

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for issuance of an order to the City)
of Leesburg and South Sumter Gas Company,) Docket No. 20180085-GU
LLC, to show cause why they should not be)
regulated by the Commission as a public utility as) Submitted for filing: 5-3-18
defined in Section 366.02(1), *Florida Statutes*, etc.)
_____)

**PEOPLES GAS SYSTEM'S RESPONSE TO SOUTH SUMTER GAS COMPANY, LLC'S
MOTION TO DISMISS**

Peoples Gas System ("Peoples"), by its undersigned counsel and for its response to South Sumter Gas Company, LLC's ("SSGC's") Motion to Dismiss Peoples' Petition, states:

SSGC's Motion takes an incredibly narrow view of what constitutes supplying gas to the public under an agreement with a municipal gas company. In taking that position, SSGC ignores the portions of its Agreement¹ with the City of Leesburg ("Leesburg") which beg for a determination by the Commission as to whether the business relationship between SSGC and Leesburg necessitates regulation. SSGC ignores the fact that SSGC will determine where future expansion of Leesburg's gas system will take place, that SSGC's Agreement with Leesburg will create two classes of rate payers in Leesburg's system, that SSGC is paid not on a fixed rate, but rather based upon how much gas is sold to its customers in The Villages Development, and that SSGC will determine the rates being charged not only to The Villages' customers, but the "Native Rate" that will be charged to Leesburg's non Villages customers. In short, SSGC is "pulling the strings" behind the scenes of the joint venture created through the Agreement and is taking the position that as long as it distances itself from purchasing the gas to be sold to the customers, it is

¹ Natural Gas System Construction, Purchase, and Sale Agreement attached as a portion of Exhibit A to Peoples' Petition in this docket (the "Agreement").

not supplying gas. Under the Agreement, SSGC is paid by the therm and is paid a portion of the monthly fees for each customer and has the power to determine what rates customers will be charged. The more gas that is sold, the more SSGC is paid. Those are all hallmarks of a gas utility and are all integral to the Agreement. SSGC simply does not want to be regulated like any other similarly situated gas utility. In fact, the effort to avoid regulation goes so far as to provide that the Agreement is canceled in the event the Commission should rule that SSGC is subject to regulation.

SSGC does correctly cite the standard for a motion to dismiss which is to consider only what is alleged in the complaint and to construe all material facts and allegations in the light most favorable to the petitioner. Applying that standard, there is no question that Peoples has sufficiently plead its Petition to show cause and its alternative Petition for a declaratory statement.

PEOPLES HAS SUFFICIENTLY ALLEGED THAT SSGC IS A PUBLIC UTILITY

SSGS seems surprised that one would assume that an entity named “South Sumter Gas Company,” after having entered into an agreement with Leesburg which gives SSGC the ability to determine expansion, set rates, and derive payments based on the amount of gas sold in the system, would be viewed as supplying gas to the public. It insists that because Leesburg’s infrastructure is tied into the interstate transmission lines and because Leesburg will actually bill the gas customers, SSGC will not be involved in supplying gas. Notwithstanding SSGC’s modesty concerning its role in providing gas, it is relying on an overly narrow interpretation of Florida Statute § 366.02(1). The statute itself is rather broad in terms of what types of entities can supply gas to the public, and states that:

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

Peoples has alleged that the Agreement creates a partnership, association or lease arrangement in which both entities are jointly engaged in supplying gas to the public.

SSGC relies on three Commission orders to support a position that under certain circumstances, a mere lease of equipment to another entity does not mean that the lessor is supplying gas. In the first order, *In re: Joint Petition for Declaratory Statement with Respect to Applicability and Effect of 366.02(1), Florida Statutes, by Chesapeake Utilities Corporation and Citrosuco North America, Inc.*, Docket No. 990710-GU, Order No. PSC-99-1592-DAS-GU (August 16, 1999) (hereinafter the “Chesapeake Order”), the Commission determined that under the terms of the lease agreement between Citrosuco and Chesapeake, there was no need for Citrosuco to be regulated by the Commission. However, there are a number of critical differences between the lease agreement in the Chesapeake Order and the Agreement at issue in this Petition.

First, Citrosuco was not a gas company, it was a citrus processing plant. SSGC’s name indicates it is a gas company, and under the Agreement it will be constructing gas system infrastructure. Second, the annual rent in the Chesapeake Order was a fixed sum over a set term of years. In this case, under the Agreement, SSGC is being paid based on the amount of gas being sold. In other words, SSGC will make money directly from the sale of gas, and the more gas that is sold, the more money it will make. SSGC also determines when and at what time the system will expand and also creates separate rate classes under the Agreement. In short, SSGC is directly involved in supplying gas to the public in a way that was not even remotely contemplated by the agreement between Citrosuco and Chesapeake. It is disingenuous for SSGC to claim it will not be marketing the sale of gas or have any customer relationship when SSGC is in fact determining who the customers will be, and how much they will pay. Moreover, the Commission in the Chesapeake Order noted that Chesapeake was a fully regulated utility. SSGC asserts that this does

not change the analysis, but that is simply not true. In the Chesapeake Order, there was no effort being made by a gas company to evade the benefit to the public derived from regulation. The Commission noted that Chesapeake was a regulated utility because the transaction would be subject to regulation through one of the parties to the transaction. If SSGC's position is correct, none of the customers in The Villages Developments being added to the system will have the protections afforded by the statewide regulatory structure contemplated by Chapter 366, Florida Statutes.

Similarly, SSGC's reliance on *In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility*, Order No. 17009, (December 22, 1986) (the "Monsanto Order") is misplaced. The Monsanto Order did not involve a public or municipal utility. However, the order's description of lease financing is instructive. The order begins by noting that the lease will be a turn-key contract which means Monsanto will not be involved in the operation of the co-generation facility that it proposes leasing from an unnamed contractor. As outlined above, SSGC will be intimately involved in the operation of the gas system contemplated by the Agreement and in the supplying of gas to customers pursuant to the Agreement. The Monsanto Order then goes on to note why the lease payments in that case would not result in its being a regulated utility. The Commission noted at page 2 of the order:

Monsanto's lease payments would be fixed throughout the term of the lease. These payments would be independent of electric generation, production rates, or any operational variable and would include a negotiated rate of return on the lessor's investment comparable to the interest rate in traditional financing. Lease payments would continue to be due during either planned or unplanned outages of the facility.

Leesburg's payments under the Agreement with SSGC are completely different. Those payments will be dependent on gas sales, and do not appear to be tied to a negotiated rate of return on SSGC's investment in installing the distribution lines in The Villages Developments. The payments do not

appear to be comparable to any interest rate in traditional financing and it appears that payments would not be made if no gas was being provided to customers in The Villages.

SSGC then cites the case of *P.W. Ventures v. Nichols*, 522 So.2d 281 (Fla. 1988) to argue that SSGC is not providing gas to the public, apparently on the theory that it is not the entity that is charging the customers. However, in its analysis and as a part of the rationale for its decision in *P.W. Ventures*, the Commission noted that:

What P.W. Ventures proposes is to go into an area served by a utility and take one of its major customers. Under P.W. Ventures' interpretation other ventures could enter into similar contracts with other high use industrial complexes on a one to one basis and drastically change the regulatory scheme in this state. The effect of this practice would be that revenue that otherwise would have gone to the regulated utilities which serve the affected areas would be diverted to unregulated producers. This revenue would have to be made up by the remaining customers of the regulated utility since the fixed costs of the regulated systems would not have been reduced, *P.W. Ventures v. Nichols*, 533 So.2d 281 (Fla. 1988) at 283.

If one were to substitute "SSGC" for P.W. Ventures and substitute large scale residential developments for "high use industrial complexes", the rationale applies to the Agreement between SSGC and Leesburg.

Finally, by way of clarification, the reference to SSGC providing no natural gas service and having no customers refers to the fact that SSGC has not filed a tariff and does not appear to have any customers other than those that it will eventually be providing gas to under the Agreement with Leesburg. To date, those customers have not yet been served because Leesburg has not completed the 2.5 mile mainline that it needs to supply gas to the developments in question.

Based on the allegation in the Petition, the attachments to the Petition and all reasonable theories that can be drawn from them, Peoples has stated a cause of action in its petition for issuance of orders to show cause.

**PEOPLES' PETITION IS SUFFICIENT TO STATE A REQUEST FOR A
DECLARATORY STATEMENT**

Peoples' request for a declaratory statement clearly states that it is asking for interpretations of Florida Statute § 366.04(3.66.02(1)) and Florida Statute § 180.06, thus meeting the requirements of Florida Statute § 120.565 and Chapter 28-105 F.A.C.

While it is true that the underlying facts alleged in the Petition involve SGGC and Leesburg, the request for declaratory statement seeks guidance from the Commission concerning with which entity Peoples would need to resolve the dispute and which entity would be responsible for seeking consent from Peoples for operating a system immediately adjacent to Peoples under Florida Statute § 180.06. Peoples seeks a statement from the Commission based on its unique circumstance of being the utility that is attempting to resolve a territorial dispute in specific areas of planned development and is the only entity, gas utility, that is involved in these issues with SSGC and Leesburg.

SSGC also argues that the request for declaratory statement is improper because it addresses the same subject matter as contained in Docket No. 20180055-GU. While it is undoubtedly true that Docket No. 20180055-GU deals with a territorial dispute between Peoples and one or both of the intervenors in this action, it is by no means clear that a resolution of that territorial dispute would resolve the issues raised in this petition. For example, the Commission could determine who is to provide gas service to the future developments contemplated by The Villages without having to determine whether the Agreement between SSGC and Leesburg subjects those entities to being regulated as a gas utility. Depending upon the scope of the Commission's ruling in the territorial dispute docket, the issues raised in the instant docket may or may not be adjudicated. Given that both matters are before the Commission, there is little

chance of inconsistent rulings and unless the Commission declares that it intends to either consolidate the two dockets or resolve the issues raised by Peoples' petition in this docket in Docket No. 20180055-GU, it would be appropriate for the Commission to issue orders to show cause and/or a declaratory statement in this docket.

Finally, SSGC argues that the request for the declaratory statement is speculative and hypothetical. That is simply not the case. SSGC and Leesburg have already entered into the Agreement to provide gas service for customers in The Villages. The developer of the Villages Developments has determined that gas service will be provided to customers in those developments as provided in the Agreement. (Which utility will provide gas service within a given area is a determination that, under Chapter 366, is to be made by the Commission.) Both SSGC and Leesburg are at present installing pipe that will allow them to provide gas to those customers. The Agreement clearly gives a significant role to SSGC with regard to the supplying of gas and to the determination of the customers who will be supplied with gas. Peoples is seeking in the alternative to its Show Cause Petition, a declaratory statement as to which entity, either SSGC or Leesburg or a combination of the two, Peoples should address when confronting territorial issues and consent issues arising from activity occasioned by the Agreement. All of this is an actual controversy which is before the Commission and which is appropriate for a declaratory statement should the Commission not be willing to issue a show cause order as requested in the first part of the Petition.

WHEREFORE, Peoples urges the Commission to issue an Order denying SSGC's Motion to Dismiss the Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished to the following by means of the following, this 3rd day of May, 2018:

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