

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Consumer John)	DOCKET NO. 910056-PU
Falk regarding resale of electricity)	ORDER NO. 24384
and gas by the H. Geller Management)	ISSUED: 4-18-91
Company.)	
)	

Pursuant to Notice, a Prehearing Conference was held on April 10, 1991, before Commissioner Gerald L. Gunter, Prehearing Officer.

APPEARANCES:

C. EVERETT BOYD, JR., ESQUIRE, Ervin, Varn, Jacobs, Odom & Ervin, Post Office Drawer 1170, Tallahassee, Florida 32302
On behalf of H. Geller Management Corporation.

DAVID A. LAMONT, ESQUIRE, Post Office Box 13576, St. Petersburg, Florida 33733-3576
On behalf of John Falk (appearance made telephonically).

MICHAEL A. PALECKI, ESQUIRE, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0863
On behalf of the Commission Staff.

PRENTICE PRUITT, ESQUIRE, Office of the General Counsel, 101 East Gaines Street, Tallahassee, Florida 32399-0861
Counsel of the Commissioners.

PREHEARING ORDERBackground

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).

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PSC-RECORDS/REPORTING

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

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

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

After the time for rehearing of the Supreme Court's opinion had expired, Staff scheduled an informal conference in St. Petersburg for February 8, 1991. When the parties were unable to reach a settlement at the informal conference, a docket was opened, and the matter was scheduled for hearing on April 19, 1991.

Use of Prefiled Testimony

All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and exhibits, unless there is a sustainable objection. All testimony

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remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his testimony at the time he or she takes the stand.

In this docket the complainant is a consumer, who is unable to compel Florida Power Corporation (which is not a party to this docket), to prefile testimony. Therefore, complainant will be permitted to call as a witness the Florida Power Corporation employee listed in his Prehearing Statement (Samuel Nixon), despite the fact that Mr. Nixon has not prefiled testimony. Respondent will be permitted to depose Mr. Nixon for discovery purposes, at any time prior to the hearing in this cause on April 19, 1991.

Use of Depositions and Interrogatories

If any party desires to use any portion of a deposition or an interrogatory, at the time the party seeks to introduce that deposition or a portion thereof, the request will be subject to proper objections and the appropriate evidentiary rules will govern. The parties will be free to utilize any exhibits requested at the time of the depositions subject to the same conditions.

Order of Witnesses

The witness schedule is set forth below in order of appearance by the witness's name, subject matter, and the issues which will be covered by his or her testimony.

<u>Witness</u>	<u>Subject Matter</u>	<u>Issues</u>
<u>Direct</u>		
1. John Falk (Complainant)	All matters of the pending Complaint, including but not limited to his audit of electric and gas bills for the Jefferson Building of the Terrace Park of Five Towns condominium community.	All Issues
2. Roy Brummer (Falk)	All matters of the pending Complaint, including but not limited to his audit of electric and gas bills	All Issues

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- for the Jefferson Building of the Terrace Park of Five Towns condominium community.
3. Samuel Nixon (FPC) The proper method of determining the increases in rates per kilowatt hour charged by Florida Power.
4. Herm Geller (Respondent) The history and operations of the Terrace Park - Five Towns project, the purpose, intent and effects of the Jefferson Building management contract provisions, the maintenance fees paid by Jefferson Building residents, the facilities and service provided by Geller Management under the management contract, the role of Herm Geller Enterprises, Inc., the developer of the project, and the application of Commission Rules 25-6.049 and 25-7.071(3). All Issues
5. Susan Tucker (Geller) The effects and implementation of the Jefferson Building management contract, the costs incurred by Geller Management for gas and electricity used in the Terrace Park - Five Towns project, the maintenance fees paid by Jefferson Building residents and increases in those fees, the effects of gas and electric rate increases for Terrace Park - Five Towns project and the units sold in the Terrace Park - Five Towns project. All Issues

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4. Herm Geller (Respondent) The history and operations of the Terrace Park - Five Towns project, the purpose, intent and effects of the Jefferson Building management contract provisions, the maintenance fees paid by Jefferson Building residents, the facilities and service provided by Geller Management under the management contract, the role of Herm Geller Enterprises, Inc., the developer of the project, and the application of Commission Rules 25-6.049 and 25-7.071(3). All Issues
5. Susan Tucker (Geller) The effects and implementation of the Jefferson Building management contract, the costs incurred by Geller Management for gas and electricity used in the Terrace Park - Five Towns project, the maintenance fees paid by Jefferson Building residents and increases in those fees, the effects of gas and electric rate increases for Terrace Park - Five Towns project and the units sold in the Terrace Park - Five Towns project. All Issues

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|-----------------|------------------------------|--|---|
| 6. | Carl Parker
(Geller) | The requirements and purposes of certain provisions of the Florida Condominium Law, Chapter 718, Florida Statutes, and its application to the Terrace Park - Five Towns project, communications with the Division of Florida Land Sales and Condominiums regarding requirements for the prospectuses for the Terrace Park - Five Towns condominiums, and the purpose, intent and effect of the Jefferson Building management contract provisions relating to maintenance fees paid by residents. | 3,4,5,6,8
9,10,11,14
15,18 |
| 7. | Charles Parmelee
(Geller) | The proper application of Commission Rules 25-6.049 and 25-7.071(3), the maintenance fees paid by Jefferson Building residents and the costs of Geller Management for electricity in providing services under its management contract. | 1,2,3,4,5
6,7,8,9,10
11,13,14,
15,17,18,
19,20,21 |
| <u>Rebuttal</u> | | | |
| 8. | John Falk | All matters related to the pending Complaint, including but not limited to his audit of electric and gas bills for the Jefferson Building of the Terrace Park of Five Towns condominium community. | All
Issues |

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EXHIBIT LIST

<u>Exhibit No.</u>	<u>Witness</u>	<u>Description</u>
<u>(JF-1)</u>	John Falk	Complaint filed by John Falk with the Public Service Commission's Division of Consumer Affairs, and all attachments appended thereto.
<u>(HG-1)</u>	Herm Geller	Jefferson Building Management Contract, October 1, 1973, Service and Maintenance Agreement between H. Geller Management Corp. and Terrace Park - Five Towns, No. 15 Inc. Sponsored by Herm Geller.
<u>(HG-2)</u>	Herm Geller	Estimated budgets from a <u>condominium prospectus of Quincy, Radcliff, Syracuse, Tiffany and University Buildings filed with the Florida Department of business Regulation.</u>
<u>(ST-1)</u>	Susan Tucker	Effects of Electric Rate Increases if implemented in 1989 or 1990. 1989 and 1990 electric cost data for Terrace Park - Five Towns project and projections of electric rate increases of 5% to 9 3/4% and increases in resident maintenance fees.
<u>(ST-2)</u>	Susan Tucker	Effects of Gas Rate Increases if implemented in 1987, 1988, 1989 or 1990. 1987 through 1990 gas cost data for Terrace Park - Five Towns project and projections of gas rate

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<u>(ST-3)</u>	Susan Tucker	increases of 5% and increases in resident maintenance fees.
<u>(ST-4)</u>	Susan Tucker	H. Geller Management Electric Expenses. Monthly and annual electric cost data for Terrace Park - Five Towns project for 1982 through 1990, number of units sold in the project on a monthly basis.
<u>(ST-5)</u>	Susan Tucker	Jefferson Building Meter Electric Costs October, 1988 through December, 1990. Monthly electricity cost data for electric meter located in Jefferson Building for October 1988 through December 1990.
<u>(CP-1)</u>	Charles Parmelee	Project Electric Costs. Monthly electricity cost data for all meters in Terrace Park - Five Towns project other than meters located in individual condominium buildings for October 1988 through December 1990.
<u>(STAFF-1)</u>	Herm Geller Susan Tucker	Charles Parmelee Vita. Vita Vita or resume of Charles Parmelee.
<u>(STAFF-2)</u>	Herm Geller Susan Tucker	Estimated budgets of Terrace Park-Five Towns buildings filed with the Florida Department of Business Regulation.
		Worksheets prepared by Geller and provided to PSC auditor including, H. Geller Management Electric expenses; electric history; break-

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down of maintenance
 contract terms for
 each building; electric
 1988; electric 1989;
 electric 1990.

(STAFF-3)

Herm Geller
 Susan Tucker

Staff audit of books and
 records produced by the
 H. Geller Management
 Corporation at its St.
 Petersburg headquarters.

PARTIES' STATEMENT OF BASIC POSITION

JOHN FALK (FALK): The basic position of John Falk in this proceeding is that H. Geller Management Company has unlawfully collected more for electricity and gas from the residents of the Jefferson Building of the Terrace Park of Five Towns condominium community than it has paid.

H. GELLER MANAGEMENT CORPORATION (GELLER): The basic position of Geller Management is that the Commission Rules relating to metering of gas and electricity and allocation of electric and gas cost by sub-metering or other methods (Rules 25-6.049(5) and (6) and 25-7.071(2) and (3) do not apply to the Jefferson Building management contract of Geller Management. If applied to any degree to the Geller Management contract for the Jefferson Building, the operation of the Jefferson Building management contract does not violate the provisions of either of the two Commission Rules. The Jefferson Building residents do not pay a fee or charge for electricity or gas; they pay a single flat maintenance fee -- not tied in any way to consumption of electricity or gas by individual residents or the Jefferson Building -- a fee fixed by contract. The only part of the maintenance fee in any way related to electricity costs incurred by Geller Management, which is not separately stated or billed, are the amounts by which the maintenance fee has been increased under Article VI(d) of the management contract. It is totally unfair and improper to apply to the Jefferson Building management contract, a 14 year contract entered into in 1979, provisions of Commissions rules that were adopted in 1988 and 1986. For all of the reasons above the Commission does not have jurisdiction over the operation of the Jefferson Building management contract or over the claims by John Falk that prior calculations of maintenance fees were incorrect or other alleged violations of its contract may have occurred in 1982 and 1983.

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STAFF: The H. Geller Management Corporation (Geller) has acted as a public utility and has violated Commission rules in charging unit owners more for electricity and gas than it has paid the utilities providing service, Florida Power Corporation, and Peoples Gas System. Geller should be ordered to cease overcharging for electric and gas, and should be required to reimburse unit owners for the amount it has profited from resale of electricity and gas.

STATEMENT OF ISSUES AND POSITIONS

Factual Issues

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

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

GELLER: No.

STAFF: Yes. Agree with Falk.

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

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

GELLER: No.

STAFF: No position at this time.

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

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

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

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

STAFF: The contract itself provides that specified increases (including the increase for electricity at issue) in the maintenance fee shall represent increases for public utilities. In this respect unit owners pay Geller for electricity, which Geller has purchased from Florida Power Corporation.

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.

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

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

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

Again, there is really no way to determine the amount paid by Jefferson Building residents "for electricity" or the amount of electricity cost incurred by H. Geller Management Corporation in providing services and facilities to Jefferson Building residents. The only part of the maintenance fee paid by Jefferson Building residents that is related in any way to electricity is

the \$3.13 average per month by which the maintenance fee was increased pursuant to Article VI(d) of the contract. H. Geller Management Corporation's electric costs, under any method of allocation of Jefferson Building residents, greatly exceed the \$3.13 amount.

STAFF: Rule 25-6.049(6) is applicable and Geller has been reimbursed by unit owners more than the actual cost it paid for electricity.

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

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

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

STAFF: Pursuant to the contract, certain increases in the maintenance fee are specifically to cover electricity cost increases. In this respect Geller collects fees for electricity. The amount Geller has overcharged can be calculated by comparing the total increase in FPC's billings to the total amount of increase Geller has billed unit owners pursuant to Article VI(d) of the contract.

ISSUE 6: In what ways, if any, do the practices of H. Geller Management Corporation (HGMC) pursuant to its September 1, 1979 management contract with the condominium association Terrace Park of Five Towns, No. 15, Inc. involve the use of or receipt of benefit from, and

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

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

GELLER: Just as stated above for electricity, H. Geller Management Corporation's collection of maintenance fees under the management contract does not constitute payment by residents for gas used by or benefitting the residents. Residents pay a single maintenance fee for all of their services and facilities, including gas. The individual condominium units do not have separate meters for gas; Commission Rule 25-7.071(2) requires separate meters for buildings constructed after January 1987. The Jefferson Building was built in 1979. See further explanation in Issue 1 above.

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

Legal Issues

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

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

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

STAFF: In reselling electricity and gas Geller is acting as a public utility and is subject to Commission jurisdiction.

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

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

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

STAFF: In reselling electricity and gas Geller is acting as a public utility and is subject to Commission jurisdiction.

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.

FALK: Yes.

GELLER: No.

STAFF: Yes.

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.

FALK: Yes.

GELLER: No.

STAFF: No position at this time.

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.?

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

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

STAFF: Yes. Agree with Falk.

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

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

GELLER: Yes. The Jefferson Building management contract was entered into in good faith in 1979, in full compliance with Commission Rules. Indeed, although not required individual condominium units were given separate meters. The contract was in effect for nine years when Rule 25-6.049(6)(b) was adopted by the Commission to require that "fee and charges collected by a customer of record for electricity...shall not reimburse[s] the customer of record for...more than the customer's actual cost of electricity." Any attempt to now apply that provision to

go back to 1980, 1981 or any prior year and conclude (as suggested by Mr. Falk) that collection of the maintenance fee somehow violated the non-existent rule is patently improper, unfair and in violation of the Constitutional protection against impairment of contract. There is similarly no fair, proper or legally permissible way to apply the 1988 provision of the rule to the remaining five years of the contract term. Doing so rips apart the basis "single maintenance fee" concept of the contract.

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

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

ISSUE 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?

FALK: John Falk asserts and maintains that the principle set forth in Rule 25-6.049(6), Florida Administrative Code,

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is applicable to the practices of H. Geller Management Company retroactively to the point of beginning of violations.

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

STAFF: No position at this time.

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

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

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

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

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.?

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

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

STAFF: No position at this time.

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?

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

GELLER: Yes. See discussion for Issue 12 above.

STAFF: No. See discussion for Issue 12 above.

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

FALK: John Falk asserts and maintains that the principle set forth in Rule 25-7.071(3), Florida Administrative Code,

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is applicable to the practices of H. Geller Management Company retroactively to the point of beginning of violations.

GELLER: The rule does not apply at all.

STAFF: No position at this time.

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?

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

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

STAFF: Yes. Agree with Falk.

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

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

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

STAFF: No position at this time.

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?

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

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

STAFF: Yes.

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?

FALK: Yes.

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

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its rules and regulations have been violated. That ruling does not create jurisdiction over the breach of contract claim raised by Mr. Falk.

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

STIPULATED ISSUES

None.

MOTIONS

None.

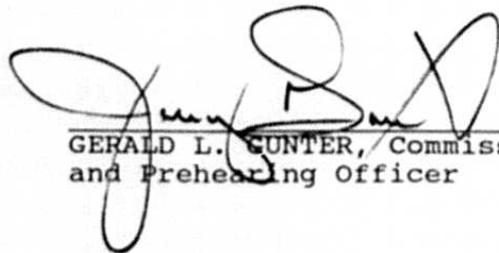
OTHER MATTERS

None.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that these proceedings shall be governed by this order unless modified by the Commission.

By ORDER of Commissioner Gerald L. Gunter, as Prehearing Officer, this 18th day of APRIL, 1991.


GERALD L. GUNTER, Commissioner
and Prehearing Officer

(S E A L)

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