

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
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IN RE: Complaint of Consumer
John Falk Regarding Resale of
Electricity and Gas by the H.
Geller Management Company.

DOCKET NO. 910056-PU
ORDER NO. 25234
ISSUED: 10/18/91

CONSUMER JOHN FALK'S MOTION FOR RECONSIDERATION

COMES NOW the Consumer, JOHN FALK, by and through his undersigned legal counsel, pursuant to Rule 25-22.060, Florida Administrative Code, and hereby respectfully moves this Honorable Commission to reconsider its Order 25234, and in support hereof states the following:

1. On October 18, 1991, this Honorable Commission issued its Order 25234 in the above-captioned proceeding, and denied the relief sought by Consumer JOHN FALK therein.

2. This Honorable Commission predicated its ultimate decision upon the following three conclusions reached by the Commission and set forth in its Order 25234:

2.1 That Respondent H. GELLER MANAGEMENT COMPANY is not acting as a public utility under its management contract with the residents of Terrace Park of Five Towns, and is therefore not subject to the jurisdiction of this Honorable Commission. [Order 25234 at

pages 2 through 3]

2.2 That Respondent H. GELLER MANAGEMENT COMPANY used the cost of electricity only as an index by which to gauge "cost of living" increases in its management contract with the Terrace Park of

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Five Towns condominium community, and did not intend to or actually seek to recover its costs of electricity. [Order 25234 at page 3].

2.3 That Respondent H. GELLER MANAGEMENT COMPANY had not violated Rule 25-6.049(5). [Order 25234 at page 4]

3. Consumer JOHN FALK respectfully requests this Honorable Commission to reconsider its decision, and in support of his request responds to the foregoing bases for decision as follows:

3.1 In Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla.1978), the Florida Supreme Court specifically and expressly ruled that the managing agent of a condominium complex does act as a public utility, for the purposes of coming within this Honorable Commission's jurisdiction, when it passes along to residents of the complex the costs of common area utilities. The Fletcher decision was recently reaffirmed in P.W. Ventures v. Nichols, 533 So.2d 281 (Fla.1988). By its Fletcher decision, the Florida Supreme Court has expressly defined the jurisdiction of this Honorable Commission to include Respondent H. GELLER MANAGEMENT COMPANY if Respondent H. GELLER MANAGEMENT COMPANY passes along its common area electricity costs to the residents of Terrace Park of Five Towns. Absent justified conclusions by this Honorable Commission, supported by competent and substantial evidence, that Respondent H. GELLER MANAGEMENT COMPANY is not passing along utility costs, any decision that Respondent H. GELLER MANAGEMENT COMPANY is beyond this Honorable Commission's jurisdiction constitutes an abdication of this Honorable Commission's statutory responsibilities as interpreted by the Florida Supreme Court in Fletcher. This conclusion is even more acutely pertinent in light of this Honorable Commission's efforts

to retain jurisdiction in this very case. In Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla.1990), this Honorable Commission specifically argued that it did have jurisdiction over Respondent H. GELLER MANAGEMENT COMPANY under the reasoning of Fletcher, and obtained the unanimous support of the Florida Supreme Court as to this position. It is patently contrary to law and reason for this Honorable Commission to now disavow the mandate of Fletcher, and its own position taken earlier in this proceeding regarding the Bryson matter, by declining to acknowledge its jurisdiction over Respondent H. GELLER MANAGEMENT COMPANY.

3.2 Contrary to the conclusion of this Honorable Commission, Respondent H. GELLER MANAGEMENT COMPANY is specifically being reimbursed for its costs of electricity under its management contract with the Terrace Park of Five Towns residents. Respondent H. GELLER MANAGEMENT COMPANY had great and obvious motivation to take the position that the provisions of its management contract providing for increases in monthly maintenance fees in response to increases in electricity costs were nothing more than an index to "keep up with inflation." Yet, Respondent H. GELLER MANAGEMENT COMPANY's own witness, CARL PARKER, the architect and draftsman of the subject maintenance contract, affirmatively and unhesitantly testified that the contract was in fact specifically designed and intended to recover the costs of electricity incurred by Respondent H. GELLER MANAGEMENT COMPANY. (TR: 710-711) Furthermore, the language of the contract itself belies Respondent H. GELLER MANAGEMENT COMPANY's position. Paragraph VI of the contract states: "The monthly maintenance fee for each condominium parcel owner shall be increased as provided for

hereinafter to represent increases for public utilities..." (emphasis added). Paragraph VI of the contract further states: "In the event that Florida Power...increases its rate per KWH by an amount equal to 5%...such increase will be apportioned among the condominium units by the addition to the monthly maintenance fee...the sum of \$15.00...There shall be no increase in the amount of the management fee for this increase..." (emphasis added). In that the express terms of the management contract state that the increase in the monthly maintenance fee is to "represent increases for public utilities", and in that the contract further expressly states that the increases are not to represent increases in the management fee, there can be no other rational, reasonable conclusion but that the contract is specifically intended and designed to recover Respondent H. GELLER MANAGEMENT COMPANY's costs of electricity.

3.3 Contrary to the conclusion of this Honorable Commission, Respondent H. GELLER MANAGEMENT COMPANY has violated the rule prohibiting resale of electricity at a profit. This Honorable Commission found at page 4 of Order 25234 that Respondent H. GELLER MANAGEMENT COMPANY had not violated Rule 25-6.049(5). Consumer JOHN FALK does not disagree with this finding, since Rule 25-6.049(5) does nothing more than establish a requirement that individual electric metering be used for "each separate occupancy unit", as that term is defined in Rule 25-6.049(5). However, Consumer JOHN FALK does respectfully submit that this Honorable Commission's focus on Rule 25-6.049(5) is misplaced. The issue of this proceeding concerns the electricity used in common areas of a condominium complex, areas which are unquestionably not occupancy units. Rule 25-6.049(6), by its

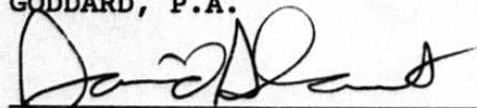
express terms, applies in those instances where individual electric metering is not required by Rule 25-6.049(5). This was expressly recognized by this Honorable Commission in its rule-making proceedings when 25-6.049(6) was being enacted. See, e.g., Volume 14, Number 21, Florida Administrative Weekly, page 1971 ("[Rule 25-6.049] was revised to prohibit reselling of electricity, that is, allocation of master meter charges in such a manner as to result in earned profit by the customer of record, in those cases where individual utility meters were not required.") Since Rule 25-6.049(5) requires individual electric metering only for separate occupancy units, it inescapably follows that Rule 25-6.049(6) applies to all situations in which electricity is provided for non-occupancy unit uses. Accordingly, Respondent H. GELLER MANAGEMENT COMPANY was and is fully entitled under the provisions of Rule 25-6.049(6)(a), as customer of record, to pass on to the residents of Terrace Park of Five Towns its electricity charges for the common areas of the condominium complex. However, Respondent H. GELLER MANAGEMENT COMPANY is specifically prohibited by Rule 25-6.049(6)(b) from collecting more from the residents of Terrace Park of Five Towns than it paid Florida Power for the electricity used in the common areas. As this Honorable Commission specifically acknowledged that Respondent H. GELLER MANAGEMENT COMPANY has collected more from the residents than it has paid Florida Power [Order 25234 at page 3], the violation of Rule 25-6.049(6)(b) is clear. Consumer JOHN FALK's argument in this regard is even more acutely pertinent when considered in light of the fact that, with respect to this very proceeding, this Commission argued in Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla.1990)

that it had jurisdiction over Respondent H. GELLER MANAGEMENT COMPANY because of Rule 25-6.049(6)(b). See Bryson at 1255.

WHEREFORE, in light of and pursuant to the foregoing, Consumer, JOHN FALK, respectfully urges this Honorable Commission to reconsider its Order numbered 25234. Respondent H. GELLER MANAGEMENT COMPANY, by the only competent and substantial evidence before this Honorable Commission, is in fact being specifically reimbursed for its costs of common area electricity. This fact makes Respondent H. GELLER MANAGEMENT COMPANY a public utility subject to this Honorable Commission's jurisdiction under the Fletcher case, a conclusion earlier advanced by this Commission with respect to this very proceeding in the Bryson case. And, Respondent H. GELLER MANAGEMENT COMPANY has, by this Honorable Commission's own acknowledgement, collected more for common area electricity costs than it has paid Florida Power. This is manifestly a violation of Rule 25-6.049(6)(b), and relief from this violation should be granted in accordance with Consumer JOHN FALK's complaint.

Respectfully submitted,

BACON, BACON, JOHNSON &
GODDARD, P.A.

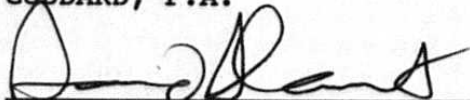


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and fifteen true and correct copies of the foregoing Motion for Reconsideration were furnished to the Director of Records and Reporting, Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0870; and that one true and correct copy was furnished to C. Everett Boyd, Jr., Esquire, 305 South Gadsden Street, Tallahassee, Florida 32301 this 30th day of October, 1991.

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