BEFORE THE
STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

Docket No. 91-0056-PU

IN RE:

Complaint of Consumer John Falk)
regarding resale of electricity and)
gas by H. Geller Management Company)
)

Filed May 30, 1991

BRIEF OF
H. GELLER MANAGEMENT CORPORATION

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PRELIMINARY STATEMENT

Pursuant to Rule 25-22.056(1), Florida Administrative Code, and this Commissions' Case Scheduling and Referral Order, H. Geller Management Corporation files its post-hearing brief, and shall refer to the corporation as "Geller Management." Herm Geller, president of Geller Management, shall be referred to as Mr. Geller. References to testimony in the record shall be as (Tr. __).

The complainant, John Falk, will be referred to herein by his name or simply "Mr. Falk." The homeowner's association of the building in which Mr. Falk resides, the Jefferson Building, Terrace Park of Five Towns, No. 15, Inc., will be referred to as the "Jefferson Building Association." The October 1, 1979, Service and Maintenance Contract between Geller Management and the Jefferson Building Association will be referred to as the "Jefferson Building Management Contract" or simply the "Management Contract."

The issues identified in the Prehearing order will not be addressed in the order set forth in the order. Rather, the issues will be grouped by their applicability to electricity or gas service and in some instances combined to avoid duplication.

STATEMENT OF THE FACTS AND CASE

John Falk and his small group of three or four people out of the 2,500 plus residents (of the 1700 units in the Terrace Park - Five Towns project), associates have been complaining for several years about the interpretation of the Jefferson Building Management Contract. (Tr. 52-53).[1] Under that contract the monthly maintenance fee paid by Jefferson Building residents has risen, in over ten years, from an average of $71.50 per month to only $124.15 per month. (Tr. 173)

The October 1, 1979 Management Contract calls for Geller Management to provide a wide range of services and facilities to the Jefferson Building Association and the residents of its 48 units. For a single monthly maintenance fee (Tr. 52) the residents are provided liability and hazard insurance on the building and grounds, gas for cooking and heating their units, hot and cold water for buildings and units, sewer service, all lawn and grounds maintenance, television antenna service, garbage and trash collection, repair and maintenance of the exterior of the building and cleaning of common areas, roof maintenance, elevator maintenance, all electric service required for the common areas of the building and common facilities, and extensive recreational

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[1] Mr. Falk filed a lawsuit in small claims court in 1987, alleging a breach of the terms of the Management Contract. The suit was dismissed. (Tr. 53-55). A Falk associate, Ruth Bender, also filed a civil court complaint alleging a breach of the Management Contract, and that suit was also dismissed. (Tr. 55-56). Mr. Falk organized his group in 1982. (Tr. 55).

facilities including servicing pools, shuffleboard courts, recreational halls, billiard rooms, saunas and steam rooms, meeting rooms and kitchen facilities. (Tr. 111; Exhibit 4 - Contract). In addition, Geller Management provides the management personnel and services necessary to coordinate and supervise all of the above described services throughout the Terrace Park - Five Towns Project; it effectively manages the building and project for the residents.

The Jefferson Building is one of thirty-four buildings in the Terrace Park - Five Towns project, with nearly every building constituting a separate condominium with its own association; there are 31 associations for the 34 buildings. (Tr. 105). Each association has a similar management contract with Geller Management to obtain for its residents the services and facilities described above. (Tr. 109-110).

Under the management contracts residents pay a single monthly maintenance fee. (Tr. 110-111). No separate charges are made or paid by residents for any of the specific services or facilities, the package of services and facilities -- amenities -- are provided for the single maintenance fee. (Tr. 52, 149).

The Management Contract has two provisions for increases to the monthly maintenance fee. On January 1 of each year the maintenance fee is increased by a flat dollar amount, which for the Jefferson Building averages $3.00 per unit. Using the average fee and increase, that constituted a 4.196% increase the first year

(Tr. 112) and a smaller percentage increase each year thereafter. The January 1, 1991 increase reflected a 2.75% increase in the fee. (Tr. 113).

In addition, Article VI of the Management Contract calls for periodic increases in the maintenance fee in the event there are increases in six of the specific costs of Geller Management. Those costs are sewer, water, gas, electricity, trash pick-up and insurance. Of these six items, one, sewer is framed as a straight pass through of actual cost increases; if sewer rates go up $2.00 per unit (or per toilet), then the increase is added to each resident's maintenance fee accordingly. (Tr. 114, 160).

The other five items are handled on a calculation that adds a fixed amount to the maintenance fee for every percentage or incremental increase in costs. For each 5% increase in the rate per B.T.U. for gas at January 1, 1980, $17.00 is added to the total maintenance fee of the 48 Jefferson Building units, or an average of $.35 per unit. For electricity, each 5% increase in rates per KWH over the January 1, 1980, rate per KWH results in a $15.00 increase in the total maintenance fee paid by the 48 Jefferson Building units, or an average of $.31 per unit.

Article VI of the Management Contract describes the increases as follows:

> The monthly maintenance fee for each condominium parcel owner shall be increased as provided for hereinafter to represent increases for public utilities and other specific costs effective immediately in the month following the announcement by any public utility, private utility, corporate sovereign

> or other company furnishing such services, and such increase shall be proportionate to each unit owner's percentage of ownership of the common elements ... .

Mr. Geller explained that the increases were not planned to pass through or directly recoup these five categories of cost increases to residents. (Tr. 115-116). Because of increases in general operating costs that are not covered by the annual increases in the maintenance fee, the Article VI increases for the five categories of expenses were intended to serve as an index of general cost levels permitting small, occasional increases in the maintenance fee. (Tr. 116). Increases of less than the threshold amount or percentage (for instance less than a 10% increase in trash pick-up expense) result in no increase in the residents' maintenance fee. (Tr. 116, 122). The contract provisions for maintenance fee increases related to the five expense categories are in no way tied or linked to consumption of gas, electricity or trash; actual usage by residents may increase or decrease the actual expense to Geller Management relating to an increase, but has no bearing on calculation of the increase in maintenance fee imposed upon the residents. (Tr. 123, 147)

ARGUMENT

POINT I

ISSUE #7

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

Geller Management is not generally subject to the jurisdiction of this Commission, unless some activity is undertaken to bring it within subject matters over which the Commission has jurisdiction. Stated more simply, unless the company conducts some business activity addressed or regulated by the Commission's statutory or rule mandates, then Geller Management is not subject to the Commission's jurisdiction.

In this vein, Chapter 366, Florida Statutes, grants the Commission authority to regulate public utilities (gas and electric). Although broadly defined as "every ... entity ... supplying electricity or gas ...," there is nothing in the business activity as shown by the record in this case sufficient to deem Geller Management a supplier of electricity or gas.

Geller Management is a management company, providing management services to the condominium associations and their 1700 member/residents of the Terrace Park - Five Towns development. The company, pursuant to its management contract with each association, provides a multitude of services and facilities for the residents in return for their payment of a monthly maintenance fee. Instructive on this issue is the fact that the Jefferson Building Management Contract (Exhibit 4), in describing the services to be furnished, does not list electricity (unlike specific references

to gas, water, sewer). (Exhibit 4, page 1 and 2 of 14 - paragraphs II(b) and (c)). As Mr. Geller explained in response to Commissioner Deason's questions, Geller Management does not supply or sell electricity; it simply provides specific services many of which necessarily require the use of electricity. (Tr. 147-149)

The residents contract with and pay Florida Power Corporation directly for the electricity used in their condominium units; this case involves only the common areas and facilities of the condominium development. (Tr. 13, 111). Perhaps the best example is found in the recreational facilities owned by Geller Management and provided for use by the Jefferson Building and other project residents. Over 31,000 square feet of recreational (community) buildings are furnished, complete with swimming pools, meeting rooms, sauna and steam rooms, dressing rooms and full kitchen facilities. (Exhibit 4, page 3 of 14 - paragraph II(k), Tr. 105-106). The building and facilities are available to and used by residents from all buildings. There are no limitations on usage, other than reasonable operating hours. Electricity is obviously required to heat, cool and light the facility, and power the kitchen and other amenities. There is no attempt, nor any way, to measure any of the electricity consumed by residents -- by individual residents or particular buildings -- and paid for by Geller Management to furnish the recreational facilities.

Once more, there is no separate charge made to residents for electricity (Tr. 106) or even for use of the recreational

building (Tr. 106). The residents like Mr. Falk (Tr. 52) simply pay their single monthly maintenance fee and enjoy the benefits of all of the services and facilities available in the project.[2]

Geller Management doesn't supply electricity -- it supplies services and facilities which require the company to use and pay for electricity. Geller Management is not a public utility subject to the Commission's jurisdiction.

POINT II

ISSUE #8

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

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?

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[2] Mr. Falk referred to paying $7.50 per month for use of the clubhouse. (Tr. 63, 80). There is no truth to such an assertion. He apparently is again referring to figures taken from the estimated budget in the condominium documents. Falk pays only a single main tenance fee each month for all services and facilities. (Tr. 52)

The two issues identified above are being consolidated for briefing purposes because they involve the same basic question, whether the complaint filed by Mr. Falk raises claims over which the Commission can or should assert jurisdiction. Mr. Falk's complaint raises two areas of concern: (a) that Geller Management has resold electricity and gas at a profit and, (b) that the company erroneously calculated contractual increases in maintenance fees in 1982 and 1983. (Exhibit 1 - Statement of Complaint paragraphs 2, 3). The first concern requires application of the Commission's rules; if the pertinent Commission rules apply and have been violated, then the Commission has and should assert jurisdiction to address the violation. If the rules are not applicable then there is no jurisdictional basis to assert authority over Geller Management. The specific rules and application thereof are addressed in other points of the brief.

The essence of Mr. Falk's second complaint is that Geller Management miscalculated -- according to Mr. Falk's interpretation of the contract -- contractual increases in the maintenance fee in 1982 and 1983. (Tr. 15). Geller Management submits that the increases were correctly made and, more importantly, the issue is clearly one of contract that is not properly an issue for the Commission's consideration.

The Management Contract provides for increases in the maintenance fees in the event of an increase of 5% in the "rate per KWH" charged by Florida Power Corporation as compared to the rate

charged at January 1, 1980. (Exhibit 4 - Contract - paragraph VI(d)). Geller Management calculated the appropriate increases in the maintenance fee using the base rate per KWH charged by Florida Power Corporation (Exhibit 1). Mr. Geller explained that at the time of the contract, September 1979, monthly fuel adjustments to Florida Power Corporation's rates would have necessitated monthly review (in pre-computer times) of all billings to determine the applicability of the contract, with the resulting possibility of monthly fluctuations in the fees paid by residents. (Tr. 151-152) Also see Commissioner Gunter's explanation of the adoption of the fuel adjustment forecast and true-up concept. (Tr. 90). Mr. Falk, although not a party to the original contract, contends simply that the contract should have been interpreted differently. (Tr. 38). Plainly, this is a contract issue calling for application of legal principles of contract construction.

In fact, Mr. Falk's complaint filed with the Commission is replete with his allegations of "erroneous calculations," "miscalculated" increases, and requests for "recalculation" of increase. Mr. Falk's letter of June 9, 1983, (Exhibit 1) to Geller Management requested Geller to "recalculate the 1982 and 1983 increases."

The true nature of Falk's complaint is shown by his March 24, 1983, letter to Florida Power Corporation (Exhibit 1 - Falk's letter) wherein Mr. Falk explained the dispute thereby:

> I am seeking <u>interpretive opinions</u> from several sources as to what constitutes "rate

per KWH" in the use of the terms as shown below in an excerpt from an agreement document.

* * *

A disagreement hinges on whether or not "Fuel Charge" is part of "rate per KWH" and while it appears patently obvious, you can help to settle the disagreement by supplying an FPC interpretation.

(Emphasis supplied).

Mr. Falk's own pen said it best: we have a "disagreement" on how to interpret the Contract. That is exactly the same disagreement over which Mr. Falk and his friends filed 3 civil suits (Exhibit 1, Background - paragraph 13), and which he now wants to have determined by the Commission. The disagreement "hinges" on a legal issue, the proper interpretation of the parties' contract; not the interpretation of Mr. Falk, Florida Power Corporation or even the Commission. As in any contract dispute, a Court will interpret the contract provision by considering surrounding circumstances, the occasion, and the apparent object of the parties, to determine the meaning and intent of the language used. Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Financial Corp., 302 So.2d 404, 407 (Fla. 1974); on remand 325 So.2d 475; enforced 328 So.2d 825.

Mr. Falk can, and must, pursue his contract claim in a properly filed civil action. There is no basis nor need for the

Commission to entertain such a dispute. The Commission should deny Mr. Falk's complaint to the extent it seeks resolution of a contract dispute.

POINT III

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 of HGMC is the customer or record with Florida Power Corporation?

ISSUE #5

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

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.?

Commission Rule 25-6.049(5) and (6), F.A.C., clearly does not apply to Geller Management and its management contract with the Jefferson Building homeowners' association (Exhibit 4). Jefferson

Building residents, and their neighbors in the Terrace Park - Five Towns project, do not pay nor does Geller Management collect, fees and charges for electricity used by those residents for which Geller Management is the customer of record with Florida Power Corporation.

Rule 25-6.049, F.A.C. is entitled "Measuring Customer Service." Subparts (5) and (6) are, together, essentially a conservation oriented rule (Tr. 219) that requires all customers using electricity at an identifiable location to have a separate meter in their own name. For several reasons, and upon several perspectives of analysis, it is clear that the rule is simply not applicable to the circumstances of Geller Management presented to the Commission in this docket.

1. The rule is first and foremost directed to "occupancy units," defined in Section 25-6.059 (5)(b)1. as a portion of a building or improvement which is "set apart from the rest of the facility by clearly determinable boundaries ... ." Section 25-6.049(5)(a) mandates that all such occupancy units, constructed after January 1, 1981, must have separate meters.[3] Subparts 1.-4. of Section 25-6.049(5)(a) then identify several common sense exceptions to the individual meter requirement, all of which relate directly and solely to occupancy units: free form commercial units

[3] All Jefferson Building condominium units have separate meters by which all residents pay Florida Power Corporation directly for electricity used in their unit. Although constructed in 1979, the conservation purpose of the rule is met because residents must pay for the electricity they use in their home.

that are "subject to alteration (Kiosks in malls are clear examples); central heating and air conditioning systems (as in a mall or shopping center); "specialized - use housing accommodations" such as hospitals, college dormitories and motels; and overnight RV parks. Just as clearly, these exceptions and the rule itself do not address, expressly or impliedly, electricity used in recreational or other types of common area facilities in any of the identified forms of commercial or residential occupancy settings. There is no way to read into Section 25-6.049(5)(a) or its provisions an intent to address electricity used to furnish swimming pools, kitchen facilities, meeting rooms, street lights or other common facilities as is the situation presented by this docket.

Section 25-6.049(6) then adds the real enforcement element to the rule. It provides that where individual metering is not required by 25-6.049(5)(a), (emphasis supplied), reasonable apportionment methods can be used to allocate the electric costs incurred to the persons actually using the electricity, but "any fees or charges collected by a customer of record" must not exceed its "actual cost of electricity." Thus, in the case of the mall owner specifically charging tenants for the central air conditioning system cooling its store, or a hospital or motel adding a separate "electricity" fee to its patients' or visitors' bill, or an RV park charging for electric hook-ups, the customer of record may not collect more from the fees and/or charges than

its actual electric cost.

The proscription of Section 25-6.049(6)(b) just as plainly does <u>not</u> apply to electricity used in the Terrace Park - Five Towns recreational facilities, or to any similar setting. The electricity used in lighting and cooling the common areas of a mall, the electricity used in running an entire hospital or hotel complex (including extensive, similar recreational facilities now common in many hotels and resorts), or electricity used to operate an apartment complex swimming pool and recreation hall, are clearly <u>not</u> addressed by the provisions of Section 25-6.049(6). In each instance the Commission rule by its own terms simply does not, and should not[4] apply. By the same token, Geller Management does not make any charge or fee whatsoever for electricity used in the Jefferson Building occupancy units and, for the same reasons, the rule does not and should not apply to it.

2. Geller Management does not collect any fees or charges from Jefferson Building or other residents for electricity used by those residents but billed to the company.

The enforcement arm of Section 25-6.049(6) directs that "any fees or charges collected .. for electricity" must not exceed the "customer's actual cost of electricity ... ." The operative

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[4] From an conservation standpoint, this is a prudent application of the rule. The person responsible for the electric bill, the mall owner, hotel or apartment building operator, will for business, and economic reasons monitor the consumption of electricity and make efforts to conserve consumption where possible. (Tr. 271).

circumstance, therefore, is the collection of fees or charge for electricity. The examples listed above, a $2.00 per night charge for electricity used in a room added to a hotel or hospital bill or a $100.00 per month fee for air conditioning added to a mall tenant's rent, are examples of fees or charges contemplated by the rule. This is certainly not the case with Geller Management and its Jefferson Building management contract.

Jefferson Building residents pay a single monthly maintenance fee that includes all facilities and services guaranteed them by the Management Agreement. Mr. Falk confirmed that he pays by a single check each month, and pays no separate fee or charge for electricity or for any other service covered by the agreement. (Tr. 52). Mr. Geller similarly confirmed that his company has never collected a separate fee or charge for electricity or any other service or facility. (Tr. 149). This is the manifestation of Mr. Geller's goal to have a retirement community where, on a long-term arrangement, residents pay a single, monthly maintenance fee and for that fee enjoy virtually all of the community facilities and management and operating services necessary to run their own building and small community. (Tr. 104, 106, 207-209). Other than their maintenance fee, they must only pay for their electricity, food and other personal needs. Everything else is guaranteed to them by the Management Contract, for the single maintenance fee.

Of course, the cost of electricity needed to provide the many services and facilities is an incidental operating expense which must be paid by Geller Management. (Tr. 271-272). Similarly, it has many other operating expenses -- labor, supplies, equipment, and other utilities such as telephone service -- all of which must be paid from its sole source of revenue, the residents' monthly maintenance fees. This is no different from mall or shopping center rent (used in part by the owner to pay electric costs) or daily room rates charged by hospitals and hotels and motels (which also must pay electric bills), and certainly do not constitute fees and charges for electricity.

3. The only thing arguably close to a fee or charge for electricity contemplated by Rule 25-6.049(6) is the occasional increase in maintenance fee permitted by the Management Contract when Florida Power Corporation raises its rates by 5% or more compared to the January 1980 rate. (Exhibit 4 - Contract paragraph VI (d)). There have only been two such increases in the nearly twelve years of the contract. The contract calls for a $15.00 increase in the maintenance fees for the entire Jefferson Building association (spread among the 48 units based on their size and location - an average of $.31 per unit) for each 5% increase in Florida Power Corporation's rate per KWH. This also does <u>not</u> constitute a fee or charge collected for electricity.

Use of this contract provision does not result in a separate fee for electricity. The provision effects an adjustment

to the maintenance fee, and a new single, monthly maintenance fee that is paid each month by residents. There is no identification of a separate fee or charge, no separate payment, and no record keeping or other treatment of the adjustment. A new maintenance fee is determined and then paid each month as the single fee paid for all of the resident's service and facilities. No fee or charge for electricity is collected before or after application of this contract provision.

The contract does not even attempt to allocate the actual cost of electricity -- or increase in cost -- billed to Geller Management. Increases in electric rates of less than 5%, or in increments less than even 5% increases, result in no change in the maintenance fees paid by residents. Only when a 5% (and increments thereof) increase in the electric per KWH rates in comparison to the January 1980 per KWH rate, is the a flat $15.00 (31 cents per unit) adjustment to the maintenance fee made. Obviously, the adjustment is not intended to pass through or even tie such adjustments to the actual increase in electric costs, and therefore is clearly not a fee or charge collected for electricity used by the residents.[5]

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[5] This is not different in application or effect than a hotel owner who, on the heels of a Florida Power Corporation rate increase, announces that his room rates will be increased 93 cents per night due to a 15% increase in electric rates. Although related or tied to the cost of electricity, the result is a new, single nightly rate that is paid by guests. Similarly, a commercial lease arrangement (where the landlord has significant common area expenses for electricity -- parking lot lights, common areas) may permit fixed rent adjustments in the event of electric rate increase. The result is still a single rental amount paid

Neither the contract adjustment considered here, nor the base maintenance fees paid by Jefferson Building residents, have any bearing whatsoever to actual consumption of electricity by Jefferson Building on any other Terrace Park - Five Towns residents. The common areas and recreational facilities are open to and used by all residents. There obviously is no way to account for actual usage by residents. Under the contract arrangement it is Geller Management that bears the risk of changes in consumption. (Tr. 76). Indeed, the contract provision in question could very easily result in a net loss to Geller Management -- and a direct benefit to residents -- if an electric rate increase were accompanied by a sudden increase in consumption. The change in consumption could be enough to negate the adjustment in maintenance fee. But, most significantly, the residents would simply continue to pay their monthly maintenance fee and receive the benefit of all community services and facilities. Their maintenance fee really has no relationship to electric consumption or actual electric costs, and does not constitute a fee or charge collected for electricity.

The Geller Management contract arrangement, and inherent use of maintenance fee revenues to pay electricity costs, is no different than thousands of other business relationships large and small throughout the State of Florida. Every business collects

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each month that has no relationship whatsoever to consumption of electricity by the tenant and is <u>not</u> a fee or charge collected for electricity.

rent, maintenance fees or other income from which it must pay all of its operating expenses, including electricity. The presence of contract provisions which adjust rent, maintenance fees or other single monthly payments as a result of changes in electric rates -- and which do not call for separate fee or charges for electricity -- are plainly not addressed by Rule 25-6.049(6). If this is not the case, then the Commission has a monumental task ahead of it to obtain and analyze thousands of contracts, leases, and condominium and other documents which govern business relationships in Florida.

The maintenance fees paid by Jefferson Building residents are not fees and charges collected for electricity as contemplated by Rule 25-6.049(6). Application of the contract adjustments provided by Article VI(d) - used but twice in 11 years -- does not alter the character of the maintenance fees nor the application of the rule. The rule does not apply here, and therefore Mr. Falk's complaint must fail.

POINT IV

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 s 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?

Rule 25-6.049(6), F.A.C. may not be constitutionally applied to the practices of Geller Management and its September 1, 1979, management contract with the Jefferson Building association. Such an application would constitute an improper impairment of contract rights under Article I, Section 10 of the United States and Florida Constitutions.

Rule 25-6.049(6)(b), the operative provision in question, was adopted by the Commission to become effective October 4, 1988. The Geller Management contract had already been in place for some nine years, clearly giving rise to existing, vested contractual rights in Geller Management and Jefferson Building residents. The 1979 Management Contract and the rights created thereby, were entirely proper and in full compliance with the Commission's rules.

Rights under a valid contract enjoy constitutional protection. Green v. Quincy State Bank, 368 So.2d 451 (Fla. 1st DCA 1979). Also see Island Manor Apartments v. Division of Florida Land Sales, 515 So.2d 1327 (Fla. 2d DCA 1987).

Another decision of the Florida Supreme Court clearly reaffirms these constitutional protections. State Department of Transportation v. Edward M. Chadbourne, Inc., 382 So.2d 293 (Fla. 1980). In Chadbourne the Court refused to apply a statutory amendment retroactively:

> ... unfortunately, that part of the amendment which attempted to affect existing contracts flies into the wall of absolute prohibition.

> The fact that a law is just and equitable does not authorize its enactment in the face of a constitutional prohibition.
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> This Court has generally upheld all forms of contract impairment.
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> * * *
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> This Court therefore concludes that the 1976 amendment clearly affected existing contractual rights of contractors ... and the rights and obligations flowing therefrom cannot be affected by the 1976 amendment. Any contracts made after the effective date of the 1976 amendment would, of course, come under the statute as amended.

382 So.2d at 297. (Emphasis supplied).

Retroactive application of Rule 25-6.049(6) to the Jefferson Building contract would virtually destroy a central element of the contract -- the determination of maintenance fees to be paid by the residents. It was the concept of a single "fixed" maintenance fee, subject only to the modest annual increase -- now less than 4% -- and the six categories of adjustments including Article VI(d) involving electricity, that enabled the relativity low maintenance fee to be set. In a leading case involving a statute to be applied to existing contracts (coincidentally involving a condominium management contract), the Supreme Court of Florida held:

> Section 718.126 is an attempt by the legislature to make the requirements of Section 718.3025 retroactively applicable.

> The retroactive application of the provision requiring that maintenance agreements have certain provisions would invalidate many existing agreements. This impairs the obligations incurred under the pre-existing contracts and is unconstitutional.
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> Rebholtz v. Metrocare, Inc., 397 So.2d 677 (Fla. 181).

In Tri-Properties, Inc. v. Moonspinner Condominium Association, Inc., 447 So.2d 965 (Fla. 1st DCA 1984), another management contract was issue. The association rejected a prior contract entered into by the association when controlled by the developer. Citing the Rebholtz decision, the Court noted the problems with retroactive application of statutes which impair contracts:

> ... appellant recognizes the difficulty in asserting an impairment of contract claim under the federal or state constitutions, since the statute ... was in effect prior to and at the time of execution of the contract.
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> * * *
>
> [Footnote]
> In order for a statue to offend the prohibition against impairment of contracts ... it must have the effect of changing the substantive rights of the parties to an existing contract. Manning v. Travelers Insurance Company, 250 So.2d 972 (Fla. 1971).
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> ... any attempt to retroactivity apply the cancellation rights conferred by Section 718.302 to existing contracts would, however, be constitutionally suspect.

447 So.2d at 967.

Application of Rule 25-6.049(6) to Geller Management and its contract as sought by Mr. Falk can only be accomplished by altering the maintenance fees paid by residents. The essence of the contract is the single maintenance fee paid in return for all of the services and facilities available to residents. Any disturbance of the maintenance fees paid will substantially and materially alter the contract, and the "substantive contract rights" and obligations thereunder.

The rule itself is fine. It's application on a prospective basis will do no injury to Geller Management or the Jefferson Building residents, and serve as a guide to all future contracts. Its retroactive application to a 1979 contract, and adjustments to the maintenance fees made pursuant the contract in 1982 and 1983, are fundamentally unfair, improper and unconstitutional.

This is not a case of rent control or mobile home park regulations where reasonable restraints and regulation have been upheld "in the light of social and economic conditions which prevail at a given time." Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d (Fla. 1974); Department of Business Regulation v. National Manufactured Housing Federation, Inc., 370 So.2d 1132 (Fla. 1979). By contrast, it is important to note that the Rebholtz v. Metrocare, Inc., supra case directly involved a condominium association (indeed, a condominium management contract) one of the most heavily regulated -- by statue and rule -- business

relationships in Florida. Nevertheless, the court found unconstitutional the statutory provision that would have impaired existing rights and obligations of the condominium management contract.

Neither does this case involve the authority of the Commission to regulate and set utility rates, notwithstanding existing contracts by utilities with customers. H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979), reaffirms the principle that "contracts with public utilities are made subject to the reserved authority of the state ... to modify contracts in the interest of the public welfare without unconstitutional impairment of contracts." 373 So.2d at 914. See also, City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1966)[6]; City of Planation v. Utilities Operating Co., 156 So.2d 842 (Fla. 1963); and Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309.

The contract at issue in the present docket is between a management company and condominium homeowner's association, a far cry from the contract in Miller directly with a utility company for specific charges for water and sewer fees, and the franchise agreements between the cities and utilities in City of Plant City and City of Planation. Geller Management did not contract with

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[6] The City of Plant City v. Mayo decision didn't really turn on a true contract impairment issue. The court concluded that there was no impairment because the amounts paid by TECO to each city in franchise fees would be the same after the Commission's ruling. 337 So.2d at 973.

Florida Power Corporation, aware of the Commission's broad authority to regulate "charges and services performed by utilities." City of Plantation, supra, 156 So.2d at 843. The Management Contract did not involve electric service rates or charges.[7] It only provided for the provision of condominium management services and numerous community recreational facilities, all for payment of a monthly maintenance fee.

The contract provision in question does not bring it within the Commission's jurisdiction, or the exclusion from contract impairment principles available for regulation of contracts with utilities for utility rates and services.

In Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2d DCA 1975), the Court affirmed the principle that "contracts by public service corporations for their services or products" are subject to the Commission's authority to raise and lower rates -- even though "established by a pre-existing contract". 324 So.2d at 157. But, more significantly, the Court in Cohee drew the clear distinction between such "public service" [utilities] contracts, on the one hand,and private contracts such as that entered into between Geller Management and the Jefferson Building association on the other, quoting the Florida Supreme

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[7] An additional case cited by staff is equally inapplicable. State v. Burr, 84 So. 61 (Fla. 1920) involved a jurisdictional dispute between this Commission's predecessor Railroad Commission and the City of Jacksonville over rail rates in Duval County. The Court simply stated that all contracts for transportation rates are subject to regulation and may be decreased or increased.

Court in Miami Bridge Co. v. Railroad Commission, 20 So.2d 356, 358 (Fla. 1944):

> The State as an attribute of sovereignty is endowed with inherent power to regulate the rates to be charged by the public utility for its products or service. Contracts by public service corporations for their services or products, because of the interest of the public therein, are not to be classed with personal and private contracts, the impairment of which is forbidden by constitutional provisions. (Emphasis supplied).

Application of Commission Rule 25-6.049(6) retroactively to the parties' 1979 contract, a private contract, would plainly constitute an unlawful impairment of contract.

POINT V

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?

Rule 25-6.049(6) should not be applied to the Management Contract in any shape or form.

The earliest date on which the provision of Rule 25-6.049(6) might possibly be applied to the Geller Management

contract with the Jefferson Building association is October 5, 1988, the effective date of the rule. The authorities cited in Point IV above virtually compel such a result and preclude retroactive application.

Even the suggestion of applying the rule to Geller Management's 1979 contract prior to the date of the rule reeks of unfairness, clearly prohibited by the constitutional protections of due process and contract impairment.

The Geller Management contract was entered into in good faith and in full compliance with the then applicable Commission rules. It would be patently unfair and improper to apply the rule prior to its effective date. The broad authority inherent in the setting rates and charges for utilities must be done prospectively, not retroactively. Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla. 1972).

From a view of statutory construction, it is well settled that a statute is deemed to operate prospectively only in the absence of a clear legislative declaration that a retroactive application is intended. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983); Anderson v. Anderson, 468 So.2d 528 (Fla. 3rd DCA 1985); Stone v. Town of Mexico Beach, 348 So.2d 40 (Fla. 1st DCA 1977). Rule 25-6.049(6) bears no hint of retroactive application. It can only be read to call for prospective application of the rule.

There is no basis on which to apply the Rule to any activities of Geller Management, or any other party, prior to its

October 5, 1988, effective date. Any other conclusion, and certainly application of the rule to the 1979 contract at issue here, is simply and inherently wrong. But, the rule should not be applied, in any way, to Geller Management's existing contracts. It should only be applied to new contracts entered into after October 5, 1988.

POINT VI

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?

On its face the plain language of Rule 25-6.049(6) applies only to fees and charges collected for electricity used in occupancy units. The rule provides as follows:

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

> based on the use of sub-metering or any other allocation method, shall be determined in a manner which reimburses the customer of record for no more than the customer's actual cost of electricity.

The operative provision in § 25-6.049(6)(a) is the key -- Section 25-6.049(5)(a) is used as a threshold for applying § 25-6.049(6). We must look to § 25-6.049(5)(a) to determine the applicable instances where individual metering is not required in occupancy units:

1. units subject to alteration;
2. central hearing and air conditioning;
3. hospitals, hotels, dormitories; and
4. RV parks.

These are the operative provisions of the rule; these are the circumstances where individual metering is not required -- and master meters allowed -- that kick in the provisions of 25-6.049(6). All of these circumstances involve occupancy units; instances where a particular person or entity is occupying a portion of a building or facility that is set apart from the rest of the building or facility.

These instances are treated in more detail above. See Point III above. The focus, intent and purpose of Rule 25-6.049(5), and therefore 25-6.049(6), is the proper treatment of occupancy units. That is the plain language of the rule. The

Commission certainly can amend the rule to address instances where fees and charges are collected for electricity used in common areas and recreational facilities, but the present rule does not. There simply is no need to address the question of electricity used by a management company, or landlord, or condominium homeowner's association, or hotel, to furnish recreational services to residents, tenants or guests. In those instances it is the services that are being furnished, and paid for, and not the electricity incidentally needed to furnish the services.

POINT VII

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.

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? All witnesses.

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.

ISSUE #14

If Commission Rule 25-6.049(6) is applicable in any way to the practices of HGMC pursuant to is 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?

The above 4 issues are combined to avoid repetition and afford a more orderly treatment of the issues.

1. There essentially is no way to reasonably determine either the amount or cost of electricity used by Jefferson Building residents or the amount of maintenance fees paid by those residents which are attributable to electricity.

Under its management contract, Geller Management provides to residents a wide variety of services and facilities, and management supervision of the condominium project. The services vary from yard maintenance to swimming pools to billiard tables to

exterior lighting of buildings. (Exhibit 4 - Contract paragraph II). Subject to general rules concerning use, the services and facilities are available for all residents without any real limitation. A given resident may swim 5 hours every day of the week, or may play billiards a like period. The payment of a single monthly maintenance fee entitles each resident to virtually unlimited use of and benefits from all of the services and facilities. (Tr. 110-111).

The services and facilities are used by residents from all 34 buildings in the project, which contain 1700 units. With the exception of lighting and elevators in specific buildings, there is no rational way to determine which residents from which buildings use any of the services and facilities at any given time or for how long. The services and facilities are made available to all residents -- as per the Management Contract -- and they are used by all residents. Geller Management has no way, Mr. Falk has suggested no way,[8] and the Commission has no way to rationally and reasonably illustrate how the services and facilities are used by individual residents or the residents of any one building.

In return for the many services and facilities available, the residents pay a single monthly maintenance fee to Geller

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[8] Mr. Falk's efforts at an "audit" are totally useless. HE totally ignored the electricity "used" by Geller Management to provide all of the recreational and other common facilities, (Tr. 62, 63-64, 66) and assumed full occupancy of all buildings from day one (Tr. 61). The "audit" is of no probative value.

Management. The amount of the maintenance fee is set by the management contract. The maintenance fees paid at any one time by Jefferson Building residents is comprised of three basic sources: the original fee set in the contract, annual increases of a fixed amount (about $3.00 Tr. 50), and any increases made as per the contract adjustments in paragraph VI(2) of the Management Contract.

It is unrefuted that residents pay a flat, single monthly fee. There is no breakdown or separation of maintenance fee for any specific services or facilities made available by Geller Management. (Tr. 52). There is no breakdown or separation of maintenance fees for any specific services actually used by a given resident or the residents of a given building. The residents pay a flat monthly fee; period. There is no adjustment made for consumption, increases or decreases, in electricity, taxes, labor, water, or any other expense or cost item utilized by Geller Management in providing all of the services and facilities. There is simply no way to determine how much or what portion of the maintenance fee is paid for electricity or any other cost item or specific service or facility. Mr. Paul Stalleup, Commission Audit Manager, agreed with this assessment (Exhibit 9):

> The maintenance contracts do not specify any fixed proportion or amount that is collected for the purpose of paying for electricity. ... it was not possible to determine a total amount received by H. Geller Management Company for the purpose of supplying electricity to the common areas of the condominium associations.

In one sense, Jefferson Building residents pay a portion of this maintenance fee for electricity, just as they "pay" for every other expense incurred by Geller Management in providing all of the services and facilities available for residents. But, in the most practical and realistic sense, the residents do not pay for electricity; they simply pay their maintenance fee; period. Just as they pay their car insurance premium and their auto repair bill and their grocery bill every month; all of those providers of service use and pay for electricity from the revenue or income they receive.

It is also clear, that the estimated budget referred to by Mr. Falk (Exhibit 1 - Estimated Budget; Tr. 20) is totally useless in trying to ascertain whether specific amounts of the maintenance fees are "paid" or allocated for electricity or any other given expense item.

The developer of the Terrace Park - Five Towns project, Herm Geller Enterprises, Inc., was required to prepare and file with the Department of Business Regulation a whole host of condominium documents known as a prospectus. (Tr. 109-110, 207-208). The developer was a separate corporation affiliated with Mr. Geller, but whose separate and distinct legal identify was expressly explained in the Management Contract (Exhibit 4 - Contract paragraph XIV(e). (Tr. 108-109). The developer was required by the Department to include in the prospectus an

estimated yearly budget for the condominium homeowner's association. (Tr. 204). Typically, the estimate budget provides prospective residents an idea of the likely expenses (and therefore homeowner's dues they will pay) necessary to operate the condominium association. (Tr. 204). Because of the 14 year Management Contract, the estimated budget was of little or no use to the buyers or the association. Residents would pay only the maintenance fee called for in the contract subject only to increases annually or by the six categories of adjustment in paragraph VI. (Tr. 208-209). The residents paid the fee and, in return, would receive all of the services. The Management Contract was part of the prospectus. (Tr. 109).

The Department of Business Regulation staff insisted that an estimated budget document be included in the Jefferson Building prospectus. (Tr. 205-206). The staff expressed no interest in the budget items, as long as the total estimated monthly expenses equaled the average $71.50 maintenance called for in the Management Contract. (Tr. 127). Later estimated budgets filed for other Terrace Park - Five Towns building had no line item for electricity or other expense items (Tr. 127); only a notation that the expense categories were included in the single maintenance fee to be paid by prospective buyers - residents (Tr. 127; Exhibit 4 budgets for Quincy, Radcliff, Syracuse, Tiffany and University Buildings).

Simply stated, the estimated budget relied upon by Mr. Falk has absolutely no basis in fact. It was at best, an <u>estimate</u>

prepared not by Geller Management but by the developer. The expense item numbers were calculated not by actual budgeting or expense forecasting, but by inserting numbers that added up to the $71.50 average maintenance fee. The budget does not represent any reliable expense for electricity or any other expense category used in providing services to Jefferson Building residents.

2. The only aspect of the maintenance fee even related to electricity or the cost of electricity are the amounts by which the Jefferson Building maintenance fees were increased pursuant to Article VI(d) of the Management Contract. As explained earlier, adjustments to the maintenance fee were made in 1982 and 1983 based upon increases in the rates per KWH charged by Florida Power Corporation. (See Point III above).

The Jefferson Building maintenance fees were increased a total of $3.13 per month per unit (spreading the increases among the 48 units) as a result of the 1982 and 1983 contract adjustments (Tr. 174). That is the only portion of the maintenance fee that can specifically be linked in any way to the use of electricity by Geller Management, even though the adjustments were simply added to the maintenance fee to create a new, flat monthly amount with no identification or separation for any particular contract adjustment or particular expense category.

By any comparison, the $3.13 fee adjustment is far less than the actual expense incurred by Geller Management each month, for electricity. Looking at Susan Tucker's Exhibit 6 and Late

Filed Exhibit 8, it is clear that any kind of per unit per month electric expense is far greater than $3.13. To that degree, Geller Management does not receive more from the $3.13 contract adjustments related to electricity than it has to pay for electricity.

3. Any attempt to isolate the adjustment to the maintenance fees -- the $3.13 described above -- and specific amounts paid by Geller Management as a result of Florida Power Corporation rate increases are equally unreliable and unsupported by the record. Such an attempt offered by Mr. Stallcup fails for three principal but fatal reasons.

The first is that the approach totally ignores the actual contract provision -- the adjustment in maintenance fee is based on the increase in Florida Power Corporation rates per KWH over the rate per KWH in place in January 1980. The Commission can take notice of its own records, including company existing and cancelled tariffs on file with the Commission. (Tr. 91-92). The Florida Power Corporation rate in January 1980 was $46.44. All comparisons and calculations in increased costs related to the $3.13 adjustments to the maintenance fees must take into account the increase using January 1980 rates as the base or test period. Mr. Stallcup's audit approach did not use the 1980 tariff rates per KWH, and is therefore flawed in approach.

Mr. Stallcup's Audit Report (Exhibit 9) used a base/test rate of $70.53. If the correct 1980 base/test rate is used

instead, the results reached by Mr. Stallcup will be vastly different, and should show no excess of revenue from adjustments to maintenance fees over actual increase in electric expenses. One example is illustrative. Mr. Stallcup's Table 2 shows, for the April 1990 - September 1990 period, a total rate of $70.82 with 887, 919 KWHs. Using the January 1980 rate, the increase in electric expense for that period due to the increase in total rate amounts to $21,647.00, far greater than Mr. Stallcup's $189.00 figure.

The second flaw in Mr. Stallcup's approach is that it totally ignores the electric expense that is included in the "base" maintenance fees. While it is possible to identify the maintenance fees increases paid due electric rate increases, it is simply not reasonable to ignore the expenses -- obviously the bulk of the electric expense for the entire project -- that are necessarily included in the base maintenance fee. It is convenient to try to isolate only the maintenance fee increases and related increase in electric expense, but it is not reasonable or intellectually supportable to ignore the majority of the electric expense.

A third flaw in Mr. Stallcup's analysis is that it ignores the very real increase in electric expense to Geller Management, since the contract adjustments were made, that are a result of increases in per unit consumption in electricity in the project. Under the Management Contract Geller Management assumed

the risk, at the time of an adjustment in maintenance fees due to a change in electric rates, that its electric expense would also increase due to increases in consumption. At the time of the adjustment in fee its electric expense could increase (1) due to the increase in rates and (2) due to an increase in consumption. Mr. Stallcup ignored the latter factor.

Late File Exhibit No. 13 filed by Geller shows the effect of the increase, in consumption and resulting electric expense after the March 1983 electric rate increase and adjustment to maintenance fee. An additional $83,383.00 in electric expense is reflected in the calculation.

4. A final but different approach should also be considered by the Commission. The data in Late Filed Exhibit 8 filed by Geller Management provides the actual electric expenses, consumption and number of units occupied in the 26 buildings completed before the March 1983 adjustment to maintenance fee that resulted from the Florida Power Corporation rate increase. From that data Geller Management has prepared an analysis of that 1982 - 1991 operations at Terrace Park - Five Towns that makes a common sense effort to allocate, from the raw data, the electric expense and maintenance fees for the project. Attached to this brief as an Appendix, is a compilation of that analysis and the conclusions thereof.

The specific adjustments, allocations and calculations made with the raw data in Late Filed Exhibit No. 8 are explained

in the Notes preceding the compilation. Critical to this compilation is the fact that any analysis or allocation of electric expense (or any other expense), to be compared to maintenance fee revenues must be made at the early stages of occupation of each particular building. When the buildings were constructed and maintenance fees set by the contract, Geller Management did not have the benefit of the actual operating experience for the building. Therefore, the allocation of the maintenance fees is based on the house meter expense in the early months of the buildings' occupancy. The Jefferson Building per unit expense factor, $2.31, is based on the actual January 1980 electric expense for that building and the FPC tariff rate, since that is the operative month for maintenance fee adjustments related to Florida Power Corporation electric rate increases. All buildings opened before or with the Jefferson Building use the same figure, because their actual expense could only have been lower with lower electric rates in the 1970's. Some of the buildings go back to the early 1970's. The balance of the buildings' base electric expense factor's are based on per unit electric expense for all buildings in January of the year in which the particular building was first occupied. Again, the allocation of electric expense must be based on the time period when the building was opened and maintenance fee set.

The final allocation is of the electric expense for the services and facilities provided in common areas of the project.

The "amenities" portion of the electric expense is a straight calculation -- the total common area electric expense divided by the total number of units occupied in the project. No assumptions or allocations are required.

The result of the compilation, shown in the Appendix, is a building by building calculation of the experience of Geller Management for 1982 to date. It shows that for all buildings, over the nine year period, Geller Management paid out some $111,208.10 more in electric expense than the maintenance fee revenue attributable to electric usage. Using the compilation, the Jefferson Building figures show a net surplus of $226.25 in maintenance fee revenues over the $27,000.00 plus paid in electric expense. The compilation shows 25 buildings with deficits to Geller (more paid in electric expense than received in maintenance fee revenues), and only 9 buildings where slightly less was paid in electric expense than received in maintenance fees.

Viewed as a whole the compilation should clearly demonstrate the answer to the issue, that Geller Management has not received more in maintenance fees related to electric expense than it actually paid out in electric costs to Florida Power Corporation. Mr. Falk has not proven otherwise, and his complaint should be denied.

POINT VIII

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.?

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) required that fees and charges collected by a customer of records for gas billed to the customer's account by the utility be determined in a manner which reimbursed the customer of record for no more than the customer's actual cost of gas?

Rule 25-7.071 does not apply to the practices of Geller Management under its Management Contract with the Jefferson Building Association, or with the other buildings in the Terrace Park - Five Towns project. The rule -- on its face -- does not require that fees and charges collected, by a customer of record in a master metering setting, not exceed the actual electric expenses incurred by the customer.

The pertinent Commission's rule, set forth under the section of the gas rules relating to customer metering, states as follows:

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.

Clearly, just as in Rule 25-6.049(5), the primary focus of the gas rule 25-7.071(2) and (3) is to require that all residential and commercial buildings constructed (construction started) prior to January 1, 1987, must have individual gas meters for each separate occupancy unit. Again, as in the case of electric, this is obviously a conservation minded rule intended to ensure that, for example, each apartment or business owner will be paying for the gas actually used in his own apartment or store. He uses it and he pays for it.

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 as part of its package of Management Contract services. The refuted evidence in this docket is that the Jefferson Building was constructed before 1980, (Tr. 120), some 7

or 8 years prior to the 1987 effective date of the individual metering requirement of the rule. Indeed, the evidence in the record is that all of the buildings in the Terrace Park - Five Towns project were constructed prior to January 1, 1987. (Exhibit 8)[9]

The Commission rule did not and does not require separate meters for the condominium units in the project, so Geller Management is in full compliance with the Commission's rules.

The rule itself, however, does not contain the express proscription against collecting fees and charges in excess of actual gas costs of Rule 25-6.049(6)(b), and therefore is equally not applicable to Geller Management for that reason. Rule 25-7.071(3)(a) permits, but does not require, the use of submetering in order to allocate gas costs incurred in a master meter setting. The rule, as adopted, would allow an owner of an apartment building to install submeters for each apartment should he wish to directly pass the cost of gas through to each of his tenants if also permitted by his lease.[10]

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[9] Late Filed Exhibit 8 shows the number of units occupied in each building on a monthly basis. All of the buildings, except one, were first occupied prior to 1987 and therefore clearly predated the rule's 1987 effective date. The 54 unit University Building was first occupied in August 1987, so its construction would have had to have been started prior to January 1987.

[10] As explained by Mr. Parmelee, witness, he would simply amend his lease as lease terms expire and new leases begin -- something Geller Management is not able to do in a 14 year term Management Contract.

The plain reading of Rule 25-7.071(3) is that submetering is permitted, but that such an allocation is not required. Secondly, the proscriptive language clearly stated in Rule 25-6.049(6)(b) is not contained in the gas rule. Such an exclusion can only be read to mean that the "fees and costs" limitation of §25-6.049(6)(b) is not in the gas rule. The Commission may for conservation or other policy reasons wish to revisit the gas rule to bring it in line with the electric rule. But, until it does so, the present form of Rule 25-7.071(3) simply does not contain the limitation and none can be read or otherwise grafted into the rule. There is no limitation and none can be applied to Geller Management in this docket. For this reason alone Mr. Falk's complaint, as it relates to gas, must be denied.

POINT IX

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?

This issue is basically moot by the actual language of Rule 25-7.071(2) and (3) as explained in Point IX above.

Nevertheless, the inapplicability of the rule to Geller Management on constitutional grounds of impairment of contract are of equal weight and import.

Rule 25-7.071(2) and (3), with its January 1, 1987, cut-off date, was adopted in 1986, long after the 1979 Jefferson Building and the entire Terrace park - Five Towns project. If somehow contorted to allow an analysis of the "fees and charges" collected "for gas," application of the rule to the 1979 Management Contract and other building contracts would be a gross violation of the constitutional principles of impairment of contract. The authorities and argument in Point IV above are equally applicable here, and should be followed by the Commission as a basis not to apply the rule to Geller Management and its contracts.

POINT X

ISSUE #17

> If Commission Rule 25-7.071(3) is applicable in any way to the practices of HGMC pursuant tot is 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?

As with Issue 16, the substance of Issue 17 is basically rendered moot as to Geller Management by the express terms of the gas rule. The rule and its 1987 cut-off date for master metering and option to allow allocation of gas costs by sub-meters, clearly

can and should not be applied on a retroactive basis. For the reasons outlined in Issue IV above, the gas rule must be applied on a prospective basis only. Geller Management's gas arrangements complied with the existing Commission rules -- allowing master metering -- and therefore should not now be disturbed by the retroactive application of Rule 25-7.071. The complaint of Mr. Falk as it related to gas should be denied.

POINT XI

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 use of or receipt of benefit from, and payment to HGMC for gas by owners of condominium units in the Jefferson Building, for which has HGMC is the customer of record with Peoples Gas Company?

The Management Contract of Geller Management as part of the package of services and facilities covered by the monthly maintenance fee, calls for the provision of gas to the residents' units for heating and cooking. (Tr. 119). Geller Management is served by one or more master meters for the project (Tr. 73). The gas used by the residents in their units is one of the many services provided as part of the total package covered by the single maintenance fee paid each month (Tr. 106, 119). The

maintenance fee paid is in no way related to actual consumption of gas by the residents -- the gas is furnished as one of the multitude of services encompassed by the flat maintenance fee. (Tr. 119).

In addition, gas is used by Geller Management in providing many of the other services and facilities also covered by the maintenance fee. Gas is used to heat the water furnished to each unit, and gas is used in the recreational facilities. (Tr. 128). These services too are covered by the single maintenance fee without any limitation on consumption. (Tr. 128).

The Management Contract concept of furnishing gas, directly and indirectly, is entirely consistent with the Commission's rule allowing master metering of gas in these types of circumstances. As treated in the preceding points, the Commission's rules have been complied with and there is no merit to Mr. Falk's complaint.

POINT XII

ISSUE #2

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

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.

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?

The remaining three issues relating to gas also fail due to the actual provisions of the pertinent gas rule 25-7.071 and its inapplicability to Geller Management. Two substantive points related to the issues, however, can be addressed.

The first is that its is equally not reasonably feasible or possible to determine how much Jefferson Building or other building residents use or "pay for" gas under their Management Contract. Gas for the project is obtained by master meter (Tr. 73), with several buildings being served on a loop arrangement. (Tr. 22, 73, 119). The residents use gas in their units to heat and cook, with no sub-metering to determine usage by building or by unit. (Tr. 119). Geller Management uses gas in the

recreational facilities which are available to and used by all residents. All of these uses of gas are covered by the single maintenance fee paid each month, which in no way is related to the actual consumption of gas by buildings or by units, nor is the fee related to the actual gas incurred by Geller Management. (Tr. 119, 128, 171). There is truly no way to divide-up or allocate the maintenance fee paid to determine what portion of the fee is paid "for gas."

The second point that is made clear by the record is that, in fact, Geller Management is not collecting more than it pays for gas. Even Mr. Falk's crude "audit" analysis, flawed as it is, concludes that by 1984 (7 years ago) Geller Management was losing money on the gas portion of its management contract. (Tr. 23, 77). Witness Tucker's analysis of the Geller Management operations confirms that, based on 1989 and 1990 expenses levels and ignoring potential increases in consumption that will also increase costs, any gas rate increase (and resulting adjustment to increase the maintenance fee) will result in a net loss to the company. (Tr. 169-170). Because of the relatively moderate levels of consumption in 1989 and 1990, increased levels of gas consumption would drive the loss to even greater levels. (Tr. 172).

Even more instructive is Ms. Tucker's analysis of the very real 15% plus rate increase adopted by Peoples' Gas in October 1990. Based on current levels of consumption, and even considering

an adjustment increase in the average maintenance fee by $1.06 per unit in the Jefferson Building, Geller Management will lose $.66 per month per Jefferson Building unit due to Peoples Gas rate increase.

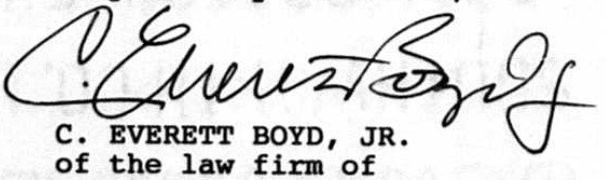
By any approach, there is no violation of Commission rules as to gas and Mr. Falk's complaint should be denied.

CONCLUSION

The complaint filed by Mr. Falk should be denied. The question of contract interpretation and calculation should be left to the Courts. Despite any appearances or misguided "audit" attempts, there has been no showing in this docket of any violation of the Commission rules. Indeed, the cited rules simply do not apply, or cannot constitutionally be applied to alter the substantive rights and obligations created by the 1979 Jefferson Building contracts and contracts for other buildings all of which predate the pertinent Commission rules.

For all of the reasons set forth herein, the complaint should be denied. The rules may be applied on a prospective basis, but not to these existing contracts of Geller Management. The Commission may wish to amend the rules to clearly address these or similar circumstances, but its present rules by their own terms do not.

Respectfully submitted,



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H. GELLER MANAGEMENT CORPORATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of H. Geller Corporation was furnished to Mike Palecki, Esquire, Public Service Commission, The Fletcher Building, 101 East Gaines Street, Tallahassee, Florida 32309-0850 by hand delivery and David Lamont, Esquire, Post Office Box 13576, St. Petersburg, Florida 33733-3576, by United States mail this 30th day of May, 1991.

C. EVERETT BOYD, JR.

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