

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

PEOPLES GAS SYSTEM,

Petitioner,  
v.

Case No. 18-004422  
Docket No.: 20180055-GU

SOUTH SUMTER GAS COMPANY, LLC  
AND CITY OF LEESBURG,

Respondents.

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

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

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

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

### PGS exception to COL 147

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

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

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

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

#### PGS exception to COL 160

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

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<sup>1</sup> By this reference, SSGC incorporates pages 37-41 of its Proposed Recommended Order as if fully set forth.

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

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

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

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

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

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

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

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

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

PGS general “exception”

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

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

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

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

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

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

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



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

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

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

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

Conclusion

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

Respectfully submitted this 25th day of October, 2019.

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**CERTIFICATE OF SERVICE**

I HERBY CERTIFY that a true and correct copy of the foregoing was served on the following counsel via e-mail transmission this 25th day of October, 2019 to:

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