BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Sun City Center Community Association, Inc. against Peoples Gas System for alleged improper billing.	DOCKET NO. 090083-GU ORDER NO. PSC-09-0661-PAA-GU ISSUED: October 5, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

NOTICE OF PROPOSED AGENCY ACTION
ORDER FINDING THAT PEOPLES GAS SYSTEM CHARGED THE APPROPRIATE RESIDENTIAL RATES AND DETERMINING THAT NO REFUND IS REQUIRED

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. Background

On December 7, 2007, Mr. Brian Davidson, of Energy Tax Solutions,[1] filed an informal complaint against Peoples Gas System (Company or PGS) on behalf of the Sun City Center Community Association, Inc. (SCCCA or Customer). This complaint was assigned Complaint No. 761557G. In that complaint, he alleged that the Customer's gas service had been improperly switched in August 2005 from the Commercial GS-2 Service rate to the Residential Service rate. On behalf of SCCCA, Mr. Davidson requests that the Company be required to switch SCCCA back to the GS-2 Service rate, and that it be refunded the difference in revenues collected with interest.

After reviewing the informal complaint, by letter dated May 8, 2008, our staff advised the customer that it appeared that the Company had correctly applied its tariffs in accordance with the orders issued by the Commission. Our staff further advised the Customer that this was staff's opinion, and that an informal conference could be held to see if a settlement could be reached, or the matter could be taken directly to the Commission if the parties thought that an informal

[1] By Order No. PSC-09-0551-FOF-GU, issued August 6, 2009, Mr. Davidson was authorized to appear as a qualified representative.

conference would be unproductive. To try to reach a settlement, our staff held an informal conference on July 30, 2008. At the informal conference, the Company asked the Customer to provide clarification or corroborating evidence on several points, which the Customer provided on August 11, 2008. No settlement was reached by the parties.

On August 27, 2008, the Customer sent an e-mail to our staff requesting reconsideration of all facts and evidence submitted and a recommendation to the Commission supporting the Customer's position. By letter dated January 22, 2009, the Customer again requested that our staff take action on its informal complaint. However, when our staff did not quickly take action in response to the January 22, 2009, letter, the Customer filed its formal complaint on February 16, 2009. The formal complaint was assigned to this docket.

In the formal complaint, the Customer reiterates that the usage for common areas of SCCCA was properly billed by the Company on the GS-2 Service rate (commercial rate) prior to August 2005. SCCCA states that the Company alleges that it switched SCCCA to the Residential Service rate to comply with Commission Order 19365.[2] In that Order, we found "that gas utilities should consider service to commonly owned areas of condominium associations, cooperative apartments, and homeowner associations as residential service." In the case at hand, PGS is providing gas for the heating of the community pool.

The complaint alleges that this change to the Residential Service rate is in conflict with Provision 2 of the Residential Service rate schedule (tariff) which states that, "None of the Gas is used in any endeavor which sells or rents a commodity or provides service for a fee," because residents pay special fees to the SCCCA for exclusive use of the pool for certain hours and days. SCCCA further states that it is a Community Association (CA), and is not included in the description in Order No. 19365 or the tariff which includes specifically "commonly owned facilities of condominium associations, cooperative apartment, and homeowners associations." SCCCA further notes that Tampa Electric Company (TECO) serves similar accounts using a Commercial rate. In conclusion, the Customer requests that it be moved back to the Commercial GS-2 Service rate (tariff), and that it receive a refund with interest of the difference between the two rates since the switch occurred in August 2005.

This Order addresses the Customer's complaint that it should be billed under the GS-2 Service rate and not the Residential Service rate, and whether the customer should be switched back to the GS-2 Service rate and awarded a refund with interest for being charged inappropriate rates from August 2005 through to the present. We have jurisdiction pursuant to Sections 366.04 and 366.05(1), Florida Statutes (F.S.).

II. Complaint of the Customer

In SCCCA's letters and complaints to this Commission, it raises three main points as to why it should be billed under the GS-2 Commercial Service rate (tariff) and not the Residential rate. Our analysis of each point is set out below.

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[2] Issued May 24, 1988, in Docket No. 860106-PU, In re: General Investigation Into Deposit Practices.

1. SCCCA alleges that because it is a Community Association and not a Condominium Association, Cooperative Apartment, or Homeowner's Association as set out in Order No. 19365 and the Company's tariffs, it is not subject to being charged under the Residential Service rate tariff.

The Sixth Revised Sheet No. 7.201,[3] titled Company's RESIDENTIAL SERVICE (Rate Schedule RS) tariff provides as follows:

Applicability:

> Gas Service for residential purposes in individually metered residences and separately metered apartments. Also, for Gas used in commonly owned facilities of condominium associations, cooperative apartments, and homeowners associations, (excluding any premise at which the only Gas-consuming appliance or equipment is a standby electric generator), subject to the following criteria:
>
> 1. 100% of the Gas is used exclusively for the co-owner's benefit.

(Emphasis supplied) Also, Order No. 19365, page 3, states: "This Commission believes that gas utilities should consider service to commonly owned areas of condominium associations, cooperative apartments, and homeowner associations as residential service."

SCCCA focuses on the three specific categories listed, and also that the gas used must be exclusively for the co-owner's benefit. SCCCA states that it is neither a Condominium Association, Cooperative Apartment, nor a Homeowners Association, which are organized under Chapter 720, F.S., but is a Community Association organized under Chapter 617, F.S. SCCCA further argues that this is a "distinction with a difference" in that the dues-paying members have no common ownership interests in the common property, but merely a right to use the recreational facilities managed by the Customer as long as the members pay their dues. Also, SCCCA notes that Order No. 19365 only requires that the commonly-owned areas of the condominium associations, cooperative apartments, and homeowner associations should be considered residential service. Fitting none of these requirements, SCCCA argues that neither the tariff nor the Order are applicable to SCCCA.

The Company states that the proper tariff is the Residential Service tariff, and that:

1. A community association is the same as a condo or homeowners association, and to treat them otherwise is a "distinction without a difference;" and

[3] See Attachment A for the full tariff sheet.

2. The fees charged by the Customer (in connection with the gas-heated pool) are no different than assessments paid by a condo or homeowners association, and are not fees for a service.

By letter dated February 19, 2008, the Customer provided its Articles of Incorporation (Articles). The Articles state that the SCCCA operates by and for the benefit of the residents or certain other parties expressly included in the Articles. Article II states:

> The corporation is to serve the residents of the retirement community . . . known as Sun City Center, by providing relief for the elderly, providing assistance and essential service . . . for the benefit of the residents . . . .
>
> In furtherance of these purposes, Sun City Center Community Association, Inc. shall manage recreational facilities owned for the benefit of all residents, shall enforce that private zoning known as "restrictive covenants running with the land" on behalf of the residents and for the benefit of the community . . . .

Article IV states:

> Members of this corporation shall be all residents of Sun City Center and those individuals who would subsequently qualify if Sun City Center Civic Association had not consolidated into Sun City Center Community Association.
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> In the SCCCA's Bylaw, the Preamble states:
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> Payment of dues, and the requirement contained in the "restrictive covenants" that at least one occupant of each dwelling unit must be fifty-five (55) years of age or older . . . are determined to be of paramount importance and benefit to all residents . . . .

Bylaw I - Membership states:

> Section 1. All residents/resident-owners in the retirement portion of Sun City Center are members of the Association.
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> Section 2. Use of Association facilities and other privileges normal to Association membership requires that all members have all dues, fees, and assessments obligations satisfied, ...
>
> Section 3. Residents of Lake Towers who have previously been members of the Association may continue their membership, subject to rules and conditions established by the Board of Directors.

Bylaw V - Section 7 states:

> The Board may exercise the right of lien to effect collection of dues which remain unpaid thirty (30) days after the due date.

Although Order No. 19365 specifically addresses only "service to commonly owned areas of condominium associations, cooperative apartments, and homeowner associations" as being residential, and does not list "community associations," this omission is not conclusive. In Order No. 4150, issued March 2, 1967,[4] we initially only required that service to the common areas of condominium associations and cooperative apartments be provided pursuant to the residential tariffs. Then, by Order No. 8539, issued October 25, 1978, we expanded this to include service to common areas provided by homeowners associations.[5] In both those orders and in Order No. 19365, the thrust is not who the entity is, but the nature of the service provided. Further, all the orders find that service to common areas, whether electric or gas, is more residential in nature.

In Order No. 10104, issued June 25, 1981,[6] regarding the application of a residential rate to commonly-owned facilities of homeowner associations, we found that the particular incorporation structure of the entity receiving the service did not matter as much as the type of services the utility supplied:

> The Hearing Officer found that the condominium/cooperative form of ownership of common facilities on the one hand, and homeowners' ownership of facilities, are both residential in nature. We concur in this finding noting that the various forms of real property ownership at issue all involve residents sharing in the control and upkeep of common elements and facilities appurtenant to their residences . . . .

(Order 10104, p. 3) Although Order No. 19365 was issued subsequent to Order No. 10104, the gist of the orders issued by this Commission is that service provided to common areas such as a community pool is residential in nature, and it is the nature of the service provided and not the entity to which service is provided that controls its determination as residential service.

Based on the information provided by the SCCCA, we find that SCCCA performs a similar function to that of condominium associations, cooperative apartments, and homeowners associations. The fact that it may be incorporated under a different statute or may perform functions not available to other, similar homeowner associations does not preclude it from providing a similar service to its members. We further find that it is the nature of the service provided that determines which tariff rate applies, and that maintenance of a swimming pool for members has been determined to be in the nature of residential service. Also, Article II of SCCCA's Articles states that "Sun City Center Community Association, Inc. shall manage recreational facilities owned for the benefit of all residents, shall enforce that private zoning

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[4] In Docket No. 7697-EU, In re: Show Cause order to All Electric Utilities on Application of Rates for Energy used in Commonly-owned Facilities in Condominium and Cooperative Apartment Buildings.
[5] In Docket No. 780547-EU, In re: Show cause order to electric utilities concerning the application of the residential rate to commonly-owned facilities of homeowner associations.
[6] In Docket No. 790847-EU, In re: Forsythe Colony Homeowners Association and President's Council of Tamarac v. Florida Power and Light Company v. Florida Public Service Commission.

known as 'restrictive covenants running with the land' on behalf of the residents and for the benefit of the community . . . ." Therefore, we reject the argument of the SCCCA that the Residential Service rate should only be applicable to services provided by condominium associations, cooperative apartments, or homeowners associations.

2. Argument That the Criteria in Provision 2. of the Residential Service Tariff Prevents the Use of the Residential Service Tariff

In order for the Residential Service tariff to apply, Provision 2. of the Residential Service tariff provides as follows:

> None of the Gas is used in any endeavor which sells or rents a commodity or provides service for a fee.

The Customer argues that it has different clubs offering exercise and dance classes in the gas-heated pool, and that club members are required to pay a separate club fee giving them exclusive use of the pool for specific days and times. Therefore, the Customer believes that Provision 2. of the Residential Service tariff would prevent the application of that tariff in this situation.

By letter dated January 11, 2008, the Customer stated that there was a reciprocal agreement with two non-affiliated assisted living facilities whereby "former residents and members of the Community Association who have moved to one of these 2 facilities are allowed to remain a member as long as they continue to pay their membership dues." (emphasis supplied by the Customer.) We believe that this shows that the facilities are open only to resident members or former-resident members – all of whom must maintain their dues -- and that the facilities are not available to the general public at large.

Based on the provisions of the Articles of Incorporation and Bylaws cited above, the provision of recreational facilities is paid for by all members through mandatory dues. The fact that some members pay a nominal additional charge for special services or to reserve the pool exclusively is more like a management or maintenance fee than a "fee for service" under the tariff. Use is not based solely on the additional "fees" paid for certain services. Residents would not be eligible to use the facilities at all, absent their general membership dues to the Association, and the services offered are still available only to members. The members are essentially paying themselves since SCCCA operates as a not-for-profit entity and presumably all funds go back into providing the services offered. Under these circumstances, we find that these type of fees do not constitute a "fee for service" under the tariff which would make the usage commercial in nature. The facilities are still closed to all but a closely defined group of residential users. Therefore, the requirements of provision 2. noted above would not prohibit the use of the Residential Service rate in this situation.

3. Consistency Between Gas and Electric Application

The Customer argues that all 11 of its electric accounts with TECO are at Commercial rates and have consistently been so since inception by TECO. The Customer notes that in Order

No. 19365, this Commission found that gas service to commonly owned areas was residential based on similar Commission rulings regarding electricity use. Conversely, SCCCA states "where it has been established that electric service to Customer's facilities is commercial, then gas use to same facilities is also commercial."

This complaint addresses only what is the correct gas service tariff to use and does not address what type of electric service is entailed by the 11 different electric accounts. In Orders Nos 4150, 8539, 19365, and 10104, we have consistently determined that common areas such as pools shall be provided service based on the Residential Service rate.

4. Conclusion

In summary, we find that the type of use by SCCCA in this instance has been determined by this Commission to be residential in nature. Because the service provided is in the nature of residential service, we find that the Residential Service rate applied by the Company was appropriate, and that the Company correctly billed SCCCA pursuant to PGS's Residential Service rate tariff.

As an additional note, this issue will not occur in the future, as a result of changes made in PGS's recent rate case.[7] Prior to the last rate case, all PGS residential customers initiating service after January 1988, took service under the RS rate, pursuant to Order No. 19365, even though the characteristics of the load could be similar to use by larger GS customers. In PGS's most recent rate case, the General Service classes were restructured to expand the eligibility of the GS-1 through GS-5 rate schedules to include residential use. This allows the largest residential customers to be included with similarly-situated non-residential customers for pricing purposes based on their therm usage levels. An additional benefit of this approach is that it clarifies the rights of condominium units to purchase their gas supply from a third-party pursuant to the Company's transportation service program because all commercial customers must be offered the right to take transportation-only services under federal law.[8] The deposit terms and conditions associated with residential service continue to apply to condominium customers that are reclassified to a GS rate schedule.[9]

Because the Company has properly applied the Residential Service rate at least through approval of the new GS Service rates approved in Order No. PSC-09-0411-FOF-GU, no refund of the tariffed rates charged by PGS is required. Also, it appears that the new GS Service tariff rates approved by Order No. PSC-09-0411-FOF-GU are applicable and are appropriate on a going-forward basis.

In consideration of the above, it is

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[7] See Order No. PSC-09-0411-FOF-GU, issued June 9, 2009, in Docket No. 080318-GU, In re: Petition for a Rate Increase by Peoples Gas System.
[8] See Rule 25-7.0335(1), F.A.C.
[9] See Order No. PSC-09-0411-FOF-GU, p. 55.

ORDERED by the Florida Public Service Commission that the service provided to Sun City Center Community Association, Inc. is residential in nature, and Sun City Center Community Association, Inc. was correctly billed pursuant to the Residential Service rate tariff of Peoples Gas System in effect prior to the approval of new GS Service tariffs at the May 19, 2009, Agenda Conference. It is further

ORDERED that because Peoples Gas System has charged the appropriate rates, no refunds are required. It is further

ORDERED that Attachment A to this Order is by reference incorporated herein. It is further

ORDERED that the provisions of this Order are issued as proposed agency action, and shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if no substantially affected person files a protest within 21 days of the date of the Proposed Agency Action Order, this docket shall be closed upon the issuance of a Consummating Order.

By DIRECTION of the Florida Public Service Commission this 5th day of October, 2009.

ANN COLE
Commission Clerk

(SEAL)

RRJ

DISSENT BY: COMMISSIONER ARGENZIANO

COMMISSIONER ARGENZIANO dissents without separate opinion.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, 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 will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 26, 2009.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

ATTACHMENT A, PAGE 1 OF 1

Peoples Gas System
a Division of Tampa Electric Company
Original Volume No. 3

Sixth Revised Sheet No. 7.201
Cancels Fifth Revised Sheet No. 7.201

RESIDENTIAL SERVICE
Rate Schedule RS

Availability:

Throughout the service areas of the Company.

Applicability.

Gas Service for residential purposes in individually metered residences and separately metered apartments. Also, for Gas used in commonly owned facilities of condominium associations, cooperative apartments, and homeowners associations, (excluding any premise at which the only Gas-consuming appliance or equipment is a standby electric generator), subject to the following criteria:

1. 100% of the Gas is used exclusively for the co-owner's benefit.
2. None of the Gas is used in any endeavor which sells or rents a commodity or provides service for a fee.
3. Each Point of Delivery will be separately metered and billed.
4. A responsible legal entity is established as the Customer to whom the Company can render its bills for said services.

Monthly Rate:

Customer Charge:	$10.00 per month
Distribution Charge:	$0.39034 per Therm

Note 1 – Company's BudgetPay plan is available to eligible Customers receiving Gas Service pursuant to this rate schedule (See Sheet No. 5.401-3).

The bill for the Therms billed at the above rates shall be increased in accordance with the provisions of the Company's Purchased Gas Adjustment Clause set forth on Sheet No. 7.101-1.

Minimum Bill: The Customer charge.

Special Conditions:

1. The rates set forth above shall be subject to the operation of the Energy Conservation Cost Recovery Adjustment Clause set forth on Sheet No. 7.101-2.
2. The rates set forth in this schedule shall be subject to the operation of the Company's Competitive Rate Adjustment Clause set forth on Sheet No. 7.101-5.

Issued By: William N. Cantrell, President
Issued On: September 29, 2008

Effective: October 29, 2008