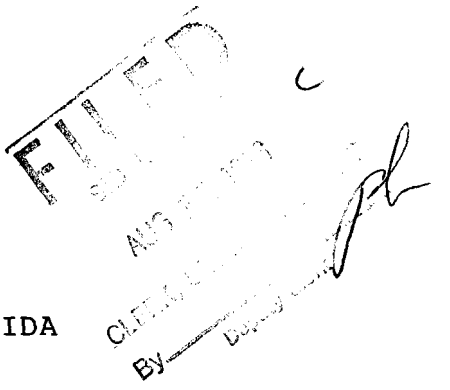

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,283

CITY GAS COMPANY OF FLORIDA,

Appellant,

vs.

JOHN R. MARKS, et al.,

Appellees.

Initial Brief of Appellant

On Review from a Final Order of the
Florida Public Service Commission

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Statement of the Case

Early in 1985, both Miller Gas Company and City Gas Company of Florida, two natural gas distribution companies, petitioned the Florida Public Service Commission for approval of their respective tariff filings for an interruptible rate different from rates then on file with the Commission for other classes of service. Both companies essentially sought to serve a single customer -- the Water and Sewer Authority of Dade County, Florida ("WASA") -- at the Alexander Orr, Jr. water treatment plant located in Miami. (R. 1, Supp. R. 1). The Commission suspended both new tariff filings and, on Miller Gas' motion, consolidated them into one docket for a determination of which one of the two should be approved. (R. 23).

A prehearing conference was held on July 10, 1985. (R. Vol. 2 pp. 1-110). A major issue considered but not resolved at that hearing was the authority of the Commission to authorize exclusive service territories for natural gas utilities. A final hearing was conducted on July 18 and 19, 1985, at which the territorial dispute issue was again discussed. (R. Vol. 2).

On October 18, 1985 the Commission entered its Order No. 15268, approving Miller Gas' proposed, interruptible rate tariff and rejecting the tariff of City Gas. (R. 147). The Commission expressly did not rule on its authority to resolve territorial disputes between gas companies. (Id.)

City Gas filed a timely request for reconsideration of this order (R. 154), which the Commission denied. (Order No. 15511, R. 189). City Gas then filed this appeal, simultaneously asking the Court to vacate the Commission's order on reconsideration as being improperly entered by the joinder of a person who was no longer a member of the Commission. The Court denied City Gas' request, and in due course set July 24, 1986 as the service date for City Gas' initial brief.

On July 17, the Court tolled the briefing schedule pending its ruling on a motion to supplement the record. On July 31, the Court ruled on the motion to supplement the record, with the consequence that City Gas' initial brief is due to be served on or before August 7. Rule 9.300(b).

Statement of the Facts

Prior to any formal tariff filings with the Commission, Miller Gas had been negotiating with Dade County to provide natural gas to the Alexander Orr, Jr. Water Treatment Plant ("Orr Plant") located in the southwest section of Miami. (Tr. of July 18, 1985 at 29). The natural gas needs of the Orr Plant encompassed an existing water pump facility, previously served by Miller Gas, and a new and separate lime kiln facility scheduled to begin operation in January 1987. (Id. at 29; see also Dade County's "Invitation to Bid," attachment 4 to Miller Gas' Petition to Resolve Territorial Dispute, R. 26.). Negotiations had progressed to that time under Miller Gas' assumption that it possessed an exclusive territorial right to serve WASA at the Orr Plant. WASA, however, had also commenced negotiations for service to the Orr Plant with City Gas. (Tr. of July 18 at 30).

In doubt of its ability to select a gas company of its own choosing, WASA sought an advisory opinion from the legal department of the Commission regarding Miller Gas' assertion of an exclusive territorial right to serve the plant. Ultimately, the staff responded with a split decision. Legal staff suggested that Miller Gas had the exclusive right to serve. The electric and gas division disagreed, expressing the view that competitive bidding by the two companies was appropriate. (Tr. of Prehearing Conf. at 47-49, 58).

Miller Gas had been serving the natural gas needs of the water pump facility at the Orr Plant prior to WASA's request for service to the new lime kiln. This service was provided under a Commission-approved tariff for interruptible gas at a rate of 13.25¢ per therm. (Tr. of July 18, at 31). Miller Gas' contract for service to the water plant, which was its only customer for interruptible service, was scheduled to expire in June 1985. (See Dade County's "Invitation to Bid."). During the same period of time, City Gas had on file with the Commission an approved tariff with a rate of 9.48¢ per therm for like, interruptible service.

As both utilities desired to service the new and larger needs of the Orr Plant, a competitive bidding process began in March 1985 when WASA issued preliminary specifications for a single company to supply natural gas both to the water plant and the lime kiln for a contract period of two years. (Id.). These specifications stated that WASA would buy a minimum of at least two million therms per year for each of two years.

After the preliminary specifications were issued by WASA, both gas companies filed proposed new tariffs with the Commission for special, interruptible rates to serve the new needs of WASA. Miller Gas proposed a rate of 7.5¢ per therm, with certain specified minimum monthly sales for its effectiveness. (Supp. R. 1). In its filing, Miller Gas acknowledged that the tariff applied to the new service (Tr. of

July 18, 1985, Vol. 2 at 127), and that it would be earning in excess of its authorized rate of return if allowed to charge WASA its previously approved rate of 13.25¢ per therm. (Id.). City Gas filed a new tariff to serve WASA at 7¢ per therm. (R. 1).

Miller Gas and City Gas each petitioned to intervene in and object to the tariff filing of the other. (R. 5, 14). The Commission suspended both newly proposed rates, noting objections to both. (R. 23).

Both Miller Gas and City Gas operate main distribution lines in close physical proximity to the WASA site. (Tr. of July 18, 1985 at 35, 260). Miller Gas has for years been serving customers in only a small geographic area in southwest Miami which is surrounded by the customers and lines of City Gas. This service area has been non-exclusive. City Gas has always had customers within the area (see the map filed of record below as Exhibit 201), and has been available to serve others in this area who seek City Gas' service. (Tr. of July 18, 1985 at 178-179.). In fact, Miller Gas acknowledged to the Commission that City Gas was free to serve customers in the geographic territory where Miller Gas' operations have been confined. (Tr. of July 18, 1985 at 69).

In the course of these proceedings, both parties amended their original filings in material respects to accommodate the Commission's concerns. Of principal import to the issues before the Court is City Gas' amendment to its

tariff to make its proposed new interruptible rate available not just to WASA but to any institutional customer who might use a minimum of two million therms per year for a guaranteed period of two years. (Tr. of July 18 at 191-192).

WASA issued a final "Invitation to Bid" on June 11, 1985, reiterating its desire for only a single source of natural gas to serve the entire Orr Plant. (Attachment 4 to Miller Gas' Petition to Resolve Territorial Dispute, R. 26). The Commission's staff remained divided on which of the two utilities should serve the Orr Plant. The legal staff opined that Miller Gas was solely entitled to serve because the Orr Plant was within its exclusive territory. The electric and gas department staff took the view that competition prevailed in the natural gas market place, and that a customer was entitled to its preference of utilities based on its choice between competing bids. (Tr. of Prehearing Conf. at 47-49, 58.) Dade County urged its right to select between competing bids. At no point in the proceeding did the Commission explain or discuss why both tariffs could not be approved so that WASA could exercise its choice between them.

Summary of the Argument

The Commission had no cogent basis to deny the proposed tariff for preferred interruptible service filed by City Gas. The Commission commented that the company's proposal was discriminatory and not cost-based, but the record contains no support for either assertion. City Gas proved that its proposal was viable and economical, and that it was beneficial to Dade County, to City Gas' other customers, and to the company. Its methods were similar to those presented to the Commission by Miller Gas. There is no competent or substantial evidence to support the Commission's rejection of City Gas' rate tariff.

The Commission awarded Miller Gas the right to serve the WASA facility based solely on that company's history of service in the geographical area. The Commission exceeded its lawful authority in granting Miller Gas an exclusive service territory. Florida law neither creates nor authorizes territorial exclusivity for natural gas utilities. Section 366.04, Florida Statutes. City Gas is permitted by law to serve all customers seeking its service.

The Commission exceeded its authority by depriving Dade County of its prerogative to select by bid invitation an economical natural gas service company of its choice. Had the Commission not denied City Gas' tariff, the County would have been free to select the utility or utilities it desired to commence serving the needs of its WASA facility.

Argument

1. The Public Service Commission abused its discretion when it failed to approve City Gas' proposed interruptible rate tariff.

The Public Service Commission is given broad discretion to approve and deny tariffs. That discretion, however, is not unbridled or unstructured. The Commission erred in rejecting an interruptible service tariff filed by City Gas which, as amended, met all necessary ratemaking guidelines and was constructed through traditional means.

A number of factors are required to be considered by the Commission in approving a tariff with the goal of providing rates beneficial to customers, the companies and other consumer rate classes. These factors include 1) consumption and load characteristics, 2) cost to serve, 3) value of service, 4) rate history, 5) competition, 6) revenue stability and continuity, 7) energy conservation, and 8) public acceptance and understanding of rate structure. See sections 366.041(1) and 366.06(1), Florida Statutes (1985).

The Commission rejected City Gas' proposed tariff on two grounds. First, the Commission determined that City Gas' proposal was unduly discriminatory in that it would apply only to WASA. Second, it opined that no meaningful costs had been allocated to the proposed rate, so that City Gas' proposed rates were not cost-based. Neither of these findings of fact by the Commission are supported by the record.

City Gas' proposal was not a "specialty" rate for one customer alone. When filed, the tariff proposed by City Gas met the specific needs of WASA for the volume (at least two million therms per year) and term (two consecutive years) specified in its proposal for bids. City Gas had no other customers with the same volume requirements and duration of purchase (Tr. of July 18 at 180-181). During the course of the hearing, concern by the Commission led the president of City Gas to concede, cheerfully, that the company would gladly extend the same rate for interruptible service to any of its new or existing customers which met the same volume and term criteria. (Id. at 192). The Commission acknowledged this alteration of the original filing in its reconsideration order.

This modification of City Gas' tariff did not introduce a speculative factor into the approval process, as maintained in the Commission's final order. City Gas presented unrefuted evidence that it would offer this preferred rate, or an even lower one, to all interruptible customers in order to prevent their switching to alternate and cheaper sources of fuel. (Tr. of July 18 hearing at 191-192.). In fact, the Commission noted that it had recently approved (but not yet issued) a rule providing for rate reductions which are geared to the same end -- that is, to allow gas companies to meet alternate fuel competitors. (Id. at 249.). The record clearly reflects that City Gas did not intend to set a discriminatory rate by responding to WASA's request for bids, any more than

Miller Gas did, and that present Commission policy in any event would allow preferred rates to customers when appropriate to meet outside market forces.

The Commission is empowered to approve rate structure, but it is not in the business of creating specific sales prices for select customers. See Lewis v. Public Service Commission, 463 So.2d 227 (Fla. 1985); City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1980); Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977). City Gas' proposed tariff did not seek a single customer sales price. Rather, it offered the positive prospect of more sales to customers who were eligible to benefit from this preferred rate class.

As regards the second basis for the Commission's rejection of City Gas' tariff, Commissioner Cresse himself recognized that City Gas' proposed tariff was cost-based. In fact, the expected revenues from serving the Orr Plant were greater than the incremental costs necessary to connect the plant, which alone cost-justified City Gas' proposed rate. (Tr. of July 18 at 240). Both its authorized and newly proposed energy charge per therm left the company well within its Commission-approved rate of return. (Id. at 224, 239.).

City Gas also established that its rate was economically feasible and that it was productive of revenues which would leave the company within its authorized rate of return. This was uncontested. The cost of service was not an appropriate consideration in evaluating, let alone rejecting City Gas' tariff.

A cost of service study, if City Gas had prepared one, would only have demonstrated that City Gas was not earning the minimum authorized rate of return previously approved by the Commission. (Id. at 224, 239.). The study would have highlighted across-the-board deficiencies in rate of return for all the company's rate classes. (Id. at 236.). There was simply no reason to develop such a study under these circumstances, since a cost of service study is compiled only to adjust each rate class of service to bring it within the rate of return authorized by the Commission.

A cost of service study will reflect that no particular class is charged above the range set for the rate of return. Where a new class is added and the revenues produced by that class exceed the incremental costs of service, however, a cost of service study serves no valid purpose. The cost of serving established classes is not reduced, and the cost of serving the new class is not placed on existing customers.

Given its underearnings position, City Gas was not obligated to factor common plant costs into the rate proposal for this new class of interruptible service consumer since it would remain below or within its authorized rate of return in all events. The testimony before the Commission was unrefuted on this point.

The testimony was also unchallenged that the rate proposed by City Gas would serve as a buffer for existing customers by obviating the need for a future rate increase.

(Tr. of July 18 at 223.). A prudent Commission would have approved the proposed rate. If City Gas were accepted by WASA to serve all or part of the Orr Plant, City Gas would have more closely approached its authorized rate of return and its present customers would have had an increase-prevention rate buffer.

It is irrelevant to the approval of City Gas' tariff that Miller Gas was required to perform a cost of service study to justify its proposed rate tariff. Traditional principles of ratemaking mandated that Miller Gas conduct a cost of service study. The company's authorized rate of return would have been vastly exceeded if its approved interruptible service charge was applied to the consumption needs of the entire WASA facility. (Id. at 127.).

Miller Gas in fact conducted only what its financial witness termed a "quick and dirty" study, utilizing a cost of service study prepared for a previous rate case. (Id. at 154). Miller Gas simply contrived a reduced rate, using this study, so that the WASA contract would generate revenues at a level where profits from this significant new load would not cause it to overearn its authorized rate of return. Despite the fact the company's waterpump service had long been subsidizing the other rate classes, so that reduced rates would have been appropriate for those customers, the company elected not to pass through any of its increased profits from new WASA revenues in the form of reduced charges to its other customer

classes. Instead, the company decided to retain all the profits to be made from its enhanced rate of return.

Miller Gas' use of a prior cost of service study accomplished nothing -- it did not lead to an adjustment of rates to other customer classes. Regardless of the validity or utility of Miller Gas' procedure, there was no dramatic difference in the way either that company or City Gas devised the interruptible rate offered for the WASA contract.

This Court is well aware that there is nothing magical or preemptive about any one of the several ratemaking factors. Cost to serve is but one factor among many of the ratemaking criteria. The Commission itself has often approved rates based on other criteria. Florida Retail Federation Inc. v. Mayo, 331 So.2d 308 (Fla. 1976); International Minerals & Chemical Corp. v. Mayo, 336 So.2d 548 (Fla. 1976); Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977); Re Tampa Electric Co., 92 P.U.R. 3d 398 (Fla. P.S.C. 1971).

The Commission recognized in its decision that neither company had rested its proposed rate solely on the cost of service factor. (R. 147). Each based its rate on competition as well. (Id.). Inasmuch as City Gas proved beyond dispute that its proposed rate was economically feasible and within its authorized rate of return, it was arbitrary of the Commission to deny City Gas' proposed tariff on the ground that the cost of service factor was not adequately addressed. The value of this service to WASA, City Gas, and the company's other

customers, as well as its cost economy, was never seriously questioned.

2. The Public Service Commission exceeded its jurisdiction by awarding an exclusive service territory to Miller Gas.

The pivotal factor selected by the Commission in choosing between the tariffs proposed by the two companies was that WASA was an existing customer of Miller Gas. (Order Denying Motion for Reconsideration, R. 189.). The Commission found that City Gas had invaded the self-described territory of Miller Gas, and it refused to condone this invasion. In unusually strident terms, the Commission asserted it would not sit by idly and permit City Gas to win this customer from Miller Gas given the companies' geographical descriptions of their service areas and the history of Miller Gas' service to a portion of the WASA plant. (Id.). The Commission simply deemed Miller Gas the "appropriate utility" to serve the entire Orr Plant. (Order on Proposed Interruptible Rate Tariffs, R. 147).

The critical issue here is what the Commission did, as opposed to what language it used to clothe its decision. The Commission went to lengths to announce that it was not resolving a territorial dispute between competing utilities. By denying City Gas the opportunity to serve WASA, however, and by barring WASA's right to select City Gas, the Commission in

fact provided an exclusive service territory to Miller Gas. This result was highlighted on reconsideration when the Commission announced its intent to stop City Gas from invading Miller Gas' alleged territory, notwithstanding that in the past City Gas "may have been better situated to provide service than Miller" to consumers of natural gas in that area. (R. 189).

The Commission ran roughshod over Dade County's right to invite competitive bids for the most economical service from two public utilities. In this regard the Commission went beyond its jurisdiction over rates and service areas. See section 366.04, Florida Statutes, and compare Teleprompter Corp. v. Hawkins, 384 So.2d 648 (Fla. 1980); Deltona Corp. v. Mayo, 342 So.2d 510 (Fla. 1976); Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978).

Chapter 366 addresses the regulation of electric and gas utilities. The Commission's grant of authority extends to rates and to service, but it does not extend to carving the state into non-competitive territorial domains. The law grants the Commission limited jurisdiction to approve or disapprove territorial agreements and to resolve territorial disputes, but only among electric utilities. Sections 366.04(2)(d) and (e), Florida Statutes (1985).

The Commission has not been given authority in Chapter 366, or any other provision of the law, to establish exclusive service areas for natural gas utilities. It is beyond question, of course, that administrative agencies have no

common-law powers beyond those conferred by statute. E.g., Peck Plaza Condominium v. Division of Florida Land Sales & Condominiums, Dept. of Business Regulation, 371 So.2d 152 (Fla. 1st DCA 1979).

Just last month this Court reiterated that the Commission's jurisdiction is purely statutory and that it does not extend to providing equitable relief. In United Telephone Co. of Florida v. Public Service Commission, 11 F.L.W. 330 (Fla. July 17, 1986), a Court "sympathetic to the commission's motives" nonetheless rejected that agency's legal bases for its action, saying that:

> The issue presented to us, however, is not whether the commission's solution was sound but whether the commission had jurisdiction to act at all under these circumstances. (11 F.L.W. at 331.)

The cases construing sections 366.04(2)(d) and (e) all start with the premise that the Commission has been afforded a clear but limited jurisdictional mandate to approve territorial agreements and settle territorial disputes among electric utilities alone. See Utilities Commission of City of New Smyrna Beach v. Florida Public Service Commission, 469 So.2d 731 (Fla. 1985); Gainesville-Alachua County Regional Electric, Water & Sewer Utilities Bd. v. Clay Electric Co-op., 340 So.2d 1159 (Fla. 1976); Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So.2d 1384 (Fla. 1982). In Gainesville-Alachua County, for example, the Court upheld these statutes against an undue delegation argument expressly

because they were "limited in scope." 340 So.2d at 1162. Significantly, the legislature has afforded the Commission no authority to create exclusive service territories among competing natural gas utilities.

In the course of this proceeding, the Commission's legal staff urged repeatedly that Miller Gas was entitled to serve the entire natural gas consumption of WASA because the Orr Plant was located within the exclusive service territory of Miller Gas. Staff relied on City Gas Co. v. Peoples Gas Systems, Inc., 182 So.2d 429 (Fla. 1965) as support for this position. The City Gas case, however, did not say the Commission had this authority. Moreover, it was decided prior to passage of the express grant of statutory authority to the Commission to settle territorial disputes and approve territorial agreements among electric utilities.

In City Gas, the court held that the Commission has the implied power to approve territorial service agreements between gas companies if they do not result in anti-competitive practices violating the antitrust laws. Id. at 434-35. This was inferred as a means of relieving gas utilities of their statutory obligation to be competitive, in the public interest. In the present proceeding, the Commission did not have before it a request to approve a territorial agreement by companies desiring to be relieved of their statutory duty to be competitive. Nothing in the City Gas decision implies power for the Commission to resolve territorial disputes which the

parties did not themselves settle first and then bring to the Commission for approval.

When City Gas was decided, section 366.04 did not grant the Commission authority to resolve territorial disputes for any public utilities. In later adding sections 366.04(2)(d) and (e), the legislature is presumed to have been aware of the City Gas decision. See State ex rel. Quigley v. Quigley, 463 So.2d 224 (Fla. 1985). By giving the Commission the power of territorial reconciliation over electric utilities only, the legislature did not confer the anti-competitive power which the Commission has now arrogated to itself in this case. In the presence of this limited but express grant of statutory powers, the omission of other powers essentially means that none may be inferred. See Thayer v. State, 335 So.2d 815 (Fla. 1976).

The City Gas decision does not afford the Commission power to settle a territorial dispute by awarding a customer to one competing natural gas utility on the basis of exclusive service rights. And subsequent Supreme Court decision, moreover, indicates just the opposite.

Prior to the amendments which gave the Commission territorial approval rights for electric companies, Storey v. Mayo, 217 So.2d 304 (Fla. 1968) raised the question of Commission authority to approve territorial service agreements between electric utilities. There, Florida Power & Light and the City of Homestead agreed to draw a boundary line between

their service areas in order to avoid duplication of lines in a suburb adjacent to the city. This agreement resulted in the transfer of certain customers from one utility to the other at no increase in service charge. The court affirmed the Commission's approval of the territorial agreement, explaining

> When the Commission approved the subject agreement, it, in effect, informed the respondent electric company that it would not have to serve the particular area because under the circumstances it would not be reasonable to require it to do so.

Id. at 308.

Guided by the Commission's authority to order extensions of service by utilities, the Court concluded that as a corollary function the Commission could approve decisions by utilities not to make extensions. Id. at 307. Thus, the Court in Storey held that the Commission could withdraw the public service obligation of a utility to serve a customer's reasonable request for service where that request could be reasonably served, at no added expense, by another utility.

The important point of Storey is that the Court was obliged to work within the statutory framework of competitive obligations to serve. This is still the law today. Recently the Court re-emphasized that

> [T]he legislature of Florida has never conferred upon this commission any general authority to regulate 'public utilities.' Traditionally, each time a public service of this state is made subject to the regulatory power of the commission, the legislature has enacted a comprehensive plan of regulation

> and control and then conferred upon the commission the authority to administer such plan.

Teleprompter Corp. v. Hawkins, 384 So.2d 648, 650 (Fla. 1980).

The legislature has acted comprehensively to regulate gas and electric utilities. In the gas field, it has provided the Commission no express authority over territorial disputes and agreements. In the electric field, it has done so expressly. The Commission is a creature of statute, not a constitutional body imbued with organic authority to change the law. See City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493, 495 (Fla. 1973). The Commission may not change the law or its express authority by creating exclusive service territories for natural gas utilities.

The effect of the Commission's decision in this case is anti-competitive. Miller Gas has been awarded the exclusive right to serve the Orr Plant, free from competitive challenge by another natural gas utility which has found it economically beneficial to serve the plant and has affirmed to do so at a lower rate. "Government should not intrude to restrict or limit freedom of private enterprise to function in any area unless governing statutes clearly so provide." Greyhound Lines, Inc. v. Yarborough, 275 So.2d 1, 3 (Fla. 1973). The governing statutes do not so provide.

Chapter 366 of the Florida Statutes must be read in tandem with the provisions of the state's antitrust law, section 542.15 et. seq., Florida Statutes (1985), because the

regulatory chapter retains the competitive principles of efficiency, sufficiency and adequacy in the fixing of rates. See section 366.041(1), Florida Statutes (1985). These laws embody the legislative intent to foster commercial competition. Unless Chapter 366 expressly permits public utilities particular anti-competitive practices, the Commission may not do so. In the absence of express statutory authority for the establishment of monopolistic enclaves of exclusive service territory for natural gas utilities, none may be implied consistent with the underlying legislative scheme embodied in Chapters 366 and 542.

An interesting parallel is seen in the law of California. There, it is generally accepted that a gas utility may serve only within an approved area granted by certification. Re Pacific Gas and Electric Co., 71 P.U.R. 4th 471 (Cal. Pub. Util. Comm. 1986). Nonetheless, the California Public Utilities Commission has recently opened areas of significant new service to competition. The Commission found that there is no state-based constitutional right for a gas utility to be free from competition even in an alleged exclusive service territory, and that such state-created monopolistic zones invariably do not serve the public interest in cost efficient and reliable energy service.

The decision of the Commission to award an exclusive right to Miller Gas to serve WASA eclipsed Dade County's right to select among competitive bids from utilities economically

suited to serve its needs. The County's bid invitation process was invalidated and the Commission obstructed the County's ability to obtain the lowest cost service for its natural gas needs.

A consumer utilizing the services of a particular utility may discontinue use, subject only to the terms of its contract with that utility. See Manatee County Growers Ass'n v. Florida Power & Light Co., 113 Fla. 449, 152 So. 181 (1934). Just as the Commission has no authority to vindicate breaches of private contracts, Deltona Corp. v. Mayo, 342 So.2d at 512, or to adjudicate whether a utility has breached its contract by raising its rates, Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2d DCA 1975), so too it has no authority to compel a natural gas customer to contract with a specific utility to the exclusion of another company offering a better service rate.

The Commission's decision impaired the County's rights without reference to the interest of the public at large. The unrebutted testimony of Miller Gas' own rate expert was that a WASA contract with City Gas would promote greater savings county-wide than would acceptance of Miller Gas' proposed rate. (Tr. of July 18, at 166-168). The Commission seems to have lost sight of this Court's admonition that the "regulation of commercial enterprise is generally a bilateral bargain." United Gas Pipe Line Co. v. Bevis, 336 So.2d at 564.

The Commission in this case sought to benefit Miller Gas without concerning itself with adverse effects on the public. It wielded the state's police power to promote one privately operated utility above the public interest, by impairing the opportunity of a public consumer to gain the best rate for utility service. Cf. United Gas Pipe Line Co. v. Bevis, 336 So.2d at 563 n. 12: "[a]lthough legislation is not necessarily invalid because it benefits only a limited group, the class of 'public' affected. . . is relevant when we are weighing an exercise of the State's police power against the impingement of contract rights."

The Commission's decision constitutes just such a misuse of police powers. It simply reached out and demanded that this consumer take gas service from Miller Gas. To achieve this goal, the Commission ignored the facts developed in its proceeding. Despite having obligated itself to serve only in its described service territory, Miller Gas did not even desire to serve all users of natural gas within that territory. In some instances, Miller Gas and its affiliates continue to supply more expensive propane gas to consumers instead of natural gas. (Tr. of July 18 at 185.). The Commission wholly ignored this fact in purporting to serve the public's interest by making Miller Gas' territory exclusive.

The Commission also erred in evaluating another key, factual matter. It characterized the service needs of the WASA facility as an additional load for an existing customer. City

Gas does not contend that the WASA account would not add additional load to either of the bidding companies, for clearly both had to extend significant pipage to the lime kiln in order to serve it. City Gas does challenge the assumption behind the Commission's declaration that WASA was an existing customer of Miller Gas. It was not. The contract term for service to WASA's waterpumps had ended and the service being provided was terminable by Dade County on one month's notice. The County's goal at all times was to obtain service for all its needs at the Orr Plant, at the lowest possible cost, from a single gas company.

Finally, the Commission justified the economics of its conclusory ruling by measuring only the cost to Dade County of Miller Gas' old service rate to the pumps, coupled with City Gas' proposed rate to serve the kiln. (R. 189). This ignored the fact that Miller Gas' rate, as proposed, contemplated that it would revert to the old, higher price if total consumption at the plant did not exceed the revenues Miller Gas earned from its old rate applied to the waterpump service. (Tr. of July 18 at 148). In reality, Miller Gas' proposed rate is the speculative one because it depends on actual consumption at the lime kiln. The Commission ignored the savings to the County from City Gas' rate as applied to all consumption needs of the

Orr Plant.[1] This calculation too bears witness to the Commission's arbitrary decision to award the service request of WASA to Miller Gas.

Conclusion

The Commission exceeded its jurisdictional mandate in awarding to Miller Gas an exclusive territorial right to serve the Orr Plant. Its powers do not encompass this authority.

City Gas established the value of its service and the overall economic viability of its proposed tariff. It was entitled to have the tariff approved. No statute permits the Commission to prevent the County from choosing between two legally sufficient service proposals. The choice belonged to Dade County.

The decision of the Commission should be reversed.

Respectfully submitted,

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[1]City Gas expressly guaranteed its proposed rate to the pumps, as well as the lime kiln, if the Commission ordered it to serve the entire plant. (Tr. of July 18 at 203-204.)

Certificate of Service

I certify that correct copies of this initial brief were mailed August 7, 1986, to the following:

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