

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of Consumer)	DOCKET NO. 910056-PU
John Falk Regarding Resale of)	ORDER NO. 25234
Electricity and Gas by the H.)	ISSUED: 10/18/91
Geller Management Company.)	
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The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
J. TERRY DEASON

FINAL ORDER

BY THE COMMISSION:

H. Geller Management Corporation (Geller) contracted a service and maintenance agreement with Terrace Park of Five Towns, Number 15, Inc., a condominium association. John F. Falk (Falk) owns a condominium unit at Terrace Park and pays Geller for its management services, including the provision of gas (for individual units) and electricity (for all common areas).

This matter was initiated by complaint filed with our Division of Consumer Affairs, in which Falk alleged that Geller overcharged him. Specifically, Falk claimed that Geller bought gas and electricity from public utilities and then, contrary to law, resold those resources to individual customers at a profit. Staff apprised Geller of the complaint and said it intended to hold an informal conference pursuant to the Florida Administrative Code. Geller denied the allegation, claiming that it did not resell the resources--it merely used indices to determine maintenance fee increases. Thereafter Staff scheduled an informal conference to be held on November 27, 1989, in St. Petersburg, Florida.

Before the conference could be held, Geller filed a complaint in the circuit court seeking an injunction to stop the Commission from proceeding on the ground that we had no jurisdiction. Over the Commission's objection, the circuit court entered a temporary injunction on November 17, 1989, and denied a subsequent motion to dissolve the injunction. We then filed a petition for a writ of prohibition in the Florida Supreme Court.

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FPSC-RECORDS/REPORTING

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In Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990), the Florida Supreme Court ruled that the Circuit Court lacked jurisdiction to enjoin the Commission from reviewing a complaint which alleged that a property management company overcharged a condominium unit owner for gas and electricity. In its opinion issued November 8, 1990, the Supreme Court held that we had, at the very least, a colorable claim of exclusive jurisdiction to consider the allegations and that the proper vehicle for the management company to contest the Commission's jurisdiction was by direct appeal after we had acted.

After the time for rehearing of the Supreme Court's opinion had expired, Staff scheduled an informal conference in St. Petersburg for February 8, 1991. When the parties were unable to reach a settlement at the informal conference, a docket was opened, and the matter was scheduled for hearing.

A full evidentiary hearing on this matter was held in St. Petersburg, Florida, on April 19, 1991.

RESALE OF ELECTRICITY ISSUES

At the outset we note that the issues in this docket regarding resale of electricity involve only the common areas and facilities of the condominium development. The record reflects that the residents of Terrace Park of Five Towns pay Florida Power Corporation directly for the electricity used in their condominium units. In addition we note that the question before us in this docket is whether or not the Geller Company has resold electricity at a profit. The question of whether the Geller Company, breached, or misconstrued its management contracts is not before this Commission.

The record in this docket reflects that Geller, pursuant to its management contracts, provides services and facilities for the residents of Terrace Park of Five Towns in return for their payment of a monthly maintenance fee. Mr. Geller testified that Geller Management does not supply or sell electricity; it simply provides specific services many of which necessarily require the use of electricity. (Tr. 147-149)

The Management Contracts call for Geller Management to provide a wide range of services and facilities. For a monthly maintenance fee (Tr. 52) residents are provided liability and hazard insurance on the building and grounds, gas for cooking and heating their units, hot and cold water for buildings and units, sewer service, lawn and grounds maintenance, television antenna service, garbage and trash collection, repair and maintenance of the exterior of the

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building and cleaning of common areas, roof maintenance, elevator maintenance, electric service required for the common areas of the building and common facilities, and recreational facilities including servicing pools, shuffleboard courts, recreational halls, billiard rooms, saunas and steam rooms, meeting rooms and kitchen facilities. (Tr. 111; Exhibit 4 - Contract).

There is no separate charge made to residents for electricity (Tr. 106) or for use of the recreational buildings (Tr. 106). The residents pay their monthly maintenance fee for all of the services and facilities available in the project.

Geller Management doesn't supply electricity -- it supplies services and facilities which require the company to use and pay for electricity. It is the management company's obligation to provide these services and inherent in the provision of these services is the fact that electricity is needed. Geller does not supply electricity to the ultimate consumer and the ultimate consumer is unable to choose how the electricity is used. This is not a sale of electricity to the ultimate consumer. Rather, this is a provision of services, with the price of these services being indexed to the price of electricity.

From a common sense standpoint Geller is not an electric utility engaged in the sale of electricity. The contract that was entered into between Geller and the condominium owners is one which contains an indexing procedure for the pricing of the services. As part of the indexing procedure the condominium maintenance fee would increase by a dollar amount each time Florida Power Corporation increased its rates by a certain percentage. For example, Mr. Falk, the complainant, lives in the Jefferson Building, one of 32 condominium buildings located in Terrace Park of Five Town. Paragraph VI of the Jefferson Building's management contract provides that in the event Florida Power increases its rates by 5%, the monthly maintenance fee for the Jefferson Building shall increase by \$15. Each of the other buildings in the Terrace Park of Five Towns complex has a similar provision.

Under this indexing procedure, the maintenance fee increases tied to electric rates could have been more or less than the actual increases paid by Geller to Florida Power Corporation, depending on consumption. The record in this proceeding reveals that the amount the Geller Company collected from unit owners as a result of the maintenance fee increases is more than the amount Geller paid to Florida Power Corporation as a result of rate increases. This result could change however, with an increase in consumption in the common areas.

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In addition, our rule which prohibits resale of electricity at a profit applies to occupancy units, not common areas and services. The purpose of Rule 25-6.049(5), Florida Administrative Code is to mandate the use of individual meters for occupancy units such as condominium units, apartments, stores and shops in shopping centers and malls. The rule is not intended to be thrust into a setting such as this where units are separately metered and residents pay Florida Power Corporation directly for the electricity used in their individual units. The rule does not apply to a maintenance fee paid for common area services and facilities used by residents of the condominium development. We therefore find that Geller has not violated Rule 25-6.049(5), Florida Administrative Code. In addition we find that Geller has not resold electricity at a profit, and is not an electric utility subject to the Commission's regulatory jurisdiction.

RESALE OF GAS ISSUES

The complainant has failed to sustain its burden of proof with regard to resale of gas. It appears that over the long term there has not been a material difference between the amount collected for gas by Geller and the amount it pays to Peoples. From year to year there has been some fluctuation with some years Geller making a profit and other years sustaining a loss. Witness Tucker testified that based on 1989 and 1990 expense levels, the 15% gas rate increase adopted by Peoples Gas, and the resulting increase in the maintenance fee, will result in a net loss to the Geller Company. While this is impossible to predict with any certainty because gas consumption can vary significantly from year to year due to weather conditions, it is quite possible that a severe winter could result in a loss to the company.

With regards to gas, the record does not reflect that the residents of Terrace Park of Five Towns have been consistently overcharged for gas. To the contrary, the fee increase for gas set forth in the maintenance contract appears to accurately reflect the cost of gas.

It is therefore

ORDERED by the Florida Public Service Commission that the relief requested in the complaint filed by John F. Falk regarding the alleged resale of electricity and gas by the H. Geller Management Corporation is hereby denied.

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By ORDER of the Florida Public Service Commission, this
18th day of OCTOBER, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.