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May 25, 2001

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Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: DOCKET NO. 991680-EI

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Florida Power and Light Company are the following documents:

1. Original and fifteen copies of Florida Power & Light Company's Response to Colony Beach's Exceptions to Recommended Order.

2. A diskette in Word Perfect 6.0 containing a copy of this document.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.	)	Docket No. 991680-EI Filed: May 25, 2001

FLORIDA POWER & LIGHT'S RESPONSE TO COLONY BEACH'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent Florida Power & Light Company ("FPL"), by and through its undersigned counsel and pursuant to Rule 28-106.217(2), Florida Administrative Code, hereby submits its Response to the Exceptions filed by Petitioner Colony Beach & Tennis Club, Ltd. ("Colony") to the Recommended Order entered by Administrative Law Judge Lawrence P. Stevenson (the "ALJ") on April 25, 2001 in DOAH Case No. 00-1117. The Recommended Order was entered following an extensive two day formal administrative hearing conducted by the ALJ pursuant to Sections 120.569 and 120.57(1), Fla. Stat. (2000)[1]. As part of the administrative hearing, the ALJ evaluated the testimony of 7 witnesses and examined over 50 exhibits. After the hearing, the parties submitted detailed proposed findings of fact and conclusions of law which were considered by the ALJ in the preparation of the Recommended Order. The ALJ concluded, in a comprehensive 34 page Recommended Order, that Colony's request for a refund from FPL should be denied. Colony's Exceptions to the Recommended Order are factually and legally insufficient and Colony has failed to provide a basis for altering or ignoring the ALJ's findings and conclusions.

[1]All citations are to the 2000 Florida Statutes unless otherwise indicated.

Standards That Must be Applied in Ruling on Petitioners' Exceptions

Under the Administrative Procedure Act, Chapter 120, Florida Statutes, (the "APA"), a *de novo* hearing was conducted by the ALJ to resolve disputed issues of fact in this proceeding. Section 120.57(1)(k), Fla. Stat. The *de novo* proceeding is an important step in the formulation of final agency action. See McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977); see also, Boca Raton Artificial Kidney Ctr., Inc. v. Dept. of Health and Rehab. Serv., 475 So.2d 260, 262 (Fla. 1st DCA 1985)(The proper role of Section 120.57 hearings in the administrative process is to aid in the formulation of final agency action); Beverly Enterprises-Florida, Inc. v. Dept. of Health and Rehab. Serv., 573 So.2d 19, 23 (Fla. 1st DCA 1990) (A formal administrative hearing commences a *de novo* proceeding intended to help formulate agency action.) The ALJ concluded that Colony's refund request should be denied. There is competent, substantial evidence in the record to support the ALJ's findings. The ALJ's findings do not support any conclusion other than the denial of Colony's refund request. The Commission should not attempt to reweigh the evidence or endeavor to make supplemental findings. Instead, the Commission should issue a Final Order adopting the ALJ's well-reasoned Recommended Order in *toto*.

Section 120.57(1)(l), Florida Statutes, establishes the standards an agency must apply in reviewing a recommended order following a formal administrative proceeding. That statute provides that the agency may adopt the recommended order as the final order of the agency. An agency may only reject or modify an ALJ's findings of fact if after a review of the entire record the agency determines and states with particularity that the findings "were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law." The seminal legal decision that examines the role of an agency in reviewing

a recommended order is Heifetz v. Dept. of Business Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). In Heifetz, the First District Court of Appeal set forth the following standards:

> Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact. It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusions. We recognize the temptation for agencies, viewing the evidence as a whole, to change findings made by a hearing officer that the agency does not agree with. As an appellate court, we are sometimes faced with affirming lower tribunal rulings because they are supported by competent, substantial evidence even though, had we been the trier of fact, we might have reached an opposite conclusion. As we must, and do, resist this temptation because we are not the trier of fact, so too must an agency resist this temptation since it is not the trier of ordinary factual issues not requiring agency expertise. (citations omitted)

See also, Dunham v. Highlands County School Board, 652 So.2d 894, 896 (Fla. 2d DCA 1995).

The courts have clearly ruled that an agency should not attempt to rewrite recommended orders by re-weighing evidence and recasting findings of fact as policy questions. See, Lawnwood Medical Center v. Agency for Health Care Administration, 678 So.2d 421, 425 (Fla. 1st DCA 1996). In Lawnwood, the court held that an agency could not reject findings of fact in a recommended order by simply claiming the issue was a policy matter. The court emphasized the *de novo* nature of the formal administrative proceeding and accorded great weight to the findings of fact made by the ALJ.

An agency is also prohibited from rejecting or modifying conclusions of law unless it has

substantive jurisdiction over the issue. Section 120.57(1)(b), Fla. Stat.; see also, Deep Lagoon Boat Club, Ltd. v. Sheridan, 26 F.L.W. 562 (Fla. 2d DCA 2001) (wherein the court held that an agency's jurisdiction over environmental regulation did not extend so far as to allow the agency to reject an ALJ's determination of whether application of the doctrine of collateral estoppel limited consideration of the secondary impacts of a proposed storm water project); accord, Dunham, 652 So.2d 894, 896. The agency "must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that the substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified." Section 120.57(1)(1), Fla. Stat. The statute further provides that "rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact." Id.

Colony's Exceptions are an Inappropriate Attempt to Reargue Its Case

Virtually all of the issues raised in Colony's Exceptions were presented to the ALJ for consideration at the final hearing and in Colony's proposed findings of fact and conclusions of law. Despite Colony's wishes, review of the ALJ's Recommended Order by the Commission is not an opportunity to reconsider or re-weigh the evidence. Colony has not provided any appropriate grounds for altering the ALJ's findings of fact. As set forth above, it was the role of the ALJ to reconcile conflicting testimony and to reach independent conclusions based upon the evidence presented and the record as a whole. To overturn the ALJ's findings, it is not enough for an excepting party to simply claim that the evidence presented could support a contrary or additional finding. Instead, the issue is whether the ALJ's findings are supported by competent substantial

evidence in the record. Colony has not pointed to a single finding by the ALJ that is not supported by competent substantial evidence. Colony has not presented any legally justifiable basis for deviating from or modifying any portion of the Recommended Order. Implicit in Colony's Exceptions is an attempt to reweigh the evidence and supplement the findings in the Recommended Order to include matters which Colony believes are relevant but the ALJ apparently did not. Colony has already had a full and fair opportunity to present its case. The ALJ has entered a comprehensive Recommended Order which addresses all of the issues presented to him. In issuing a Final Order, the Commission's focus must be on the Recommended Order and an assessment as to whether the record from the proceeding contains competent substantial evidence to support the findings contained therein. Since Colony's Exceptions are not framed to meet this standards, they must be denied. It should be noted that Colony fails to cite to any portions of the record to support its exceptions.

Colony fails to note that many of the exceptions it has raised are specifically addressed in the Findings of Fact made by the ALJ. For example, Colony's Exception 1 is addressed in Finding of Fact 10 of the Recommended Order. Similarly, Exception 2 is addressed in Finding of Fact 12 and Exception 3 is addressed in Findings of Fact 2-5, 8-9 and 13 of the Recommended Order. While the ALJ may not have adopted the precise language suggested by Colony and obviously did not share Colony's view as to the significance of certain matters, it was entirely appropriate for the ALJ to make his own independent judgment as to the relevant and persuasive portions of the evidence presented.

In its Exceptions to the ALJ's Conclusions of Law, Colony reargues its legal position which was fully presented during the administrative hearing. For example, in paragraph 68 of the

Recommended Order, the ALJ acknowledged that application of the master meter rule to hybrid facilities such as Colony has proven problematic. Nonetheless, as set forth in paragraph 66, even if all of Colony's factual arguments are accepted, "FPL was justified in declining the request [for master metering] because of the Rule's requirement that condominium units be individually metered. FPL's reading of the rule was at least colorable, and consistent with the PSC's own interpretation as subsequently set forth in Holiday Villas II."

Colony's Exceptions fail to note that prior to the amendments to Rule 25-6.049(5)(a), Florida Administrative Code, in 1997, Colony's ownership and method of operation fell within the definition of a "timesharing plan" as that term was defined in the Rule. Accordingly, until the 1997 amendments, master metering of the Colony would have been contrary to the rules adopted by the Commission and could only have been accomplished through a waiver or similar order granted by the Commission. Colony's attempt to tag FPL with a huge refund based upon an alleged verbal request in the late 1980's is unwarranted. Indeed, even with the relaxation of the rule in 1997, a waiver or variance is still the best approach for hybrid facilities seeking to be master metered. By requiring a request for waiver or variance for such facilities, the Commission can insure that the purposes and goals of the underlying statute and Rule are being met.

Colony may have been able to demonstrate it was entitled to a waiver prior to 1997, but it was incumbent upon Colony to take the steps necessary to secure it. Upon adoption of the 1997 amendments to the Rule and the relaxation of the master metering requirement, FPL acted promptly in responding to Colony's request. Under these circumstances, there is no factual or legal basis for the refund request.

WHEREFORE, FPL respectfully requests that Colony's Exceptions be denied and that the Commission enter a Final Order adopting the ALJ's Recommended Order in *toto* and denying Colony's refund request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following this __ day of May, 2001:

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