047 W/app

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 13 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JOHN FALK,

Appellant,

v.

J. TERRY DEASON and SUSAN F. CLARK, as and constituting the FLORIDA PUBLIC SERVICE COMMISSION, and H. GELLER MANAGEMENT CORP.,

Appellees.

Case No. 79,676

==========

APPEAL FROM
THE FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NUMBER 910056-PU

==========

ANSWER BRIEF OF APPELLEE H. GELLER MANAGEMENT CORP.

C. EVERETT BOYD, JR.
Fla. Bar No. 190
of the law firm of
Ervin, Varn, Jacobs,
Odom & Ervin
Post Office Drawer 1170
Tallahassee, Florida 32302
(904) 224-9135

ATTORNEYS FOR APPELLEE
H. GELLER MANAGEMENT CORP.

TABLE OF CONTENTS

CITATION OF AUTHORITIES

CASES CITED: PAGE(S)

STATEMENT

Appellee, H. Geller Management Corp., was a party to the proceedings before the Florida Public Service Commission, and shall be referred to as "GELLER." The Public Service Commission will be referred to as the "Commission." Appellant, John Falk shall be referred to as "FALK."

The Record on Appeal has been prepared in two volumes, identified as Volume I and Volume 11. All citations herein as to the record shall be Vol. I as (Vol. I, R. __) or Volume II as (Vol 11, R. __). The exhibits introduced into evidence at the hearing are contained in Volume II of the Record, but are not separately paginated; References to exhibits shall be as (Vol. 11, Ex. __). The transcript of the evidentiary hearing held below is also contained in Volume II of the Record on Appeal, and citations to that transcript shall be as (Tr. __).

GELLER files herewith its Appendix to this Brief to aid the Court in its consideration of this cause. Citations to the Appendix shall be as (App. __).

STATEMENT OF CASE AND FACTS

GELLER is substantially in agreement with the statement of the case and facts set forth in FALK's initial brief. The Court can easily note and should disregard the numerous attempts by FALK to argue the merits of the case by his description of the parties' positions and Commission's rulings below. A few brief clarifications of the case and facts are nevertheless called for.

Pursuant to its September 1, 1979, management contract with the Jefferson Building condominium (Vol. 11, Ex. 4), GELLER provides to its residents a wide range of services and facilities. This case involves only the use of electricity in providing those services and facilities.

For a single monthly maintenance fee (Tr. 52), FALK and the other residents are provided liability and hazard insurance, gas, hot and cold water for the buildings, sewer service, garbage and grounds maintenance, roof maintenance, and extensive recreational facilities including swimming pools, shuffleboard courts, recreation halls, billiard rooms and kitchen facilities. (Tr. 111); (Vol. 11, Ex. 4, pp. 1-3). Included in the "wide range of services and facilities" provided are "electric service required for the common areas of the building an[d] common facilities, and recreational facilities including servicing pools, shuffleboard courts, recreational halls, billiard rooms saunas and steam rooms, meeting rooms and kitchen facilities." Commission's October 18, 1991, Final Order (App. 2-3).

"There is no separate charge made to or collected from residents for electricity, for use of the recreational buildings or for use of any of the services provided by GELLER." (Tr. 52, 106, 149). Commission's October 18, 1991, Final Order (App. 3). The single monthly fee paid by residents entitles them to virtually unlimited (subject to reasonable rules of operation) use of all of the recreational facilities and services. (Tr. 110-111).

An estimated budget filed with the Division of Florida Land Sales and Condominiums at the inception of the Jefferson Building condominium project contained an estimate of $180.00 per month for the electricity coats for the entire Jefferson Building. (Tr. 124). The estimated budget was prepared, not by GELLER, but by the developer of the project, Herm Geller Enterprises, Inc. (Tr. 108, 124). The developer was a separate corporation affiliated with Mr. Geller but whose separate and distinct existence was expressly explained in the management contract. (Tr. 108-109; Vol. 11, Ex. 4 [contract paragraph XIV(e)]). The budget was a rough estimate of numerous operating expenses put together by the developer, at the urging of the Land Sales Division staff. (Tr. 205-206).

FALK's statement of the case and facts (pages 5, 6 of 17) relies upon the estimated budget to assert, without qualification, that the Jefferson Building residents "paid" specific amounts for common area electricity in given years. The Commission found below that no separate charge was made by GELLER to residents for electricity. (App. 3).

After the filing *of* FALK's complaint, GELLER initially contested the Commission's jurisdiction. This Court held, in Florida Public Services Commission v. Bryson, 569 So.2d 1253, 1256 (Fla. 1990), that the Commission had "... a colorable claim *of* exclusive jurisdiction to consider allegations that a management company overcharged a condominium owner for gas and electricity." The action below thus proceeded *to* final evidentiary hearing and issuance of the order now disagreed with by FALK.

SUMMARY OF AR

The Commission construed its statutes and rules to find that GELLER, operating under its September 1, 1979, management contract with the Jefferson Building condominium, was not a public utility. That finding comes to the court clothed with a presumption of correctness and validity, which should be affirmed unless shown not to be supported by competent substantial evidence or contrary to the essential requirements of law. FALK would have this Court reweigh the substantial evidence heard and considered by the Commission in concluding that "GELLER doesn't supply electricity ... it supplies services and facilities [in the condominium common areas] which require the company to use and pay for electricity." (App. 3). The Commission's finding should be affirmed.

The Commission further construed its Rule 25-6.049(5) and (6) to conclude that the rule applies only to occupancy units and, thus, not to the management activities of GELLER. That finding is likewise favored with a presumption of correctness that FALK has failed to overcome. The conservation oriented rule titled "Measuring Customer Service" requires all "occupancy units to be individually metered" -- the Jefferson Building condominium units are so metered. The rule 25-6.049(5)(a) goes on to exempt four categories of occupancy units (such as shopping center kiosks, central heating and air conditioning systems, hospitals, hotels, college dorms, and RV parks, where practical considerations suggest

individual metering is not appropriate. Finally the rule provides "where individual meters are not required under **25-6.049** (5)(a)," the customer of record may apportion his electric costs among the actual users, but can only recover his actual costs.

The rule is abundantly practical, fair, and clearly not applicable to instances such as GELLER's where the electric service involved is for condominium common areas and recreational facilities. The Commission found that the rule "does not apply to a maintenance fee paid for common area services of the condominium development." That finding should be affirmed.

ARGUMENT

I.

THE COMMISSION'S FINDING THAT GELLER WAS NOT ACTING AS A PUBLIC UTILITY UNDER ITS MANAGEMENT CONTRACT WITH THE JEFFERSON BUILDING CONDOMINIUM IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

The Commission found that GELLER was not acting as a public utility under its September 1, 1979, management contract with the Jefferson Building condominium association. That decision, made following a full evidentiary hearing, is now challenged by FALK. FALK has failed, however, to refer the Court to the proper standard of review upon appeal.

This Court has often restated the very "narrow"[1] standard of review that it applies to decisions of the Commission and the concomitant "burden"[2] on appellants to show that the Commission's determination was arbitrary or unsupported by evidence. This Court only determines whether the Commission's order is supported by competent substantial evidence and comports with the essential requirements of law. International Telecharge, Inc. v. Wilson, 573

---

[1] Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353, 1354 (Fla. 1980) and Florida Telephone Corporation v. Mayo, 350 So.2d 775 (Fla. 1977).

[2] International Telecharge, Inc. v. Wilson, 573 So.2d 816, 819 (Fla. 1991) and Manatee County v. Marks, 504 So.2d 763, 765 (Fla. 1973).

So.2d 816 (Fla. 1991); Gulf Power Company v. Florida Public Service Commission, 453 So.2d 799 (Fla. 1984); Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983). Orders of the Commission came to the Court clothed with a presumption of correctness. Citizens of the State v. Public Service Commission, 448 So.2d 1024 (Fla. 1984); Gulf Oil Company v. Bevis, 322 So.2d 30 (Fla. 1975). FALK has failed to overcome that presumption of correctness.

The Commission, in finding that GELLER was not acting as a public utility, obviously applied the definition of utility contained in Chapter 366, Florida Statutes (1991)[3] to the facts of the present cause. The contemporaneous construction of a statute by the Commission, or other agencies charged with enforcement and interpretation of the statute, is entitled to great weight. Raffield v. State, 565 So.2d 704 (Fla. 1990), cert. den., 111 S.Ct. 674, 112 L.Ed.2d 666; Samara Development Corp. v. Marlow, 556 So.2d 1097 (Fla. 1990); P.W. Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988). The Court will not depart from that construction unless clearly shown to be unauthorized or erroneous. P.W. Ventures, supra at 283; Gay v. Canada Dry Bottling Company, 59 So.2d 788 (Fla. 1952). FALK has patently failed to demonstrate

---

[3] "Public Utility" means every person, corporation, partnership, association or other legal entity ... supplying electricity or gas ... to or for the public within this state; ... .

Section 366.02(1), Florida Statutes.

such error.

The Commission fully examined the circumstances of the management contract under which GELLER provides services to the Jefferson Building and other condominium associations in the Terrace Park of Five Towns complex. The Commission had before it the contract itself (Vol. 11, Ex. 4) and the testimony of Mr. Falk, as well as the testimony of Mr. Herm Geller, the principal of GEUER, and GELLER's secretary-treasurer, Susan Tucker. The Commission's Order (App. 1-5) succinctly summarized the facts surrounding the contract.

> "The record in this docket reflects that Geller ... provides services and facilities for the residents of Terrace Park of Five Towns in return for their payment of a monthly maintenance fee. Mr. Geller testified that Geller Management does not supply or sell electricity; it simply provides specific services many of which necessarily require the use of electricity." (Ts. 147-149).
>
> "The Management contracts call for Geller Management to provide a wide range of services and facilities. For a monthly maintenance fee (Tr. 52) residents are provided liability and hazard insurance on the building and grounds, gas for cooking and heating their units, hot and cold water for buildings and units, sewer service, lawn and grounds maintenance, television antenna service, garbage and trash collection, repair and maintenance of the exterior of the building and cleaning of common areas, roof maintenance, elevator maintenance, electric service required for the common areas of the buildings on common facilities, and recreational facilities including servicing pools, shuffleboard courts, recreational halls, billiard rooms, saunas and steam rooms, meeting rooms and kitchen facilities. (Tr. 111; Exhibit 4 - Contract)."

> "There is no separate charge made to residents for electricity (Tr. 106) or for use of the recreational buildings (Tr. 106). The residents pay their monthly maintenance fee for all of the services and facilities available in the project."

FALK advances a strained reading of the contract and GELLER's provision of facilities and services thereunder that simply is not supported by the record. As noted by the Commission, and conceded by FALK, this case solely involves electricity used by GEUER in connection with its contractual obligation to furnish common areas and recreational facilities and services for the condominium residents. It does not involve the electricity for the residents' own condominium units, which are separately metered; each resident is a direct customer of Florida Power Corporation for their own unit. (Tr. 13, 111). The many common area facilities and services are available to all residents without any limitation or separate charge or fee. (Tr. 52, 110-111). The residents all pay a single lump-sum monthly maintenance fee for all services by GELLER. (Tr. 52). No separate fee or charge is assessed, nor paid by residents, for electricity. (Tr. 106).

As noted by the Commission, GELLER's management contract allows it to periodically increase the maintenance fee, by set amounts, in the event of increases in certain enumerated operating costs incurred by GELLER. Those costs include gas, sewer charges, insurance, garbage fees, and electricity (Vol. 11, Ex. 4, pp. 5-7). As explained by Mr. Geller (Tr. 116) and correctly observed by the Commission (App. 3) these provisions of the contract serve as an

"indexing procedure" (App. 3) allowing GEUER to recoup some of its increased operating costs. The indexed increase in maintenance fees do not exactly track the actual increase in costs, (they may be greater or less than the actual increase in costs) a further reflection that the contract provisions are indices and not specific charges for specific services.

FALK, of course, would direct the Court to his narrow contention of a sale of electricity. The Commission, with its experience and expertise in the public utility arena, also observed that "from a common sense standpoint GELLER is not a public utility engaged in the sale of electricity." (App. 3) GELLER's provision of typical community areas, services and facilities -- swimming pools, saunas, meeting rooms, kitchen facilities and the like, inherently require the use of electricity (as well as other costs for labor, materials, supplies, etc.). No fee or charge made to residents is assessed based on how much the residents use those facilities or how much electricity is consumed while they are used. The residents are permitted unlimited use of those services and facilities, (Tr. 110-111) and correspondingly unlimited use of the electricity needed to operate them.

FALK also makes much to do about an estimated budget prepared in 1979 by the developer of the Jefferson Building project, Herm Geller Enterprises, Inc. That budget was solely an estimate by the developer of anticipated expense levels and does not represent actual charges to residents. (Tr. 127, 204). The residents are in no way "charged" for electricity by virtue of that

estimated budget.

The Commission obviously considered and placed little or no weight on the significance of the estimated budget. That is exactly the role of the Commission -- to weigh and evaluate the evidence in the record. FALK would have the Court reweigh that evidence to support his claims, plainly contrary to the Court's established principles of review. Manatee County v. Marks, supra at 765; Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 443 So.2d 92 (Fla. 1983). The Commission evaluated and weighed the evidence, and resolved the conflicts in the evidence offered by GELLER and FALK.

The Court's explanation of its review of Commission orders in Gulf Power Company, supra, is especially instructive:

> We will not overturn an order of the PSC because we would have arrived at a different result had we made the initial decision and we will not reweigh the evidence. Our task is to determine whether competent substantial evidence supports a PSC order. (Citations omitted).

453 So.2d at 803. The Commission's decision was correct and is clearly supported by competent substantial evidence.

FALK's reliance on Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978), is misplaced. Fletcher does not hold that a management company acts as a public utility when it passes along the costs for common area utilities; the facts in Fletcher are far different from those in the present case.

In Fletcher, the management company proposed to take water for an entire development through its master meter. Electricity was not involved. Fletcher then proposed to turn around and separately charge each of the single family homes, 242 condominium units and 826 rental apartments in the development for the water used in their homes, as well as water used in the common areas. Sewer services would be similarly handled. The Commission, affirmed by this Court, found Fletcher's activity to constitute that of a water and sewer utility:

> From the facts cited above, it is apparent that the operations of Fletcher Properties, Inc. in providing water and sewer utility service, are within the definitions of a utility in Section 367.021, Florida Statutes. ... This is particularly so as to the condominium units and others not tenants of Fletcher.

356 So.2d at 292. (Emphasis supplied.)

Thus, the particular emphasis of the Commission in Fletcher was the management company's specific assessment of charges for water and sewer services used by individual single family homes, condominiums and apartments (living units). In addition, the single family home owners, apartment centers and condominium association were to be directly charged for the water and sewer expenses by some form of allocation process. This is a far cry from GELLER's contractual arrangement for electricity where (1) the residents are separately metered by Florida Power Corporation for their own units, (2) the residents pay a single

monthly maintenance fee for all services and facilities, from which GELLER must recoup all of its operating costs, including common area electric expenses, and (3) no separate charge or fee is made for electricity.[4]

Thus, Fletcher provides no support for FALK. Indeed, it provides a clear distinction between the Fletcher facts -- where residents, including single family, condominium and apartment residents, are directly charged for water consumed, -- and GELLER's contractual arrangement where no such charges are made. The costs incurred by GELLER for electricity used in the common areas is recovered from the residents solely through the single, fixed maintenance fee paid by all residents.

The Commission correctly found GELLER not to be a public utility engaged in the resale of electricity. That determination is overwhelmingly supported by competent substantial evidence in the record, and comports with the essential requirements of law. The Commission's finding should be affirmed.

---

[4] FALK also cites to P.W. Ventures, Inc., supra, as reaffirming Fletcher. P.W. Ventures distinguished Fletcher, noting that in Fletcher:

> We simply affirmed the PSC's determination that the developer and owner of lines and lift stations who proposed to furnish water and sewer service to single family homes at the same rate as it was charged by the area water and sewer utility occupied the status of a public utility."

533 So.2d at 284.

II.

THE COMMISSION CORRECTLY FOUND THE PROVISIONS OF ITS RULE, SECTION 25-6.049 FLORIDA ADMINISTRATIVE CODE, INAPPLICABLE TO GELLER UNDER ITS MANAGEMENT CONTRACT FOR THE JEFFERSON BUILDING CONDOMINIUM.

The Commission, after considering the extensive evidence of GELLER's operations under its management contract with the Jefferson Building condominium, concluded that its Rule 25-6.049 is not applicable to GELLER. The Commission explained its conclusions as fallows:

> "Our rule which prohibits resale of electricity at a profit applies to occupancy units, not common areas and services. The purpose of Rule 25-6.049(5), Florida Administrative Code is to mandate the use of individual meters for occupancy units such as condominium units, apartments, stores and shops in shopping centers and malls. The rule is not intended to be thrust into a setting such as this where units are separately metered and residents pay Florida Power Corporation directly for the electricity used in their individual units. The rule does not apply to a maintenance fee paid for common area services and facilities used by residents of the condominium development. We therefore find that Geller has not violated Rule 25-6.049(5), Florida Administrative Code."

The presumption of correctness and validity discussed in Point I above applies with equal force to the Commission's construction of its own rules. Pershing Industries, Inc. v. Department of Banking and Finance, 591 So.2d 991 (Fla. 1st DCA

1991). FALK has certainly not shown that construction to be in error.

The rules in question are found under the heading "Measuring Customer Service." (App. 8). Rule 25-6.049, Sections (1)-(4) prescribes general rules relating to meters and reading thereof. Rule 25-6.049(5) then requires all "separate occupancy units"[5] constructed after 1981 to have "individual electric metering." The rule (§25-6.049(5)1.-4.) then sets out four categories of facilities that are exempt from individual metering, for obvious reasons:

1. portions of commercial facilities subject to physical alteration;

2. electricity used in central heating and air conditioning systems (again, such as in a shopping center, mall or office building);

3. electricity used in "specialized-use" housing such as hospitals, nursing homes, college dorms, fraternity and sorority houses, motels and hotels; and

4. overnight travel trailer (RV) parks or marinas.

---

[5] "Occupancy unit" means that portion of any commercial establishment, single and multi-unit residential building, or trailer, mobile home or recreational vehicle park, or marina which is set apart from the rest of such facility by clearly determinable boundaries as described in the rental, lease, or ownership agreement for such unit. Section 25-6.049(5)(b)1.

The purpose of Rule 25-6.049(5) is to foster energy conservation (Tr. 219) by requiring individual metering of all separate occupancy units -- homes, apartments, condominiums, offices, retail stores. The person or entity using the electricity receives and pays a separate bill for the electricity used. The above exceptions represent common sense identification of occupancy units where separate metering is simply not practical.

The commission rule then goes on, in Section 25-6.049(6)(a) and (b), to address the exception categories where individual metering is not required by 25-6.049(5), providing:

> (6)(a) Where individual metering is not required under Subsection (5)(a) and master metering is used in lieu thereof, reasonable apportionment methods, including sub-metering may be used by the customer of record or the owner of such facility solely for the purpose of allocating the cost of the electricity billed by the utility.
>
> (b) *Any* fees or charges collected by a customer of record for electricity billed to the customer's account by the utility, where based on the use of sub-metering or any other allocation method, shall be determined in a manner which reimburses the customer of record for no more than the customer's actual cost of electricity.

(Emphasis supplied).

The clear intent of Rule 25-6.049(6)(a) and (b) is to, (1) where individual metering for occupancy units is not required by 25-6.049(5), allow the customers of record to apportion their electric expense to the several persons or entities occupying the units, and (2) to provide in those instances that the customer of record must apportion his costs so he recovers no more than this

actual electric expense. Again, a common sense approach that will foster a mechanism for the actual consumers of electricity to pay the bill, but prevent the customer of record from making a profit on the electricity.

Clearly the Commission's rules do not address and are not intended to be applied to non-occupancy units. The rules apply to condominium units, but not to common areas; to shopping mall retail stores and kiosks or other defined occupancy units, but not to the balance of the common areas. Rule 25-6.049(5) plainly applies only to occupancy units. Rule 25-6.049(6) just as clearly -- by its express reference "where individual metering is not required under subsection (5)(a)," is intended to apply only to occupancy units. FALK's protests to the contrary are without basis in law or fact.

FALK's citation (at page 14 of his brief) to the 1988 rule making proceedings for the rule in fact supports the Commission's construction in the present case. The quoted language expressly ties the prohibition against recovery of a "profit" by the customer of record, to instances "where individual utility meters were not required." That is the precise language of Section 25-6.049(6)(a) which ties the prohibition against profit to the instances "where individual metering is not required under Subsection (5)(a)." (Emphasis supplied). It is readily apparent that the entire rule is directed to occupancy units, and not to electricity used in recreational facilities in a condominium project.

The Commission's findings[6] reflect a practical yet consistent reading of its own rules. There simply is no basis upon which to apply the rules (25-6.049(5) and *(6))* to the case at bar where "a maintenance fee is paid for common area services and facilities used by residents of the condominium development." **(App. 4).**

FALK's analysis of the rules fails to even mention the provisions of Rule **25-6.09(5)(a)1.-4.,** where the Commission has exempted the four classes of occupancy units from being individually metered. It is those categories to which 25-6.049(6) refers when it says "where individual metering is not required under 5(a)." Indeed, there are countless instances of non-occupancy units in Florida that do not require or have individual meters, condominium common areas, commercial shopping areas, common areas of office buildings. The customers of record in those instances are not drawn into the sphere of this rule simply because **they** pass-through or recover their electric expenses in the form of rent or maintenance fees. It is ludicrous to suggest the Commission's rules so intend.

---

[6] Because the Commission held Rule 25-6.049(5) and (6) not applicable to GELLER, it did not reach Issue 12 identified before the Commission as to whether application of the rule, adopted in **1988,** to the September 1, 1979, management contract of GELLER would violate the constitutional prohibition against impair of contract. GELLER contended before the Commission, and still contends, that such a prohibited impairment of contract would result if the rule is applied to GELLER's 1979 contract. Article I, Section 10 of the Florida and United States Constitution. The issue is addressed to length in GELLER's brief filed before the Commission. (Vol. I, R. **121-128, 202-206).**

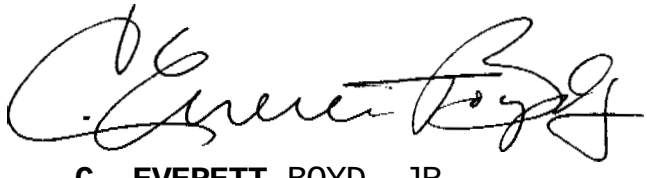
The Commission has followed both the letter and the practical intent of its rule. Rule 25-6.049(5) and (6) does not apply to circumstances such as GELLER's where condominium residents pay a single lump sum maintenance fee that covers all common area services and facilities, and where no separate charge is made for electricity. The Commission has correctly and fairly applied its rule, and that decision should be affirmed.

CONCLUSION

The Commission's order below correctly found that GELLER's activities under its condominium management agreement -- the provision of services and facilities for a monthly maintenance fee -- do not render it a public utility. Further, the Commission properly held those activities not to be violative of its rule relating to separate meeting of occupancy units. The Commission's decisions are clearly supported by competent, substantial evidence and are consistent with the essential requirements of law.

FALK has made no showing to overcome the presumption of correctness and validity carried by this and all Commission orders. The Commission's order should be affirmed in all respects.

Respectfully submitted,



C. EVERETT BOYD, JR.
Fla. Bar No. 190960
of the law firm of
Ervin, Varn, Jacobs,
Odom & **Ervin**
Post Office Drawer 1170
Tallahassee, Florida 32302
(904) 224-9135

ATTORNEYS FOR APPELLEE
H. GELLER MANAGEMENT CORP.

CERTIFICATE OF SERVICE

1 HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief and attached Appendix *to* Answer Brief was furnished by United States Mail to David A. Lamont, Esquire, Post Office Box 13576, St. Petersburg, Florida 33733 and to Rob Vandiver, Esquire and Cynthia Miller, Esquire, 101 East Gaines Street, Tallahassee, Florida 32301, this 13TH day of July, 1992.

C. EVERETT BOYD, JR.

==========

APPENDIX TO
ANSWER BRIEF OF
H. GELLER MANAGEMENT CORP.

==========

INDEX TO APPENDIX

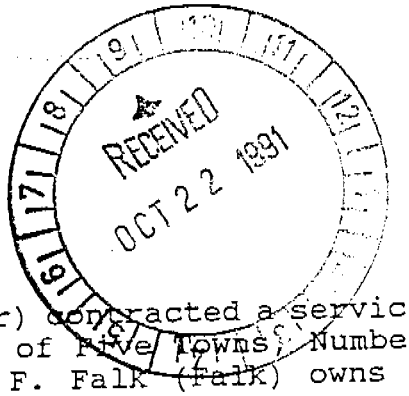
Answer.brf

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of Consumer John Falk Regarding Resale of Electricity and Gas by the H. Geller Management Company.	)	DOCKET NO. 910056-PU ORDER NO. 25234 ISSUED: 10/18/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
J. TERRY DEASON



FINAL ORDER

BY THE COMMISSION:

H. Geller Management Corporation (Geller) contracted a service and maintenance agreement with Terrace Park of Five Towns, Number 15, Inc., a condominium association. John F. Falk (Falk) owns a condominium unit at Terrace Park and pays Geller for its management services, including the provision of gas (for individual units) and electricity (for all common areas).

This matter was initiated by complaint filed with our Division of Consumer Affairs, in which Falk alleged that Geller overcharged him. Specifically, Falk claimed that Geller bought gas and electricity from public utilities and then, contrary to law, resold those resources to individual customers at a profit. Staff apprised Geller of the complaint and said it intended to hold an informal conference pursuant to the Florida Administrative Code. Geller denied the allegation, claiming that it did not resell the resources--it merely used indices to determine maintenance fee increases. Thereafter Staff scheduled an informal conference to be held on November 27, 1989, in St. Petersburg, Florida.

Before the conference could be held, Geller filed a complaint in the circuit court seeking an injunction to stop the Commission from proceeding on the ground that we had no jurisdiction. Over the Commission's objection, the circuit court entered a temporary injunction on November 17, 1989, and denied a subsequent motion to dissolve the injunction. We then filed a petition for a writ of prohibition in the Florida Supreme Court.

In Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990), the Florida Supreme Court ruled that the Circuit Court lacked jurisdiction to enjoin the Commission from reviewing a complaint which alleged that a property management company overcharged a condominium unit owner for gas and electricity. In its opinion issued November 8, 1990, the Supreme Court held that we had, at the very least, a colorable claim of exclusive jurisdiction to consider the allegations and that the proper vehicle for the management company to contest the Commission's jurisdiction was by direct appeal after we had acted.

After the time for rehearing of the Supreme Court's opinion had expired, Staff scheduled an informal conference in St. Petersburg for February 8, 1991. When the parties were unable to reach a settlement at the informal conference, a docket was opened, and the matter was scheduled for hearing.

A full evidentiary hearing on this matter was held in St. Petersburg, Florida, on April 19, 1991.

RESALE OF ELECTRICITY ISSUES

At the outset we note that the issues in this docket regarding resale of electricity involve only the common areas and facilities of the condominium development. The record reflects that the residents of Terrace Park of Five Towns pay Florida Power Corporation directly for the electricity used in their condominium units. In addition we note that the question before us in this docket is whether or not the Geller Company has resold electricity at a profit. The question of whether the Geller Company, breached, or misconstrued its management contracts is not before this Commission.

The record in this docket reflects that Geller, pursuant to its management contracts, provides services and facilities for the residents of Terrace Park of Five Towns in return for their payment of a monthly maintenance fee. Mr. Geller testified that Geller Management does not supply or sell electricity; it simply provides specific services many of which necessarily require the use of electricity. (Tr. 147-149)

The Management Contracts call for Geller Management to provide a wide range of services and facilities. For a monthly maintenance fee (Tr. 52) residents are provided liability and hazard insurance on the building and grounds,gas for cooking and heating their units, hot and cold water for buildings and units, sewer service, lawn and grounds maintenance, television antenna service, garbage and trash collection, repair and maintenance of the exterior of the

building and cleaning of common areas, roof maintenance, elevator maintenance, electric service required for the common areas of the building an common facilities, and recreational facilities including servicing pools, shuffleboard courts, recreational halls, billiard rooms, saunas and steam rooms, meeting rooms and kitchen facilities. (Tr. 111; Exhibit 4 - Contract).

There is no separate charge made to residents for electricity (Tr. 106) or for use of the recreational buildings (Tr. 106). The residents pay their monthly maintenance fee for all of the services and facilities available in the project.

Geller Management doesn't supply electricity -- it supplies services and facilities which require the company to use and pay for electricity. It is the management company's obligation to provide these services and inherent in the provision of these services is the fact that electricity is needed. Geller does not supply electricity to the ultimate consumer and the ultimate consumer is unable to choose how the electricity is used. This is not a sale of electricity to the ultimate consumer. Rather, this is a provision of services, with the price of these services being indexed to the price of electricity.

From a common sense standpoint Geller is not an electric utility engaged in the sale of electricity. The contract that was entered into between Geller and the condominium owners is one which contains an indexing procedure for the pricing of the services. As part of the indexing procedure the condominium maintenance fee would increase by a dollar amount each time Florida Power Corporation increased its rates by a certain percentage. For example, Mr. Falk, the complainant, lives in the Jefferson Building, one of 32 condominium buildings located in Terrace Park of Five Town. Paragraph VI of the Jefferson Building's management contract provides that in the event Florida Power increases its rates by 5%, the monthly maintenance fee for the Jefferson Building shall increase by $15. Each of the other buildings in the Terrace Park of Five Towns complex has a similar provision.

Under this indexing procedure, the maintenance fee increases tied to electric rates could have been more or less than the actual increases paid by Geller to Florida Power Corporation, depending on consumption. The record in this proceeding reveals that the amount the Geller Company collected from unit owners as a result of the maintenance fee increases is more than the amount Geller paid to Florida Power Corporation as a result of rate increases. This result could change however, with an increase in consumption in the common areas.

In addition, our rule which prohibits resale of electricity at a profit applies to occupancy units, not common areas and services. The purpose of Rule 25-6.049(5), Florida Administrative Code is to mandate the use of individual meters for occupancy units such as condominium units, apartments, stores and shops in shopping centers and malls. The rule is not intended to be thrust into a setting such as this where units are separately metered and residents pay Florida Power Corporation directly for the electricity used in their individual units. The rule does not apply to a maintenance fee paid for common area services and facilities used by residents of the condominium development. We therefore find that Geller has not violated Rule 25-6.049(5), Florida Administrative Code. In addition we find that Geller has not resold electricity at a profit, and is not an electric utility subject to the Commission's regulatory jurisdiction.

RESALE OF GAS ISSUES

The complainant has failed to sustain its burden of proof with regard to resale of gas. It appears that over the long term there has not been a material difference between the amount collected for gas by Geller and the amount it pays to Peoples. From year to year there has been some fluctuation with some years Geller making a profit and other years sustaining a loss. Witness Tucker testified that based on 1989 and 1990 expense levels, the 15% gas rate increase adopted by Peoples Gas, and the resulting increase in the maintenance fee, will result in a net loss to the Geller Company. While this is impossible to predict with any certainty because gas consumption can vary significantly from year to year due to weather conditions, it is quite possible that a severe winter could result in a loss to the company.

With regards to gas, the record does not reflect that the residents of Terrace Park of Five Towns have been consistently overcharged for gas. To the contrary, the fee increase for gas set forth in the maintenance contract appears to accurately reflect the cost of gas.

It is therefore

ORDERED by the Florida Public Service Commission that the relief requested in the complaint filed by John F. Falk regarding the alleged resale of electricity and gas by the H. Geller Management Corporation is hereby denied.

By ORDER of the Florida Public Service Commission, this 18th day of OCTOBER, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MAP:bmi
910056b.bmi

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 Director, Division of Records and Reporting 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 or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting 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.

25-6.049 Measuring Customer Service.

(1) All energy sold to customers, except that sold under flat rate schedule, shall be measured by commercially acceptable measuring devices owned and maintained by the utility, except where it is impractical to meter loads, such as street lighting, temporary or special installations, in which case the consumption may be calculated, or billed on demand or connected load rate or as provided in the utility's filed tariff.

(2) When there is more than one meter at a location the metering equipment shall be so tagged or plainly marked as to indicate the circuit metered. Where similar types of meters record different quantities, (kilowatt-hours and reactive power, for example), metering equipment shall be tagged or plainly marked to indicate what the meters are recording.

(3) Meters which are not direct reading shall have the multiplier plainly marked on the meter. All charts taken from recording meters shall be marked with the date of the record, the meter number, customer, and chart multiplier. The register ratio shall be marked on all meter registers. The watt-hour constant for the meter itself shall be placed on all watt-hour meters.

(4) Metering equipment shall not be set "fast" or "slow" to compensate for supply transformer or line losses.

(5)(a) Individual electric metering by the utility shall be required for each separate occupancy unit of new commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks for which construction is commenced after January 1, 1981. This requirement shall apply whether or not the facility is engaged in a time-sharing plan. Individual electric meters shall not, however, be required:

1. In those portions of a commercial establishment where the floor space dimensions or physical configuration of the units are subject to alteration, as evidenced by non-structural element partition walls, unless the utility determines that adequate provisions can be made to modify the metering to accurately reflect such alterations;

2. For electricity used in central heating, ventilating and air conditioning systems, or electric back up service to storage heating and cooling systems;

3. For electricity used in specialized-use housing accommodations such as hospitals, nursing homes, living facilities located on the same premises as, and operated in conjunction with, a nursing home or other health care facility providing at least the same level and types of services as a nursing home, convalescent homes, facilities certificated under Chapter 651, Florida Statutes, college dormitories, convents, sorority houses, fraternity houses, motels, hotels, and similar facilities;

4. For separate, specially-designated areas for overnight occupancy at trailer, mobile home and recreational vehicle parks where permanent residency is not established and for marinas where living aboard is prohibited by ordinance, deed restriction, or other permanent means.

(b) For purposes of this rule:

1. "Occupancy unit" means that portion of any commercial establishment, single and multi-unit residential building, or trailer, mobile home or recreational vehicle park, or marina which is set apart from the rest of such facility by clearly determinable boundaries as described in the rental, lease, or ownership agreement for such unit.

2. "Time-sharing plan" means any arrangement, plan, scheme, or similar device, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser, in exchange for a consideration, receives a right to use accommodations or facilities, or both, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years.

3. The construction of a new commercial establishment, residential building, marina, or trailer, mobile home or recreational vehicle park shall be deemed to commence on the date when the building structure permit is issued.

4. The individual metering requirement is waived for any time sharing facility for which construction was commenced before December 23, 1982, in which separate occupancy units were not metered in accordance with subsection (5)(a).

5. "Overnight Occupancy" means use of an occupancy unit for a short term such as per day or per week where permanent residency is not established.

6. The term "cost", as used herein means only those charges specifically authorized by the electric utility's tariff, including but not limited to the customer, energy, demand, fuel, and conservation charges made by the electric utility plus applicable taxes and fees to the customer of record responsible for the master meter payments. The term does not include late payment charges, returned check charges, the cost of the distribution system behind the master meter, the cost of billing, and other such costs.

(6)(a) Where individual metering is not required under Subsection (5)(a) and master metering is used in lieu thereof, reasonable apportionment methods, including sub-metering may be used by the customer of record or the owner of such facility solely for the purpose of allocating the cost of the electricity billed by the utility.

(b) Any fees or charges collected by a customer of record for electricity billed to the customer's account by the utility, whether based on the use of sub-metering or any other allocation method, shall be determined in a manner which reimburses the customer of record for no more than the customer's actual cost of electricity.

(7) Each utility shall develop a standard policy governing the provisions of sub-metering as provided for herein. Such policy shall be filed by each utility as part of its tariffs. The policy shall

have uniform application and shall be nondiscriminatory.

Specific Authority 366.05(1) FS. Law Implemented 366.05(3) FS. History—Amended 7-29-69, 11-26-80, 12-23-82, 12-28-83, Formerly 25-6.49, Amended 7-14-87, 10-5-88.

ANNOTATIONS

Jurisdiction

Florida Public Service Commission was not precluded from asserting jurisdiction over consumer complaint of management company's overcharging of condominium unit owner for gas and electricity; PSC has the authority to interpret statutes which empower it, including those which are jurisdictional, and to issue orders accordingly. PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988); Fletcher Properties, Inc. v. Florida Pub. Serv. Comm'n, 356 So. 2d 289 (Fla. 1978). Furthermore, PSC was not estopped by virtue of its previous order in In re Sale of Electricity To Be Resold, Order No. 4874, 34 Fla. Supp. 40 (F.P.S.C. 1970); F.A.C. Rule 25.6.049(6)(b), in conjunction with Fletcher Properties, Inc., supra, has effectively overruled this order. Accordingly, circuit court's issuance of injunction to stop PSC from proceeding was vacated. Florida Public Service Com'n v. Bryson, 569 So. 2d 1253 (1990).

Maintenance fees

PSC found that subject management company did not supply electricity to complaining party or to others; rather, it supplied services and facilities which required it to use and pay for electricity. Thus, there was no sale of electricity to the ultimate consumer, and Rule 25-6.049(5), F.A.C., was inapplicable to subject fees. In re: Complaint [R]egarding [G]eller Management Co., 91 FPSC 10:339 (1991).