

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

M E M O R A N D U M

September 12, 1991

TO : DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM : DIVISION OF LEGAL SERVICES [PALECKI] *MP*
DIVISION OF ELECTRIC AND GAS [KUMMER, WHEELER] *DW. JDJ*
DIVISION OF AUDITING AND FINANCIAL ANALYSIS [STALLCUP] *AS*

RE : DOCKET NO. 910056-PU - COMPLAINT OF CONSUMER JOHN FALK
REGARDING RESALE OF ELECTRICITY AND GAS BY THE H. GELLER
MANAGEMENT COMPANY.

AGENDA: 9/24/91 - CONTROVERSIAL - PARTIES MAY NOT PARTICIPATE

CRITICAL DATES: NONE

CASE BACKGROUND

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 the Commission's 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 the Commission had no jurisdiction. Over the Commission's objection, the circuit court entered a temporary injunction on November 17, 1989, and denied a

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subsequent motion to dissolve the injunction. The Commission 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 the Commission 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 the Commission 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, before Commissioners Gunter and Deason. After Commissioner Gunter's death, Chairman Beard read the record of the proceedings in order to vote in place of Commissioner Gunter.

Although the parties have drafted the issues in this docket in terms of the Jefferson Building of Terrace Park of Five Towns, it is apparent from the testimony and exhibits introduced at hearing that the issues and evidence are applicable to all of the buildings in the Terrace Park Condominium complex. Also the consumer complaint filed by Mr. Falk specifically alleges overcharges to all of the buildings in the complex.

This Commission should not ignore the presence of a violation of its rules if such a violation is evident in the record before it. Should the Commission determine that a refund is in order in this docket, it is incumbent upon the Commission to order a refund wherever the Commission is aware of a violation.

DISCUSSION OF ISSUES

ISSUE 1: Whether H. Geller Management Company has collected more from the residents of the Jefferson Building of Terrace Park of Five Towns condominium community for electricity than it has paid Florida Power.

RECOMMENDATION: Yes. The Geller Company has collected more for electricity than it has paid to Florida Power Corporation.

FALK: Yes. H. Geller Management Company has collected more for electricity than it has been charged by the utility.

GELLER: No.

STAFF ANALYSIS: Since the early 1980s the H. Geller Management Corporation has supplied electricity to all common areas of the Terrace Park of Five Towns condominium complex. Geller is the customer of record with Florida Power Corporation.

The unit owners of Terrace Park of Five Towns, pursuant to management contracts, pay a monthly maintenance fee to the H. Geller Management Corporation. The monthly maintenance fee is a lump sum which pays for numerous maintenance services such as gas for cooking and heating their units, water, sewer, lawn and ground maintenance, television antenna service, garbage and trash collection, and electricity for all common areas. 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, but many contain different numerical values. (See Table 1) Six of the 32 buildings were built after Florida Power Corporation's 1983 rate increase and therefore are unaffected by this issue.

The record in this proceeding reveals that the amount that the Geller Company has paid to Florida Power Corporation as a result of rate increases is substantially less than the amount that it has collected from unit owners as a result of maintenance fee increases pursuant to Paragraph VI of the management contract.

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The question before the Commission 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.

Nonetheless, the record in this case reveals that the operation of the management contract has resulted in resale of a profit. There are several reasons for this.

First, the percentage increases in Power Corp.'s billings do not correlate with the dollar increases in the maintenance fee. That is, Geller collected more than it paid for increases in the price of electricity.

Second, the Geller Company interpreted the contract to allow increases in the maintenance fee based solely on Power Corp.'s base rates, excluding the fuel elements and customer charges. As Commissioner Gunter revealed in cross-examination:

COMMISSIONER GUNTER: Well, don't give me that. I've seen you expert witnesses for 13 years now.

Go down to D on that page under electricity and you show me in that contract where it says the base rate, excluding fuel elements, excluding customer charge or anything else, where does it say that?

WITNESS PARMELEE: It does not say that.
T-251.

The problem with excluding fuel elements from the calculations is that even when these costs went down, the maintenance fees continued to go up.

Finally, when FPC's rates decreased, the maintenance fee did not decrease accordingly:

Q (By Mr. Palecki) I note that every time there has been a 5% or more increase in the Florida Power rates, there has been the according increase in the maintenance fee. But I note that, historically, there was a 5% decrease at one period. Was the maintenance fee decreased?

A No, sir.

Q And why was it not decreased?

A The contracts do not call for that.

Q So the contracts only call for an increase in the maintenance fee. What is the maintenance fee or what if the Florida Power rates drastically would decrease, let's say by 50%, is there any provision in the contract for there to be an according decrease in the maintenance fee?

A No, sir.
T-195

Rule 25-6.049(6), Florida Administrative Code, which makes it illegal for customers of record to resell electricity at a profit, became effective on October 5, 1988. Therefore staff has calculated the amount of overcharge to Terrace Park of Five Towns for the period beginning October 5, 1988. As discussed in Issue 4 of this recommendation, for the period October 1988 to March 1991, Geller has been reimbursed by Terrace Park of Five Towns unit owners \$58,676.50 more than it paid for the electricity.

ISSUE 2: Whether H. Geller Management Company has collected more from the residents of the Jefferson Building of Terrace Park of Five Towns condominium community for gas than it has paid Peoples Gas.

RECOMMENDATION: No. Although from year to year there have been differences between the amount collected for gas by Geller and the amount it has paid to Peoples, it has not been shown that these differences have been material over the long term.

FALK: Yes. Geller has collected more for gas than it has been charged by the utility.

GELLER: No.

STAFF ANALYSIS: It appears from the record 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 appears to be some fluctuation with some

years Geller making a profit and other years 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 residents of Terrace Park of Five Towns do not appear to be consistently overcharged for gas year after year as they are for electricity. The fee increase for gas set forth in the maintenance contract seems to more accurately reflect the cost of gas. While staff would be more comfortable with a straight pass through of actual cost increases (as the contract provides for sewer charges), staff cannot say that the maintenance fee increases for gas consistently result in overcharges, as do the fee increases for electricity. However, staff recommends that Geller should be ordered to cease selling gas at any rate other than a straight pass-through of cost until it has received tariff approval from the Commission.

ISSUE 3: In what ways, if any, do the practices of H. Geller Management Corporation (HGMC) pursuant to its September 1, 1979 management contract with the condominium association Terrace Park of Five Towns, No. 15, Inc. involve the use of or receipt of benefit from, and payment to HGMC for electricity by owners of condominium units in the Jefferson Building, for which electricity HGMC is the customer or record with Florida Power Corporation?

RECOMMENDATION: The H. Geller Management Corporation supplies electricity to all common areas of the Terrace Park of Five Towns condominium complex. Geller is the customer of record in purchasing electricity from Florida Power Corporation. Geller in turn charges condominium owners more for the electricity than it pays to Florida Power Corporation.

FALK: John Falk asserts and maintains that the practices of H. Geller Management Company pursuant to its maintenance contract with the Jefferson Building result in the receipt by H. Geller Management Company of payment for electricity by the owners of units therein.

GELLER: The practices of H. Geller Management Corporation under its management contract with the Jefferson Building condominium association do not involve the use of or benefit from, or payment to H. Geller Management Corporation for electricity for which H. Geller Management Corporation is customer of record with Florida Power Corporation. Simply stated, H. Geller Management Corporation does not charge and residents do not pay for electricity. Each Jefferson Building residents pays his own bill for the electric meter for his own individual condominium unit. The residents pay a single, fixed rate maintenance each month for all of the services and facilities provided by H. Geller Management Corporation under its management contract.

There is no separate charge for electricity, gas, insurance, swimming pools, or any other individual cost or expense incurred by H. Geller Management Corporation in providing all of the facilities and services within the project. Electricity is but one of the costs associated with providing all of the services and facilities to Jefferson Building residents. The maintenance fee is not dependent in any way on the amount of consumption of electricity by a single resident or all of the residents, just as it is not dependent on the amount of use any of the other services and facilities.

STAFF ANALYSIS: Geller's argument that it did not collect money from condominium owners for common area electricity costs is refuted by the record.

Paragraph VI of the management contract states, in pertinent part: "The monthly maintenance fee for each condominium parcel owner shall be increased as provided for hereinafter to represent increases for public utilities." Thereafter the contract sets forth schedules for increases for sewer, water, gas, electricity, trash and insurance. With regard to electricity the contract states: "...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). If the increase is to "represent increases for public utilities", specifically for electricity from Florida Power Corporation, and is not to represent an increase in the management fee, it is difficult to accept Geller's argument that it did not charge unit owners for electricity. In fact, Geller's own witness, Carl J. Packer, who drafted the contract, testified as follows on cross examination by staff:

Q And thereafter, you list the sewer increase, and water, and gas, and electricity, and insurance. So basically, it clearly says that these increases are to cover the increases for electricity, gas, water, sewer, insurance. Is that correct?

A The increases were to cover the increases in the sewer, water, gas, electricity, trash and insurance correct.

Q Specifically for that purpose.

A I don't believe you can interpret the contract any differently. T-710-711

ISSUE 4: If Commission Rule 25-6.049(6) is applicable in any way to the practices of HGMC pursuant to its September 1, 1979 management contract with the condominium association Terrace Park of Five Towns, No. 15, Inc., can it be reasonably determined whether Jefferson Building residents have reimbursed HGMC more than its actual cost of electricity for the electricity actually utilized by the Jefferson Building residents? If so, has HGMC been reimbursed by Jefferson Building residents more than its actual cost of electricity for the electricity actually utilized by Jefferson Building residents; if so, by how much?

RECOMMENDATION: Rule 25-6.049(6) is applicable and Geller has been reimbursed by unit owners more than the actual cost it paid for electricity. For the period October 1988 to March 1991 Geller has been reimbursed by Terrace Park of Five Towns unit owners \$58,676.50 more than it paid for the electricity.

FALK: John Falk asserts and maintains that it is factually and reasonably possible to determine and conclude that the residents of the Jefferson Building have reimbursed H. Geller Management Company for more than its actual cost of electricity.

GELLER: No. H. Geller Management Corporation incurs a multitude of costs in providing all of the services and facilities called for under the management contract to Jefferson Building residents, and all Terrace Park - Five Towns residents. Those costs are not tied to or can they be allocated to any given building within the project. All of the buildings have "house" meters, meters that record the electricity used for hall lights, elevators and exterior

lights in the buildings, but at least five buildings have other facilities tied into those meters.

All of the common areas, facilities and services are available to and used by residents from all buildings throughout the project, so there is no way to determine what portion of the cost of electricity is used by or should be allocated to Jefferson Building residents. Similarly, as stated above the residents do not pay a separate charge for electricity. They pay a single flat monthly maintenance that covers all services and facilities available under the management contract.

Again, there is really no way to determine the amount paid by Jefferson Building residents "for electricity" or the amount of electricity cost incurred by H. Geller Management Corporation in providing services and facilities to Jefferson Building residents. The only part of the maintenance fee paid by Jefferson Building residents that is related in any way to electricity is the \$3.13 average per month by which the maintenance fee was increased pursuant to Article VI(d) of the contract. H. Geller Management Corporation's electric costs, under any method of allocation of Jefferson Building residents, greatly exceed the \$3.13 amount.

STAFF ANALYSIS: Contrary to the argument submitted by the Geller Company, the question of whether the residents of Terrace Park of Five Towns have been overcharged by electricity can be calculated. The exact nature of the calculations was suggested by Commissioner Gunter at the April 19, 1991 hearing:

COMMISSIONER GUNTER: If we established the base year, we say, "We're not going to worry about what people were paying prior to the time you signed the contract." And if you looked at only the increases--you know, if the power company went up 5%, you went up \$15. I think there was one testimony they went up 17 or 18%, you only went up the multiples of three on the five.

So if we looked at your total billings from the electric company, and that would reflect usage, your total billings--

WITNESS GELLER: Yes sir.

COMMISSIONER GUNTER: --and then the other

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side if we looked at total revenues that you had received from that base point forward, that would give us an indication of whether in fact you had been eating part of the price of electricity because of usage or whatever--

WITNESS GELLER: That's right.

COMMISSIONER GUNTER: --or, if fact, you had gotten more revenue from those increases?

WITNESS GELLER: Exactly, I know what you're saying.

COMMISSIONER GUNTER: And then if you were getting more revenues, it would lay out that, in fact, yeah, you might be reselling it?
T-155-156

COMMISSIONER GUNTER:....I want to see the bottom line. I want to see bills from the Company and receipts from the customers. And then you look at a materiality difference--

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COMMISSIONER GUNTER:....When you get total revenue versus total expenses, I can quit dancing around real quick. That's add, subtract, multiply and divide; and then doesn't it get to be a materiality issue?

WITNESS PARMELEE: Could you define "materiality issue" for me?

COMMISSIONER GUNTER: Well, "materiality" is the amount of dollars. You know, if you're within \$1000 of breaking even, you know, if the customer is only giving you a grand more than your expenses are. But if they're giving you 50 grand more than your expenses are, that gets to be material.

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WITNESS PARMELEE: Yes, I believe that number
you want can be computed accurately,....
T-267

The only difference between the calculations suggested by Commissioner Gunter, and those submitted by staff in this recommendation, is that staff's figures begin in October of 1988. The Commission rule prohibiting resale at a profit was implemented October 5, 1988. Resale prior to that date was unlawful because Geller's rates were not filed with and approved by the Commission pursuant to its ratemaking authority. In an abundance of caution however, staff has determined Geller's resale of electricity only from the October 5, 1988 implementation of Rule 25-6.049(6).

Table 1 shows the calculations used to compute the increase in maintenance fees attributable to the April 1983 rate increases by Florida Power Corporation.

Column (a) lists the condominium associations located within the Terrace Park of Five Towns development. The six condominiums denoted by an asterisk were built after FPC's April 1983 rate increase. These condominiums were not subject to the change in fees and are excluded from the calculations.

Column (b) lists the number of units in each condominium association.

Columns (c), (d), and (e) summarize the terms of the maintenance contracts with respect to changes in electric rates. For example, the Amherst maintenance contract specifies that for each 5 percent increase in electric rates, the maintenance fee will increase by \$.35 per unit.

Therefore, if electric rates were to increase by 12%, each unit would be charged an additional \$.70 per month. With 96 units in the building, this translates into a \$67.50 per month increase for that building's condominium association.

Column (f) lists the increase in maintenance fees for each condominium that resulted from the April 1983 rate increase.

The total at the bottom of column (f) shows the total monthly maintenance fee increases for the entire condominium development.

Table 2 calculates the difference between the actual amount paid for electricity by Geller for the common areas and the lesser amount Geller paid during the one year test period prior to the Florida Power Corporation rate increases. The figure obtained by this calculation reflects the additional amount Geller has paid as a result of the Florida Power Corporation rate increases, as well as any increases due to increased consumption. When this figure is compared to the increase in maintenance fees paid by unit owners as a result of the FPC increase, we can determine whether or not Geller profited from the FPC increases and resulting maintenance fee increases.

Table 2 was developed from the information contained in Hearing Exhibit No. 8. Exhibit 8 shows the total kilowatt hours used by month for the period January 1982 through March 1991. This total is broken down into usage for each of the building "house" meters, and the "amenities". Each of the kilowatt hours amounts also has a dollar amount associated with it.

Comparing Table 1 (Maintenance Fee Increases) with Table 2 (Actual Increases in Amount Paid For Electricity) shows that the maintenance fees for the entire complex increased by \$100,402.50 for the period October 1988 through March 1991. Table 2 indicates that electric bills increased by \$41,726 for the same period. Thus, Geller collected an additional \$100,402.50, but only paid out an additional \$41,726 between October 1988 and March 1991, as a result of the earlier Florida Power Corporation rate increases. This would indicate a profit of \$58,676.50 from resale of electricity for the period.

Staff recommends that Geller be ordered cease selling electricity at any rate other than a straight pass-through of cost until it has received tariff approval from the Commission. In addition, Geller should be ordered to reimburse the unit owners of Terrace Park of Five Towns the \$58,676.50 it has profited from resale of electricity.

ISSUE 5: Does H. Geller Management Corporation collect fees or charges for electricity billed to its account by Florida Power Corporation? If so, what specific fees and charges and in what amount have been collected?

RECOMMENDATION: Pursuant to the contract, certain increases in the maintenance fee are specifically to cover electricity cost increases. In this respect Geller collects fees for electricity.

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The amount Geller has overcharged can be calculated by comparing the total increase in FPC's billings to the total amount of increase Geller has billed unit owners pursuant to Article VI(d) of the contract.

FALK: John Falk asserts that H. Geller Management Company does collect fees or charges for electricity billed to H. Geller Management Company by Florida Power, and that the amounts are set forth in John Falk's Complaint before the Public Service Commission.

GELLER: No. As stated above, H. Geller Management Corporation does not collect fees and charges for electricity. The only part of the maintenance fee paid by Jefferson Building residents that is in any way related to H. Geller Management Corporation's electricity cost is the \$3.13 average per month by which this fee has been increased pursuant to Article VI(d) of the contract. That amount is fixed and not related in any way to consumption of electricity or by Jefferson Building residents or by all residents collectively.

STAFF ANALYSIS: See staff analysis for Issues 3 and 4 above.

ISSUE 6: In what ways, if any, do the practices of H. Geller Management Corporation (HGMC) pursuant to its September 1, 1979 management contract with the condominium association Terrace Park of Five Towns, No. 15, Inc. involve the use of or receipt of benefit from, and payment to HGMC for gas by owners of condominium units in the Jefferson Building, for which gas HGMC is the customer of record with Peoples Gas Company?

RECOMMENDATION: The contract itself provides that specified increases (including the increases for gas at issue) in the maintenance fee represent increases for public utilities. In this respect unit owners pay Geller for gas.

FALK: John Falk asserts and maintains that H. Geller Management Company's practices do result in the payment by the Jefferson Building for gas.

GELLER: Just as stated above for electricity, H. Geller Management Corporation's collection of maintenance fees under the management contract does not constitute payment by residents for gas used by or benefitting the residents. Residents pay a single maintenance fee for all of their services and facilities, including gas. The

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individual condominium units do not have separate meters for gas; Commission Rule 25-7.071(2) requires separate meters for buildings constructed after January 1987. The Jefferson Building was built in 1979. See further explanation in Issue 1 above.

STAFF ANALYSIS: It is clear that unit owners of Terrace Park of Five Towns pay the Geller Company for gas. Such payment for gas is included in the maintenance fee and increases in gas prices will result in increases to the maintenance fee.

Because of the use of master metering it is impossible to determine the exact gas usage of specific buildings in the complex such as the Jefferson Building. It is quite possible to determine however, whether the complex as a whole is being overcharged for gas. It does not appear from the record that the complex as a whole is being consistently overcharged for gas year after year as they are for electricity. See staff analysis for Issue 2. Therefore, based on lack of materiality, staff recommends that the Commission order no refund. However, staff recommends that Geller should be ordered to cease selling gas at any rate other than a straight pass-through of cost until it has received tariff approval from the Commission.

Legal Issues

ISSUE 7: Whether H. Geller Management Company is generally subject to the jurisdiction of the State of Florida Public Service Commission.

RECOMMENDATION: Yes. In reselling electricity at a profit, Geller is acting as a public utility and is subject to Commission jurisdiction.

FALK: H. Geller Management Company is subject to the jurisdiction of the State of Florida Public Service Commission.

GELLER: No. Geller is not subject to the jurisdiction of the Commission.

STAFF ANALYSIS: Section 366.01, Florida Statutes (1977) gives the Florida Public Service Commission exclusive jurisdiction over public utilities. "Public utility" is defined in Section 366.02(1), Florida Statutes:

"Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state.....

The Supreme Court of Florida, in Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978), held that the Public Service Commission had jurisdiction over those who provide utility services to condominiums. There the Supreme Court ruled that the "public" included condominium unit owners and others not tenants.

The facts in Fletcher are similar to those here. In Fletcher, a company served as managing agent for a private residential community containing condominiums. The company paid the local water company, Jacksonville Suburban Utilities, for the water used by the community. The company in turn obtained reimbursement for the water from the individual unit owners, on an equal share basis per occupied unit, collecting the same amount of money that it had paid to the water company. On these facts, the Supreme Court held that the managing agent was subject to the jurisdiction of the Public Service Commission.

The Fletcher case made it clear that a managing agent of a condominium complex who pays for a utility provided by a third party, and who is thereafter reimbursed by the condominium owners, is a supplier of utility services and thus subject to the jurisdiction of the Public Service Commission.

More recently, in P.W. Ventures v. Nichols, 533 So.2d 281 (Fla. 1988), the Supreme Court reaffirmed its holding in Fletcher, supra, and held that the phrase "to the public" as used in Section 366.02 means "to any member of the public," rather than "to the general public". The Court ruled that sale of electricity even to a single customer would make the provider a public utility subject to regulation by the Public Service Commission.

The Florida Legislature in Section 366.01, Florida Statutes has deemed the regulation of utilities to be an "exercise of the police power of the state for the protection of the public welfare" and has specified that this chapter "shall be liberally construed for the accomplishment of that purpose." Section 366.03 requires that all rates charged by regulated utilities be "fair and

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reasonable", while Section 366.04 gives the Public Service Commission jurisdiction to regulate each public utility "with respect to its rates..."

Pursuant to the Commission's statutory authority to regulate the sale of electricity to the public, Rule 25-6.049(6)(b), Florida Administrative Code, provides that customers of record such as Geller may not resell electricity at a profit:

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.

This rule is designed to protect Florida's citizens by ensuring that customers pay no more for electricity than those rates set by the Public Service Commission. A management company which sells electricity to condominium unit owners for more than the actual cost of the electricity would be in violation of this rule.

ISSUE 8: Whether the issues in dispute between John Falk and H. Geller Management Company are a matter of contract over which the State of Florida Public Service Commission should or can constitutionally assert jurisdiction.

RECOMMENDATION: In reselling electricity Geller is acting as a public utility and is subject to Commission jurisdiction. The Public Service Commission has the authority to reject rates established by pre-existing contracts and the courts have universally rejected claims of contractual interference in the face of the Commission's authority to regulate utility rates.

FALK: H. Geller Management Company is subject to the jurisdiction of the State of Florida Public Service Commission.

GELLER: No. The issues in dispute between John Falk and H. Geller Management Corp. are a matter of contract over which the Public Service Commission has jurisdiction.

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STAFF ANALYSIS: Constitutional claims of contractual interference have been universally rejected by the courts in the face of the Public Service Commission's exercise of its statutory authority to regulate utility rates. Specifically, the Commission's regulation of utility rates is considered a valid exercise of its police power. When an existing contract is voided by the Commission's actions, there is no unconstitutional impairment of contract under the Florida or United States Constitution. H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979) City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976); City of Plantation v. Utilities Operating Co., 156 So.2d 842 (Fla. 1963); Union Dry Good Co. v. Georgia Public Service Corporation, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309; Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

See also State v. Burr, 84 So. 61 (Fla. 1920) and Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2 DCA, 1975), which hold that the Public Service Commission has authority to raise as well as lower rates established by a pre-existing contract. In fact, Cohee holds that the Commission is not even permitted to take into consideration a pre-existing contract in its determination of reasonable rates.

ISSUE 9: Whether, under applicable Florida law, H. Geller Management Company has collected more from the residents of the Jefferson Building of Terrace Park of Five Towns condominium community for electricity than it has paid Florida Power.

RECOMMENDATION: Yes. See Issue 4.

FALK: Yes.

GELLER: No.

STAFF ANALYSIS: See staff analysis for Issue 4.

ISSUE 10: Whether, under applicable Florida law, H. Geller Management Company has collected more from the residents of the Jefferson Building of Terrace Park of Five Towns condominium community for gas than it has paid Peoples Gas.

RECOMMENDATION: No. Although from year to year there have been differences between the amount collected for gas by Geller and the amount it has paid to Peoples, it has not been shown that these

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differences have been material over the long term. Although Staff does not recommend a refund, Geller should be ordered to cease selling gas at any rate other than a straight pass-through of cost until it has received tariff approval from the Commission.

FALK: Yes.

GELLER: No.

STAFF ANALYSIS: See staff analysis for Issue 2.

ISSUE 11: Do the provisions of Commission Rule 25-6.049(5) and (6) apply to the practices of HGMC pursuant to its September 1, 1979 management contract with the condominium association Terrace Park of Five Towns, No. 15, Inc.?

RECOMMENDATION: Yes. Rule 25-6.049(5) and (6) apply where the customer of record has been reimbursed for more than it actually paid for electricity.

FALK: John Falk asserts and maintains that the provisions of Rule 25-6.049(6), Florida Administrative Code, do apply to the practices of H. Geller Management Company pursuant to its maintenance contract with the Jefferson Building.

GELLER: No. (a) Rule 25-6.049(5) addresses individual metering of separate occupancy units. Because the Jefferson Building was constructed prior to the January 1, 1981, cut-off date, the rule doesn't apply--even though the condominium units are separately metered. (b) The entire regulatory scheme of Rule 25-6.049(5) and (6) is directed to occupancy units. Because of the separate metering, the circumstances involved in this case involve only the project wide electricity used by H. Geller Management Corporation in providing all of the services and facilities called for in the management agreement. (c) If in any way applicable to the Jefferson Building setting, Rule 25-6.0549(6)(b) adopted in 1988 can not be nine years later applied to the management contract in place since 1979. (d) If at all applicable, which H. Geller Management Corporation denies, the rule can only be applied from October 1988 forward.

STAFF ANALYSIS: The provisions of Rule 25-6.049(5) and (6) apply to the practices of the Geller Company pursuant to its management contracts with each of buildings in the Terrace Park of Five Towns complex. Geller is a customer of record of Florida Power

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Corporation. Geller is also passing the cost of electricity billed to its account by FPC along to residents of Terrace Park of Five Towns. See staff analysis for Issue 3.

ISSUE 12: Is the application of Commission Rule 25-6.049(6) to the practices of HGMC pursuant to its September 1, 1979 management contract with the condominium association, Terrace Park of Five Towns, an unconstitutional impairment of the contract rights of HGMC or the association in violation of Article I, Section 10 of the Florida Constitution and Article I, Section 10 of the United States Constitution?

RECOMMENDATION: No. Constitutional claims of contractual interference have been universally rejected by the courts in the face of the Public Service Commission's exercise of its statutory authority to regulate utility rates.

FALK: John Falk asserts and maintains that the application of Rule 25-6.049(6), Florida Administrative Code, to the maintenance contract between the Jefferson Building and H. Geller Management Company in no way constitutes an unconstitutional impairment of contract rights, nor in any other manner or way infringes upon constitutional rights.

GELLER: Yes. The Jefferson Building management contract was entered into in good faith in 1979, in full compliance with Commission Rules. Indeed, although not required individual condominium units were given separate meters. The contract was in effect for nine years when Rule 25-6.049(6)(b) was adopted by the Commission to require that "fee and charges collected by a customer of record for electricity...shall not reimburse[s] the customer of record for...more than the customer's actual cost of electricity." Any attempt to now apply that provision to go back to 1980, 1981 or any prior year and conclude (as suggested by Mr. Falk) that collection of the maintenance fee somehow violated the non-existent rule is patently improper, unfair and in violation of the Constitutional protection against impairment of contract. There is similarly no fair, proper or legally permissible way to apply the 1988 provision of the rule to the remaining five years of the contract term. Doing so rips apart the basis "single maintenance fee" concept of the contract.

STAFF ANALYSIS: If the Geller Company has been reselling electricity at a profit, this Commission is empowered regulate the Geller Company as a public utility despite the existence of the

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pre-existing contract between Geller and the unit owners of Terrace Park of Five Towns. Claims of unconstitutional impairment of contract have been universally rejected by the courts in the face of a regulatory commission's exercise of its statutory authority to regulate utility rates.

See staff analysis for Issue 8.

ISSUE 13: If Commission Rule 25-6.049(6) is applicable in any way to the practices of HGMC pursuant to its September 1, 1979 management contract with the condominium association, Terrace Park of Five Towns, No. 15, Inc., from what date should the rule be applied?

RECOMMENDATION: From October 5, 1988 when the rule became effective.

FALK: John Falk asserts and maintains that the principle set forth in Rule 25-6.049(6), Florida Administrative Code, is applicable to the practices of H. Geller Management Company retroactively to the point of beginning of violations.

GELLER: As stated above, the Rule may not be applied to the existing management contract. If at all applicable, the only remotely possible way to apply the rule would be on a prospective basis from October, 1988 forward.

STAFF ANALYSIS: Rule 25-6.049(6), making resale of electricity at a profit illegal, became effective on October 5, 1988. Staff believes that Geller unlawfully acted as an unregulated public utility by reselling electricity prior to that date because the rate was not filed and approved by the Commission pursuant to its statutory ratemaking authority. Nonetheless, in an abundance of caution, staff has calculated Geller's profits from resale only from the October 5, 1988 effective date of Rule 25-6.049(6).

ISSUE 14: If Commission Rule 25-6.049(6) is applicable in any way to the practices of HGMC pursuant to its September 1, 1979 management contract with condominium association Terrace Park of Five Towns, No. 15, Inc., can it be reasonably determined whether Jefferson Building residents have reimbursed HGMC more than its actual cost of electricity for the electricity actually utilized by the Jefferson Building residents?

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RECOMMENDATION: Yes. Rule 25-6.049(6) is applicable and it can be reasonably determined that Geller has been reimbursed by unit owners for more than it actually paid for electricity.

FALK: John Falk asserts and maintains that it is factually and reasonably possible to determine and conclude that the residents of the Jefferson Building have reimbursed H. Geller Management Company for more than its actual cost of electricity.

GELLER: No. See discussion to Issue 4 under questions of fact above. As a matter of law the Rule is intended to address direct, separately stated fees and charges for electricity costs being allocated to residents, or tenants. The plain language of the Rule refers to instances where occupancy units are not separately metered, and the use of "in-project" sub-meters to allocate electric consumption and costs. The circumstances presented by this case--condominium units and a single maintenance fee that covers all services and facilities used by residents--is simply not one to which Rule 26-6.049(6) is intended to or should be applies.

STAFF ANALYSIS: Among other things, the Geller Company argues that since usage of common area electrical facilities by Jefferson Buildings residents cannot be measured, their share of costs for the electricity cannot be determined. The Geller Company is correct in this argument to the extent the exact share of costs for the electricity cannot be determined. This argument is specious however when it is considered that the entire complex has been overcharged for electricity in the amount of \$58,676.50. An exact allocation of the overcharges to each unit or building is unnecessary to make a determination that the Geller Company has sold electricity for a profit.

ISSUE 15: Do the provisions of Commission Rule 25-7.071(2) and (3) apply to the practices of HGMC pursuant to its September 1, 1979 management contract with the condominium association, Terrace Park of Five Towns, No. 15, Inc.?

RECOMMENDATION: Rule 25-7.071(3) does not specifically contain a prohibition against resale of gas at a profit. Since Staff has not found a significant variance between the amount Geller paid and the amount Geller charged unit owners for gas, this issue may be moot.

FALK: John Falk asserts and maintains that Rule 25-7.071(3) applies to the practices of H. Geller Management Company.

GELLER: No. (a) Rule 25-7.071(2)(a) does not require separate metering of occupancy units such as in the Jefferson Building when built prior to 1987. Thus the rule is not applicable at all to the present case. (b) Rule 25-7.071(3)(a) permits the use of sub-metering to allocate gas costs where individual metering of gas is not required. The Rule does not contain any provision that fees and charges collected may not exceed the cost of gas to the customer of record. The Rule has no application and does not prohibit the practices alleged by the complaint filed by Mr. Falk.

STAFF ANALYSIS: Rule 25-7.071 provides in pertinent part:

25-7.071(2)(a) Individual gas 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, 1987. This requirement shall apply whether or not the facility is engaged in a time-sharing plan.

(3)(a) Where individual metering is not required under Subsection (2)(a)3, and master metering is used in lieu thereof, sub-metering may be used by the customer of record/owner of such facility solely for the purpose of allocating the cost of the gas billed by the utility.

The primary focus of Rule 25-7.071(2) and (3) is to require that all residential and commercial buildings constructed (construction started) after January 1, 1987, must have individual gas meters for each separate occupancy unit.

The Jefferson Building and other buildings in the project do not have separate gas meters for each condominium unit. Using gas service from Peoples Gas with master meters, Geller Management provides gas to the residents. The evidence in this docket is that the Jefferson building and all buildings in the Terrace Park-Five Towns complex were constructed prior of January 1, 1987. It therefore appears, that with regard to master metering, Geller has not violated the terms of Rule 25-7.071.

Rule 25-7.071(3) does not contain a prohibition against resale of gas at a profit. Therefore, even if unit owners were overcharged for gas, such overcharges would not necessarily result in a violation of Rule 25-7.071. In this respect, staff believes the rule is defective and should be amended to prohibit resale at a profit. However, nothing in the rule authorizes Geller to act as a public utility. Staff therefore recommends that Geller should be ordered to cease selling gas at any rate other than a straight pass-through of cost until it has received tariff approval from the Commission.

ISSUE 16: Is the application of Commission Rule 25-7.071(3) to the practices of HGMC pursuant to its September 1, 1979 management contract with the condominium association, Terrace Park of Five Towns to prohibit or alter the practices of the parties under that contract, an unconstitutional impairment of the contract rights of HGMC or the association in violation of Article I, Section 10 of the Florida Constitution and Article I, Section 10 of the United States Constitution?

RECOMMENDATION: No. See discussion for Issue 12 above.

FALK: John Falk asserts and maintains that the application of Rule 25-7.071(3), Florida Administrative Code, to the maintenance contract between the Jefferson Building and H. Geller Management Company in no way constitutes an unconstitutional impairment of contract rights, nor in any other manner or way infringes upon constitutional rights.

GELLER: Yes. See discussion for Issue 12 above.

STAFF ANALYSIS: Constitutional claims of contractual interference have been universally rejected by the courts in the face of the Public Service Commission's exercise of its statutory authority to regulate utility rates. See staff analysis for Issue 12 above.

ISSUE 17: If Commission Rule 25-7.071(3) is applicable in any way to the practices of HGMC pursuant to its September 1, 1979 management contract with the condominium association, Terrace Park of Five Towns, No. 15, Inc., from what date should the rule be applied?

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RECOMMENDATION: Rule 25-7.071(3) does not specifically contain a prohibition against resale of gas at a profit. Since Staff has not found a significant variance between the amount Geller paid and the amount Geller charged unit owners for gas, this issue may be moot.

FALK: John Falk asserts and maintains that the principle set forth in Rule 25-7.071(3), Florida Administrative Code, is applicable to the practices of H. Geller Management Company retroactively to the point of beginning of violations.

GELLER: The rule does not apply at all.

STAFF ANALYSIS: See staff analysis for Issue 15 above.

ISSUE 18: If Commission Rule 25-7.071(3) is applicable in any way to the practices of HGMC pursuant to its September 1, 1979 management contract with condominium association Terrace Park of Five Towns, No. 15, Inc., can it be reasonably determined whether the Jefferson Building residents have reimbursed HGMC more than its actual cost of gas for the gas utilized by Jefferson Building residents?

RECOMMENDATION: Yes. The question of whether unit owners have been overcharged for gas can be reasonably determined.

FALK: John Falk asserts and maintains that it is factually and reasonably possible to determine and conclude that the residents of the Jefferson Building have reimbursed Geller for more than its actual cost of gas.

GELLER: No. Just as with electric costs, there is no reasonable, rational calculation by which to determine the amounts "paid by" Jefferson Building residents for gas or the actual costs of gas used by somehow allocated to Jefferson building residents. See discussion in Issue 2 above.

STAFF ANALYSIS: See staff analysis for Issue 2.

ISSUE 19: Commission Rule 25-7.071(3) does not contain a provision similar to Rule 25-6.049(6)(b). Does Rule 25-7.071(3) require that fees and charges collected by a customer of record for gas billed to the customer's account by the utility be determined in a manner which reimburses the customer of record for no more than the customer's actual cost of gas?

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RECOMMENDATION: Rule 25-7.071(3) does not specifically contain a prohibition against resale of gas at a profit. Since Staff has not found a significant variance between the amount Geller paid and the amount Geller charged unit owners for gas, this issue may be moot.

FALK: John Falk asserts and maintains that Rule 25-7.071(3) does require that fees and charges collected by a customer of record for gas billed to the customer's account be determined in a manner which reimburses the customer of record for no more than the actual cost of gas.

GELLER: No. On its face Rule 25-7.071(3) does not contain the limitation of fees and costs collected for actual gas costs. There is no way to read the Rule to contain the same requirements as the electric Rule 25-6.049(6)(b).

STAFF ANALYSIS: See staff analysis for Issue 15.

ISSUE 20: Does Commission Rule 25-6.049(6) apply to use of electricity in areas other than occupancy units in commercial establishments, residential buildings, shopping centers, malls, apartment condominiums and other similar locations?

RECOMMENDATION: Yes, the rule applies to common areas as well as occupancy units. However, the only issue the Commission need answer in this docket is whether the rule applies to overcharges for electricity used in the common areas of condominiums.

FALK: John Falk asserts and maintains that Rule 25-6.049(6) does apply to use of electricity in areas other than occupancy units in condominiums.

GELLER: No. The entire focus of Rule 25-6.049(6) is occupancy units. The purpose of the rule is to encourage -- mandate -- the use of individual meters for occupancy units -- condominium units, apartments, stores and shops in shopping centers and malls. The rule is not intended to be thrust into a setting where units are separately metered and a single, composite maintenance fee is paid for all services and facilities used by residents.

STAFF ANALYSIS: Rule 25-6.049(6) does not distinguish between occupancy units and common areas. The rule only addresses the question of whether a customer of record, such as Geller, has resold electricity at a profit.

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Whether the rule applies to commercial establishments, shopping centers, malls and other similar establishments is irrelevant to the Commission's determination in this docket. The Commission's ruling here should be a narrow one, based solely on the facts in the record in this docket.

ISSUE 21: Does the Commission have jurisdiction to adjudicate the claim by Mr. Falk that H. Geller Management Corporation breached its management contract with the Jefferson Building condominium association in 1982 and 1983 by incorrectly calculating increases in the maintenance fee?

RECOMMENDATION: Generally no; only insofar as the alleged breach of contract may have been a violation of Commission rules, or Florida Statutes regarding utility regulation.

FALK: Yes.

GELLER: No. The principal complaint of Mr. Falk is that the calculation of increases to the maintenance fee in 1982 and 1983 under Article VI(d) of the management contract was incorrect. If Mr. Falk is correct, this claim is may state a cause of action for breach of contract that will support a civil action in circuit court. It does not, however, present a claim over which the Commission has jurisdiction. The Supreme Court in Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990) held that the Commission has jurisdiction to determine if its rules and regulations have been violated. That ruling does not create jurisdiction over the breach of contract claim raised by Mr. Falk.

STAFF ANALYSIS: The question of whether there may have been a breach of contract between Geller and the condominium association is irrelevant to the Commission's consideration of this matter. The only question the Commission should concern itself with in this case is whether there has been a resale of electricity at a profit. This Commission should not embroil itself in any dispute over whether there has been a violation of the management contract.

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Table 1 - Increase in Maintenance Fees					
(a) Building Name	(b) # Units	(c) (d) (e) Maintenance Contract Terms			(f) Actual Monthly Fee Increase
		Rate Change	Fee Change	Basis	
Amherst	96	5%	\$0.35	per unit	235.20
Arlington	44	5%	\$0.30	per unit	92.40
Ast/Bel/Cam	28	1%	\$0.10	per unit	98.00
Bershire	96	5%	\$0.35	per unit	235.20
Concord	32	5%	\$0.30	per unit	67.20
Cornell	96	5%	\$0.35	per unit	235.20
Dartmouth	75	5%	\$0.35	per unit	183.75
Dorchester	32	5%	\$10.00	per building	70.00
Emory	75	5%	\$0.35	per unit	183.75
Exeter	32	5%	\$12.00	per building	84.00
Fairview	32	5%	\$12.00	per building	84.00
Fordham	75	3%	\$0.30	per unit	247.50
Georgetown	75	5%	\$0.35	per unit	183.75
Harvard	60	5%	\$0.30	per unit	126.00
Ivy	64	10%	\$0.35	per unit	67.20
Jefferson	48	5%	\$15.00	per building	105.00
Kenilworth	56	5%	\$20.00	per building	140.00
LVE	36	5%	\$0.30	per unit	75.60
LVW	36	5%	\$0.30	per unit	75.60
Lexington	56	5%	\$20.00	per building	140.00
Madison	56	5%	\$20.00	per building	140.00
Newport	56	5%	\$20.00	per building	140.00
Oxford	44	5%	\$20.00	per building	140.00
* Princeton	44	1%	\$0.10	per unit	N/A
* Quincy	56	1%	\$0.10	per unit	N/A
* Radcliff	54	1%	\$0.05	per unit	N/A
SVE	42	5%	\$0.30	per unit	88.20
SVW	42	5%	\$0.30	per unit	88.20
* Syracuse	54	1%	\$0.10	per unit	N/A
* Tiffany	54	1%	\$0.05	per unit	N/A
* University	48	1%	\$0.10	per unit	N/A
Andover	6	1%	\$0.10	per unit	21.00
	1,700		Monthly Fee Increase:		3,346.75
			April 1983 - Mar 1991:		321,288.00
			October 1988 - Mar 1991:		100,402.50
* Built after 1983					

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 TABLE II

FALK - GELLER
INCREASE IN AMOUNT PAID FOR ELECTRICITY
 October 1988 - March 1991

Period	Total Electric Charges Paid by Geller Mgmt. *	Electric Charges Based on Average Monthly Expense During Test Period **	Increase in Amount Paid For Electricity
Oct. 1988 - March 1989	47,716.40	42,662.76	5,053.64
April 1989 - September 1989	52,467.75	42,662.76	9,804.99
October 1989 - March 1990	49,942.57	42,662.76	7,279.81
April 1990 - September 1990	54,415.60	42,662.76	11,752.84
October 1990 - March 1991	50,497.66	42,662.76	7,834.90
	\$255,040	\$213,314	\$41,726

* Excludes amounts for Princeton, Quincy, Radcliff, Tiffany, Syracuse & University Buildings.

** Test period March 1982 through February 1983. Average \$7,110.46 per month.