IN THE SUPREME COURT OF FLORIDA

JOHN FALK, Appellant, v. THOMAS M. BEARD, ETC., et al. as and constituting the FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	CASE NO. 79,676

ANSWER BRIEF OF APPELLEE
THE FLORIDA PUBLIC SERVICE COMMISSION

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PRELIMINARY STATEMENT

The subject of this appeal is an order of the Florida Public Service Commission, which shall hereinafter be referred to as "the Commission" or "the FPSC." The proceeding before the Commission in which the subject order was rendered was brought by John Falk, who shall hereinafter be referred to as "Falk" against the H. Geller Management Company, which shall hereinafter be referred to as "Geller."

The record has been prepared in two volumes, identified as Volume I and Volume II. Citations to the record shall be in the following form: (Vol. I, R. ___). The transcript citations of the April 19, 1991, Florida Public Service Commission hearing on this matter are in the form (TR ___).

Appellant also notes that the correct style of the case is John Falk v. Thomas M. Beard, Etc., et al.

STATEMENT OF THE CASE AND FACTS

The FPSC takes issue with the Appellant's Statement of the Case and Facts. Appellant's Statement of the Case and Facts should be partially disregarded in that it presents argument on the points.

The Commission specifically takes exception with the following points in Appellant's statement. First, the characterization of the management fee as a resale of electricity and gas by Geller is itself an argument rather than a statement of the facts. (Appellant's Initial Brief, at 2) Second, Appellant's material omission of the fact that the fee is in no way tied to KWH consumption is noteworthy. Appellant states that the maintenance fee expressly includes the cost of electricity, yet fails to note there is no fee tied to KWH consumption. Third, Falk's lengthy recital of alleged overcharges by Geller based on a budget is moot for this jurisdictional question when charges are not tied to resale of electricity. In addition, the Commission supplements the statement with the following facts.

This is an appeal from the final order of the Commission denying relief soughtby Falk against Geller regarding a management fee charged by Geller in the Terrace Park condominium community of which Falk is a resident.

H. Geller Management is the company employed to manage the buildings. The complaint filed by Falk is about the charges for the common elements of the Jefferson Building, not for the individual units. (TR 13) As Appellant acknowledged, this case

does not involve electricity used by residents in their own units. (TR 121)

The management contract allows Geller to raise the monthly maintenance fee $15.00 for every 5% increase in the rate per KWH charged by Florida Power. (TR 13) Herman Geller, president of H. Geller Management Corporation, had testified the increase was not intended to cover the electricity increase. (TR 121, 122) Geller said the provision was merely intended to allow for an increase in the maintenance fee to keep up with inflation, as an inflation index. (TR 131, 148) The maintenance fee does not include any other cost of living percentage index. (TR 49) Mr. Falk knew of the maintenance fee at the time he purchased the apartment. (TR 66)

At the hearing before the Commission, Herman Geller addressed what is included in the fee and distinguished it from a fee to directly recoup for electric and gas service. He analogized it to a trash removal fee. It was not developed to pass through or directly recoup electric and gas increases, he testified. In addition, the management company bears the increased expenses which do not reach the trigger amount. (TR 116, 168)

In response to Falk's emphasis on the budget as a basis for showing alleged overcharges, Geller testified that the purpose and meaning of the estimated budget have been overstated. (TR 124, 125) The condominium law requires developers to include an

estimated budget in the condominium prospectus. (TR 125) He testified that it is not fair, realistic or supportable to take any information in the estimated budget and conclude it represents an actual level of any expense. He stated that the monthly maintenance fees are fixed by the contract and have no relationship to the costs actually incurred by the management company, except for sewer charges. (TR **126)** The maintenance fee bears no relationship to the usage of electricity (TR **121, 123, 138, 171, 220, 238)** Also, **Mr.** Parmalee indicated the rough estimate nature of the budget (TR **226, 227).** The contract, not the budget, is used to establish a fee. (TR **127, 226, 227)**

The contract at page 6 states, "The monthly maintenance fee shall be increased to represent increases for public utilities and other specific **costs."** (TR **210)** Thus, the question arose at the hearing as to whether the escalation factor was to cover the cost of the utilities or just a factor to be applied to **the** overall maintenance to **keep** up with inflation.

Mr. Geller further testified as to the reason the management company used utility rates as an inflation benchmark. He said it was because utility rates did not fluctuate often. (TR **132)** He said this would not subject residents to horrific increases overnight. (TR **110, 130,** 138) **He** envisioned a project that would offer retired people housing with essentially a fixed level of maintenance expenses, at a time in the 1970's when double digit

inflation was a great source of fear to senior citizens. (TR 104) He said the escalation clause relating to electric costs from Florida Power Corp. is used as an escalation factor to be applied to the cost of other services. (TR 115, 146) The electricity factor was easily recognized by newspaper articles on rate increases and it was advertised months in advance. (TR 150) The maintenance fee covered a number of services. (TR 111, 112)

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 and common facilities, and recreational facilities including servicing pools, shuffleboard courts, recreationalhalls, billiard rooms, saunas and steam rooms, meeting rooms and kitchen facilities. (TR 111; Order No. 25234 at 2-3; Appellant's Appendix at 1-3) There is no separate charge made to residents for

electricity or for use of the recreational facilities. (TR 106) The residents pay their monthly maintenance fee for all of the services and facilities available in the project. (Order No. 25234 at 3)

Charles Parmalee, an independent electric utility rate consultant, testified on behalf of Geller regarding the facts and contractual arrangement in relation to the applicability of Rule 25-6.049, F.A.C. His testimony was that the parts of the rule pertaining to individual metering only apply to electric service to occupancy units, not to shared facilities such as pools and recreation centers. (TR 218)

The service and maintenance agreement does not include any mechanism for allocating the actual cost of electricity billed to Geller, since the agreement does not base any charges on the amount of electricity actually used each month in the facilities. (TR 220) The management company assumed the responsibility and, therefore, the risk for fluctuations in energy consumption due to factors such as weather and facility usage. (TR 220) Up to a 4.9% rate increase would result in no adjustment. (TR 221)

The rule does not address the fee in this case, testified Parmalee, because:

1. It addresses occupancy units which would not include electric services to common use areas; (TR 229)

2. The company agreed to provide services such as recreational centers, swimming pools, and maintenance of the common areas. The electricity is incidental to the service provided. (TR 230)

The electricity cost adjustment clause in the service agreement was never intended to allocate increases in electricity cost with any degree of accuracy. (TR 231) Furthermore, Geller Management does not recover the cost on a kilowatt hour basis; it is through a flat fee which does not recognize consumption. (TR 238) The Geller management contract has no adjustment for increased consumption. (TR 240)

Mr. Parmalee said that, in essence, virtually every business in the state in a sense resells electricity. If they use electricity in the production of a product or service, they are going to recover those expenses. (TR 256) For example, he urged that every apartment owner that has common facilities in that apartment and buys electricity for those common facilities has to include the cost of that electricity in the rent. (TR 255)

Testimony indicated the management fee clause represents an adjustment mechanism in a contract between two parties. (TR 259) The management company is in the business of providing a service to the condominium owner and the electricity is not the service being provided. (TR 106, 121, 222)

SUMMARY OF ARGUMENT

On the basis of the evidentiary record produced at a full and fair hearing in the proceeding below, the Commission determined that Geller had not resold electricity at a profit, and found that Geller was not a utility engaged in the sale of electricity. The record provides ample support for the Commission's determination that Geller was in the management service business, with the electricity provided to the common area in the building as an incidental part of the contractual service. An escalation factor tied to discrete rises in utility rates did not convert the management contract into a resale of electricity.

The escalation clause based on 5% increases in electric utility rates was a contractual cost of living adjustment, not a resale of electricity. Furthermore, the escalation clause in no way reflected kwh consumed; thus it does not mirror a charge for electricity. Geller Management does not supply electricity -- it supplies services and facilities which require the company to use and pay for electricity.

The Commission's decision adheres to case law in this area. It is distinguishable from Fletcher Properties, Inc., V. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978) and P.W. Ventures V. Nichols, 533 So.2d 281 (Fla. 1981), in that the service is primarily a management service, with the electricity and gas only being an incidental portion of that service. The contractual

agreement with the tenants in this set of facts does not trigger the Commission's jurisdiction. The Commission properly exercised its discretion in finding Geller not to be a reseller of electricity.

The Court should not allow Appellant to force a reweighing of the evidence. The Commission's decision is entitled to great weight and is clearly supported by the record.

The Commission also correctly held that Rule 25-6.049 was inapplicable to the Geller Management agreement. The agreement covered the fee for management services on the use of a common area, not for utility service for individual units. On its face, the rule relating to occupancy units could not be applied. The Commission's construction of its own rules is entitled to great weight and should not be overturned in the instant case.

1.

THE COMMIBBION WAS WITHIN ITS DISCRETIONARY AUTHORITY IN DETERMINING THAT GELLER IS NOT A REBELLER OF ELECTRICITY UNDER ITS MANAGEMENT CONTRACT WITH THE JEFFERSON BUILDING

1. The Commission's decision declaring Geller not to be a reseller of electricity or a utility adheres to case law.

The Commission's decision in this case adheres to the case law, and was not an abuse of the agency's discretion. The evidence before the Commission did not trigger the "public utility'' determination in Fletcher and PW Ventures. Indeed, the evidence indicated the case fell outside the pivotal facts for a jurisdictional determination as identified in those cases.

The Commission is unable to reconcile Appellant's description of the Fletcher case with what actually is within the four corners of the case. Appellant's heavy reliance on Fletcher is misplaced. The Court characterized its Fletcher holding in the discussion in PW Ventures, Inc. v. Nichols, 533 So.2d 281, **284**, as follows: **"We** simply affirmed the PSC's determination that the developer and owner of lines and lift stations who proposed to furnish water and sewer services 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."**

Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978), on which Appellant heavily

relies, is clearly distinguishable on both the facts and law. In Fletcher, Baymeadows, a private residential community, retained ownership of the water lines. In the new single family home subdivision planned by Baymeadows, Jacksonville Suburban Utilities Corp. had approved service of the addition, but "will not bill those customers direct, since it does not own the lines and the meters will be individually installed at each residence." Id. at 290

The Public Service Commission's order in response to the request for a declaratory statement in Fletcher, addressed the "utility" coverage in Section 367.021(3), F.S., as an entity providing, or proposing to provide, water or sewer service to the public for compensation. The Commission found no basis for the Fletcher operation to fall within the enumerated statutory exemptions in Section 367.022, F.S.

What is noteworthy is that Fletcher addressed a different set of facts: the entity actually owning the lines with the utility refusing to bill the water and sewer customers directly, and meters being individually installed at each residence. Fletcher Properties recouped the costs of water and sewer service. And, Fletcher addressed a different set of statutes: Chapter 367 provisions which expressly enumerate specific exemptions from the water and sewer utility definition. Chapter 366, including the issue of resale of electricity, is different. Also noteworthy is

that Fletcher arose from a declaratory statement petition, without the development of a hearing and evidentiary record.

Appellant misstates Fletcher by implying it only relates to the costs of common areas. (Brief at 8) Actually, Fletcher involved individual lines to individual houses, as well as common areas. There was no mandate in Fletcher that applies to the instant set of facts.

Again, Appellant misstates the holding of this Court in Fletcher by stating this court "specifically and expressly ruled that the managing agent of a condominium complex does act as a public utility . . . when it passes on the costs of common area utilities." (Appellant's Brief at 9) Appellant fails to mention the different set of facts, the different industry (electric versus water), the different set of laws, and the different set of rules.

In Fletcher, Fletcher Properties was found to be a jurisdictional utility because service was available to all individuals within a given area including those with whom Fletcher had no other existing relationship. Fletcher's sale of service involved customers who were not tenants of Fletcher Properties. It was selling utility service to the general public in a given area. Here, service is tied to tenants in the building through a management contract. It is not offered to the general public.

In Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1255 (Fla. 1990), the Court stated that the PSC has the

authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly. Therein, the PSC was given the authority to review the facts and case, not the authority only to find Geller to be a utility. After a fair hearing, the Commission reasonably determined that the utility status was not triggered.

Furthermore, other cases which find no utility status are more analogous to the facts presented here. In Department of Revenue v. Merritt Square Corp., 334 So.2d 351 (Fla. 1st DCA 1976), a tax case, the Court found Merritt Square to be a private rather than public utility. Merritt Square was a private utility for tax purposes because it sold electricity only to the tenants, parties with whom it had a relationship other than just the sale of electricity.

In Cherry Lake v. Kearce, 157 Fla. 484, 26 So.2d 434 (Fla. 1946), Cherry Lake was not found to be a public utility because the telephone system that was installed "was maintained primarily for the convenience of the corporation. . . and although a few subscribers . . . were allowed to participate in the service, such service was incidental and in nowise changed the dominant purpose for which the system was installed." (26 So.2d at 437) Similarly, Geller's management service is for the convenience of residents.

In Villase Gardens v. City of Miami Springs, 171 So.2d 199 (Fla. 3rd DCA 1965), Miami Springs was found not to be a public

utility because of its incidental sale of bulk water to Village Gardens. The dominant purpose of the City of Miami Springs was to provide governmental services, including water, to its own residents, not to provide water to Village Gardens. Geller, in the instant case, has a dominant purpose of providing management services, not to provide electricity or gas.

However, unlike the above cases, in PW Ventures v. Nichols, 533 So.2d 281 (Fla. 1981), PW Ventures was proposing to sell electricity to the public in an industrial park owned by United Technologies, Pratt and Whitney's parent. PW Ventures was created for the sole purpose of selling electricity to other unrelated parties. It was in the business to sell electricity to others. Geller, on the other hand, is in the business of providing management services for residents. The provision of any utility service is incidental as it is in many businesses that serve customers.

Appellant states that the only inquiry is whether Geller passed along electricity costs to the Jefferson Building residents. Appellant hinges its thesis on the initial estimated budget prepared by Geller. Yet, the recital of numbers from the budget is irrelevant when the management fee is instead fixed by contract. (TR 127, 226, 227, 259) The management fee was not intended to be a direct pass-through of electricity and gas costs. (TR 121, 122)

The testimony of Geller indicates that the electric and gas service is incidental to the management services.

The Commission found that the evidence supported a finding that the contract contains a monthly maintenance fee with an increase to represent increases for utilities. It is not based on consumption of energy, and it is inaccurate to label it a resale of energy. It is a maintenance fee; only the escalation factor is based on increases for utilities.

The Commission has interpreted the term "utility" consistent with the definition in Section 366.02, Fla. Stat. Geller does not supply electricity or gas to or for the public in this very fact specific case.

The construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight. Courts should not depart from that construction unless it is clearly erroneous. PW Ventures V. Nichols, 533 So.2d 281 (Fla. 1988); Warnock v. Florida Hotel and Restaurant Comm'n, 178 So.2d 917 (Fla. 3rd DCA 1965), appeal dismissed, 188 So.2d 811 (Fla. 1966); Gay V. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952).

The Commission's interpretation is not erroneous nor has the Commission disregarded prior court decisions which interpret that Section 366.02. The Commission's decision was well reasoned based on the facts presented at the hearing. Appellant has not overcome the presumption of correctness attached to Commission orders. Pan

American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983).

Falk is asking the Court to reweigh the evidence and is attempting inappropriately to reargue the case. On review of orders of the Commission, the Supreme Court's responsibility is not to reweigh or reevaluate evidence, but only to ascertain whether the Commission's order is supported by competent substantial evidence. Jacksonville Suburban Utilities Corp. v. Hawkins, 380 So.2d 425 (Fla. 1980).

2. The Commission correctly determined that Rule 25-6.049 was inapplicable to Geller in its implementation of a manaaement asreement

Appellant argues that the customer of record cannot pass along non-occupancy unit electricity costs in such a manner as to be reimbursed more than his actual costs or it becomes a utility. Yet, this theory is seriously flawed, as can be seen by examples. For example, a business that increases its cost of service to customers due to a rise in the cost of postage stamps would be in the business of selling stamps, according to this narrow theory. A maid service on a cruise line that provides an apple to guests becomes a grocer; a recreation center that provides lighted tennis courts becomes a utility when it bases its fee increase in some non-consumption way upon a lighting increase. If a contract had a provision which escalated the maintenance fee by the cost of fertilizer, such would become a fertilizer resale, under Appellant's theory. (TR 270)

As stated in Order No. 25234, the FPSC 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), F.A.C., is to mandate the use of individual meters for occupancy units, such as condominiums units, apartments, stores and shops in shopping centers and malls. The rule is not intended to apply to this setting where units are separately metered and residents pay

Florida Power Corp. 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.

While subparagraphs 6.a. and 6.b. which are part of Section (5) do prohibit the reimbursement of the customer of record for more than the customer's actual cost of electricity, they are not set forth to trigger a jurisdictional utility status and they do not apply to a management fee such as in the instant case. Rather, the management fee covers a variety of management services, of which electricity is but one part. The fee is not based on consumption of energy and the utility service is merely incidental to the panoply of management services provided by Geller.

Appellant fails to acknowledge the Court's standard of review in an agency's interpretation of its rule or statutes. In PW Ventures, Inc. V. Nichols, 533 So.2d 281, 283 (Fla. 1988), the Florida Supreme Court stated, "contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight. The courts will not depart from such a construction unless it is clearly unauthorized or erroneous." See also, Southern Bell Telephone and Telegraph V. Beard, 17 FLW 957, 958 (Fla. 1st DCA 1992).

CONCLUSION

Based upon the foregoing presentation of argument and authorities, the Florida Public Service Commission respectfully submits that the decision of the Commission based on this particular set of facts was correct and must be upheld. Therefore, the Commission further requests that this Honorable Court enter its order affirming the decision of the Commission.

Respectfully submitted,

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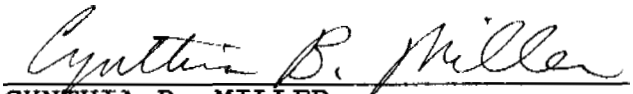

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Dated: July 31st 1992

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief of Appellee, Florida Public Service Commission, has been furnished by U.S. Mail to David A. Lamont, Esquire, Post Office Box 13576, St. Petersburg, Florida 33733, and C. Everett Boyd, Esquire, 305 South Gadsden Street, Tallahassee, Florida 32301, this 13th day of July, 1992.

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