State of Florida

Public Service Commission

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RECORDS AND REPORTING

DATE: JANUARY 6, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (JAYE)
DIVISION OF ELECTRIC AND GAS (E. DRAPER)

RE: DOCKET NO. 991680-EI - COMPLAINT BY THE COLONY BEACH & TENNIS CLUB, INC. AGAINST FLORIDA POWER & LIGHT COMPANY REGARDING RATES CHARGED FOR SERVICE BETWEEN JANUARY 1988 AND JULY 1998, AND REQUEST FOR REFUND.

AGENDA: 1/18/00 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991680.RCM

CASE BACKGROUND

Pursuant to Rule 25-22.032, Florida Administrative Code, The Colony Beach & Tennis Club, Inc. (Colony) filed a formal consumer complaint against Florida Power & Light Company (FPL) with the Division of Records and Reporting on November 4, 1999. Included in the filing were several exhibits, including Colony's declaration of condominium and advertisements depicting Colony as a hotel. In its complaint, Colony contends that it has continually operated as a hotel pursuant to Section 509.242(1)(a), Florida Statutes, since its inception in 1976. Colony asserts that it has no permanent residents except its manager. Colony maintains that investors who bought the separate units may not stay longer than 30 days per year rent free.

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As a result of its operating structure, Colony asserts that it has at all times been eligible for master metering. Colony complains that FPL failed to master meter the property in question upon Colony's request in January of 1988. Colony contends that this was contrary to Rule 25-6.093(2), Florida Administrative Code, which requires a public utility, upon the request of any customer, to advise its customers of the rates and provisions applicable to the type or types of service furnished by the utility and to assist the customer in obtaining the most advantageous rate schedule for the customer's requirements. Colony complained that, because FPL failed to abide by Rule 25-6.093(2), Florida Administrative Code, FPL also failed to abide by Rule 25-6.049(5)(a)(3), Florida Administrative Code, which excepts certain types of properties, such as hospitals, motels and hotels, from the individual metering requirement. Colony claims FPL violated Rule 25-6.049(5)(a)(3), Florida Administrative Code, by refusing to master meter the property when Colony first approached FPL on the matter in 1988.

Colony requested relief in the form of a refund of the difference between what it paid in individual metered rates for its accommodations and what its competitors in the hotel industry in the same area paid for master metered service for their accommodations from January 1988 through June 1998.

FPL responded on December 20, 1999, by filing an answer and affirmative defenses to the complaint. FPL asserted that Colony has not stated sufficient facts upon which a refund may be granted. FPL further denied that Colony requested master metering in January of 1988. FPL contended that Colony has always operated as a resort condominium under Section 509.242(1)(c), Florida Statutes, and not as a hotel under Section 509.242(1)(a), Florida Statutes, as Colony claims. According to Rule 25-6.049(5)(a), Florida Administrative Code, condominiums are to be individually metered and, therefore, according to FPL, Colony is not eligible for master metering service. As a result, FPL asserted that a waiver of Rule 25-6.049(5)(a), Florida Administrative Code, should have been obtained before FPL master metered the facility in June of 1998, however, because of an oversight, FPL did not require Colony to obtain a waiver of the master metering rule. For these reasons, FPL maintained that Colony should not be granted a refund. In its

affirmative defenses, FPL asserted that contract theory and the statute of limitations both act to bar Colony from obtaining any refund for the dates at issue. FPL contended that the 1988 request for master metering by Colony and the subsequent refusal to do so by FPL, if they occurred, were negotiations pursuant to a contract. FPL concluded that, as a result, Colony's claims as stated in the petition are for breach of contract or specific performance and are, therefore, barred by the civil statue of limitations.

Colony responded to FPL's answer and affirmative defenses by filing its response on January 5, 2000. In its responses to FPL's affirmative defenses, Colony asserted that its request for master metering in 1988 and FPL's refusal to master meter the property are not based in contract law, but are based upon rules of the Commission. Colony asserted that once FPL did a site survey of Colony in 1997, it immediately consented to master meter the facility because Colony operates like, and is licensed as, a hotel.

DISCUSSION OF ISSUES

ISSUE 1: Should the civil statute of limitations operate as an absolute bar to Colony's petition?

STAFF RECOMMENDATION: No. The civil statute of limitations does not bar Colony's petition, as asserted by Florida Power & Light Company. Colony's petition for refund does not arise from alleged meter error. It should, therefore, be addressed under Rule 25-6.106(2), Florida Administrative Code. (Jaye)

STAFF ANALYSIS: In its response to Colony's petition, FPL asserted that Section 95.11(5)(a), Florida Statutes, operated to bar Colony's request for a refund because the statute of limitations had run on matters relating to contracts other than for the recovery of real property. Staff disagrees.

Rule 25-6.106(2), Florida Administrative Code, provides that in the event of overbillings not caused by meter error, the utility shall:

> refund the overcharge to the customer for the period during which the overcharge occurred based on available records. If commencement of the overcharging cannot be fixed, then a reasonable estimate of the overcharge shall be made and refunded to the customer. The amount and period of the adjustment shall be based on the available records. The refund shall not include any part of a minimum charge.

According to the wording in this rule, staff believes that Rule 25-6.106(2), Florida Administrative Code, mirrors Rule 25-6.104, Florida Administrative Code, which provides that "In the event of unauthorized or fraudulent use, or meter tampering, the utility may bill the customer on a reasonable estimate of the energy used." In neither rule is the civil statute of limitations implicated. Billing matters involving regulated utilities are, by public policy and by case law precedent, excepted from operation of the civil statute of limitations.

Both the backbilling rule and public policy, as enunciated in

Corporation de Gestion Ste.-Foy, Inc. v. Florida Power & Light Company, 385 So.2d 124 (Fla. 3d DCA 1980), require utilities whose rates are governmentally regulated not to grant a rebate or other preferential treatment to any particular customer. Public utilities must collect undercharges from established rates, "whether they result from its own negligence or even from a specific contractual undertaking to charge a lower amount" (Id. at 126). According to Rule 25-6.106(2), Florida Administrative Code, it appears that the converse is also true. Staff believes that public utilities also must refund customers for non-meter related overbilling "for the period during which the overcharge occurred based on available records" as provided in Rule 25-6.106(2), Florida Administrative Code, in order to avoid giving a preference to one set of customers over another in administering rates and charges.

Even if the statue of limitations were to apply to this petition, staff believes that there is a time period during which Colony could bring a civil suit under contract without violating the statute of limitations. FPL master metered the facility in June of 1998, therefore, Colony could have petitioned for a refund under contract theory for a portion of the time before Colony was master metered and still be within the four year statute of limitations FPL cites.

Staff, therefore, recommends that the Commission apply Rule 26-6.106(2), Florida Statutes, which allows refunds "to the customer for the period during which the overcharge occurred based on available records" without regard to the civil statute of limitations. Staff believes such a reading of the rule is consistent with public policy, Commission authority and Commission rules as discussed above.

ISSUE 2: Should the complaint of Colony Beach & Tennis Club, Inc. against Florida Power & Light Company be set for hearing?

STAFF RECOMMENDATION: Yes. This docket involves disputed issues of material fact and law which staff believes can best be determined through a formal hearing before the Commission. (Jaye, E. Draper)

STAFF ANALYSIS: Because of the diametrically opposed stances taken by Colony and FPL, staff believes that this docket should be set for a Section 120.57(1), Florida Statutes, hearing. Because the parties' positions on issues in this docket turn upon the interpretation of Commission rules, staff recommends that the matter be set for hearing before the Commission, rather than before the Division of Administrative Hearings. Additionally, Colony, petitioned on January 5, 2000, that this matter be set for hearing.

Specifically, the parties do not agree upon whether the master metering rule, Rule 25-6.049(a)(3), Florida Administrative Code, requires facilities organized and operated in the manner of Colony to be individually or master metered. Further, the parties do not agree upon whether Rule 25-6.093(2), Florida Administrative Code, forms an absolute and universal duty on the part of the company to alert customers to the best available rates. The parties do not even agree if discussions between representatives of the Colony and of FPL concerning master metering actually did take place in 1988, and if they did, what was the outcome of the discussion.

ISSUE 3: Should this docket be closed?

STAFF RECOMMENDATION: No. This docket should remain open until the Commission concludes a full evidentiary hearing on the matter. (Jaye)

STAFF ANALYSIS: This docket should remain open until the Commission concludes a full evidentiary hearing on the matter.