

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Peoples Gas System for issuance of an order to the City of Leesburg and South Sumter Gas Company, LLC, to show cause why they should not be regulated by the Commission as a public utility as defined in Section 366.02(1), F.S., etc.

DOCKET NO. 20180085-GU
ORDER NO. PSC-2018-0333-FOF-GU
ISSUED: June 27, 2018

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
JULIE I. BROWN
DONALD J. POLMANN
GARY F. CLARK
ANDREW GILES FAY

ORDER GRANTING THE CITY OF LEESBURG'S AND SOUTH SUMTER GAS COMPANY LLC'S MOTIONS TO DISMISS PEOPLES GAS SYSTEM'S REQUEST FOR A SHOW CAUSE ORDER OR IN THE ALTERNATIVE DECLARATORY STATEMENT

BY THE COMMISSION:

I. Background

On April 2, 2018, Peoples Gas System (Peoples) filed a petition pursuant to Sections 120.565, 366.02(1) and 366.04(3)(b), Florida Statutes (F.S.), requesting that we issue an order to show cause the City of Leesburg (Leesburg) and South Sumter Gas Company (SSGC) as to why they should not be regulated by us as a public utility as defined in Section 366.02(1), F.S. The Petition also requests that, in the alternative, we issue a declaratory statement as to which utility, either Leesburg or SSGC, Peoples should negotiate with in an effort to resolve the territorial dispute initiated by Peoples in Docket No. 20180055-GU (*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*). SSGC was granted intervention in this docket by Order No. PSC-2018-0258-PCO-GU, issued May 24, 2018. Leesburg was granted intervention in this docket by Order No. PSC-2018-0257-PCO-GU, issued May 24, 2018.

On April 26, 2018, SSGC filed a motion to dismiss Peoples' Petition (SSGC's motion to dismiss) and a motion for oral argument. On the same day, Leesburg also filed a motion to dismiss Peoples' Petition (Leesburg's motion to dismiss) and a motion for oral argument. On May 3, 2018, Peoples filed responses to SSGC's and Leesburg's motions. We heard oral argument on SSGC's and Leesburg's Motions to Dismiss at the June 5, 2018, Agenda Conference. We have jurisdiction pursuant to Section 120.565 and Chapter 366, F.S.

II. Peoples' Petition

The first part of Peoples' Petition asks us to issue an order or orders to show cause Leesburg and SSGC for acting as a public utility. The Petition states that Leesburg is a Florida municipality which operates a natural gas distribution system in a portion of Lake and Sumter Counties and is a "natural gas utility" as defined by Section 366.04(3)(c), F.S., subject to our statutory jurisdiction. The Petition states that SSGC is a Florida limited liability company formed on or about March 22, 2017, and Peoples believes SSGC currently provides no natural gas service and has no customers.

Peoples' Petition alleges that Leesburg and SSGC have entered in an agreement for the construction, purchase, and sale of certain natural gas distribution facilities for the purpose of providing natural gas service to customers located within the service area described by the agreement. The Petition states Leesburg will pay to SSGC each month a portion of the revenues charged to natural gas customers within the service area (i.e., they will share the revenues from the provision of natural gas service to the customers in the service area). Peoples' Petition further states that the City of Leesburg has adopted an ordinance, Section 22-250 of the City's Code of Ordinances, which establishes the rates to be charged to Leesburg customers residing within the service area pursuant to the agreement between Leesburg and SSGC.

Peoples attached the agreement between SSGC and Leesburg to its Petition. Peoples argues that the agreement between SSGC and Leesburg is evidence that SSGC and Leesburg are acting as a public utility. For example, Peoples cites Section 366.02(1), F.S., which defines a public utility as:

... every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying...gas...to or for the public within this state.

Peoples argues that according to the plain meaning of the statute a municipality such as Leesburg is not a public utility, a partnership, association, or other legal entity which supplies natural gas to the public is a public utility under Section 366.02(1), F.S. Peoples states that Section 366.02, F.S., does not define the terms partnership, association, other legal entity, but Peoples submits that by the plain and reasonable reading of those words, the agreement between SSGC and Leesburg meets that description.

Peoples' Petition also states that the nature of the agreement is such that SSGC and Leesburg are partnering or associating to supply gas to the public. Peoples states that there is no purchase price or closing date in the contract, and, unlike a typical purchase and sale agreement, this agreement contemplates a continuing association between SSGC and Leesburg for an initial term of up to 30 years for the supply of natural gas to the public, thereby usurping or circumventing our regulatory power or that of the Leesburg City Commission.

The second part of Peoples' Petition is a request, in the alternative, for a declaratory statement. Peoples seeks a declaratory statement from the Commission as to which utility

(Leesburg or SSGC, or a partnership, joint venture, or other legal entity created by the agreement between the two) Peoples should negotiate with in an effort to resolve the territorial dispute in Docket No. 20180055-GU, which is the docket established to resolve the territorial dispute between Peoples and SSGC and Leesburg. Peoples alleges that our determination of which utility (Leesburg or SSGC) it must work with to resolve the dispute described in the territorial dispute docket (Docket No. 20180055-GU) will affect its substantial interests.

Peoples' Petition states that a declaratory statement "will involve the Commission's determination as to whether the Agreement creates a separate entity which is a 'public utility' as defined Section 366.02(1), Florida Statutes." Peoples refers to Section 180.06, F.S., in its Petition, stating that the section lists the activities authorized by municipalities and "private companies" such as SSGC. Peoples concludes that it is "in doubt regarding which of SSGC, Leesburg, or another entity created by the agreement, should have sought Peoples' consent to the Construction of the System, which is ongoing."

III. SSGC's and Leesburg's Motions to Dismiss

SSGC argues that we should decline the invitation to issue the requested show cause order. SSGC states that we have the right to initiate a show cause proceeding, not a party. Further, SSGC argues that a show cause order would be inappropriate because Peoples' failed to plead sufficient facts as to a violation of order, rule, or statute.

SSGC argues that Peoples' alternative request for declaratory statement should be denied because the requested declarations would require a resolution of pending, disputed issues, which would be inconsistent with the purpose and intention of the declaratory statement statutes and rules. SSGC also states that the declarations sought by Peoples' Petition are directed solely to the conduct of third persons: SSGC and Leesburg. Further, SSGC argues that Peoples' request for declaratory statement is dependent on speculative and uncertain facts and events that affect the future actions of third parties rather than Peoples' own particular facts and situation.

Additionally, SSGC argues that Peoples is attempting to utilize the declaratory statement procedures to resolve the pending litigation in its favor rather than as a means to avoid litigation. SSGC states that the subject matter of the declaration request by Peoples is the same subject matter at issue in Docket No. 20180055-GU and, thus, cannot be resolved by declaratory statement.

Like SSGC, Leesburg argues that Peoples' requested show cause order is unnecessary. Leesburg states that many of Peoples' allegations are disputed in Docket No. 20180055-GU and, thus, should be addressed in that docket only. In addition, Leesburg argues that Peoples' declaratory statement petition should be dismissed because Peoples' Petition inappropriately requests us to opine on the conduct of Leesburg and SSGC and matters that are currently pending in Docket No. 20180055-GU. Additionally, Leesburg states that Peoples' request for declaratory relief asks us to interpret Section 180.06, F.S., which is not applicable to the facts and should not be considered in the analysis of the declaratory statement.

IV. Peoples' Response to SSGC's and Leesburg's Motions to Dismiss

Peoples asserts that SSGC and Leesburg are acting as a public utility. Peoples argues it has properly stated a cause of action in its Petition for issuance of a show cause order. Peoples admits that the underlying facts alleged in its Petition involve SSGC and Leesburg, but argues that it seeks our guidance concerning which entity Peoples needs to resolve the dispute with and which entity would be responsible for seeking consent from Peoples for operation of a system under Section 180.06, F.S. Peoples also argues that while it is true that Docket No. 20180055-GU and its Petition in this docket involves similar matters, there is little chance for inconsistent rulings. Peoples states that unless we declare that we intend to either consolidate the two dockets or resolve the issues raised by Peoples' Petition in this docket, it would be appropriate for us to issue the orders to show cause and/or a declaratory statement in this docket.

Peoples' response to Leesburg's Motion to Dismiss reiterates its belief that SSGC and Leesburg are jointly selling natural gas to the public and are acting as a public utility. Peoples also argues that an answer to its requested declaratory statement is necessary because Leesburg's motion highlights the need for clarity as to the applicability of Section 180.06, F.S., which Peoples states applies to activities involved with building a natural gas distribution system.

V. Standard of Review for Motion to Dismiss

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. *Id.* When making this determination, all reasonable inferences drawn from the petition must be made in favor of the petitioner. *Id.* All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. *Kislak v. Kreedian*, 95 So. 2d 510 (Fla. 1957).

In determining the sufficiency of the petition, we must confine our consideration to the petition and the grounds asserted in the motion to dismiss. *Flye v. Jeffords*, 106 So. 2d 229 (Fla. 1st DCA 1958). Moreover, we must construe all material facts and allegations in the light most favorable to the petitioner in determining whether the petition is sufficient. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2d DCA 1960).

VI. Analysis and Conclusion

We hereby grant SSGC's and Leesburg's Motions to Dismiss Peoples' request for show cause orders. The decision to issue a show cause order lies with us, not parties.¹ We do not

¹See Order No. PSC-10-0425-PCO-GU, issued Oct. 18, 2010, in Docket No. 100315, *In re: Complaint by Miami-Dade Cty. for Order Requiring Fla. City Gas to Show Cause Why Tariff Rate Should Not Be Reduced & for the Comm'n to Conduct A Rate Proceeding, Overearnings Proceeding, or Other Appropriate Proceeding Regarding Fla. City Gas' Acquisition Adjustment* where the Commission stated, "The purpose of our show cause procedures is to address specific instances where a utility knowingly refuses to comply with, or willfully violates, a specific

believe that we should exercise our discretion to issue a show cause order at this time. Docket No. 20180055-GU is in its initial stages and discovery has not yet occurred. As the record is developed in Docket No. 20180055-GU, our staff will have the opportunity to review and monitor the evidence and issues presented. If any matter appears to rise to the point where a show cause order is necessary, our staff will bring the matter to us for our consideration.

In addition, we hereby grant SSGC's and Leesburg's Motions to Dismiss Peoples' alternative Petition for Declaratory Statement. As discussed below, the petition for declaratory statement is deficient.

The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance to avoid costly administrative litigation. *See Chiles v. Department of State, Division of Elections*, 711 So. 2d 151, 154 (Fla. 1st DCA 1998).² Peoples filed its request for a declaratory statement after it initiated litigation against Leesburg and SSGC in Docket No. 20180055-GU. Peoples' Petition then asks us to declare who it should litigate against, either Leesburg or SSGC. However, it appears Peoples has already answered its own question as to whom to litigate against. Therefore, a declaratory statement is not necessary and it would not be helpful to avoid litigation.

Moreover, a declaratory statement is not an appropriate remedy where there is related pending litigation. *Couch v. Florida Dept. of Health and Rehabilitative Services*, 377 So. 2d 32 (Fla. 1st DCA 1979). Because Peoples filed its request for a declaratory statement after it already initiated litigation against Leesburg and SSGC in Docket No. 20180055-GU, it is inappropriate for us to opine in a declaratory statement on the same matters. "[T]he rule is declaratory statement proceedings are not properly filed on issues simultaneously litigated in judicial or other administrative proceedings." *Gopman v. Dep't of Educ.*, 908 So. 2d 1118, 1123 (Fla. 1st DCA 2005).³

Commission order, rule or statute and to bring the utility into compliance...[T]he decision to invoke the Commission's show cause procedure is ultimately ours."

²See also *Department of Business and Professional Regulation, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999), where the court held, "A declaratory statement procedure is intended to enable members of the public to definitively resolve ambiguities of law arising in the planning of their future affairs and to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts."

³See also *Fox v. State, Board of Osteopathic Medical Examiners*, 395 So.2d 192 (Fla. 1st DCA 1981) (appropriate to deny petition for declaratory statement where issues raised currently pending in administrative hearings). See also *Exxon Mobile Oil Corp. v. Dep't of Agric. & Consumer Servs.*, 50 So. 3d 755 (Fla. 1st DCA 2010) (stating that an administrative agency must decline to provide a declaratory statement when the statement would address issues currently pending in a judicial proceeding). The purpose of a declaratory statement is to answer the petitioner's questions about how the statutes or rules apply to his own circumstances so that he may select a proper course of action. *Carr v. Old Port Cove Prop. Owners Ass'n, Inc.*, 8 So. 3d 403, 404 (Fla. 4th DCA 2009). See also In Commission Order 21301, issued May 31, 1989, in Docket No. 890415-EI, *In re: Petition of Tampa Electric Company for a declaratory statement regarding proposed transfer of service*, (the Commission denied TECO's request for declaratory statement, because the Commission found answering the request for declaratory statement was not likely to resolve all of previously pending issues.).

It is also not proper for us to issue a declaratory statement determining the conduct of third persons. Rule 28-105.001, F.A.C. Peoples' request that the Commission issue an order declaring who it should negotiate with would require us to declare whether SSGC and/or Leesburg are public utilities. Thus, a declaratory statement would affect the legal obligations and conduct of Leesburg and SSGC, in contravention of Rule 28-105.001, F.A.C.

Finally, Rule 28-105.001, F.A.C., allows a declaratory statement as a means to resolve a controversy covering the applicability of statutory provisions over which the agency has authority. In its Petition, Peoples seems to ask us to interpret Section 180.06, F.S., a statute that is not enforced by us. This would not be appropriate for a declaratory statement.

For the reasons set forth above, we hereby grant SSGC's and Leesburg's Motions to Dismiss Peoples' Petition.

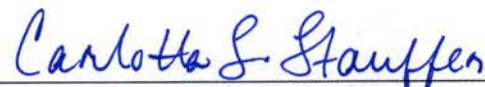
It is, therefore,

ORDERED by the Florida Public Service Commission that South Sumter Gas Company's and the City of Leesburg's Motions for Oral Argument are granted. It is further

ORDERED that South Sumter Gas Company's and the City of Leesburg's Motions to Dismiss Peoples Gas System's Petition are granted. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 27th day of June, 2018.



CARLOTTA S. STAUFFER
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

AEH

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or
- 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.