

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 3, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Trierweiler, Harper) *W. J. S.*
Division of Economics (Coston, Draper, Guffey) *EST*
Division of Engineering (Ballinger) *DB*

RE: Docket No. 20180055-GU – Petition to resolve territorial dispute in Sumter County and/or Lake County with City of Leesburg and/or South Sumter Gas Company, LLC, by Peoples Gas System.

AGENDA: 01/14/2020 – Regular Agenda – Post Hearing Decision – Participation is limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Polmann

CRITICAL DATES: The Commission’s final order must be furnished to DOAH no later than February 20, 2020

SPECIAL INSTRUCTIONS: None

Case Background

On February 23, 2018, Peoples Gas System (PGS) filed a petition pursuant to Section 366.04(3)(b), Florida Statutes (F.S.), and Rule 25-7.0472, Florida Administrative Code (F.A.C.), (Petition), requesting that the Commission resolve a territorial dispute between PGS and the City of Leesburg (Leesburg) and South Sumter Gas Company, LLC (SSGC). The Petition alleged that PGS and Leesburg or SSGC were in a dispute as to the rights of each to provide natural gas services to the customers in Sumter County, Florida, including The Villages. The area in dispute is characterized by residential areas of varying density, interspersed with commercial support areas, and is referred to in the evidence as Bigham North, Bigham West, Bigham East (collectively “Bigham” or the “disputed area”).

On August 21, 2018, the Commission Chairman directed the Commission Clerk to refer the case to the Division of Administrative Hearings (DOAH). DOAH accepted a letter from the Clerk and assigned an Administrative Law Judge (ALJ) for the purpose of conducting an administrative hearing and issuing a Recommended Order¹ on the territorial dispute filed on the same day. On August 22, 2018, the ALJ's procedural Initial Order was filed in the docket under DOAH Case No. 18-004422.

Administrative law judge (ALJ) Gary Early conducted the three-day hearing which began on June 24, 2019. Following the evidentiary proceedings on June 24, 2019, the ALJ held a public comment period. No customers or other members of the public appeared. At the hearing, PGS called six witnesses and entered 34 exhibits into the record. Leesburg called five witnesses and entered 20 exhibits into the record. SSGC called three witnesses and entered 18 exhibits into the record. The hearing concluded on June 27, 2019. Each party timely filed its proposed recommended orders. The ALJ issued his Recommended Order awarding the disputed territory to PGS on September 30, 2019. The Recommended Order is attached to this recommendation as Attachment A.

On October 15, 2019, the parties submitted exceptions to the Recommended Order. The exceptions are attached to this recommendation as Attachment B. On October 25, 2019, each party filed a Response to Exceptions, which are found as Attachment C to the staff's recommendation.

Section 120.57(1)(l), F.S., establishes the standards an agency must apply in reviewing a Recommended Order following a formal administrative proceeding. The statute provides that the agency may adopt the Recommended Order as the Final Order of the agency or may modify or reject the Recommended Order. An agency may only reject or modify an ALJ's findings of fact if, after a review of the entire record, the agency determines and states with particularity that the findings of fact were not based on competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.²

Section 120.57(1)(l), F.S., also states that an agency in its final order may reject or modify conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction. When rejecting or modifying a conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying the conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.³

In regard to parties' exceptions to the ALJ's Recommended Order, Section 120.57(1)(k), F.S., provides that the Commission does not have to rule on exceptions that fail to clearly identify the disputed portion of the Recommended Order by specific page numbers or paragraphs or that do

¹ "Recommended Order" is defined in Section 120.52(15), F.S., as the official recommendation of the ALJ assigned by DOAH or of any other duly authorized presiding officer, other than the agency head or member thereof.

² Section 120.57(1)(l), F.S.

³ *Id.*

not identify the legal basis for the exception, or those that lack appropriate and specific citations to the record.⁴ Section 120.57(1)(l), F.S., requires the Commission's final order to include an explicit ruling on each exception and sets a high bar for rejecting an ALJ's findings.

Overview of the Recommended Order

As a public gas utility, PGS began construction in August of 2017 to provide natural gas services to the Fenney residential development as part of The Villages in the northwest corner of the City of Wildwood, in Sumter County. One month later, The Villages began exploring other options to provide gas services to its next phase of residential developments, to be constructed immediately adjacent to Fenney. The Villages then formed SSGC to serve as its construction affiliate. The ALJ determined that SSGC is a construction company, not a gas utility. SSGC began searching for an alternate natural gas service provider for the yet to be constructed Bigham development. SSGC entered into a contractual agreement (Agreement) with Leesburg, a municipal gas utility, with an effective date of February 13, 2018. Under the Agreement, SSGC would construct the gas infrastructure necessary to serve Bigham and then sell the system to Leesburg. In accordance with their "pay to play" arrangement under the Agreement, Leesburg was also obligated to remit a significant share of its gas revenues back to SSGC.⁵ The Agreement set the initial rates for Bigham at the same rates that were being paid by PGS customers.

The distance from PGS's preexisting distribution line into any of the Bigham developments was between 10 to 100 feet. PGS's total cost of connecting to the Bigham interior service lines were determined to be, at most, \$10,000, and its cost of extending gas distribution lines was, at most, \$11,000. The Recommended Order found that the cost differential between Leesburg's and PGS's costs to serve was far from de minimis. The Recommended Order also found that Leesburg embarked upon a "race to serve" Bigham, with knowledge of PGS's presence and service to the adjacent area. In order to reliably serve Bigham, Leesburg had SSGC 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. The miles of gas distribution lines that SSGC built and sold to Leesburg under the Agreement, resulted in an uneconomic duplication of facilities. Leesburg's new County Road (CR) 468 line runs parallel along the preexisting PGS line for its entire route and crosses the PGS line in places.

In his Recommended Order, the ALJ detailed the relevant facts and legal precedent required to conduct the cost-to-serve-comparison based on the factors in Rule 25-7.0472, F.A.C. In his conclusion, the ALJ recommended that the right to serve Bigham be awarded to PGS on such terms as deemed appropriate by the Commission.

This recommendation, which is based upon review of the entire record of the hearing and post-hearing submissions, addresses whether the Commission should adopt the ALJ's Recommended Order as filed, make any changes to the order, or act on any of the matters raised in the parties' exceptions to the Recommended Order. Issues 1-2 address the post-hearing submissions by PGS,

⁴ Section 120.57(1)(k), F.S.

⁵ Although significant to PGS, the "pay to play" amounts do not play a role in the analysis of the territorial dispute, as "pay to play" amounts are not identified as a factor in Rule 25-7.0472, F.A.C. The ALJ does note that under the Commission's cost-based rate setting oversight, PGS, as a public utility, could not "pay to play."

SSGC, and Leesburg. Issue 3 addresses the adoption of the ALJ's Recommended Order. The Commission has jurisdiction pursuant to Sections 120.57 and 366.04, F.S.

The Commission's Legal Authority over Natural Gas Territorial Disputes and the Underlying Role or Consideration of Uneconomic Duplication of Facilities

Before the Legislature provided the Commission with explicit authority to approve territorial agreements and resolve territorial disputes in 1974, the Commission determined it had implicit authority to eliminate or minimize uneconomic duplication of facilities constructed by investor-owned electric and natural gas utilities. When it approved a territorial agreement between City Gas Company and Peoples Gas System in 1960, the Commission stated:

It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest. Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic regulation, in such cases, is better than, and takes the place of competition. A public utility is entitled under the law to earn a reasonable return on its investment. If two similar utilities enter the same territory and compete for the limited business of the area, each will have fewer customers, but there inevitably will be excess facilities which must earn a reasonable return. The rates in such a situation will be higher than the service is worth, or customers in more remote areas will bear some of the unjustified expense necessary to support such economic waste.

Order No. 3051, issued November 9, 1960, in Docket No. 6231-GU, *In re: Territorial Agreement between Peoples Gas System, Inc., and City Gas Company of Florida*, p.1. The avoidance or elimination of uneconomic duplication of facilities is one of the cornerstones that has governed the Commission is its decision making over territorial matters since it approved the first territorial agreement brought before it in 1958. *Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida*, Richard Bellak and Martha Carter Brown, 19 *Fla. St. U. L. Rev.* 407, 410 (1991).

The Legislature gave the Commission explicit authority over electric territorial agreements and disputes when it enacted certain revisions to Chapter 366, F.S., in 1974. *Id.* at 414-416. "Under [these revisions], the Commission's jurisdiction to ensure the adequacy of the grid and to prevent uneconomic duplication of facilities included ... authority [in part] ... to review and approve territorial agreements and resolve territorial disputes involving all types of utilities, not just investor-owned utilities." *Id.* at 415. Section 366.04, F.S., which provides for the Commission's jurisdiction over electric territorial agreements and disputes, was further amended in 1989 to provide the Commission with authority over natural gas territorial agreements and disputes.⁶

⁶ Ch. 89-292, 1989 Fla. Laws

With respect to the resolution of territorial disputes between electric or natural gas utilities, Section 366.04, F.S., provides the Commission may consider:

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.

Section 366.04(2)(e) and (3)(b), F.S.

To capture all types of utilities supplying gas, the Legislature broadened the Commission's authority over natural gas utilities to:

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.

Section 366.04(3)(c), F.S.

To implement its authority, the Commission adopted Rule 25-7.042, F.A.C., to govern territorial disputes between natural gas utilities. The rule provides:

25-7.0472 Territorial Disputes for Natural Gas Utilities.

(1) A territorial dispute proceeding may be initiated by a petition from a natural gas utility, requesting the Commission to resolve the dispute. Additionally the Commission may, on its own motion, identify the existence of a dispute and order the affected parties to participate in a proceeding to resolve it. 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.

The Commission also adopted a rule to govern territorial agreements. The rules governing territorial agreements for both electric and natural gas utilities provide the Commission may consider “[t]he reasonable likelihood that the agreement will eliminate existing or potential uneconomic duplication of facilities.” Rules 25-6.0440(2)(c) and 25-7.0471(2)(c), F.A.C.

Every territorial issue that comes before the Commission is fact specific. When resolving a dispute, the Commission looks at the location of the lines and the abilities of the utilities to serve before a dispute is commenced. Where one utility takes action to serve a territory that could be more easily be served by another utility, the Commission has found a race to serve. *See* Order No. PSC-92-1474-FOF-EU, issued December 21, 1992, in Docket No. 920214-EU, *In re: Petition to Resolve Territorial Dispute Between Talquin Elec. Coop., Inc. & Town of Havana* (The Commission awarded Talquin Electric the disputed area because “Havana's actions to construct service lines to the disputed area constituted a race to serve.” Havana never approached the other utility about service arrangements and constructed lines to cut off the other utilities ability to serve.)

Whether a utility “raced to serve” a disputed area is but one of the factors the Commission and Florida Supreme Court have considered when evaluating whether uneconomic duplication exists and determining how to resolve a territorial dispute. In particular, the Supreme Court observed:

certain factors are relevant to a determination of whether uneconomic duplication is likely to occur. These factors, which are not exclusive, include the utilities' costs to provide service, “lost revenues for the non-serving utility, aesthetic and safety problems, proximity of lines, adequacy of existing lines, whether there has been a ‘race to serve,’ and other concerns ...” *Clark*, 674 So. 2d at 123. A utility's historical presence in an area may also be relevant to the Commission's analysis. *W. Fla. Elec. Coop. Ass'n, Inc. v. Jacobs*, 887 So. 2d 1200, 1205 (Fla. 2004).

Choctawhatchee Elec. Co-op., Inc. v. Graham, 132 So. 3d 208, 216 (Fla. 2014).

Discussion of Issues

Issue 1: Should the Commission accept any of the exceptions filed by PGS?

Recommendation: No. PGS has failed to present any legally justifiable basis for rejecting or modifying any portion of the Recommended Order. Therefore, staff recommends that the Commission deny PGS's exceptions to Conclusion of Law 147 and 160 and disregard its request for additional requested conditions. (Trierweiler, Harper)

Staff Analysis: PGS filed exceptions with respect to the ALJ's Conclusions of Law 147 and 160.

PGS Exception to Conclusion of Law 147

PGS takes exception with the ALJ's conclusion of law in Conclusion of Law 147, which states:

Conclusion of Law 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.

PGS asserts that the Agreement entered into by Leesburg and SSGC created a "hybrid utility" or "public utility" under Section 366.02(1), F.S. PGS reiterates its arguments from the hearing that the SSGC is acting as a hybrid or public utility that should be regulated by the Commission due to the number of responsibilities taken and decisions made by SSGC in the construction of gas infrastructure and providing natural gas services to Bigham.

PGS argues the ALJ's Conclusion of Law 147, which holds that SSGC is not a natural gas utility as defined in Section 366.04(3)(c),⁷ F.S., does not answer the question of whether the Agreement creates a "public utility" as defined in Section 366.02(1),⁸ F.S. PGS states that the definition provided in 366.04(3)(c), F.S., is only to make clear that the Commission's jurisdiction to approve territorial agreements and resolve territorial disputes extends beyond Commission-

⁷ Section 366.04(3)(c), F.S., provides as follows: "For purposes of this subsection, 'natural gas utility' means any utility which supplies natural gas or manufactured gas or liquefied gas with air mixture, 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."

⁸ Section 366.02(1), F.S., provides as follows: "'Public utility' means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term "public utility" does not include either a cooperative now or hereafter organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof; any dependent or independent special natural gas district; any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial consumers; any entity selling or arranging for sales of natural gas which neither owns nor operates natural gas transmission or distribution facilities within the state; or a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, or owning or operating facilities beyond the outlet of a meter through which natural gas is supplied for compression and delivery into motor vehicle fuel tanks or other transportation containers, unless such person also supplies electricity or manufactured or natural gas."

regulated natural gas utilities. PGS essentially argues that the ALJ legal conclusion is erroneous in the absence of addressing the question of whether the Agreement between Leesburg and SSGC creates a public utility within the meaning of Section 366.02, F.S.

SSGC's and Leesburg's Responses

SSGC and Leesburg argue there is no evidence or case law supporting PGS's "hybrid utility" argument. Leesburg is acting as the sole utility and will maintain the natural gas system and manage and operate the system. Because SSGC will play no role in supplying natural gas to customers, SSGC and Leesburg assert PGS's argument was properly rejected by the ALJ.

Leesburg's witness Rogers testified that the Commission, recognizing Leesburg as the sole utility, has interacted with Leesburg with respect to the construction of Bigham from the very beginning.⁹ Likewise, Leesburg bills the customers; Leesburg is responsible for the safety of the system including the customers within The Villages; and Leesburg provides the safety reports to and interacts with the Commission.¹⁰

Leesburg also offers several arguments in opposition to PGS's attempt to reargue the "hybrid utility" conclusion in Conclusion of Law 147. Leesburg notes there is competent, substantial evidence of record to support Conclusion of Law 147,¹¹ and that PGS failed to file an exception to the ALJ's Findings of Fact 7, 9, 57, and 63, which directly support Conclusion of Law 147. Significantly, Leesburg notes that Conclusion of Law 147 is supported by the ALJ's Finding of Fact 63.

Leesburg also addresses PGS's assertion that the ALJ did not properly consider the broader definition of a utility in Section 366.02(1), F.S. Leesburg argues that PGS ignores the ALJ's Conclusions of Law 136 and 137 which indicate, by virtue of citing both sections of law, that the ALJ did consider the two statutes:

Conclusion of Law 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.

Conclusion of Law 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."

SSGC adds that "an agency has no authority to make independent or supplemental findings of fact."¹² In other words, if PGS's exception was granted, several supplemental findings of fact would be required to support the substituted conclusion of law, and the Commission has no such authority to make independent or supplemental findings of fact. For that reason alone, SSGC contends that the exception should be denied. For the above reasons, SSGC and Leesburg assert that Conclusion of

⁹ Rogers, TR 532.

¹⁰ Rogers, TR 547.

¹¹ Rogers, TR 440-443, 547-548, 623-624, and 545-548.

¹² *Friends of Children v. Dep't of Health and Rehabilitative Servs.*, 504 So. 2d 1345, 1347-48 (Fla. 1st DCA 1987).

Law 147 is supported by competent, substantial evidence and may not be modified or rejected by the Commission.

Staff Analysis and Conclusion

In its exception to Conclusion of Law 147, PGS argues if the ALJ had used the broader public utility definition contained within Section 366.02(1), F.S., the ALJ would have found that the business Agreement between Leesburg and SSGC resulted in the creation of a “hybrid utility.” To reach this conclusion, PGS invites the Commission to reevaluate the contract between Leesburg and SSGC concerning the construction and operation of the gas lines to serve Bigham and to reach a contrary conclusion regarding this contract.

As Leesburg provided in its response to PGS’s exceptions, the ALJ analyzed the definitions in both statutes, in conjunction with the factual record of the case, before reaching his conclusion of law. PGS neglected to file an exception to Finding of Fact 63, which directly supports the ALJ’s Conclusion of Law:

Finding of Fact 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.

PGS failed to demonstrate that the ALJ erred in Conclusion of Law 147. The ALJ’s conclusion is based upon Findings of Fact that are supported by uncontroverted competent, substantial evidence after conducting a detailed analysis. PGS failed to offer sufficient justification that the ALJ ignored Section 366.02(1), F.S.

In addition, the Commission’s jurisdiction over municipalities is limited to rate structure, safety oversight and territorial disputes.¹³ PGS is asking the Commission to go beyond its jurisdiction to interpret a contract between a municipality and a private company.¹⁴ While a territorial agreement or dispute triggers the Commission’s jurisdiction, it does not, in and of itself, provide the Commission with new or additional regulatory authority over a municipal utility’s contractual agreements.¹⁵ Leesburg is a municipal utility and SSGC is a private construction company.

¹³ Section 366.06(2), F.S.

¹⁴ Section 171.208, F.S., 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.”

¹⁵ There is no evidence in the record of a rule, order, or statute that gives the Commission authority to regulate how or when a municipal utility provides service to its customers. If on the other hand, there was evidence a company was acting as a public utility under the statute, the Commission would have ratemaking and service authority over that utility. In this case, staff believes there is insufficient record evidence that SSGC was acting as a utility.

PGS made the “SSGC is a hybrid public utility” argument at hearing, and the ALJ addresses the arguments in the Recommended Order.¹⁶ Conclusion of Law 147 is supported by competent, substantial evidence in the record. As noted in uncontested Finding of Fact 63, PGS has failed to support a contrary conclusion that is as or more reasonable than the one reached by the ALJ.¹⁷ For the above stated reasons the Commission should deny PGS’s exception to Conclusion of Law 147.

PGS Exception to Conclusion of Law 160

PGS also takes exception with the ALJ’s Conclusion of Law 160, which states:

Conclusion of Law 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 evidence indicates that PGS cost-per-home is \$1,579.

PGS takes issue with Conclusion of Law 160 because the ALJ determined Leesburg’s cost to serve by deriving the cost evidence put forth by SSGC. PGS asserts that the evidence of the cost to serve cannot come from SSGC, but must come from Leesburg as the utility.¹⁸ PGS argues that Leesburg’s total costs are not simply SSGC’s costs, but should include other total costs as provided under the Agreement. PGS also resurrects its arguments from its exception to Conclusion of Law 147, by suggesting that if the ALJ accepts the information from SSGC, that would mean that SSGC is a public utility.

SSGC’s and Leesburg’s Responses

SSGC and Leesburg argue PGS is asking the Commission to revisit and reevaluate certain evidence and expert testimony and to substitute its own findings. SSGC and Leesburg argue PGS made this argument at hearing and it was properly rejected by the ALJ. Leesburg specifically highlights Finding of Fact 123:

Finding of Fact 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.

Leesburg argues that in Finding of Fact 123, the ALJ rejected the testimony of PGS witness Durham by holding that the revenues generated by SSGC under the Agreement with Leesburg were not relevant as to the “pay to play deal” and did not fall within one of the factors for consideration under the Territorial Dispute Rule, 25-7.0472, F.A.C.

Staff Analysis and Conclusion

PGS asks the Commission to reweigh the evidence and use a different analysis to compute Leesburg’s costs to serve. The ALJ relied upon SSGC’s cost to serve evidence in order to make the determination on Leesburg’s costs to serve Bigham. The record shows that SSGC was the

¹⁶ Findings of Fact 3, 7, and 63.

¹⁷ Section 120.57(1)(1), F.S.

contractor responsible for constructing the natural gas infrastructure required to serve the Bigham Developments, and that the Agreement between SSGC and Leesburg requires SSGC to bill Leesburg for its construction of the gas infrastructure and that Leesburg would purchase the infrastructure from SSGC after construction was completed. The ALJ's reliance upon SSGC's costs to construct the gas infrastructure necessary for Leesburg to serve Bigham, particularly in absence of contrary evidence from Leesburg, is not erroneous, and is supported by competent, substantial evidence. In Finding of Fact 123, the ALJ clearly rejected the evidence offered by PGS witness Durham, and declared that the revenues that would flow under the Agreement to SSGC were not relevant to the determination of Leesburg's cost to serve.

Moreover, Conclusion of Law 160 was derived directly from the factual findings addressed in Findings of Fact 118 and 119 of the Recommended Order, neither of which were challenged by PGS:

Finding of Fact 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.

Finding of Fact 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.

PGS's failure to object to Findings of Fact 118, 119, and 123 precludes it from taking exception with Conclusion of Law 160. A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact."¹⁹ The ALJ's unchallenged factual findings support the conclusion of law in Conclusion of Law 160 and PGS has waived the right to challenge it.

The ALJ assesses the weight of evidence and the Commission may not reweigh Findings of Fact absent a showing that the finding was not based on competent, substantial evidence.²⁰

Further, PGS did not offer a compelling legal basis for its contention that its proffered substitution is as or more reasonable than the ALJ's conclusion of law on the topic of Leesburg's cost per home. When an agency rejects or modifies a conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than the ALJ's conclusion or interpretation.²¹ Therefore, based on the foregoing reasons, the Commission should deny this exception.

¹⁹ *Envtl. Coalition of Fla., Inc.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc.*, 847 So. 2d 540, at 542 (Fla. 4th DCA 2003).

²⁰ *Rogers v. Department of Health*, 920 So. 2d at 30.

²¹ Section 120.57(1)(1), F.S.

PGS's Request for Additional Conditions

In paragraphs 29-33 of its exceptions, PGS requests that the Commission, in support of the ALJ's Recommended order awarding PGS the right to serve the disputed area, order the following additional conditions:

- Customers must be transferred to PGS within 90 days of the Commission's final order.
- PGS must pay SSGC or Leesburg no more than \$1,200 per resident customer within the Bigham Developments.
- The Commission should apply its policies regarding disputes involving a race to serve and prohibit Leesburg from serving customers using the lines along CR 501 and along SR 44 and CR 468 that were built to serve the disputed area.
- Leesburg should be prohibited from serving, either temporarily or permanently, any customers along the route.

PGS states that Commission precedent supports its additional requested conditions and encourages the Commission to apply its policies to grant these requested remedies to PGS as the prevailing party in the territorial dispute and against Leesburg for its failed race to serve and uneconomic duplication.

SSGC's and Leesburg's Reponses

SSGC and Leesburg argue that the Commission may not act on PGS's requests based upon a variety of reasons which include a lack of jurisdiction, that the actions would constitute an improper taking, and that to do so would go beyond the ALJ's findings and conclusions of law.

SSGC characterizes PGS's request for additional conditions as proposed "exceptions" that fail scrutiny under the requirements of the Administrative Procedure Act (APA). Specifically, SSGC refers to Section 120.57(1)(k), F.S., which 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. Additionally, Section 120.57(1)(1), F.S., expressly provides that rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

Staff Analysis and Conclusion

The ALJ concludes the Recommended Order as follows:

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.

[emphasis added]²²

As the prevailing party in the dispute, PGS appears to seize upon the ALJ's invitation, stated in italics above, to support its request for additional conditions. For this reason, PGS specifically asserts that it would be appropriate for the Commission to make an additional finding that PGS pay no more than \$1,200 per resident/customer within the Bigham Developments. PGS also argues that the Commission should adopt all of the conditions because doing so would be consistent with the Commission's actions taken in prior territorial disputes which involve uneconomic duplication or a "race to serve" where the Commission awarded the prevailing party similar conditions.

However, any request for additional conditions must be supported by evidence in the record. Section 120.57(1)(k), F.S., states 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. The condition related to the \$1,200 cap on payment per home amount was supported by evidence that was rejected by the ALJ's ruling in a Motion to Strike and is inconsistent with the \$1,800 per home amount in Finding of Fact 118. The Commission may not disturb the ALJ's evidentiary ruling or make additional or alternate findings of fact.

The additional conditions sought by PGS in Paragraphs 29-33 of its exceptions should have been made during hearing and were not. Further they are beyond the scope of consideration made by the ALJ in Conclusion of Law 152:

Conclusion of Law 152. The area subject to this territorial dispute is that of the three Bigham Developments, Bigham North, Bigham West, and Bigham East.

As such, PGS's request for additional conditions is improper comment and does not qualify as proper exceptions. For the reasons stated above, staff recommends that the Commission disregard PGS's request for additional conditions found in Paragraphs 29-33 of its exceptions.

Conclusion

PGS has failed to present any legally justifiable basis for rejecting or modifying any portion of the Recommended Order. Therefore, for the above stated reasons, staff recommends that the Commission deny PGS's exceptions to Conclusions of Law 147 and 160 and disregard its request for additional conditions.

²² Recommended Order, page 63.

Issue 2: Should the Commission accept any exceptions filed by SSGC or Leesburg?

Recommendation: No. SSGC and Leesburg have failed to present any legally justifiable basis for rejecting or modifying any portion of the Recommended Order. Therefore, staff recommends that the Commission deny all of SSGC's and Leesburg's filed exceptions. (Trierweiler, Harper)

Staff Analysis: SSGC and Leesburg took issue with several of the ALJ's findings and conclusions that led to awarding the disputed territory to PGS. Where the arguments and positions of SSGC and Leesburg are aligned, they are addressed together below:

Cost-Per-Home – Exceptions to Findings of Fact 118 and 120

One of the issues raised in the territorial dispute is the cost-per-home for Leesburg to install the distribution infrastructure in the Bigham developments. SSGC and Leesburg argue that the cost-per-home is \$1,219; however, the ALJ found the cost to be \$1,800. The ALJ found in Findings of Fact 118 and 120:

Finding of Fact 118. The cost-per-home for Leesburg and SSGC is \$1800 (*see* ruling on Motion to Strike). In addition, Leesburg will be installing automatic meters at a cost of \$72.80 per home.

Finding of Fact 120. The cost-per-home is a factor -- though slight -- in PGS's favor.

Before making these findings, the ALJ struck testimony of SSGC witness McDonough concerning his updated figure for the cost-per-home. The ALJ determined that the revised \$1,219 figure as testified to by McDonough was created so late in the proceeding that PGS had no opportunity to discover or learn of the revised amount.

According to SSGC and Leesburg, the ALJ committed error by granting PGS's Motion to Strike and excluding evidence on Leesburg's cost-per-home. SSGC argues this ruling created a *de facto* new discovery rule because SSGC timely provided cost documentation to PGS in pretrial discovery, which provided the foundational basis for witness McDonough's testimony. SSGC argues PGS could have discovered the facts at issue if it had taken depositions of SSGC's witness. SSGC and Leesburg also argue that the ALJ failed to correctly apply Section 90.403, F.S., because the ALJ made no finding of prejudice.²³

PGS's Response

PGS asserts \$1,800 is SSGC's cost-per-home of installing distribution infrastructure, but not the total cost to Leesburg to purchase the infrastructure. PGS argues it is not clear whether the \$1,800 figure includes all the relevant costs outlined in Rule 25-7.0472, F.A.C. PGS also argues that SSGC's costs are not Leesburg's costs, unless SSGC is in fact a hybrid utility.

²³ Section 90.403, F.S., provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.

According to PGS, the genesis of these exceptions is the ALJ's decision to strike witness McDonough's testimony that SSGC's cost to serve was \$1,219 per residence. The ALJ concluded that "it would be a surprise and unfairly prejudicial to PGS to allow the newly created information to be received into evidence in lieu of the figure provided by Mr. McDonough as the corporate representative and in response to written discovery." The ALJ found that because Mr. McDonough testified the additional calculations were completed after the deposition deadline, even if PGS had taken an additional deposition of Mr. McDonough the calculations would not have been completed and, therefore, they would not have been discoverable. PGS argues, as a matter of law, that the Commission is powerless to reject the ALJ's evidentiary ruling excluding Mr. McDonough's testimony. The Commission does not have the authority to change the ALJ's finding of fact regarding the cost-per-home because the Commission would first have to reject the ALJ's evidentiary ruling excluding the testimony that supports Leesburg's argument that the alternative figure of \$1,219 should be used.

Staff Analysis and Conclusion

SSGC and Leesburg failed to file additional exceptions to the ALJ's Findings of Fact that are central to his determination of the cost to serve. For example, no exceptions were filed to Finding of Fact 89, which places PGS's facilities required to serve Bigham in a location directly adjacent to Bigham with no additional facilities needed, or to Finding of Fact 91, which estimates PGS's cost to reach the disputed territory from its existing facilities in Fenney to be from \$500 to \$1,000. Nor were exceptions filed to the ALJ's findings that Leesburg required substantial additional facilities to serve the disputed territory (Finding of Fact 93) and would incur significantly more cost to serve the disputed area (Finding of Fact 96). By failing to file exceptions to these findings, SSGC and Leesburg waived their objections to the ALJ's determination of the cost to serve.²⁴

The Commission should not substitute the alternate \$1,219 amount because this amount was stricken from the record by the ALJ. The Commission may reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.²⁵ Staff agrees with PGS that the ALJ's evidentiary ruling to strike this evidence falls outside of the Commission's substantive jurisdiction and should not be disturbed.

In addition, staff recommends that SSGC and Leesburg are seeking to have the Commission reweigh the evidence, and their request for the Commission to make exceptions to Findings of Fact 118 and 120 should be denied.²⁶

Cost (To Serve) Differential – Exceptions to Findings of Fact 39, 97, and 129 and Conclusions of Law 155, 156, and 157

The ALJ also made several findings with respect to the cost differential for Leesburg to serve Bigham versus PGS. SSGC took issue with Findings of Fact 39 and 129; Leesburg took issue

²⁴ *Env'tl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; see also *Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542.

²⁵ Section 120.57(1)(1), F.S.

²⁶ *Rogers v. Department of Health*, 920 So. 2d at 30.

with Findings of Fact 97 and 129 and Conclusions of Law 155, 156, and 157. The findings for which they seek exceptions are quoted below, in pertinent part:

Finding of Fact 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.”

Finding of Fact 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 infrastructure to serve Bigham could be as much as \$2.2 million.

Finding of Fact 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.

Conclusion of Law 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.

Conclusion of Law 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).

Conclusion of Law 157. This factor and weighs strongly in favor of PGS.

Although neither Leesburg nor SSGC filed an exception to Conclusion of Law 154, Conclusion of Law 154 is important to the staff analysis discussed below. Conclusion 154 provides:

Conclusion of Law 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.

SSGC argues the ALJ should have considered PGS's preexisting infrastructure as part of PGS's cost to serve. SSGC contends that the ALJ's decision to exclude PGS's costs for preexisting infrastructure prejudiced Leesburg.

SSGC claims that there is no competent and substantial evidence to support the ALJ's finding that PGS's cost to extend service to Bigham would have been minimal, or that the cost differential between PGS and Leesburg is *de minimis*. SSGC asserts that several cost factors were not considered by the ALJ, such as the number and footage of several lines, meters and meter installations, the cost of PGS's pipeline on State Road 468 and associated gate stations, and the main line on County Road 468.

SSGC further argues there is no competent, substantial evidence to support the ALJ's conclusion that PGS's cost to extend gas service into Bigham would be minimal. SSGC states it made an arrangement with The Villages for Leesburg to be its natural gas utility, and the Agreement provided that Leesburg would charge a rate equal to the fully regulated PGS rate. Because The Villages customers would never be charged rates higher than those charged by PGS, the costs to the customers are essentially same.

Leesburg argues that these findings and conclusions are speculative and contrary to the record. Leesburg also argues that the ALJ relied upon the amount \$2,200,000 (Finding of Fact 97) to find Leesburg's infrastructure costs necessary to serve Bigham to be "uneconomic." Leesburg renews its arguments concerning the ALJ's exclusion of the \$1,219 cost-per-home figure for Leesburg in the Motion to Strike and suggests that rejection of the \$1,219 amount and reliance upon an estimated cost of construction of the CR 501 and CR 468 led to an erroneous conclusion that Leesburg's construction was "uneconomic."

PGS's Response

PGS states that SSGC's exception to Finding of Fact 39 ignores the testimony of Witness Wall that Bigham West was "literally within 5 to 10 feet of the end of our (PGS) distribution system."²⁷ Mr. Wall also testified that the developments were 10 to 100 feet from PGS's lines along CR 468.²⁸ SSGC also ignores Mr. Wall's testimony that it would only cost \$100 to \$200 to tie into Bigham West.²⁹ PGS argues that there is ample competent, substantial evidence to support the ALJ's finding that PGS's cost to serve the Bigham Developments was minimal.

In addition, PGS disputes SSGC's contention that the cost of PGS's lines along CR 468 should have been included in the estimate of PGS's cost to extend service to the Bigham Developments. As the ALJ noted throughout his Recommended Order (Findings of Fact 70, 74, 91, 95, 129, 130, and Conclusions of Law 151, 154, and 162), those lines predated the Bigham Developments. The lines were preexisting facilities that were not built to specifically serve the Bigham Developments, and were therefore properly excluded from any calculation of the incremental cost to serve the Bigham Developments.

PGS argues that Finding of Fact 129 is supported by competent, substantial evidence that establishes the total cost of Leesburg's lines along CR 501 and CR 468. PGS argues that while the total cost of infrastructure that was necessary for Leesburg to serve Bigham may not have been known at the time of the hearing, the record supports the range of costs identified by the ALJ. PGS asserts that the unrefuted testimony of witness Rogers supports the ALJ's Finding of Fact 129 that Leesburg's total cost to serve would be at least \$1,212,207, with persuasive evidence to suggest that the cost would total closer to \$2,200,000. PGS also argues that Leesburg's exceptions fail to provide citations to the record as required by Rule 28-106.271, F.A.C., and should therefore be denied as insufficient.

Finally, SSGC's exception to Finding of Fact 129 is an argument that the substantial cost differential between Leesburg and PGS should be ignored because the rates Leesburg will charge customers in the Villages will be capped by the PGS rate. SSGC cites to no Commission rule or statute to support its position. The term "rates" does not appear in Rule 25-7.0472, F.A.C. Rates are not costs as that term is used in Rule 25-7.0472, F.A.C., and are irrelevant to determine which utility should serve a territory.

Staff Analysis and Conclusion

In Finding of Fact 129, the ALJ found the cost differential between PGS and Leesburg to be "far from *de minimis*." The term "*de minimis*" arises from *Gulf Coast Electric Cooperative, Inc. v. Clark*, 674 So. 2d 120 (Fla. 1996), where the Florida Supreme Court found the cost differential of \$14,583 to be "*de minimis* in comparison" to the cost differential of \$173,480 at issue in *Gulf Power Co. v. Public Service Commission*, 480 So. 2d 97 (Fla. 1985). In *Gulf Power*, the Commission described the \$173,480 cost differential as "relatively extravagant expenditures" by one of the competing utilities that resulted in "an uneconomic duplication of electrical facilities." *Id.* In a more recent dispute, a \$89,738 cost differential was also determined to be *de minimis*.³⁰

²⁷ Wall TR 152.

²⁸ Wall TR 154.

²⁹ Wall TR 156.

³⁰ *Choctawhatchee Electric Cooperative, Inc. v. Graham*, 132 So. 3d at 215-215.

With these opinions serving as a guideline, the ALJ found that a cost differential of at least \$1,212,207 between Leesburg and PGS was far from *de minimis*.

The \$1,219 cost-per-home amount that Leesburg seeks to use as its cost-per-home to serve was stricken from the record by the ALJ. There is no support for Leesburg's assertions that the \$1,219 cost-per-home for Leesburg should replace the \$1,800 figure provided in SSGC's discovery response, or that the low end of the range of Leesburg's cost to construct gas mains to serve Bigham of \$1,212,207 has as much or more support in the record than the \$2,200,000 figure in Findings of Fact 97 and 129 and Conclusion of Law 155 and 156.

Finding of Fact 129 is the ALJ's factual summary of the evidence of the preexisting infrastructure and costs to serve Bigham by PGS and Leesburg. Witness Rogers' testimony supports the ALJ's finding that Leesburg's total cost to serve would be at least \$1,212,207, with persuasive evidence to suggest that the cost would total closer to \$2,200,000.

In Conclusions of Law 154-156, the ALJ further captures the considerable disparity in costs between the two utilities to construct gas mains to reach Bigham. In Conclusion of Law 154, which is supported by Findings of Fact 70, 74, 91, 95, 129, and 130, the ALJ concluded that PGS could provide reliable natural gas service to the disputed territory through its existing facilities at a cost of, at most, \$11,000 with no additional facilities. In Conclusion of Law 155, the ALJ determined that Leesburg could not provide similar service without building 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 \$1,212,2017 and \$2,200,000. Conclusion of Law 155, is supported by Findings of Fact 35-37, 64-69, 85-86, and 94-97. The ALJ's Conclusion of Law 156 cites to Commission precedent in the form of a prior Florida Supreme Court decision to support his ultimate conclusion that the cost differential to Leesburg to provide reliable natural gas service to the disputed territory is far from *de minimis*. Conclusions of Law 154-156 are well supported by competent, substantive evidence and application of relevant legal authority.

In Leesburg's use of the type and strike method to reword the ALJ's findings it purports to suggest that there is evidence to support contrary Findings of Fact 97 and 129 and Conclusions of Law 155, 156, and 157. Leesburg, however, provides no citation to the record to support for these contrary findings. Leesburg attempts to change the outcome of Conclusion of Law 157 by striking the word "PGS" and replacing it with "City," without providing support. Notwithstanding Leesburg's failure to support its alternative findings, the existence of contrary evidence would be insufficient for the Commission to act to select an alternative finding of fact because the Commission is bound by the hearing officer's reasonable inference when conflicting inferences are presented by the record.³¹

Section 120.57(1)(l), F.S., requires the Commission's final order to include an explicit ruling on each exception and sets a high bar for rejecting an ALJ's findings. In order to reject or modify the ALJ's conclusions of law, the Commission must make a finding that its substituted conclusion of law is as or more reasonable than that which it replaced.³² Leesburg has failed to

³¹ *Greseth*, 573 So. 2d at 1006-1007.

³² Section 120.57(1)(l), F.S.

provide support for replacing or modifying these findings of fact or conclusions of law. SSGC and Leesburg failed to provide specific references to the record to support their exceptions. In addition, Conclusions of Law 155, 156, and 157 are clearly supported by the evidence and the application of the applicable rules, statutes, and legal precedent. Staff recommends that the Commission deny SSGC's and Leesburg's exceptions to Findings of Fact 39, 97, and 129 and related Conclusions of Law 155, 156, and 157.

Starting Point to Determine Preexisting Infrastructure – Exceptions to Findings of Fact 74, 85-86, and 88

The ALJ made findings with respect to PGS and Leesburg's existing infrastructure, the date of filing of the territorial dispute, and the starting point to consider preexisting facilities. The Findings of Fact in question are provided below:

Finding of Fact 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.

Finding of Fact 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.

Finding of Fact 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.

Finding of Fact 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."

SSGC and Leesburg take exception to the ALJ's legal determination that PGS had existing infrastructure in the disputed area before Leesburg and SSGC. SSGC states Leesburg was supplying natural gas in the disputed area as of the date of the hearing, and thus, the ALJ incorrectly analyzed the "starting point" for assessing the need for additional facilities. Leesburg likewise asserts that the start point should be determined according to the facilities that existed at the time of the hearing, not when the dispute arose. SSGC also argues that the Recommended

Order lacks evidentiary support and mischaracterizes Leesburg's construction activities in anticipation and furtherance of service to Bigham.

PGS's Response

PGS argues that there is ample competent, substantial evidence from Leesburg's witnesses that Leesburg and SSGC engaged in a "race to serve." No case law supports SSGC's arguments that the hearing date is the starting point for assessing the need for additional facilities; rather, case law supports the ALJ's finding that Leesburg had to deploy lines along CR 501 and CR 468 in order to serve the Bigham Developments, and did so at a cost that far exceeded PGS's cost to serve the same territory.

PGS asserts that Leesburg failed to provide particular citations to the record as required by Rule 28-106.217, F.A.C., and on that basis alone Leesburg's exceptions to the findings of fact should be rejected. PGS further argues that there is no support for Leesburg's argument that the starting point for determining whether each utility had existing facilities capable of serving the disputed area should be the start of the hearing, rather than at the time that the dispute arose. PGS highlights that Leesburg witness Rogers testified that Leesburg would be infringing on PGS territory and recognized the need for a territorial agreement with PGS as far back as September 2017.³³

Staff Analysis and Conclusions

There is competent, substantial evidence to support the ALJ's findings. SSGC and Leesburg are asking the Commission disregard the relative starting positions of the two competing utilities in the dispute and to reweigh the evidence. Florida case law holds that an agency reviewing a recommended order is not authorized to reevaluate the quantity and quality of the evidence presented at a DOAH hearing.³⁴ Rather an agency can only make a determination of whether the evidence is competent and substantial.³⁵ Further, SSGC's failure to file exceptions to Findings of Fact 89, 91, 93, and 96, which establish the starting positions for the two utilities and the resulting costs to serve, results in a waiver of any exceptions to objecting to the issue of "existing facilities."³⁶ Findings of Fact 74, 85, 86, and 88 are based upon competent, substantial evidence and therefore Leesburg's argument that there may also be competent and substantial evidence to support a contrary finding is not persuasive.³⁷ For these reasons, staff recommends that SSGC's exceptions to Findings of Fact 74, 85-86, and 88 should be denied.

Uneconomic Duplication of Facilities – Exceptions to Findings of Fact 127-129 and Conclusion of Law 162

The ALJ found that Leesburg's extension of lines to serve Bigham constituted an uneconomic duplication of PGS's existing facilities. SSGC and Leesburg disagreed and thus they filed exceptions to the following Findings of Fact and Conclusions of Law, in relevant part:

³³ TR 569-571, 576.

³⁴ *Rogers v. Department of Health*, 920 So. 2d at 30.

³⁵ *Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996).

³⁶ *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; see also *Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542.

³⁷ *Greseth*, 573 So. 2d at 1006-1007.

Finding of Fact 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 25-7.041. A review of Commission Orders indicates that many natural gas territorial dispute cases involved a discussion on uneconomic duplication of facilities because disputes are frequently resolved by negotiations and entry of a territorial agreement....

Finding of Fact 128. There are Commission Orders that suggest the issue of uneconomic duplication of facilities is an appropriate field of inquiry in a territorial dispute event 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-94-13-1310-S-GU (Fla. PSC Oct. 224, 1994).

Finding of Fact 129. The evidence in this case firmly establishes that Leesburg’s extension of facilities to the Bigham developments, both through CR 501 line and the CR 468 line, constituted an uneconomic duplication of PGS’s existing gas facilities....

Conclusion of Law 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.

SSGC and Leesburg argue the ALJ erred in reading the statute to include non-statutory criteria, i.e., the uneconomic duplication of facilities, as a factor to be considered and weighed. SSGC argues that the ALJ is “bootstrapping a non-statutory and non-rule uneconomical duplication of facilities analysis – employed by the Commission in addressing a settlement – to the present natural gas territorial dispute.” SSGC and Leesburg further contend that the ALJ’s reliance on Commission decisions to insert uneconomic duplication as a factor for consideration in a gas territorial dispute is contrary to Article V, Section 21 of the Florida Constitution, and thus constitutes improper deference. Article V, Section 21 of Florida’s Constitution provides that “[i]n interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency’s interpretation of such statute or rule, and must instead interpret such statute or rule de novo.” SSGC and Leesburg also object to the ALJ’s reliance upon Commission precedent in electric territorial disputes as improper because those rulings were decided under a different statute.

SSGC also claims that even if consideration of the issue of uneconomic duplication of facilities is appropriate, PGS did not offer evidence that uneconomic duplication of facilities will result from SSGC's activities. SSGC argues the Commission should reject the ALJ's conclusions that continued service to the disputed area by Leesburg would result in uneconomic duplication of facilities and that there is a material difference in the cost to serve.

PGS's Response

According to PGS, the arguments regarding Article V, Section 21 of the Florida Constitution are an overbroad application of this newly adopted constitutional provision designed to remedy the situation where a hearing officer or judge feels compelled to defer to the administrative agency's interpretation of a statute or rule. The new constitutional amendment does not prevent an ALJ from citing to an agency's interpretation of a statute or a rule which is consistent with his own. What is proscribed is an ALJ having to adopt the agency position when the ALJ believes it is not a proper interpretation of statute. PGS argues there is no evidence in the Recommended Order that indicated that the ALJ felt compelled to defer to the Commission.

In Finding of Fact 127, the ALJ points out that neither Section 366.04(3), F.S., nor Rule 25-0472, F.A.C., expressly identifies consideration of "uneconomic duplication of facilities." The ALJ then points out that Rule 25-7.0471, F.A.C., concerning territorial agreements for natural gas utilities, requires the Commission to consider whether a territorial agreement will "eliminate existing or potential uneconomic duplication of facilities." The ALJ further cites to Commission orders on territorial agreements that discuss the potential for uneconomic duplication of facilities and that the Commission finds agreements will eliminate potential uneconomic duplication.

PGS also argues that although Finding of Fact 128 contains a reference to a Commission order that addresses uneconomic duplication of facilities in territorial disputes, there is no indication that the ALJ would have taken a contrary position in the absence of these previous Commission orders. Rather, it appears the Commission precedent is referenced because it is consistent with the ALJ's interpretation of the statute or rule.

PGS also addresses SSGC's assertion that it is inappropriate to consider uneconomic duplication of facilities in natural gas territorial disputes. PGS argues that the avoidance of uneconomic duplication of facilities to provide utility service is the basis for, and the foundation of, the state policy of displacing competition in the utility arena and replacing it with a policy of regulated monopolies; i.e., that one provider of utility service can more economically provide utility service than separate providers vying for the same customers. The establishment of service territories within which utilities have a right to serve avoids the uneconomic duplication of facilities.

PGS argues that while neither the statute regarding the Commission's jurisdiction over territorial disputes between gas utilities (Section 366.04(3), F.S.) nor the statute regarding the Commission's jurisdiction over electric utility territorial disputes (Section 366.04(2), F.S.) specifically uses the phrase "uneconomic duplication," the criteria listed in the statute clearly have that end in mind. In Conclusions of Law 127 and 128, the ALJ cites to a Commission orders that address the relevance of uneconomic duplication of facilities in territorial disputes in electric and gas cases. PGS states that the ALJ also interpreted that Rule 25-7.0472, F.A.C. must be read

consistently with Rule 25-7.0471, F.A.C., which would make uneconomic duplication relevant in territorial disputes involving gas utilities. PGS concludes that there is no indication that the ALJ would have taken a contrary position in the absence of these previous Commission orders, but that he cited to the orders because they are consistent with the ALJ's interpretation of statute and rule.

PGS states that any argument that PGS presented no evidence of uneconomic duplication of facilities is without merit, and the uncontroverted evidence is that Leesburg had to build lines along CR 501, SR 44, and CR 468 in order to duplicate what PGS already had in place along CR 468. PGS also argues that while witness Dismukes testified that no uneconomic duplication would result if Leesburg continued to service the disputed area, he did not testify regarding whether Leesburg's extending facilities to serve the territory was, in the first place, uneconomic. Witness Dismukes did not disagree with amounts put forth as Leesburg's costs or PGS's cost to tie in to its CR 468 line of approximately \$10,000. PGS concludes that Leesburg, by building miles of pipe in order to serve an area literally within a few feet of PGS's lines, is preventing the full utilization of PGS's infrastructure.

Staff Analysis and Conclusion

SSGC's and Leesburg's constitutional deference argument is without merit. The amendment does not prohibit an ALJ from citing to an agency's interpretation of a statute or rule to support the ALJ's independent analysis. The ALJ acknowledges that Section 366.04(3), F.S., and Rule 25-7.0472, F.A.C., do not expressly require consideration of "uneconomic duplication of facilities" as a factor in resolving territorial disputes. He appropriately found adequate support to evaluate "uneconomic duplication of facilities" in his review of the statute, rule, and Commission Orders. The ALJ expressly recognized that the Commission resolved gas territorial disputes by promoting the "longstanding policy of avoiding unnecessary and uneconomic duplication of facilities."³⁸ The ALJ cites Commission orders where a utility that caused uneconomic duplication or that had considerable costs to provide utility service in a disputed area was not permitted to serve customers in the disputed area.³⁹ The ALJ was not in conflict with the Florida Constitution when he considered previous Commission orders and statutory interpretations on uneconomic duplication.

SSGC and Leesburg failed to provide support for rejecting the ALJ's determination that the direction to consider uneconomic duplication of facilities when considering whether to approve a territorial agreement under Rule 25-7.0471(2)(c), F.A.C. (the Territorial Agreement Rule) can be read consistently with Rule 25-7.0472, F.A.C. (the Territorial Dispute Rule). Under Section 366.04(3)(b), F.S., when the Commission resolves territorial disputes for natural gas utilities, it 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." This language contemplates uneconomic duplication as a factor in resolving territorial disputes.

³⁸ For example, Findings of Fact 127-128 contain a history of prior Commission decisions wherein uneconomic duplication of facilities was a consideration in territorial disputes between natural gas utilities that were resolved by Territorial Agreements.

³⁹ For example: *Gulf Coast Elec. Coop v. Clark*, 674 So. 2d 120, 122 (Fla. 1996); *Gulf Power Co. v. Public Service Commission*, 480 So. 2d 987 (Fla. 1985).

Any argument that PGS presented no evidence of uneconomic duplication is without merit when considering the unrefuted testimony of Witness Wall, Vice President of Operations for PGS, that Bigham West was “literally within 5 to 10 feet of the end of our (PGS) distribution system.”⁴⁰ Witness Wall also testified that the Bigham developments were 10 to 100 feet from PGS’s lines along CR 468.⁴¹ SSGC also ignores Witness Wall’s testimony that it would cost only \$100 to \$200 to tie into Bigham West.⁴²

Staff agrees with PGS that in Findings of Fact 127-129, the ALJ determined that the consideration of uneconomic duplication of gas facilities can be read consistently with Rule 25-7.0472, F.A.C., and is supported by ample Commission precedent. Leesburg failed to provide adequate support to disturb these findings. Staff recommends that the Commission deny SSGC’s and Leesburg’s exceptions to Findings of Fact 127-129 and acknowledge the ALJ’s application of facts to the relevant legal precedent to find considerations of uneconomic duplication relevant to the dispute.

Conclusion of Law 162 is the summary to Findings of Fact 127-129, where the ALJ concludes based on the evidence in the record that Leesburg’s construction of gas facilities to serve Bigham involved substantial and significant duplication of existing PGS facilities. The record does not support a finding of no uneconomic duplication. Therefore, staff recommends that the Commission deny SSGC’s and Leesburg’s exception to Conclusion of Law 162.

Race to Serve – Exceptions to Finding of Fact 130 and Conclusion of Law 151(b)⁴³

The ALJ found that Leesburg raced to serve the Bigham Development. SSGC and Leesburg filed exceptions to the ALJ’s “race to serve” findings, as reflected in pertinent part below:

Finding of Fact 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.

Conclusion of Law 151(b). 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

⁴⁰ Wall TR 152.

⁴¹ Wall TR 154.

⁴² Wall TR 156.

⁴³ There are two sequential Conclusion of Law paragraphs 151 in the Recommended Order, so they are referred to herein as Conclusions of Law 151(a) and (b). Conclusion of Law 151(a) concerns the “pay to play” Agreement between Leesburg and SSGC. 151(b) deals with Leesburg’s race to serve. Conclusion of Law 151(b) is the focus of SSGC’s exception that is being addressed here.

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.

SSGC states it made an Agreement with The Villages for Leesburg to be its natural gas utility, and that Leesburg's contract with the Villages did not create a "race to serve" situation. SSGC and Leesburg object to the ALJ's use of the term "race to serve" as it is not found in statute or rule. According to SSGC, the ALJ improperly relied on the electric statute when he concluded there was a "race to serve." SSGC asserts that the impact characterizing Leesburg's construction as a "race to serve" punishes Leesburg for the timely construction of facilities necessary to comply with its contractual obligation and the needs of the Villages. Leesburg asserts there is no competent, substantial evidence to support a finding of a "race to serve," or that the City did not conduct its actions publicly and in good faith, consistent with its obligations as a public entity and pursuant to a lawful contractual agreement. Leesburg also contends that because the infrastructure required to serve Bigham was constructed by the time of the hearing, it should be on equal footing as to cost to serve with PGS, even though PGS's infrastructure predated the dispute.

PGS's Response

SSGC's Exceptions to Findings of Fact 130 and Conclusion of Law 151(b) are closely related to the starting point of existing facilities exceptions by SSGC and Leesburg to Findings of Fact 74, 85-86, and 88, discussed above, and PGS's response to those findings apply here as well.

In addition, PGS argues that even though "race to serve" is not referenced in rule or statute, the term is routinely referred to by the Commission and the Florida Supreme Court to describe the "needless and reckless" duplication of utility facilities that is detrimental to the public interest and which the Commission has a duty to prevent.

PGS argues that the term "race to serve" is a very descriptive shorthand for the activity a utility (in this case SSGC/Leesburg) engages in when it extends its lines into the territory of another utility (in this case PGS) and then argues that it should not be punished for extending its lines into the other utility's territory. Since it now has infrastructure in the disputed area, the "racing utility" argues it should be allowed to serve the disputed area. PGS asserts that in this case, the "race to serve" went further because the encroaching utility (Leesburg/SSGC) continued its encroachment by continuing to build infrastructure during the pendency of the territorial dispute. PGS argues that the Recommended Order accurately characterizes the activity of Leesburg as a race to serve.

PGS argues that the cases Leesburg offers in its exceptions fail to support the positions advocated by Leesburg. For example, Leesburg relies upon the holding in *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), to stand for the proposition that de novo administrative hearings should be based on the facts as they exist at the time of the agency's final action. PGS asserts that while *McDonald* does stand for the proposition that the court should permit evidence of circumstances as they exist at the time of the hearing, the case does not suggest that in a territorial dispute, one party may take advantage of

the delay during the adjudication of a dispute in order to improve its position. PGS asserts that the other cases cited by Leesburg are equally irrelevant to determining the starting point for uneconomic duplication of facilities in the adjudication of territorial disputes between utilities or a “race to serve.”

PGS also argues that the actual territorial disputes cases cited for authority by Leesburg fail to support the positions taken by Leesburg. None of the cited cases provide any guidance for determining when the start time for making uneconomic duplication of facilities determinations is, or relate to a race to serve in such a way that would support Leesburg’s cost to serve position as being equal with PGS. These cases do not assist Leesburg’s position regarding uneconomic duplication of facilities in its “race to serve” Bigham.

Staff Analysis and Conclusion

SSGC’s and Leesburg’s arguments that Leesburg will suffer significant financial impact if not permitted to serve Bigham are rejected by the ALJ. This alleged adverse financial impact was incurred by Leesburg after the filing of the petition. Leesburg built its facilities with knowledge of PGS’s preexisting infrastructure, but that does not mean Leesburg was entitled to do so. The record is replete with examples of Leesburg’s advanced knowledge of PGS’s preexisting infrastructure and service immediately adjacent to this area. (Findings of Fact 34-38) SSGC’s and Leesburg’s disagreements with the ALJ’s determination disregard the entirety of the law on “race to serve” as well as the Commission’s precedent and authority to adjudicate territorial disputes and is akin to their assertions that The Villages should be able to select its gas service provider.

Leesburg’s contention that its completion of the facilities required to serve Bigham prior to the date of the hearing should have removed the considerations of “uneconomic duplication of facilities or “race to serve” from the ALJ’s determination of cost to serve is unsupported. The ALJ cannot ignore the competent, substantial evidence in the record concerning PGS’s preexisting gas infrastructure in the area or Leesburg’s substantial cost to serve the same area. Leesburg witness Rogers testified that Leesburg, as far back as September 2017, recognized it would be infringing on PGS territory, and as such, it needed a territorial agreement with PGS, but declined to raise the matter with PGS.⁴⁴

Further, SSGC disputes Finding of Fact 130, by referring to evidence that is not in the record (PGS’s original costs to serve the area adjacent to Bigham) and further argues that the ALJ failed to consider that evidence. Section 120.57(1)(k), F.S., establishes the standards by which an agency shall consider exceptions to finding of fact, stating in pertinent part:

The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number and paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

⁴⁴ TR 569-571, 576.

SSGC's and Leesburg's exceptions to Finding of Fact 130 were deficient in that each failed to include appropriate and specific citations to the record.

The alleged adverse financial impact upon Leesburg that the ALJ's "race to serve" finding would have upon Leesburg is not a compelling argument. Leesburg offers no citations to the record sufficient to overcome the ALJ's extensive findings regarding Leesburg's deliberate actions that resulted in uneconomic duplication of facilities in its "race to serve" Bigham. The Commission cannot reject or modify the findings of fact unless the Commission first determines that the findings of fact were not based upon competent and substantial evidence, or that the proceedings upon which the findings were based did not comply with the essential requirements of law.⁴⁵ Further, financial need is not a relevant factor to be considered by the Commission in resolving a territorial dispute. Therefore, staff recommends that the Commission deny SSGC's exception to Finding of Fact 130, as it is supported by competent and substantial evidence.

As to Conclusion of Law 151(b), SSGC's and Leesburg's failures to file exceptions to the ALJ's Findings of Fact 34-38, which detail SSGC's and Leesburg's actual knowledge and responsibility to acknowledge that PGS was serving the area immediately adjacent to Bigham, are facts that support a finding of a "race to serve," and cannot be ignored as inconvenient. As these findings directly support Conclusion of Law 151(b), regarding Leesburg's "race to serve," a party that files no exceptions to certain underlying findings of fact has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.⁴⁶

Staff agrees with PGS's response to Leesburg's argument that the starting point for consideration of uneconomic duplication and a "race to serve" is not the hearing date and that the cases cited by Leesburg do not support its argument. Staff agrees that the holding in *McDonald*, 346 So. 2d at 584, stands for the proposition that the ALJ should consider relevant evidence that exists at the time of the agency's final action. However, there is no support for the argument that facts associated with the amount of infrastructure that Leesburg was able to build before the date of the hearing should be disregarded in a territorial dispute. To the contrary, the concept of a "race to serve" is a well-established factor to be considered in a territorial dispute and facts underlying a "race to serve" argument are appropriately raised at the time of hearing. The proposition for which *McDonald* was cited by Leesburg actually supports the notion that "race to serve" evidence that exists at the time of the agency's final action should be considered. As such, the ALJ confirmed that the amount of infrastructure that Leesburg was able to build before the date of the hearing is a relevant factor in a territorial dispute. He did so by concluding:

...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."⁴⁷

SSGC makes a similar argument that the ALJ's Finding of Fact 88 ignored the financial needs of The Villages by arbitrarily selecting a starting point; however, SSGC failed to provide a specific

⁴⁵ Section 120.57(1)(I), F.S.

⁴⁶ *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc.*, 847 So. 2d 540, at 542 (Fla. 4th DCA 2003).

⁴⁷ Finding of Fact 88.

reference to legal authority that might support its position. As noted above, financial need is not a relevant factor to be considered by the Commission in its resolution of a territorial dispute. On the other hand, a “race to serve” is a factor to be considered at the time of hearing and the facts underlying a “race to serve argument are appropriately raised at the time of hearing.

SSGC makes an additional argument that the ALJ did not make a specific finding that any portion of Bigham was the service area of PGS either at the time Leesburg began to provide service therein, or at the time PGS filed its petition. However, SSGC again failed to provide any legal support for its second exception to Conclusion of Law 151(b)(and Findings of Fact 85, 88 and 130), other than to repeat its argument that The Villages should have been permitted to select its own provider. The argument that Bigham was completely unclaimed territory until The Villages chose to build there and the developer could therefore choose its own gas service provider, has no support in the record and is contrary to the law. SSGC has failed to provide a basis to disturb the ALJ’s Findings of Fact or Conclusions of Law concerning Leesburg’s “race to serve” Bigham.

Leesburg and SSGC failed to provide a basis upon which the Commission should substitute Leesburg’s assertions that it should benefit from its construction efforts during the pendency of this hearing, for the ALJ’s Conclusion of Law 151(b).

Staff recommends that the Commission deny the request for exceptions to Finding of Fact 130 and Conclusion of Law 151(b).

Customer Preference – Exception to Conclusion of Law 166

The ALJ found that customer preference should not play a role in the resolution of this dispute. In Conclusion of Law 166 he found:

Conclusion of Law 166. The factors set forth in rule 25-7.0472(2)(a)-(d), on the whole, strongly favors PGS’s right to serve Bigham. Thus, customer preference plays no role.

Both SSGC and Leesburg took exception with this finding. They argue that the customer’s preference (that is The Villages’ preference) is for Bigham to be served by Leesburg, and that the ALJ should have considered this.⁴⁸

Leesburg encourages the Commission to reweigh the evidence by arguing that under a majority of the factors, both parties were equally capable of serving Bigham. Leesburg, as a municipal utility, highlights that it prevailed under one category, the ability to provide other utility services to the area in addition to gas. PGS, a public utility that provides only natural gas service, was never a viable contender in this category. Ignoring that PGS prevailed under the other factors, Leesburg seeks a substitute ruling that the parties’ cost to serve was substantially equal and therefore customer preference is relevant, and would break the tie.

⁴⁸ 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.

PGS's Response

PGS argues that SSGC and Leesburg are asking the Commission to ignore the large number of findings of fact, conclusions of law, and evidence in the form of exhibits, maps, and testimony, that show that Leesburg's costs to serve greatly exceed those of PGS by millions of dollars. PGS asserts the cost to extend service to the Bigham Developments for PGS was at most \$11,000,⁴⁹ while the cost to extend service for Leesburg was \$1.94 million.⁵⁰ PGS further argues that the Agreement between SSGC and Leesburg would cause Leesburg to spend up to \$2.2 million in additional costs.⁵¹ In view of this overwhelming evidence on cost to serve and other factors, the ALJ determined that the factors strongly supported PGS, and therefore, customer preference plays no role in determining which utility should serve the disputed area.

Staff Analysis and Conclusion

Staff disagrees with the assertions that there is no competent, substantial evidence to support the ALJ's conclusion that customer preference should not be a factor in this dispute. The ALJ supported his Conclusion of Law 166 by laying out the factors contained in Rule 25-7.0472(2)(a)-(d), F.A.C., that favor PGS. The final factor in a cost to serve determination in a territorial dispute is found in Rule 25-7.0472(2)(e), F.A.C., which provides the Commission may consider "Customer preference if all other factors are substantially equal." Because all of the factors are not substantially equal, customer preference should not be considered.

Conclusion of Law 166, is supported by a multitude of findings, including Findings of Fact 20-30, 64-65, 89, 91, 93, and 96. These findings establish the starting positions for the two utilities and the resulting costs to serve, the distance of Leesburg's mains at the time that Leesburg entered the Agreement, and Leesburg's awareness that PGS was the closest provider to the three Bigham developments. Thus, SSGC and Leesburg waived any exceptions concerning PGS's preexisting facilities and service to the area adjacent Bigham. SSGC and Leesburg's failure to object to the Findings of Fact that supported the ALJ's Conclusion precludes them from taking exception with Conclusion of Law 166. A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact."⁵²

For the reasons stated above, staff recommends that SSGC's and Leesburg's exceptions to Conclusion of Law 166 to the Recommended Order be denied.

General Exceptions to the ALJ's Ultimate Conclusion

The ALJ concluded his Recommender Order by finding PGS should be awarded the disputed territory:

[I]t is recommended that the Public Service Commission enter a final order awarding People's Gas System the right to serve Bigham North, Bigham West,

⁴⁹ TR 194, 200-201

⁵⁰ TR 555

⁵¹ See Finding of Fact 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."

⁵² *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; see also *Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542

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 People's Gas from the City of Leesburg or South Sumter Gas Company, LLC, as deemed appropriate by the Commission.⁵³

SSGC and Leesburg reject the ALJ's conclusion and recommendation awarding the disputed territory to PGS. In their opinions, the weight of competent, substantial evidence and appropriate construction and application of applicable law should result in a recommendation that Leesburg may continue to serve Bigham. SSGC and Leesburg take further exception that the ALJ's ultimate conclusion may result in PGS's acquisition of Leesburg's property, which SSGC argues would be a taking. According to Leesburg, neither the ALJ or the Commission have the right to divest Leesburg's property rights to facilities and infrastructure owned by Leesburg without due process.

PGS's Response

PGS argues that SSGC's and Leesburg's final exceptions are requests that the Commission ignore the ample and overwhelming weight of the competent and substantial evidence that the ALJ used to conclude that PGS should serve the Bigham Developments.

Staff Analysis and Conclusion

SSGC's and Leesburg's general exceptions are devoid of the required legal citation or support to qualify as an exception. Exceptions must identify the disputed portion of the recommended order by page number or paragraph, must identify the legal basis for the exception, and include any appropriate and specific citations to the record.⁵⁴ Staff recommends that the Commission reject and deny SSGC's and Leesburg's general exceptions.

Conclusion

Neither SSGC or Leesburg have presented any legally justifiable basis for rejecting or modifying any portion of the Recommended Order. Therefore, staff recommends that the Commission deny all of SSGC or Leesburg's filed exceptions.

⁵³ Recommended Order pages 63, 64.

⁵⁴ Rule 28-106.217(1), F.A.C.

Issue 3: Should the Commission approve the Recommended Order submitted by the Administrative Law Judge?

Recommendation: Yes. The Commission should approve and adopt the attached Recommended Order (Attachment A) as the Final Order in this docket. (Trierweiler, Harper)

Staff Analysis: Staff recommends that the Commission adopt the ALJ's findings of fact. According to Section 120.57(1)(l), F.S., the Commission may not reject or modify the recommended findings unless it first determines from a review of the entire record that the findings of fact were not based upon competent, substantial evidence or that the proceeding on which the findings were based did not comport with the essential requirements of law.

Staff has reviewed the Recommended Order and believes that the findings of fact are based upon competent, substantial evidence that is consistent with the evidence presented by the staff and parties' witnesses. Further, staff believes that the proceedings before the ALJ comported with the essential requirements of law. Consistent with staff's recommendations in Issues 1-2, staff recommends that the Commission adopt the findings of fact without modification.

The Commission may reject or modify the conclusions of law or the interpretation of administrative rules over which it has substantive jurisdiction. When doing so, the Commission must state with particularity its reasons for modifying or rejecting the conclusion or interpretation. In addition, the Commission must make a finding that its substituted conclusions of law or interpretations of rule are as, or more reasonable than, that of the Administrative Law Judge. Section 120.57(1)(l), F.S. Commission staff recommends that the conclusions are consistent with prior Commission interpretations and decisions.

Based on the foregoing, staff recommends that the Commission adopt the ALJ's Recommended Order, found in Attachment A, as its Final Order, regarding this petition. Accordingly, Peoples Gas System should be awarded the right to provide natural gas service to Bigham North, Bigham West, and Bigham East.

Issue 4: Should this docket be closed?

Recommendation: Yes the Docket should be closed upon the issuance of a final order after the time for filing an appeal has run. (Trierweiler, Harper)

Staff Analysis: The docket should be closed upon the issuance of a final order and after the time for filing an appeal has run.