IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,283

FILED
OCT 1 1986
CLERK, SUPREME COURT
By
Deputy Clerk

CITY GAS COMPANY OF FLORIDA

Appellant,

vs.

JOHN R. MARKS, et al.,

Appellees.

Reply Brief of Appellant

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

Arthur J. England, Jr., Esq.
and
Charles M. Auslander, Esq.
of
Fine Jacobson Schwartz Nash
Block & England, P.A.
2401 Douglas Road
Miami, Florida 33145
Telephone: (305) 446-2200
Attorneys for City Gas
Company of Florida

TABLE OF CONTENTS

	Page
Statements of the Case and Facts	1
Argument	3
Conclusion	4
Certificate of Service	5

Statements of the Case and Facts

Both Miller Gas and the Commission have included in their answer briefs statements of the case and facts different from those recited in the initial brief filed by City Gas. The differences, however, are legally inconsequential, and appear to have been inserted solely for characterization. For example, Miller Gas makes the point that City Gas designed its tariff to serve WASA simply to undercut a rate proposal made by Miller Gas. This characterization of City Gas is obviously irrelevant to the outcome of this proceeding. As noted in City Gas' initial brief, competition is the desired goal of the legislation governing this industry. In any event, the characterization is inaccurate. As the answer brief of the Commission makes clear (see Commission brief at page 3), Miller Gas initially filed a tariff at 7.5 cents per therm in order to undercut the tariff which City Gas had on file for 9.48 cents per therm to interruptible users of natural gas.

The Commission also took a hand at characterization, classifying the tariff filed by City Gas as discriminatory because it applied only to one facility -- WASA. Miller Gas' tariff for interruptible service was available only to one customer as well, however, and the record indicates that it had no prospect of obtaining any other customer who would ever use this preferential tariff. The Commission acknowledged as much

in its answer brief, at page 10. The Commission has never explained why Miller Gas is privileged to serve one customer with a special rate, but City Gas is not. In any event, this dichotomy ignores the fact that City Gas made its tariff available to any other customer which would guarantee the same high volume and a minimum two year term, as Dade County had done.

As another point of asserted difference, both Miller Gas and the Commission maintain that Dade County has benefited from the Commission's award to Miller Gas by having a rate below that which either Miller Gas or City Gas would have charged to interruptible customers before the bidding war began. It is nonsensical, however, to compare Miller Gas' winning rate of 7.5 cents per therm with the rates both Miller Gas and City Gas had on file for other customers before the County issued its invitation to bid. The only relevant comparison would test City Gas' proposed rate of 7 cents per therm against the 7.5 cent rate which the County is now required to pay.

What is legally relevant in the statement of the case and facts is that, when all is said and done, the Commission simply chose to favor the utility initially favored by the legal staff on the ground that Miller Gas had an exclusive territory. All else in the proceeding is justification for the arbitrary action which the Commission took in rejecting City Gas' tariff so that Dade County would be obliged to accept the higher rate proposed by Miller Gas.

Argument

The first issue posed by City Gas was the Commission's abuse of its discretion in failing to approve the proposed interruptible rate tariff submitted by City Gas. The record basis for supporting that proposed tariff, and the legal authorities for doing so, are adequately set out in City Gas' initial brief. They establish, beyond argument, that City Gas did all that was necessary -- indeed all that Miller Gas did -- to win the approval of its proposed tariff from the Commission. The answer briefs of appellees do not derogate from that showing.

Contrary to the suggestion in the answer briefs, the Commission was not obliged to reject one tariff and accept the other. It could have approved both rates, leaving to Dade County the choice of its natural gas supplier. The Commission abused its discretion in denying City Gas the opportunity to serve WASA so that Miller Gas could alone serve that customer.

The second argument presented by City Gas centers on the Commission's award of an exclusive service territory to Miller Gas. The Commission denies that this occurred. The fact is, however, that Order No. 15511 entered by the Commission on January 2, 1986 stated in no uncertain terms that the Commission did not intend to condone an invasion by City Gas into the self-described territory of Miller Gas. Given

that City Gas was indeed authorized to serve WASA in the area which Miller Gas claimed as its exclusive territory[1] (see Commission answer brief at page 13), the only appropriate decision for that agency, on the basis of this record, was to approve both the tariff filed by City Gas and the tariff filed by Miller Gas.

Conclusion

There is competent and substantial evidence to support the approval of City Gas' proposed interruptible rate tariff for high volume, long-term customers. The court should vacate so much of the Commission's orders as withholds approval of the tariff filed by City Gas for this class of service.

Respectfully submitted

Arthur J. England, Jr., Esq.
and
Charles M. Auslander, Esq.
of
Fine Jacobson Schwartz Nash
Block & England, P.A.
2401 Douglas Road
Miami, Florida 33134
(305) 446-2200

---

[1] Miller Gas supported its claim of exclusivity by reference to a Federal Power Commission order alleged to preclude City Gas from serving WASA. This argument is factually and legally irrelevant to issues in this proceeding. That order related only to pipeline resales to City Gas of "firm" gas, not interruptible gas, and the Commission even acknowledged its lack of authority to create exclusive territories of service for state-regulated utilities.

Certificate of Service

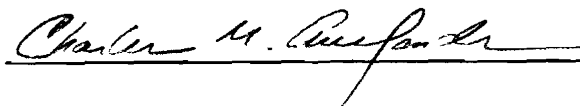
I hereby certify that a true and correct copy of the foregoing was furnished by mail on September 29, 1986, to:

William S. Bilenky, General Counsel
Public Service Commission
101 E. Gaines Street
Tallahassee, Florida 32301-8153;

Norman Horton, Jr., Esq.
Mason, Erwin & Horton, P.A.
1020 E. Lafayette Street
Tallahassee, Florida 32301

and

Clifford A. Schulman, Esq.
Greenberg, Traurig, Askew, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1401 Brickell, 7th Floor
Miami, Florida 33131



5481D
092686/5/SR