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February 9, 2000

Florida Public Service Commission
Attn: Ms. Blanca S. Bayo
Director, Division of Records & Reporting
2540 Shumart Oak Blvd
Tallahassee, Florida 32301

991680-EI

Dear Ms. Bayo:

Enclosed for filing in above referenced docket, please find an original and fifteen copies of the Colony's Reply to FP&L's Motion to Transfer the Complaint to DOAH.

Thank you for your assistance with this filing.

Yours Very Truly,

Marc Mazo
Authorized Representative
The Colony Beach & Tennis Resort

Enclosures

Cc: Kenneth Hoffman, Esq

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STATE OF FLORIDA
BEFORE THE PUBLIC SERVICE COMMISSION

THE COLONY BEACH & TENNIS
CLUB, INC.

DOCKET NUMBER 991680-EL

Complainant

V.

Florida Power & Light

Respondent

ORIGINAL

REPLY TO FP&L'S MOTION TO TRANSFER COMPLAINT
TO THE DIVISION OF ADMINISTRATIVE HEARINGS

COMES NOW the Colony Beach and Tennis Club Inc., through its undersigned representative and hereby files its reply to the above titled motion advanced by FP&L.

1. In its motion seeking to transfer this case to DOAH, FP&L essentially argues that, 1) referral to DOAH is particularly appropriate because this complaint may rest, in whole or in part, on the application of the statute of limitations defense raised by FP&L pursuant to Chapter 95.11, Florida Statutes, and on the interpretation of condominium documents attached to the complaint, and 2) Commission precedent confirms that absent a waiver granted by the Commission, a resort condominium is subject to the individual metering requirements set forth in Rule 25-6.049(5)(a), F.A.C.

2. Both of these issues turn on interpretation of commission rules and are more appropriately issues for the PSC rather than an administrative law judge.

FP&L's statute of limitations defense is inapplicable under the facts alleged in the instant case. The complaint by the

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PSC-RECORDS/REPORTING

Colony is for overcharges by FP&L in violation of PSC Rules and regulations. There are no allegations of breach of contract or requests for specific performance. The courts have long held that the PSC has exclusive jurisdiction over the rates charged customers by public utilities.

In Richter v Florida Power Corporation, the Second District Court clearly stated that, "Chapter 366, Florida Statutes embraces the statutory regulation of public utilities. In Section 366.01, the legislature has mandated that the regulation of public utilities is declared to be in the public interest and this chapter.....shall be liberally construed for the accomplishment of this purpose. Section 366.03 requires that all rates charged by regulated utilities be fair and reasonable, while 366.04 gives the PSC exclusive jurisdiction to regulate and supervise each public utility with respect to its rates. The decisional law of Florida attests to the comprehensive character of the PSC's authority in the field of utility regulation. See Storey v Mayo, 217 So2d 304 (Fla 1968).

The civil statute of limitations is not applicable under the PSC rules governing backbilling by public utilities, or refunds to customers by public utilities. Refunds sought in the instant case are governed by Rule 25.106(2), F.A.C. Rate and billing issues concerning regulated utilities are by public policy and case law precedent, excepted from operation of the civil statute of limitation.

This issue clearly is more appropriate for the Commission, rather than an administrative law judge, as an interpretation of the agency's rules are critical to the complaint. In addition,

there is a question of interpretation of the method of calculating a customer's refund, which if granted by the PSC, could be a significant factor in the outcome. This issue cannot properly be addressed by DOAH.


3. As to FP&L's assertion in its motion that absent a waiver, a "resort condominium" is subject to the individual metering requirements set forth in Rule 25-6.049(5)(a), F.A.C., this interpretation of the rule is in dispute. Under the facts of this case, the Colony, a "resort condominium", at all material times including January 1988, held itself out as, operated and operates as, and legally was and is a "hotel", as defined by Section 509.242(1)(a), Florida Statutes. Therefore, as a "hotel", the Colony would clearly be allowed to master meter under Rule 25-6.049(5)(a)(3) and receive service on FP&L's lower GSD rate.

4. This case contains both questions of law and fact, and upon reason and belief, it is a case of first impression that requires Commission interpretation of Section 366.03, Florida Statutes, Rule 25-6.093(2) F.A.C., Rule 25.106(2) F.A.C., and Rule 25-6.049(5)(a)(3) F.A.C. As such, it is not analogous to the plethora of cases cited by FP&L that were referred to DOAH, and is more appropriate for a hearing before the full commission as opposed to an administrative law judge.

5. Finally, this case was originally scheduled for agenda conference before the full commission on January 18, 2000. It was deferred to the February 1, 2000, agenda at the mutual request of the parties. The parties requested a second deferral on January 27, 2000, until the February 29, 2000 agenda. The undersigned understood that the sole purpose of the deferral was to allow the

parties additional time for negotiations towards a possible settlement. The Colony believes its rights would be prejudiced and not properly served by such a transfer.

WHEREFORE, the Colony respectfully requests the Commission deny FP&L's motion to transfer this complaint to the Division of Administrative Hearings.


MARC D. MAZO
14252 Puffin Court
Clearwater, Florida 33762
727-573-5787 - Telephone
727-573-5675 - Telecopier

Authorized Representative
The Colony Beach and Tennis Club

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by U.S. Mail to the following this 9th day of February, 2000.

Kenneth A. Hoffman, Esq.
Rutledge, Ecenia, Purnell
& Hoffman, P.A.
P.O. Box 551
Tallahassee, Fl 32302

Grace Jaye, Esq
Division of Legal Services
2540 Shumard Oak Boulevard
Betty Easley Conference Center, #110
Tallahassee, Florida 323990-0850


Marc Mazo