

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 20180085-GU

CITY OF LEESBURG’S MOTION TO DISMISS

The City of Leesburg (“The City”), by and through its undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code (“FAC”), moves to dismiss the Petition filed by Peoples Gas System (“PGS”) in the above-styled matter for the failure to state a cause of action upon which relief can be granted. The grounds for the Motion to Dismiss are set forth below.

I. BACKGROUND

1. The City of Leesburg is a municipality of approximately 22,500 residents that was incorporated in 1875. Since 1959, the City has provided natural gas service to its customers. Presently, the City distributes natural gas to nearly 12,000 customers, both within and outside its corporate boundary limits. The City has approximately 240 miles of distribution lines installed and operating to provide its customers with natural gas. The City has an outstanding safety record as documented by the Florida Public Service Commission and provides exemplary service to its customers.

2. The City has natural gas distribution lines near future planned development of The Villages and is well positioned to efficiently, safely and effectively provide natural gas service to these future developments. The Villages, aware of the City’s outstanding performance, and being dissatisfied with natural gas service provided by PGS, seeks to have all

future natural gas service to its developments be provided by the City; the City is ready, willing and able to provide such service. The City entered into a contractual agreement (“Agreement”) with South Sumter Gas Company, LLC (“SSG”) on or about February 12, 2018.

SSG is constructing natural gas infrastructure in communities of the Villages that are in the process of being developed. This Agreement, a copy of which was attached to the PGS Petition as Exhibit A, provides that, for consideration linked to a portion of revenues generated by customers served by the SSG installed distribution system, SSG will convey title to the natural gas infrastructure it develops to the City. The City will own, maintain and operate certain natural gas infrastructure constructed by SSG as residential development in the south Sumter County area moves in a southerly direction toward the City limits, and toward an existing and nearby federal facility, the Coleman Correctional Facility, that the City currently provides with natural gas. The City will also install automated meter reading devices and bill customers served by the SSG-constructed natural gas distribution system.

SSG will have no responsibility for operating the natural gas distribution system it constructs and subsequently sells to the City. SSG does provide the City with a limited warranty and assumes an obligation to correct construction defects arising and discovered within one year of the closing and conveyance of natural gas distribution assets from SSG to the City. See Agreement, Paragraph 5.

II. PGS RELIEF REQUESTED

3. PGS petitions the Commission for:
 - i. The entry of an order to show cause why the Agreement between the City and SSG “does not create a partnership or other legal entity” or “why the

Agreement is not a lease”, either of which PSG contends would trigger the full regulatory jurisdiction of the Commission. PGS Petition, p. 1;

- ii. A declaratory statement as to with which party PGS “should negotiate in an effort to resolve the territorial dispute addressed in Peoples’ petition in Docket no. 20180055-GU.” PGS Petition, p. 1¹.

III. SHOW CAUSE REQUEST AS TO PARTNERSHIP OR LEASE

4. PSG’s request that the Commission issue a show cause order that the Agreement between the City and SSG creates a partnership or other legal entity or is a lease² should be dismissed or denied for a number of reasons. Plainly, the City is a “natural gas utility” as defined in Section 366.04(3)(c), Florida Statutes. That statutory provision is entitled “Jurisdiction of the Commission” and the relevant language provides:

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

The Legislature has provided the Commission with the appropriate regulatory tools to oversee natural gas utilities, including the City. PGS has filed a Petition in Docket No. 20180055 alleging a territorial dispute. The Agreement in question was affixed to the Petition in Docket No. 20180055. A separate petition to create a separate docket that raises disputed issues about the very same Agreement found in an open docket is superfluous, redundant, unnecessary, and inefficient. The Commission is on notice of the Agreement since it was filed in Docket No. 20180055.

¹ PGS expressly acknowledges that the City is a natural gas utility and has alleged a territorial dispute involving the City. See PGS Petition, Paragraph 2. The answer to PGS’s “negotiation” question should be apparent.

Should the territorial dispute petition in Docket No. 20180055-GU survive pending motions to dismiss, PGS may wish to raise its alleged “partnership” and/or “lease” questions during the issues identification process. Should the territorial dispute be dismissed, the Commission is aware of the Agreement and may wish to follow up with the City, informally or formally, to satisfy itself that the City is fulfilling its regulatory responsibilities, which it is.

The request for an order to show cause is unnecessary as an existing docket exists, Docket No. 20180055-GU, and the Commission is on notice of the Agreement in question. Many of the Petitioner’s allegations about the Agreement in question are disputed, and the Commission, should it not grant pending motions to dismiss, should use its normal process, with discovery and an issues identification process, to address any relevant questions about the Agreement rather than issuing an order to show cause.

5. Black’s Law Dictionary defines an order to show cause as one which “commands a party to appear in court to show why something should not be done.” See, Black’s Law Dictionary Free Online Legal Dictionary, 2nd Edition. PGS does not cite any statutory or rule authority for its request that the Commission issue an order to show cause. Often, orders to show cause are issued based on sworn testimony or a demonstrated failure of a party to comply with a prior court order, neither of which exists here. Mere assertions and untested legal conclusions about an Agreement that is subject to consideration in detail in a related, pending docket do not properly form the basis for an order to show cause.

6. The Agreement finances the City’s acquisition of new natural gas infrastructure to serve new customers and is neither a lease nor a partnership agreement. Even if it were a lease, which is not the case, this Commission previously determined that a lease of natural gas infrastructure by a non-regulated entity to a regulated entity did not result in the Commission

having jurisdiction over the non-regulated entity. See *In re; Joint petition for declaratory statement with respect to applicability and effect of portion of 366.02(1), Florida Statutes, by Chesapeake Utilities Corporation and Citrosuco North America, Inc.*, Docket No. 990710 GU, Order No. PSC-99-1592-DS-GU issued August 16, 1999). In the *Chesapeake* case, in which a declaratory statement was properly sought by the two parties to the agreement (not a third party), the Commission also declined to assert jurisdiction because one of the parties to the agreement was a regulated natural gas company. The Commission stated, “Furthermore, as Petitioners suggest, there is no compelling public policy reason to assert jurisdiction over Citrosuco, because Chesapeake is a regulated natural gas company.” *Id.* at p. 4. Similarly, here, the City is a regulated natural gas utility over whom the Commission has certain statutory jurisdiction, diminishing the public policy reason to assert jurisdiction over SSG.

7. In essence, the PGS “show cause” request is really an indirect request, a wolf in sheep’s clothing, for the Commission to issue a declaratory statement about a contractual relationship between the City and SSG. As detailed *infra*, a request for a Commission declaration about the conduct not of the Petitioner, but of two other entities, is not authorized, and PGS does not have standing to make such a request.

8. For the reasons set forth above, the PGS Petition for an order to show cause should be dismissed.

IV. DECLARATORY STATEMENT REQUEST

9. PGS asks the Commission, as an alternative to its misplaced show cause request, to issue a declaratory statement telling PGS with whom it should negotiate in an effort to resolve the territorial dispute alleged in Docket No. 20180055-GU. PGS Petition, p. 1.

10. PGS's alternative relief should also be dismissed. Again, the sum and substance of PGS's requested relief is bound up in an open, pending docket. This effort to open a second front against the City and SSG is superfluous, redundant, unnecessary and inefficient, and should not be permitted to proceed.

11. PGS's Petition hardly fulfills the requirements of a bona fide declaratory statement request which seeks to ascertain the agency's opinion of how certain statutes, rules or orders impact the Petitioner. Section 120.565, Florida Statutes, states in pertinent part:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

A proper declaratory statement petition details the petitioner's facts and circumstances, and then asks the agency its opinion of how certain statutes, rules or orders impact or apply to the petitioner. Here, PGS in essence asks not about how certain statutes, rules or orders will impact it, but how certain statutes, rules or orders may impact others, the City and SSG. PGS's pleading is replete with ill-founded, surmised "factual" claims involving SSG and the City that further serve to make the requested declaratory relief inappropriate. At bottom, PGS makes an improper, unauthorized request for a declaratory statement that does not meet the basic pleading requirements for a declaratory statement petition, and accordingly, the declaratory statement request should be dismissed.

12. Rule 28-105.001, Florida Administrative Code, addresses declaratory statements. This rule provides in pertinent part:

A declaratory statement is a means for resolving a controversy or answering questions or

doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. **A declaratory statement is not the appropriate means for determining the conduct of another person.** (emphasis added).

13. The PGS alternative relief for a declaratory statement is inappropriately premised on the the conduct of two other persons, the City and SSG. PGS asks the Commission to opine on the conduct of the City and SSG, and their contractual relationship, ostensibly for the purpose of advising PGS with whom PGS should negotiate. (Again, importantly, the City disputes many of the allegations set forth in the PGS Petition.) Rule 28-105.001, F.A.C., expressly provides that the Commission should not issue a declaratory statement as a means for determining the conduct of the City or SSG.

V. CONSENT PURSUANT TO SECTION 180.06, FLORIDA STATUTES

14. As part of its declaratory relief request, PGS also asks the Commission to tell it who “should have sought Peoples’ consent to the construction of the System [natural gas distribution network]” contending that section 180.06, Florida Statutes, requires either the City or SSG to obtain the consent of PGS. See PGS Petition, Paragraph 33.

15. The statutory section relied upon by PGS, s. 180.06, F.S., provides:

However, a private company or municipality shall not construct any system, work, project or utility authorized to be constructed hereunder in the event that a system, work, project or utility of a similar character is being actually operated by a municipality or private company in the municipality or territory immediately adjacent thereto, unless such municipality or private company consents to such construction.

16. Section 180.05, Florida Statutes, defines “private company” as:

A “private company” shall mean any company or corporation duly authorized under the laws of the state to construct or operate water works systems, sewerage systems, sewage treatment works, garbage collection and garbage disposal plants.

17. PSG is not a “private company” from whom consent must be sought since it is “a natural gas local distribution company (“LDC”) providing sales and transportation delivery of natural gas....” See PGS Petition, p. 2, Paragraph 3. It does not construct or operate “water works systems, sewerage systems, sewage treatment works, and garbage collection and garbage disposal plants”, business characteristics that the Legislature said are necessary to be a private company whose consent arguably must be secured. The provision relied upon by PGS, section 180.06, Florida Statutes, is simply not applicable, and PGS’s misguided request that the Commission identify who should have sought PGS’s consent should be dismissed.

VI. CONCLUSION

18. For the foregoing reasons, the City respectfully asks that the Commission dismiss the PGS Petition, not issue an order to show cause, not issue a declaratory statement and not address the question regarding consent.

Respectfully submitted this 26th day of April, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following by Electronic Mail, on this 26th day of April, 2018:

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