IN THE SUPREME COURT OF FLORIDA

CITY GAS COMPANY OF FLORIDA, Appellant, v. JOHN R. MARKS, et al., in the official capacity as and constituting the FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	CASE NO. 68,283

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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STATEMENT OF THE CASE

On March 20, 1985, Miller Gas filed a tariff to provide service entitled "Interruptible Gas Service - Large Volume" and Docket No. 850115-GU was initiated. On April 4, 1985, City Gas filed a petition seeking approval of a tariff for "Interruptible - Preferred County Government Service" in Docket No. 850118-GU. Each tariff sought approval authority for the provision of Interruptible Gas Service to the same customer, the Dade County water treatment and pumping facility and lime kiln operation. Each utility responded to the filing of the other, sought intervention and a "cease and desist order" was requested. Both tariff requests were suspended at the May 21, 1985 Agenda Conference. A hearing on the merits was ordered by Order No. 14460. Dade County was granted intervenor status and participated at the hearing held on July 18, 1985 in Hialeah, Florida. The Commission at a subsequent Agenda Conference, as evidenced by Order No. 15268, approved the tariff submitted by Miller Gas finding that it was "cost-justified, reasonable and non-discriminatory...." It also disapproved the City Gas tariff finding that it was "not cost-based... [and was] unduly discriminatory...." (Order No. 15268 at 5). City Gas filed its Notice of Appeal and this appeal ensued.

STATEMENT OF FACTS

The Appellee respectfully disagrees with the statement of the facts in the Appellant's brief as being a mis-characterization of the facts and not representative of the record on review. The record supports the following facts.

Dade County was operating a water treatment and pumping facility at the Alexander Orr treatment facility. The fuel used at the facility was natural gas provided by Miller Gas for over 22 years (Tr. 27). The County had been using a lime kiln at the facility, burning a fuel other than natural gas to dry the lime. The facility used quantities of lime in the water purification and treatment process. For environmental reasons the kiln was closed (Tr. 47). The County converted the kiln to burn natural gas and did not expect any environmental challenges as a result of this change in process (Tr. 28). The usage of natural gas at the water pumping facility had been over 638,000 therms per year (Tr. 32). With the expected load of the kiln, the County anticipated adding an additional 2,000,000 to 3,000,000 therms per year (Tr. 31). As a result, the County sought competitive bids for the provision of the expected load for the entire facility (Tr. 39-40).

Miller Gas, which had been providing service to the water pumping facility, initially offered to provide service at 13.25 cents per therm for the entire facility. At the time, Miller Gas had no customers in this class and was offering the tariff for approval to serve a current customer, Dade County, which was increasing and changing its requirements (Tr. 38-39).

City Gas had an approved tariff for an interruptible rate of

9.48 cents per therm (Tr. 210). City Gas had 28 customers receiving that rate for gas service (Tr. 244).

When Miller Gas learned of the rate available to the County from City Gas, it amended the tariff filed with the Commission offering to provide gas service to the entire County facility for 7.5 cents per therm with other terms and conditions (Tr. 40). City Gas then responded by filing a new tariff for the provision of service to "preferred interruptible county governmental natural gas service" (Tr. 176). The City Gas tariff as originally filed was an exception to its interruptible tariff on file with the Commission. It was applicable only to the County and not to any of the other 28 interruptible customers (Tr. 144). At the hearing, the President of City Gas offered to amend the tariff to permit all of City Gas' interruptible customers to receive this lower rate if they qualify (Tr. 211). This change in company policy came as a complete surprise to another witness sponsored by City Gas, Mr. James A Wutzler, the company's Controller (Tr. 233). No evidence was presented as to the quantitative effect this spontaneous change in applicability of the tariff would have on the earnings of the company and the public interest of the other customers of City Gas.

City Gas was offering to provide service to just the lime kiln and not the entire facility as described in the request for bids offered by the County (Tr. 180). In addition, City Gas admitted at hearing that the tariff price of 7.0 cents per therm was not cost based and was being offered to undercut the tariff of Miller Gas (Tr. 190 & 236).

If the tariff offered by City Gas was approved and service lines were constructed, they would parallel and duplicate the lines of Miller Gas. The comment of City Gas' President, Sid Langer, on this wasteful duplication of facilities was: "so what?" (Tr. 206).

The cost to Miller Gas to extend service to the lime kiln was estimated to be $109,000 or if an alternative route was made available, $74,051 (Tr. 22-36). This equated to approximately $29.26 per foot based upon experience from existing contractors (Tr. 109). The cost to City Gas to provide comparable service was $182,000 or approximately $21.24 per foot (Tr. 226-227). Upon cross examination of the Controller for City Gas, Commissioner Cresse apparently had some reservations that City Gas may have been "low balling" the estimated cost to understate the cost associated with City Gas' provision of service (Tr. 230).

The Controller for City Gas admitted that in calculating the cost of service for the proposed new customer, he did not allocate an amount for: mains, distribution and A&G. In addition, he further admitted that there was no allocation for sales expenses and no maintenance cost for the general plant (Tr. 237). As a justification, he stated that it was for the existing customers to carry these costs (Tr. 237).

City Gas was only seeking to provide service to the lime kiln, despite the bid request of the County requesting to consolidate both the pumping operation and the lime kiln into one customer. If City Gas was awarded the contract and allowed to serve both, City Gas acknowledged at hearing that Miller Gas would

have stranded investment which Miller Gas' customers (or shareholders) would have had to support (Tr. 210).

Under the tariff approval procedure used by the Commission to consider the competing submission of Miller Gas and City Gas, the County received a lower rate than either utility had originally proposed to the County (Tr. 210).

The case can best be summarized by the stipulation of all parties in the proceeding found in the record. The stipulation provided: In order for City Gas to service the lime kiln, it would either have to serve under the existing tariff available to all other interruptible customers (9.48 cents per therm) or it would have to have its proposed amended tariff approved (7.0 cents per therm). In order for Miller Gas to serve the pumping facility and the lime kiln, all parties stipulated that its proposed amended tariff would have to be approved (7.5 cents per therm) (Tr. 169). Based upon the record in this proceeding, the Commission approved the tariff filed by Miller Gas. It did not approve the tariff filed by City Gas. City Gas appealed.

SUMMARY OF ARGUMENT

The Commission exercised its statutory authority to approve a tariff filed by Miller Gas and disapprove a proposed amended tariff filed by City Gas. The parties stipulated that the issue in this proceeding before the Commission was the approval of competing tariffs and not the questions of territorial disputes or exclusive service territories. The Commission's order reflects this position.

Miller Gas supported its proposed tariff with credible cost justifications. City Gas, on the other hand, filed its proposed amended tariff with incomplete cost justifications. The tariff, as filed, discriminated in favor of the County as the only eligible recipient of service and against all other customers of City Gas similarly situated. In addition, City Gas' President, without any evidentiary support, changed the applicability of the tariff to all customers in the class who might qualify for service. The company's Controller could not present financial support for this change.

There was substantial and competent evidence in the record to support the Commission's finding that the best interest of the ratepayers of Miller Gas were served by approving the tariff. The record further demonstrates that the ratepayers of City Gas realized no change in their positions by the denial of the tariff as originally proposed by City Gas. Finally there was no evidence in the record to support the tariff as extemporaneously amended by the President of City Gas.

City Gas may not claim rights that the County might have had

and elected not to appeal. The law is well established that a party has no standing to raise third party rights, especially as in this case, where the third party has not elected to raise those issues on appeal.

From the facts in the case it is clear that the County received a lower rate for service under the Commission procedure than either tariff originally offered.

The Commission's decision is supported by substantial and competent evidence in the record and is supported by the statutory authority in sections 366.041 and 366.07, Florida Statutes.

POINT I

THE COMMISSION APPLIED TRADITIONAL RATE APPROVAL CRITERIA SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE IN APPROVING THE TARIFF FILED BY MILLER GAS AND FOUND NO CREDIBLE EVIDENCE SUPPORTING CITY GAS' PROPOSED TARIFF.

The Commission's jurisdiction with regard to approving rates offered by public utilities is partially contained in section 366.041(1), Florida Statutes. It provides:

> In fixing the just, reasonable, and compensatory rates... to be... charged for service... by any... public utilities... the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities....

Evidence was tendered by both utilities in an attempt to convince the trier of fact, the Commission, that their respective tariffs were cost-based and in the best interest of the ratepaying public. Miller Gas established by credible evidence that the cost to serve the entire facility was significantly lower than the costs that City Gas would incur in adding this new customer. For Miller Gas the costs would be $109,000 or $74,051 if an alternative route was approved. Exhibit 107, filed by Dade County establishes that the alternative route was available to Miller Gas. Miller Gas had based its estimate of $74,051 on actually experienced contract costs for similar line installations. Its cost per foot was $29.26. City Gas' estimated cost of service was $182,000 (Tr. 226). When calculated on a per foot basis it was

$21.24 (Tr. 230). From the record of the questioning of City Gas' sponsoring witness, Commissioner Cresse expressed an apparent concern that City Gas may have been "low balling" the estimate so as to make City Gas' estimate seem more favorable (Tr. 230).

City Gas also responded to the request of the County in a unresponsive manner. The County sought bid proposals that were designed to provide service to the water pumping and lime kiln operation (Tr. 203). City Gas only proposed to serve the lime kiln (Tr. 180). The rationale behind this decision can be reasonably inferred from the testimony of the President of City Gas. If City Gas served both the water pumping facility and lime kiln, the facilities of Miller Gas in place to serve the water pumping operation would become stranded investment (Tr. 210). Stranded investment is plant in place to serve a customer for which no revenues are received to support that investment. The President of City Gas admitted that it was "not fair" to Miller Gas' other customers to strand this investment (Tr. 210). As a corollary to this proposition, the construction of service lines by City Gas to serve this customer would duplicate lines that parallel existing lines of Miller Gas. Despite President Langer's "so what" attitude for duplicating existing facilities, the Commission must consider "the efficiency [of the] facilities" in determining the rates it approves for regulated utilities (§ 366.041(1), Fla. Stat.).

The Commission has other statutory obligations it must observe in approving rates. In section 366.07, Florida Statutes, the Commission is guided by the following:

> Whenever the commission after public hearing... shall find the rates... charges or classifications... proposed... by any public utility for any service... are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential... the commission shall determine and by order fix the... fair and reasonable rates... charges or classifications... to be imposed... in the future.

Similar language is found in the Commission's general rate setting authority in the file and suspend section, section 366.06(2), Florida Statutes.

In this proceeding, Miller Gas had filed a tariff to serve the entire County owned facility. The rate was a generally applicable interruptible rate available to any customer who met the threshold entitlement criteria. Miller Gas at the time had only one large customer who was qualified to receive the service. All of its remaining customers were either businesses or residential customers.

City Gas on the other hand had 28 customers on line who could have qualified to receive this lower rate (Tr. 244). However, as the rate was titled and structured, it would have only applied to the County (Tr. 233). In fact, the tariff was entitled: "Preferred County Government Service." (Tr. 176). Therefore, on its face the rate was discriminatory against the other customers of the class of interruptible customers similarly situated with no justification for the discrimination. When questioned in this regard by Commissioner Cresse, President Langer of City Gas, altered his prefiled testimony and offered to make the lower rate tariff available to all interruptible customers in

the class who were similarly situated (Tr. 192). This change in company policy came as a surprise to the Controller for City Gas. He testified that: "Well, last week my understanding was that we weren't interested in lowering the other rates. But Mr. Langer has changed that today." (Tr. 233). The result of this shift in company position may have eliminated the discriminatory character of the rate proposal but the change was not supported by any evidence of the impact on the earnings of the company, the number of customers who could take advantage of the rate, the effect on earnings and the relative business and financial risks that other customers may have been exposed to if the Commission approved the tariff as extemporaneously amended.

The tariff proposed by City Gas was applicable to only the "Preferred County Government." During cross examination, the testimony revealed that the cost study used by City Gas to justify the rate did not include costs traditionally allocated to a rate in a cost of service study. As such, the Commission determined that the tariff filed by City Gas was not cost-justified. In its order at page 4, the Commission summarized the deficiencies in allocating the costs to this rate from the testimony of the company's Controller:

> He acknowledged that in calculating the new rate he had not included any of the rate base or O&M costs previously allocated to the existing interruptible class in the utility's most recent cost of service study. He further acknowledged on cross-examination that in calculating his proposed rate he had included only $179 of annual O&M costs, $8 of customer costs, $37 for A&G and nothing for sales expense and maintenance for general plant for the cost to serve the lime kiln. He also

> acknowledged that he had only included in his rate total annual costs of $17 to serve the water pump facility.

From the evidence presented at hearing, the best interest of the customers of Miller Gas would be served by approving the tariff as filed. The County received a lower rate than had been originally proposed. With the addition of this increased load associated with the lime kiln to the Miller Gas system, the earning of Miller Gas may in the future exceed its authorized rate of return. If this were to occur, the Commission would institute, either on its own motion or upon Petition by the utility, a proceeding to institute a rate reduction proceeding which would further benefit the other customers of Miller Gas (Tr. 72 & 127). Whereas, if Miller Gas lost the County as a customer, it would have a major impact on the company's earning and the rates charged to the remaining residential and commercial customers would increase by 27.83% (Tr. 133). The cost to the customers of City Gas was unchanged by the decision of the Commission to withhold consent of the tariff offered by City Gas.

The decision of the Commission was supported by competent and substantial evidence and complied with the essential requirements of law. Citizens of Florida v. Florida Public Service Commission, 464 So.2d 1194 (Fla. 1985). Whereas this Court has consistently refused to substitute its judgment for the finder of fact, Citizens of Florida v. Florida Public Service Commission, 435 So.2d 784 (Fla. 1983), it should likewise refuse to do so here.

POINT II

THE COMMISSION APPROVED ONE OF TWO COMPETING TARIFFS AND DID NOT ESTABLISH EXCLUSIVE SERVICE TERRITORIES NOR DID IT RESOLVE A TERRITORIAL DISPUTE.

A. The Commission Has Acted Within Its Authority.

The Commission was apprised by some of parties that it lacked jurisdiction to set territorial boundaries for gas utilities. It was also apprised that it lacked jurisdiction to resolve territorial disputes between two competing gas utilities (Tr. 8-12). However nowhere in the record is there any allegation that the Commission lacked jurisdiction to approve tariffs that are in the public interest and reject those found by substantial and competent evidence to be detrimental to the public interest.

Nowhere in the order of the Commission is there an award of an exclusive right in Miller Gas to serve the County. Had the County decided it wanted service from City Gas it could have received service from City Gas. The problem for City Gas was that its approved tariff provided for a rate higher than Miller Gas' approved rate. In denying approval of City Gas' proposed amended tariff, City Gas had a less favorable rate and thus lost a competitive edge. The reason that City Gas' rate was not approved was City Gas' failure to support a cost-basis for the rate and the public interest test for the approval of the tariff. City Gas amended its tariff request on the witness stand (Tr. 192) to the surprise of its chief financial officer (Tr. 233).

The Commission acknowledged in the record that it may not have had jurisdiction to resolve territorial disputes and to set

territorial boundaries (Tr. 12). In recognition of those facts, the Commission received a stipulation from all parties as to the issue in the case. As stipulated, the issue before the Commission was consideration of two tariffs; one filed by Miller Gas seeking to add a new class of service; and, one filed by City Gas seeking to create a specialized tariff within a customer class to provide service to a single customer (Tr. 169). This was an issue squarely within the Commission's jurisdiction.

B. Appellant Seeks to Assert Rights of a Party Appellee.

City Gas, in its brief, contends that the Commission through its rate approval proceedings, had somehow ran rough-shod over the County's competitive bid procedures (Brief at 15). The facts in this case do not support the Gas Company's contention. The President of City Gas admitted that as a result of the Commission's proceeding, the County received a lower price for gas than had been originally available to it under either Companies tariff (Tr. 209).

More interesting, perhaps, is the fact that City Gas and not the County is raising this contention of deprivation of rights. City contends that the decision of the Commission "invalidated (and) obstructed" the County's rights to "obtain the lowest cost service." (Brief at 22). The County was a party below and has not appealed the Commission's action. The County is a party to this appeal as a party Appellee. Fla. R. App. P. 9.020(f)(2).

The United States Supreme Court has settled the issue of the rights of an appellant to raise third party rights. In Tileston v. Ullman, 318 U.S. 44, 63 S. Ct. 493, 87 L.Ed. 603 (1943) a

doctor argued that a statute prohibiting his dispensation of contraceptives to his patients, jeopardized the lives of several patients who should not give birth. For these reasons, the doctor asserted that the law, as applied to him, was unconstitutional. The United States Supreme Court held that since the doctor's life was not in danger, he was without standing to complain of a threat to the lives of his patients, and he could not adjudicate their constitutional right to life. In Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975), several groups of plaintiffs complained of a municipality's zoning guidelines designed to exclude low income, nonwhite residents. As to the low-income/middle-income petitioners, who had sought but not found housing in the municipality, the Court held that they had not alleged facts to show that, absent the restrictive zoning practices, there was a substantial probability that they and not others sharing their socioeconomic attributes, would have relocated to the municipality. See also Gladstone Realtors v. Bellwood, 441 U.S. 91, 99 S. Ct. 1601, 60 L.Ed.2d 66 (1979). In Warth, the Court recognized narrow exceptions where a party may assert the rights of third parties; the primary exception being when a party's legal or constitutional right rests squarely upon the claim of a third party, without speculation. 45 L.Ed.2d at 356; see U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L.Ed.2d 524 (1960). Lacking application of the narrow exceptions, a party may invoke the jurisdiction of the Courts only to protect personal rights or interests, 67A C.J.S. Parties §11.

Florida Courts adhere to the proposition. In L'Engle v.

Florida Central Railroad Company, 14 Fla. 266 (1873), the Court held that a court-appointed receiver had no standing to contest an order terminating his services as he had "no right to intermeddle in questions affecting the rights of parties or dispositions of the property in his hands." Id at 267. Similarly, in Fruggiero v. Best Western Resort Inn, 461 So.2d 251 (Fla. 1st DCA 1984), the Court held that a 63-year old appellant could not attack a state statute adverse to her interests on the grounds that it conflicts with a federal Social Security statute applicable only to 65 year olds. Lastly, in Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986), the Court held that a reporter could not appeal his contempt violation for failure to name an informant, by attacking a criminal statute under which his anonymous informant would be charged.

Therefore, City Gas' contention that somehow the County was deprived of its rights cannot be raised by the Appellant. Even if it could raise the issue, the record simply does not support City Gas' contention. The County received a lower rate through this process than either of the gas utilities had offered and the County has not complained.

Finally, finding that City Gas' proposed tariff was defective and that Miller Gas' tariff was in the best interest of the customers and the company, the Commission approved Miller Gas' tariff. It never reached the issue of its jurisdictional authority to resolve territorial disputes or to grant territorial service areas. The Commission's order clearly stated:

> Resolution of Territorial Dispute
> It is not clear that this Commission has the statutory authority to either establish exclusive service territories for natural gas utilities (as it does for telephone, water and sewer utilities) or resolve territorial disputes between natural gas utilities (as specifically authorized for electric utilities). However, our resolution of this question is not necessary in view of our finding that Miller is the appropriate utility to serve WASA's natural gas requirements for both the water pumps and the lime kiln.

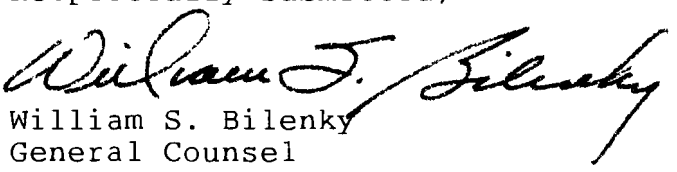
(Order No. 15268, at 5 & 6.)

Appellant's contentions notwithstanding, the Commission neither resolved a territorial dispute nor set exclusive service areas. Miller Gas received approval for a tariff and City Gas; requested tariff change was disapproved. City Gas still had a valid tariff on file, and available to all its interruptible customers which it could and did offer to the County. Under the facts of this case the County received a substantial lower rate from Miller and in the best interests of its constituency it selected Miller Gas.

CONCLUSION

There being substantial competent evidence to support the Commission's exercise of its rate approval authority in sections 366.041(1) and 366.07, Florida Statutes, the Court should affirm the findings and conclusions of the Commission.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLANT, FLORIDA PUBLIC SERVICE COMMISSION, has been furnished by U.S. Mail this 2nd day of September, 1986 to the following:

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