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

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

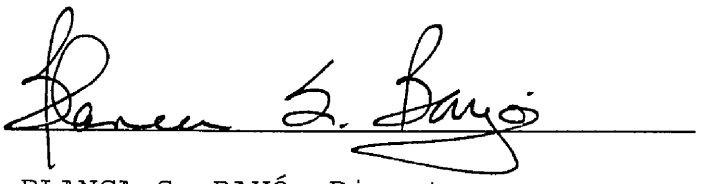
ORDERED by the Florida Public Service Commission that Colony Beach & Tennis Club's Exceptions to the Recommended Order are denied. It is further

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

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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

For Petitioner: Bernard F. Daley, Esquire
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Qualified Representative
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For Respondent: Kenneth A. Hoffman, Esquire
J. Stephen Menton, Esquire
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For Intervenor: Katrina Walker, Esquire
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard, Room 370
Tallahassee, Florida 32399-0850

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Petitioner, the Colony Beach and Tennis Club, Ltd. ("Colony") is entitled to a refund from Respondent, Florida Power and Light Company ("FPL"), pursuant to statutes and rules cited in the Amended Complaint.

PRELIMINARY STATEMENT

On November 4, 1999, Colony filed a formal consumer complaint with the Florida Public Service Commission ("PSC" or "Commission") against FPL. The Complaint sought a refund from FPL, pursuant to Rules 25-6.093(2) and 25-6.049(5)(a)(3), Florida Administrative Code, and Section 366.03, Florida Statutes. As amended, the Complaint alleges that FPL failed to convert the 232 units at Colony from individual meters billed at residential rates to master meters billed at the lower commercial service demand rate, following an oral request by Colony's chief engineer in late 1988 or early 1989. Colony was converted from individual to master meters in June 1998, and

alleges that it is entitled to a refund for the period between the oral request and the completion of the conversion.

FPL filed an Answer and Affirmative Defenses ("Answer") to the Complaint. The Answer denied that Colony was entitled to a refund and challenged Colony's assertion that it was entitled to master metering under the PSC rules that were in place at the time of the oral request. The Answer asserted that FPL properly charged the individual units at Colony for electric service in accordance with approved tariffs and existing PSC rules and that Colony was not eligible for master metering at the time of the oral request without a waiver of Rule 25-6.049(5)(a), Florida Administrative Code.

On February 7, 2000, FPL filed a motion to transfer the Complaint to the Division of Administrative Hearings. By Order dated March 6, 2000, the PSC granted the motion and forwarded the Complaint to the Division of Administrative Hearings for conduct of a formal hearing. On May 10, 2000, the PSC filed a petition to intervene as a non-aligned party to the proceeding. By Order issued May 23, 2000, the petition to intervene was granted.

On October 11, 2000, FPL filed a Motion for Summary Recommended Order of Dismissal. On October 26, 2000, Colony filed a Motion for Findings of Fact and Summary Final Order. A hearing on both motions was conducted on November 17, 2000,

before Administrative Law Judge Mary Clark. On November 21, 2000, Judge Clark issued an Order that found there were too many disputed issues of fact to warrant the summary disposition sought by either party. Judge Clark's Order also confirmed an agreement among the parties that this proceeding would be bifurcated. The initial phase of the hearing would determine whether Colony is entitled to a refund. If Colony established its entitlement to a refund, the second phase of the hearing would determine the amount of that refund.

The case was transferred to the undersigned, and the initial phase of the hearing was held on January 22 and 23, 2001, in Sarasota.

At the hearing, the parties pre-marked 48 exhibits as Joint Exhibits and stipulated to their authenticity. During the course of the hearing, Joint Exhibits 45-48 were withdrawn. Joint Exhibits 1 through 12 and 14 through 44 were admitted without objection.

Colony presented the testimony of Michael Moulton, Colony's executive vice president; Jerry Sanger, Colony's chief maintenance engineer; Tom Saxon, a former FPL employee; and Mark Mazo, president of Power Check Consultants. Colony Exhibits 1 through 5 and 10 were admitted into evidence without objection. Colony Exhibit 6 was admitted over FPL's objection to its relevance.

FPL presented the testimony of Rosemary Morley, a rate development manager for FPL; Terri Britton, an FPL employee working in its energy conservation program; and Jim Guzman, an FPL service planner. FPL also offered the deposition testimony of Greg Bauer, admitted as Joint Exhibit 43, and of Larry Valentine, admitted as Joint Exhibit 44. FPL Exhibit 1 was also admitted into evidence.

The PSC presented no testimony and offered no exhibits.

A transcript of the hearing was ordered. The Transcript was filed with the Division of Administrative Hearings on February 22, 2001. All parties filed Proposed Recommended Orders on or before the thirty-day deadline established by stipulation at the hearing.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record of this proceeding, the following findings of fact are made:

A. The Colony

1. The Colony Beach Resort was originally built in the 1950s on Longboat Key, a coastal island in the Gulf of Mexico near Bradenton and Sarasota. Dr. Murray J. Klauber purchased the facility in the 1960s. In the early 1970s, Dr. Klauber had most of the existing buildings demolished and built the 232 residential units that stand on the property today. The units

were sold pursuant to a unique financing arrangement that resulted in the establishment of one of the first all-suite resorts in the United States.

2. Each unit of the Colony was sold as a condominium. The purchaser acquired fee simple title to the unit and became a limited partner in a partnership formed to operate a rental pool for the units. Participation in the rental pool was, and is, a mandatory incident of purchasing one of the units.

3. The unit owners are members of a condominium association known as the Colony Beach and Tennis Club Association (the "Association"). The Association was incorporated in 1973. The articles of incorporation state, in relevant part:

> The purpose for which the Association is organized is to provide an entity pursuant to [former] Section 711.12 of the Condominium Act, Florida Statutes, for the operation of Colony Beach & Tennis Club, a Condominium Resort Hotel, herein referred to as the "Condominium," located at 1620 Gulf of Mexico Drive, Longboat Key, Sarasota County, Florida.

4. The Declaration of Condominium of Colony Beach and Tennis Club states: "The purpose of this Declaration is to submit the lands described in this instrument and the improvements constructed or to be constructed thereon to the Condominium form of ownership and use in the manner provided by [former] Chapter 711, Florida Statutes, herein called the

Condominium Act." The Declaration defines a "unit" as "a part of the condominium property which is to be subject to private ownership."

5. The cited documents demonstrate that Colony was established under a condominium form of ownership. However, the same documents also establish that Colony was never intended to operate as a typical condominium in which the unit owners may reside at the facility. A prospectus for the sale of the units, dated September 8, 1977, explained the anticipated operation of the facility and the rights of prospective unit owners:

> Each purchaser of a Condominium Unit obtains private ownership of the interior of an apartment, and an undivided 1/244th interest in the land submitted to condominium ownership and in those portions of the buildings and improvements in the Project that are not privately owned. . . . In addition, each such purchaser receives an interest as a limited partner ("Partnership Interest") in Colony Beach & Tennis Club, Ltd. (the "Partnership"), a limited partnership organized on December 31, 1973 for the purpose of operating the Project as a resort hotel. . . . The Condominium Unit and the Partnership Interest will be offered and sold to the public only in combination. Neither the Condominium Unit nor the Partnership Interest may be sold or transferred separately. . . . Purchasers will be permitted to occupy each Condominium Unit owned by them for up to thirty (30) days in each calendar year without rental charge. The Condominium Units sold to the public hereunder will be dedicated to operation of the Project as a resort hotel. Because of the required dedication of Condominium Units to the hotel operation,

the Units are not suitable for permanent residence.

The prospectus describes Colony as "a Condominium Resort Hotel."

6. The ownership structure and the right of owners to use the individual units for specific periods of time less than a full year during each year met the criteria of a "timesharing plan" as it was defined in Rule 25-6.049(5)(b)2, Florida Administrative Code, from the early 1980s until its amendment effective March 23, 1997. This amendment is more fully discussed below.

7. Michael Moulton, who has been the executive vice president of Colony for ten years, testified that Colony is operated by Resorts Management, Inc., which also controls the mandatory rental pool as the general partner of the limited partnership.

8. Mr. Moulton testified that Colony operates as a tennis resort, including tennis lessons, all-day programs for children, a spa, and a fitness center. Colony maintains a central registration area for guests, a central telephone switchboard, a restaurant, and a laundry. Signage on the property uses the word "hotel." Colony advertises worldwide for guests.

9. Mr. Moulton's testimony established that most units at Colony are rented more than three times in a calendar year for

periods of fewer than 30 days. Thus, Colony also meets the definition of a "resort condominium" as defined in Subsection 509.242(1)(c), Florida Statutes.

10. Colony has been licensed as a motel with the Department of Business and Professional Regulation ("DBPR") since at least February 1, 1985.

11. Colony has been registered as a hotel for occupational licensing purposes with the Town of Longboat Key since at least September 1987.

12. Colony has been registered as a hotel for occupational licensing purposes with Sarasota County since the county's licensing ordinance took effect on October 1, 1992.

13. In summary, the Colony is a hybrid facility that meets the definitions of a "timesharing plan," a "resort condominium," and in some respects of a transient rental facility such as a hotel or motel.

14. From at least 1973 until June 1998, the units at Colony were individually metered for electric service. No evidence was presented to establish the original reasoning behind FPL's decision to individually meter each unit in the early 1970s.

B. Rule 25-6.049(5), Florida Administrative Code

15. Rule 25-6.049(5)(a), Florida Administrative Code, was originally adopted in November 1980 in response to the federal Public Utilities Regulatory Policies Act, which required state regulatory commissions and regulated utilities to implement measures to conserve electricity. The rule requires individual metering for each separate occupancy unit of: "new commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks for which construction is commenced after January 1, 1981."

16. As to buildings constructed prior to January 1, 1981, the PSC has stated that its intent was to allow master metered buildings constructed before 1981 to remain master metered, but not to allow individually metered buildings constructed before 1981 to convert to master meters. In re: Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corporation, Order No. PSC-98-0449-FOF-EI (March 30, 1998).

17. The PSC's rationale for adopting the rule was that individual metering helps to conserve energy by making the individual unit owner or occupant aware of the amount of electricity being consumed by the unit, thus providing an

incentive to reduce consumption and the cost of the electric bill for the unit.

18. The rule exempts a lengthy list of otherwise covered facilities from the individual metering requirement. Among the exempted facilities are "hotels, motels, and similar facilities."

19. From the early 1980s until March 1997, Rule 25-6.049(5)(a), Florida Administrative Code, included a statement that the requirement for individual metering applied to each separate condominium unit and other multi-use facility "whether or not the facility is engaged in a timesharing plan." Prior to March 1997, Rule 25-6.049(5)(b)2, Florida Administrative Code, defined "timesharing plan" to mean:

> any arrangement, plan, scheme, or similar device, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right to use agreement or by any other means, whereby a purchaser, in exchange for a consideration, receives a right to use accommodations or facilities, or both, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years.

20. In 1996, the PSC directed its staff to review the exemptions from the individual metering requirements to determine whether to allow master metering for timeshare facilities. In January 1997, the PSC approved amendments to

Rule 25-6.049(5), Florida Administrative Code, to allow timeshare facilities to be master metered. The amendments deleted the language in subparagraph (5)(a) that required individual metering for a covered facility whether or not it was subject to a timesharing plan. The amendments deleted the definition of "timesharing plan" quoted above, and added language allowing master metering of timeshare facilities and requiring the customer to reimburse the utility for the costs of converting from individual to master meters.

C. The Conversion of Colony to Master Meters

21. Marc Mazo is president and owner of Power Check, a company that consults with commercial clients to find savings in their electric, water, sewer, and telephone bills. Mr. Mazo was retained by Colony in early 1997 to review its utility billings.

22. Prior to starting his work for Colony, Mr. Mazo had been actively involved in the PSC proceedings that led to the amendments to Rule 25-6.049(5), Florida Administrative Code, discussed above. Mr. Mazo testified that he believed the definition of "timesharing plan" in the pre-1997 rule was "broad," and that his goal in the rule amendment proceeding was to persuade the PSC to authorize master metering for timeshares and for resort condominiums. The amendments adopted by the PSC authorized master metering for timeshares, but not for resort condominiums.

23. Mr. Mazo testified that his review of Colony's billings showed that the facility had 232 individual meters. He testified that Colony appeared to operate as a hotel and, thus, should be eligible for master metering under the "hotels, motels, and similar facilities" exemption from the individual metering requirement of Rule 25-6.049(5)(a)3, Florida Administrative Code.

24. In approximately February 1997, Mr. Mazo contacted Jim Guzman, FPL's customer service representative for the Sarasota area. Mr. Mazo requested the conversion from individual to master meters for three separate resort facilities that he represented: Colony, the Veranda, and White Sands.

25. At the time of Mr. Mazo's initial contact, neither Mr. Guzman nor his supervisor, Greg Bauer, was aware of the pending amendments to Rule 25-6.049(5) that would allow master metering of timeshares. They learned of the pending amendments from Mr. Mazo. Neither Mr. Guzman nor Mr. Bauer had ever been involved in the conversion of a facility from individual to master meters.

26. Mr. Guzman and Mr. Bauer confirmed through FPL sources that the pending amendments were as represented by Mr. Mazo. Then, they made a phone call to Colony and asked the person who answered the phone whether Colony was a timeshare. This unidentified person answered in the affirmative. Based on this

answer, Mr. Guzman and Mr. Bauer decided to move forward with the conversion.

27. Mr. Guzman testified that his main concern was to comply with the request of his customer and that this phone call was sufficient to reassure him that Colony qualified for conversion under the pending timeshare amendments.

28. FPL did not conduct a detailed analysis to determine whether Colony qualified for master metering. After the phone call to Colony, Mr. Guzman moved forward with a cost analysis to convert Colony to master metering in accordance with amended Rule 25-6.049(5)(a)5, Florida Administrative Code, which states in relevant part:

> When a time-share plan is converted from individual metering to master metering, the customer must reimburse the utility for the costs incurred by the utility for the conversion. These costs shall include, but not be limited to, the undepreciated cost of any existing distribution equipment which is removed or transferred to the ownership of the customer, plus the cost of removal or relocation of any distribution equipment, less the salvage value of any removed equipment.

29. In approximately March 1997, Mr. Bauer and Mr. Guzman met with Mr. Mazo and Tom Saxon, a consultant called in by Mr. Mazo. The discussion dealt with technical issues regarding the conversion of all three resort facilities. There was a disagreement as to the allocation of costs that could not be

settled at the meeting, due to the inexperience of Mr. Guzman and Mr. Bauer with conversion issues. Mr. Guzman testified that it was necessary to seek input from higher in the FPL chain of command.

30. After the meeting, Mr. Mazo and Mr. Guzman engaged in extensive negotiations regarding the cost of conversion, communicating by telephone and written correspondence.

31. The testimonial and documentary evidence indicates that there was a fundamental misunderstanding between Mr. Mazo and the FPL representatives as to the nature of Mr. Mazo's request for conversion of Colony. Mr. Mazo testified that his intent was that Veranda and White Sands should be converted pursuant to the timeshare amendments but that Colony should be converted pursuant to the longstanding "hotels, motels, and similar facilities" exemption in Rule 25-6.049(5)(a)3, Florida Administrative Code.

32. Mr. Guzman and Mr. Bauer testified that they understood Mr. Mazo to be requesting the conversion of all three facilities pursuant to the timeshare amendments, and that all of their actions were premised on that understanding.

33. Mr. Mazo testified that the participants at the face-to-face meeting in March 1997 discussed and agreed with the premise that Colony was a hotel and should be master metered as

a hotel. Mr. Saxon, the consultant brought to the meeting by Mr. Mazo, corroborated Mr. Mazo's recollection of the meeting.

34. Neither Mr. Guzman nor Mr. Bauer recalled discussing with Mr. Mazo whether Colony was a hotel. Mr. Guzman testified that FPL had already decided to go forward with the master metering of all three facilities and that it treated all three facilities as timeshares. Mr. Guzman testified that, once having decided to grant its customer's request for master metering, FPL was unconcerned whether Colony was a hotel or a timeshare.

35. In a memorandum to Mr. Guzman, dated March 19, 1997, Mr. Mazo wrote:

> First of all, based on our numerous discussions, it is my understanding that FP&L has agreed that since The Colony has been and continues to operate as a hotel, it is allowed under the old rule 25-6.049(5)(a)3 to be master metered. Therefore, we do have to wait for the amended version of the rule relating to time share resorts to take effect to begin the conversion process. (Emphasis added)

36. Mr. Mazo testified that the emphasized portion of the memorandum contained a typographical error, and should have stated that "we do not have to wait for the amended version of the rule." The context of the statement makes Mr. Mazo's testimony credible on that point. The remainder of the

memorandum deals exclusively with the scope of the work and costs for the conversion of Colony.

37. Mr. Guzman testified that Mr. Mazo's statement that FPL agreed that Colony operated as a hotel was incorrect. He testified that FPL's actions toward Colony and the other two facilities represented by Mr. Mazo were a response to the timeshare amendments, and it was FPL's understanding that all three facilities were the same. He did not contemporaneously respond to the statement in Mr. Mazo's memorandum because the issue of Colony's status as a hotel was irrelevant once the decision had been made to allow the conversion.

38. Mr. Guzman stated that FPL assessed costs as to all three facilities in accordance with the timeshare amendments. He noted that there was no basis in the rules to assess costs for the conversion of a hotel and that a different inquiry would have been made in the FPL chain of command had he been asked to convert a hotel.

39. In a memorandum to Mr. Guzman, dated March 27, 1997, and titled "Master Meter Conversion Projects," Mr. Mazo states:

> Also, the owner posed a question that since the Colony has been operating as a hotel for many years now, and should have been converted long ago to master metering, would it fall under the same "cost of conversion rule"?

The balance of this memorandum discusses payment of conversion costs, itemization of the charges, and scheduling of the conversions.

40. Mr. Guzman testified that he "vaguely" recalled responding to the quoted portion of the March 27 memorandum as to how the costs would be assessed on Colony. Again, he stated that Mr. Mazo's contention that Colony was a hotel had no significance to FPL and there was no reason to respond to that contention.

41. In a letter to Mr. Mazo dated November 25, 1997, Mr. Guzman stated a final cost of $11,152 for the conversion of Colony and requested payment in full prior to release of a work order. The first sentence of the letter reads: "Thank you for your recent inquiry concerning the conversion of your timeshare resort, from individual residential metered units to single master commercial meter." Mr. Guzman testified that this was a form letter, his only independent input being insertion of the numbers reflecting the amount of payment and time required to complete the conversion.

42. Shortly after receiving the letter, Mr. Mazo phoned Mr. Guzman. Mr. Mazo told Mr. Guzman that he wished to proceed with conversion of Colony and agreed to the stated cost. However, Mr. Mazo requested that Mr. Guzman rewrite the letter, substituting the word "hotel" for "timeshare resort." Mr. Mazo

testified that he emphasized to Mr. Guzman that he had never represented that Colony was a timeshare resort and that the reference in the letter should be corrected.

43. Mr. Guzman recalled the conversation, but testified that there was no real discussion as to why Mr. Mazo was requesting the change in the letter. Mr. Guzman discussed the matter with his superior, Mr. Bauer, who instructed him to accede to the request, because it made no difference to the master metering project whether Colony was called a "hotel" or a "timeshare resort." Mr. Guzman made the change and reissued the letter on December 22, 1997.

44. Mr. Mazo sent FPL the payment for the Colony master metering project on April 10, 1998. The project was completed in June 1998.

D. The Refund Claim

45. Mr. Mazo testified that at some point in the latter half of 1997, he was discussing the conversion with Jerry Sanger, Colony's longtime chief maintenance engineer. During the conversation, Mr. Sanger mentioned that he was gratified that Mr. Mazo was able to complete the conversion, because Mr. Sanger had unsuccessfully attempted to do so several years earlier.

46. Mr. Sanger testified that one of his duties at Colony is to monitor energy usage. Some time in 1988 or 1989, he

discovered that the units at Colony were individually metered and separately billed by FPL and that there was a $6.00 monthly charge for each of the meters. He knew from his prior experience in the construction field that it was possible to service all the units with a single meter and thought that Colony could save money by reducing the number of meters and bills.

47. Mr. Sanger contacted FPL, which sent a representative to Colony. Mr. Sanger could not recall the representative's name. FPL had no record of this meeting.

48. Mr. Sanger testified that he asked the FPL representative whether Colony could move to a smaller number of meters. The FPL representative said that the company would look into the matter and requested a copy of Colony's operating license, which Mr. Sanger provided.

49. Mr. Sanger testified that a couple of weeks later, FPL contacted him and stated that Colony did not qualify for master metering. Mr. Sanger recalled that the FPL representative stated something to the effect that Colony was licensed as a condominium, not as a hotel, and therefore did not qualify.

50. Mr. Sanger testified that this was the end of the matter. He did not pursue the issue further with FPL, though he subsequently had repeated dealings with company representatives.

Colony made no further efforts to obtain master metering until Mr. Mazo arrived on the scene in 1997.

51. Mr. Mazo testified that his conversation with Mr. Sanger gave him the thought that Colony might be entitled to a refund, because it had always operated as a hotel and FPL should have granted Mr. Sanger's request in 1988 or 1989 to convert to the presumably less expensive master meters.

52. Neither Mr. Guzman nor Mr. Bauer of FPL recalled Mr. Mazo ever mentioning a refund request during their 1997 negotiations about the conversion. Mr. Mazo admitted that he could not recall mentioning his intention to seek a refund during those negotiations. Mr. Mazo contended that he did not formulate the intention to seek a refund until the conversion was complete.

53. Mr. Mazo's testimony on this point cannot be credited. As found above, Mr. Mazo's correspondence throughout the negotiations repeatedly asserted that Colony is a hotel, not a timeshare. These assertions would have been irrelevant if Mr. Mazo were seeking only the conversion of the meters, because FPL had already decided to go forward with the conversion. It is reasonable to infer that Mr. Mazo was purposefully creating a record to support his anticipated refund request, and attempting to obtain FPL's acquiescence in terming Colony a "hotel" by not signaling his ultimate intent to seek a refund.

54. Mr. Sanger's testimony is credited as a truthful recollection. However, his recollection is insufficient to support a finding that FPL incorrectly denied his request. Mr. Sanger could not recall precisely when the request was made. There was no written documentation of either the request or of the FPL inquiry into the matter.

55. No evidence was presented to establish that FPL or any of its employees employ a strategy to force customers who may be eligible for master metering to take service on individual meters. To the contrary, the evidence established that when the PSC adopted the timeshare amendments, FPL launched an outreach program to locate those facilities that might qualify for conversion and actively solicited them to convert to master metering.

E. PSC Interpretations of the Rule

56. Rule 25-6.049(5), Florida Administrative Code, has never authorized master metering for a resort condominium. On several occasions, the PSC has been called upon to address hybrid facilities such as Colony, which is a resort condominium possessing characteristics of timeshare facilities and transient rental facilities such as hotels and motels.

57. The evidence presented at the hearing establishes that the PSC's practice in dealing with such hybrid facilities has been through the mechanism of rule waiver proceedings under

Section 120.542, Florida Statutes. In Petition by Holiday Villas II Condominium Association for variance from or waiver of Rule 25-6.049(5)(a), F.A.C., Regarding Electric Metering, Docket No. 980667-EU, the PSC was presented with a factual scenario similar to that of the instant proceeding. Holiday Villas II was registered as a condominium and therefore presumptively subject to the individual metering requirements of Rule 25-6.049(5)(a), Florida Administrative Code. However, Holiday Villas II also had many of the characteristics of a hotel: only two of its 72 units were used for permanent occupancy; the other 70 units were treated by their owners as investments and were let on a daily or weekly basis to vacationers; Holiday Villas II maintained a registration desk and lobby where guests were checked in and out; Holiday Villas II maintained a central telephone switchboard; and the facility was in direct competition with hotels and motels in its area.

58. Holiday Villas II had requested master metering from Florida Power Corporation, which declined the request because of the individual metering requirement for condominiums in Rule 25-6.049(5)(a), Florida Administrative Code. Holiday Villas II then petitioned for a waiver of the rule, which was granted by the PSC in Order No. 98-1193-FOF-EU (September 8, 1998).

59. The PSC has refrained from making a blanket statement regarding the application of Rule 25-6.049(5), Florida Administrative Code, to hybrid facilities such as Colony. PSC staff has taken the position that the rule requires individual metering of all condominiums and that a waiver or variance is required when a condominium also possesses characteristics similar to those of a timeshare or a hotel. In essence, the PSC has recognized that Rule 25-6.049(5), Florida Administrative Code, provides exemptions from the individual metering requirement and has employed the waiver mechanism as a means of ensuring that facilities claiming such exemptions are in fact entitled to them in those instances where the utility has declined an initial request for conversion.

60. The evidence produced at the hearing established that Mr. Mazo was aware of the waiver process employed by the PSC to allow master metering of hybrid facilities. On October 9, 2000, Mr. Mazo filed a petition for variance or waiver from Rule 25-6.049(5)(a), Florida Administrative Code, on behalf of a resort condominium operating under the name of The Dunes of Panama. On October 12, 2000, Mr. Mazo filed such a petition on behalf of Sundestin International Homeowners Association, Inc., a beachfront condominium providing transient accommodations in the manner of a hotel.

61. No petition for variance or waiver was ever filed on behalf of Colony.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding. Section 120.569 and Subsection 120.57(1), Florida Statutes.

63. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in any proceeding before the Division of Administrative Hearings. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993); Antel v. Department of Professional Regulation, 522 So. 2d 1056 (Fla. 5th DCA 1988); and Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). In this proceeding, that burden falls on Colony.

64. Colony must demonstrate by a preponderance of the evidence that FPL has violated the rule provisions stipulated to be at issue. Subsection 120.57(1)(j), Florida Statutes. A "preponderance" of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

65. Until its amendment in 1997, Rule 25-6.049(5)(a), Florida Administrative Code, required individual metering of condominium units. While Colony possesses characteristics of a hotel and of a timeshare, it is registered with DBPR as a condominium and the individual units of the facility are separately owned in accordance with the Condominium Act, Chapter 718, Florida Statutes. Colony has been so registered at all times relevant to this proceeding.

66. Even if it is accepted that Mr. Sanger requested a conversion to master meters in 1988 or 1989, FPL was justified in declining the request 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. After FPL's rejection, Colony did not petition the PSC or take any other steps to pursue the matter further until 1997.

67. FPL argues that it had no authority unilaterally to make the decision to master meter a registered condominium prior to the rule amendments in 1997. FPL argues that it was not until 1997, when the PSC "relaxed" its individual metering requirements to allow master metering for timeshare facilities that there was even a colorable basis for FPL to master meter Colony. While the undersigned is not entirely persuaded that the evidence and cited authorities clearly establish that FPL

had no authority to master meter Colony before 1997, the record does establish that the rule provided FPL with a reasonable basis for declining Colony's request.

68. Colony correctly points out that individual meters are not required under Rule 25-6.049(5)(a), Florida Administrative Code, for certain types of buildings and facilities specifically listed in subparagraph 3 of the rule, including "motels, hotels, and similar facilities." As discussed above, the application of the rule to hybrid facilities has proven problematic. The PSC has interpreted the rule to require individual metering of multi-unit buildings or facilities that fall within the scope of Rule 25-6.049(5)(a), Florida Administrative Code, but that might also qualify for a master meter exception, unless the customer successfully applies for a variance or waiver pursuant to Section 120.542, Florida Statutes. This interpretation may not be the sole permissible reading of Rule 25-6.049(5)(a),Florida Administrative Code, but it cannot be called irrational or arbitrary in terms of serving the underlying goal of the rule, which is to encourage energy conservation.

69. The PSC has demonstrated a willingness to consider expanding the exceptions from the individual metering requirement, where a facility can demonstrate that the purpose of the underlying statute will be or has been achieved by other means, and when application of the rule would create a

substantial hardship or violate principles of fairness. The PSC applied these fairness principles in granting a waiver in Holiday Villas II. While the manner in which Colony operates might have provided a basis for the PSC to exempt Colony from the individual metering requirements of the rule, Colony never made application for a variance or waiver from the strict application of the rule.

70. Colony's claim for a refund must also be denied because it has cited no statutory or rule authority for the relief requested. Colony cited Rule 25-6.106(2), Florida Administrative Code, as authority for the requested refund. Rule 25-6.106(2), Florida Administrative Code, provides:

> In the event of other overbillings not provided for in Rule 25-6.103 [applying to meter errors], 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.

71. Overbilling is not an issue in this case. Colony has neither alleged nor proved that FPL billed Colony in excess of the rates that were applicable to the individual meters at the time the bills were distributed. Colony has cited no precedent for expanding the concept of "overbilling" to encompass a

situation in which a customer alleges that it should have been converted to another type of meter that arguably would have led to billings at a lower rate.

72. Colony also cites Rule 25-6.093(2), Florida Administrative Code, which provides:

> Upon request of any customer, the utility is required to provide to the customer a copy and/or explanation of the utility's rates and provisions applicable to the type or types of service furnished or to be furnished such customer, and to assist the customer in obtaining the rate schedule which is most advantageous to the customer's requirements.

73. The cited rule requires the utility to "assist the customer" in obtaining the most advantageous rate schedule. However, the rule does not require the utility to provide legal advice to a customer regarding the proper interpretation of the PSC's rules governing individual metering nor does it require the utility to assist the customer in obtaining a variance or waiver of an existing rule.

74. 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 the authority to promulgate such a rule, but it has not done so with Rule 25-6.093(2), Florida Administrative Code.

75. Finally, Colony contends that its claimed refund is authorized by Section 366.03, Florida Statutes, which provides:

> Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission. No public utility shall be required to furnish electricity or gas for resale except that a public utility may be required to furnish gas for containerized resale. All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect. (Emphasis added)

76. Colony contends that it has been subjected to a competitive disadvantage because of the electric rates it paid in comparison to those paid by the area hotels with which it competes. The bifurcation of this case prevented Colony from actually demonstrating this alleged cost differential in this phase of the proceeding. It is assumed arguendo that Colony would be able to establish the cost differential in the second phase of the proceeding.

77. In arguing that Section 366.03, Florida Statutes, prohibits the competitive disadvantage it presumably suffered, Colony cites Corporation de Gestion Ste-Foy, Inc., v. Florida Power and Light Company, 385 So. 2d 124 (Fla. 3d DCA 1980), wherein the court held that, under Section 366.03, Florida Statutes, "a public utility or common carrier is not only permitted but is required to collect undercharges from established rates, whether they result from its own negligence or even from a specific contractual undertaking to charge a lower amount." 385 So. 2d at 126. Colony argues that the converse must also be true: the utility should be required to pay overcharges from established rates, to avoid providing either a preference or a disadvantage to a given customer.

78. It is concluded that the rationale of Corporation de Gestion is inapplicable, because any "overcharges" paid by Colony were not deviations from "established rates." Corporation de Gestion involved a situation in which an employee of the utility had negligently misread the plaintiff's electric meter for a period in excess of three years, resulting in underbillings of $99,000 to the customer. The court found that those underpayments must be collected to avoid granting this customer a preference by paying less for the same service than those customers who received accurate bills.

79. In the instant case, Colony has made no allegation that it paid more for its individually metered service than did other customers who received the same service. Rather, Colony contends that it received the wrong type of service as compared to similar customers. As discussed at length above, PSC rules have established a mechanism whereby a utility customer in Colony's situation may petition for relief by requesting a variance or waiver from the individual metering requirement. Colony never availed itself of this mechanism, and should not be allowed to use its own inaction as the basis to claim a refund.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Colony's complaint and request for refund against FPL regarding rates charged for service between January 1988 and July 1998 be DENIED.

DONE AND ENTERED this 25th day of April, 2001, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.