

BEFORE THE STATE OF FLORIDA PUBLIC SERVICE COMMISSION

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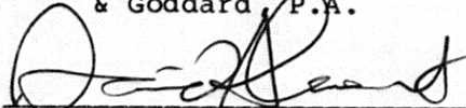
IN RE: Complaint of Consumer John  
Falk regarding resale of electricity  
and gas by the H. Geller Management  
Company.

DOCKET NO. 910056-PU

CONSUMER JOHN FALK'S BRIEF  
OF THE ISSUES PRESENTED IN THE ABOVE-CAPTIONED CAUSE

Respectfully submitted,

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



BY: DAVID A. LAMONT, ESQUIRE  
Post Office Box 13576  
St. Petersburg, Florida 33733-3576  
(813) 327-3935  
Attorneys for Consumer John Falk

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FPSC-RECORDS/REPORTING

PRELIMINARY STATEMENT

For the purposes of brevity, H. Geller Management Company will throughout John Falk's arguments in response to Factual Issues, Legal Issues, and Policy Issues be referred to as "HGMC".

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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.

HGMC 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.

The estimated budget of the Jefferson Building, which is appended to the Complaint of John Falk introduced at the Formal Hearing as Exhibit 1, was a part of the condominium documents provided to and which govern all persons who own condominium units in the Jefferson Building. According to this initial budget, the Jefferson Building residents collectively paid \$180.00 per month for electricity charges. This monthly charge of \$180.00 collected from the residents of the Jefferson Building by HGMC specifically represented the initial reimbursement to HGMC for the costs of electricity charged to the house meter of the Jefferson Building.

Thus, the Jefferson Building residents collectively paid HGMC a total of \$2,160.00 for electricity in both 1980 and 1981 (\$180.00 per month X 12 months = \$2,160.00 per year). Yet, according to Geller's Late Filed Exhibit 8, HGMC only paid Florida Power \$1,221.87 in 1980 and \$1,744.10 in 1981. It is thusly clear that HGMC was over-reimbursed \$938.13 in 1980 (\$2,160.00 paid to HGMC by the Jefferson Building residents minus \$1,221.87 paid by HGMC to Florida Power), and that HGMC was over

reimbursed \$415.90 in 1981 (\$2,160.00 paid to HGMC by the Jefferson Building residents minus \$1,744.10 paid by HGMC to Florida Power).

In 1982, HGMC imposed, pursuant to its management contract, an additional monthly charge of \$45.00 expressly and explicitly in response to an increase by Florida Power Corporation of its charges. Thus, the residents of the Jefferson Building began compensating HGMC at the rate of \$225.00 per month for electricity (initial charge of \$180.00 per month plus the increase of \$45.00). This increase went into effect in March, 1982. Therefore, the Jefferson Building residents paid \$180.00 for January and February, 1982, and \$225.00 per month for the balance of 1982, yielding a total payment to HGMC of \$2,610.00 for electricity. Yet, again, Geller's Late Filed Exhibit 8 indicates that HGMC only paid Florida Power Corporation \$1,602.07. HGMC was therefore over-reimbursed by \$1,007.93 in 1982.

In 1983, another increase was implemented by HGMC; this time, the increase was an aggregate \$105.00 per month. Thus, the residents of the Jefferson Building were, effective April, 1983, paying \$330.00 per month for electricity (initial charge of \$180.00 per month plus the 1982 increase of \$45.00 plus the 1983 increase of \$105.00). Since this increase was not effective until April, 1983, the Jefferson Building residents paid \$225.00 for three months, and \$330.00 for the remaining nine months of 1983, yielding a total payment of \$3,645.00 to HGMC for



electricity. Yet, Geller's Late Filed Exhibit 8 indicates that HGMC paid Florida Power only \$1,613.89. In 1983, HGMC was therefore over-reimbursed \$2,031.11 (\$3,645.00 paid to HGMC less \$1,613.89 paid by HGMC to Florida Power).

Since 1983, there have been no increases implemented by HGMC for electricity cost increases; thus, the Jefferson Building residents have collectively paid HGMC \$3,645.00 per year for each of the years in the period of 1984 through 1990. When these payments by the Jefferson Building residents to HGMC for electricity are compared to the payments by HGMC to Florida Power for the Jefferson Building house meter set forth on Geller's Late Filed Exhibit 8, it is clear that HGMC has been over-reimbursed for years in the period of 1984 through 1990, as follows: 1984 - \$1,956.08; 1985 - \$1,881.31; 1986 - \$1,737.03; 1987 - \$2,178.53; 1988 - \$2,578.27; 1989 - \$2,593.15; and 1990 - \$2,533.98.

The foregoing arithmetic establishes that HGMC has, between 1980 and 1990, collected from just the residents of the Jefferson Building \$19,851.42 more for electricity than was paid by HGMC to Florida Power Corporation.

John Falk's calculations as set forth herein are not affected by HGMC's argument at the Formal Hearing that occupancy rates of the different buildings must be taken into account, since according to Geller's own Late Filed Exhibit 8 the Jefferson Building has been fully occupied since 1980.

It appeared from the evidence presented by HGMC at the Formal Hearing that its three basic arguments were (1) that HGMC did not collect money from the residents for electricity; (2) that the Public Service Commission could not determine that there have been overcharges because the initial budget relied upon by John Falk was meaningless and there was therefore no way to determine how much had actually been collected for electricity, and (3) that John Falk did not take into account the cost of supplying electricity for the various amenities to the total Terrace Park of Five Towns community. John Falk respectfully submits that none of these arguments are meritorious.

First, there can be no rational question that HGMC did in fact collect money from the Jefferson Building residents for HGMC's common area electricity costs. The management contract clearly contemplates this collection, and even the attorney who drafted the contract testified that the contract could not be read any differently.

Second, while Herm Geller very much desires that this Honorable Commission believe that the initial budget was meaningless, the uncontroverted fact is that John Falk was never advised of this position, nor, to Mr. Falk's knowledge, were any other residents of the Jefferson Building. Even if this Honorable Commission omits any consideration of the budget, which action John Falk vehemently opposes, it is still clear that HGMC collected more from the residents of the Jefferson Building than it paid Florida Power Corporation. There is absolutely no

question whatsoever that in 1982 and 1983, HGMC by written document in the record of the Formal Hearing charged a specific amount to the collective body of Jefferson Building residents to compensate for an increase in the costs of electricity incurred by HGMC. If this Honorable Commission assumes that the initial budget was meaningless and that HGMC charged the Jefferson Building residents nothing for electricity in 1980 and 1981, it is still clear from the record that since April, 1983, when the second of the increases was implemented by HGMC, the residents have collectively been charged \$150.00 per month for electricity. This amounts to \$1,800.00 per year. Geller's Late Filed Exhibit 8 shows that only in 1986 did HGMC pay Florida Power more than \$1,800.00 per year. In 1980, 1981, 1982, 1983, 1984, 1985, 1987, 1988, 1989, and 1990, HGMC paid less than \$1,800.00 to Florida Power Corporation for the Jefferson Building house meter. Therefore, even if you completely omit reference to the initial budget charge for electricity of \$180.00 per month, and look only at the effect of the 1982 and 1983 charges from April, 1983 forward, it is manifest that HGMC has collected more for electricity from the residents of the Jefferson Building than it has paid Florida Power.

Finally, HGMC suggested that John Falk was in error by looking only at the electricity charges billed by Florida Power Corporation to HGMC from the house meter of the Jefferson Building. HGMC asserts that all of the electricity charges from the amenities must be included in the analysis. This is

proposition is fatally flawed for two reasons. To begin with, the evidence in the record establishes that the "amenities" to which HGMC refers are the recreational centers, gazebos, pools, pumps, and street lights. Inclusion of the electricity costs for these items would be in direct contravention of HGMC's express contractual undertaking to provide these items to the residents of the Jefferson Building as a part of the general management fee. See Paragraph II(k) of the management contract.

Furthermore, the initial budget provided by HGMC to the residents of the Jefferson Building indicates that the residents have been paying since 1980 the sum of \$360.00 per month for "pool and recreation center." Considering that the Jefferson Building is only one of thirty-four buildings in the Terrace Park of Five Towns community, it is absurd to suggest that HGMC has not already been fully compensated by the residents for the electricity costs to operate these "amenities."

In summary, the electricity costs of operating the amenities should not be and are not properly included in the analysis of whether HGMC has been over-reimbursed for its electricity costs. Based upon a comparison of the amounts collected by HGMC from the residents of the Jefferson Building with the amounts paid by HGMC to Florida Power for the Jefferson Building house meter, the record clearly shows that HGMC was materially and measurably over-reimbursed for its electricity costs.



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.

HGMC 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. The only evidence in the record concerning John Falk's claim that HGMC has been over-reimbursed for gas costs is John Falk's testimony; HGMC offered no evidence to rebut John Falk's claim.

According to John Falk's uncontroverted testimony, HGMC was over-reimbursed a total of \$7,163.78 in the five year period between 1980 and 1984. John Falk reached this conclusion by apportioning to the Jefferson Building a reasonable percentage of the total gas bill incurred by HGMC from the gas meter into which the Jefferson Building and fifteen other buildings at the Terrace Park of Five Towns community are tied. By comparing this percentage share of the gas cost for the years 1980 through 1984 to the amounts collected by HGMC from the Jefferson Building residents for gas reimbursement, it was arithmetically evident that HGMC had been over-reimbursed \$3,343.31 in 1980; \$1,626.41 in 1981; \$1,786.16 in 1982; \$520.56 in 1983; and \$112.66 in 1984. John Falk determined the amount collected by HGMC from the Jefferson Building residents for gas reimbursement in the same manner as he determined the amount collected by HGMC for

electricity charges; this method is more fully described in John Falk's argument in response to ISSUE 1, above.

Because HGMC has failed to provide further information to John Falk or this Honorable Commission regarding gas costs after 1984, John Falk cannot arithmetically determine whether HGMC has been over-reimbursed for its gas costs since 1984.

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 the owners of condominium units in the Jefferson Building for which electricity HGMC is the customer of record with Florida Power?

The management contract between HGMC and the Jefferson Building specifically provides for the increase in monthly maintenance fees paid by the Jefferson Building residents in response to increases by Florida Power in the cost of electricity incurred by HGMC. Though Herm Geller in his testimony attempts to obfuscate the issue by representing that it was never his intent that those provisions pass through to the residents the increases in the cost of electricity, the clear language of the management contract together with the testimony of Carl Parker, the attorney who drafted the management contract, mandate a contrary conclusion. There is no other rational way to view the operation of this provision. 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...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" and is not to represent an increase in the management fee, then how can Herm Geller's testimony that he only intended the electricity increase adjustment to allow him to keep up with inflation be considered persuasive?

In light of the foregoing, it is respectfully submitted that the practices of HGMC under its management contract with the Jefferson Building clearly result in the payment by residents of the Jefferson Building to HGMC for electricity purchased by HGMC from Florida Power.



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?

a. 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?

Rule 25-6.049(6) is applicable and HGMC has been reimbursed by Jefferson Building residents more than the actual cost it paid for electricity which could rightfully be passed on to the residents of the Jefferson Building. The reasons for the applicability of Rule 25-6.049(6) and the amounts of over-reimbursement are explained and set forth in John Falk's argument in response to ISSUE 1, above, which John Falk hereby adopts and restates in response to this specific issue as if fully set forth herein.

ISSUE 5: Does H. Geller Management Company 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?

The management contract between HGMC and the Jefferson Building residents specifically implements increases in the monthly maintenance fees paid by such residents in response to increases in electricity charges by Florida Power Corporation. In this sense, HGMC does collect fees or charges from the residents of the Jefferson Building for electricity billed to its account by Florida Power Corporation. The specific fees and charges are established by Paragraph VI (d) of the management contract, as more fully discussed in response to ISSUE 1, above, and the amounts collected are more fully set forth in response to ISSUE 1 above, which responses John Falk hereby adopts and restates as if fully set forth herein.

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 the owners of condominium units in the Jefferson Building, for which gas HGMC is the customer of record with Peoples Gas Company?

The management contract between HGMC and the Jefferson Building specifically provides for the increase in monthly maintenance fees paid by the Jefferson Building residents in response to increases by Peoples Gas in the cost of gas incurred by HGMC. Though Herm Geller in his testimony attempts to obfuscate the issue by representing that it was never his intent that those provisions pass through to the residents the increases in the cost of gas, the clear language of the management contract together with the testimony of Carl Parker, the attorney who drafted the management contract, mandate a contrary conclusion. There is no other rational way to view the operation of this provision. 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...In the event that Florida Gas Company...increases its rate per BTU 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 \$17.00...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" and is not to represent an increase in the management fee, then how can Herm Geller's testimony that he only intended the gas increase adjustment to allow him to keep up with inflation be considered persuasive?

In light of the foregoing, it is respectfully submitted that the practices of HGMC under its management contract with the Jefferson Building clearly result in the payment by residents of the Jefferson Building to HGMC for electricity purchased by HGMC from Florida Power.



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

HGMC is subject to the jurisdiction of the State of Florida Public Service Commission. To the extent that HGMC is engaged in the resale of electricity and/or gas, H. Geller Management is clearly acting as a public utility and is subject to the jurisdiction of the State of Florida Public Service Commission. Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla.1978).

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.

The issues in dispute between John Falk and HGMC are not a matter of contract which do or should preclude the State of Florida Public Service Commission from asserting jurisdiction over this matter.

As a general proposition, the Public Service Commission "may review a contract entered into between a regulated and unregulated entity or person to determine whether the contract is unreasonable and adversely affects the public interest." Florida Power Corporation v. Public Service Commission, 487 So.2d 1061 (Fla.1986). There is certainly no question that John Falk is an unregulated person. In accordance with John Falk's position stated elsewhere in this brief that HGMC is a regulated entity, then under Florida Power the Public Service Commission generally has jurisdiction.

Also supporting John Falk's position are H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla.1979) ("contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts...the effect of ruling in favor of Miller would have been to allow a private party to circumvent by contract the

police power of the state, which is impermissible.") and Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2d DCA 1975)

("...despite the fact that Crestridge had a pre-existing contract concerning its rates, now that Crestridge is under the jurisdiction of the Public Service Commission, these rates may be ordered changed by that body. The Public Service Commission has authority to raise as well as lower rates established by a pre-existing contract when deemed necessary in the public interest."

HGMC has previously relied upon United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116 (Fla.1986) to support its contention that the Public Service Commission is without jurisdiction to be involved in the dispute between John Falk and HGMC. This analysis of United is incorrect. United very simply stands for the proposition that the Public Service Commission does not have any authority to interfere with contracts between regulated utilities. The dispute between John Falk and HGMC does not involve contracts between regulated utilities; John Falk is not a regulated utility. Cohee, Hawkins, and Florida Power expressly recognize the authority of the Public Service Commission to become involved in, and even interfere with, a contract between a regulated utility and a private customer. Here, HGMC is clearly a regulated utility, and John Falk is clearly a private customer. In these circumstances, the Public Service Commission may lawfully and properly assert jurisdiction over this matter.



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.

Based upon the position of John Falk, as set forth herein, that HGMC is fully subject to Public Service Commission jurisdiction, John Falk further asserts that HGMC has, under applicable law, collected more from the residents of the Jefferson Building of Terrace Park of Five Towns for electricity than it has paid Florida Power. Please refer to John Falk's argument in response to ISSUE 1, above, which John Falk hereby adopts and restates as if fully set forth herein.



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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 People's Gas.

Based upon the position of John Falk, as set forth herein, that HGMC is fully subject to Public Service Commission jurisdiction, John Falk further asserts that HGMC has, under applicable law, collected more from the residents of the Jefferson Building of Terrace Park of Five Towns for gas than it has paid Peoples Gas. Please refer to John Falk's argument in response to ISSUE 2, above, which John Falk adopts and restates as if fully set forth herein.

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.?

The provisions of Rule 25-6.049(5) and (6) apply to the practices of HGMC under its management contract with the Jefferson Building. HGMC is without question a customer of record of Florida Power. HGMC is, without rational dispute, passing the costs of electricity billed to its account by Florida Power along to the residents of the Jefferson Building. Thus, there can be no legitimate issue as to the application of Rule 25-6.049(5) and (6) to HGMC.

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 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?

The application of Rule 25-6.049(6) to the practices of HGMC under its management contract with the Jefferson Building does not constitute an unconstitutional impairment of the contract rights of HGMC or the Jefferson Building. The discharge by the Public Service Commission of its statutory duties to regulate utilities and utility rates has long been determined not to constitute an infringement upon or impairment of contractual rights, and thus not violative of either 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 Commission, 248 U.S. 372; Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).



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?

The principle set forth in Rule 25-6.049(6) should be applied to the practices of HGMC under its management contract with the Jefferson Building from the commencement of performance by HGMC thereunder. The principles espoused by Rule 25-6.049(6) did not originate in the rule; the statutory scheme of utility-regulation has long expressly contemplated the terms and provisions of Rule 25-6.049(6). Furthermore, there is no requirement that the Public Service Commission codify each and every of its positions through formal rulemaking. City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla.1983). Accordingly, the rule should be applied from the commencement of the relationship between HGMC and the Jefferson Building.

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?

It can be reasonably determined under Rule 25-6.049(6) whether the Jefferson Building residents have paid to HGMC more for electricity than HGMC's actual costs thereof. There is more than ample evidence in the record of what HGMC paid Florida Power and what HGMC collected from the residents of the Jefferson Building, and a comparison of the two demonstrates that HGMC has been reimbursed for more than its actual costs of electricity. John Falk's calculations, not materially controverted by any other evidence, alone demonstrate without rational equivocation that HGMC has been reimbursed more than its actual costs of electricity.

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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.?

The provisions of Rule 25-7.071(2) and (3) do apply to the practices of HGMC under its management contract with the Jefferson Building. HGMC is without question a customer of record of People's Gas. HGMC is, without rational dispute, passing the costs of gas billed to its account by People's Gas along to the residents of the Jefferson Building. Thus, there can be no legitimate issue as to the application of Rule 25-7.071(2) and (3) to HGMC.



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?

The application of Rule 25-7.071(3) to the practices of HGMC under its management contract with the Jefferson Building does not constitute an unconstitutional impairment of the contract rights of HGMC or the Jefferson Building. The discharge by the Public Service Commission of its statutory duties to regulate utilities and utility rates has long been determined not to constitute an infringement upon or impairment of contractual rights, and thus not violative of either 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 Commission, 248 U.S. 372; Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).

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?

The principle set forth in Rule 25-7.071(3) should be applied to the practices of HGMC under its management contract with the Jefferson Building from the commencement of performance by HGMC thereunder. The principles espoused by Rule 25-7.071(3) did not originate in the rule; the statutory scheme of utility-regulation has long expressly contemplated the terms and provisions of Rule 25-7.071(3). Accordingly, the rule should be applied from the commencement of the relationship between HGMC and the Jefferson Building.

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?

It can be reasonably determined under Rule 25-7.071(3) whether the Jefferson Building residents have paid to HGMC more for gas than HGMC's actual costs thereof. There is more than ample evidence in the record of what HGMC paid People's Gas and what HGMC collected from the residents of the Jefferson Building, and a comparison of the two demonstrates that HGMC has been reimbursed for more than its actual costs of gas. John Falk's calculations, not materially controverted by any other evidence, alone demonstrate without rational equivocation that HGMC has been reimbursed more than its actual costs of gas.



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?

Under Rule 25-7.071(3), a customer of record may not be reimbursed by persons to whom his gas is furnished for more than the actual cost of the gas. Though the language of the rule does not expressly proscribe over-reimbursement, such proscription is nevertheless implicit in the rule as a result of the statutory scheme set in place by utility-regulation legislation. To suggest that this Public Service Commission has no power to prohibit over-reimbursement, or to regulate the manner of reimbursement for gas allocated by the customer of record to third persons, is to suggest that the Public Service Commission has no jurisdiction or powers to carry out its statutory mandate unless it has adopted a specific rule implementing its authority. This proposition is unmeritorious. Furthermore, there is no requirement that the Public Service Commission codify each and every position through formal rulemaking processes. City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla.1983).

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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?

Rule 25-6.049(6) clearly applies to the use of electricity in all areas other than occupancy units. Rule 25-6.049(6)(a) provides: "Where individual metering is not required under Subsection (5)(a) and master metering is used in lieu thereof, reasonable apportionment...may be used by the customer of record...solely for the purpose of allocating the cost of electricity billed by the utility." This language is not ambiguous or open for interpretation; it expressly provides that when individual metering is not required under Rule 25-6.049(5)(a), then the customer of record may use a reasonable method of apportionment to allocate the costs of electricity paid by the customer of record. Reference to Rule 25-6.049(5)(a) discloses that individual metering is required "for each separate occupancy unit..." Since Rule 25-6.049(6)(a) comes into operation only when individual metering is not required under Rule 25-6.049(5)(a), and since Rule 25-6.049(5)(a) requires individual metering only for separate occupancy units, then it is inescapably clear that Rule 25-6.049(6)(a) applies to all situations where separate occupancy units are not involved. The dispute between John Falk and HGMC involves charges for electricity for areas other than occupancy units. Therefore, Rule 25-6.049(6)(a) unequivocally applies to HGMC. And, since

Rule 25-6.049(6)(b) provides that a customer of record apportioning the costs of electricity under Rule 25-6.049(6)(a) may not be reimbursed for more than the actual cost of the electricity, it is manifest that HGMC is subject to Rule 25-6.049(6)(b).



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?

The Public Service Commission does have the jurisdiction, and indeed the statutory duty and obligation, to resolve the issues in dispute between John Falk and HGMC Florida Power Corporation v. Public Service Commission, 487 So.2d 1061 (Fla.1986); H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla.1979); Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2d DCA 1975); 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 Commission, 248 U.S. 372; Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934). The exercise of this jurisdiction and the discharge of these duties does not result in "an adjudication" that HGMC has breached a contract with the residents of the Jefferson Building.

POLICY ISSUES

It was determined during the Prehearing Conference that the Policy Issues raised in the above-captioned Cause were duplicative of either or both the Factual Issues and/or the Legal Issues similarly raised. Therefore, Consumer John Falk, in response to the Policy Issues identified, hereby adopts and restates as if fully set forth his foregoing argument with respect to the Factual Issues and the Legal Issues as follows:

ISSUE 22: Please see John Falk's argument with respect to ISSUE 11.

ISSUE 23: Please see John Falk's argument with respect to ISSUE 13.

ISSUE 24: Please see John Falk's argument with respect to ISSUE 14.

ISSUE 25: Please see John Falk's argument with respect to ISSUE 15.

ISSUE 26: Please see John Falk's argument with respect to ISSUE 17.

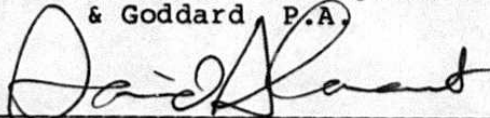
ISSUE 27: Please see John Falk's argument with respect to ISSUE 18.

ISSUE 28: Please see John Falk's argument with respect to ISSUE 19.

ISSUE 29: Please see John Falk's argument with respect to ISSUE 20.

Respectfully submitted,

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



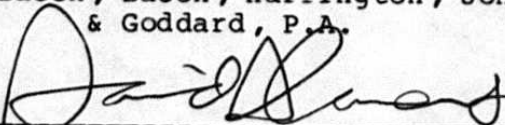
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BY: DAVID A. LAMONT, ESQUIRE  
Post Office Box 13576  
St. Petersburg, Florida 33733-3576  
(813) 327-3935  
Attorneys for Consumer John Falk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and fifteen true and correct copies of the foregoing were dispatched by Federal Express to the Director of Records and Reporting, Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0870; and that one (1) true and correct copy was dispatched by Federal Express to C. Everett Boyd, Jr., Esquire, 305 South Gadsden Street, Tallahassee, Florida 32301 this 29 day of May, 1991.

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



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BY: DAVID A. LAMONT, ESQUIRE  
P.O. Box 13576  
St. Petersburg, Florida 33733-3576  
(813) 327-3935  
Attorneys for Consumer John Falk