BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of Naples Orangetree, Ltd. Against ORANGE TREE UTILITY COMPANY in Collier County for Refusal to Provide Service.	DOCKET NO. 940056-WS ORDER NO. PSC-94-0762-FOF-WS ISSUED: June 21, 1994

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER ON COMPLAINT, REQUIRING DEVELOPER AGREEMENT, APPROVING HOOK-UP AND PAYMENT OF SERVICE AVAILABILITY CHARGES, SUBJECT TO REFUND, AND REQUIRING ESCROW ACCOUNT

BY THE COMMISSION:

Background

Orange Tree Utility Company (Orange Tree or utility) is a Class C utility providing water and wastewater service to 122 water and wastewater customers in Collier County. On December 20, 1993, Orange Tree filed an application for approval to modify its service availability charges (Docket No. 931216-WS).

In Docket No. 931216-WS, the utility requested to decrease its water plant capacity fee from $320 to $281 per equivalent residential connection (ERC), and to increase its wastewater plant capacity fee from $200 to $2,834 per ERC. Orange Tree also requested an increase in its meter installation fee from $100 to $187 for each 5/8" X 3/4" meter, and from $130 to $262.82 for each 1" meter. In addition, Orange Tree requested initiation of the following tap-in charges: 3/4" Meter-Short Line, $270.27; 3/4" Meter-Long Line, $320.27; 1" Meter-Short Line $280.12; and 1" Meter-Long Line, $330.12. No other changes were requested.

By Order No. PSC-94-0524-FOF-WS, issued May 2, 1994, we suspended Orange Tree's requested service availability charges. A final decision in the service availability docket has not yet been made. On January 14, 1994, Naples Orangetree, Ltd. (Naples), a developer, filed a Petition for Leave to Intervene in Docket No. 931216-WS. On that same day, Naples filed a Complaint against

Orange Tree. The complaint and the related pleadings are the subject of this Order.

Complaint

Naples is in direct competition with an affiliate of the utility, Orangetree Associates, to develop lots located within the utility's service area. In its complaint, Naples alleges that the utility's operation places Naples at a significant business disadvantage in its efforts to compete with Associates. On February 14, 1994, Orange Tree filed a Motion to Strike and Response to the Naples' complaint.

On March 21, 1994, Naples filed an Amended Complaint. The Amended Complaint adds several paragraphs to its original complaint. First, in paragraph 4, Naples states that 423 single family lots in Waterways at Orangetree were received by Naples. In paragraph 5, Naples asserts that the utility was delaying the development of Orangetree Section IV, Waterways at Orangetree and Lake Lucerne. Furthermore, paragraph 9 was rewritten alleging that Naples made three requests for a developer agreement from the utility to provide water and wastewater capacity.

Following the revision of paragraph 9, Naples added four paragraphs numbered 10, 11, 12, and 13, in the Amended Complaint. In paragraph 14, previously numbered 10 in the original complaint, Naples adds that the "agreement encumbered provisions for the utility to turn over lines to county and county lease back to the utility." The remaining paragraphs numbered 15 and 16 are identical to 11 and 12 in the original Complaint. Aside from Naples' addition of the four paragraphs that changed the numbering and amplified paragraphs 4 and 14 in the Amended Complaint, paragraphs 3, 4, 14, 15, and 16 of the Amended Complaint are essentially the same as paragraphs 3, 4, 10, 11, and 12 of the original Complaint. On April 7, 1994, Orange Tree filed an Amended Motion to Strike and Response to Naples' Amended Complaint. The Amended Motion relates to paragraphs 3, 4, 14, 15, and 16 of the Amended Complaint.

According to the Amended Complaint, 2,700 acres were to be developed into 2,100 residential units and 22 acres zoned for commercial use. Development of this project was run under four entities, Orangetree Associates, Orange Tree Utility Company, Inc., Sand Limited, and East Collier County Construction Company, Inc. The owner of Naples, Mr. Amnon Golan, was once a general partner in the four entities, owning 28 percent of the partnership, while the owners of Orange Tree, controlled the remaining 72 percent.

In the Amended Complaint, Naples further alleges that in 1992, the partnership dissolved. Further, in an out of court settlement agreement, dated June 26, 1992 and November 25, 1992, Naples agreed to transfer 28 percent ownership of the partnership in exchange for undeveloped acreage zoned for 423 single family lots, 21 partially-developed lots, and 57 fully-developed lots. Also, Naples alleges that promises and assurances regarding further development of the properties were given in consideration.

Naples subsequently requested service to two areas known as Lake Lucerne, consisting of 21 developed lots, and Waterways at Orangetree, consisting of 423 single family lots. However, Orange Tree refused to provide service until a developer agreement was signed. Subsequently, Orange Tree provided Naples with an unexecuted developer agreement to be signed prior to providing utility service. This developer agreement provided for the payment of service availability charges by Naples, consistent with the utility's approved tariffs.

In the Amended Complaint, Naples alleges that, based on the out of court settlement agreement, Naples "shall not bear any expense in connection with the expansion of the utility capabilities of Orange Tree Utility Co." The utility's proposed developer agreement specifically states that "this agreement supersedes all previous agreements or representations, either verbal or written, heretofore in effect between DEVELOPER and SERVICE COMPANY..." Naples argues that this language attempts to supersede the previously agreed settlement regarding the "payment of contributions-in-aid-of-construction by virtue of the land concessions" made by Naples and its transfer of shares.

We do not believe that it is appropriate for us to determine the disposition of contractual disputes. The Commission does not have jurisdiction to determine the legal rights and obligations pursuant to contracts nor can it award damages of any sort. However, we do have the authority and the obligation to dispose of complaints by customers, including developers, against utilities. Although this matter appears to stem from a prior contractual agreement, it also appears that this was a regulated utility when this transaction between its owners took place. Allegations have been made that consideration in the form of a portion of ownership was conveyed to the utility in return for a commitment to provide future water and wastewater service without further payment of contributions-in-aid-of-construction (CIAC).

Based upon Naples' refusal to execute a developer agreement, Orange Tree has refused to provide service. Since Naples is allegedly being financially harmed by Orange Tree's refusal to

serve, on March 15, 1994, Naples filed a request for emergency hook-up to the Lake Lucerne lots and payment of service availability charges subject to refund. In its request, Naples states that it is willing to pay CIAC to the utility, subject to refund pending the Commission's final determination of the respective rights and positions in this docket. Orange Tree responded to Naples' request arguing that there is no "emergency justifying the Commission's intervention" prior to its full consideration of the complaint docket. However, it is Naples' belief that there is a critical date for the complainant in this docket constituting an emergency. Naples has indicated that there is a contract with a contractor which will expire on June 30, 1994, if no utility service is provided.

In order to determine the emergency status of this petition, our Staff held a meeting with all parties involved on April 18, 1994. Due to the concerns raised by the parties, we believe that additional time is needed to determine the merits of the amended complaint. To further investigate the parties' concerns, we have completed an Audit Service Request (ASR) with a due date of June 28, 1994, in order to determine the utility's compliance with the approved tariffs and to examine the utility's practices concerning developer agreements. This investigation will include the business relationship of Orange Tree Utility, Orangetree Associates, and East Collier Construction Company, Inc. Although there is a probability that no discrepancies in the utility's practice may be found, we believe that the allegations of undue discrimination warrant such scrutiny of the practices of the utility.

To the extent that the proper operation of the utility is involved, as well as the fairness, justness and reasonableness of the utility's application of its current service availability policy to a particular developer, the prior out of court settlement agreement will be investigated and considered. The audit shall examine the books and records of this utility to determine if any amount has been recorded as CIAC from this particular developer and whether its practices regarding provision of service to other developers, including affiliated developers, has been consistent with its treatment of this developer. Once we have completed our investigation, involving primarily an audit of the utility's books and records, we will make a final determination with respect to this amended complaint. However, because we believe that Naples has demonstrated an emergency need for immediate service, we believe it is appropriate for us to establish the terms and conditions upon which this developer may obtain such service at this point in time.

Motion to Strike

As stated earlier, on February 14, 1994, Orange Tree filed a Motion to Strike and Response to Naples' Complaint. The Motion to Strike moved to have paragraphs 3, 4, 10, 11, and 12 of the Complaint stricken on the basis that paragraphs 3, 4, 10, 11, and 12 of Naples' Complaint refer to prior litigation and have no relevance to the issues within the Commission's jurisdiction. Specifically, Orange Tree argues that the enumerated paragraphs allude to agreements, relied on by Naples, that cannot amend Orange Tree's approved tariffs, as that authority rests solely with this Commission.

On March 21, 1994, Naples filed its Amended Complaint, discussed earlier. On April 7, 1994, Orange Tree filed a second Motion to Strike and Response to the Amended Complaint filed by Naples. In its second Motion to Strike, Orange Tree seeks to have paragraphs 3, 4, 14, 15, and 16 of the Amended Complaint stricken. The paragraphs sought to be stricken in the Amended Complaint are practically identical to the paragraphs sought to be stricken in the original Complaint.

Paragraph 3 in the Amended Complaint describes the settlement agreement. Paragraph 3 also includes the settlement agreement provision that states "Golan shall not bear any expense in connection with the expansion of the utility capability of Orange Tree Utility Co." Paragraph 4 in Naples' Amended Complaint states that "as part of the land received by Naples Orangetree, under the settlement agreement, was an area known as Lake Lucerne, which consists of 21 developed lots." In paragraph 14 of the Amended Complaint, Naples states that, although the developer agreement requires that it does not object to executing a developer agreement with Orange Tree, "the developer agreement tendered and demanded by Orange Tree Utility contains provisions that are unfair and discriminatory and which seek to deprive Naples of the benefits of the agreements reached with Collier County . . . regarding dedication of utility lines." Further, in paragraph 14, Naples asserts that the "agreement encompassed provisions for the Utility to turn the lines over to Collier County and the county to lease the lines back to the Utility."

In paragraph 15 of the Amended Complaint, Naples states that although the developer agreement requires that Naples pay CIAC, it has already paid CIAC by "virtue of land concessions" it made in the settlement agreement, "as well as the transfer of Naples Orangetree's shares in Orange Tree Utility."

Finally, in paragraph 16, Naples asserts that Orange Tree is using the developer agreement to charge Naples and "create unfair and discriminatory service arrangements contrary to the terms of the settlement agreement, and in spite of the fact that "in kind" contribution has already been received from Naples for all future necessary expansion of the utility."

Essentially, the arguments raised by Orange Tree to support its Motion to Strike the five paragraphs in Naples' Amended Complaint relate to the fact that this information involves a prior settlement agreement that is outside the jurisdiction of this Commission. Orange Tree argues that its Commission-approved tariffs and service availability policy should be implemented in this instance and that any prior arrangements made between the utility or its owners and this particular developer are not relevant. Therefore, Orange Tree asserts these paragraphs should be stricken.

Although Naples has filed no response specific to either of Orange Tree's Motions to Strike, Naples did, on March 15, 1994, file a Request for Emergency Hookup Subject to Refund. Much of the argument contained in Naples' Amended Complaint and its Request for Emergency Hookup goes to the settlement agreement that was entered into by the parties prior to this disagreement. Although it is true that this Commission may not determine the rights and obligations of the parties pursuant to a contractual or settlement agreement, this Commission must determine the appropriate disposition of Naples' Amended Complaint.

We believe that, in our consideration of the allegations made in Naples' Amended Complaint, it is appropriate to consider the information relevant to the prior relationship and communications between these parties, as well as the possibility that the prior settlement agreement may constitute an unapproved developer agreement. We do not want to trespass into the circuit court's arena, but we do believe that we need all available information in making our final decision in this case. Therefore, we find it appropriate to deny Orange Tree's Motion to Strike.

Request for Emergency Hookup

Naples cannot commence to build on the 21 developed lots in Lake Lucerne without utility service; therefore, Naples asserts it is being financially harmed. In its Amended Complaint, Naples asserts that it is willing to pay currently effective service availability charges, subject to refund pending the Commission's determination of their validity.

Our Staff engineer examined the service area and facilities of Orange Tree Utilities on April 14, 1994. The lots at Lake Lucerne were found to be fully developed and ready for the required tests to be connected to the utility. The engineer further examined an area consisting of 322 lots in the Waterways. This area is raw land, which Naples indicated was ready for engineering and development.

Because we believe that there is a possibility that Naples may be financially harmed due to the fact that a construction contract will expire without utility service, we find that the need for an emergency hookup exists. Therefore, Orange Tree shall provide emergency hookup service to Naples.

Wastewater Treatment Plant

The Commission received a letter dated May 12, 1994, from Orange Tree's attorney indicating that the utility's wastewater treatment plant is currently over capacity. The letter indicates that the plant is permitted for 45,000 gallons per day (gpd). The Department of Environmental Protection (DEP) advised the utility engineer that the utility must construct surge control facilities prior to the monthly average flows exceeding 35,000 gpd. Orange Tree's current average flows are at 39,000 gpd. Our Staff engineer has contacted both DEP and the utility's engineer to discuss this situation. It has been determined that the utility is permitted for 45,000 gpd for the extended aeration mode of operation; however, the utility is permitted for 100,000 gpd for contact stabilization mode of operation. This mode could be reached with minor plumbing modifications. With this contact stabilization mode, Orange Tree has the capacity to serve the 21 lots at Lake Lucerne. Also, once Orange Tree installs the necessary surge control facilities, the utility would have the required capacity for limited growth with extended aeration mode of operation. We find that the utility should plan on expanding the wastewater plant capacity in the near future so that they can operate in the extended aeration mode, which is preferred over the contact stabilization mode. Our Staff will continue to monitor the expansion activities.

Lake Lucerne

In its Amended Complaint, Naples alleges that the unsigned developer agreement requires payment of CIAC by Naples in order to receive utility service. In the amended complaint, Naples alleges that based on the out of court settlement agreement, Naples "shall not bear any expense in connection with the expansion of the utility capabilities of Orange Tree Utility Co." The utility's

proposed developer agreement specifically states that "this agreement supersedes all previous agreements or representations, either verbal or written, heretofore in effect between DEVELOPER and SERVICE COMPANY..." Naples argues that this language attempts to supersede the previously agreed settlement regarding the "payment of contributions-in-aid-of-construction by virtue of the land concessions" made by Naples and its transfer of shares.

Due to the concerns raised by the parties, we believe that additional time is needed to determine the merits of the amended complaint. To further investigate the parties' concerns, our Staff has completed an Audit Service Request in order to determine the utility's compliance with the approved tariffs and to examine the utility's practices concerning developer agreements. This investigation will include the validity of service availability charges for Naples. This will be addressed at a later time in this docket.

Since additional time is required to investigate the allegations of undue discrimination on the part of Orange Tree, we find it appropriate not to require Orange Tree to provide service to the 21 developed lots in Lake Lucerne prior to Naples payment of currently approved service availability charges, subject to refund. The Amended Complaint alleges discriminatory treatment of Naples in reference to delaying development of Naples' lots and efforts to create unfair and discriminatory service arrangements contrary to the terms of the settlement agreement. Orange Tree's present service availability fees were established by Order No. 17614, issued May 26, 1987. Since their initial approval, the service availability charges have not been changed.

Developer Agreement

In the amended complaint, Naples alleges that it first requested a developer agreement on August 31, 1993 to which Orange Tree did not respond. Naples further indicates that the second request was issued on October 8, 1993, to which the utility responded by stating that "the request for a developer agreement [would be taken] under consideration." The third and most recent request was made on February 21, 1994. Orange Tree responded by sending a blank developer agreement. The amended complaint further states that "Naples needs a fully integrated developer agreement to complete the development of the Waterways at Orangetree project."

The utility entered into a developer agreement with Orangetree Associates, an affiliated developer, on November 23, 1993. This agreement was subsequent to the first and second requests for service by Naples.

At the April 18, 1994 meeting, the parties agreed that the disputed sections of the proposed developer agreement were Section 4.02, Section 4.05 and Section 22.

Section four of the submitted blank developer agreement addresses On-Site Installations, specifically the necessity of engineering plans, inspection of work, and transfer of title. In dispute is a portion of Paragraph 4.02 as follows:

> "DEVELOPER shall indemnify and hold SERVICE COMPANY harmless from and in respect of any repairs or replacements required to be made to said water and sewer facilities conveyed by DEVELOPER to SERVICE COMPANY which occur within one (1) year from the date of the conveyance of such water and sewer facilities from DEVELOPER to SERVICE COMPANY. Simultaneously, the conveyance of the water and sewer facilities described above from DEVELOPER to SERVICE COMPANY the DEVELOPER shall deliver to SERVICE COMPANY an executed Contract Bond in the total amount of the actual cost of construction of said water and sewage facilities." (Emphasis added)

At the April 18, 1994 meeting, the parties discussed this requirement. By letter dated April 25, 1994, Naples offered a Performance Bond from Mitchell & Stark Construction Company in the amount of 10 percent of the construction costs of the water and wastewater lines. By letter dated April 27, 1994, Orange Tree indicated that a bond in the amount of 10 percent of construction costs of the water and wastewater facilities was unacceptable. After researching this provision, we find that the requirement of a performance bond in the total amount of the actual cost of construction of water and wastewater facilities is reasonable. Our practice has been to approve this provision in executed developer agreements. Therefore, we do not believe that this paragraph should be in dispute.

Section 4.05 addresses the Transfer of Title of the water and wastewater facilities. Specifically, the developer would transfer title of all water distribution and wastewater collection systems to the utility. In its letter dated April 19, 1994, Naples contests this provision and proposes to have the right to dedicate said facilities to the county for leaseback to Naples. Orange Tree indicated in its April 27, 1994 letter that this dedication to the county was an effort, by Naples, to avoid payment of the tax impact of CIAC. Orange Tree further indicates that the utility is not authorized by the Commission to collect this gross-up; therefore, Naples would not incur such. We can find no reason for the developer to act in the capacity of a utility by dedicating the

water and wastewater facilities to the county then leasing them back. This is a function of the utility and as such, we do not believe Section 4.05 should be in dispute.

In reference to Section 22, Naples argues that the utility's proposed developer agreement contradicts the previous letter settlement agreements dated June 26, 1992 and November 25, 1992. The utility's proposed developer agreement specifically states that "this agreement supersedes all previous agreements or representations, either verbal or written, heretofore in effect between DEVELOPER and SERVICE COMPANY..." Naples argues that this language attempts to supersede the previously agreed settlement regarding the "payment of contributions-in-aid-of-construction by virtue of the land concessions" made by Naples and its transfer of shares. Because of what Naples believes is contradictory wording between the previous settlement agreement and the utility's proposed developer agreement, Naples refuses to enter into the utility proposed developer agreement. Orange Tree refuses to provide service until Naples signs the developer agreement.

We find that the language found in Section 22, as stated above, should be modified to read as follows:

> This Agreement supersedes all previous developer agreements on file with and approved by the Florida Public Service Commission heretofore in effect between DEVELOPER and SERVICE COMPANY, made with respect to the matters herein contained, and when duly executed, constitutes the agreement between DEVELOPER and SERVICE COMPANY.

We believe this is a reasonable solution, in that this Commission does not infer or assume jurisdiction of any previous out of court letter agreements or settlements. We do not intend to investigate whether or not the parties inadvertently entered into a developer agreement with the letter settlement agreements dated June 26, 1992 and November 25, 1992. This agreement addresses utility service to be provided to Naples without any further payment. A determination of whether this constitutes a developer agreement, without the Commission's approval, is required.

If service is provided prior to an executed developer agreement, the developer may decline to execute said agreement subsequent to our final decision. At that time, there could be customers on line and the utility service could not be discontinued. Without an executed developer agreement, the provisions of on-site installation inspections and warranties would not be in effect and could place the utility at significant risks.

These risks could be transposed on the utility's existing and future ratepayers. We do not believe it is unreasonable for Orange Tree to require an executed developer agreement prior to providing service.

Security

Since we have approved the request for emergency hook-up and payment of service availability charges, subject to refund, the utility must escrow all service availability charges collected. The escrow account shall be established between the utility and an independent financial institution pursuant to a written escrow agreement. The Commission shall be a party to the written escrow agreement and a signatory to the escrow account. The written escrow agreement shall state the following: That the account is established at the direction of this Commission for the purpose set forth above, that no withdrawals of funds should occur without the prior approval of the Commission through the Director of the Division of Records and Reporting, that the account shall be interest bearing, that information concerning the escrow account shall be available from the institution to the Commission or its representative at all times, and that pursuant to Consentino v. Elson, 263 So. 2d 253 (Fla. 3d. DCA 1972), escrow accounts are not subject to garnishments.

The utility shall deposit the funds to be escrowed in the escrow account. If a refund to Naples is required, all interest earned by the escrow account shall be distributed to Naples. If a refund to Naples is not required, the interest earned by the escrow account shall revert to the utility.

The utility shall keep an accurate and detailed account of all monies it receives. Pursuant to Rule 25-30.360(7), Florida Administrative Code, the utility shall provide a report by the 20th of each month indicating the monthly and total revenue collected subject to refund. Should a refund be required, the refund shall be with interest and undertaken in accordance with Rule 25-30.360, Florida Administrative Code. In no instance should maintenance and administrative costs associated with any refund be borne by the Naples. The costs are the responsibility of, and should be borne by, the utility.

As stated earlier, we have identified several concerns with respect to this complaint. Therefore, this docket shall remain open pending completion of the investigation and final disposition of the escrowed monies.

ORDERED by the Florida Public Service Commission that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that Orange Tree Utility Company's Motion to Strike is denied. It is further

ORDERED that Orange Tree Utility Company shall execute a developer agreement as set forth in this Order, shall provide emergency hookup service to Naples Orangetree, Ltd. and shall collect service availability charges, subject to refund. It is further

ORDERED that Orange Tree Utility Company shall establish an escrow account for the collection of the service availability pursuant to the conditions set forth herein. It is further

ORDERED that pursuant to Rule 25-30.360(7), Florida Administrative Code, the Orange Tree Utility Company shall provide a report by the 20th of each month indicating the monthly and total revenue collected subject to refund. It is further

ORDERED that this docket remain open pending completion of the investigation and final disposition of the escrow monies. It is further

By ORDER of the Florida Public Service Commission, this 21st day of June, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

JBL/LAJ/MEO

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 Records and Reporting 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 or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.