BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.	DOCKET NO. 20180055-GU ORDER NO. PSC-2020-0052-FOF-GU ISSUED: February 11, 2020

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK, Chairman
ART GRAHAM
JULIE I. BROWN
DONALD J. POLMANN
ANDREW GILES FAY

FINAL ORDER RESOLVING TERRITORIAL DISPUTE

BY THE COMMISSION:

I. BACKGROUND

On February 23, 2018, Peoples Gas System (PGS) filed its 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 customers in Sumter County, Florida, including The Villages. The area in dispute is characterized as residential areas of varying density, interspersed with commercial support areas, and is referred to in the record as Bigham North, Bigham West, Bigham East (collectively "Bigham" or the "disputed area").

The dispute was referred to the Division of Administrative Hearings (DOAH) on August 21, 2018, and was assigned DOAH Case No. 18-004422. Administrative law judge (ALJ) Gary Early conducted the four-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. The hearing concluded on June 27, 2019. The ALJ issued his Recommended Order on September 30, 2019, awarding the disputed territory to PGS. The Recommended Order is attached as Attachment A. On October 15, 2019, the parties submitted exceptions to the Recommended Order. On October 25, 2019, each party filed a Response to Exceptions.

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 reject or modify an ALJ's findings of fact only 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.[1]

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.[2]

In regard to the parties' exceptions to the ALJ's Recommended Order, Section 120.57(1)(k), F.S., provides that we are not required 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 not identify the legal basis for the exception, or those that lack appropriate and specific citations to the record.[3] Section 120.57(1)(l), F.S., otherwise requires our final order to include an explicit ruling on each exception and sets a high bar for rejecting an ALJ's findings.

We have Jurisdiction over this matter under Sections 120.57, 366.04(2)(e) and (3)(b), F.S. As discussed in more detail below, we deny the parties' Exceptions to the Recommended Order and adopt the Administrative Law Judge's Recommended Order as the Final Order.

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 which is part of The Villages in the northwest corner of the City of Wildwood, in Sumter County. Bigham, the next planned development by The Villages in the area, was to be located immediately adjacent to Fenney. At issue in the dispute is the role that SSGC, The Villages construction affiliate, played in providing natural gas service to the customers residing in Bigham. The ALJ determined that SSGC is a construction company, not a gas utility. 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 sell the facilities to Leesburg. In accordance with their "pay to play" arrangement under the Agreement,

[1] Section 120.57(1)(l), F.S.
[2] *Id.*
[3] Section 120.57(1)(k), F.S.

Leesburg was also obligated to remit a significant share of its gas revenues back to SSGC.[4] The Agreement set initial rates for Bigham customers at the same rates that were being paid by PGS customers.

The distance from PGS's preexisting distribution line into any of the areas within the Bigham development was between 10 to 100 feet. PGS's total cost of connecting to the Bigham interior service lines was determined to be, at most, $10,000, and its cost of extending gas distribution lines was, at most, $11,000. The ALJ found that the cost differential between Leesburg's and PGS's costs to serve was far from de minimis. The ALJ 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 to 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 make a territorial determination under Chapter 366, F.S. and 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.

Relevant to this proceeding, Section 366.04(3)(b), F.S., provides that in the exercise of its jurisdiction, the Commission shall have authority over natural gas utilities:

> To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among natural gas utilities. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

Rule 25-7.042, F.A.C., governs territorial disputes between natural gas utilities. The rule provides:

> (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

[4] 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."

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.

II. EXCEPTIONS

A. PGS's Exceptions

Conclusion of Law 147 - Hybrid Utility

PGS takes exception with the ALJ's 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 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),[5] F.S., does not answer the question of whether the Agreement creates a "public utility" as defined in Section 366.02(1),[6] F.S. PGS states that the definition provided in 366.04(3)(c), F.S., is only to make clear that our jurisdiction to approve territorial agreements and resolve territorial disputes extends beyond Commission-regulated natural gas utilities. PGS essentially argues that the ALJ's 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 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. 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.

Leesburg also offers several arguments in opposition to PGS's attempt to reargue the "hybrid utility" finding in Conclusion of Law 147. Leesburg notes there is competent, substantial

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[5] 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."

[6] 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."

evidence of record to support Conclusion of Law 147, 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."[7] 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 we have 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 Law 147 is supported by competent, substantial evidence and may not be modified or rejected by this Commission.

Ruling

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 us 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

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

> 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, our jurisdiction over municipalities is limited to rate structure, safety oversight, and territorial disputes.[8] PGS is asking us to go beyond our jurisdiction to interpret a contract between a municipality and a private company.[9] While a territorial agreement or dispute triggers our jurisdiction, it does not, in and of itself, provide us with new or additional regulatory authority over a municipal utility's contractual agreements.[10] PGS has not provided a sufficient basis to deviate from the ALJ's finding that Leesburg is a municipal utility and SSGC is a private construction company.

PGS made the "SSGC is a hybrid public utility" argument at hearing, and the ALJ addresses the arguments in the Recommended Order.[11] Conclusion of Law 147 is supported by competent, substantial evidence in the record. As noted in uncontested Finding of Fact 63, PGS failed to support a contrary conclusion that is as or more reasonable than the one reached by the ALJ.[12] For the above stated reasons, we deny PGS's exception to Conclusion of Law 147.

Conclusion of Law 160 - Cost per Home

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 the 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 from 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. PGS argues that Leesburg's total costs are not simply SSGC's costs, but should include

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[8] Section 366.06(2), F.S.

[9] 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."

[10] There is no evidence in the record of a rule, order, or statute that gives us 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, we would have ratemaking and service authority over that utility. In this case, there is insufficient record evidence that SSGC was acting as a utility.

[11] Findings of Fact 3, 7, and 63.

[12] Section 120.57(1)(1), F.S.

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 and Leesburg argue PGS is asking us 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 finding 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.

Ruling

PGS asks us 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 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. PGS has not provided a sufficient basis to deviate from the ALJ's finding regarding SSGC's costs to construct the gas infrastructure necessary for Leesburg to serve Bigham, particularly in the absence of contrary evidence from Leesburg. The ALJ's finding 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."[13] 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.

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.[14] Therefore, based on the foregoing reasons, we deny PGS's exception to Conclusion of Law 160.

PGS's Exceptions in paragraphs 29-33

In paragraphs 29-33 of its Exceptions to the Recommended Order, PGS requests that we, 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 our final order.
- PGS must pay SSGC or Leesburg no more than $1,200 per residential customer within the Bigham Developments.
- 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.
- Prohibit Leesburg from serving, either temporarily or permanently, any customers along the route.

As the prevailing party in the territorial dispute, PGS argues that Commission precedent supports its additional requested conditions against Leesburg for its failed race to serve and uneconomic duplication. SSGC and Leesburg respond by arguing that we are prohibited from acting on PGS's requests based upon a variety of reasons that include a lack of jurisdiction, the

[13] *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).
[14] Section 120.57(1)(1), F.S.

actions would constitute an improper taking, and 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.

Ruling

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][15]

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 us to make a finding that PGS pay no more than $1,200 per resident/customer within the Bigham Developments. PGS also argues that we should adopt all of its conditions because doing so would be consistent with our prior orders in previous territorial disputes that involve uneconomic duplication or a "race to serve" where the prevailing parties received similar results.

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. PGS has failed to support its request that we disturb the ALJ's evidentiary ruling or make additional or alternate findings of fact.

The request for additional conditions sought by PGS in paragraphs 29-33 of its exceptions should have been made during the hearing and was not. As such, PGS's request for

[15] Recommended Order, page 63.

additional conditions is improper comment and the requested conditions do not qualify as proper exceptions. For the reasons stated above, we will disregard PGS's request for additional conditions found in paragraphs 29-33 of its exceptions.

B. SSGC's and Leesburg's Exceptions

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.

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

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.
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> 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 retaken the deposition of SSGC's witness after McDonough had been designated as a "cost to serve" expert 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.[16]

In its 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,

[16] 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.

F.A.C. PGS also argues that SSGC's costs are not Leesburg's costs, unless SSGC is in fact a hybrid utility.

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 we are powerless to reject the ALJ's evidentiary ruling excluding Mr. McDonough's testimony. In order to change the ALJ's finding of fact regarding the cost-per-home an agency 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.

Ruling

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.[17]

Further, we will not substitute the alternate $1,219 amount because this amount was stricken from the record by the ALJ. While we may reject or modify conclusions of law over which we have substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction,[18] the ALJ's evidentiary ruling to strike this evidence falls outside of our substantive jurisdiction and will not be disturbed.

In addition, SSGC and Leesburg are seeking to have us reweigh the evidence, which we may not do; therefore, their exceptions to Findings of Fact 118 and 120 are denied.[19]

[17] *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; see also *Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542.
[18] Section 120.57(1)(1), F.S.
[19] *Rogers v. Department of Health*, 920 So. 2d at 30.

Exceptions to Findings of Fact 39, 97, and 129 and Conclusions of Law 155, 156, and 157 - Cost to Serve Differential

The ALJ 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 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."
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> 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.
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> 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.
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> 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, it is important to our analysis. 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 the 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."

In its 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." Mr. Wall also testified that the developments were 10 to 100 feet from PGS's lines along CR 468. SSGC also ignores Mr. Wall's testimony that it would only cost $100 to $200 to tie into Bigham West. 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. PGS states that 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, PGS argues 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. PGS contends that SSGC cites to no Commission rule or statute to support its position and that the term "rates" does not appear in Rule 25-7.0472, F.A.C. PGS concludes that 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.

Ruling

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*, we 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*.[20] 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. Conclusion of Law 154, is supported by Findings of Fact 70, 74, 91, 95, 129, and 130, and 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 for 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 as support for these contrary findings. Leesburg attempts to change the outcome of Conclusion of Law 157 by

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

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 us to act to select an alternative finding of fact because we are bound by the hearing officer's reasonable inference when conflicting inferences are presented by the record.[21]

Section 120.57(1)(l), F.S., requires our 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, we must make a finding that our substituted conclusion of law is as or more reasonable than that which it replaced.[22] Leesburg has failed to 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. Therefore, SSGC's and Leesburg's exceptions to Findings of Fact 39, 97, and 129 and related Conclusions of Law 155, 156, and 157 are denied.

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

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

[21] *Greseth*, 573 So. 2d at 1006-1007.
[22] Section 120.57(l)(l), F.S.

> 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.

In its response, PGS argues that there is ample competent, substantial evidence from Leesburg's witnesses that Leesburg and SSGC engaged in a "race to serve." PGS states that 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.

Ruling

There is competent, substantial evidence to support the ALJ's findings. SSGC and Leesburg are asking us to 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.[23] Rather an agency can only make a determination of whether the evidence is competent and substantial.[24] Further, SSGC's failure to file exceptions to Findings of

[23] *Rogers v. Department of Health*, 920 So. 2d at 30.
[24] *Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996).

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."[25] Findings of Fact 74, 85, 86, and 88 are based upon competent, substantial evidence. Leesburg's argument that there is competent, substantial evidence to support contrary findings failed to offer sufficient justification to alter the ALJ's findings.[26] For these reasons, Leesburg's and SSGC's exceptions to Findings of Fact 74, 85-86, and 88 are denied.

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

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 filed exceptions to the following Findings of Fact and Conclusions of Law, in relevant part:

> 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 faculties 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

[25] *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; see also *Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542.
[26] *Greseth*, 573 So. 2d at 1006-1007.

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 our prior 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 we 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.

In its response, PGS states that SSGC's and Leesburg's 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. It further states that 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 agues there is no evidence in the Recommended Order that indicated that the ALJ felt compelled to defer to Commission precedent.

PGS argues that 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." It states that the ALJ 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." PGS further states that the ALJ further cites to our prior orders on territorial agreements that discuss the potential for uneconomic duplication of facilities and that we have found agreements will eliminate potential uneconomic duplication.

PGS also argues that although Finding of Fact 128 contains a reference to one of our prior orders 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 our previous

orders. Rather, PGS contends that 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. It states that 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 our jurisdiction over territorial disputes between gas utilities (Section 366.04(3), F.S.) nor the statute regarding our jurisdiction over electric utility territorial disputes (Section 366.04(2), F.S.) specifically uses the phrase "uneconomic duplication," the criteria listed in the statutory provisions clearly have the avoidance of uneconomic duplication in mind. In Conclusions of Law 127 and 128, the ALJ cites to 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 our previous orders, but that he cited to Commission precedent 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. PGS states that 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.

Ruling

There is no merit in SSGC's and Leesburg's constitutional deference arguments. The Florida Constitution 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 found adequate support to evaluate "uneconomic duplication of facilities" in his review of the statute, rule, and Commission Orders. The ALJ expressly recognized that we resolve gas territorial

disputes by promoting the "longstanding policy of avoiding unnecessary and uneconomic duplication of facilities."[27] The ALJ cited 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.[28] The ALJ was not in conflict with the Florida Constitution when he considered our previous 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 we resolve territorial disputes for natural gas utilities, we 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.

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." Witness Wall also testified that the Bigham developments were 10 to 100 feet from PGS's lines along CR 468. SSGC also ignores Witness Wall's testimony that it would cost only $100 to $200 to tie into Bigham West.

With respect to 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. SSGC's and Leesburg's exceptions to Findings of Fact 127-129 are denied. The ALJ correctly applied the 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 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, SSGC's and Leesburg's exception to Conclusion of Law 162 are denied.

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[27] 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.

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

Exceptions to Finding of Fact 130 and Conclusion of Law 151(b)[29] - Race to Serve

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 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.

[29] 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.

In its response, PGS argues that 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 us and the Florida Supreme Court to describe the "needless and reckless" duplication of utility facilities that is detrimental to the public interest and which we have a duty to prevent. PGS argues that the term "race to serve" is a 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 also 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. PGS states that 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. It concludes that these cases do not assist Leesburg's position regarding uneconomic duplication of facilities in its "race to serve" Bigham.

Ruling

We note that SSGC's and Leesburg's arguments that Leesburg will suffer significant financial impact if not permitted to serve Bigham were 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.

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.

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

Moreover, the alleged adverse financial impact 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. We cannot reject or modify the findings of fact unless we first determine 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.[30] Further, financial need is not a relevant factor to be considered in resolving a territorial dispute. Therefore, SSGC's exception to Finding of Fact 130 is denied, as the ALJ's finding 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

[30] Section 120.57(1)(l), F.S.

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.[31]

PGS accurately responded 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 Leesburg's argument. 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."[32]

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 reference to legal authority that might support its position. As noted above, financial need is not a relevant factor to be considered in our resolution of a territorial dispute. On the other hand, "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.

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[31] *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).
[32] Finding of Fact 88.

Leesburg and SSGC also failed to provide a basis upon which we 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). Therefore, Leesburg's and SSGC's exceptions to Finding of Fact 130 and Conclusion of Law 151(b) are denied.

Exception to Conclusion of Law 166 - Customer Preference

Both SSGC and Leesburg took exception Conclusion of Law 166. In Conclusion of Law 166 the ALJ found that customer preference should not play a role in the resolution of this dispute:

> 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.

SSGC and Leesburg 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.[33]

Leesburg encourages us 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.

In its response, PGS argues that SSGC and Leesburg are asking us 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, while the cost to extend service for Leesburg was $1.94 million. PGS further argues that the Agreement between SSGC and Leesburg would cause Leesburg to spend up to $2.2 million in additional costs.[34] 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 will serve the disputed area.

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[33] 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.

[34] *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."

Ruling

We disagree 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 we 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. SSGC and Leesburg's failure to object to these 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."[35] Therefore, SSGC and Leesburg waived any exceptions concerning PGS's preexisting facilities and service to the area adjacent Bigham.

SSGC's and Leesburg's exceptions to Conclusion of Law 166 to the Recommended Order are denied.

General Exceptions to the ALJ's Ultimate Conclusion

SSGC and Leesburg filed exceptions to the 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, 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 form the City of Leesburg or South Sumter Gas Company, LLC, as deemed appropriate by the Commission.[36]

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 we, nor the ALJ, have the right to divest Leesburg's property rights to facilities and infrastructure owned by Leesburg without due process.

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[35] *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; see also *Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542
[36] Recommended Order pages 63, 64.

PGS's response states that SSGC's and Leesburg's final exceptions are requests that we 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.

Ruling

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.[37] We therefore deny SSGC's and Leesburg's general exceptions.

Conclusion

SSGC and Leesburg have failed to present any legally justifiable basis for rejecting or modifying any portion of the Recommended Order. Therefore, all of SSGC's and Leesburg's filed exceptions are denied.

III. ADOPTION AND APPROVAL OF THE RECOMMENDED ORDER AS THE FINAL ORDER

As set forth above, we deny all exceptions filed by PGS, SSGC, and Leesburg, and approve all of the ALJ's findings of fact and conclusions of law without modification. Based on the foregoing, we hereby adopt the ALJ's Recommended Order, found in Attachment A, as our Final Order, regarding PGS's petition. Accordingly, Peoples Gas System shall be awarded the right to provide natural gas service to Bigham North, Bigham West, and Bigham East.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the attached Recommended Order (Attachment A) is adopted and approved as the Final Order in this docket. It is further

ORDERED that all of the exceptions to the Recommended Order filed by Peoples Gas System, South Sumter Gas Company, LLC, and the City of Leesburg are denied. It is further

ORDERED that the docket shall be closed after the time for filing an appeal has run.

[37] Rule 28-106.217(1), F.A.C.

By ORDER of the Florida Public Service Commission this 11th day of February, 2020.

ADAM J. TEITZMAN
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

WLT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PEOPLES GAS SYSTEM,

Petitioner,

vs. Case No. 18-4422

SOUTH SUMTER GAS COMPANY, LLC,
AND CITY OF LEESBURG,

Respondents,
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 24 through 27, 2019, in Tallahassee, Florida, before E. Gary Early, a designated administrative law judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUES

This proceeding is for the purpose of resolving a territorial dispute regarding the extension of gas service to areas of The Villages of Sumter Lake ("The Villages") in Sumter County, Florida, pursuant to section 366.04(3)(b), Florida Statutes, and Florida Administrative Code Rule 25-7.0472; and whether a Natural Gas System Construction, Purchase, and Sale Agreement ("Agreement") between the City of Leesburg ("Leesburg") and South Sumter Gas Company ("SSGC") creates a "hybrid" public utility subject to ratemaking oversight by the Public Service Commission ("Commission").

PRELIMINARY STATEMENT

On February 23, 2018, Peoples Gas System ("PGS" or "Petitioner") filed a Petition of Peoples Gas System ("Petition"), with the Commission which alleged that a territorial dispute exists between PGS and Leesburg or SSGC (collectively "Respondents"), or a combination thereof, with

respect to the rights of each to serve customers in Sumter County, Florida, including The Villages.

On June 28, 2018, The Commission entered an Order Denying [Respondents'] Motions to Dismiss Peoples Gas System's Petition to Resolve Territorial Dispute ("Order"), which denied Respondents' separately filed motions to dismiss and recognized "our statutory responsibility to resolve any territorial dispute upon petition and . . . to consider the cost of each utility to provide natural gas service to the disputed area presently and in the future."

The Petition was referred to DOAH on August 21, 2018, assigned to Administrative Law Judge ("ALJ") Donald R. Alexander, and set for a final hearing on January 28 through 31, 2019.

On September 7, 2018, Leesburg filed a Counter Petition, which objected to efforts by PGS to serve the American Cement facility in Sumter County. After a series of motions and responses were filed, an Order on Counter Petition was entered on September 28, 2018, which noted that the subject matter of the Counter Petition was in the jurisdiction of the Commission and, until such time as the American Cement dispute is referred by the Commission, DOAH has no authority to address that issue.

On September 20, 2018, the Commission filed a Notice of Participation by the staff of the Commission.

On December 20, 2018, SSGC, on behalf of the parties and after consultation with the ALJ's office, filed an Unopposed Motion for a Continuance to a Date Certain. The motion was granted on December 21, 2018, and the final hearing was rescheduled for April 1 through 5, 2019.

On January 10, 2019, SSGC filed an Unopposed Motion for Entry of Confidentiality and Protective Order which sought protection from public disclosure of certain trade secret and confidential business information, which motion was granted on January 14, 2019. On January 15, 2019, SSGC moved to amend the Confidentiality and Protective Order, which was granted on January 24, 2019.

On March 25, 2019, SSGC filed a Stipulated Motion for Continuance of the April 1 through 5, 2019, final hearing, which was granted on March 28, 2019. A Third Notice of Hearing was entered on April 3, 2019, which rescheduled the hearing for June 24 through 28, 2019.

Between April 3, 2019, and the commencement of the final hearing, a series of evidentiary and procedural motions were filed, disposition of which are as reflected in the docket.

On June 11, 2019, this case was transferred to the undersigned, and a telephonic pre-hearing conference was held on June 14, 2019. At the conclusion of the hearing, an addendum to Notice of Hearing was entered that established a public comment

period during the final hearing for any non-party customer to receive oral or written communications regarding the territorial dispute pursuant to section 366.04(4).

On June 21, 2019, the parties filed their Joint Pre-hearing Stipulation, which included stipulated issues of fact and law. Among the stipulated facts was that "[t]he issues of cost of capital and amortization and depreciation are not applicable to this dispute."

The final hearing was convened as scheduled on June 24, 2019. At the conclusion of the evidentiary proceedings on June 24, 2019, the hearing was recessed, and the public comment period was convened as noticed. No non-party customers or other members of the public appeared. The public comment period was then adjourned.

Petitioner called as witnesses: Thomas J. Szelistowski, PGS's President; Rick Wall, PGS's Vice President for engineering and operations; Bruce Stout, PGS's gas design Project Manager; Dr. Stephen Durham, who was accepted as an expert in economics; James Caldwell, a PGS engineer in research and planning; Terry Deason, a former Public Service Commissioner, who is recognized as an expert in energy policy; and Richard Moses, Bureau Chief of the Commission's Bureau of Safety. PGS Exhibits 1, 2, 4 through 13, 16, 19 through 21, 27, 29 through 32, 44 through 46, 49, 51, and 71 through 80 were received in evidence.

Leesburg called as witnesses: Al Minner, Leesburg's City Manager; Jack Rogers, Director of Leesburg's natural gas department, who was tendered and accepted as an expert in natural gas operations, construction and safety; Joe Garcia, a former Public Service Commissioner, who was tendered and accepted as an expert in energy policy; Thomas Geoffroy, General Manager and Chief Executive Officer for Florida Gas Utility ("FGU"), who was tendered and accepted as an expert in natural gas supply and operations; and Dr. David Dismukes, who was tendered and accepted as an expert in economics and regulatory policy. Leesburg Exhibits 1 through 6a, 8 through 12, 16, and 19 through 28 were received in evidence. Leesburg Exhibit 7 was included as an attachment to Leesburg Exhibit 24, and, thus, was not separately introduced.

SSGC called as witnesses: Ryan McCabe, Operations Manager for The Villages; Matthew Lovo, Purchasing Director for The Villages; and Thomas McDonough, Director of Development for The Villages. SSGC Exhibits 1 through 18 were received in evidence.

The seven-volume Transcript of the final hearing, along with a separate Transcript of the public comment portion of the final hearing, was filed on July 25, 2019. The time for submission of post-hearing submissions was set at 30 days from the date of the filing of the transcript. Each party was allowed 50 pages for their post-hearing submissions. In

addition, each party was allowed to file a separate memorandum not to exceed 10 pages to address a motion to strike certain testimony from Mr. McDonough regarding cost of extending residential service that was developed between March 15 and March 30, 2019.

Motion to Strike

During the lead-up to the final hearing, the cost-per-home for SSGC to extend service to customers in The Villages' Bigham North, Bigham West, and Bigham East developments (collectively "Bigham" or the "Bigham developments") of $1,800 -- an estimated amount -- was provided by Respondents in their written discovery responses and corporate representative deposition, was accepted by the parties as the representative cost-per-home figure, and was relied upon by experts in the development of their opinions. That $1,800 figure formed the basis for most of the economic evidence and testimony offered by PGS and Leesburg.

In the final hours of the third and final day of the hearing, Mr. McDonough testified that he was asked to develop a more refined calculation of costs incurred by SSGC to run the service lines to the residences in the Bigham developments. Starting around March 15 and continuing through March 30, 2019, Mr. McDonough conferred with SSGC's accountants; reviewed invoices generated for the work; and determined that the actual cost of service was $1,219 per residence.

PGS made an *ore tenus* motion to strike, arguing that the information regarding Mr. McDonough's calculations and opinions were based on new figures that had not been provided to PGS prior to Mr. McDonough's testimony at hearing.

SSGC argued that, although Mr. McDonough had been deposed as a corporate representative fact witness of SSGC in November 2017, he was not subsequently deposed as an expert during the expert witness deposition window created by Judge Alexander in his January 11, 2019, Order Granting Unopposed Motion for Modification of Discovery Schedule. That argument fails to recognize that the deposition window for expert witnesses closed on March 15, 2019, the very day Mr. McDonough started his work, and that discovery closed altogether on March 22, 2019. By the time Mr. McDonough completed the new calculations around March 30, 2019, PGS had no ability to know of those calculations, and opinions derived therefrom, through deposition, written discovery, or otherwise, short of Respondents voluntarily providing the new calculations and advising PGS of their intent to rely upon them. Despite the breadth of the October 2, 2018, Modified Order of Pre-hearing Instructions, Respondent made no effort to disclose the newly created cost-per-home figures.

SSGC correctly noted that, although the $1,800 figure was provided by SSGC in responses to interrogatories served on

November 2, 2018, the rules of discovery contain no continuing obligation to supplement responses that were complete and accurate at the time. SSGC also noted that the information was correct when Mr. McDonough was deposed in November 2018 as the corporate representative in a rule 1.310(b)(6) deposition, and that PGS had not sought to re-depose him as an expert before the close of the time for taking expert deposition. Nonetheless, the information developed by Mr. McDonough was not subject to discovery, and could not have been elicited in a second deposition, since discovery was closed by the time he performed his calculations.

Under the circumstances, the undersigned finds and concludes that it would be a surprise and unfairly prejudicial to PGS to allow the newly created information to be received in evidence in lieu of the figure provided by Mr. McDonough as the corporate representative and in responses to written discovery. See § 90.403, Fla. Stat. Therefore, the motion to strike is granted, and Mr. McDonough's testimony and evidence designed to establish a cost to extend service to Bigham residences that differs from the $1,800 cost previously provided by SSGC and relied upon by the parties will not be considered.

On August 16, 2019, Leesburg filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders. The Motion was granted, and the time for filing proposed recommended

orders was extended to and including September 6, 2019. Each party timely filed a Proposed Recommended Order ("PRO"), which has been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2018), unless otherwise noted.

FINDINGS OF FACT

The Parties and Stipulated Issues

1. PGS is a natural gas local distribution company providing sales and transportation delivery of natural gas throughout many areas of the State of Florida, including portions of Sumter County. PGS is the largest natural gas provider in Florida with approximately 390,000 customers, over 600 full-time employees, and the same number of construction contract crews. PGS's system consists of approximately 19,000 miles of distribution mains throughout Florida. PGS operates systems in areas that are very rural and areas that are densely populated. PGS currently serves more than 45,000 customers in Sumter and Marion counties. PGS is an investor-owned "natural gas utility," as defined in section 366.04(3)(c), and is subject to the Commission's statutory jurisdiction to resolve territorial disputes.

2. Leesburg is a municipality in central Florida with a population of approximately 25,000 within the city limits, and a

broader metropolitan service area ("MSA") population of about 50,000. Leesburg provides natural gas service in portions of Lake and Sumter counties. Leesburg is a "natural gas utility" as defined in section 366.04(3)(c). Leesburg has provided natural gas service to its customers since 1959, and currently serves about 14,000 residential, commercial, and industrial customers both within and outside its city limits via a current system of approximately 276 miles of distribution lines. Leesburg is subject to the Commission's statutory jurisdiction to resolve territorial disputes.

3. SSGC is a Florida limited liability company and an operating division of The Villages. SSGC is the entity through which The Villages has entered into a written contract with Leesburg authorizing Leesburg to supply natural gas services to, initially, the Bigham developments.

4. The issues of cost of capital and amortization and depreciation are not applicable to this dispute.

The Dispute

5. A territorial dispute is a disagreement over which natural gas utility will serve a particular geographic area. In this case, the area in dispute is that encompassed by the Bigham developments.

6. PGS argued that the dispute should be expanded to include areas not subject to current development, but that are

within the scope of anticipated Villages expansion. The extension of this territorial dispute beyond the Bigham developments is not warranted or necessary, and would have the effect of establishing a territorial boundary in favor of one of the parties.

7. As a result of the Agreement to be discussed herein, SSGC has constructed residential gas infrastucture within Bigham, and has conveyed that infrastructure to Leesburg. Leesburg supplies natural gas to Bigham, bills and collects for gas service, and is responsible for upkeep, maintenance, and repair of the gas system. The question for disposition in this proceeding is whether service to Bigham is being lawfully provided by Leesburg pursuant to the standards applicable to territorial disputes.

Natural Gas Regulation

8. PGS is an investor-owned public utility. It is subject to the regulatory jurisdiction of the Commission with regard to rates and service. Its profits and return on equity are likewise subject to regulation.

9. Leesburg is a municipal natural gas utility. The Commission does not regulate, or require the reporting of municipal natural gas utility rates, conditions of service, rate-setting, or the billing, collection, or distribution of revenues. The evidence suggests that the reason for the "hands-

off" approach to municipal natural gas utilities is due to the ability of municipal voters to self-regulate at the ballot box. PGS argues that customers in The Villages, as is the case with any customer outside of the Leesburg city limits, do not have any direct say in how Leesburg sets rates and terms of service.[1/] That may be so, but the Legislature's approach to the administration and operation of municipal natural gas utilities, with the exception of safety reporting and territorial disputes, is a matter of legislative policy that is not subject to the authority of the undersigned.

History of The Villages

10. The Villages is a series of planned residential areas developed under common ownership and development. Its communities are age-restricted, limited to persons age 55 and older. It has been the fastest growing MSA for medium-sized and up communities for the past five years.

11. The Villages started in the 1970s as a mobile home community known as Orange Blossom Gardens in Lake County. That community proved to be successful, and the concept was expanded in the 1980s to include developments with golf courses and clubhouses. Residents began to customize their mobile homes to the point at which the investment in those homes rivaled the cost of site-built homes.

12. In the 1990s, The Villages went to site-built home developments. By then, one of the two original developers had sold his interest to the other, who proceeded to bring his son into the business. They decided that their approach of building homes should be more akin to traditional development patterns in which growth emanates from a central hub. Thus, in 1994, the Spanish Springs Town Center was built, with an entertainment hub surrounded by shopping and amenities. It was a success.

13. By 2000, The Villages had extended southward to County Road ("CR") 466, and a second town center, Lake Sumter Landing, was constructed. The following years, to the present, saw The Villages continue its southward expansion to State Road ("SR") 44, where the Brownwood Town Center was constructed, and then to its southernmost communities of Fenney, Bigham North, Bigham West, and Bigham East, which center on the intersection of CR 468 and CR 501.

14. The Villages currently constructs between 200 and 260 residential houses per month. Contractors are on a computerized schedule by which all tasks involved in the construction of the home are set forth in detail. The schedule was described, aptly, as rigorous. A delay by any contractor in the completion of the performance of its task results in a cascading delay for following contractors.

Gas Service in the Area

15. Gas mains are generally "arterial" in nature, with relatively large distribution mains operating at high distribution pressure extending outward from a connection to an interstate or intrastate transmission line through a gate station. Smaller mains then "pick up" growth along the line as it develops, with lower pressure service lines completing the system.

16. In 1994, Leesburg constructed a gas supply main from the terminus of its existing facility at the Lake County/Sumter County line along CR 470 to the Coleman Federal Prison.

17. In August 2009, PGS was granted a non-exclusive franchise by the City of Wildwood to provide natural gas service to Wildwood. SSGC Exhibit 6, which depicts the boundaries of the City of Leesburg, the City of Wildwood, and the City of Coleman, demonstrates that most, if not all, of the area encompassed by the Bigham developments is within the Wildwood city limits.

18. In 2015, the interstate Sabal Trail transmission pipeline was being extended south through Sumter County. The line was originally expected to run in close proximity to Interstate 75. Even at that location, Leesburg decided that it would construct a gate station connecting to the Sabal Trail

pipeline to provide backfill capabilities for its existing facilities in Lake County, and for its Coleman prison customer.

19. In 2016, the Sabal Trail pipeline was redirected to come much closer to the municipal limits of Leesburg. That decision made the Leesburg determination to locate a gate station connecting to the Sabal Trail pipeline much easier. In addition, construction of the gate station while the Sabal Trail pipeline was under construction made construction simpler and less expensive. By adding the connecting lines to the Sabal Trail pipeline while it was under construction, a "hot tap" was not required.

20. In May 2016, PGS began extending its gas distribution facilities to serve industrial facilities south of Coleman. It started from the terminus of its existing main at the intersection of SR 44 and CR 468 -- roughly a mile and a half west of the Lake County/Sumter County line and the Leesburg city limit -- along CR 468 to the intersection with U.S. Highway 301 ("US 301"), and extending along US 301 to the town of Coleman by January 2017. The distribution line was then extended south along US 301 to Sumterville.[2/] In addition, Sumter County built a line off of the PGS line to a proposed industrial customer/industrial park to the south and west of Coleman, which was assigned to PGS.

21. It is common practice for investor-owned utilities to extend service to an anchor customer, and to size the infrastructure to allow for the addition of customers along the route. By so doing, there is an expectation that a line will be fully utilized, resulting in lower customer cost, and a return on the investment. Nonetheless, PGS has not performed an analysis of the CR 468/US 301 line to determine whether PGS would be able to depreciate those lines and recover the costs.

22. The CR 468/US 301 PGS distribution line is an eight-inch line, which is higher capacity in both size and pressure. The entire line is ceramic-coated steel with cathodic protection, which is the most up-to-date material.

23. PGS sized the CR 468/US 301 distribution line to handle additional capacity to serve growth along the corridor. Although PGS had no territorial or developer agreement relating to any area of The Villages when it installed its CR 468/US 301 distribution line, PGS expected growth in the area, whether it was to be from The Villages or from another developer. Although it did not have specific loads identified, the positioning of the distribution line anticipated residential and commercial development along its route. Nonetheless, none of the PGS lines were extended specifically for future Villages developments. PGS had no territorial agreement, and had no discussion with The Villages about serving any development along the mains.

24. PGS constructed a gate station at the intersection of CR 468 and CR 501 connecting to the Sabal Palm pipeline to serve the anchor industrial facilities. The Sabal Trail gate station was not constructed in anticipation of service to The Villages.

Gas Service to The Villages

25. In 2017, The Villages decided to extend gas service to its Fenney development, located along CR 468. Prior to that decision, The Villages had not constructed homes with gas appliances at any residential location in The Villages.

26. The Villages has extended gas to commercial facilities associated with its developments north of SR 44, which had generally been provided by PGS.

27. The Villages' development in Fruitland Park in Lake County included commercial facilities with gas constructed, installed, and served by Leesburg.

28. Prior to the time in which the Fenney development was being planned, The Villages began to require joint trenching agreements with various utilities contracted to serve The Villages, including water, sewer, cable TV, irrigation, and electric lines. Pursuant to these trenching agreements, The Villages' contractors excavate a trench to serve residential facilities prior to construction of the residences. The trenches are typically four-feet-wide by four-feet-deep. Each of the utilities install their lines in the trench at a

designated depth and separation from the other utility lines in order to meet applicable safety requirements. Using a common trench allows for uniformity of installation and avoids installation mishaps that can occur when lines are installed after other lines are in the ground. The trenching agreements proved to be effective in resolving issues of competing and occasionally conflicting utility line development.

29. The PGS CR 468 distribution line runs parallel to CR 468 along the northern boundary of the Fenney development. Therefore, PGS was selected to provide service when the decision was made to extend gas service into Fenney. PGS entered into a developer agreement with The Villages that was limited to work in Fenney.

30. PGS was brought into the Fenney development project in August 2017, after four development units had been completed. Therefore, PGS had to bring gas service lines into residences in those units as a retrofitted element, and not as a participant to the trenching agreements under which other utilities were installed.

31. There were occasions during installation when the PGS installation contractor, R.A.W. Construction, severed telephone and cable TV lines, broke water and sewer lines, and tore up landscaped and sodded areas. As a result, homes in the four completed Fenney development units were delayed resulting in

missed closing dates. However, since PGS was not brought in until after the fact for the four completed developments, it is difficult to assign blame for circumstances that were apparently not uncommon before joint trench agreements were implemented, and which formed the rationale for the creation of joint trench agreements.[3/]

32. The Villages was not satisfied with the performance of PGS at its Fenney development. The problems described by The Villages related to construction and billing services. The Villages also complained that PGS did not have sufficient manpower to meet its exceedingly rigid and inflexible construction requirements.

33. Mr. McDonough indicated that even in those areas in which PGS was a participant in joint trenching agreements, it was incapable of keeping up with the schedule. Much of that delay was attributed to its contractor at the time, R.A.W. Construction. After some time had passed, PGS changed contractors and went with Hamlet Construction ("Hamlet"), a contractor with which The Villages had a prior satisfactory relationship. After Hamlet was brought in, most of the construction-related issues were resolved. However, Mr. Lovo testified that billing issues with PGS were still unsatisfactory, resulting in delays in transfer of service from

The Villages to the residential home buyer, and delays and mistakes in various billing functions, including rebates.

34. In late 2017, as the Fenney development was approaching buildout, The Villages commenced construction of the Bigham developments. The three Bigham developments were adjacent to one another. The Bigham developments will collectively include 4,200 residential homes, along with commercial support facilities.

35. By September 27, 2017, Leesburg officials were having discussions with Mr. Geoffroy, a representative of its gas purchasing cooperative, Florida Gas Utility ("FGU"), as to how it might go about obtaining rights to serve The Villages' developments. Mr. Rogers inquired, via email, "[w]hat about encroachment into [PGS] territory north of 468, which is where they plan to build next? [PGS] has a line on 468 that is feeding the section currently under development." Some 15 minutes later, Mr. Geoffroy described the "customer preference" plan that ultimately became a cornerstone of this case as follows:

> Yes, the areas that the Villages "plans" to build is currently "unserved territory", so the PSC looks at a lot of factors, such as construction costs, proximity of existing infrastructure and other things; however, the rule goes on to state that customer preference is an over-riding factor; if all else is substantially equal. In this case, simply having the Villages say they will

> only put gas into the homes if Leesburg serves them, but not TECO/PGS, will do it. (emphasis added).

36. On November 16, 2017, Leesburg was preparing for a meeting with The Villages to be held "tomorrow." Among the topics raised by Mr. Rogers was "territorial agreement?" to which Mr. Geoffroy responded "[d]epends on which option [The Villages] choose. If they become the utility, then yes. If not, you will eventually need an agreement with [PGS]."

37. During this period of time, PGS had no communication with either Leesburg or The Villages regarding the extension of gas service to Bigham.

38. PGS became aware that Hamlet was installing gas lines along CR 501 and CR 468 in late December 2017. PGS had not authorized those installations. Bigham West adjoined Fenney, and PGS had lines in the Fenney development that could have established a point of connection to the Bigham developments without modification of the lines. In addition, each of the three Bigham developments front onto CR 468 and are contiguous to the CR 468 PGS distribution line. The distance from the PGS line directly into any of the Bigham developments was a matter of 10 to 100 feet.

39. The cost to PGS to extend gas service into Bigham would have been minimal, with "a small amount of labor involved and a couple feet of pipe."

40. PGS met with Leesburg officials in January 2018 to determine what was being constructed and to avoid a territorial dispute. PGS was directed by Leesburg to contact The Villages for details.

41. Thereafter, PGS met with representatives of The Villages. PGS was advised that The Villages was "unappreciative" of the business model by which The Villages built communities, and a public utility was able to serve the residential customers and collect the gas service revenues for 30 or 40 years.

The Agreement

42. The Villages was, after the completion of Fenney, unsure as to whether it would provide gas service to Bigham, or would continue its past practice of providing all electric homes. The Villages rebuffed Leesburg's initial advances to extend gas service to The Villages' new developments, including Bigham.

43. Thereafter, The Villages undertook a series of discussions with Leesburg as to how gas service might be provided to additional Villages' developments in a manner that would avoid what The Villages' perceived to be the inequity of allowing a public utility to serve The Villages' homes, with the public utility keeping the revenues from that service.

44. Leesburg and The Villages continued negotiations to come to a means for extending gas service to The Villages' developments, while allowing The Villages to collect revenues generated from monthly customer charges and monthly "per therm" charges. SSGC was formed as a natural gas construction company to engage in those discussions. SSCG was, by its own acknowledgement, "an affiliate of The Villages, and the *de facto* proxy for The Villages in this proceeding."

45. On January 3, 2018, Leesburg internally discussed how to manage the issue of contributions in aid of construction ("CIAC"). It appeared to Mr. Rogers that gas revenues would continue to be shared with The Villages after its infrastructure investment, with interest, was paid off, with Mr. Rogers questioning "is there a legal issue with them continuing to collect revenue after their capital investment is recovered? Admittedly that may not occur for 15 years." A number of tasks to be undertaken by The Villages "justifying the continued revenue stream" were proposed, with Mr. Geoffroy stating that:

> While this may seem a large amount for very little infrastructure, I think it would probably be okay. Because [PGS] distribution is so close, and the Villages has used them previously, it would be relatively easy for the Villages to connect to [PGS] and disconnect from [Leesburg], at any point in the future. In order to get and retain the contract, this is what [Leesburg] has to agree to win the deal.

> Not sure anyone has rate jurisdiction on this anyway, other than [Leesburg].

46. Those discussions led to the development of the Agreement under which service to Bigham was ultimately provided.

47. The Agreement was a formulaic approach to entice The Villages into allowing Leesburg to be the gas provider for the residents that were to come.

48. The Agreement governs the construction, purchase, and sale of natural gas distribution facilities providing service to residential and commercial customers in The Villages' developments.

49. On February 12, 2018, the Leesburg City Commission adopted Resolution 10,156, which authorized the Mayor and City Clerk to execute the Agreement on the Leesburg's behalf. The Agreement was thereupon entered into between Leesburg and SSGC, with an effective date of February 13, 2018. Then, on February 26, 2019, the Leesburg City Commission adopted Ordinance 18-07, which enacted the Villages Natural Gas Rate Structure and Method of Setting Rates established in the Agreement into the Leesburg Code of Ordinances.

50. The Agreement has no specific term of years, but provides for a term "through the expiration or earlier termination of [Leesburg]'s franchise from the City of Wildwood." Mr. Minner testified that "the length of the

agreement is 30 years from when a final home is built, and then over that overlay is the 30-year franchise agreement from the City of Wildwood." However, SSGC's response to interrogatories indicates that the Agreement has a 30-year term. Though imprecise, the 30-year term is a fair measure of the term of the Agreement.

51. For the Bigham developments, i.e., the Agreement's original "service area," facilities are those installed into Bigham from the regulator station at the end of Leesburg's new CR 501 distribution line, and include distribution lines along Bigham's roads and streets, all required service lines, pressure regulator stations, meters and regulators for each customer, and other appurtenances by which natural gas will be distributed to customers.

52. The Agreement acknowledges that Leesburg and SSGC "anticipate that the service Area will expand as The Villages® community grows, and thus, as it may so expand, [Leesburg and SSGC] shall expand the Service Area from time to time by written Amendment to this Agreement."

53. SSGC is responsible for the design, engineering, and construction of the natural gas facilities within Bigham. SSGC is responsible for complying with all codes and regulations, for obtaining all permits and approvals, and

arranging for labor, materials, and contracts necessary to construct the system.

54. Leesburg is entitled to receive notice from SSGC prior to the construction of each portion of the natural gas system, and has "the right but not the obligation" to perform tests and inspections as the system is installed. The evidence indicates that Leesburg has assigned a city inspector who is on-site daily to monitor the installation of distribution and service lines.

55. SSGC has, to date, been using Hamlet as its contractor, the same company used by PGS to complete work at Fenney.

56. Upon completion of each section in the development, SSGC provides Leesburg with a final inspection report and a set of "as-built" drawings. SSGC then conveys ownership of the gas distribution system to Leesburg in the form of a Bill of Sale.

57. Upon the conveyance of the system to Leesburg, Leesburg assumes responsibility for all operation, maintenance, repairs, and upkeep of the system. Leesburg is also responsible for all customer service, emergency and service calls, meter reading, billing, and collections. Upon conveyance, Leesburg operates and provides natural gas service to Bigham through the system and through Leesburg's facilities "as an integrated part of [Leesburg's] natural gas utility operations."

58. In order to "induce" SSGC to enter into the Agreement, and as the "purchase price" for the system constructed by SSGC, Leesburg will pay SSCG a percentage of the monthly customer charge and the "per therm" charge billed to Bigham customers.

59. Leesburg will charge Bigham customers a "Villages Natural Gas Rate" ("Villages Rate"). The "per therm" charge and the monthly customer charge for each Bigham customer are to be equal to the corresponding rates charged by PGS. If PGS lowers its monthly customer charge after the effective date of the agreement, Leesburg is not obligated to lower its Villages Rate.

60. Bigham customers, who are outside of Leesburg's municipal boundaries and unable to vote in Leesburg municipal elections, will pay a rate for gas that exceeds that of customers inside of Leesburg's municipal boundaries and those inside of Leesburg's traditional service area.

61. A preponderance of the evidence indicates that for the term of the agreement, The Villages will collect from 52 percent (per Mr. Minner at hearing) to 55 percent (per Mr. Minner in deposition) of the total gas revenues paid to Leesburg from Bigham customers. The specific breakdown of revenues is included in the Agreement itself, and its recitation here is not necessary.

62. The mechanism by which The Villages, through SSGC, receives revenue from gas service provided by Leesburg, first to

its "proxy" customer and then to its end-user customers, is unique and unprecedented. It has skewed both competitive and market forces. Nonetheless, PGS was not able to identify any statute or rule that imposed a regulatory standard applicable to municipal gas utilities that would prevent such an arrangement.

63. The evidence establishes that, under the terms of the Agreement, Leesburg is the "natural gas utility" as that term is defined by statute and rule. The evidence establishes that SSGC is, nominally, a gas system construction contractor building gas facilities for Leesburg's ownership and operation. The evidence does not establish that the Agreement creates a "hybrid" public utility.

Extension of Service to the Bigham Developments

64. Leesburg's mains nearest to Bigham were at SR 44 at the Lake County/Sumter County line, a distance of approximately 3.5 miles from the nearest Bigham point of connection; and along CR 470, a distance of approximately 2.5 miles to the nearest Bigham point of connection.

65. When the Agreement was entered, neither the Leesburg 501 line nor the Leesburg 468 line were in existence.

66. At the time the Agreement was entered, Leesburg knew that PGS was the closest provider to the three Bigham developments.

67. In order to serve Bigham, Leesburg constructed a distribution line from a point on CR 470 near the Coleman Prison northward along CR 501 for approximately 2.5 miles to the southern boundary between Bigham West and Bigham East.

68. Leesburg constructed a second distribution line from the Lake County line on SR 44 eastward to its intersection with CR 468, and then southward along CR 468 to the Florida Turnpike, just short of the boundary with Bigham East, a total distance of approximately 3.5 miles.

69. The Leesburg CR 468 line will allow Leesburg to connect with the Bigham distribution line and "loop" or "backfeed" its system to provide redundancy and greater reliability of service to Bigham and other projects in The Villages as they are developed.

70. The new Leesburg CR 468 line runs parallel to the existing PGS CR 468 line along its entire CR 468 route, and crosses the PGS line in places. There are no Commission regulations that prohibit crossing lines, or having lines in close proximity. Nonetheless, having lines in close proximity increases the risk of, among other things, complicating emergency response issues where fire and police believe they are responding to one utility's emergency when it is the other's emergency.

Safety

71. Although PGS was the subject of a Commission investigation and violation related to a series of 2013-2015 inspections, those violations have been resolved to the satisfaction of the Commission. Mr. Szelistowski testified that PGS has received no citations or violations from the Commission, either from a construction standpoint or an operation and maintenance standpoint, for the past three years. Mr. Moses testified that both PGS and Leesburg are able to safely provide natural gas service to customers in Sumter County. His testimony is credited. Given the differences in size, geographic range, nature, and density of areas served by the PGS and Leesburg systems, the prior violations are not so concerning as to constitute a material difference in the outcome of this case.

72. All of the distribution and service lines proposed by Leesburg and PGS to serve and for use in the disputed territory are modern, safe, and state-of-the-art.

Reliability

73. As stated by Leesburg in its PRO, "[t]he reliability of a natural gas distribution system to serve a designated area depends on the nature, location and capacity of the utility's existing infrastructure, the ability of the utility to secure

the necessary quantities of natural gas, and the ability of the natural gas utility to supply gas in a safe manner."

74. As set forth herein, the location of PGS's existing infrastructure, vis-a-vis the disputed territory, weighs strongly in its favor. As to the other reliability factors identified by Leesburg, both parties are equally capable of providing reliable service to the disputed territory.

75. Both PGS and Leesburg demonstrated that they have the managerial and operational experience to provide service in the disputed area.

76. There was no evidence to suggest that end-user customers of either Leesburg or PGS, including PGS's Fenney customers, are dissatisfied with their service.

Regulatory Standards for Territorial Disputes

77. Rule 25-7.0472 establishes the criteria for the resolution of territorial disputes regarding gas utilities.

Rule 25-7.0472(2)(a)

78. Rule 25-7.0472(2)(a) includes the following issues for consideration in resolving a territorial dispute regarding gas utilities:

1. The capability of each utility to provide reliable natural gas service within the disputed area with its existing facilities and gas supply contracts.

79. Leesburg currently obtains its natural gas supply from the Florida Gas Transmission ("FGT") distribution system, and

purchases natural gas through FGU, a not-for-profit joint action agency, or "co-op" for purchasing natural gas. FGU's membership consists of city or governmental utility systems in Florida that distribute natural gas to end-user customers, or that use natural gas to generate electricity. FGU purchases and provides gas and manages interstate pipeline capacity for its members.

80. FGU's members contractually reserve space in interstate transmission lines. FGU aggregates its members' contracts into a single consolidated contract between FGU and the interstate pipelines and collectively manages its members' needs through that contract. FGU has flexibility to transfer pipeline capacity from one member to benefit another member.

81. Leesburg currently takes its natural gas through a "lateral" pipeline from the FGT transmission line. Gas travels through one of two gate stations, one in Haines Creek, and the other near the Leesburg municipal airport, both of which are located in Leesburg's northeast quadrant. At the gate stations, transmission pressure is reduced to lower distribution pressure, and the gas is metered as it is introduced into Leesburg's distribution system.

82. The FGT transmission capacity is fully subscribed by FGU. Leesburg has not fully subscribed its lateral pipeline and has sole access to its lateral line capacity.

83. Prior to the entry of the Agreement, and Leesburg/SSGC's extension of distribution lines along CR 501 and CR 468, Leesburg's distribution lines extended into Sumter County only along CR 470 to the Coleman Federal Prison. One other Leesburg line extended to the county line along SR 44, and then north to serve a residential area in Lake County.

84. Leesburg argues that it has already extended lines, and is providing service to thousands of homes in Bigham, and that those facilities should be considered in determining whether it can "provide reliable natural gas service within the disputed area with its existing facilities." PGS did not know of Leesburg's intent to serve Bigham until late December 2017, when it observed PGS's Fenney contractor, Hamlet, installing lines along CR 468, lines that it had not approved. PGS met with Leesburg officials in January 2018 to determine what was being constructed and to avoid a territorial dispute. PGS was directed by Leesburg to contact The Villages for details.

85. PGS filed its territorial dispute on February 23, 2018, 10 days from the entry of the Agreement, and three days prior to the adoption of Ordinance 18-07. Construction of the infrastructure to serve Bigham occurred after the filing of the territorial dispute. Given the speed with which The Villages builds, hundreds of homes have been built, and gas facilities to serve have been constructed, since the filing of the territorial

dispute. To allow Leesburg to take credit for its facilities in the disputed territory, thus prevailing as a *fait accompli*, would be contrary to the process and standards for determining a territorial dispute. The territory must be gauged by the conditions in the disputed territory prior to the disputed extension of facilities to serve the area.

86. Leesburg's existing facilities, i.e., those existing prior to extension to the disputed territory, were sufficient to serve the needs of Leesburg's existing service area. The existing facilities were not sufficient to serve the disputed territory without substantial extension.

2. The extent to which additional facilities are needed.

87. Both PGS and Leesburg have sufficient interconnections with transmission pipelines.

88. Prior to commencement of construction at Bigham, the area consisted of undeveloped rural land. As discussed herein, the "starting point" for determining the necessity of facilities is the disputed territory property before the installation of site-specific interior distribution and service lines. To find otherwise would reward a "race to serve."

89. PGS demonstrated that it is capable of serving the disputed territory with no additional facilities needed. Its distribution mains are located directly adjacent to the disputed

territory from the Fenney development from the west, and are contiguous to each of the Bigham developments from CR 468.

90. The PGS CR 468 line was not constructed in specific anticipation of serving Bigham, and its cost is not fairly included in PGS's cost to provide natural gas service to the disputed area presently and in the future.

91. PGS's existing distribution mains are capable of providing service to Bigham literally within feet of a point of connection. PGS's cost to reach the disputed territory from its existing facilities in Fenney was estimated at $500 to $1,000. The cost of connecting the interior Bigham service lines to PGS's CR 468 line is, at most, $10,000.

92. PGS's total cost of extending gas distribution lines to serve Bigham is, at most, $11,000.

93. The evidence demonstrated that Leesburg required substantial additional facilities to serve the disputed territory.

94. In order to meet the needs for reliable service to Bigham established in the Agreement, Leesburg constructed a new high-pressure distribution line from the existing CR 470 line north along CR 501 to Bigham for a distance of 2.5 miles at a cost of $651,475. The CR 501 line was constructed in specific anticipation of serving Bigham and is fairly included in

Leesburg's cost to provide natural gas service to the disputed area presently and in the future.

95. In order to meet the needs for reliable service to Bigham established in the Agreement, Leesburg constructed a new high-pressure distribution line along SR 44 and CR 468 to Bigham for a distance of 3.5 miles at a cost of $560,732. The CR 468 segment of Leesburg's line is adjacent and parallel to PGS's existing CR 468 pipeline. Leesburg plans to connect the CR 468 line with the CR 501 line by way of a regulator station to create a system loop. Although Leesburg's CR 468 pipeline is, ostensibly, not the primary distribution line for Bigham, it is directly related to the CR 501 line, and provides desired redundancy and reliability for Bigham, as well as infrastructure for the further expansion of Leesburg's gas system to The Villages. Thus, the cost of extending Leesburg's CR 468 line is fairly included in Leesburg's cost as an "additional facility" to provide "reliable natural gas service," to the disputed area presently and in the future.

96. Leesburg's total cost of extending gas distribution lines designed as primary distribution or redundant capability to serve Bigham is a minimum of $1,212,207.

97. In addition to the foregoing, Leesburg, in its response to interrogatories, indicated that it "anticipates spending an amount not to exceed approximately $2.2 million

dollars for gas lines located on county roads 501 and 468." Furthermore, Leesburg stated that "[a]n oral agreement exists [between Leesburg and SSGC] that the amount to be paid by Leesburg for the construction of natural gas infrastructure on county roads 468 and 501 will not exceed $2.2 million dollars. This agreement was made . . . on February 12, 2018." That is the date on which Leesburg adopted Resolution 10,156, which authorized the Mayor and City Clerk to execute the Agreement on Leesburg's behalf. The context of those statements suggests that the total cost of constructing the gas infrastucture to serve Bigham could be as much as $2.2 million.

98. PGS argues that Leesburg's cost of connecting to the Sabal Trail transmission line should be included in the cost of serving the disputed territory. Leesburg began planning and discussions to connect to Sabal Trail as early as 2015, when the construction of Sabal Trail through the area became known. Leesburg entered into a contract for the Sabal Trail connection in February 2016. The Sabal Trail connection was intended to provide Leesburg with additional redundant capacity for its system independent of service to The Villages. The cost of constructing the Sabal Trail gate station is not fairly included in Leesburg's cost to provide natural gas service to the disputed area presently and in the future.

Rule 25-7.0472(2)(b)

99. Rule 25-7.0472(2)(b) includes the following issues for consideration in resolving a territorial dispute regarding gas utilities:

1. The nature of the disputed area and the type of utilities seeking to serve it.

100. The area in dispute was, prior to the commencement of construction, essentially rural, with rapidly encroaching residential/commercial development. Although the area was generally rural at the time PGS installed its CR 468/US 301 distribution line, there was a well-founded expectation that development was imminent, if not by The Villages, then by another residential developer. The disputed territory is being developed as a master-planned residential community with associated commercial development.

101. The Bigham developments are currently proximate to the Fenney development. Other non-rural land uses in the area include the Coleman Federal Prison and the American Cement plant.

102. As indicated, Leesburg is a municipal gas utility, and PGS is a public gas utility. The utilities seeking to serve the disputed territory are both capable, established providers with experience serving mixed residential and commercial areas.

103. There is nothing with regard to this factor that would tip the balance in either direction.

2. The degree of urbanization of the area and its proximity to other urban areas.

104. As it currently stands, the disputed territory is bounded to its south and east by generally undeveloped rural property, to its south by rural property along with the Coleman Prison and American Cement plant, to its west by the Fenney development and additional undeveloped rural property, and to its north by low-density residential development.

105. The disputed territory is characterized by residential areas of varying density, interspersed with commercial support areas. The nearest of the "town centers," which are a prominent feature of The Villages development, is Brownwood Paddock Square, which is located north of SR 44, and a few miles north of Fenney and Bigham. The town center is not in the disputed territory.

106. The terms "urban" and "rural" are not defined in Florida Administrative Code chapter 25-7, or in chapter 366. Thus, application of the common use of the term is appropriate. "Urban" is defined as "of, relating to, characteristic of, or constituting a city." Merriam-Webster, https://www.merriam-webster.com/dictionary/urban. "Rural" is defined as "of or relating to the country, country people or life, or

agriculture." Merriam-Webster, https://www.merriam-webster.com/dictionary/rural.

107. The disputed territory was rural prior to the development of Bigham. The area is becoming more loosely urbanized as The Villages has moved into the area and is expected to experience further urban growth to the south and east. Fenney and Bigham are, aside from their proximity to one another, not currently proximate to other urban areas.

108. There is nothing with regard to this factor that would tip the balance in either direction.

3. The present and reasonably foreseeable future requirements of the area for other utility services.

109. Since the disputed territory is a completely planned development, there are requirements for basic utilities. Leesburg provides other utility services to the greater Leesburg MSA and the Villages Fruitland Park development, including electric, water, and sewer service, and has, or is planning to provide such services to other developments for The Villages in the area.

110. Leesburg's ability to provide other utility services to The Villages in addition to gas service is a factor in Leesburg's favor.

Rule 25-7.0472(2)(c)

111. Rule 25-7.0472(2)(c) establishes that the cost of each utility to provide natural gas service to the disputed area presently and in the future is an issue for consideration in resolving a territorial dispute regarding gas utilities. Various costs are broken out in subparagraphs 1. through 9. of the rule, and will be addressed individually. However, it is clear, as set forth in the facts related to rule 25-7.0472(2)(a) above, that the cost of extending service into Bigham was substantially greater for Leesburg than for PGS.

112. The individually identified costs include the following:

1. Cost of obtaining rights-of-way and permits.

113. There was no evidence to suggest that the cost of obtaining rights-of-way and permits for the construction of the gas infrastructure described herein varied between Leesburg and PGS.

114. There is nothing with regard to this factor that would tip the balance in either direction.

2. Cost of capital.

115. The parties stipulated that the issue of cost of capital is not applicable to this dispute.

3. Amortization and depreciation.

116. The parties stipulated that the issues of amortization and depreciation are not applicable to this dispute.

4. through 6. Cost-per-home.

117. The cost-per-home for extending service to homes in Bigham includes the costs identified in rule 25-7.0472(2)(c)4. (labor; rate per hour and estimated time to perform each task), rule 25-7.0472(2)(c)5. (mains and pipe; the cost per foot and the number of feet required to complete the job), and rule 25-7.0472(2)(c)6. (cost of meters, gauges, house regulators, valves, cocks, fittings, etc., needed to complete the job).

118. The cost-per-home for Leesburg and SSGC is $1,800 (see ruling on Motion to Strike). In addition, Leesburg will be installing automated meters at a cost of $72.80 per home.

119. The preponderance of the evidence indicates that the PGS cost-per-home is $1,579, which was the cost-per-home of extending service in the comparable Fenney development.

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

7. Cost of field compressor station structures and measuring and regulating station structures.

121. None of the parties specifically identified or discussed the cost of field compressor station structures and

measuring and regulating station structures in the Joint Pre-hearing Stipulation or their PROs. Thus, there is little to suggest that the parties perceived rule 25-7.0472(2)(c)7. to be a significant factor in the territorial dispute. As a result, there is nothing with regard to this factor that would tip the balance in either direction.

8. Cost of gas contracts for system supply.

122. None of the parties specifically identified or discussed the cost of the respective gas contracts for system supply in the Joint Pre-hearing Stipulation or their PROs. Thus, there is little to suggest that the parties perceived rule 25-7.0472(2)(c)8. to be a significant factor in the territorial dispute. As a result, there is nothing with regard to this factor that would tip the balance in either direction.

9. Other costs that may be relevant to the circumstances of a particular case.

123. There was considerable evidence and testimony as to the revenues that would flow to SSGC under the 30-year term of the Agreement. SSGC's revenues under the Agreement are not relevant as they are not identified as such in rule 25-7.0472, and are not directly related to the rates, which will likely not exceed PGS's regulated rate.

Rule 25-7.0472(2)(d)

124. Rule 25-7.0472(2)(d) includes that the Commission may consider "other costs that may be relevant to the circumstances of a particular case." This factor is facially identical to that in rule 25-7.0472(2)(c)9., but is, nonetheless, placed in its own rule section and must therefore include costs distinct from those to provide natural gas service to the disputed area presently and in the future.

1. Cost of service to end-user customers.

125. Due to the nature of the Agreement, Leesburg will charge a "Villages Rate" that will be equal to the fully regulated PGS rate.[4/] Thus, as a general rule, the cost of service to end-user customers will be the same for PGS and Leesburg.

126. There is nothing with regard to this factor that would tip the balance in either direction.

2. Uneconomic duplication of facilities.

127. Neither section 366.04(3), nor rule 25-7.0472, pertaining to natural gas territorial disputes, expressly require consideration of "uneconomic duplication of facilities" as a factor in resolving territorial disputes. The Commission does consider whether a natural gas territorial agreement "will eliminate existing or potential uneconomic duplication of facilities" as provided in rule 25-7.0471. A review of

Commission Orders indicates that many natural gas territorial dispute cases involve a discussion of uneconomic duplication of facilities because disputes are frequently resolved by negotiation and entry of a territorial agreement. In approving the resultant agreement, the Commission routinely considers that the disposition of the dispute by agreement avoids uneconomic duplication of facilities. See In re: Petition to Resolve Territorial Dispute with Clearwater Gas System, a Division of the City of Clearwater, by Peoples Gas System, Inc., 1995 Fla. PUC LEXIS 742, PSC Docket No. 94-0660-GU; Order No. PSC-95-0620-AS-GU (Fla. PSC May 22, 1995)("[W]e believe that the territorial agreement is in the public interest, and its adoption will further our longstanding policy of avoiding unnecessary and uneconomic duplication of facilities. We approve the agreement and dismiss the territorial dispute.); In re: Petition by Tampa Electric Company d/b/a Peoples Gas System and Florida Division of Chesapeake Utilities Corporation for Approval of Territorial Boundary Agreement in Hillsborough, Polk, and Osceola Counties, 1999 Fla. PUC LEXIS 2051, Docket No. 990921-GU; Order No. PSC-99-2228-PAA-GU181 (Fla. PSC Nov. 10, 1999)("Over the years, CUC and PGS have engaged in territorial disputes. As each utility expands its system, the distribution facilities become closer and closer, leading to disputes over which is entitled to the unserved areas. The purpose of this Agreement

is to set forth new territorial boundaries to reduce or avoid the potential for future disputes between CUC and PGS, and to prevent the potential duplication of facilities."); In re: Joint Petition for Approval of Territorial Agreement in DeSoto County by Florida Division of Chesapeake Utilities Corporation and Sebring Gas System, Inc., 2017 Fla. PUC LEXIS 163, Docket No. 170036-GU; Order No. PSC-17-0205-PAA-GU (Fla. PSC May 23, 2017)("The joint petitioners stated that without the proposed agreement, the joint petitioners' extension plans would likely result in the uneconomic duplication of facilities and, potentially, a territorial dispute . . . . [W]e find that the proposed agreement is in the public interest, that it eliminates any potential uneconomic duplication of facilities and will not cause a decrease in the reliability of gas service.").

128. There are Commission Orders that suggest the issue of uneconomic duplication of facilities is an appropriate field of inquiry in a territorial dispute even when it does not result in a territorial agreement. See In re: Petition to Resolve Territorial Dispute with South Florida Natural Gas Company and Atlantic Gas Corporation by West Florida Natural Gas Company, 1994 Fla. PUC LEXIS 1332, Docket No. 940329-GU; Order No. PSC-94-1310-S-GU (Fla. PSC Oct. 24, 1994)("On March 31, 1994, West Florida filed a Petition to Resolve a Territorial Dispute with South Florida and Atlantic Gas . . . . On

August 26, 1994, West Florida, South Florida, and Atlantic Gas filed a Joint Petition for Approval of Stipulation, which proposed to resolve the territorial dispute by West Florida's purchase of the Atlantic Gas facilities . . . . We believe that approval of the joint stipulation is in the public interest because its adoption will avoid unnecessary and uneconomic duplication of facilities.").

129. The evidence in this case firmly establishes that Leesburg's extension of facilities to the Bigham developments, both through the CR 501 line and the CR 468 line, constituted an uneconomic duplication of PGS's existing gas facilities. As set forth in the Findings of Fact, PGS's existing gas line along CR 468 is capable of providing safe and reliable gas service to the Bigham developments at a cost that is negligible. To the contrary, Leesburg extended a total of roughly six miles of high-pressure distribution mains to serve the Bigham developments at a cost of at least $1,212,207, with persuasive evidence to suggest that the cost will total closer to $2,200,000. This difference in cost, even at its lower end, is far from de minimis, and constitutes a significant and entirely duplicative cost for service.

130. Leesburg argues that if uneconomic duplication of facilities is a relevant factor, "the evidence of record demonstrates that the City will suffer significant financial

impact if it is not permitted to continue to serve the Bigham Developments." The fact that Leesburg, with advance knowledge and planning, was able to successfully race to serve Bigham, incurring its "financial impact" after the territorial dispute was filed, does not demonstrate either that PGS meets the standards to prevail in this proceeding, or that PGS should be prevented from serving development directly adjacent to its existing facilities in the disputed territory.

Rule 25-7.0472(2)(e)

131. Rule 25-7.0472(2)(e) establishes that customer preference is the "tie-breaker" if all other factors are substantially equal. The Villages is the "customer" for purposes of the selection of the provider of natural gas service to Bigham.

132. There is no dispute that The Villages, as the proxy for the individual end-user customers, has expressed its preference to be served by Leesburg. The direct financial benefit to The Villages, and Leesburg's willingness to enter into a revenue sharing plan -- a plan that, if proposed by PGS, would likely not be allowed by the Commission in its rate-setting capacity -- no doubt plays a role in that decision. Gas service to end-user customers living in in Bigham will be a revenue-generating venture for The Villages if served by Leesburg, and will not if served by PGS.

133. Leesburg and SSGC have suggested that customer preference should occupy a more prominent role in the dispute since gas service, unlike electric, water, and sewer services, is an optional utility service. SSGC argued that since The Villages expressed that it would forego providing gas service to its developments if PGS is determined to be entitled to serve -- a position oddly presaged by Mr. Geoffroy in his September 27, 2017, email with Leesburg (see paragraph 35) -- and "in consideration of the business practices, size, track record of success, and economic import of The Villages," the preference of The Villages for service from Leesburg should "be a significant factor in the resolution of this dispute." Neither of those reasons can serve to elevate customer preference from its tie-breaker status as established by rule.

CONCLUSIONS OF LAW

Jurisdiction

134. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

135. The Commission has the authority to regulate natural gas utilities in the State of Florida, within the scope of its jurisdiction as set forth by law, including section 366.04.

136. The Commission regulates "public utilities," as that term is defined in section 366.02(1), which are entities that "supply" natural gas to or for the public.

137. The Commission has "authority over natural gas utilities," pursuant to section 366.04(3), for the resolution of "any territorial dispute involving service areas between and among natural gas utilities."

138. The Commission has certain additional authority over natural gas utilities under chapter 368 regarding gas transmission and distribution, as well as gas safety.

Standing

139. The facts stipulated by the parties are sufficient to demonstrate that the substantial interests of the parties would be affected by the disposition of this territorial dispute. Furthermore, standing is conferred on competing natural gas utilities as a result of section 366.04(3).

Nature of the Proceeding and Burden of Proof

140. This is a *de novo* proceeding. § 120.57(1)(k), Fla. Stat. Petitioner, PGS, has the burden of proving, by a preponderance of the evidence, that it is entitled to serve Bigham under the standards applicable to territorial disputes for natural gas utilities. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

Standards

141. Section 171.208, Florida Statutes, establishes that municipalities have the authority to provide services and facilities in areas outside of their municipal boundaries "subject to the jurisdiction of the Public Service Commission to resolve territorial disputes under s. 366.04."

142. Section 366.11(1) establishes that "[n]o provision of this chapter shall apply in any manner, other than as specified in [s.] 366.04 . . . , to utilities owned and operated by municipalities, whether within or without any municipality . . . ." The Commission does not have jurisdiction over a municipality's natural gas rates and charges. See, e.g. In re: Joint Petition for Approval of Territorial Agreement in Orange County by Peoples Gas System and The Lake Apopka Natural Gas District, 2013 Fla. PUC LEXIS 215, Docket No. 130166-GU; Order No. PSC-13-0345-PAA-GU (Fla. PSC July 31, 2013)("Lake Apopka is not a public utility as defined by section 366.02(1), F.S., but it is a natural gas utility subject to our jurisdiction under section 366.04(3), F.S., for the purpose of resolving territorial disputes and approving territorial agreements. We do not have jurisdiction over Lake Apopka's rates and charges.")

143. Section 366.03 provides, in pertinent part, that:

> All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it,

> and each rule and regulation of such public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

"The underlying purposes of Sections 366.03 and 366.05(1), Florida Statutes, are to ensure that customers are provided with sufficient, adequate, and efficient service at fair and reasonable rates and charges; and to ensure that such service and the associated rates and charges are provided in a non-discriminatory manner." In re: Petition for Approval of a Pre-pay Residential Service Experimental Rate by Florida Power & Light Company, 2000 Fla. PUC LEXIS 837, Docket No. 000478-EI; Order No. PSC-00-1282-PAA-EI (Fla. PSC Jan. 14, 2000). As it pertains to public utilities like PGS, the Commission is "granted broad authority with Chapter 366, F.S., to interpret the term 'undue' discrimination. Adopting a non-cost base rate to achieve a public good could open the door not only to other such requests, but also charges of discriminatory treatment of those customers who would bear the increased cost not paid by the cost causer." In re: Petition for Rate Increase by Tampa Electric Company, 2009 Fla. PUC LEXIS 251, Docket No. 080317-EI; Order No. PSC-09-0283-FOF-EI (Fla. PSC Apr. 30, 2009).

144. Section 366.04(3) establishes the authority of the Commission to both approve territorial agreements between and

among natural gas utilities, and to resolve territorial disputes between natural gas utilities, and provides, in pertinent part, that:

> (3) In the exercise of its jurisdiction, the commission shall have the authority over natural gas utilities for the following purposes:
>
> (a) To approve territorial agreements between and among natural gas utilities. However, nothing in this chapter shall be construed to alter existing territorial agreements between the parties to such agreements.
>
> (b) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among natural gas utilities. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

145. Rule 25-7.0472, entitled "Territorial Disputes for Natural Gas Utilities," which is unaltered from its February 25, 1991 adoption, establishes the standards and criteria to be weighed and balanced in a territorial dispute as follows:

> (1) A territorial dispute proceeding may be initiated by a petition from a natural gas utility, requesting the Commission to resolve the dispute . . . . Each utility which is a party to a territorial dispute shall provide a map and written description

of the disputed area along with the conditions that caused the dispute. Each utility party shall also provide a description of the existing and planned load to be served in the area of dispute and a description of the type, additional cost, and reliability of natural gas facilities and other utility services to be provided within the disputed area.

(2) In resolving territorial disputes, the Commission shall consider:

(a) The capability of each utility to provide reliable natural gas service within the disputed area with its existing facilities and gas supply contracts and the extent to which additional facilities are needed;

(b) The nature of the disputed area and the type of utilities seeking to serve it and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;
(c) The cost of each utility to provide natural gas service to the disputed area presently and in the future; which includes but is not limited to the following:

1. Cost of obtaining rights-of-way and permits.

2. Cost of capital.

3. Amortization and depreciation.

4. Labor; rate per hour and estimated time to perform each task.

5. Mains and pipe; the cost per foot and the number of feet required to complete the job.

> 6. Cost of meters, gauges, house regulators, valves, cocks, fittings, etc., needed to complete the job.
>
> 7. Cost of field compressor station structures and measuring and regulating station structures.
>
> 8. Cost of gas contracts for system supply.
>
> 9. Other costs that may be relevant to the circumstances of a particular case.
>
> (d) Other costs that may be relevant to the circumstances of a particular case.
>
> (e) Customer preference if all other factors are substantially equal.
>
> (3) The Commission may require additional relevant information from the parties of the dispute if so warranted.

146. The evidence in this case establishes that Leesburg is a municipality "which supplies natural gas . . . by pipeline, to or for the public." Thus, Leesburg is a "natural gas utility" as defined in section 366.04(3)(c).

147. The Agreement between Leesburg and SSGC does not confer duties on SSGC that would cause it to become a supplier of natural gas. Thus, SSGC is not a "natural gas utility" as defined in section 366.04(3)(c). Furthermore, the evidence establishes that the relationship between Leesburg and SSGC has not created a "hybrid utility" of which SSGC is a part.

148. PGS's claims meet the requirements for it to bring a territorial dispute pursuant to section 366.004(3) and

rule 25-7.0472. As established in the Commission's Order dated June 28, 2018, the PGS Petition sets forth that SSGC and Leesburg are installing gas infrastructure in a PGS natural gas service area; the area in question is adjacent to PGS natural gas infrastructure; PGS has a non-exclusive franchise with the City of Wildwood to provide natural gas service to the area; and there is an agreement between Leesburg and SSGC for Leesburg to supply gas to the area. The Order further provides that "[t]he Petition contains adequate information in the form of an agreement, construction notices, ordinance, permits, and maps to indicate that an active dispute exists as to who will provide natural gas to the disputed service area. Our review of the maps attached to the Petition further illustrates that this is a fully formed territorial dispute over the contested service area." The findings and conclusions set forth by the Commission in its Order were substantiated by the evidence received in this case, and are accepted and adopted herein.

149. Finally, the Order reiterates the Commission's policy regarding "customer preference" by providing that "SSGC and Leesburg encouraged us to allow market forces to settle this matter and to allow the customers to select their own utility to serve this area. These arguments run counter to our statutory responsibility to resolve any territorial dispute upon petition and ignores rule 25-7.0472(2)(c-e), F.A.C., which requires us,

when resolving territorial disputes, to consider the cost of each utility to provide natural gas service to the disputed area presently and in the future. Among the many factors that we consider in a territorial dispute, customer preference is considered only if all other factors related to the costs are substantially equal."

150. Leesburg concludes its proposed findings of fact with the statement that its "provision of natural gas services to The Bigham Developments is an example of beneficial competition" and, in its proposed conclusions of law, asserts that "it appears that market forces are at work, and PGS failed to effectively compete."

151. The Commission, as the regulatory body having exclusive jurisdiction over this matter pursuant to chapter 366, may accept the undersigned's findings and conclusions and apply its policies as it believes to be in the best interest of the public. However, it should not do so in this case based on a misapprehension that the Agreement between Leesburg and SSGC was, in any way, "beneficial competition," or that The Villages' decision to select Leesburg as its natural gas provider was driven by "market forces." It was fundamentally, in the words of Leesburg's own city manager, "a pay-to-play deal."[5/] Leesburg paid, so Leesburg played. Under the Commission's cost-based rate setting oversight, PGS could not pay, so PGS did not play.

151. The evidence clearly establishes that Leesburg knew of the proximity of PGS's existing infrastructure to Bigham, and rather than work with PGS, embarked on a race to serve the Bigham developments with as little notice to PGS as was possible. In doing so, the Commission has, in the context of electrical disputes, established that "[w]e always consider whether one utility has uneconomically duplicated the facilities of the other in a 'race to serve' an area in dispute, and we do not condone such action." Gulf Coast Elec. Coop. v. Clark, 674 So. 2d 120, 122 (Fla. 1996). There is no reason that it should be condoned here.

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

153. Based on the foregoing Findings of Fact, it is concluded that the factors set forth in rule 25-7.0472(2)(a)-(d) are substantially equal, with the following exceptions:

1. Rule 25-7.0472(2)(a) - The capability of each utility to provide reliable natural gas service within the disputed area with its existing facilities and gas supply contracts and the extent to which additional facilities are needed.

154. The evidence demonstrates the PGS could provide reliable natural gas service to the disputed territory through its existing facilities at a cost of, at most, $11,000, and requires no additional facilities.

155. The evidence demonstrates that Leesburg could not provide reliable natural gas service to the disputed territory through its existing facilities. In order to reliably serve Bigham, Leesburg had to construct distribution mains along CR 501 for a distance of 2.5 miles, and along SR 44/CR 468 for a distance of 3.5 miles, at a cost of between $1,212,207 and $2,200,000.

156. The cost differential -- at least $1,200,000 and possibly as much as a million dollars more -- is far from *de minimis*. For example, as stated by the Florida Supreme Court:

> In [Gulf Coast Electric Cooperative v. Clark, 674 So. 2d 120, 123 (Fla. 1996)], the Gulf Coast cooperative spent $14,583 to upgrade a single-phase line to a three-phase line to enable it to provide service to a new prison. . . . This Court concluded that competent substantial evidence did not support, among other findings, that the $14,583 difference in costs was considerable. Id. This Court said:
>
> > Compare, for instance, the costs incurred for the upgrade in this case with the costs incurred in Gulf Power Co. v. Public Service Commission, 480 So. 2d 97 (Fla. 1985)(difference between Gulf Coast's $27,000 cost to provide service and Gulf Power's $200,480 cost to provide service found to be considerable). The cost differential in this case is *de minimis* in comparison to the cost differential in that case. (emphasis added).

Choctawhatchee Elec. Coop. v. Graham, 132 So. 3d 208, 214-215 (Fla. 2014).

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

2. Rule 25-7.0472(2)(b) - The present and reasonably foreseeable future requirements of the area for other utility services.

158. Leesburg provides other utility services to the greater Leesburg MSA, including electricity, water, and sewer service, and has, or is planning to provide such services to developments for The Villages in the area.

159. Leesburg's ability to provide other utility services to The Villages in addition to gas service is a factor in Leesburg's favor.

3. Rule 25-7.0472(2)(c) - The cost of each utility to provide natural gas service to the disputed area.

160. The cost-per-home for Leesburg and SSGC to provide service in Bigham is $1,800. In addition, Leesburg will be installing automated meters at a cost of $72.80 per home. The preponderance of the evidence indicates that the PGS cost-per-home is $1,579.

161. The cost-per-home is a factor -- though slight -- in PGS's favor.

4. Rule 25-7.0472(2)(d) - Other costs that may be relevant to the circumstances of a particular case - Uneconomic duplication of facilities.

162. To the extent the Commission, in the exercise of its exclusive jurisdiction in natural gas territorial disputes arising from chapter 366, determines that the issue of

uneconomic duplication of facilities is relevant under the circumstances of this case, the evidence, as described in detail in the Findings of Fact, establishes that the extension of service to Bigham by Leesburg involved substantial and significant duplication of existing PGS facilities. The uneconomic duplication of PGS facilities by Leesburg weighs in favor of PGS.

5. Rule 25-7.0472(2)(e) - Customer preference.

163. Customer preference, here the preference of The Villages as the developer, is in favor of Leesburg. However, as set forth herein, all other factors are not substantially equal.

164. In analyzing the role of customer preference in cases in which the "customer" is the developer, rather than the end-user, the Commission has established that:

> Regardless of the desires of the subdivision developer, we conclude, as we have done in previous cases, that customer preference should not be decisive in the resolution of this dispute. This case is even more compelling in favor of giving little weight to customer preference because here we are dealing with the developer and not the purchaser or ultimate user of electricity. Moreover, customer preference should only be considered as a guiding factor if the facts do not weigh heavily in favor of one utility. Therefore, customer preference shall be given little weight, in light of the other facts brought out in the record.

In re: Territorial Dispute Between Gulf Power Company and Gulf Coast Electric Cooperative, Inc., 1984 Fla. PUC LEXIS 271, Docket No. 830484-EU; Order No. 13668 (Fla. PSC Sept. 10, 1984).

165. Furthermore, the Commission has determined that:

> [C]ustomer preference should not be relevant to our decision in a case such as this, where the facts are so heavily weighted in favor of one utility. Moreover, Florida case law is clear that no customer has an organic or economic right to service by a particular utility. Storey v. Mayo, 217 So. 2d 304 (Fla. 1968).

In re: Petition of Gulf Power Company Involving a Territorial Dispute with Gulf Coast Electric Cooperative, 1984 Fla. PUC LEXIS 960, Docket No. 830154-EU; Order No. 12858 (Fla. PSC Jan. 10, 1984).

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

CONCLUSION

Based on the Findings of Fact and Conclusions of Law set forth herein, it is RECOMMENDED that the Public Service Commission enter a final order awarding Peoples Gas System the right to serve Bigham North, Bigham West, and Bigham East. The award should be on such terms and conditions regarding the acquisition of rights to facilities and infrastructure within the Bigham developments by Peoples Gas from the City of Leesburg

or South Sumter Gas Company, LLC, as deemed appropriate by the Commission.

DONE AND ENTERED this 30th day of September, 2019, in Tallahassee, Leon County, Florida.

E. GARY EARLY
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of September, 2019.

ENDNOTES

[1/] PGS's policy argument is not without merit. In this case, Leesburg customers within the Leesburg city limits and its more traditional service area will be paying the standard Leesburg rates and charges. However, the rates and charges in The Villages will be the regulated rate charged by PGS. To be sure, customers in Bigham will be paying no more regardless of which entity prevails in this proceeding. However, the suggestion that municipal rates are controlled through the ballot box does not apply when the municipality is (legally) extending service beyond its municipal, and even county, boundaries.

If Leesburg was providing service on its own, the customers of Bigham would presumably have the advantage of the lower Leesburg rate. The interjection of The Villages, as a "proxy" for the end-user customers has resulted in the imposition of a higher rate in Bigham, the sharing of rates with the "proxy" for 30 years, and no ability of the end-user customers to influence or control their rates by any means.

In In Re: Petition of Timber Energy Resources, Inc. for a Declaratory Statement Concerning Sales as "Private Utility" Status, 1987 Fla. PUC LEXIS 1314, Docket No. 861621-EU, Order No. 17251 (Fla. PSC Mar. 5, 1987), the Commission addressed the protections provided to consumers of utility services in the absence of the Commission's regulatory oversight:

> Perhaps the most basic function of this agency is to ensure that captive customers of monopoly utility services are protected from abuses sometimes occasioned by the lack of competition in that market. We are frequently cited as a substitute for competition. In those instances where our jurisdiction is exempted, there is some other substitute. For example, customers control the management and policies of both municipal and co-operative utilities by means of ballot. In the instant case there is no such substitute.

In this case, the end-user customers are outside the municipal limits. If served by Leesburg pursuant to the Agreement, the residents of Bigham are served by a gas provider over which they have no control, either by "voting the rascals out," or by a system of rate-of-return regulation. The Commission's decision in this case will, thus, determine the extent to which a municipality may arrange to be the "choice" of a developer in exchange for providing the developer with a share of the revenues from higher-than-municipal rates charged to non-citizen end-user customers.

[2/] The supply line to Sumterville was initially extended southward along US 301 to serve industrial users in the Sumterville area. A line was then extended from that US 301 line eastward along CR 470 to the American Cement plant which abuts the western boundary of the Coleman Federal Prison. Service to the Eastern Cement plant is the subject of a proceeding at the Commission, and is not at issue in this case.

[3/] As a basis for its decision to select Leesburg to provide gas service to Bigham beyond the obvious and considerable economic benefit that was created by its relationship with the rate-unregulated municipal gas utility, SSCG asserted (correctly) that with regard to the initial delays in Fenney, "The Villages has not experienced any similar problems in the performance of Leesburg." What was left unsaid is that Leesburg was never

asked to perform work as a "retrofitted element," as was PGS, and had full advantage of operating as a participant to the trenching agreements, as PGS was not.

[4/] Leesburg devotes several pages of its PRO touting that its gas rates are among the lowest in the state, "historically [] below that of other municipalities and [] lower than the rate charged by PGS," and that its gas supply cost is considerably lower than PGS. However, that evidence is given little weight since, despite its low rates to its customers in Leesburg, the Villages' rate will be no lower than those charged by PGS and, if PGS were to lower its rate to a rate lower than that charged on January 1, 2018, the Leesburg Village rate could be higher than the PGS rate.

[5/] Tr. 4, 460:20.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.