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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOHN FALK,

Appellant,

vs.

CASE NUMBER 79,676

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

Appellees.
_____/

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

APPELLANT'S REPLY BRIEF

Bacon, Bacon, Johnson, Goddard & Lamont, P.A.

BY: DAVID A. LAMONT, ESQUIRE
Post Office Box 13576
St. Petersburg, FL 33733
(813) 327-3935
Florida Bar Number 747378
Attorneys for Appellant

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PRELIMINARY STATEMENT

Appellant, JOHN FALK, shall hereinafter be referred to as "FALK." Appellees Florida Public Service Commission and H. Geller Management Corp. shall hereinafter be collectively referred to as "Appellees", when the circumstances require, and as "the COMMISSION" and "GELLER" when the circumstances require.

All citations to the record shall be in either of the following forms: (Vol.I R. --) or (Vol.II R. --). Citations to pertinent exhibits will be made to the Appendix to FALK's Initial Brief, and shall be in the following form: (App. --). Citations to the Answer Brief of the Florida Public Service Commission shall be in the following form: (PSC Answer Brief at --). Citations to the Answer Brief of H. Geller Management Corp. shall be in the following form: (Geller Answer Brief at --).

SUMMARY OF ARGUMENT IN REBUTTAL

The COMMISSION has appeared once before this Court and argued that Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So. 2d 289 (Fla.1978) and Rule 25-6.049(6) gave the COMMISSION, at the very least, colorable jurisdiction over GELLER. Since the COMMISSION's earlier appearance before this Court, no new material facts have been disclosed to the COMMISSION. Yet, the COMMISSION and GELLER now argue that neither Fletcher nor Rule 25-6.049(6) have any application whatsoever to GELLER. This profound turnaround, unsupported by any plausible explanation, is unlawfully arbitrary, and compels the reversal of such order. Furthermore, the COMMISSION's finding that GELLER was not allocating common area electricity costs is abjectly unsupported by any competent, substantial evidence. The express terms of the management contract are clear and unambiguous with respect to the direct and specific allocation by GELLER of common area electricity costs to the residents of the Jefferson Building. The architect of the management contract confirmed that the management contract language dealing with common area electricity was in fact clear and unambiguous. The only evidence arguably supporting the COMMISSION's determination is the self-serving testimony of GELLER, which in the face of the clear and unambiguous contract language cannot be regarded as substantial evidence supporting the COMMISSION's order.

ARGUMENT IN REBUTTAL

In their Answer Briefs, Appellees argue that Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So. 2d 289 (Fla.1978) does not stand for the proposition for which FALK has asserted it stands. The Appellees further argue that Rule 25-6.049(6) does not apply to GELLER. FALK respectfully submits that the Appellees' position is untenable, and that the COMMISSION's order is both contrary to the essential requirements of law and unsupported by substantial competent evidence.

I. THE COMMISSION'S ORDER IN THE SUBJECT CASE WAS UNLAWFULLY ARBITRARY AND DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW

The arguments of Appellees regarding Fletcher and Rule 25-6.049(6) are diametrically opposite of the position the COMMISSION took in an earlier proceeding before this Court involving FALK's complaints against GELLER.

In Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla.1990), GELLER had obtained an injunction from the circuit court enjoining the COMMISSION from proceeding against GELLER upon FALK's complaint that GELLER "bought.. .electricity from public utilities and then, contrary to law, resold those resources to individual customers at a profit." Bryson at 1254. The COMMISSION sought a writ of prohibition from this Court restraining the circuit court from enjoining the COMMISSION's actions against GELLER.

In Bryson, this Court noted as follows:

> The PSC in this case relied on the language in sections 366.04(1) and 366.02(1) as the basis of its jurisdiction. The PSC found additional support in Fletcher Properties, Inc., where the Court approved the PSC's conclusion that the managing agent and part owner of a private residential community in Jacksonville was a "utility" under the PSC's jurisdiction ...because of its operations relating to water and sewer service. The PSC's analysis approved by this Court said PSC jurisdiction is particularly appropriate where the company provides utility services to condominiums units, ..Additionally, the PSC in this case relied on Florida Administrative Code Rule 25-6.049(6)(b), which the PSC promulgated pursuant to its statutory authority.

Bryson at 1255. It is thus apparent that when the COMMISSION'S jurisdiction over GELLER based upon FALK's allegations was being challenged by GELLER via injunctive relief in a circuit court, the COMMISSION conveniently found Fletcher to be pertinent to the case. The purported factual differences apparently were not then so meaningful. The difference in pertinent statutes apparently was not then so meaningful. Rule 25-6.049(6)(b) apparently was not then so clearly inapplicable to GELLER. Everything FALK now argues regarding Fletcher and Rule 25-6.049(6) was affirmatively argued by the COMMISSION in Bryson, and yet now the COMMISSION seeks to disavow everything it previously argued in order to sustain its subsequent, contradictory finding that EELLER is not within the jurisdiction of the COMMISSION.

The COMMISSION suggests in its Answer Brief that Bryson simply recognized that the COMMISSION had a "colorable claim of jurisdiction" with which a circuit court could not interfere, and

that the later full evidentiary hearing somehow elicited facts or circumstances which justify its profound change of position. The record simply does not support this assertion.

In order for the colorable claim of jurisdiction that the COMMISSION argued so strongly for in Bryson to evaporate, the COMMISSION would have to have discovered facts different from those known to it at the time Bryson was argued to this Court. The record of the full evidentiary hearing shows no such new facts. When Bryson was argued, the COMMISSION obviously knew the substance of FALK's complaint against GELLER. See Bryson at 1254 ("Falk claimed that Geller bought ...electricity from public utilities and then, contrary to law, resold those resources to individual customers at a profit."). Further, when Bryson was argued, the COMMISSION obviously knew of GELLER's argument that the contract simply used electricity costs as an "indexing procedure." See Bryson at 1254 ("Geller denied [Falk's] allegation, claiming that it did not resell resources--it merely used indices to determine maintenance fee increases."). FALK's position in this case, and GELLER's position in this case, are precisely the same now as they were when Bryson was argued. Nothing changed between Bryson and the COMMISSION's subject order. And yet, the COMMISSION has, upon the very same facts in the very same case, argued both that Fletcher does and does not apply to GELLER, and that Rule 25-6.049(6) does and does not apply to GELLER.

This Court recently noted in International Telecharge, Inc. v. Wilson, 573 So.2d 816 (Fla.1991), FALK's burden "...is to demonstrate that the commission's determination was arbitrary." The COMMISSION, based upon the very same set of basic facts, has in a single case before it argued both that Fletcher and Rule 25-6.049(6)(b) bind GELLER to the jurisdiction of the COMMISSION, and that Fletcher and Rule 25-6.049(6)(b) do not bind EELLER to the jurisdiction of the COMMISSION. There can be no clearer an example of a capricious and arbitrary decision than the COMMISSION's in the case at bar. This Court simply cannot permit the COMMISSION, under the guise of "presumptive validity", to be exonerated from the arbitrary decision issued in this case.

Notwithstanding the remarkable turnaround in the COMMISSION's position, the Appellees argue that there are dispositive factual differences between Fletcher and the case at bar which obviate any pertinency of Fletcher to the case at bar. Any such differences, however, are inconsequential.

This Court in Fletcher stated: "We agree with the determination by the Public Service COMMISSION that [Fletcher] is a water and sewer utility...for the reasons stated in the declaratory statement of the COMMISSION." Fletcher at 292. In turn, the COMMISSION's declaratory statement in Fletcher clearly established that Fletcher was the customer of record for the water to be provided by Jacksonville Suburban to the new development, and that the water was master-metered at the entrance to the overall development. Fletcher intended to pass

along the water costs of the new development to the residents thereof by installing individual meters at each residence. Upon these facts, the COMMISSION, and in turn this Court, expressly found Fletcher to be acting as a utility.

The facts of Fletcher are not in any material manner different from the facts of the case at bar. Fletcher and GELLER are both customers of record with a regulated public utility (Jacksonville Suburban and Florida Power, respectively); Fletcher and GELLER both had the utility services for which they were customer of record master-metered; and Fletcher and GELLER both intended to pass along the utility costs to the ultimate users of the utility service. The only difference between what Fletcher proposed to do and what GELLER has done is that Fletcher wanted to install individual meters (sub-metering) as a method of apportioning the costs of the water utility Service, whereas GELLER apportioned the electrical utility service costs through a formula set forth in a management contract. In short, there are no material differences between Fletcher and the case at bar.

The Appellees' respective positions with respect to the applicability of Rule 25-6.049(6) are equally untenable. The COMMISSION, in its Answer Brief, does not address Rule 25-6.049(6) in any detail, except to state that it does not trigger the COMMISSION's jurisdiction and that the COMMISSION is entitled to deference in its own interpretations of its rules. GELLER, in its Answer Brief, argues that Rule 25-6.049(6) applies only to occupancy units. Neither position can be accepted.

GELLER apparently arrives at its conclusion based upon certain enumerated exceptions enumerated in Rule 25-6.049(5)(a) to the individual metering requirement also imposed by Rule 25-6.049(5)(a). GELLER's argument appears to be that the initial language of Rule 25-6.049(5)(a) requires individual, electric metering for all "separate occupancy units", and that later language in (5)(a) delineates four exceptions to the general rule. GELLER reasons that it is these four exceptions, and only these four exceptions, to which the allocation and anti-profit rule, Rule 25-6.049(6), applies, since Rule 25-6.049(6) begins: "Where individual metering is not required under Subsection (5)(a)...."

FALK agrees with GELLER's proposition that Rule 25-6.049(6) applies to the enumerated exceptions. However, FALK does not agree that the scope of Rule 25-6.049(6) stops there, and respectfully submits that GELLER's argument is too myopic. Each of the four enumerated exceptions of Rule 25-6.049(5)(a) appear to fall within the definition of "occupancy unit" set forth in Rule 25-6.049(5)(b), and the enumeration is therefore simply an acknowledgment that these are occupany units for which there is no individual metering requirement. However, since Rule 25-6.049(5)(a) requires individual metering far all separate occupancy units, the converse is necessarily true: individual metering is not required for non-occupancy units. GELLER's assertion that Rule 25-6.049(6) does not apply to non-occupancy units effectively excludes the vast majority of circumstances in

which the rule would apply. In turn, this exclusionary effect permits the COMMISSION to avoid its statutory duties to regulate the sale of electricity. This interpretation cannot be embraced.

Agency rules are promulgated by agencies in furtherance of their regulatory duties and responsibilities, as prescribed by statute or constitution. The COMMISSION promulgated Rule 25-6.049(6) to allow customers of record to allocate electricity costs so long as no profit was earned from the allocation. This is clearly in furtherance of the COMMISSION's duty and responsibility to regulate the sale of electricity in the State of Florida. To permit the COMMISSION's order in this case to stand is tantamount to allowing the COMMISSION to abdicate its regulatory responsibilities, since the reading of Rule 25-6.049(6) advanced by the COMMISSION in the light of the instant facts effectively permits every customer of record for "common area electricity" to specifically contract to allocate those costs at a profit. Such circumstances are, quite simply, the sale of electricity, a matter over which the COMMISSION is supposed to exercise regulatory control but will not if permitted to read Rule 25-6.049(6) as set forth in its arguments to this Court.

While the COMMISSION is to be given deference in its interpretation of its rules, this deference is not and cannot be absolute. When an agency interprets its rules in a manner which leads to an absurd or clearly erroneous result, the deference

ordinarily afforded to the agency is not to be blindly observed. Here, Rule 25-6.049(6) was not foisted upon the **COMMISSION** by some other entity, but was indeed promulgated by the **COMMISSION** itself. GELLER has taken advantage of Section 6(a) of the rule, but does not want to honor the concomitant responsibilities of Section 6(b) of the rule. **The COMMISSION,** through its subject **order,** wants to permit GELLER to evade the prohibitions of Section 6(b). This cannot be permitted, for to do so will render Rule 25-6.049(6) effectively meaningless.

11. THE COMMISSION'S DECISION IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE

Even if this Court is undisturbed by the **COMMISSION's** blatant change of position, these **still** can be no question that the **COMMISSION's order was** unsupported by any substantial. evidence.

The issue before the **COMMISSION** upon which evidence had a bearing **was** the question of whether or not GELLER was in fact allocating its electricity costs to the residents of the Jefferson Building. The **COMMISSION,** in its subject order, found that GELLER **was** not allocating its electricity costs to the residents. The only evidence supporting this conclusion **was** GELLER's own testimony. The question is whether this testimony was sufficiently substantial to uphold the **COMMISSION's** order. FALK respectfully suggests that it is not.

The "competent, substantial evidence" necessary to support the **COMMISSION's** determination is "...such relevant evidence as a reasonable mind would accept as adequate to support

a conclusion." De Groot v. Sheffield, 95 So.2d 912 (Fla.1957). In this case, the only evidence supporting the COMMISSION's conclusion that GELLER was not allocating common area electricity costs was GELLER's own testimony. GELLER testified that it was never its intention to pass along common area electricity costs to the residents. Instead, GELLER asserted, electricity costs, together with the cost of other utility services, were simply used as an "indexing procedure" to allow it to keep pace with inflation.

This testimony, however, is directly at odds with the clear and unambiguous language of GELLER's own management contract, as well as the clear and unambiguous testimony of the attorney who drafted the contract.

Paragraph VI of the Jefferson Building management contract specifically states:

> The monthly maintenance fee for each condominium parcel owner ~~shall~~ be increased as provided for hereinafter to represent increases for public utilities...In the event that Florida Power,..increases its rate per KWH by an amount equal to 5%...such increase will be apportioned among the condominium units by the addition to the monthly maintenance fee...the sum of $15.00...~~There~~ shall. be no increase in the amount of the management fee for this increase. (emphasis added).

(App. 6). The language, as well as the effect, of this contractual provision is clear and unambiguous; when Florida Power's rate per kilowatt hour rises by 5%, the residents of the Jefferson Building pay $15.00 more per month because of and ~~dire~~directly arising from Florida Power's increase in that rate per

kilowatt hour. Clearly, GELLER is being reimbursed for its costs of electricity. There is no other rational view of this contractual provision, a fact confirmed by GELLER's own witness, Carl Parker, the Pinellas County attorney who drafted the management contract, who testified that there was no other way to read the contract but that it was specifically intended to reimburse GELLER for his costs of common area electricity. (Vol.II R. 210-211). Furthermore, the management contract provided for an automatic annual increase in the monthly maintenance fee paid by the Jefferson Building residents. (App. 4-5).

GELLER argues that 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." (Geller Answer Brief at 10). This argument is unmeritorious. Indeed, as the foregoing demonstrates, it is GELLER's interpretation of the contract that is perilously strained. In the face of the contractual language and the testimony of the contract's architect, GELLER's own self-serving testimony cannot rationally be viewed as competent substantial evidence supporting the COMMISSION's order. Accordingly, the order of the COMMISSION must be reversed.

CONCLUSION

Based upon the foregoing presentation of argument and authorities, FALK respectfully submits that the decision of the COMMISSION denying the relief requested by FALK was manifestly erroneous, and must be reversed, Therefore, FALK respectfully requests this Honorable Court to reverse the decision of the COMMISSION, and remand the Cause to the COMMISSION for entry of a final order granting FALK the relief requested by him in the proceeding below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Robert D. Vandiver, Esquire and Cynthia B. Miller, Esquire, Counsel for the Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0862 and to C. Everett Boyd, Esquire, Counsel for H. Geller Management Corp., 305 South Gadsden Street, Tallahassee, Florida 32301 this 18th day of August, 1992.

Bacon, Bacon, Johnson, Goddard
& Lamont, P.A.

BY: DAVID A. LAMONT, ESQUIRE
BY: DAVID A. LAMONT, ESQUIRE
Post Office Box 13576
St. Petersburg, FL 33733
(813) 327-3935
Florida Bar Number 747378
Attorneys for Appellant