STATE OF FLORIDA
BEFORE THE PUBLIC SERVICE COMMISSION

ORIGINAL

THE COLONY BEACH & TENNIS CLUB, INC.

DOCKET NUMBER 991680-EL

Complainant

V.

Florida Power & Light

Respondent

_____/

**REPLY TO AFFIRMATIVE DEFENSES OF FP&L**

COMES NOW the Colony Beach and Tennis Club Inc., located at and hereby files its reply to the affirmative defenses of FP&L.

**Reply to Affirmative Defense 1** - There was no offer for service by FP&L to the Colony under the requested master metered rate. FP&L specifically refused the Colony's request for such service when it took the position that the contract for rates under master metering was not applicable to the Colony. Colony's complaint does not request specific performance, but asserts FP&L was in violation of Rule 25-6.093(2) of the Florida Administrative Code. FP&L's failure to assist the Colony in obtaining the most advantageous rate schedule for the Colony's requirements created an over-billing situation for which the Colony seeks a refund pursuant to Rule 25-6.106 (2) FAC. The over charges by FP&L were also a violation of Section 366.03 Florida Statutes. By over-billing the Colony, FP&L subjected the Colony to a disadvantage in competing against the hotels and motels in its area that were paying less for electric than the Colony.

**Reply to Affirmative Defense 2** - FP&L's refusal to assist the Colony in obtaining the most advantageous rate schedule by converting to master metering, cannot be construed as a breach of contract since FP&L specifically denied applicability of master metering to the units at the Colony, and refused to enter into such a contract. FP&L's refusal to convert the units to master metering was a violation of Rule 25-6.093(2). FP&L's violation of such rule created an overbilling of the Colony by FP&L. The type of overbilling alleged in the complaint is governed by Rule 25-6.106(2) Florida Administrative Code. In addition, the over charges by FP&L violated Section 366.03 Florida Statutes. By over-billing the Colony, FP&L subjected the Colony to a disadvantage in competing against the hotels and motels in its area that were paying less for electric than the Colony. Based on these facts, Section 95.11, Florida Statutes does not apply to the issues before the commission.

**Reply to Affirmative Defense 3** - FP&L's refusal to assist the Colony in obtaining the most advantageous rate schedule by converting to master metering, cannot be construed as a breach of an oral contract since FP&L specifically denied applicability of master metering to the units at the Colony, and refused to enter into a contract for the same. FP&L's refusal to convert the units to master metering was not a breach of an oral contract, but a violation of Rule 25-6.093(2) FAC. FP&L's violation of such rule created an overbilling of the Colony by FP&L. In addition, the over charges by FP&L violated Section 366.03 Florida Statutes. By

over-billing the Colony, FP&L subjected the Colony to a disadvantage in competing against the hotels and motels in its area that were paying less for electric than the Colony. Based on these facts, Section 95.11, Florida Statutes does not apply to the issues before the commission.

**Reply to Affirmative Defense 4** - Section 95.11 simply does not apply to the factual situation at issue before the commission.

Although Colony's reason's for not filing a complaint or declaratory action prior to the date of this complaint are not relevant to the issue at bar, its misplaced reliance on the representations of FP&L are part of the cause. Colony believed in 1988 when it requested FP&L's assistance in obtaining the most cost advantageous rate plan, which would have included master metering the property, that FP&L's interpretation of the rule governing its own metering requirements was correct. A fact, which the Colony subsequently learned was inaccurate.

Any efforts to fight a battle against FP&L at that time were seen as futile and not cost effective. Colony still needed and wanted FP&L's help to implement conservation methods to reduce energy costs, and believed a court battle or battle before the PSC might negatively affect that process.

Such decision in no way bars the Colony from filing a complaint with the Florida Public Service Commission after subsequently learning that FP&L's interpretation of the metering rules might not have been correct. FP&L's refusal to master meter the Colony and service the units under a lower rate plan effectively resulted in the Colony being over-billed for its

electric service since 1988. This placed the Colony in a significant position of disadvantage with its area hotel and motel competitors, a violation of Section 366.03, Florida Statutes. Since such violation of the Florida Statutes was also related to over-billing of the Colony, the applicable rule is Rule 25-6.106(2), Florida Administrative Code. This rule not Section 95.11, Florida Statutes controls in the case before the commission. Rule 25-6.106(2) specifically allows a customer of an IOU to receive a refund for the period during which the overbilling occurred.

**Reply to Affirmative Defense 5** - In addition to being a "resort condominium" as defined by Section 509.242(1)(c), Florida Statutes (1999), the Colony is more appropriately to its type of operation, and at all material times, including January 1988, has held itself out as, operates as and legally is a "hotel", as defined by Section 509.242(1)(a), Florida Statutes. FP&L recognized this fact in 1997 after performing a site survey of the facility. Such recognition of the Colony as a hotel is reflected in the letter to the Colony by Jim Guzman of FP&L dated December 22, 1997. A copy is attached hereto as Exhibit "A".

As a result of FP&L's recognition in 1997 that the Colony was operating as a hotel with full restaurant and convention facilities, FP&L did in fact properly agree and properly assist the Colony in converting its units to master metering.

Colony asserts the position in December 1997 taken by FP&L was the correct application of Rule 25-6.049(5)(a)(3). The rule indicates individual metering shall be required for each separate occupancy unit of new commercial establishments and condominiums,

unless those new commercial establishments or condominiums fall within any of the exceptions provided by rule. In the example of a new, for-profit hospital being built after January 1, 1981, a new commercial establishment is required to be individually metered under the rule, however, because the new commercial establishment was also a hospital, it falls within one of the exceptions stated in the rule. Therefore, the new commercial establishment (the hospital), would properly be allowed to master meter its facility.

With respect to the Colony, although it was a "resort condominium" in 1988, it was also registered as, licensed as, operated as, and pursuant to Section 509.242(1)(a), Florida Statutes, was a "hotel". As such, the Colony clearly falls within the expressly stated exception to the individual metering requirement of the rule in existence now, and in 1988.

Regarding FP&L's reference to Holiday Villas II Condominium Association, Inc., and its petition for a rule waiver, the facts in that case were significantly different than those with the Colony. Holiday Villas II was not a similarly situated facility! The factual differences include:

1) Holiday Villas II was not licensed with the County or City where it was located as a hotel. Holiday Villas II was registered with the Department of Business Regulation as a "Resort Condominium" with transient rentals, not as a hotel or motel. The Colony has been registered with the Department of Business Regulation since at least 1988 as a hotel or motel, registered with the City of Longboat Key as a hotel since prior

to 1988, and registered with Sarasota County and paid occupational taxes as a hotel.

2) The Colony has a full service gourmet restaurant, tennis pro-shop and courts, and full convention facilities on the premises. These facilities have been serviced by FP&L under its commercial rates since prior to 1988. Only the units at the Colony were not allowed to be master metered by FP&L. Holiday Villas II had no restaurant, tennis, or convention facilities.

3) The Colony's ownership rules are significantly different from Holiday Villas II. At the Colony, an owner is not allowed to live rent free in a unit for more than 30 days. After 30 days, an owner must pay for the unit on a daily basis as any other hotel guest. The owners at Holiday Villas II had full ownership rights to use their units as permanent residences with no obligation to pay a daily room rental fee like a hotel.

4) Holiday Villas owners received their electric bills directly from the Power Company and paid the same. Until master metering occurred, the owners at Holiday Villas II were primarily responsible for conservation. Since prior to 1988, the Colony's property management staff in its accounts payable department received each unit's electric bill monthly from FP&L. The Colony, not the owners, processed and paid the same every month. Conservation efforts, since prior to 1998, have been the responsibility of the Colony's General Manager and the property management team, including a full engineering and maintenance staff similar to all large hotels.

6) The fact that Holiday Villas II chose to file for a waiver, or that the PSC granted the waiver, in no way stands for

the proposition that Holiday Villas II was not entitled to be master metered without such a waiver. If in fact, Holiday Villas was a hotel, motel, or similar facility then it would have fallen under the exception to the rule and been allowed to master meter. Holiday Villas II did not choose to challenge the rule in this manner, but simply requested, and was granted a waiver.

**Reply to Affirmative Defense 6** - The Colony clearly has operated as a hotel since prior to January 1988, therefore, it falls within the stated exception to the individual metering requirement of Rule 25-6.049(5)(a) Florida Administrative Code. Even if the rule is strictly construed as suggested by FP&L, (which under Section 366.01, Florida Statutes does not appear to be the requirement), Rule 25-6.049(5)(a)(3) follows the intent of the commission to allow master metering to certain facilities that operate as hotels, motels, or similar facilities (Emphasis Supplied).

The intent of the commission in adopting the rule was to further conservation efforts in the state. The fact that hotels, motels, and similar facilities are included in the exception indicates the commission believed conservation efforts are better served in these types of facilities when master metered. Since the Colony was clearly a hotel, motel, or similar facility in 1988, under either a strict or liberal construction of the rule, the Colony should have been allowed to implement master metering and obtain service from FP&L at the lower rate schedule in the same manner as other hotels and motels in the area.

As for FP&L's assertion that there is no express exception to the individual metering requirement for "resort condominiums", the Colony maintains this interpretation of the rule is not only inaccurate, but inapplicable under the facts of this complaint. The rule expressly includes hotels, motels, and similar facilities from the individual metering requirement. Based on this specific stated exception, even under strict construction of the rule, when a "resort condominium" also operates or functions as a hotel, motel, or similar facility as the Colony has done since prior to 1988, with conservation efforts in the hands of on site managers rather than in the hands of the individual owners, the intention of the commission to encourage conservation is being fulfilled through an interpretation of the rule that would allow master metering to such facilities.

Clearly when a "resort condominium" operates primarily as a transient facility, more as a hotel or motel then a residential condominium, and competes regularly with hotel and motels in the surrounding area, the commission's policy of fair and reasonable rates is also accomplished by applicability of the exception to the individual metering requirement. Hotels and motels in the surrounding area where the Colony is located have been serviced by FP&L on master metering and paying the lower rates for such service since prior to 1988. The Colony, at all material times has operated as a transient facility, not residential, and was subjected to an unreasonable disadvantage in violation of Section 366.03, Florida Statutes, as a result FP&L's refusal to allow master metering and service on the lower rates.

In memorandum dated September 23, 1996, division of appeals summarized Rule 25-6.049 by stating that "with certain exceptions such as specialized housing accommodations and transient facilities" (Emphasis Added), individual meters are required for each customer. It would follow under this interpretation that a "resort condominium" operating primarily as a transient facility would not be required to be individually metered. A copy of the memorandum is attached as Exhibit "B".

**Reply to Affirmative Defense 7 -** Not only was documentation provided as to the Colony's operation as a hotel, but it was public record that it was licensed with the City of Longboat Key and the Department of Business Regulation as a hotel or motel. FP&L was obligated to assist the Colony in obtaining the most cost advantageous rate schedule, when requested by the Colony in 1988. The most cost-effective rate included master metering of the facility and service on the rate schedule used by other hotels and motels in FP&L's territory.

Respectfully Submitted,

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 Facsimile and/or U.S. Mail to the following this 3rd day of January, 2000.

Kenneth A. Hoffman, Esq.
Rutledge, Ecenia,et al, P.A.
P.O. Box 551
Tallahassee, Fl 32302

Blanca S. Bayo, Director
Division Records & Reporting
2540 Shumard Oak Boulevard
Betty Easley Center, Rm 110
Tallahassee, Florida 323990

Grace Jaye, Esq
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 323990-0850

Ms Elisabeth Draper
Division of Electric & Gas
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 323990-0850

Marc Mazo