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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| THE COLONY BEACH & TENNIS CLUB, INC., | ) | |
| Petitioner, | ) | |
| vs. | ) | Case No. 00-1117 |
| FLORIDA POWER & LIGHT COMPANY, | ) | |
| Respondent. | ) | |

ORDER STRIKING FIRST FOUR AFFIRMATIVE DEFENSES

On March 17, 2000, Petitioner filed a Motion for Partial Summary Order. On March 24, 2000, Respondent filed a Response in Opposition to Petitioner's Motion for Partial Summary Order and Cross-Motion for Summary Recommended Order.

This case arises out of a complaint filed by Petitioner on November 5, 1999, seeking refunds from Respondent. The complaint alleges that Petitioner is a residential resort that, from January 1988 through June 1998, received electrical service from Respondent in the form of individual meters. The complaint alleges that Petitioner had sought Respondent's assistance in January 1988 to obtain master meters and that, until Respondent installed master meters in June 1998, Respondent improperly charged Petitioner at the higher rates for electricity supplied through individual meters.

Respondent filed a responsive pleading containing, among other things, seven affirmative defenses. The first four of these affirmative defenses are the subject of these opposing

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motions. Each of these affirmative defenses characterizes the subject proceeding in such a fashion as to subject Petitioner's claim to one of several statutes of limitation in Section 95.11, Florida Statutes. The first affirmative defense states that, if Petitioner's claim seeks specific performance of a contract, then it is subject to the one-year statute of limitations in Section 95.11(5)(a), Florida Statutes. The second affirmative defense states that, if Petitioner's claim seeks to reform a contract with restitution, then it is subject to the five-year statute of limitations in Section 95.11(2)(b), Florida Statutes. The fourth affirmative defense states that, if Petitioner's claim is a refund claim not otherwise subject to the preceding statutes of limitation, then it is subject to the residual, four-year statute of limitations of Sections 95.11(3)(p) and 95.11(6), Florida Statutes, and the doctrine of waiver. The third affirmative defense states that Petitioner is seeking specific performance and reformation, which are equitable remedies exclusively within the jurisdiction of circuit court.

Petitioner's motion seeks an order finding that the Public Service Commission (PSC) has exclusive jurisdiction and that its rules, not provisions of Chapter 95.11, Florida Statutes, control this case. Essentially, Petitioner seeks an order striking these affirmative defenses.

Respondent's motion seeks an order denying Petitioner's motion and entering a summary recommended order on one or more of Petitioner's affirmative defenses.

These opposing motions require a two-part analysis. First, it is necessary to determine the extent, if any, to which the PSC has jurisdiction over this case. Second, if the PSC has jurisdiction over this case, it is necessary to determine what, if any, limitation provisions may apply to this case.

First, the jurisdiction in this case is with the PSC, and the jurisdiction of the PSC is exclusive. Section 367.011(2), Florida Statutes, grants "exclusive jurisdiction" to the PSC "over each utility with respect to its authority, service, and rates." Section 367.011(3), Florida Statutes, adds that the regulation of utilities is "in the public interest, and this law is an exercise of the police power of the state for the protection of the public health, safety, and welfare."

The PSC has addressed metering issues in Rule 25-6.049(5)(a), Florida Administrative Code. This rule provides that individual metering is required except for, among other things, "motels, hotels, and similar facilities . . .."

In Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995), the court held that the PSC had jurisdiction over a rate dispute between Charlotte County and General Development Utilities, even though the County filed its complaint after the General Development Utilities had sold the utility to the County and the PSC had canceled the certificate of General Development Utilities. Although the large number of connection points and vast quantities of water precluded actual metering of the water being supplied by General Development Utilities to the County, the dispute involved the utility's

calculation of the volume of water supplied to the County. The County filed its action in circuit court, but General Development Utilities filed a motion to dismiss on the ground that the PSC had exclusive jurisdiction of this "overbilling complaint."

The circuit court allowed the PSC to determine if it had jurisdiction, and, when the PSC determined that it had jurisdiction, the County appealed the administrative determination. In sustaining the determination of the PSC, the appellate court cited with approval Public Service Commission v. Bryson, 569 So. 2d 1253, 1254-55 (Fla. 1990), in which the Supreme Court instructed: "the PSC must be allowed to act when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute."

The General Development Utilities case is not controlling because its holding states only that the PSC has a colorable claim to jurisdiction in a dispute over a volume calculation between a utility customer and a formerly regulated utility. However, the legal principle of General Development Utilities is that the courts must allow the PSC to act when it has a colorable claim to jurisdiction.

This legal principle defers to the choice of the PSC to exercise jurisdiction, but does not appear to mandate that the PSC choose to exercise its discretion in every case in which it has a colorable claim to jurisdiction. Application of this legal principle in the present case is thus complicated by the fact that the documents attached to the pleadings and motions suggest

that the PSC has elected not to declare whether it has jurisdiction of the present dispute until after the Administrative Law Judge examines the issue.

However, the PSC is obviously considering whether to exercise jurisdiction in this case, or else it would not have referred the dispute to the Division of Administrative Hearings. Even though the PSC may ultimately decline to exercise jurisdiction in this case, a ruling from an Administrative Law Judge disclaiming jurisdiction would be inconsistent with applicable law.

Based on the foregoing, it is

ORDERED that the third affirmative defense is stricken.

The second issue is whether the cited statutes of limitation and the doctrine of waiver apply to the present case. The second issue applies to the first, second, and fourth affirmative defenses, which Respondent contends apply, even if the PSC exercises its jurisdiction over the case.

Limitation provisions serve the salutary purpose of precluding the presentation of stale claims as to which evidence may no longer be available. Perhaps the first principle involving limitation provisions is that, despite their practical value, there is no constitutional right to a limitations provision, except as to claims that have already become time-barred. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1254 (Fla. 1996).

Several principles guide the applicability of limitation provisions in administrative proceedings. First, courts will

enforce various forms of limitation provisions, although the strictness of the enforcement of these limitation provisions depends upon the form (e.g., jurisdictional or nonjurisdictional) and the source of the limitation provision (i.e., statutory, regulatory, judicial, or contractual). The first point is that no such limitation provision expressly governs this case, as it is properly characterized as an administrative claim for a refund, rather than a legal action on a contract.

In the alternative to its argument that Petitioner's claim properly is a legal action, Respondent argues that the claim, if administrative, nonetheless should be governed by the statute of limitations that would apply to the most analogous legal counterpart to this administrative proceeding.

The courts have declined to use this reasoning to apply statutes of limitation in disciplinary cases. See, e.g., Ong v. Department of Professional Regulation, 565 So. 2d 1384, 1386 (Fla. 5th DCA 1990); and Donaldson v. Department of Health and Rehabilitative Services, 425 So. 2d 145, 147 (Fla. 1st DCA 1983). In Farzad v. Department of Professional Regulation, 443 So. 2d 373, 375-76 (Fla. 1st DCA 1983), the court also declined to apply the doctrine of laches in a disciplinary case.

However, courts will apply the doctrine of laches in certain cases. For instance, in Devine v. Department of Professional Regulation, the court considered a case involving an unsuccessful applicant for a dentistry license. In this case, the applicant waited five years to challenge an examination. In the interim, the agency had destroyed the records. In deciding whether to

allow a defense of laches, the court harmonized its recent Farzad decision by noting that the refusal to allow a laches defense in a disciplinary proceeding and the allowance of a laches defense in an application proceeding both shared the common policy of protecting the public from unqualified practitioners.

The court in Bishop v. Division of Retirement, 413 So. 2d 776 (Fla. 1st DCA 1982), went further and applied a statute of limitations based on Respondent's reasoning in this case. Concluding that the legal relationship between three retired teachers and the Division of Retirement sounded more in contract than in tort, the court applied the applicable statutory limitations period to each of the pension payments that they were challenging. Interestingly, the Farzad court distinguished the Bishop case as follows: "Bishop involved an action which was an administrative substitute for the common law remedy of a suit for a breach of contract, rather than a disciplinary proceeding brought in the name of the sovereign, as here." 443 So. 2d at 375.

Although the court did not do so, it also could have harmonized the holdings by noting that implied limitation provisions are not applied against state agencies. This would be an extension of the public-protection argument relied upon by the Devine court.

The proper characterization of this case requires consideration of the nature of the case and the identity of the party against whom the implied limitation period is sought to be applied.

As for the nature of the case, it is more like a disciplinary case than it is a pension case. The state agency was incidentally the pension administrator in Bishop; more typically, private entities administer pensions. By contrast, the state agency is typically the only entity involved in disciplining regulated professionals. In such cases, unlike cases involving the administration of pensions, the state is exercising responsibilities that have traditionally been restricted to the state. The nature of the present case therefore militates in favor of striking the three remaining affirmative defenses under challenge.

As for the identity of the parties, Respondent seeks to interpose these affirmative defenses against another private entity, not an agency of the state, such as the PSC. The identity of the party against whom the affirmative defenses has been interposed therefore militates in favor of denying the motion to strike these affirmative defenses.

Judicial analysis seems to have depended more on the nature of the case than on the identity of the party against whom a limitation provision would be imposed. The better reasoning is probably that the regulatory functions exercised by the PSC in metering matters, which involve issues of public policy in terms of the levels and cost of the public consumption of energy, are more analogous to the regulatory functions exercised by various state agencies in disciplinary matters. Thus, absent an limitation provision explicitly governing refund claims of the type presented by Petitioner, an Administrative Law Judge should

not restrict such claims by applying an implied limitation provision, whether it is an analogous statute of limitations or the doctrine of waiver or laches.

Based on the foregoing, it is

ORDERED that the first, second, and fourth affirmative defenses are stricken.

Based on the foregoing, it is

ORDERED that Respondent's cross-motion is denied.

DONE AND ORDERED this 31st day of March, 2000, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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