

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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DATE: October 10, 2019
TO: Adam J. Teitzman, Commission Clerk, Office of Commission Clerk
FROM: Adria Harper, Office of the General Counsel *ah*
RE: Docket No. 20180055-GU

Please place the attached documents in the above mentioned docket file.

Thank you.

Attachment

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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").

APPEARANCES

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For Respondent City of Leesburg:

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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.

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 infrastructure 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
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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.