$101,424	$790,937	$1,415,546	$808,098	$1,489,351	$0	

SUPPORTING SCHEDULES: H-2 p.5, H-2 p.6

RECAP SCHEDULES: H-3 p.1

SCHEDULE H-2 | COST OF SERVICE STUDY | PAGE 3 OF 4

FLORIDA PUBLIC SERVICE COMMISSION

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY

TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

ALLOCATION OF COST OF SERVICE
TO CUSTOMER CLASSES
SCHEDULE E: PAGE 1 OF 2

LINE NO.	COST OF SERVICE BY CUSTOMER CLASS	TOTAL	TS-1	TS-2	TS-3	TS-4	TS-5	SPECIAL CONTRACTS	THIRD PARTY SUPPLIER	ALLOCATOR
	DIRECT AND SPECIAL ASSIGNMENTS: COST OF SERVICE									
	OPERATIONS & MAINTENANCE EXPENSE:									
	CUSTOMER									
1	874 Mains & Services	$13,528	$3,478	$619	$4,388	$3,860	$887	$296	$0	wtd.cust./direct
2	878 Meters and House Regulators	$10,749	$2,764	$491	$3,487	$3,067	$705	$235	$0	wtd.cust./direct
3	892 Maint. of Services	$3,904	$1,004	$179	$1,266	$1,114	$256	$85	$0	wtd.cust./direct
4	893 Maint. of Meters & House Reg.	$13,862	$3,564	$634	$4,497	$3,956	$909	$303	$0	wtd.cust./direct
5	All Other	$339,641	$44,479	$1,334	$148,080	$58,211	$50,273	$6,758	$30,506	wtd.cust./direct
6	Total	$381,685	$55,288	$3,257	$161,718	$70,209	$53,030	$7,677	$30,506	
	Capacity									
7	874 Mains and Services	$40,786	$1,269	$619	$5,414	$15,081	$11,043	$7,361	$0	peak/avg sales/direct
8	877 Measuring & Reg. Sta. Eq.- Gate Station	$0	$0	$0	$0	$0	$0	$0	$0	peak/avg sales/direct
9	887 Maint. of Mains	$18,653	$580	$283	$2,476	$6,897	$5,050	$3,366	$0	peak/avg sales/direct
10	891 Maint. of Meas.& Reg.Sta.Eq.- Gate Station	$12,754	$26	$13	$113	$315	$230	$12,056	$0	peak/avg sales/direct
11	All Other	$288,115	$8,955	$3,370	$44,248	$88,533	$91,010	$51,999	$0	peak/avg sales/direct
12	Total	$360,308	$10,830	$4,285	$52,251	$110,826	$107,333	$74,782	$0	
	Commodity									
13	Account #	$0								
14	Account #	$0								
15	Account #	$0								
16	All Other	$0	$0	$0	$0	$0	$0	$0	$0	annual sales
17	Total	$0	$0	$0	$0	$0	$0	$0	$0	
18	TOTAL OPERATIONS & MAINTENANCE EXPENSE	$741,993	$66,118	$7,542	$213,969	$181,035	$160,363	$82,459	$30,506	
	DEPRECIATION AND AMORTIZATION EXPENSE:									
19	Customer	$53,756	$13,821	$2,458	$17,438	$15,339	$3,525	$1,175	$0	wtd.cust./direct
20	Capacity	206,297	$6,412	$3,129	$27,387	$76,280	$55,857	$37,232	$0	peak/avg sales/direct
21	TOTAL DEPRECIATION AND AMORTIZATION EXP	$260,052	$20,232	$5,587	$44,824	$91,619	$59,382	$38,408	$0	

SUPPORTING SCHEDULES: H-2 p.5, H-2 p.6

RECAP SCHEDULES: H-3 p.1

SCHEDULE H-3 | COST OF SERVICE STUDY | PAGE 1 OF 5

FLORIDA PUBLIC SERVICE COMMISSION | EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY | TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

DERIVATION OF REVENUE DEFICIENCY
SCHEDULE F

LINE NO.	REVENUE DEFICIENCY	TOTAL	TS-1	TS-2	TS-3	TS-4	TS-5	SPECIAL CONTRACTS	THIRD PARTY SUPPLIER
1	CUSTOMER COSTS	$511,544	$78,026	$9,850	$208,494	$111,354	$62,486	$10,829	$30,506
2	CAPACITY COSTS	$898,460	$23,660	$10,546	$107,052	$263,465	$219,105	$274,631	$0
3	COMMODITY COSTS	$0	$0	$0	$0	$0	$0	$0	$0
4	REVENUE COSTS	$1,510	$109	$22	$338	$401	$302	$306	$33
5	TOTAL COST OF SERVICE	$1,411,514	$101,795	$20,417	$315,884	$375,220	$281,893	$285,766	$30,539
6	less:REVENUE AT PRESENT RATES (in the projected test year)	$1,171,866	$79,157	$15,991	$245,948	$296,935	$228,468	$279,192	$26,175
7	equals: GAS SALES REVENUE DEFICIENCY	$239,648	$22,638	$4,426	$69,935	$78,285	$53,425	$6,574	$4,364
8	plus:DEFICIENCY IN OTHER OPERATING REV.	$0	$0	$0	$0	$0	$0	$0	$0
9	equals:TOTAL BASE-REVENUE DEFICIENCY	$239,648	$22,638	$4,426	$69,935	$78,285	$53,425	$6,574	$4,364
	UNIT COSTS:								
10	Customer	$4.886	$1.046	$1.350	$13.532	$17.777	$72.322	$37.601	$0.000
11	Capacity	$3.047	$2.581	$2.358	$2.734	$2.416	$2.744	$5.160	$0.000
12	Commodity	$0.000	$0.000	$0.000	$0.000	$0.000	$0.000	$0.000	$0.000

SUPPORTING SCHEDULES: E-1 p.2, H-1 p.6 | RECAP SCHEDULES: H-3 p.1

SCHEDULE H-3 | COST OF SERVICE STUDY | PAGE 2 OF 5

FLORIDA PUBLIC SERVICE COMMISSION | EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY | TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

RATE OF RETURN BY CUSTOMER CLASS
SCHEDULE G: PAGE 1 OF 2: PRESENT RATES

LINE NO.	RATE OF RETURN BY CUSTOMER CLASS	TOTAL	TS-1	TS-2	TS-3	TS-4	TS-5	SPECIAL CONTRACTS	THIRD PARTY SUPPLIER
	REVENUES: (projected test year)								
1	Gas Sales (due to growth)	$1,171,866	$79,157	$15,991	$245,948	$296,935	$228,468	$279,192	$26,175
2	Other Operating Revenue	$14,335	$14,335	$0	$0	$0	$0	$0	$0
3	Total Revenues	$1,186,201	$93,492	$15,991	$245,948	$296,935	$228,468	$279,192	$26,175
	EXPENSES:								
4	Purchased Gas Cost	$0	$0	$0	$0	$0	$0	$0	$0
5	O&M Expenses	$741,993	$66,118	$7,542	$213,969	$181,035	$160,363	$82,459	$30,506
6	Depreciation and Amortization Expenses	$260,052	$20,232	$5,587	$44,824	$91,619	$59,382	$38,408	$0
7	Taxes Other Than Income	$22,156	$1,724	$476	$3,819	$7,806	$5,059	$3,272	$0
8	Taxes Other Than Income--Revenue	$1,510	$109	$22	$338	$401	$302	$306	$33
9	Total Expses before Income Taxes	$1,025,712	$88,184	$13,626	$262,951	$280,861	$225,106	$124,444	$30,539
10	INCOME TAXES:	$75,509	$6,009	$1,640	$13,129	$26,552	$17,120	$11,058	$0
11	NET OPERATING INCOME	$84,981	($700)	$725	($30,131)	($10,478)	($13,759)	$143,690	($4,364)
12	RATE BASE	$5,021,351	$415,994	$101,424	$790,937	$1,415,546	$808,098	$1,489,351	$0
13	RATE OF RETURN	1.69%	-0.17%	0.71%	-3.81%	-0.74%	-1.70%	9.65%	0.00%

SUPPORTING SCHEDULES: E-1 p.2, H-1 p.5, H-1 p.6, | RECAP SCHEDULES: H-3 p.1

SCHEDULE H-3 | COST OF SERVICE STUDY | PAGE 3 OF 5

FLORIDA PUBLIC SERVICE COMMISSION | EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY | TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

RATE OF RETURN BY CUSTOMER CLASS
SCHEDULE G: PAGE 2 OF 2: PROPOSED RATES

LINE NO.	RATE OF RETURN BY CUSTOMER CLASS	TOTAL	TS-1	TS-2	TS-3	TS-4	TS-5	SPECIAL CONTRACTS	THIRD PARTY SUPPLIER
	REVENUES:								
1	Gas Sales	$1,411,514	$101,795	$20,417	$315,884	$375,220	$281,893	$285,766	$30,539
2	Other Operating Revenue	$14,335	$14,335	$0	$0	$0	$0	$0	$0
3	Total Revenues	$1,425,849	$116,130	$20,417	$315,884	$375,220	$281,893	$285,766	$30,539
	EXPENSES:								
4	Purchased Gas Cost	$0	$0	$0	$0	$0	$0	$0	$0
5	O&M Expenses	$741,993	$66,118	$7,542	$213,969	$181,035	$160,363	$82,459	$30,506
6	Depreciation and Amortization Expenses	$260,052	$20,232	$5,587	$44,824	$91,619	$59,382	$38,408	$0
7	Taxes Other Than Income	$22,156	$1,724	$476	$3,819	$7,806	$5,059	$3,272	$0
8	Taxes Other Than Income--Revenue	$1,510	$109	$22	$338	$401	$302	$306	$33
9	Total Expses before Income Taxes	$1,025,712	$88,184	$13,626	$262,951	$280,861	$225,106	$124,444	$30,539
10	INCOME TAXES:	$75,509	$6,009	$1,640	$13,129	$26,552	$17,120	$11,058	$0
11	NET OPERATING INCOME	$324,629	$21,938	$5,151	$39,804	$67,807	$39,666	$150,264	$0
12	RATE BASE	$5,021,351	$415,994	$101,424	$790,937	$1,415,546	$808,098	$1,489,351	$0
13	RATE OF RETURN	6.46%	5.27%	5.08%	5.03%	4.79%	4.91%	10.09%	0.00%

SUPPORTING SCHEDULES: E-1 p.3, H-1 p.5, H-1 p.6 | RECAP SCHEDULES: H-3 p.1

SCHEDULE H-3 | COST OF SERVICE STUDY | PAGE 4 OF 5

FLORIDA PUBLIC SERVICE COMMISSION | EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY | TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

PROPOSED RATE DESIGN
SCHEDULE H

LINE NO.	PROPOSED RATE DESIGN	TOTAL	TS-1	TS-2	TS-3	TS-4	TS-5	SPECIAL CONTRACTS	THIRD PARTY SUPPLIER
	PRESENT RATES (projected test year)								
1	GAS SALES (due to growth)	$1,171,866	$79,157	$15,991	$245,948	$296,935	$228,468	$279,192	$26,175
2	OTHER OPERATING REVENUE	$14,335	$14,335	$0	$0	$0	$0	$0	$0
3	TOTAL	$1,186,201	$93,492	$15,991	$245,948	$296,935	$228,468	$279,192	$26,175
4	RATE OF RETURN	1.69%	-0.17%	0.71%	-3.81%	-0.74%	-1.70%	9.65%	0.00%
5	INDEX	1.00	-0.10	0.42	-2.25	-0.44	-1.01	5.70	0.00
	COMPANY PROPOSED RATES								
6	GAS SALES	$1,411,514	$101,795	$20,417	$315,884	$375,220	$281,893	$285,766	$30,539
7	OTHER OPERATING REVENUE	$14,335	$14,335	$0	$0	$0	$0	$0	$0
8	TOTAL	$1,425,849	$116,130	$20,417	$315,884	$375,220	$281,893	$285,766	$30,539
9	TOTAL REVENUE INCREASE	$239,648	$22,638	$4,426	$69,935	$78,285	$53,425	$6,574	$4,364
10	PERCENT INCREASE	20.20%	24.21%	27.68%	28.44%	26.36%	23.38%	2.35%	16.67%
11	RATE OF RETURN	6.46%	5.27%	5.08%	5.03%	4.79%	4.91%	10.09%	0.00%
12	INDEX	100.00%	81.57%	78.56%	77.84%	74.09%	75.93%	156.06%	0.00%

SUPPORTING SC SUPPORTING SCHEDULES: H-1 p.3, H-1 p.4 | RECAP SCHEDULES: H-3 p.1

SCHEDULE H-3 | COST OF SERVICE STUDY | PAGE 5 OF 5

FLORIDA PUBLIC SERVICE COMMISSION | EXPLANATION: PROVIDE A FULLY ALLOCATED EMBEDDED COST OF SERVICE STUDY | TYPE OF DATA SHOWN: PROJECTED TEST YEAR: 12/31/2020

COMPANY: SEBRING GAS SYSTEM, INC.

DOCKET NO: 20190083-GU

CALCULATION OF PROPOSED RATES

LINE NO.	CALCULATION OF PROPOSED RATES	TOTAL	TS-1	TS-2	TS-3	TS-4	TS-5	SPECIAL CONTRACTS	THIRD PARTY SUPPLIER
1	PROPOSED TOTAL TARGET REVENUES	$1,425,849	$116,130	$20,417	$315,884	$375,220	$281,893	$285,766	$30,539
2	LESS:OTHER OPERATING REVENUE	$14,335	$14,335	$0	$0	$0	$0	$0	$0
	LESS:CUSTOMER CHARGE REVENUES								
3	PROPOSED CUSTOMER CHARGES		$12.00	$20.00	$70.00	$225.00	$1,000.00	$11,906.92	$3.50
4	NUMBER OF BILLS	8,725	6,215	608	1,284	522	72	24	8,725
5	CUSTOMER CHARGE REV. BY RATE CLASS	$682,374	$74,580	$12,160	$89,880	$117,450	$72,000	$285,766	$30,538
6	EQUALS:PER-THERM TARGET REVENUES	$729,140	$27,215	$8,257	$226,004	$257,770	$209,893	$0	$1
7	DIVIDED BY:NUMBER OF THERMS	1,906,511	40,641	17,628	430,636	645,684	504,685	267,237	0
8	TRANSPORTATION RATE PER THERM (ROUNDED)		$0.66965	$0.46843	$0.52481	$0.39922	$0.41589	$0.00000	$0.00000
9	TRANSPORTATION RATE REVENUES		$27,215	$8,257	$226,002	$257,770	$209,893	$0	$0
	SUMMARY:PROPOSED TARIFF RATES								
10	CUSTOMER CHARGE		$12.00	$20.00	$70.00	$225.00	$1,000.00	$11,906.92	$3.50
11	TRANSPORTATION CHARGE (CENTS PER THERM)		66.965	46.843	52.481	39.922	41.589	0.000	0.000
12	TOTAL CHARGES PER THERM		66.965	46.843	52.481	39.922	41.589	0.000	0.000
	SUMMARY:PRESENT TARIFF RATES								
13	CUSTOMER CHARGE		$9.00	$12.00	$35.00	$150.00	$500.00	$11,633.00	$3.00
14	TRANSPORTATION CHARGE (CENTS PER THERM)		57.140	49.327	46.677	33.861	38.136	0.000	0.000
15	TOTAL CHARGES PER THERM		57.140	49.327	46.677	33.861	38.136	0.000	0.000

	SUMMARY:OTHER OPERATING REVENUE	**PRESENT REVENUE**			**PROPOSED REVENUE**		
		NUMBER	CHARGE	REVENUE	NUMBER	CHARGE	REVENUE
16	ACCOUNT TURN-ON CHARGE - RES	211	$25.00	$5,275	211	$25.00	$5,275
17	ACCOUNT TURN-ON CHARGE - COMM	14	$50.00	$700	14	$50.00	$700
18	ACCOUNT OPENING CHARGE	22	$10.00	$220	22	$10.00	$220
19	COLLECTION FEE	70	$10.00	$700	70	$10.00	$700
20	LATE CHARGE		$0.00	$7,410		$0.00	$7,410
21	RETURNED CHECK FEE		$0.00	$30		$0.00	$30
22	TOTAL OTHER OPERATING REVENUE			$14,335			$14,335

SUPPORTING SCHEDULES: E-2 p.1, E-3 p.1-6, H-1 p.2 | RECAP SCHEDULES: H-3 p.1

Sebring Gas System, Inc.
BILL COMPARISONS - PRESENT VS. STAFF-RECOMMENDED RATES

(Usage between 0 and 200 therms per year)
Average Usage: 6.5 therms per month

PRESENT RATES - TS-1	PROPOSED RATES - TS-1
Customer Charge	**Customer Charge**
$9.00	**$12.00**
Transportation Charge	**Transportation Charge**
(Cents per Therm)	**(Cents per Therm)**
57.14	**66.965**

Monthly Therm Usage	Present Monthly Bill	Proposed Monthly Bill	Percent Increase	Dollar Increase
2	$10.14	$13.34	31.51%	$3.20
4	$11.29	$14.68	30.06%	$3.39
6	$12.43	$16.02	28.88%	$3.59
8	$13.57	$17.36	27.90%	$3.79
10	$14.71	$18.70	27.07%	$3.98
12	$15.86	$20.04	26.35%	$4.18
14	$17.00	$21.38	25.74%	$4.38
16	$18.14	$22.71	25.20%	$4.57

Bills do not include the cost of natural gas, conservation costs, utility taxes, franchise fees, or gross receipts taxes.

Sebring Gas System, Inc.
BILL COMPARISONS - PRESENT VS. STAFF-RECOMMENDED RATES

(Usage between 201 and 1,000 therms per year)
Average Usage: 29 therms per month

PRESENT RATES - TS-2	PROPOSED RATES - TS-2
Customer Charge	**Customer Charge**
$12.00	**$20.00**
Transportation Charge	**Transportation Charge**
(Cents per Therm)	**(Cents per Therm)**
49.327	**46.843**

Monthly Therm Usage	Present Monthly Bill	Proposed Monthly Bill	Percent Increase/Decrease	Dollar Increase/Decrease
20	$21.87	$29.37	34.32%	$7.50
30	$26.80	$34.05	27.07%	$7.25
40	$31.73	$38.74	22.08%	$7.01
50	$36.66	$43.42	18.43%	$6.76
60	$41.60	$48.11	15.65%	$6.51
70	$46.53	$52.79	13.46%	$6.26
80	$51.46	$57.47	11.68%	$6.01

Bills do not include the cost of natural gas, conservation costs, utility taxes, franchise fees, or gross receipts taxes.

Sebring Gas System, Inc.
BILL COMPARISONS - PRESENT VS. STAFF-RECOMMENDED RATES

(Usage between 1,001 and 10,000 therms per year)
Average Usage: 336 therms per month

PRESENT RATES - TS-3	PROPOSED RATES - TS-3
Customer Charge	**Customer Charge**
$35.00	**$70.00**
Transportation Charge	**Transportation Charge**
(Cents per Therm)	**(Cents per Therm)**
46.677	**52.481**

Monthly Therm Usage	Present Monthly Bill	Proposed Monthly Bill	Percent Increase/Decrease	Dollar Increase/Decrease
100	$81.68	$122.48	49.96%	$40.80
200	$128.35	$174.96	36.31%	$46.61
300	$175.03	$227.44	29.94%	$52.41
400	$221.71	$279.92	26.26%	$58.22
500	$268.39	$332.41	23.85%	$64.02
600	$315.06	$384.89	22.16%	$69.82
700	$361.74	$437.37	20.91%	$75.63
800	$408.42	$489.85	19.94%	$81.43

Bills do not include the cost of natural gas, conservation costs, utility taxes, franchise fees, or gross receipts taxes.

Sebring Gas System, Inc.
BILL COMPARISONS - PRESENT VS. STAFF-RECOMMENDED RATES

(Usage between 10,001 and 50,000 therms per year)
Average Usage: 1,239 therms per month

PRESENT RATES - TS-4	PROPOSED RATES - TS-4
Customer Charge	**Customer Charge**
$150.00	**$225.00**
Transportation Charge	**Transportation Charge**
(Cents per Therm)	**(Cents per Therm)**
33.861	**39.922**

Monthly Therm Usage	Present Monthly Bill	Proposed Monthly Bill	Percent Increase/Decrease	Dollar Increase/Decrease
1000	$488.61	$624.22	27.75%	$135.61
1500	$657.92	$823.83	25.22%	$165.92
2000	$827.22	$1,023.44	23.72%	$196.22
2500	$996.53	$1,223.05	22.73%	$226.53
3000	$1,165.83	$1,422.66	22.03%	$256.83
3500	$1,335.14	$1,622.27	21.51%	$287.14
4000	$1,504.44	$1,821.88	21.10%	$317.44

Bills do not include the cost of natural gas, conservation costs, utility taxes, franchise fees, or gross receipts taxes.

Sebring Gas System, Inc.
BILL COMPARISONS - PRESENT VS. STAFF-RECOMMENDED RATES

(Usage 50,000 or more therms per year)
Average Usage: 6,985 therms per month

PRESENT RATES - TS-5	PROPOSED RATES - TS-5
Customer Charge	**Customer Charge**
$500.00	**$1,000.00**
Transportation Charge	**Transportation Charge**
(Cents per Therm)	**(Cents per Therm)**
38.136	**41.589**

Monthly Therm Usage	Present Monthly Bill	Proposed Monthly Bill	Percent Increase/Decrease	Dollar Increase/Decrease
5000	$2,406.80	$3,079.45	27.95%	$672.65
6000	$2,788.16	$3,495.34	25.36%	$707.18
7000	$3,169.52	$3,911.23	23.40%	$741.71
8000	$3,550.88	$4,327.12	21.86%	$776.24
9000	$3,932.24	$4,743.01	20.62%	$810.77
10000	$4,313.60	$5,158.90	19.60%	$845.30
11000	$4,694.96	$5,574.79	18.74%	$879.83
12000	$5,076.32	$5,990.68	18.01%	$914.36

Bills do not include the cost of natural gas, conservation costs, utility taxes, franchise fees, or gross receipts taxes.