4-25-01

AT

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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 ORDER NO. PSC-01-2090-FOF-EI ISSUED: October 22, 2001

00-1117

LPS-CUS

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

FINAL ORDER DENYING COLONY BEACH & TENNIS CLUB'S REQUEST FOR ORAL ARGUMENT, DENYING EXCEPTIONS TO THE RECOMMENDED ORDER, AND ADOPTING RECOMMENDED ORDER

BY THE COMMISSION:

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 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.

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.

By Order No. PSC-00-0477-PCO-EI, issued March 4, 2000, the Commission granted FPL's motion. An Administrative Hearing in this matter was held on January 22-23, 2001, before Lawrence P. Stevenson, a duly designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings. On April 25, 2001, the Administrative Law Judge issued his Recommended Order. The Administrative Law Judge determined that Colony had failed to demonstrate, by a preponderance of the evidence, that FPL had violated Rule 25.0649(5)(a)(3), Florida Administrative Code, and that accordingly, no refund was due. The Recommended Order is attached to this Order as Attachment A. On May 10, 2001, Colony Beach submitted exceptions to the Recommended Order. On May 17, 2001, Colony Beach filed a Request for Oral Argument on the Recommended Order. On May 25, 2001, FPL filed a response to Colony Beach's exceptions. This order addresses the Request for Oral Argument, the Exceptions to the Recommended Order, and the Recommended Order.

Jurisdiction over this matter is vested in the Commission by Sections 366.04, 366.05, and 366.06, Florida Statutes. By this order, we deny Colony's Request for Oral Argument and Colony's Exceptions to the Recommended Order. Furthermore, we adopt the Administrative Law Judge's Recommended Order as the Final Order.

Request for Oral Argument

On May 17, 2001, Colony filed a Request for Oral Argument of the Recommended Order. In support of its request, Colony states "this case is one of first impression regarding the Commission's metering rule... oral argument will aid the Commission in evaluating the differences between the Petitioner's position and previous cases involving the rule." Colony suggest that the Commission allow up to 30 minutes per side. FPL did not file a response to Colony's Request for Oral Argument.

We do not believe Colony has met the standard for post-hearing oral argument. Rule 25-22.058(1), Florida Administrative Code,

requires a movant to "state with particularity how oral argument would aid the Commission in comprehending and evaluating the issues before it." Colony's complaint has had a full hearing on the merits, resulting in Recommended Order which includes 61 findings of fact detailed in more than 20 pages. An effort to show the differences between "the Petitioner's position and previous cases involving the rule" would either be an invitation to reweigh evidence considered by the Administrative Law Judge, or an attempt to introduce new factual matters. Both are impermissible in this context. Therefore, we deny Colony's Request for Oral Argument.

Exceptions to Recommended Order

On May 10, 2001, Colony filed Exceptions to the Recommended Order. On May 25, 2001, FPL filed a Response to Colony Beach's Exceptions to Recommended Order. FPL states at pages 4 and 5 of its Response:

> 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.... 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.

Section 120.57(1), 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." In Heifetz v. Dept. of Business Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985), 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.

Colony has not demonstrated that any of the 61 specific Findings of Fact in the Recommended Order were not based on competent substantial evidence. Indeed, Colony's Exceptions appear to present 13 new or recast Findings of Fact, without any reference whatsoever to the Recommended Order. The Conclusions of Law presented by Colony do not challenge the Conclusions of Law in the Recommended Order, but are predicated upon the Factual Findings advanced in the Exceptions. Therefore, we deny Colony's Exceptions to the Recommended Order.

Recommended Order

At the formal hearing, the Administrative Law Judge heard testimony from seven witnesses and received fifty exhibits into evidence. After considering the weight of the evidence, the Administrative Law Judge concluded that Colony had failed to demonstrate that Florida Power & Light Company had violated either Rule 25-6.093(2), or Rule 25-6.049(5)(a), Florida Administrative Code, in providing electric service to Colony. The Administrative Law Judge specifically concluded that:

> Under the facts of this case, the reading of Rule 25-6.093(2), Florida Administrative Code, urged by Colony would require the utility to guarantee that its customers obtain the most advantageous rate schedule, to affirmatively canvass its customers to make good on that guarantee, and to provide a refund to any customer who is ultimately found not to have received the most advantageous rate, regardless of whether that customer ever made more than a cursory effort to obtain the desired rate. The PSC may or may not have authority to promulgate such a rule, but it has not done so with Rule 25-6.093, Florida Administrative Code (Conclusion of Law 74).

The Administrative Law Judge recommended that Colony's complaint and request for refund against FPL regarding rates charged for service between January 1988 and July 1998 be denied. See Attachment A.

Upon review of the record, we believe that the Findings of Fact in the Recommended Order are based on competent substantial evidence in the record of this case. The Conclusions of Law in the Recommended Order accurately apply the applicable law to the facts of this case. For these reasons, we adopt the Administrative Law Judge's Recommended Order, in its entirety, as the Final Order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Colony Beach & Tennis Club's Request for Oral Argument is denied. It is further

ORDERED by the Florida Public Service Commission that Colony Beach & Tennis Club's Exceptions to the Recommended Order are denied. It is further

ORDERED by the Florida Public Service Commission that the Recommended Order is adopted as the Final Order. It is further

ORDERED that the complaint of Colony Beach & Tennis Club against Florida Power & Light Company is denied. It is further

ORDERED that this docket be closed.

By ORDER of the Florida Public Service Commission this 22nd day of October, 2001.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be

completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

ATTACHMENT A

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE COLONY BEACH & TENNIS CLUB, LTD.,	)	
Petitioner,	)	
vs.	)	Case No. 00-1117
FLORIDA POWER AND LIGHT,	)	
Respondent,	)	
and	)	
FLORIDA PUBLIC SERVICE COMMISSION,	)	
Intervenor.	)	

RECOMMENDED ORDER

A formal hearing was held in this case before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on January 22-23, 2001, in Sarasota, Florida.

APPEARANCES

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