State of Florida

Public Service Commission

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DATE: FEBRUARY 17, 2000

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

FROM: DIVISION OF LEGAL SERVICES (KEATING) RVE
DIVISION OF ELECTRIC AND GAS (E. DRAPER) EAD DRW PLT

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: 2/29/00 - 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 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.

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

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upon Colony's request in January of 1988. Colony contends that this failure by FPL violated Rule 25-6.093(2), Florida Administrative Code. This rule 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, FPL explained that 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 both contract theory and the statute of limitations 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.

On February 7, 2000, FPL filed a motion to transfer Colony's complaint to the Division of Administrative Hearings (DOAH). FPL argued in its motion that the Commission has traditionally referred consumer complaints to DOAH and that the Commission should do so in this instance.

Colony responded to FPL's motion on February 14, 2000. In its response, Colony asserted that its complaint was based upon the interpretation and application of Commission rules, not a contractual dispute or a misapplication of the terms of a tariff. Colony, therefore, requests that the Commission retain jurisdiction of this matter.

DISCUSSION OF ISSUES

ISSUE 1: Should Florida Power & Light Company's Motion to Transfer Complaint Filed by Colony Beach & Tennis Club, Inc. to the Division of Administrative Hearings be granted?

RECOMMENDATION: No. Colony's petition involves the interpretation and application of Commission rules rather than merely a factual dispute. (Jaye)

STAFF ANALYSIS: FPL's motion asserts that the Commission has historically sent consumer complaints to DOAH for hearings. In its response, Colony asserted that its complaint was based upon the interpretation and application of Commission rules, not a contractual dispute or a misapplication of the terms of a tariff. Staff agrees that the Commission has transferred some consumer complaint dockets to DOAH solely for fact finding.

In this docket, however, staff believes that the ultimate settlement of the dispute will turn upon the Commission's interpretation of Rules 25-6.093(2), and 25-6.049(a)(3), Florida Administrative Code. Because this docket differs in this important respect from the majority of consumer complaint dockets referred to DOAH, staff recommends that FPL's motion be denied and that this matter be set for hearing before the Commission.

In support of this, staff believes that Pan American World Airways, Inc. V. Florida Pub. Ser. Comm'n, 427 So. 2d 716 (Fla. 1983), upholds the contention that an agency should be the first to interpret its rules. In its opinion, the Florida Supreme Court stated that an agency's interpretations of its rules "will be entitled to great weight and will not be overturned unless clearly erroneous." *Id.* at 719-20. This assessment of the primacy to be given to agency interpretations of rules by the judiciary was repeated in Panda-Kathleen, L.P./Panda Energy Corp. v. Clark. 702 So. 2d 322 (Fla. 1997); rehearing denied 718 So. 2d 1234 (Fla. 1998), cert. den. 523 U.S. 1073, 118 S. Ct. 1514 (1998), where the Florida Supreme Court stated:

> We give great deference to the Commission's interpretation of its own rules and will not disturb that interpretation unless the interpretation is shown to be clearly erroneous. *Id.* at 327.

Staff believes that rule interpretations tend to involve consideration of policy matters. Staff believes that these types

of decisions are most appropriately made by the Commissioners, rather than by an Administrative Law Judge. Given the issues raised in Colony's complaint, staff recommends that FPL's Motion should be denied.

ISSUE 2: 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. Colony's petition for refund 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. Fla. Power & Light Co., 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. This general maxim is only limited by situations in which a settlement of disputed amount has been reached by both parties. Such a settlement operates as accord and satisfaction for any amount formerly in dispute. See e.g.: Jacksonville Electric Authority v. Draper's Egg and Poultry Co., Inc., 531 So. 2d 373 (Fla. 1988) However, 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." De Gestion 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. In this case, staff believes that both the Commission's rules and the case law argue against the limitation of any refund by a civil statute of limitations for public policy reasons.

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 that FPL cites.

Staff notes that the doctrine of mutual mistake could also operate to toll the civil statute of limitations in this instance because it appears that both parties labored under a misunderstanding of fact concerning the availability of master metering for Colony's property. In McNeely v. Philadelphia National Bank, 314 Pa. 334, 172 A. 111 (Pa. 1934), the doctrine of mutual mistake is explained as the erroneous impression of a the existence of a fact. As important to the doctrine as this impression, according to the McNeely court, is mutuality. In Cameron v. Bogusz, 305 Ill. App. 3d 267, 711 N.E.2d 1194, 238 Ill.

Dec. 533 (1999), the Appellate Court of Illinois explained mutuality as follows:

> A mistake of fact is a mistake, "not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in an unconscious ignorance or forgetfulness of a fact past or present material to the contract, or belief in the present existence of a thing material to the contract which does not exist, or in the past existence of a thing which had not existed. At 272, *quoting* Boyd v. Aetna Life Insurance Co., 310 Ill. App. 547, 234 N.E.2d 543 (1968).

The court in McNeely further held that for mutual mistake to toll the statute of limitations, both parties "must rely on the erroneous impression."

It appears to staff that if the statute of limitations were to apply in this docket, it would be tolled by operation of the doctrine of mutual mistake if both parties operated under the erroneous belief that Rule 25-6.049(a)(3), Florida Administrative Code, was an absolute bar to master metering the Colony's property until 1998. If the doctrine of mutual mistake is applicable, the statute of limitations would operate from the date that the parties agreed to master meter the property in 1998.

Staff, therefore, recommends that 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" controls the timing of the petition for refund in this instance rather than 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 3: Should this docket be closed?

STAFF RECOMMENDATION: No. If the Commission approves staff on Issues 1, and 2, 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.