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-95-0241-FOF-WS ISSUED: February 21, 1995

The following Commissioners participated in the disposition of this matter:

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

ORDER APPROVING WATER AND WASTEWATER SERVICE STIPULATION

AND

NOTICE OF PROPOSED AGENCY ACTION

ORDER REQUIRING UTILITY TO PROVIDE WATER AND WASTEWATER SERVICE, FINDING DEVELOPER LIABLE FOR SERVICE AVAILABILITY CHARGES AND RELEASING ESCROW

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the actions discussed herein requiring the utility to provide water and wastewater service, finding the developer liable for service availability charges and releasing the escrow are preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

Orange Tree Utility Company (Orange Tree Utility or the Utility) is a Class C utility providing water and wastewater service for 146 customers in Collier County. According to its 1993

Annual Report, for the twelve months ending December 31, 1993, the utility had operating revenues of $30,201 and $33,767 for water service and wastewater service, respectively, with corresponding net operating losses of $42,560 and $8,553.

On December 20, 1993, Orange Tree Utility filed an application for approval to modify its service availability charges, which was docketed as Docket No. 931216-WS. By Order No. PSC-94-0524-FOF-WS, issued May 2, 1994, the Commission suspended Orange Tree Utility's proposed changes in service availability charges, pursuant to Section 367.091(5), Florida Statutes.

On July 11, 1994, Orange Tree Utility filed a revision to its application to modify service availability charges, and, on July 22, 1994, a further revision. On June 28, 1994, the Division of Auditing and Financial Analysis, filed Audit Report Audit Control No. 94-118-4-1, for the 12 months ended December 31, 1993. The Utility filed its response to the audit report on July 21, 1994. By Order No. PSC-94-1175-FOF-WS, issued September 26, 1994, the Commission suspended the proposed revised changes in service availability charges, and denied the December 20, 1993 tariff filing.

Initially, a corporation known as Springhill of Collier County, Inc. (Springhill), with offices in Hollywood, Florida, undertook to develop a Planned Development Unit (P.U.D.) encompassing 2,752 acres, known as North Golden Gate, in Collier County, in a joint venture with Amnon Golan. Springhill and Mr. Golan formed Orangetree Associates Joint Venture (Orangetree Associates), a Florida general partnership on January 27, 1986, for this purpose. The development was to consist of 2,100 residential units, with 22 acres zoned for commercial use. Amnon Golan Enterprises, Inc. and Naples Orangetree, Ltd. (Naples) jointly held a 28% interest in Orangetree Associates, Sands, Ltd., a limited partnership engaged in excavation and selling fill, Orange Tree Utility Company, a closely held corporation, and East Collier Construction, Inc., home builders. Mr. Golan is the president of both Amnon Golan Enterprises, Inc. and Naples Orangetree, Ltd. Springhill held the remaining 72% interest in these entities. Roberto Bollt is the president of Springhill. On May 28, 1991, the Collier County Board of County Commissioners, concluding negotiations with Mr. Golan as trustee for Orangetree Associates, passed Ordinance No. 91-43, amending Ordinance No. 87-13, which, on March 31, 1987, had established the Orangetree Planned Unit Development. Ordinance No. 91-43 provides, among other things, that the "Developer freely and voluntarily agrees to convey at no cost all water and sewer treatment plants and distribution/collection and transmission system components to

Collier County" and that the County "will agree not to make formal request to serve the project with water or sewer related services until on or after January 1, 2001."

With the execution of a letter of settlement agreement on June 26, 1992, Mr. Golan separated his entire interest in Orangetree Associates, Sands, Ltd., Orange Tree Utility Company, and East Collier Construction, Inc., through a partitioning of assets and liabilities based upon the respective interests of the joint venturers. Under this agreement, Mr. Golan was to receive title to several parcels of land, known as Section 4, an 8 acre commercial tract, Lake Lucerne, 34 dry lots (to be determined by blind draw), and 11 lakefront lots (to be determined by blind draw). On November 25, 1992, following arbitration of certain matters as set forth in the June 26, 1992, settlement agreement and further negotiation of the arbitrators' findings, Mr. Golan and Springhill executed a letter agreement as expressing their final agreement of separation. By the final agreement, Mr. Golan received title to the several parcels of land known as Section 4 (subject to excavation rights of Sands), Lake Lucerne, 43 dry lots (to be determined by blind draw), and 14 lakefront lots (to be determined by blind draw).

Both Naples and Orangetree Associates develop lots located within the Utility's certificated service area. On January 13, 1994, Naples filed a complaint with this Commission against Orange Tree Utility for refusal to provide service to the Lake Lucerne lots on terms identical to those in effect for Orangetree Associates, which complaint is the subject matter of this order. In its complaint, Naples alleged that the Utility is being operated so as to place Naples at "a significant business disadvantage in its efforts to compete with" Orangetree Associates. Naples asserted that Orange Tree Utility improperly requires Naples to pay contributions-in-aid-of-construction, on the basis of Paragraph 4 (b) (iv) of the June 26, 1992, settlement agreement, which provides that "Golan shall not bear any expense in connection with the expansion of the capabilities of Orange Tree Utility Co." Naples requested that the Commission order Orange Tree Utility to immediately provide service to the Lake Lucerne lots at fair and reasonable rates and on a non-discriminatory basis and to undertake an expansion of its facilities in order to serve the entire P.U.D. On February 14, 1994, Orange Tree Utility filed a Motion to Strike and Response to the Naples complaint. The Utility claimed that it is not a party to the settlement agreement of June 26, 1992; that it has offered a developer agreement to Naples identical with that submitted with its application for certification and to that executed by Orangetree Associates on November 23, 1993; and that it is ready, willing, and able to provide water and wastewater service to Naples in accordance with its existing tariffs.

On March 15, 1994, Naples filed a Request for Emergency Hookup Subject to Refund for 21 lots in the Lake Lucerne development. In its Response filed March 21, 1994, Orange Tree Utility maintained that it is ready, willing, and able to provide services to the Lake Lucerne lots in accordance with its approved tariffs. On March 21, 1994, Naples filed an Amended Complaint, in which it alleged that Orange Tree Utility is delaying the development of the Lake Lucerne lots and the Waterways (Section 4, previously identified, consisting of 423 lots) by withholding the issuance of developer agreements and refusing to provide services to the Lake Lucerne and Waterways lots on terms identical to those available to Orangetree Associates. Naples requested that the Commission order Orange Tree Utility to immediately provide services to Lake Lucerne's 21 and Waterways' 423 lots at fair and reasonable rates and on a nondiscriminatory basis; to provide a developer agreement for the Waterways development; to test the Waterways water and wastewater line connections; and to undertake a facility expansion in order to serve all developed lots in the P.U.D. On April 7, 1994, Orange Tree Utility filed a Motion to Strike and Response to Amended Complaint, in which it again asserted that it is ready, willing, and able to provide water and wastewater service to Naples in accordance with its tariffs so long as it has available capacity. In Order No. PSC-94-0762-FOF-WS, issued June 21, 1994, the Commission denied Orange Tree Utility's motion to strike and ordered the Utility to execute a developer agreement with Naples, to contain certain provisions relating to a performance bond, the dedication of facilities to the county, and the effect of prior agreements and representations; provide the developer with emergency hookup service for the Lake Lucerne lots; and collect service availability charges, to be held in escrow, subject to refund.

On June 7, 1994, Naples filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code in U.S. Bankruptcy Court for the Southern District of Florida, Broward Division. On June 26, 1994, Orange Tree Utility filed a Petition Requesting a Prompt Formal Administrative Hearing, by which it requested a Section 120.57(1), Florida Statutes, hearing on the issues raised in Order No. PSC-94-0762-FOF-WS. On July 6, 1994, the Utility filed a Motion for Reconsideration of Order No. PSC-94-0762-FOF-WS. On July 7, 1994 and July 8, 1994, respectively, Naples responded in opposition to the petition and motion. On August 11, 1994, Orange Tree Utility and Naples, in light of the bankruptcy court's then apparently imminent consideration of a negotiated developer agreement, jointly requested that we defer consideration of the petition and motion. On October 4, 1994, Orange Tree Utility

withdrew both the petition for hearing and motion for reconsideration, advising the Commission that it had entered into a developer agreement with Naples concerning the 21 lots in Lake Lucerne, which the trustee in bankruptcy approved.

Naples and Orange Tree Utility continue their efforts to negotiate a developer agreement for the Waterways development. Judge Raymond Ray, U.S. Bankruptcy Court, entered an order on December 21, 1994, requiring that the claims relating to the June 26, 1992 settlement agreement, as modified on November 25, 1992, be sent to binding arbitration. Orange Tree Utility contends that it does not have wastewater capacity in place for the Waterways development, nor the capital resources to increase the existing plant's capacity without payment presently of CIAC for the entire development. Naples asserts that it does not have sufficient resources to pay CIAC for the entire development, and, moreover, that it cannot reorganize under the bankruptcy laws and obtain financing in order to proceed with the Waterways development on a phased basis unless it obtains a commitment from Orange Tree Utility for water and wastewater services for the entire development.

WATER AND WASTEWATER SERVICES

Service Capacity

In its complaint against Orange Tree Utility, Naples requested that the Commission take the following actions: a) immediately provide service to the Lake Lucerne lots without any additional requirements; b) immediately provide a fully integrated developer agreement to Naples for the Waterways at Orangetree lots without further delay; c) immediately test the water and wastewater line connections built for the Waterways at Orangetree development and supply capacity for the development if the lines satisfy industry standards for reliability and operation; d) that Orange Tree Utility be ordered to commence and complete, by a date certain, the mandated expansion of its facility so as to be able to serve all developed lots within the Orange Tree P.U.D., including the Lake Lucerne subdivision, and e) that said service be continued at fair and reasonable rates and on a non-discriminatory basis.

Orange Tree Utility contends that the only issue properly before this Commission is whether the Utility is proceeding with the Commission's rules and regulations and Orange Tree Utility's approved tariffs. Further, the Utility contends that it has so proceeded and is ready, willing, and able to provide water and wastewater service to Naples Orangetree in accordance with the existing tariffs so long as it has available capacity. The Utility

contends that it has plant capacity to provide water and wastewater service to Naples' 21 Lake Lucerne lots and water service to Naples' Waterways development. However, the Utility states that it does not have sufficient plant capacity to provide wastewater service to the Waterways development.

Naples made three requests for a developer agreement to obtain water and wastewater service to the Waterways development. These requests were made on August 31, 1993, October 8, 1993, and again on February 21, 1994. On September 30, 1994, Naples submitted a proposed developer agreement for the Waterways development to the Utility and requested the Utility's response. The Utility did not respond, whereupon, on November 4, 1994, Naples again submitted a proposed developer agreement, also with a request that the Utility respond.

On November 23, 1993, Orange Tree Utility entered into a developer agreement with its affiliate, Orangetree Associates. This agreement was based on providing water service to 1,614 Orangetree Associates equivalent residential connections (ERCs) and wastewater service to 92 Orangetree Associates ERCs, and noted that wastewater connections were so limited due to limited treatment capacity.

Orange Tree Utility does not maintain that there is not sufficient water plant capacity to serve both Orangetree Associates and Naples' Waterways development. However, the Utility has stated that it has neither sufficient wastewater plant capacity to serve the total requested ERCs of Orangetree Associates nor the total requested ERCs of Naples. On May 12, 1994, the Utility advised the Commission that its wastewater treatment plant is currently operating with a deficit capacity. The Utility's operations permit authorizes operation of a 45,000 gallons per day (gpd) extended aeration plant or a 100,000 gpd contact stabilization process plant. The permit requires the Utility to construct surge control facilities prior to the monthly average flows exceeding 35,000 gpd. In Order No. PSC-94-0762-FOF-WS, we urged the Utility "to plan on expanding the wastewater plant capacity in the near future so that they can operate in the extended aeration mode," noting that "once Orange Tree installs the necessary surge control facilities, the utility would have the required capacity for limited growth."

When designing a wastewater treatment facility, utilities typically use industry standards established by the American Water Works Association and accepted by this Commission to calculate plant capacity. However, whenever available, capacity is more accurately calculated using actual historical flow data. Wastewater flows are assumed to be 80% of the water flows. This

assumption is inappropriate in this case because large water flows, directed to new swimming pools and lawn irrigation for new homes, are not transmitted to the wastewater treatment facility.

Accordingly, we have determined from the Utility's monthly operating reports, required to be filed with the Department of Environmental Protection, that actual wastewater flows ranged from a low of 10,000 gpd in December, 1993, to a high of 20,000 gpd in April, 1994. The Utility states that there are presently 146 total connections including 144 single family residences, one convenience store and a recreation center. Gpd/ERC calculations yield a range in that period of time of 60.2 to 120.5. Using 121 gpd/ERC, we determine the wastewater treatment plant capacity to be as follows:

Extended aeration	
WWTP current capacity	45,000 gpd
Total ERCs at capacity	372
Current connections	146
Currently available connections	226
Contact stabilization	
WWTP capacity, potential	100,000 gpd
Total ERCs at capacity, potential	826
Current connections	146
Potentially available connections	680

Orangetree Associates projects growth of 1,614 units for the period 1993 through 2004, with annual growth rates ranging from 100 to 217 units. Naples projects growth of 423 units for the period 1993 through 2000, with annual growth rates ranging from 30 to 99 units. As of December 12, 1994, Orange Tree Utility made 12 connections in the year 1994. Based on these projections, we show in Schedule No. 1 that demand on the wastewater treatment plant will not reach the plant's 100,000 gpd capacity until 1998. We note, as a result, that there is sufficient time for the Utility to construct a larger plant with sufficient capacity to provide for the entire development. The Utility states that the cost of a wastewater treatment plant with sufficient capacity to serve the development at buildout was estimated in 1992 to be $3.4 million. With such a plant, we believe that the Utility would be capable of treating up to 500,000 gpd; however, as shown in Schedule 1, we have determined that the maximum demand at buildout in 2003 will be 300,000 gpd. We further believe that the cost of a 300,000 gpd plant would be approximately $2.6 million in 1998.

Section 367.121(1)(d), Florida Statutes, provides that we shall have the power "[t]o require repairs, improvements, additions, and extensions to any facility, or to require the

construction of a new facility, if reasonably necessary to provide adequate and proper service to any person entitled to service." Pursuant to Section 367.111(1), Florida Statutes, "[e]ach utility shall provide service to the area described in its certificate of authorization within a reasonable time." Further, Rule 25-30.520, Florida Administrative Code, states, "It is the responsibility of the utility to provide service within its certificated territory in accordance with terms and conditions on file with the Commission." Hence, we find it appropriate to order Orange Tree Utility to provide water and wastewater service to Naples. Further, we order the Utility to allocate to Naples the 423 ERCs the developer requests for the Waterways development in accordance with the following connections schedule, which we determine to be consistent with the projections of both developers:

	Orangetree Associates	Naples
1995	110 units	30 units
1996	150	54
1997	200	63
1998	200	85
1999	209	92
2000	200	99
2001	209	
2002	217	
2003	119	
Total	1,614 units	423 units

Service Availability Charges

Both Naples and Orangetree Associates shall be responsible for the payment of the applicable service availability charges in effect at the time of actual connections. See H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913, 916 (Fla. 1979) (crucial time must be date of connection since actual cost of maintaining sufficient capacity cannot be sooner ascertained). However, if Naples wishes to ensure adequate capacity for the entire Waterways development, the developer agreement should encompass the entire development and require payment of all applicable service availability charges. On the other hand, if Naples wishes to secure capacity for each phase of the development, it may elect to enter into separate developer agreements for each phase of development, which would include payment only of service availability charges applicable to each phase. Nevertheless, the Utility shall not be obligated to provide service if the developer fails to pay the appropriate service availability charges.

The November 23, 1993, developer agreement entered into by Orange Tree Utility and Orangetree Associates provided payment of "system capacity charges" in accordance with the Utility's approved tariff. The developer agreement further provides that the Utility may "establish, amend, revise and enforce, from time to time in the future, its tariff, extension policy, rates or rate schedules, fees and charges (including capacity or connection charges) provided that such rates and charges are uniformly applied to customers in the service area and are non-discriminatory as applied to the same classification of service throughout the service area." Following our imminent decision in Docket No. 931216-WS, concerning the Utility's application for modified plant capacity, meter installation and connection charges, developers, such as Orangetree Associates and Naples, will possibly face different service availability charges. Even though developers may have reserved capacity through pre-payment of CIAC, if the charges are increased, they will be responsible for paying the amount of the increase for any unconnected ERCs to be connected. Likewise, if the charges are decreased, the developers would be due refunds for any then-unconnected ERCs.

We find that Naples, as any developer requesting utility services, is liable for any applicable service availability charge. If it is determined in the bankruptcy proceeding that Naples fulfilled its obligation to pay service availability charges under the terms of the settlement agreement, payment of CIAC shall be imputed to the Utility.

DEVELOPER AGREEMENT

In Order No. PSC-94-0762-FOF-WS, we ordered Orange Tree Utility to execute a developer agreement with Naples, containing certain provisions relating to a performance bond, the dedication of facilities to the county, and the effect of prior agreements and representations; provide the developer with emergency hookup service for the Lake Lucerne lots; and collect service availability charges, to be held in escrow, subject to refund. On August 15, 1994, Orange Tree Utility entered into a developer agreement with Naples and Visual Entertainment, Inc. (a Golan entity) for the lots in Lake Lucerne. On October 4, 1994, Orange Tree Utility and Naples submitted to the Commission for its approval a stipulation between them concerning the agreement.

The stipulated developer agreement differs from the requirements set out in Order No. PSC-94-0762-FOF-WS, first, in respect to the escrow agreement, and, second, in respect to the effect of the developer agreement upon earlier agreements allegedly involving the same parties:

1) Rather than the funds paid as CIAC being escrowed with an independent institution under conditions we specified, the funds have been escrowed with Pennington and Haben, counsel for Naples. According to the parties, this was done in order to save the assessment of fees and costs attendant to an escrow agreement.

2) The superseding language ordered by the Commission is as follows:

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

The stipulated language, in Section 22, is as follows:

> The rights and obligations under [the settlement agreements] are presently being disputed in various fora. The parties hereby agree that resolution of any issues related to said agreements shall be resolved in the forum and in the manner determined appropriate in the pending bankruptcy proceeding in the United States Bankruptcy Court Southern District of Florida styled In Re Naples Orangetree, Ltd, Case No. 94-22202-BKC-RBR.

Although the utility erred in the manner in which it established the escrow account - in that it did not comply with the requirements of Order No. PSC-94-0762-WS - later in this order, we find it appropriate to release the escrow. Thus, the parties' request that we approve the escrow agreement is moot.

As to the second part, the bankruptcy proceeding bears no connection to the escrow as ordered by the Commission nor to the determination made by us herein concerning Naples' liability for service availability charges. We ordered the Utility to establish the escrow. The developer, Naples, not the Utility, has filed a petition for relief under Chapter 11, United States Code. In the bankruptcy proceeding, the court is expected to determine whether the escrowed funds inure to Naples or to Orange Tree Utility, upon construing the disputed clause in the settlement agreement. Therefore, we have no reason to take issue with the stipulation language in Section 22 of the developer agreement, not finding it

to be inconsistent with our purpose in Order No. PSC-94-0762-FOF-WS. We approve the language of Section 22 and, thus, the stipulated developer agreement between Orange Tree Utility and Naples to provide water and wastewater service to Naples' Lake Lucerne development.

ESCROW ACCOUNT

In Order No. PSC-94-0762-FOF-WS, we approved the request of Naples for emergency hook-up for the Lake Lucerne lots and payment of service availability charges, subject to refund. We ordered Orange Tree Utility to escrow all service availability charges collected. Further, we required that the escrow account be established by the Utility with an independent financial institution pursuant to a written escrow agreement; that the Commission be a party to the escrow agreement and a signatory to the escrow account; that the escrow agreement state that the account is established at the direction of this Commission for the purpose of escrowing all service availability charges collected by Orange Tree Utility from Naples relative to the Lake Lucerne lots; that no withdrawals of funds should occur without the prior approval of the Commission; that the account shall be interest bearing; that information concerning the escrow account be available from the institution to the Commission at all times; and that the agreement state that, pursuant to Cosentino v. Elson, 263 So. 2d 252 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.

Orange Tree Utility acknowledged that the escrow agreement executed on August 15, 1994, was not established in compliance with the conditions set forth in Order No. PSC-94-0762-WS, and explained that:

> The funds paid as CIAC were escrowed with the agreement of all the parties and the bankruptcy trustee and the approval of the bankruptcy court with Pennington and Haben, Counsel for NOL, rather than with a bank in order to save the assessment of fees and costs attendant to an escrow account.

Section 24 of the developer agreement between Naples and Orange Tree Utility provides that:

> DEVELOPER agrees to pay SERVICE COMPANY the contributions in aid of construction and other charges set forth in Exhibit "D" attached hereto ... Said contributions in aid of construction and other charges as set forth in Exhibit "D" shall be held in escrow by the law firm of Pennington & Haben, P.A.

No other language in the developer agreement addresses the escrow agreement. It is apparent that the Utility established an escrow agreement without compliance with our requirements for the establishment of escrow accounts, thus, violating a lawful order of the Commission. Section 367.161(1), Florida Statutes, provides that if any utility knowingly refuses to comply with, or willfully violates any lawful order of the commission, that utility shall incur a penalty for each such offense of not more than $5,000, with each day of refusal or violation constituting a separate offense.

The Utility's act was "willful" in the sense intended by Section 367.161, Florida Statutes. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the Utility's establishing the escrow agreement and account without adhering to applicable Commission requirements, would meet the standard for a "willful violation."

In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

The failure of the Utility in this respect, while not condonable, does not appear to have resulted in actual harm to any interested person nor to have in fact compromised the Commission's interests. Rather than not complying with the order, the proper action would have been for the Utility to have requested different escrow treatment. However, we do not believe that Orange Tree Utility's apparent violation of Section 367.161(1), Florida Statutes, rises to the level of warranting that a show cause order be issued. Thus, we do not order that Orange Tree Utility show cause for failing to execute an escrow agreement in adherence to the Commission's requirements set forth in Order No. PSC-94-0762-FOF-WS.

LIABILITY FOR SERVICE AVAILABILITY CHARGES

We have found that Naples is liable for any applicable service

availability charge. There has been a tap-in into the service mains at the property line of the Lake Lucerne development, and, even though no connections are currently being served, that fact satisfies the necessary condition establishing Naples' liability for CIAC charges applicable to Lake Lucerne.

Naples disputes its liability for further payment of CIAC on the basis of Paragraph 4 (b) (iv) of the June 26, 1992, settlement agreement, by which the parties partitioned their respective interests in the January 27, 1986, joint venture. The bankruptcy court, in an Order Granting Motion to Abate Adversary Proceeding, Referring Certain Matters to Binding Arbitration As Per Pre-Petition Agreement of the Parties, Denying Defendant/Counter-Plaintiff's Motion for Relief from Stay Without Prejudice, and Denying Counter-Defendant's Motion to Dismiss for Failure to Comply With the Contractual Provision Respecting Arbitration, issued December 24, 1994, in Case No. 94-22202-BKC-RBR, ADV. No. 94-0607-BKC-RBR-A, ordered that the parties be compelled to arbitrate "[a]ll of the issues set forth with specificity in Counts I through VII of the Defendant/Counter-Plaintiff's Counterclaim ... except Count IV ...." Count II alleges as follows:

> Count II of the Counterclaim sues the Counter-Defendants, Theodore Bollt, Roberto Bollt and Steven Lowitz, individually and as general partners of Sands, Ltd., Sands, Ltd., Orangetree Associates, ... Hollywood Enterprises, ... Springhill of Collier County, ... and Orangetree Utility Company, Inc., ... seeking a declaratory judgment regarding the obligation of this estate to Orangetree Utility, Inc., for any expense in connection with the expansion of the utility capability of Orangetree Utility Company, Inc., and for a determination of whether all of the Counter-Defendants, other than Orangetree Utility Company, Inc., are obligated to indemnify the Debtor/Counter-Plaintiff in the event this court declares that the estate is required to pay the contribution in aid of construction charges sought by Orangetree Utility Company.

In Order No. PSC-94-0762-FOF-WS, this Commission, addressing this same matter, declared that "[w]e do not believe that it is appropriate for us to determine the disposition of contractual disputes. The Commission does not have the jurisdiction to determine the legal rights and obligations pursuant to contracts nor can it award damages of any sort." We believe that the question concerning Count II, which the bankruptcy court has referred to binding arbitration, does not require or would not result in a ruling that would encroach on the jurisdiction of the

Commission, under Chapter 367, Florida Statues, to prescribe fair and reasonable rates and charges for jurisdictional utilities. Rather, the referral seeks only to determine the rights of the parties under the settlement agreement.

Thus, having found Naples liable for the service availability charges for the lots in Lake Lucerne, we find it appropriate to order Orange Tree Utility to terminate the escrow agreement. The funds collected and held in the escrow account at the law firm of Pennington & Haben shall be released to the Utility.

Based on the foregoing, it is therefore,

ORDERED by the Florida Public Service Commission that Orange Tree Utility Company shall provide water and wastewater services to Naples Orangetree, Ltd.'s Waterways development. It is further

ORDERED 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 shall allocate to Naples Orangetree, Ltd. 423 equivalent residential connections for Naples Orangetree, Ltd.'s Waterways development in accordance with the connections schedule set forth in the body of this Order. It is further

ORDERED that Naples Orangetree, Ltd. shall pay to Orange Tree Utility Company all applicable service availability charges. It is further

ORDERED that Orange Tree Utility Company shall terminate the escrow agreement and that the funds escrowed shall be released to Orange Tree Utility Company. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that the developer agreement to which Orange Tree Utility Company and Naples Orangetree, Ltd. have stipulated is in all respects approved. It is further

ORDERED that in the event this Order becomes final, this Docket should be closed.

By ORDER of the Florida Public Service Commission, this 21st day of February, 1995.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CJP

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.

As identified in the body of this order, our actions requiring the utility to provide water and wastewater service, finding the developer liable for service availability charges and releasing the escrow are preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by these actions proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on March 14, 1995. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the effective date 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.

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 wastewater 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 Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.