ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 021215-WS

IN RE: APPLICATION FOR AMENDMENT OF CERTIFICATES NOS. 340-W AND 397-S TO ADD TERRITORY IN PASCO COUNTY BY MAD HATTER UNITLIY, INC.
_____/

PASCO COUNTY'S RESPONSE TO MAD HATTER'S FOURTH REQUEST FOR CONTINUANCE

Pasco County, through its undersigned counsel, hereby responds to the fourth request for continuance filed by Mad Hatter Utility, Inc. (Mad Hatter). The Commission should deny the motion for continuance for the following reasons:

1. Three years ago on December 6, 2002, Mad Hatter filed an application to amend its certificates which resulted in docket #021215WS. That request was set for a hearing on September 11-12, 2003. Two years later on November 24, 2004, Mad Hatter filed an application for amendment of certificate to add additional territory to its certificates which resulted in docket #041342WU. Pasco County filed timely objections to both petitions.

2. On April 15, 2005, the Commission consolidated the two dockets for hearing. There have been four separate orders establishing procedure and setting new controlling dates including the hearing dates which have been moved and continued three times. On four occasions, Mad Hatter has

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moved for a continuance. To date, Mad Hatter has requested and received three continuances which resulted in modifications to the controlling dates.

3. One of the central issues in these dockets is whether Mad Hatter has the capacity to provide wastewater service. It sends its wastewater to the County for disposal pursuant to a 1992 Agreement between the parties. That Agreement requires the County to accept up to 350,000 GPD from Mad Hatter from an area designated on an exhibit to the Agreement. Mad Hatter has exceeded that capacity and thus the County had raised the issue of Mad Hatter's lack of capacity in its opposition to the applications.

4. Mad Hatter has contended before this Commission that it has the capacity to provide wastewater disposal as it has claimed that the County was required to accept wastewater in excess of the 350,000 GPD cap. It filed a Motion for Clarification, Modification, and Enforcement of Final Judgment and Permanent Injunction (the motion) in the litigation between the parties, Mad Hatter Utility, Inc. and Larry Delucenay v. Pasco County, Florida and Douglas S. Bramlett, United States District Court, Middle District of Florida, Case No. 94-1473-CIV-T-25(E). A copy of the motion and memorandum is attached as Exhibit A. Specifically, Mad Hatter sought clarification as to the County's obligation to accept wastewater treatment flow in excess of 350,000 GPD

under the 1992 Bulk Wastewater Treatment Agreement. See p. 2 of the motion attached as Exhibit A. Mad Hatter alleged that the parties 1992 Agreement required the County to treat more than 350,000 GPD if it has capacity to do so. See Exhibit A, p. 7. Mad Hatter specifically requested the Federal Court re-state or further clarify the parties' rights and obligations under the 1992 Agreement and find that the County must provide service. See p. 10 memorandum to motion attached as Exhibit A.

5. The Federal Court by an order dated January 15, 2005, denied the motion. It refused to redraft the 1992 Agreement to require the County to accept additional wastewater. See pp. 11-12 of the Order attached as Exhibit B. Thus, Mad Hatter has no capacity to serve the areas subject to its pending applications.

6. On March 7, 2004, July 19, 2004 and March 7, 2005, the Commission granted Mad Hatter's requests to continue the hearing as Mad Hatter contended that the Federal Court needed to rule on the motion and address the issue of whether the County need accept wastewater in excess of the cap. The Federal Court has now reached that decision.

7. The Federal Court has denied Mad Hatter relief. Unhappy with that decision, Mad Hatter has now filed a complaint in state court raising the same issue. Copies of the complaint and amended complaint are attached as Exhibits

C and D. The original complaint alleged federal causes of action which would have permitted the County to remove the action to Federal Court pursuant to 28 U.S.C. §1441, et seq. Before serving the County, Mad Hatter amended the complaint to delete those causes of action to prevent the litigation from being removed to Federal Court.

8. The new action amounts to forum shopping. The state court should grant summary judgment against Mad Hatter based on the doctrine of res judicata. Mad Hatter now contends that it needs a ruling by the state court addressing the same issue which the Federal Court has already rejected. The Commission should not rely on the new action as a basis to further postpone a hearing.

9. The County and the customers whom Mad Hatter hopes to take from the County deserve a ruling on the pending applications. In the three years since the original application was filed, much of the land which Mad Hatter hopes to add to its certificates has been developed. The County provides service to those customers as they are not within Mad Hatter's certiciated territory. Those customers have the right to know that they will not be disconnected from their utility provider and forced to accept service from Mad Hatter.

WHEREFORE, Pasco County prays the Commission will deny Mad Hatter's fourth motion for continuance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been served by facsimile and regular U.S. mail upon Jennifer Rodan, Esq., Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399, and F. Marshall Deterding, Rose Sundstrum & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301, this 21st day of September, 2005.

JOHNSON, POPE,
BOKOR, RUPPEL & BURNS, LLP

By: _____

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAD HATTER UTILITY, INC., a Florida Corporation, LARRY DELUCENAY, President of Mad Hatter Utility, Inc.,

Plaintiffs,

vs.

PASCO COUNTY, FLORIDA, a political subdivision of the State of Florida, and DOUGLAS S. BRAMLETT, Assistant Pasco County Administrator,

Defendant.

/

CASE NO.: 94-1473-CIV-T-25(E)

PLAINTIFF'S MOTION FOR CLARIFICATION, MODIFICATION, AND ENFORCEMENT OF FINAL JUDGMENT AND PERMANENT INJUNCTION AGAINST PASCO COUNTY AND SUPPORTING MEMORANDUM OF LAW PREPARED BY PLAINTIFF, MAD HATTER UTILITY, INC.

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EXHIBIT
A

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2. Certificate of Service
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4. EXHIBIT B - Pasco County's Objection to the Application for Amendment.
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9. EXHIBIT G - Affidavit of Larry G. DeLucenay with Exhibits 1 - 4.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAD HATTER UTILITY, INC., a Florida Corporation, LARRY DELUCENAY, President of Mad Hatter Utility, Inc.,

Plaintiffs, **CASE NO.: 94-1473-CIV-T-25(E)**

vs.

PASCO COUNTY, FLORIDA, a political subdivision of the State of Florida, and DOUGLAS S. BRAMLETT, Assistant Pasco County Administrator,

Defendant.

/

PLAINTIFF'S MOTION FOR CLARIFICATION, MODIFICATION, AND ENFORCEMENT OF FINAL JUDGMENT AND PERMANENT INJUNCTION AGAINST PASCO COUNTY AND SUPPORTING MEMORANDUM OF LAW

Plaintiff, Mad Hatter Utility, Inc., ("Plaintiff" or "Mad Hatter") pursuant to Rule 60 of the Federal Rules of Civil Procedure, hereby moves this Court to clarify, modify and enforce the Final Judgment and Permanent Injunction entered in its favor and against Pasco County, Florida ("Pasco County" or "the County") on March 11, 1998, and subsequently clarified on February 6, 2001, and also seeks and award of attorneys' fees, and as grounds therefore states as follows:

Summary of Relief Sought:

1. Plaintiff seeks clarification, modification, and enforcement on four issues: 1) the applicability of the permanent injunction to prevent Pasco County from serving a small portion of the Oak Grove PUD that falls partially outside Mad Hatter's existing certificated

territory based on Pasco County's ill-gotten gain; 2) Pasco County's obligation to accept wastewater treatment flows in excess of 350,000 GPD under the 1992 Bulk Wastewater Treatment Agreement; 3) Mad Hatter's entitlement to Southwest Florida Water Management District ("SWFWMD") permitted water use quantities or "credits" originally assigned to, and used by, Pasco County exclusively in providing potable water to the Oak Grove PUD because those credits are necessary to make Mad Hatter whole and they were ill-gotten by Pasco County; and 4) Pasco County's obligation to pay for Mad Hatter's legitimate costs of transferring service of uncontested areas of the Oak Groves PUD from Pasco County to Mad Hatter pursuant to the Final Judgment. Mad Hatter also seeks an award of the attorneys' fees and costs it has incurred in bringing this Motion to enforce the Final Judgment and Permanent Injunction.

Procedural Posture and Factual Background:

2. On March 11, 1998, this Court entered a Final Judgment and Permanent Injunction ("the Final Judgment") in Mad Hatter's favor in the above-styled action. The Final Judgment provided in part that "[t]he Defendant, Pasco County, Florida, its county commissioners, agents, and servants are enjoined from providing water and wastewater service, except as provided below, at the Oak Groves PUD (Phase 1A and the Denham Oaks Elementary School) . . . ." (Doc. #282).

3. Pasco County appealed the Final Judgment but it was affirmed by the Eleventh Circuit Court of Appeals. Mad Hatter Utility, Inc. v. Pasco County, 190 F.3d 541 (11th Cir. 1999).

4. Following the affirmance, in October 2000, Mad Hatter moved this Court for clarification of the Final Judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure. (Doc. #360-361). The motion was based on the build-out that had occurred between the entry of the Final Judgment and the completion of the appellate process. Mad Hatter sought modification of the Permanent Injunction to include the entire Oak Grove PUD and all its CIAC infrastructure, not just Phase 1A and the Denham Oaks Elementary School that were specified in the Final Judgment. Id. The Developer of the PUD at that time, Intervenor Sunfield Homes, opposed Mad Hatter's request for clarification, arguing the Final Judgment should be read literally to mean that *only* Phase 1(a) and the Denham Oaks Elementary School should be served by Mad Hatter. Sunfield Homes claimed the remainder of the project should be taken and served by Pasco County even though Mad Hatter's Florida Public Service Commission ("PSC") certificate (a/k/a "franchise" in previous orders) had covered this Project since 1977 for planned utility services. (Doc. #365, 371). Pasco County claimed no position on the matter. (Doc. #360).

5. By order dated February 6, 2001, this Court granted Mad Hatter's motion for clarification. (Doc. #377). The order modified the original Permanent Injunction to delete any references to Phase 1A as a limitation to the scope of the permanent injunction. (Doc. #377, p.7) (hereinafter "the modification order"). The modification order further required Pasco County to transfer water and wastewater to Mad Hatter within ninety (90) days and the transfer of service would include conveyance to Mad Hatter of all rights, title, and interest to CIAC. Id.

6. Intervenor Sunfield Homes appealed the modification order, which was also affirmed by the Eleventh Circuit Court of Appeals. Mad Hatter Utility, Inc. v. Pasco County, 33 Fed. Appx. 992 (11th Cir. 2002).

7. In April 2001, Pasco County filed a motion for clarification of the Final Judgment. In its motion Pasco County recognized that the February 2001 modification order extended "the geographic location of the injunction to the entire Oak Grove subdivision rather than just Phase 1A" (Doc. #388, p.2) but the County requested a clarification regarding its ability to provide reclaimed water to the subdivision. Id.

8. In May 2001, this Court denied Pasco County's motion for clarification and allowed Mad Hatter to provide reclaimed [irrigation] water service to the Oak Grove PUD. (Doc. #399).

9. The transfer of water and wastewater utility services from Pasco County to Mad Hatter subsequently took place on May 7, 2001. Mad Hatter is presently providing all water and wastewater utility services to all of the developed areas within its certificated territory in accordance with the terms of the Final Judgment as modified by the February 2001 modification order. However, Mad Hatter has not been able to provide reclaimed water service because Pasco County and Mad Hatter were unable to reach agreement for Mad Hatter's purchase of reclaimed water for distribution in Oak Grove, and Pasco subsequently removed all connections from its reclaimed water system to Oak Grove.

Mad Hatter's Entitlement to the De Minimus Area:

10. Since Pasco County cut off and turned over utility service to all the Oak Grove PUD then-developed areas and turned over most CIAC to Mad Hatter on May 7,

2001, Mad Hatter has discovered that a small portion in the northeast corner of the Oak Groves PUD, which this Court determined was appropriately served by Mad Hatter, is not currently within Mad Hatter's previous and original certificated service territory. The portion of the Oak Grove PUD that is not within Mad Hatter's certificated territory represents a de minimis area of approximately 1/16th of Section 33 of Township 26, Range 19 East in Southern Pasco County, and is the only portion of the Oak Grove PUD not currently within the original 1977 PSC certificated service territory of Mad Hatter (hereinafter the "de minimus area").

11. When the instant action was filed in 1994 and until as recently as late October 2002, both Mad Hatter and Pasco County both mistakenly believed that the entire Oak Grove PUD was within Mad Hatter's PSC certificated territory. Indeed, several single family residences are already receiving service within this non-certificated area because they were turned over to Mad Hatter for utility service when Pasco County cut off its utility lines and services to all those properties pursuant to the February 2001 modification order.

12. It was only after Mad Hatter entered into a developer's agreement in late October 2002, with Eagle Creek Properties Management, Inc., the owner of a small parcel of commercial property in the northeast corner of Section 33 on the adjacent east side of the main entrance on Oak Grove Boulevard that Mad Hatter discovered the de minimus area was not fully within its certificated territory. Mad Hatter's PSC-approved contract requires that a developer such as Orsi Development/Sunfield Homes submit a legal description to specifically describe the property that makes up the project to be served. In this instance, because of the County's intrusion, Mad Hatter never received an accurate legal description

from the original developer with which to compare to his certificated territory descriptions. Obviously, even the County lacked that information, despite its superior access to the information through its close long-term relationship with Orsi Development/Sunfield Homes.

13. Upon learning of the error, Mad Hatter promptly filed an Application for Amendment of Certificate for an Extension of Territory with the PSC, seeking to add the de minimus portion of Section 33 in question to its water and wastewater certificates. Mad Hatter's December 6th, 2002 Application for Amendment is attached hereto as Exhibit "A." In its application, Mad Hatter points out that the configuration of the facilities constructed by the developer of the Oak Grove PUD, based on designs approved by Pasco County, require that the entire development be served by one central water and wastewater service provider. Id. Because wastewater and water systems are in place to serve the entire development, any attempt to segregate the de minimus area (less than 75 ERC's) from the remainder of the development for service by a separate provider would be extremely inefficient. The end result would be the uneconomical and unnecessary duplication of utility systems beyond what was originally planned in 1977.

County's Use of Oak Grove CIAC Line to Object / Obligation to Accept Wastewater Treatment Flows:

14. In response to Mad Hatter's PSC application, Pasco County filed an objection to the Application for Amendment of Water and Wastewater Certificates. Pasco County's objection is attached hereto as Exhibit "B." In its objection, Pasco County claims it would now be more cost effective for the County to provide the service at this late date to the de minimus area apparently contending that the force main originally installed by Oak Grove

for the County as CIAC, places the County's facilities in close proximity to the requested service. In addition, the County again asserts (this time to the PSC) that "Pasco County only has to provide wastewater treatment for up to a maximum of 350,000 GPD and only to those areas identified on Exhibit 3 to the 1992 agreement. That area described on Exhibit 3 to the 1992 agreement does not include the areas to which Mad Hatter now seeks to modify its PSC certificated territory." Exhibit "B" at p.4, ¶7. The County further contends that if Mad Hatter sends wastewater from this area to the County for treatment, "[t]he County will not treat it. Mad Hatter will be forced to find another "new" source for wastewater treatment." Id.

15. The problem with the County's argument that it only has to provide wastewater treatment for up to a maximum of 350,000 GPD, is that it was already addressed in the 1992 Agreement, Exhibit "C" attached hereto, which clearly states:

> Excess Capacity - The County agrees to treat wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommitted capacity is available at the County's wastewater treatment facilities, as determined by the County, and all appropriate permits have been obtained by Mad Hatter from State regulatory agencies. Mad Hatter agrees to pay the per thousand gallon rate for such services as set forth above.

Exhibit "C," pp. 5-6, ¶D.

16. This Court recognized that requirement in its order on Motions For Summary Judgment, when it stated:

> In this regard, the County has agreed to treat more than 350,000 gallons per day if it has sufficient capacity to do so. While it is given the discretion in deciding this, the discretion may not be exercised contrary to the County's obligation to act in good faith and to deal fairly.

(Doc. #151).

17. Pasco County cannot argue that it does not have the capacity for Mad Hatter when the County itself is seeking to serve the project. Mad Hatter initially requested additional capacity by letter dated July 22, 1999. The County rejected this request by letter dated August 9, 1999. True and correct copies of these letters are attached hereto as Composite Exhibit "D." After nearly five years, the County apparently claims that it still does not have capacity for Mad Hatter, after the connection of at least tens of thousand of new homes directly to its "facilities," and most likely hundreds of thousand of new commitments, after Mad Hatter's request. The continuing refusal to grant Mad Hatter additional capacity at its facilities is both a breach of contract and unconstitutionally unequal treatment of Mad Hatter's right to that capacity, but for our purpose here, also constitutes bad faith and observed by the Court previously.

Mad Hatter's Entitlement to Credits:

18. When Pasco County originally usurped Mad Hatter's opportunity to serve the Oak Groves PUD and Denham Oaks Elementary School back in 1994, the Southwest Florida Water Management District ("SWFWMD") permitted Pasco County sufficient potable well water permitted quantities, or credits, to serve the entire Oak Groves and Denham Oaks Elementary School Projects. Since the service to the Project was turned over to Mad Hatter, SWFWMD has refused to transfer those water withdrawal credits from Pasco County to Mad Hatter, and due to critical regional potable water shortages, SWFWMD has otherwise refused to issue new, duplicate (replacement) water credits to Mad Hatter for the Oak Grove PUD and school projects.

19. Pasco County's refusal has left Mad Hatter to utilize credits it has designed, permitted, and reserved for future developments and growth in order to serve the immediate

needs of the Oak Grove PUD and school. SWFWMD advised Mad Hatter that "the Federal Court's Orders have no jurisdiction or application over SWFWMD" and therefore, SWFWMD posits that Pasco County must voluntarily relinquish the Oak Groves PUD and school water withdrawal credits before those credits can be reallocated to Mad Hatter. However, Pasco County refuses to recognize the issue and therefore is profiting from its ill-gotten gain.

Entitlement to Expenses Incurred in Transferring Service:

20. Unrelated to the foregoing issues is Plaintiff's entitlement to be reimbursed for the costs incurred in transferring service from Pasco County to Plaintiff in accordance with the Final Judgment and this Court's previous orders. The Court reserved jurisdiction to enter orders to enforce and execute the injunction, including "any claim for costs associated with the necessary interconnections." Final Judgment, § 2(f), p.3 (Doc. #282).

21. Plaintiff has incurred over $115,000 in direct expenses associated with changing service from Pasco County to the necessary Mad Hatter service design in order to initially serve the Project. Plaintiff will incur an additional $200,000 to complete the originally anticipated connections as a result of Pasco County's intrusion and redesign of service points.

22. Pasco County has refused to pay any of these expenses and denies any obligation to do so. Accordingly, Plaintiff seeks an order from this Court ordering Pasco County to pay these expenses.

Entitlement to Attorneys' Fees:

4. Pay Plaintiff the costs incurred in transferring service from Pasco County to Plaintiff in accordance with the Court's previous orders; and

5. Pay Plaintiff's attorneys' fees and costs incurred in bringing this motion.

MEMORANDUM OF LAW

This Court has the inherent power and authority to construe and clarify its order when the order is ambiguous or unclear. See Kennecott Copper Corp., v. Federal Trade Comm'n. 542 F.2d 801, 803 (10th Cir. 1976). Courts have broad equitable powers, with wide discretion to tailor injunctive relief to the facts of the case. Equal Opportunity Commission v. Wilson Metal Casket Co., 24 F.3d 842 (6th Cir. 1994). The Court may, in the alternative, modify and extend the language in the Final Judgment and Injunction under Rule 60(b). Under Rule 60(b), a district court has the inherent power to grant a modification to an injunction, even if the injunction was entered pursuant to a consent decree. See United States v. Swift & Co., 286 U.S. 106, 114 (1932); Hodge v. Department of Housing and Urban Development, 862 F.2d 859, 861-62 (11th Cir. 1992). Modifications may be considered when (1) a significant change in facts or law warrants change and the proposed modification is suitably tailored to the change, (2) significant time has passed and the objectives of the original agreement have not been met, (3) continuance is no longer warranted, or (4) a continuation would be inequitable and each side has legitimate interests to be considered. Newman v. Graddick, 740 F.2d 1513, 1519 (11th Cir. 1984). See also United States v. United Shoe Machinery Corp. 391 U.S. 244 (1968)(modification strengthening permanent injunction deemed warranted after the passage of ten (10) years because the anti-trust violation had not been remedied). An injunction may be modified to impose more stringent conditions when such action is necessary in insure that the intended result will be achieved. United Shoe, 391 U.S. 244. United Shoe, instructs the district courts "to

determine whether the relief originally ordered [has] produced the intended results" and, if it has not, [then] 'the district court should modify the decree so as to achieve the required result with all appropriate expedition.'" Sizzler Family Steak Houses, 793 F.2d 1529, 1539 (11th Cir. 1986)(quoting Exxon Corp. v. Texas Motor Exchange, 628 F.2d 500, 503 (5th Cir. 1980)). In other words, an injunction may be modified to impose more stringent requirements on a defendant when 'the original purposes of the injunction are not being fulfilled ...'". Sizzler Family Steak Houses, 793 F.2d at 1539 (quoting 11 Charles Alalan Wright & Arthur R. Miller, Federal Practice and Procedure, §2961 (1973).

In this instance significant changes in the facts, based upon the County's newly asserted positions with Mad Hatter and the PSC, warrant clarification, modification or enforcement of the Final Judgment and Permanent Injunction. Further, significant time has passed and the objectives of the original judgment and injunction, as modified, have not been met. Failure to clarify, modify or enforce the Final Judgment and Permanent Injunction will be inequitable because the County is continuing to profit from the conduct previously found unlawful by a jury and this Court.

I. The Injunction Was Intended To and Should Apply to the Non-Certificated Portion of Oak Grove

The first issue is whether the Final Judgment and Permanent Injunction, as extended by the February 6, 2001 Order to encompass, without limitation, the entire Oak Groves PUD, applies to the de minimis non-certificated portion of the subdivision now is in the hands of Mad Hatter. If the Court finds that the Permanent Injunction does not include the non-

certificated portion of Section 33, then Mad Hatter respectfully requests modification and expansion of the Permanent Injunction to include such area.

It is not uncommon that, when a large project requests service of a utility having substantially all of its property within its certificated territory, that a small portion may lie outside the original territory. As a matter of resolving responsibility for cleaning up that small area, it is almost perfunctory that the parties agree that the certificated territory be extended to include that small area. To do otherwise would be splitting the utility service between two utilities within one project, and splitting the service responsibility line literally through the middle of several existing homes. In the unlikely event of a contest with a nearby utility over such a small area, the party originally capable of providing the service the most efficiently should win the contest at the PSC, thereby avoiding unnecessary duplication of facilities and service. This concept of avoidance of destructive competition or duplication of utilities with heavy investment in service facilities to a given area is firmly fixed in federal and Florida law. In Florida, section 180.06 of the Florida Statutes (private and municipal utilities) states the concept in the form of a prohibition as follows:

> However, a private company or municipality shall not construct any system, work, project or utility authorized to be constructed hereunder in the event that a system, work, project or utility of a similar character is being actually operated by a municipality or private company in the municipality or territory immediately adjacent thereto, unless such municipality or private company consents to such construction.

§ 180.06 Fla. Stat. (2003).

Section 153.04 of the Statutes[1] states a similar prohibition that reflects the legislature's disapproval of duplicate water and wastewater services.

In the Florida case deemed pivotal at trial in this action, City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219 (Fla. 5th DCA 1991), the court stated the purpose of section 180.06 of the Florida Statutes, as it is ingrained in Florida law is "[t]he restriction of the statute [180.06 F.S.] was designed to avoid the wastefulness of duplicate capital investments for competing utilities that could not likely be operated without financially jeopardizing each other's operating revenues if erected in the same consumer territory. Mount Dora at 223. The Mount Dora court went on to further hold that:

> ***The essence of the concept of utilities serving the public is that it is in the best interests of the public that the entities, governmental or private, providing utility services not be permitted to compete as to rates and service and that each entity be given an exclusive service area and monopolistic status.*** This unusual economic advantage is given a utility in our free market economy in exchange for the utility relinquishing its usual right to determine the level of service it provides and to set its own competitive rates and submitting those two matters to a governmental authority which regulates the quality of service to be provided and sets rates to provide the utility a reasonable return on its investment. The term public utility implies a public use with a duty on the public utility to service the public and treat all persons alike.

Id. at 224-25 (emphasis added).

The "best interest of the public" referred to in the aforementioned holding, is also incorporated in section 367.045(5)(a) of the Florida Statutes (Water & Wastewater Systems) which states that:

[1]Plaintiff recognizes that chapter 153 may not apply to Pasco County, but cites this statute as evidence of the legislature's recognition of the waste of duplication of facilities and avoidance thereof.

> The commission may grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest, but may not grant authority greater than that requested in the application or amendment thereto and noticed under this section; or it may deny a certificate of authorization or an amendment to a certificate of authorization, *if in the public interest.*
>
> . . .
>
> *The commission may not grant a certificate of authorization for a proposed system, or an amendment to a certificate of authorization for the extension of an existing system, which will be in competition with, or a duplication of, any other system or portion of a system*, unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service.

§ 367.045(5)(a) Fla. Stat. (emphasis added).

In its February 6, 2001, clarification order this Court found:

> The goal of the court, clearly evidenced from the record, was to divest the County of the contract *and other gains* it had achieved by reason of its due process violation. This gain was manifested in the contract with Sunfield Homes for the provision of water and sewer utility services throughout the Oak Groves PUD. Since entry of this judgment, the County has reaped an ever-increasing benefit due to the on-going development of this PUD. Conversely, Mad Hatter has suffered an ever-increasing deprivation of its interests in this area of growth.

(Doc. #377, pp. 6-7) (emphasis added).

In the case at hand, however, Pasco County is attempting to skew the PSC analysis of the competing interests by contending that the force main that Oak Grove installed for the County as part of the unlawful intrusion into Mad Hatter's system, now puts the County in at least as good an *existing* competitive state as Mad Hatter. Were it not for the County's previously-declared unlawful conduct, the County would be left to argue that they would have to extend miles of pipe to accomplish the connection to the customers in question, an argument that would surely be rejected by the PSC.

Therefore, the County is once again leveraging the unlawful gains it received through its deals with Sunfield Homes to further eliminate any rights or "first in time" arguments which Mad Hatter would have otherwise had to serve the properties. Although the de minimus property at issue here is not presently within its certificated territory, it *would* have been but for the County's unlawful intrusion. In this case, had the County not unlawfully intruded on Mad Hatter's territory and contracted with Sunfield Homes, Pasco would not have received a 10" force main donated to the County as CIAC from Sunfield for service to the Oak Grove PUD and school. This force main extended the County service from Oak Grove PUD East to its Wesley Chapel Sub-Regional Wastewater Treatment Plant to transfer Oak Grove PUD wastewater to that facility. Now, because of that CIAC force main, Pasco County is again using Oak Grove PUD CIAC to contend to the PSC that it can more efficiently provide service to those contested properties and thereby bootstrap itself into a facially equal standing with Mad Hater as to service availability. In reality, it was because of the County's unlawful intrusion and interference that this Court specifically warned against in its order denying a preliminary injunction, that the County gained that "competition" with Mad Hatter even now, after the Final Judgment. (Doc. 72, p. 10 n.1) (in the event plaintiff prevails, "injunctive relief would appear to be necessary to rectify the harms to Plaintiffs and prevent their reoccurrence. The risk borne by the county in these circumstances is that costly improvements may become useless and significant damages may be imposed."). Furthermore, Pasco County was later ordered to disgorge itself of that CIAC as part of the Court's Final Judgment:

> at the time of the transfer of these water and wastewater services, Pasco County, Florida shall also convey to Mad Hatter Utility, Inc., all its rights, title, and interest to the contributions in aid of construction (CIAC) dedicated to it or received by it in connection with the Oak Groves PUD (Phase 1A) and Denham Oaks Elementary School;

Final Judgment, (Doc. #282 at § 2(d)).

There is no doubt that the 10" force main is CIAC received by Pasco in connection with the Oak Groves PUD. A true and correct copy of the First Amendment – Water, Reclaimed Water, and Wastewater Treatment Service Agreement between Pasco County and Sunfield Homes and Orsi Development is attached hereto as Exhibit "E." This agreement, at paragraph 2, shows that the County agreed to construct a 10 inch offsite wastewater force main. Id. Mad Hatter did not have any immediate use for immediate service for that force main for any then-planned area projects including Oak Grove PUD. Thus, Mad Hatter had not previously sought to once again trouble the Court with enforcement of the Court's Final Judgment and Injunction in order to force Pasco to turn the force main over to Mad Hatter or abandon the use of the CIAC in 2001 when Pasco turned over most other CIAC. Mad Hatter was concerned the Court would view any such request as petty at that time. What has occurred since that time, however, is that Pasco County has used the Oak Grove PUD CIAC force main to now contend that it has "service available" adjacent to the Oak Grove PUD parcels in contention, as it is now doing before the PSC in its objection to Mad Hatter's petition to the PSC. Exhibit "B."

Mad Hatter could not have previously realized the pernicious manner in which the County is now again attempting to use that Oak Grove PUD CIAC to declare its superior ability to serve the de minimis Oak Grove PUD parcels outside Mad Hatter's territory. It

would be inequitable to allow the County to succeed in that insidious effort, and Pasco County should be ordered to immediately transfer that CIAC force main to Mad Hatter as originally ordered.

The addition of the de minimis portions of Oak Grove PUD would only require a clarification for at least two reasons: 1) had the County properly disgorged itself of all the benefits of its illegal intrusion, there would be no reasonable issue at the PSC as to whether the County is well-suited to provide service, let alone whether it is best suited to service the properties; and 2) even if Pasco had other facilities capable of serving the extraterritorial properties, had Mad Hatter been left to serve the main portion of Oak Grove, it would have been able to contract for the expansion of the certificate to cover the de minimis parcels as part of the overall agreement to provide service.

Without the force main donated to Pasco by Oak Grove PUD as part of their unlawful negotiations for service, Pasco County would be over 1.76 miles away from the extraterritorial parcels in contention, making its objection at the PSC a nullity. See Pasco County's objection to Mad Hatter Application, filed January 6, 2003, (Exhibit "B"). Pasco County's objection alleges in paragraph 14 that "[f]urthermore, the County's force main is closer to the proposed lift station and thus it is more cost effective for the developers to connect to the County's wastewater system. Exhibit "B." Further, at the end of paragraph 16 of their PSC objection the County alleges that ". . . the application seeks to duplicate existing service" based in part upon the existence of the County's ownership of this force main." Id.

In response to Mad Hatter's contention in its PSC application that the developers will have to reconfigure their system in order to be served by the County system, Pasco County

has alleged in a portion of paragraph 17 "[t]he only reconfiguration will be in the plans submitted by the developers who should not have designed their developments to connect to Mad Hatter, as they are not within Mad Hatter's certificated territory."Id. The County asserts this despite the fact that the developers no doubt "designed their developments to connect to Mad Hatter" during the time the County was illegally contracting to run what is now Mad Hatter's system and as part of the County's scheme, it no doubt required such a design by the developers.

As discussed above, because the Final Judgment requires Pasco County to disgorge its illegal gains from its intrusion, the Court should order Pasco to either abandon the force main, deed the force main over to Mad Hatter Utility, or, if the County has any *substantial* investment of its own funds in the force main, refrain from using the force main to serve Oak Grove PUD.

Even if the County has other means to serve the property, or is willing to run another force main to serve the extraterritorial properties, it should not be allowed to do so, because had Mad Hatter been left to negotiate its service with Oak Grove PUD, the parties would have agreed to include such de minimis extraterritorial properties by extension of the certificated territory. Instead, in this case, Pasco illegally interceded and now Mad Hatter is left to patch together the service after being forced to take legal action to protect its rights. Had Pasco County left Mad Hatter and Oak Grove to work out their differences rather than illegally competing, Mad Hatter would have obtained an accurate plan of the project and would have included the whole project within its certificate long before Pasco would have had competing facilities in the vicinity. Equity should not allow Pasco County to enjoy an additional benefit

of its wrongful actions. See e.g., Janigan v. Taylor, 344 F. 2d 781, 786 (1st Cir. 1965) ("It is simple equity that a wrongdoer should disgorge his fraudulent enrichment."). See United Shoe, 391 U.S. 244 (court can modify order when significant change in facts or law warrants change and proposed modification is suitably tailored to the change; or when significant time has passed and the objectives of the original agreement have not been met); Kennecott Copper Corp., 542 F.2d at 803 (court has inherent power and authority to construe and clarify its order when it is ambiguous or unclear).

II. Pasco County Is Obligated to Accept Wastewater Flows in Excess of 350,000 GPD Pursuant to the 1992 Bulk Wastewater Treatment Agreement

The second issue is whether Pasco County must accept in excess of 350,000 GPD of wastewater from Mad Hatter pursuant to the terms of the 1992 Bulk Wastewater Treatment Agreement. This issue has already been litigated herein and was resolved adversely to Pasco County. Pasco County's effort to re-litigate this issue before the PSC is barred by res judicata. See e.g., In re Justice Oaks II Ltd., 898 F.2d 1544, 1550 n.3 (11th Cir. 1990) (claim and issue preclusion bar re-litigation of issues expressly or impliedly decided in final judgment). Pasco County's wastewater treatment plant(s) issue is nothing but a deceitful and pernicious "shell game." As a result of Pasco's unlawful actions leading to the dismantling of Mad Hatter's wastewater treatment plants, all of the properties in and around Oak Grove PUD including the properties considered herein would be treated at the same wastewater treatment plant whether Pasco County or Mad Hatter provides the customer service.

Furthermore, as discussed above, the County required that Oak Grove PUD donate a 10" force main to it so that the County could provide service to Oak Grove PUD. Mad Hatter

vehemently denies that it must obtain additional capacity at Pasco's Land O' Lakes wastewater facility in spite of the fact Oak Grove wastewater flows were permitted to Pasco's Wesley Chapel Wastewater Treatment Plant many miles east of Oak Grove and just beyond I-75. Nonetheless, had the County raised that issue when Mad Hatter was negotiating a contract with Oak Grove PUD rather than unlawfully usurping that opportunity, Mad Hatter could have sought to have Oak Grove PUD provide the necessary force main to connect to the other Pasco County wastewater treatment plant as the County now insists Mad Hatter must do. This insistence contradicts Pasco's own original permitting. It would be inequitable to allow Pasco to again force Mad Hatter to extend new mains to connect to yet another wastewater treatment plant when it was Pasco that usurped Mad Hatter's original contracting engineering design ability to have the Oak Grove PUD pay for such off-site force main work.

Accordingly, Mad Hatter requests an Order from this Court re-stating or further clarifying the parties' rights and obligations under the 1992 Agreement. Specifically, Mad Hatter seeks a finding that Pasco County must provide service to all of the area encompassed by the Injunction, as interpreted, clarified or extended pursuant to this and previous adjudications.

In the alternative, Mad Hatter asks this court to disgorge the CIAC received by Pasco County to build the Wesley Chapel to Oak Grove CIAC force main discussed above, and transfer that cash CIAC to Mad Hatter in the interest of building the facilities required to meet Pasco's shell game treatment plant requirements.

The County's refusal to supply this additional service violates the spirit and intent of the Final Judgment and constitutes a significant change in the facts warranting a clarification

or modification of the Final Judgment in this regard. Further, the original objectives of the Court's Final Judgment have not been met as a result of the County's refusal and therefore the Court has the authority to modify the Final Judgment to the extent the Court finds that the Final Judgment did not require the County to provide this service. See United Shoe, 391 U.S. 244 (court can modify order when significant change in facts or law warrants change and proposed modification is suitably tailored to the change; or when significant time has passed and the objectives of the original agreement have not been met); Kennecott Copper Corp., 542 F.2d at 803 (court has inherent power and authority to construe and clarify its order when it is ambiguous or unclear).

III. Mad Hatter Is Entitled to Potable Water Withdrawal "Credits"

Because Pasco County is within the Northern Tampa Bay Water Use Caution Area, SWFWMD is very conservative about allowing additional water withdrawals through existing private utility wells, or the permitting of new wells. Accordingly, SWFWMD has refused to relocate or reallocate to Mad Hatter the potable water withdrawal credits which Pasco used to illegally serve the Oak Grove PUD initially, and to which Mad Hatter would otherwise have been entitled and assigned had those credits not previously been allocated to Pasco County. Those credits were given for use when Pasco County declared itself entitled to provide potable water to this project before this Court ruled that Mad Hatter was entitled to provide utility service to the Project. Mad Hatter has attached as Exhibit "F" a report of Peter G. Hubbell (hereinafter the "Report"), the former director of the SWFWMD, who is currently a

consultant in potable water consumptive permitting from SWFWMD.[2] Mr. Hubbell explains the existence of these amorphous withdrawal "credits" and identifies the Oak Grove PUD credits from their "issuance" to Pasco County, to the nature of their existence today. Exhibit "F."

The Final Judgment states:

> Pasco County, Florida, its county commissioners, agents, and servants shall cooperate fully as not to impede or delay the transfer of water and wastewater services to Mad Hatter Utility, Inc. Each party shall initially bear its own costs in accomplishing the transfer of services;

Final Judgment, (Doc. #282 at § 2(e)).

Any meaningful interpretation of the Court's Final Judgment as stated above requires that Pasco County relinquish service, *all* CIAC, customers, pipes, permits and *the water use credits* that it received or used from SWFWMD for potable water to be withdrawn and supplied for Pasco's service to the Project, so that those credits may be promptly reallocated to Mad Hatter. Because those credits are part and parcel of the vital water service from Mad Hatter to the Project, Pasco County has no right to those Oak Grove PUD withdrawal credits. Pasco County should be required to disgorge those credits as was required with the other aspects of service such as CIAC by relinquishing sufficient credits to allow SWFWMD to assign Mad Hatter the proper credits for Oak Grove. Although Mr. Hubbell's Report shows that the credits initially issued for Pasco's use for the Oak Grove Subdivision presently reside with Tampa Bay Water Authority, the Report also identifies a number of wells where the consumptive use permits are in Pasco's own name, from which Pasco could disgorge

[2] Mr. Hubbell's Curriculum Vitae and resume are attached hereto with his Report.

credits to allow Mad Hatter to serve Oak Grove without giving up credits for future customers.

The Oak Grove potable water credits are critical because they allow Pasco County to retain those credits for sale or use to other projects, thereby leaving Mad Hatter with existing permitted *treatment* capacity, but without the permit authority to *withdraw from its wells* a sufficient amount of water to serve the Project. By refusing to give up those credits, Pasco County has ignored the spirit of this Court's Final Judgment and Permanent Injunction if not the written terms of that Injunction. Mad Hatter requests that this Court enforce its Final Judgment and Permanent Injunction by requiring that Pasco County, (or requiring Pasco County to order the body presently holding the credits on Pasco's behalf), to take whatever action is necessary to release or transfer the water withdrawal credits to Mad Hatter. Then SWFWMD will have to acknowledge Mad Hatter's right to withdraw the water for Oak Grove PUD without it being forced to unnecessarily use other credits or permitted quantities committed to other projects.

The County's refusal to relinquish its water use credits violates the spirit and intent of the Final Judgment and constitutes a significant change in the facts warranting a clarification or modification of the Final Judgment in this regard. Further, the original objectives of the Court's Final Judgment have not been met as a result of the County's refusal and therefore the Court has the authority to modify the Final Judgment to the extent the Court finds that the Final Judgment did not encompass these credits. See United Shoe, 391 U.S. 244 (court can modify order when significant change in facts or law warrants change and proposed

modification is suitably tailored to the change; or when significant time has passed and the objectives of the original agreement have not been met); Kennecott Copper Corp., 542 F.2d at 803 (court has inherent power and authority to construe and clarify its order when it is ambiguous or unclear).

IV. Pasco County Must be Compelled to Pay Mad Hatter's Legitimate Costs of Transferring Service as Required by the Court's Earlier Judgment

Mad Hatter also requests reimbursement for costs incurred to date which are directly related to the interconnections necessary to transfer service from Pasco County to the Mad Hatter systems. The costs incurred in this regard are unrelated to issues I-III raised above. Rather, the costs Mad Hatter seeks here are expressly provided for in the Final Judgment which states: "this court retains and reserves jurisdiction of this cause for the entry of orders necessary to the enforcement and execution of this injunction, including any claim for costs associated with the necessary interconnections." Final Judgment, § 2(f), p.3 (Doc. #282).

Specifically, Mad Hatter has incurred in excess of $115,000 to date in direct expenses associated with changing service from Pasco County to the necessary Mad Hatter service design in order to initially serve the Project. See Mad Hatter's Affidavit, attached hereto as Exhibit "G." Mad Hatter estimates that it will cost an additional $200,000 to complete the originally anticipated connections as a result of Pasco County's intrusion and redesign of the service points. Mad Hatter would not have incurred those expenses but for the County's unlawful intrusion. Id. If not reimbursed for those expenses, the PSC will require payment from Mad Hatter's existing customers in the form of modification of utility rates over the life

of the facilities involved. Id. Not only is such delayed reimbursement an improper burden on Mad Hatter, it is also an improper burden on Mad Hatter's rate paying customers who had absolutely no fault in this matter. Id.

Mad Hatter has approached the County regarding payment of the first set of expenses of $15,000 pursuant to a verbal agreement before the Board of County Commissioners in public forum; however, Pasco County staff has to date refused payment and has indicated it does not intend to pay any of the expenses Mad Hatter has incurred. Id. Mad Hatter has attached its accounting back-up for the expenses as part of Exhibit "G."

Therefore, Mad Hatter asks that this court order Pasco County to immediately pay the expenses already incurred by Mad Hatter, and timely pay future expenses to complete the expenses necessary to tie in.

V. Mad Hatter is Entitled to Attorneys' Fees and Costs for Enforcement of the Final Judgment and Permanent Injunction

Finally, Mad Hatter seeks attorney's fees and costs for enforcement of the Injunction violated by the County. Although Mad Hatter did not seek payment of attorney fees in its 2001 Stipulated Motion because the County claimed to be nonaligned in the matter of whether they would be forced to serve all but phase 1A of Oak Grove, in this instance, the County has shown that it continues to pursue a policy of sharp and evasive interpretations to avoid or ignore the Court's Orders and once again usurp the lawful rights of Mad Hatter. Therefore, Mad Hatter has been forced again to file this motion seeking the Court's enforcement and review, and requests attorney's fees and costs for that effort.

The purpose of this motion is to vindicate Mad Hatter's existing rights under the law

and this Court's previous orders. Even if some clarification is required, the backbone of the motion is vindication for Pasco's continuing unlawful and overbearing tactics and avoidance of the Court's orders, either outright or by sophistry. Because Mad Hatter was forced to seek that vindication through the Court, if it is the prevailing party to this action, it is entitled to attorney's fees under 42 U.S.C. § 1988. See e.g., Miller v. Carson, 628 F. 2d 346 (5th Cir. 1980) (prevailing plaintiff entitled to attorney fees for post-judgment work and enforcement of injunction).

CONCLUSION

Mad Hatter respectfully asks this Court to modify the Final Judgment pursuant to Rule 60 (b), under the Court's inherent authority to modify injunctions, and to construe and clarify the Final Judgment under the Court's inherent authority. Mad Hatter respectfully requests the Court to order Pasco County to refrain from serving the Oak Grove PUD at all, as Mad Hatter would have secured that service but for the County's actions. Alternatively, the Court could order Pasco to abandon the CIAC force main, deed it to Mad Hatter, or refrain from using the force main for Oak Grove PUD, thereby effectively eliminating Pasco's unlawful benefit from the CIAC and equitably placing Mad Hatter back in the position it would have had but for the County's actions.

Mad Hatter further requests the Court to order Pasco County to provide wastewater service to Mad Hatter for those de minimis parcels, as such service is consistent with the Court's previous rulings, and equitably places Mad Hatter back in the position it would have been in but for Pasco's unlawful actions.

Mad Hatter also requests that this Court order Pasco County to relinquish the potable water permitted quantity "credits" applicable to Oak Grove PUD it now enjoys and as required by the Court's previous orders, so that Mad Hatter can provide that service without having to relinquish credits from other projects.

Mad Hatter further requests that the Court order Pasco County to reimburse it for the costs incurred in transferring service from Pasco County to Mad Hatter in accordance with the previous orders and judgment of this Court.

Finally, Mad Hatter requests that its attorney fees in this matter be paid by Pasco County, as the County has forced Mad Hatter to seek this relief when the County should have willingly complied with the Court's Final Judgment. Instead the County has propounded sharp and evasive interpretations of the Court's orders to once again steal economic opportunities to which Mad Hatter is lawfully entitled.

Respectfully submitted,

GERALD T. BUHR, P.A.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by facsimile and first class mail on this 18 day of April, 2004, to the following named parties: Marion Hale, Esquire, Johnson, Blakely, Pope, Bokor, et al., Post Office Box 1368, Clearwater, Florida 33757-1368; and H. Clyde Hobby, Esquire, Hobby, Grey & Reeves, 5709 Tidalwave Drive, New Port Richey, Florida 34652.

By: _____
Gerald T. Buhr

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Exhibit

1 A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAD HATTER UTILITY, INC., a Florida Corporation, and LARRY DELUCENAY, President of Mad Hatter Utility, Inc.,

Plaintiffs,

v. **Case No. 8:94-cv-1473-T-TBM**

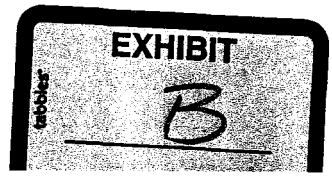
PASCO COUNTY, FLORIDA, a political subdivision of the State of Florida, and DOUGLAS S. BRAMLETT, Assistant Pasco County Administrator,[1]

Defendants.
_____/

ORDER

THIS MATTER is before the court on **Plaintiff's Motion for Clarification, Modification, and Enforcement of Final Judgment and Permanent Injunction Against Pasco County** (Doc. 411) and Pasco County's (hereinafter "County") response in opposition (Doc. 415). By its motion, the Plaintiff seeks clarification, modification, and enforcement of the court's Final Judgment and Permanent Injunction, as modified on February 6, 2001, (hereinafter "Injunction"). See (Doc. 377). In particular, Plaintiff seeks clarification, modification, and/or enforcement of the Injunction with respect to three issues: (1) the applicability of the Injunction to prevent the County from serving a small portion of the Oak Grove Planned Unit Development (hereinafter "PUD") that falls partially outside Mad

[1]As noted in previous Orders, Defendant Douglas S. Bramlett was sued in his official capacity only, and accordingly, Pasco County, Florida is the only proper party defendant.



Hatter's existing Public Service Commission's certificated territory; (2) the County's obligation to accept wastewater treatment flows in excess of 350,000 gallons per day (hereinafter "GPD") under the 1992 Bulk Wastewater Treatment Agreement; and (3) Mad Hatter's entitlement to Southwest Florida Water Management District (hereinafter "SWFWMD") permitted water use quantities or "credits" originally assigned to, and used by, the County exclusively in providing potable water to the Oak Grove PUD.[2] In support, Plaintiff asserts that the Injunction prevents *or should* prevent the County from providing water and wastewater services to this portion of the Oak Grove PUD, that the County is obliged to accept wastewater treatment flows in excess of 350,000 GPD from Plaintiff under the existing 1992 agreement, and that it is entitled to some measure of permitted water use or "credits" from the County and/or SWFWMD for potable water previously permitted the County when it was improperly servicing the Oak Grove PUD. The County essentially responds that Plaintiff is without a legal or factual basis to support these clarifications or modifications. Arguments on the motion were conducted August 11, 2004.

Thereafter, upon a review of the pleadings and consideration of the arguments presented, the court ordered the parties to submit supplemental pleadings with supporting documents or other exhibits. See (Doc. 423). Both parties have filed supplements to their arguments, survey maps of the disputed areas, affidavits, and exhibits bearing on the facts presently at issue. See (Docs. 428-431, 433). Supplemental arguments were taken January 7, 2005.

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[2]The motion seeks one additional form of relief. By Order of August 12, 2004, the court has deferred ruling on the matter pending additional investigation by the parties. See (Doc. 420).

I.

Rule 60(b) of the Federal Rules of Civil Procedure gives the court discretion to provide relief from Final Judgment and modify injunctions. Fed. R. Civ. P. 60(b); see Epic Metals Corp. v. Souliere, 181 F.3d 1280, 1283-84 (11th Cir. 1999). An injunction may be modified when the original purposes of the injunction are not being fulfilled in any material respect. Epic Metals, 181 F.3d at 1283-84 (quoting Exxon Corp. v. Tex. Motor Exch. of Houston, Inc., 628 F.2d 500, 503 (5th Cir. 1980), and following United States v. United Shoe Mach. Corp., 391 U.S. 244 (1968)). The court should look to the original purpose of the permanent injunction and modify the injunction if the plaintiff can show that a new circumstance infringed on that purpose. Epic Metals 181 F.3d at 1284; Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc., 798 F.2d 1529, 1539 (11th Cir. 1986).

II.

Here, Plaintiff urges that at least one significant change in the facts and new and antagonistic actions by the County, together with the passage of time and the failure of the Injunction to achieve its objectives, warrant the court again clarifying and modifying the Injunction. As for the significant change in facts, the Plaintiff proffers that since it took over water utility service of the Oak Grove PUD in May 2001, it discovered that a portion of land situated at the northeast corner of the Oak Grove PUD fronting State Road 54 (hereinafter the "S.R. 54 property"), is not within its certificated territory.[3] This discovery was made in or about October 2002 when Plaintiff negotiated a developer's agreement with Eagle Creek

[3]It also discovered that a portion of the build out of the Oak Grove PUD, which it now services, also lies outside its certificated area of service.

Properties Management, Inc. (hereinafter "Eagle Creek"), the developer of a parcel at the eastern side of the S.R. 54 property, and a survey revealed the problem. To rectify this situation, Plaintiff filed an application with the Florida Public Service Commission (hereinafter "PSC") seeking to add all the S.R. 54 property to its certificated area. See (Doc. 411 at Exh. A). Before the PSC and this court, Plaintiff argues that the configuration of the facilities constructed by the developer of the Oak Grove PUD and the practicalities of the situation require that the entire development, including all the S.R. 54 property, be served by a single water utility. It appears from the proffered evidence that the County stepped in to contract with the developer after Plaintiff discovered the area was outside its certificated area but before the matter of extending its territory could be resolved by the PSC. At present, water utility services for the developed portion of the S.R. 54 parcel are with the County. Before the PSC, the County has opposed Plaintiff's application on the grounds that it has an existing water and wastewater system in the proposed area, it is better suited to provide the service, and that Plaintiff's system would be an unnecessary and inappropriate duplication of service.[4] The County has also argued that Plaintiff does not have the capacity to provide wastewater treatment services to the proposed area and it is not obliged to, and in fact is

[4]Plaintiff contends that the County can make this argument only because "the force main originally installed by Oak Grove for the County as CIAC places the County's facilities in close proximity to the requested service." (Doc. 411 at 6-7). By the Plaintiff's argument, this is another ill-gotten gain of the County by reason of its due process violation. Under the Injunction, the County was ordered to surrender its interest in any CIAC dedicated to or received by it in connection with the Oak Grove PUD. (Doc. 282). The contribution at issue was a payment of $78,000 by Sunfield Homes to the County to offset the cost of the County's extending a force main to service this area. Although not raised previously, Plaintiff now argues that the force main received by the County from Sunfield Homes is CIAC within the contemplation of the Judgment and Injunction.

unable to, assist them further in this regards.[5] See id. at Exh. B. Plaintiff has argued to the PSC that the County is barred from taking these positions by reason of the court's Final Judgment and Permanent Injunction. Plaintiff also urges to this court that the blame for its belated discovery that a portion of the Oak Grove PUD lies outside its certificated territory is with the County because of the County's original intrusion into Plaintiff's certificated territory. As the argument goes, because of the County's intrusion, Plaintiff never received an accurate legal description of the development from Sunfield Homes or Orsi Development (hereinafter collectively "Sunfield Homes") to compare with the boundaries of its certificated area of service. It was only when the latest developer came to it for water utility services that the discrepancy was discovered.

As for the matter of water credits, Plaintiff maintains that when the County originally usurped its right to serve the Oak Grove PUD and Denham Oaks School, SWFWMD permitted the County potable water in sufficient quantities or withdrawal credits to provide this service. According to Plaintiff, SWFWMD has now refused to transfer those water credits, as new or replacement credits, from the County to the Plaintiff. As a result, Plaintiff complains that it has been caused to utilize credits designed, permitted, and reserved for future development in order to serve the immediate needs of the Oak Grove PUD and the Denham Oaks School. Because the County has refused to recognize the issue or voluntarily relinquish the credits, Plaintiff argues that it is profiting from an ill-gotten gain derived from its due process violation which the court should now address under the Injunction. (Doc. 441 at 8-9).

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[5]According to the Plaintiff, this argument is inappropriate under an existing 1992 contract, as well as the Injunction, and evidences the County's continued bad faith. (Doc. 431 at 7-8).

III.

Under the applicable standard, the court's purpose in granting injunctive relief in the first instance is of some import. In its previous Order modifying the Injunction, the court acknowledged that its goal in awarding injunctive relief, in lieu of the damages awarded by the jury for the County's due process violation, was to place the parties in the same position they would have occupied had the County not violated Plaintiff's due process rights by contracting with Sunfield Homes for the provision of water and wastewater services at the Oak Grove PUD. Specifically, the court stated, "[t]he goal of the court, clearly evidenced from the record, was to divest the County of the contract and other gains it achieved by reason of its due process violation." See (Doc. 377 at 6). To this end, the court modified the original Injunction prohibiting the County from providing water and wastewater services pursuant to the contract by expanding its scope to the entirety of the Oak Grove PUD and Denham Oaks Elementary School. Additionally, the court again directed the County to surrender all its rights, title, and interest to the CIAC it received in connection with the Oak Grove PUD. Id. at 7. After careful consideration, the court concludes that Plaintiff's motion (Doc. 411) should be denied because the purpose of the Injunction is not being defeated and further clarification or enforcement is not required.

In the present dispute, the parties argue contrary positions as to whether the S.R. 54 property is within the Oak Grove PUD.[6] By the plain language of the Injunction, if the property is situated within the Oak Grove PUD, it is already governed by the Injunction and

[6]Plaintiff initially argued that the disputed area is within the Oak Grove PUD. (Doc. 411). In its supplemental response, it stated, "[a] portion of the total area in dispute lies within the Oak Grove PUD, and a portion lies outside the PUD." (Doc. 431 at 2). The County maintains that the S.R. 54 property is not within the PUD.

enforcement, but no modification, would be in order. However, upon review of the supplemental pleadings and submissions, it is apparent that while the S.R. 54 property was part of the land area for which the County originally contracted with Pasco 54 Joint Venture in 1988[7] for the provision of water utility services, it was not part of the intended build-out of the Oak Grove PUD.[8] Because the S.R. 54 property is within the scope of the offending contract, it is arguable that the court should again deny the County the gains derived from the contract by reason of its provision of water and wastewater services to the commercial development. However, the facts reveal that but for the circumstance that the parcel developed by Eagle Creek within the S.R. 54 property was outside Plaintiff's certificated area, Plaintiff would likely have had the contract for the provision of these water utility services. While the County may have subsequently exploited this circumstance in contracting with Eagle Creek, it is not demonstrated that it exploited the offending contract which this court sought to address by the Judgment and Injunction. As a matter of Florida law, Plaintiff has no right at present to serve this portion of the S.R. 54 property, and this court is without authority to change that circumstance. Additionally, as the court has ruled previously, the underpinning to the Plaintiff's success on this due process claim is its property right derived from the franchise

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[7]Sunfield Homes was the successor in interest to Pasco 54 Joint Venture and the land covered by that contract. (Doc. 431 at Exhs. 3-4). The offending contract between Sunfield Homes and the County amended this agreement. Id. at Exh. 5.

[8]The court concludes that this is best revealed by the survey maps which do not show any build-out of the S.R. 54 property until in or after 2002. See (Doc. 431 at Exhs. 6, 7, 9; Doc. 429, Oak Grove PUD map). While Plaintiff may argue that the physical structure of the Sunfield Homes utility system reveals the anticipated future build-out of the S.R. 54 property, according to the design engineer for this utility system, the commercial properties were not intended to be included within the Oak Grove PUD's system. (Doc. 431 at Exhs. 8, 11). In the court's view, this build-out was not part of the Oak Grove PUD, which was a residential community, or the subject of the Injunction.

granted to it by the PSC. In the circumstances presented, the court cannot conclude that the actions by the County have violated this property right of the Plaintiff. Thus, an extension of the Injunction or enforcement thereof is not appropriate. The matter of whether the S.R. 54 property should be added to Plaintiff's certificated territory is in the hands of the PSC, not this court.

Insofar as the motion raises an issue concerning CIAC, the resolution is more problematic. On its face, the $78,000 contribution by Sunfield Homes to the County was CIAC, both under the offending agreement and as that term is defined under Florida law. See Fla. Stat. ch. 367.021 (3) (1999); see also 25 Fla. Admin. Code Ann. R. 25-30.515 (2004).[9] Given that the Injunction was intended to strip the County of the benefits derived from its due process violation in connection with its agreement with Sunfield Homes and that the Injunction expressly directed the County to surrender all CIAC to the Plaintiff, an Order directing the County to disgorge this contribution is arguably appropriate. However, in the circumstances of this case, such an Order may be inappropriate. As urged by the County, Plaintiff would never have extracted this particular contribution from Sunfield Homes or constructed this particular infrastructure because it already had a force main in place at a different location that would have been used to connect with the Oak Grove system. By the

[9]Public utilities such as the County are not subject to the provisions of this chapter; nor are they subject to regulation by the PSC. See Fla. Stat. ch. 367.022 (2002). However, this or similar definitions have guided the court and the parties throughout the post-judgment proceedings. As an example, a portion of the force main constructed with the aid of this contribution was previously turned over to the Plaintiff as a result of the Judgment and Injunction. The County's transfer of such infrastructure undermines any suggestion on this motion that the contribution was not CIAC subject to the court's Order.

County's argument, it timely turned over the appropriate portion of this force main[10] when the CIAC was transferred to Plaintiff and the remaining force main is now an integral part of its wastewater collection system that cannot be divided up without significant interruption of service to its customers. While Plaintiff maintains that this force main would not have been built but for the offending contract, the County contends the portion of the force main at issue was inevitable as its own service area expanded and the need for additional wastewater treatment capacity developed. In any event, the force main was built largely with public money and the contribution by Sunfield Homes covered only a portion of the costs of the force main and cannot be identified with any specific or divisible segment of the project.

Although these circumstances have existed since the May 2001 transfer of CIAC, the matter is now of some urgency to the Plaintiff because of the position the County has taken with respect to its application to the PSC to expand its territory to include all the S.R. 54 property. Plaintiff maintains that because of the existence of this ill-gotten force main, the County has been able to argue that it is the better suited utility to serve the S.R. 54 property and thus the application should be denied.[11] Plaintiff seeks relief that will prevent the County from making this argument before the PSC. Initially, Plaintiff requested an Order directing the County to abandon the CIAC force main and deed it to Plaintiff or refrain from using it to

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[10]It appears from arguments that the County disconnected the portion of the force main running alongside Oak Grove Boulevard (and across the S.R. 54 property from the Oak Grove PUD) and surrendered it to the Plaintiff at the time it transferred the other infrastructure in compliance with the Injunction. The portion of the force main continuing east and then north along S.R. 54 remains under use by the County to service its own customers and some of Plaintiff's customers.

[11]As discussed above, the County's argument before the PSC adds that it already provides service in this area and, in any event, Plaintiff has no additional wastewater treatment capacity and is therefore incapable of serving this additional area under any circumstances.

service the PUD (which it argues includes the S.R. 54 property). (Doc. 411 at 10). In its supplemental response, Plaintiff seeks an Order directing the County to pay it $78,000 and a decree that the County cease to use the force main to serve customers "beyond the right-of-way." In the alternative, Plaintiff requests an Order directing the County to turn over ownership of the force main back to the right-of-way where it commenced extension. (Doc. 431 at 10- 11).

After careful consideration, the court concludes that while the $78,000 contribution by Sunfield Homes was CIAC, the portion of the force main proceeding along S.R. 54 and not transferred to the Plaintiff is not CIAC contemplated in the Final Judgment and Permanent Injunction and need not be surrendered by the County.[12] Further, while the monetary contribution made by Sunfield Homes to assure an interconnect with its system may qualify as CIAC, an award of $78,000 to Plaintiff would be wholly arbitrary in the circumstances of this case. Rather than speculate on what Sunfield Homes might have been required to pay to Plaintiff for the necessary interconnect to its force main, the court will look to the actual costs

[12]It is most probable that the court would not have considered appropriating the entirety of this force main to Plaintiff at the time it entered Judgment and fashioned the Injunction, and there has been no change in circumstances warranting the court to do so now. The force main is, as contended by the County, an integral part of its wastewater collection system in that part of the county; it serves thousand of customers including some of Plaintiff's customers. Any grant of authority over this force main, or even a portion of it, to Plaintiff would give Plaintiff a windfall it does not deserve on this verdict. In any event, doing so would likely disserve the public interest. Because the court has concluded that the S.R. 54 property is not a part of the Oak Grove PUD and is outside the Plaintiff's certificated area, requiring that the County abandon this force main in connection with the S.R. 54 parcel it now serves would result in unnecessary waste. The fortuitous benefit that this force main provides the County in its argument in opposition to Plaintiff's application before the PSC to expand its territory does not change this conclusion. Had Plaintiff properly surveyed its service area when it sought its PSC certificate, the force main itself would likely not be an issue. Finally, it is apparent that this force main or one similar to it was inevitable and has worked to benefit both the County and Plaintiff.

to the Plaintiff of making the necessary interconnects to its force main after the transfer of service to it by the County. As noted above, the court has deferred ruling on this aspect of the Plaintiff's motion. See (Doc. 420). If the parties cannot agree on the actual costs of the Plaintiff's interconnect after the County transferred services to it, the matter will be further addressed by the court.[13]

Plaintiff next asks the court to address the parties' 1992 Bulk Wastewater Treatment Agreement, in particular, the County's obligation thereunder to treat wastewater from Plaintiff.[14] In the court's view, the agreement speaks for itself and no further clarification is

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[13]As reflected in the Final Judgment, the court expressly retained jurisdiction to enter orders necessary to the enforcement and execution of the Injunction, "including any claim for costs associated with the necessary interconnects." (Doc. 282 at 3). The court finds this ongoing process to be the appropriate vehicle for remedying Plaintiff's loss here.

[14]The 1992 agreement states in pertinent part:

> [s]ubject to the conditions and limitations set forth in the Memorandum of Understanding and this Agreement, the County shall provide bulk wastewater treatment services in an amount of 350,000 gallons per day (annual average) to Mad Hatter.
>
> ***
>
> [t]he County agrees to treat wastewater in excess of 350,000 gallons per day pursuant to this agreement provided sufficient unused and uncommitted capacity is available at the County's wastewater treatment facilities, as determined by the County, and all appropriate permits have been obtained by Mad Hatter from State regulatory agencies.
>
> ***
>
> [t]his agreement shall not be considered an obligation on the part of the County to perform in any way other than as indicated herein. The County shall not be obligated under the terms of this Agreement to treat additional wastewater from Mad Hatter from areas outside of its certificated area or areas which are not presently served by Mad Hatter unless the County issues written notification that it does not object to such additional service. Mad Hatter's service area is more specifically identified on Exhibit 3 attached hereto . . ."

required. The Injunction, as modified, directed the County to "make available to Mad Hatter Utility, Inc., sufficient bulk wastewater treatment capacity as is necessary to serve" Oak Grove PUD and Denham Oaks Elementary School. See (Doc. 282 at 2-3; Doc. 377 at 7). To the court's knowledge, the County has abided by this aspect of the Injunction regardless of the amount of wastewater flowing from the PUD and it will continue to do so. As a means of accomplishing this, the court did co-opt the 1992 agreement and direct that the provision of such services was to be "in accordance with and subject to the terms of the parties' 1992 permanent bulk wastewater treatment agreement." Id. However, the Injunction was intended only to insure Plaintiff sufficient wastewater treatment capacity (in whatever amount necessary) to meet the needs of the Oak Grove PUD and the school. Outside the PUD, the 1992 agreement and any others reached between the parties is controlling. As the court has noted previously, the County remains under a continuing duty to deal fairly and act in good faith toward the Plaintiff in administering their agreements (as well as in complying with the Injunction). Otherwise, the motion raises no circumstances requiring or warranting modification or enforcement of the Injunction at this time.

Finally, Plaintiff asks this court to order the County and/or SWFWMD to transfer to it water withdrawal credits originally granted to the County by reason of it wrongfully assuming the water utility service at the Oak Grove PUD. By this argument, neither SWFWMD nor the County has agreed to allocate or reallocate to Plaintiff those water use permits, even after the Court ordered the County to cease the water utility service at Oak Grove. While the court

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See (Doc. 411, Exh. C at 5-6, 10). The County's submission of Exhibit 3 to the agreement indicates that the area now referred to as Oak Grove PUD was not being serviced by Plaintiff at that time. See (Doc. 429). In the past, the parties have disagreed on the contents of the original exhibit and the court does not here attempt to resolve that dispute.

finds the argument stimulating, it concludes that the circumstances presented do not raise an issue of modification or enforcement under the Injunction. In the first instance, SWFWMD is not a party to this suit and it has not been shown to have acted contrary to the Judgment of the court. Secondly, the matter of the proper allocation of water use permits is appropriately left to the State water management districts. As such, SWFWMD appears to be the appropriate body to resolve this dispute. From the proffered evidence, when presented with this same argument, SWFWMD declined to take action on the Plaintiff's behalf. The court finds nothing about SWFWMD's decision in this regard that implicates the Injunction. Likewise, the court is unable to conclude that the County's refusal to agree with the Plaintiff's claim of credits violates its Judgment or implicates the Injunction. While it appears correct that the County gained the advantage, at least for some period of time, of some additional water use permits to which it was not entitled (under the verdict in this cause), that circumstance no longer exists.[15] Through the passage of time and by reason of the Injunction, the County has already been divested of that gain. At this late date, the court cannot conclude that it must order the County to transfer some quantum of its current water use permits to Plaintiff in order to compensate for this gain. As far as the court can tell, the additional potable water permitted to the County during the period of time it serviced Oak Grove was used to service its customers in Oak Grove or elsewhere and has long been exhausted. During this entire period, it otherwise appears that the Plaintiff has had adequate quantities of potable water to meet the demands of its customers as well and so it has suffered no actual loss. If this is so, then any

[15]According to its Utilities Director, the County has ceased including the Oak Grove PUD in its renewal applications for water use permits. At the same time, its former Oak Grove customers have been replaced by new customers to its water utility. See (Doc. 416).

form of compensatory award of water credits appears unnecessary. As for the harm that Plaintiff alleges will befall it in the future, the remedy appears to lie with the appropriate State authority charged with the proper allocation of water use permits rather than this court.

IV.

Accordingly, for the reasons set forth above, it is **ORDERED** that **Plaintiff's Motion for Clarification, Modification, and Enforcement of Final Judgment and Permanent Injunction Against Pasco County** (Doc. 411) is **DENIED.**

Done and Ordered in Tampa, Florida, this 13th day of January 2005.

THOMAS B. McCOUN III
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record

COPY

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

MAD HATTER UTILITY, INC., a Florida Corporation, Plaintiff, v. PASCO COUNTY, a Political Subdivision of the State of Florida, Defendant.	51-02005CA002416ES Case No. _____

COMPLAINT

COMES NOW, Plaintiff, MAD HATTER UTILITY, INC., a Florida Corporation ("Plaintiff"), by and through its undersigned counsel, and sues, Defendant, PASCO COUNTY, a political subdivision of the State of Florida ("Defendant"), and states:

1. This is an action for breach of contract, with damages in excess of $15,000, declaratory judgment, under chapter 86, *Florida Statutes*, and specific performance.

2. Plaintiff, MAD HATTER UTILITY, INC. is a Florida Corporation organized under the laws of the State of Florida.

3. Defendant, PASCO COUNTY, is a political subdivision of the State of Florida.

4. The subject of this action is that certain Bulk Wastewater Treatment Agreement Between Mad Hatter Utility, Inc. and

EXHIBIT
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Pasco County ("Agreement"), as well as certain ordinances promulgated by Pasco County.

5. Plaintiff provides water and wastewater within its certificated service territory, as established by the Public Servcie Commission, within Pasco County, Florida.

6. Plaintiff is a corporate customer of Defendant.

7. On February 11, 1992, Plaintiff and Defendant entered into the Agreement. The purpose of the Agreement is expressly stated in the Agreement, wherein it reads:

> It is the purpose and intent of this Agreement to provide for central public sewer services to existing homes and structures and future homes and structures located in the certificated area of Mad Hatter Utility, Inc. and to provide for additional assurances of timely payment to the County of all costs incurred in the provision of such service by the County, including, but not limited to, cost of operation and maintenance, debt service costs, capital costs, renewal and replacement costs, and expansion costs.

A copy of the Agreement is attached as Exhibit "I" and included herein by reference.

8. The Agreement provides, at Section II, A., that the "County shall provide bulk wastewater treatment services in an amount of 350,000 gallons per day (annual average) to Mad Hatter." The Agreement also provides, at Section II, D., that

> The County agrees to treat wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommited capacity is available at the County's wastewater treatment facilities, as determined by the County, and all appropriate permits have been obtained by Mad Hatter from State regulatory agencies.

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2548 Blairstone Pines Drive, Tallahassee, Florida 32301

9. Plaintiff has required, now requires, and will in the future require that more than 350,000 gallons per day of bulk wastewater be treated by the Defendant under the Agreement.

10. Plaintiff has requested, on numerous occasions, that the Defendant provide the needed bulk wastewater capacity necessary to service new or potential customers of Plaintiff; however, Defendant has refused to provide or commit the additional capacity needed to provide service to said new or potential customers.

11. Defendant has the necessary unused and uncommitted capacity available at its facilities to provide the requested service, yet Defendant continues to deny Plaintiff this commitment for bulk wastewater services.

12. Defendant now maintains that, contrary to the language of the Agreement, Defendant need not provide more than 350,000 gallons per day of this bulk wastewater for any reason, whatsoever.

13. In addition to Defendant's denial of Plaintiff's continuing request for service, Defendant has, in the past, been reprimanded by the Federal Courts for its predilection for encroaching upon and interfering with the services that Plaintiff provides its customers within its certificated service territory.

14. Such encroachments and interferences have included such actions as the redundant laying of utility facilities in areas being adequately and reasonably served by plaintiff.

15. Defendant has voluntarily engaged in the provision of

central wastewater services to the residents of Pasco County by declaring, in Section 110-28 of the Pasco County Ordinances, that the physical area embraced by the Defendant's wastewater services ordinances is intended to be "all the unincorporated area of the county."

16. Pasco County has enacted Section 110-33, of the Pasco County Ordinances, entitled "Service for bulk water customers," which provides, in pertinent part:

> The county shall have the *absolute right at all times* to refuse to extend service on the basis of a use detrimental to the county's water system, *that the municipally owned or private utility is in competition with existing or planned county facilities*, the lack of payment of required fees, the lack of sufficient capital costs, replacement costs and expansion costs, that the requested service would not be cost-effective for the county *or for any reason which, in the opinion of the county, will cause the extension not to be in the public interest*. (Emphasis supplied).

17. Based upon this Ordinance, Defendant has denied, and continues to deny, Plaintiff's service requests.

18. This ordinance, upon which Defendant predicates its discriminatory denial of wastewater treatment service to Plaintiff, notwithstanding Plaintiff's just and reasonable need, is arbitrary, unreasonable, and demonstrates Defendant's predilection toward using its wastewater treatment services in a discriminatory manner to further its own pecuniary advantage.

19. As a present customer of Defendant, Plaintiff is ready, willing and able to provide reasonable compensation to Defendant

for the requested increase in Plaintiff's wastewater treatment commitment.

20. Nevertheless, although Plaintiff is in need of an augmented wastewater treatment services and Defendant possesses such excess wastewater treatment capacity, Defendant has unreasonably refused to meet Plaintiff's reasonable request for an increase in wastewater treatment service.

21. By unreasonably denying Plaintiff wastewater treatment service concomitantly with Plaintiff's ordinary increase in wastewater treatment needs, Defendant is unreasonably discriminating against Plaintiff based on Plaintiff's provision of services to which Defendant would like to secede.

22. As a direct result of Defendants actions, Plaintiff has suffered, continues to suffer, and will continue to suffer damages.

Count I

23. Plaintiff realleges and incorporates by reference the allegations in paragraphs one (1) through twenty-two(22).

24. Under the Agreement, Defendant is obliged to "treat wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommited capacity is available at the County's wastewater treatment facilities. . . ."

25. Defendant has the unused and uncommitted capacity to treat wastewater in excess of 350,000 gallons per day.

26. Defendant has refused, and continues to refuse, to treat

wastewater in excess of 350,000 gallons per day notwithstanding Plaintiff's requests for such service.

27. Defendant's continuing refusal to honor its obligations under the Agreement has resulted in a breach of the Agreement by Defendant.

28. Plaintiff has performed all conditions precedent to be performed by Plaintiff under the Agreement, or the conditions have occurred or have been excused.

29. As a result of Defendant's breach, Plaintiff has been damaged, continues to be damaged, and will continue to be damaged so long as Defendant continues to refuse to honor its obligations under the Agreement.

WHEREFORE, Plaintiff demands judgment for damages against Defendant, together with court costs for this action, and such other relief as this Court may deem appropriate.

Count II

30. Plaintiff realleges and incorporates by reference the allegations in paragraphs one (1) through twenty-nine (29).

31. In the alternative, should the Court determine that there is any ambiguity in the Agreement, Plaintiff seeks a declaratory judgment determining its rights and obligations under the Agreement.

WHEREFORE, Plaintiff demands that judgment be entered declaring Plaintiff's rights under the Agreement, together with

court costs for this action, and such other relief as this Court may find appropriate.

Count III

32. Plaintiff realleges and incorporates by reference the allegations in paragraphs one (1) through thirty-one (31).

33. Defendant is prohibited from engaging in discriminatory practices in the provision of water or wastewater services in an area that Defendant has expressly manifested its intent to provide service.

34. As applied to Plaintiff, Section 110-33 demonstrates that Defendant has passed into law the ability to discriminate against Plaintiff in its provision of wastewater services, not only based on Defendant's finding that Plaintiff is "in competition" with Defendant, but for "any reason ... in the opinion of" the Defendant, notwithstanding Defendant's express assumption of an obligation to provide wastewater services to the residents of unincorporated Pasco County.

35. This ordinance is contrary to established law, as it purports to allow the Defendant to deny the provision of wastewater services to other utilities who may be "in competition with ... planned county facilities" in contravention of Pasco County's duty to provide such services and regardless of whether such "planned facilities" are already present or whether established service providers are generally better able to serve new or existing

customers. It is the law of the State of Florida that Defendant may not prevent the public from being served by the entity best able to serve it. Defendant's incorporation of this provision in its ordinance is thus contrary to established law.

36. Further, Section 110-33 is contrary to general law, as provided in Section 153.51, Florida Statutes (2004). Section 110-33 allows the arbitrary denial of wastewater service based on conflict with potential pecuniary gains of the Defendant by allowing refusal of service if "in competition" with Defendant's facilities. Section 153.51, however, provides that it is the intent of the legislature that Chapter 153 be utilized by county water and wastewater districts to provide water and sewer services to unincorporated areas of the counties of the State of Florida. Defendant's ability to provide water and wastewater services to residents in Pasco County is predicated on this statutory authority and, by refusing to meet the just and reasonable needs of Plaintiff, Defendant is denying service to the residents of the unincorporated areas of the County served by Plaintiff. Therefore, the ordinance upon which Defendant bases this denial of service is invalid as contrary to general law.

WHEREFORE, Plaintiff demands that judgment be entered declaring Section 110-33, Pasco County Ordinances, illegal together with court costs for this action, and such other relief as this court may find appropriate.

Count IV

37. Plaintiff realleges and incorporates by reference the allegations in paragraphs one (1) through thirty-six (36).

38. The provision of central wastewater service to customers in Pasco County is a service of a public nature.

39. Defendant has, through its voluntary undertaking of wastewater treatment services to the unincorporated areas of Pasco County, as evidenced by Section 110-28, assumed an obligation implied by law to render, for reasonable compensation and without discrimination and to all of the public in unincorporated Pasco County, service reasonably adequate to meet the just requirements of its customers.

40. Therefore, as a customer and citizen of Pasco County, Plaintiff is entitled, upon the tender of reasonable compensation, to reasonable service that meets Plaintiff's wastewater treatment requirements.

41. Similarly, Plaintiff is entitled to the reasonable provision of wastewater treatment service without discrimination.

42. Defendant's actions, based upon its asserted authority under Section 110-33, have dened Plaintiff equal protection under the U.S. and Florida Constitutions.

WHEREFORE, Plaintiff demands that judgment be entered declaring Section 110-33, Pasco County Ordinances, unconstitutional as violative of the Equal Protection Clauses of the U.S. and

Florida Constitutions, together with court costs for this action, and such other relief as this court may find appropriate.

Count V

43. Plaintiff realleges and incorporates by reference the allegations in paragraphs one (1) through forty-two (42).

44. Defendant has an obligation to "treat wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommited capacity is available at the County's wastewater treatment facilities. . . ."

45. Defendant has the unused and uncommitted capacity to treat wastewater in excess of 350,000 gallons per day.

46. Defendant has refused, and continues to refuse, to treat wastewater in excess of 350,000 gallons per day notwithstanding Plaintiff's requests for such service.

47. Even assuming that Plaintiff is successful in obtaining an award of damages against Defendant, without a court order, Plaintiff stands to continue to be damaged by Defendant's actions, should Defendant continue to refuse to provide service.

48. Defendant is the only service provider who could provide this service to Plaintiff at this time.

49. Accordingly, without the protection of a court order requiring Defendant to perform under the Contract, Plaintiff will continue to be damaged without any adequate remedy at law.

WHEREFORE, Plaintiff demands that judgment be entered in its

favor and against Defendant, that the Defendant be ordered to perform pursuant to the Agreement, together with court costs for this action, and such other relief as this court may find appropriate.

Respectfully submitted this 29th day of August, 2005.

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Bar No. 657328
Counsel for Plaintiff

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2/13/92

BULK WASTEWATER TREATMENT AGREEMENT BETWEEN MAD HATTER UTILITY, INC. AND PASCO COUNTY

THIS AGREEMENT, made and entered into this 11th day of February, 1992, by and between Mad Hatter Utility, Inc., a Florida Corporation, organized under the laws of the State of Florida, hereinafter referred to as "Utility", and Pasco County, a political subdivision of the State of Florida, acting by and through its Board of County Commissioners, the governing body thereof, hereinafter referred to as "County".

W I T N E S S E T H:

WHEREAS, the Utility has received a certificate from the Florida Public Service Commission authorizing the provision of public sewer service to an area located in the southeast portion of the County pursuant to Chapter 367.041, Florida Statutes; and,

WHEREAS, the Utility has requested the County to provide such bulk wastewater treatment service for its existing customers and specifically designated new customers of Mad Hatter's system; and,

WHEREAS, subject to the conditions and limitations set forth herein, the County desires to provide bulk wastewater treatment services to Mad Hatter for the purpose of offering centralized wastewater services from the County's Land O'Lakes Subregional Wastewater Treatment Plant which presently possesses sufficient excess capacity to provide such treatment; and,

WHEREAS, in conjunction with the requested service the County desires to provide certain standards for the expansion of the Utility's wastewater treatment system and certain requirements for

EXHIBIT "I" Total of 13 pages

the quality of effluent delivered by the Utility to the County for treatment.

NOW, THEREFORE, in consideration of the premises which shall be deemed an integral part of this Agreement and of the mutual covenants and conditions set forth herein, the County and Utility intending to be legally bound thereby, agree as follows:

Section 1. Purpose.

It is the purpose and intent of this Agreement to provide for central public sewer services to existing homes and structures and future homes and structures located in the certificated area of Mad Hatter Utility, Inc. and to provide for additional assurances of timely payment to the County of all costs incurred in the provision of such service by the County, including, but not limited to, cost of operation and maintenance, debt service costs, capital costs, renewal and replacement costs, and expansion costs. All terms and conditions contained herein shall be read and interpreted in a manner consistent with and in furtherance of this purpose and intent.

Section II. Bulk Wastewater Treatment Service.

A. Subject to the conditions and limitations set forth in the Memorandum of Understanding and this Agreement, the County shall provide bulk wastewater treatment services in an amount of 350,000 gallons per day (annual average) to Mad Hatter. Such services shall be provided through the existing connection with Mad Hatter Utility, Inc's system. Mad Hatter agrees to change this connection, at no cost to the County, if determined necessary by the

County to continue service under this Agreement. The location and type of connection shall be approved by the County prior to the time that the work is actually performed. Such work shall be supervised and directed by the County and must meet all applicable State and County standards. It shall be the responsibility of Mad Hatter to furnish proof from its staff, engineer, or other appropriate source to the County's Utility Director and/or other appropriate members of the staff of the comparability and equivalency of all such material and standards of performance as previously mentioned.

1. Mad Hatter shall install, as part of its connection to the County system, an appropriate metering device(s) at all points of connection which is acceptable to the County for the purposes of determining the amount of wastewater treatment services being provided by the County pursuant to this Agreement. It shall be the responsibility of Mad Hatter to pay all costs associated with the purchase and installation of such meter(s). The County shall own and operate the meter(s), and the County shall have the absolute right of access for testing, reading purposes, and for any necessary repairs to maintain the integrity of the County's wastewater collection system. Mad Hatter shall also be provided reasonable access to the meter(s) for testing and reading purposes.

2. Meter Reading and Payments - The County will invoice Mad Hatter on a monthly basis in accordance with meter readings taken. Mad Hatter shall make payment based upon the meter readings within thirty (30) days after receipt of the invoice from the

County. In the event that the payment is not made within thirty (30) days after receipt of the invoice, Mad Hatter agrees to pay interest or penalties as established from time to time in the County's utility system service regulations on the outstanding balance until paid in full. Nothing contained herein, including the charging of interest, shall extend the due date for any payment and any failure to pay on or before the due date shall be considered a default under the terms of this Agreement. Mad Hatter shall be liable for the costs of the purchase and installation of any meters or similar equipment or devices used to measure the amount of wastewater treated. In the event Mad Hatter disputes the accuracy of any meter reading, it must notify the County within ten (10) days of billing and demonstrate through appropriate calibration testing that the meter is either not properly calibrated or is not functioning properly. All meter readings not disputed within fifteen (15) days of reading and publication are final and not subject to dispute.

B. Monthly Service Rate - Mad Hatter agrees to pay the County a service rate of Three and 12/100 Dollars ($3.12) per thousand gallons of wastewater treated based upon the meter readings; provided, however, this rate, including any or all components thereof, may be adjusted upward or downward by the Board of County Commissioners from time to time in accordance with the County's rate-setting procedures. In addition One and 00/100 Dollar ($1.00) per thousand gallons, which amount may be adjusted from time to time by the Board of County Commissioners, shall be added as a

capital recovery surcharge for wastewater flow treated from existing development and committed development as described below.

C. Impact Fees - In addition to the monthly service rate, Mad Hatter agrees to pay impact fees to the County as follows:

(a) New Development - Mad Hatter agrees that any new development within its service area will pay to the County, uniform commitment and impact fees in an amount equivalent to fees charged by the County for its retail utility customers as established from time to time by the Board of County Commissioners, which fees will be collected by the County in accordance with its Sewer Use Ordinance. However, in the event the County adopts a bulk wastewater treatment impact fee for new developments subsequent to the execution of this Agreement, said new development shall pay the bulk impact fees established by the Board of County Commissioners from time to time for connections made to Mad Hatter's systems after such adoption. Said fee shall be paid to the County prior to the connection of any new development to Mad Hatter's system and will be collected by the County in the same manner as the County collects impacts fees for its utility system.

(b) Existing Development - Mad Hatter and the County agree that no separate, up-front impact fees will be charged for existing structures or development as of the date of this Agreement which are presently connected to Mad Hatter's system.

(c) Committed Development - Mad Hatter and the County agree that no separate, up-front impact fees will be charged for that development which has paid or partially paid Mad Hatter for service commitments and which is specifically identified on Exhibit "1" attached hereto and incorporated herein by reference; provided, however, any funds owed to Mad Hatter by developers who have partially paid for commitments, as identified on Exhibit "2", shall be paid to the County in a time frame consistent with the existing agreements with Mad Hatter.

D. Excess Capacity - The County agrees to treat wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommitted capacity is available at the County's wastewater treatment facilities, as determined by the

County, and all appropriate permits have been obtained by Mad Hatter from State regulatory agencies. Mad Hatter agrees to pay the per thousand gallon rate for such services as set forth above.

E. Discharge Regulations - Mad Hatter agrees to abide by the Pasco County Sewer Use Ordinance including the Regulations for Discharge to Pasco County Wastewater System in its entirety and as it may be changed from time to time by requirement of federal or state authorities and/or by the County.

F. Coordination of Flows - Mad Hatter will cooperate in every possible way with the County to coordinate flows into the plant so that they shall not exceed the permitted per-day maximum for the plant.

G. Notwithstanding any other provisions contained herein, the County shall not be liable for any damages as the result of the inability or failure to provide sewage treatment services pursuant to this Agreement either on a temporary, emergency, or permanent basis. The County shall use its best efforts to provide the treatment capacity needed by Mad Hatter to service its customers. Notwithstanding the foregoing, the County reserves the right to proportionately reduce the gallonage made available under this Agreement to comply with reduced treatment capacity as restricted from time to time by governmental regulatory authorities.

H. Public Sewer Collection System - Mad Hatter shall, at its expense:

1. Purchase, install, repair, or maintain its entire wastewater collection system, including all sewer lines, pump

stations, and other facilities and appurtenances that may be necessary in order to tap into or make connections with the County's wastewater system.

2. Cause to be conducted all investigations and testing that may be required in order for Mad Hatter to tap into said system, including all design, construction, repair and maintenance of said connection equipment.

3. Cause all sewer lines, pump stations, and all other facilities required for the connection to the County system to be repaired and maintained in accordance with appropriate standards and specifications.

I. **Permits** - Mad Hatter shall have the responsibility of securing and maintain all necessary permits from all governmental agencies having regulatory authority of Mad Hatter's public sewer collection system. The County shall have the same responsibility as to its sewer system.

J. **Quantity Deficiencies** - The County shall not be liable in damages to Mad Hatter in the event that the quantity of sewage to be treated under this Agreement shall be curtailed or diminished at no fault of the County.

Section III. General Provisions.

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deposited in the United States mail with sufficient postage prepaid (notwithstanding that the return receipt is not subsequently received). Notices shall be addressed as follows:

Pasco County:	County Administrator Pasco County Government Center 7530 Little Road New Port Richey, Florida 34654
Mad Hatter Utility Inc.:	Larry Delucenay, President Post Office Drawer 1387 Lutz, Florida 33549

These addresses may be changed by giving notice as provided for in this paragraph.

B. No waiver of breach of any of the terms of this Agreement shall be construed to be a waiver of any succeeding breach.

Section IV. Default.

If either party materially fails or defaults in keeping, performing, or abiding by the terms and provisions of this Agreement, then the non-defaulting party shall give written notice to the defaulting party specifying the nature of the default. If the defaulting party does not cure the default within thirty (30) days after the date of written notice, then this Agreement, at the option of the non-defaulting party, shall terminate. In the event the County elects to terminate pursuant to this Section such termination shall include the cessation of bulk wastewater services. Neither party shall be relieved of liability to the other for damages sustained by virtue of any party wrongfully exercising this provision. This paragraph is not intended to replace any other legal or equitable remedies available to any non-

defaulting party under Florida law, but it is in addition thereto. Notwithstanding the foregoing, any failure to make timely payments shall be considered a material default under the terms of this Agreement without the necessity for any written notice to Mad Hatter.

Section V. **Utility System Charges.**

Mad Hatter shall fix, revise, maintain, and collect such fees, rates, rentals, or other charge for the use of the products, services and facilities of its utility system as shall be necessary to fund the timely payment of its respective obligations and liabilities under this Agreement. Mad Hatter shall maintain its utility system operation and maintenance accounts throughout the term of this Agreement for the purpose of paying its obligations and liabilities hereunder.

Section VI. **Miscellaneous Provision.**

A. In the event the parties' performance of this Agreement, other than the payment of money, is prevented or interrupted by consequent of an act of God, or of the public enemy, or national emergency, allocation, or other governmental restrictions upon the use or availability of labor or materials, rationing, civil insurrection, riot, racial or civil rights disorder or demonstration, strike, embargo, flood, tidal wave, fire, explosion, bomb detonation, nuclear fallout, windstorm, hurricane, sinkholes, earthquake, or other casualty or disaster or catastrophe, unforeseeable failure or breakdown of pumping, transmission, or other facilities, governmental rules or acts or orders or restrictions of

regulations or requirements, acts or actions of any government, except the County, or public or governmental authority, commission, board, agency, official, or officer, or judgment or a restraining order or injunction of any court, the party shall not be liable for such nonperformance, and the time of performance shall be extended for such time period that the party is diligently attempting to perform.

B. The parties hereto agree that from and after the date of execution hereof, each will, upon the request of the other, execute and deliver such other documents and instruments and take other actions as may be reasonably required to carry out the intent of this Agreement.

C. This Agreement shall not be considered an obligation on the part of the County to perform in any way other than as indicated herein. The County shall not be obligated under the terms of this Agreement to treat additional wastewater from Mad Hatter from areas outside of its certificated area or areas which are not presently served by Mad Hatter unless the County issues written notification that it does not object to such additional service. Mad Hatter's service area is more specifically identified on Exhibit "3" attached hereto and incorporated herein by reference.

D. This Agreement shall be binding upon the heirs, representatives, and assigns of the parties hereto and the provision hereof shall constitute covenants running with the land for the benefit of the heirs, representatives, and assigns of the party. However,

this Agreement shall not be assigned by Mad Hatter without the express permission of the County; however, such consent shall not be unreasonably withheld by the County.

E. In the event the County ever elects to exercise its power of eminent domain for the purpose of acquiring all, or any part, of the utility system which may be owned by Mad Hatter, the County will not be required to pay Mad Hatter for any value which might be attributable to the services provided by the county under the terms of this Agreement. In other words, such services provided by the County under this agreement shall have no residual value in the event the County seeks to condemn all, or any party, of Mad Hatter's system. This shall not be construed as a waiver of any defense, including the defense of lack of authority, Mad Hatter may have to such an action by the County or to any claim for compensation as an ongoing business concern.

F. Term - This Agreement shall have a term of twenty-five (25) years commencing on the date of execution of this Agreement.

G. The Utility agrees that immediately upon execution of the Bulk Wastewater Agreement the Utility will file the same with the Florida Public Service Commission and, in the event Commission approval is required, the Utility shall use its best faith efforts to obtain such approval. Notwithstanding any other provision of the Agreement, in the event the Commission approval of this Agreement is required prior to its effectiveness, the same must be approved in its entirety as a condition precedent to the County's obligations hereunder. The Commission must also approve the

establishment of an appropriate escrow account for the purpose of assuring timely payment to the County for wastewater treatment services provided to the Utility.

H. An express condition precedent to this Agreement and the County's obligations hereunder is the payment to the County by or on behalf of the Utility of the amount of $54,342.54, which is the delinquent amount claimed by the County to be due and owing for past services to the Utility.

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IN WITNESS WHEREOF, the County and the Utility have executed this Bulk Wastewater Treatment Agreement on the date, month and year first above written.

[SEAL]

BOARD OF COUNTY COMMISSIONERS
OF PASCO COUNTY, FLORIDA

ATTEST:

By _____
Jed Pittman, Clerk
By: _____

By _____
Mike Wells, Chairman

WITNESSES:

_____

_____

MAD HATTER UTILITY, INC.

By _____
President

APPROVED AS TO LEGAL FORM AND CONTENT
Office of the County Attorney

By _____
Attorney

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

MAD HATTER UTILITY, INC., a Florida Corporation, Plaintiff, v. PASCO COUNTY, a Political Subdivision of the State of Florida, Defendant.	Case No. 51-2005-CA-2416ES

AMENDED COMPLAINT

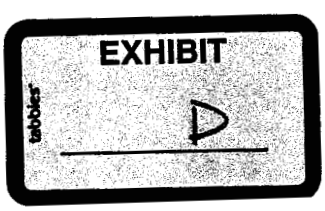
COMES NOW, Plaintiff, MAD HATTER UTILITY, INC., a Florida Corporation ("Plaintiff"), by and through its undersigned counsel, and sues, Defendant, PASCO COUNTY, a political subdivision of the State of Florida ("Defendant"), and states:

1. This is an action for breach of contract, with damages in excess of $15,000, declaratory judgment, under chapter 86, *Florida Statutes*, and specific performance.

2. Plaintiff, MAD HATTER UTILITY, INC., is a Florida Corporation organized under the laws of the State of Florida.

3. Defendant, PASCO COUNTY, is a political subdivision of the State of Florida.

4. The subject of this action is that certain Bulk Wastewater Treatment Agreement Between Mad Hatter Utility, Inc.,



and Pasco County ("Agreement"). A copy of the Agreement is attached as Exhibit "I" and included herein by reference.

5. Plaintiff provides water and wastewater within its certificated service territory, as established by the Public Service Commission, within Pasco County, Florida.

6. Plaintiff is a corporate customer of Defendant.

7. On February 11, 1992, Plaintiff and Defendant entered into the Agreement. The purpose of the Agreement is expressly stated in Section 1 of the Agreement, wherein it reads:

> It is the purpose and intent of this Agreement to provide for central public sewer services to existing homes and structures and future homes and structures located in the certificated area of Mad Hatter Utility, Inc. and to provide for additional assurances of timely payment to the County of all costs incurred in the provision of such service by the County, including, but not limited to, cost of operation and maintenance, debt service costs, capital costs, renewal and replacement costs, and expansion costs. All terms and conditions contained herein shall be read and interpreted in a manner consistent with and in furtherance of this purpose and intent.

8. The Agreement provides, at Section II, A., that the "County shall provide bulk wastewater treatment services in an amount of 350,000 gallons per day (annual average) to Mad Hatter." The Agreement also provides, at Section II, D., that

> The County agrees to treat wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommited capacity is available at the County's wastewater treatment facilities, as determined by the County, and all appropriate permits have been obtained by Mad Hatter from State regulatory agencies.

9. Plaintiff has required, now requires, and will in the future require that more than 350,000 gallons per day of bulk wastewater be treated by Defendant pursuant to the Agreement.

10. Plaintiff has requested, on numerous occasions, that the Defendant provide the needed bulk wastewater capacity necessary to service new or potential customers of Plaintiff; however, Defendant has refused to provide or commit the additional capacity needed to provide service to said new or potential customers.

11. Defendant has the necessary unused and uncommitted capacity available at its facilities to provide the requested service, yet Defendant continues to unreasonably deny Plaintiff this commitment for bulk wastewater services.

12. Defendant now maintains that, contrary to the language of the Agreement, Defendant need not provide more than 350,000 gallons per day of this bulk wastewater for any reason, whatsoever.

13. In addition to Defendant's denial of Plaintiff's continuing request for service, Defendant has, in the past, been reprimanded by the federal courts for its predilection for encroaching upon and interfering with the services that Plaintiff provides its customers within its certificated service territory.

14. Such encroachments and interferences have included such actions as the redundant laying of utility facilities in areas being adequately and reasonably served by Plaintiff.

15. Defendant has voluntarily engaged in the provision of

central wastewater services to the residents of Pasco County.

16. As a present customer of Defendant, Plaintiff is ready, willing and able to provide reasonable compensation to Defendant for the requested increase in Plaintiff's wastewater treatment commitment.

17. Nevertheless, although Plaintiff is in need of augmented wastewater treatment services and Defendant possesses such excess wastewater treatment capacity, Defendant has unreasonably refused to meet Plaintiff's reasonable request for an increase in wastewater treatment service.

18. By unreasonably denying Plaintiff wastewater treatment service concomitantly with Plaintiff's ordinary increase in wastewater treatment needs, Defendant is unreasonably discriminating against Plaintiff based on Plaintiff's provision of services to which Defendant would like to secede.

19. As a direct result of Defendant's actions, Plaintiff has suffered, continues to suffer, and will continue to suffer damages.

Count I

20. Plaintiff realleges and incorporates by reference the allegations in paragraphs one (1) through nineteen (19).

21. Under the Agreement, Defendant is obligated to "treat wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommited capacity is available at the County's wastewater treatment facilities . . . ."

22. Defendant has the necessary unused and uncommitted capacity at its facilities to treat wastewater of Plaintiff in excess of 350,000 gallons per day.

23. Defendant has refused, and continues to refuse, to treat wastewater in excess of 350,000 gallons per day, notwithstanding Plaintiff's requests for such service.

24. Defendant's continuing refusal to honor its obligations under the Agreement has resulted in a breach of the Agreement by Defendant.

25. Plaintiff has performed all conditions precedent to be performed by Plaintiff under the Agreement, or the conditions have occurred or have been excused.

26. As a result of Defendant's breach, Plaintiff has been damaged, continues to be damaged, and will continue to be damaged to the extent Defendant continues to refuse to honor its obligation to treat the additional wastewater of Plaintiff pursuant to the Agreement.

WHEREFORE, Plaintiff demands judgment for damages against Defendant, together with court costs for this action, and such other relief as this Court may deem appropriate.

Count II

27. Plaintiff realleges and incorporates by reference the allegations in paragraphs one (1) through twenty-six (26).

28. Under the Agreement, Defendant is obligated to "treat

wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommited capacity is available at the County's wastewater treatment facilities . . . ."

29. Defendant has the necessary unused and uncommitted capacity available at its facilities to treat wastewater of Plaintiff in excess of 350,000 gallons per day.

30. Defendant has refused, and continues to refuse, to treat wastewater of Plaintiff in excess of 350,000 gallons per day, notwithstanding Plaintiff's requests for such service.

31. Plaintiff has performed all conditions precedent to be performed by Plaintiff under the Agreement, or the conditions have occurred or have been excused.

32. Plaintiff seeks a declaratory judgment determining its rights and obligations under the Agreement.

WHEREFORE, Plaintiff demands that judgment be entered declaring Plaintiff's rights under the Agreement, together with court costs for this action, and such other relief as this Court may find appropriate.

Count III

33. Plaintiff realleges and incorporates by reference the allegations in paragraphs one (1) through thirty-two (32).

34. Defendant has an obligation to "treat wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommited capacity is available at

the County's wastewater treatment facilities . . . ."

35. Defendant has the necessary unused and uncommitted capacity to treat wastewater of Plaintiff in excess of 350,000 gallons per day.

36. Defendant has refused, and continues to refuse, to treat wastewater in excess of 350,000 gallons per day, notwithstanding Plaintiff's requests for such service.

37. Even assuming that Plaintiff is successful in obtaining an award of damages against Defendant, without a court order, Plaintiff stands to continue to be damaged by Defendant's refusal to provide additional service pursuant to the Agreement.

38. Defendant is the only service provider with the ability to provide wastewater service to Plaintiff at this time.

39. Accordingly, without the protection of a court order requiring Defendant to perform under the Agreement, Plaintiff will continue to be damaged without any adequate remedy at law.

WHEREFORE, Plaintiff demands that judgment be entered in its favor and against Defendant, that Defendant be ordered to perform pursuant to the Agreement, together with court costs for this action, and such other relief as this court may find appropriate.

Respectfully submitted this 15th day of September, 2005.

Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(850) 877-6555

Marshall F. Deterding
Bar No. 515876
Frederick L. Aschauer, Jr.
Bar No. 657328
Chasity H. O'Steen
Bar No. 659681
Counsel for *Plaintiff*

G:\MAD\Pasco County Civil Suit 2005\Amended Complaint 09-12-05.wpd

2/13/92

BULK WASTEWATER TREATMENT AGREEMENT BETWEEN MAD HATTER UTILITY, INC. AND PASCO COUNTY

THIS AGREEMENT, made and entered into this 11th day of February, 1992, by and between Mad Hatter Utility, Inc., a Florida Corporation, organized under the laws of the State of Florida, hereinafter referred to as "Utility", and Pasco County, a political subdivision of the State of Florida, acting by and through its Board of County Commissioners, the governing body thereof, hereinafter referred to as "County".

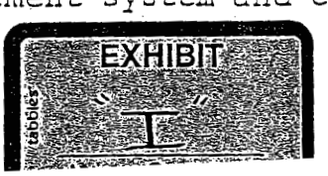
W I T N E S S E T H:

WHEREAS, the Utility has received a certificate from the Florida Public Service Commission authorizing the provision of public sewer service to an area located in the southeast portion of the County pursuant to Chapter 367.041, Florida Statutes; and,

WHEREAS, the Utility has requested the County to provide such bulk wastewater treatment service for its existing customers and specifically designated new customers of Mad Hatter's system; and,

WHEREAS, subject to the conditions and limitations set forth herein, the County desires to provide bulk wastewater treatment services to Mad Hatter for the purpose of offering centralized wastewater services from the County's Land O'Lakes Subregional Wastewater Treatment Plant which presently possesses sufficient excess capacity to provide such treatment; and,

WHEREAS, in conjunction with the requested service the County desires to provide certain standards for the expansion of the Utility's wastewater treatment system and certain requirements for



the quality of effluent delivered by the Utility to the County for treatment.

NOW, THEREFORE, in consideration of the premises which shall be deemed an integral part of this Agreement and of the mutual covenants and conditions set forth herein, the County and Utility intending to be legally bound thereby, agree as follows:

Section 1. Purpose.

It is the purpose and intent of this Agreement to provide for central public sewer services to existing homes and structures and future homes and structures located in the certificated area of Mad Hatter Utility, Inc. and to provide for additional assurances of timely payment to the County of all costs incurred in the provision of such service by the County, including, but not limited to, cost of operation and maintenance, debt service costs, capital costs, renewal and replacement costs, and expansion costs. All terms and conditions contained herein shall be read and interpreted in a manner consistent with and in furtherance of this purpose and intent.

Section II. <u>Bulk Wastewater Treatment Service.</u>

A. Subject to the conditions and limitations set forth in the Memorandum of Understanding and this Agreement, the County shall provide bulk wastewater treatment services in an amount of 350,000 gallons per day (annual average) to Mad Hatter. Such services shall be provided through the existing connection with Mad Hatter Utility, Inc's system. Mad Hatter agrees to change this connection, at no cost to the County, if determined necessary by the

County to continue service under this Agreement. The location and type of connection shall be approved by the County prior to the time that the work is actually performed. Such work shall be supervised and directed by the County and must meet all applicable State and County standards. It shall be the responsibility of Mad Hatter to furnish proof from its staff, engineer, or other appropriate source to the County's Utility Director and/or other appropriate members of the staff of the comparability and equivalency of all such material and standards of performance as previously mentioned.

1. Mad Hatter shall install, as part of its connection to the County system, an appropriate metering device(s) at all points of connection which is acceptable to the County for the purposes of determining the amount of wastewater treatment services being provided by the County pursuant to this Agreement. It shall be the responsibility of Mad Hatter to pay all costs associated with the purchase and installation of such meter(s). The County shall own and operate the meter(s), and the County shall have the absolute right of access for testing, reading purposes, and for any necessary repairs to maintain the integrity of the County's wastewater collection system. Mad Hatter shall also be provided reasonable access to the meter(s) for testing and reading purposes.

2. Meter Reading and Payments - The County will invoice Mad Hatter on a monthly basis in accordance with meter readings taken. Mad Hatter shall make payment based upon the meter readings within thirty (30) days after receipt of the invoice from the

County. In the event that the payment is not made within thirty (30) days after receipt of the invoice, Mad Hatter agrees to pay interest or penalties as established from time to time in the County's utility system service regulations on the outstanding balance until paid in full. Nothing contained herein, including the charging of interest, shall extend the due date for any payment and any failure to pay on or before the due date shall be considered a default under the terms of this Agreement. Mad Hatter shall be liable for the costs of the purchase and installation of any meters or similar equipment or devices used to measure the amount of wastewater treated. In the event Mad Hatter disputes the accuracy of any meter reading, it must notify the County within ten (10) days of billing and demonstrate through appropriate calibration testing that the meter is either not properly calibrated or is not functioning properly. All meter readings not disputed within fifteen (15) days of reading and publication are final and not subject to dispute.

B. Monthly Service Rate - Mad Hatter agrees to pay the County a service rate of Three and 12/100 Dollars ($3.12) per thousand gallons of wastewater treated based upon the meter readings; provided, however, this rate, including any or all components thereof, may be adjusted upward or downward by the Board of County Commissioners from time to time in accordance with the County's rate-setting procedures. In addition One and 00/100 Dollar ($1.00) per thousand gallons, which amount may be adjusted from time to time by the Board of County Commissioners, shall be added as a

capital recovery surcharge for wastewater flow treated from existing development and committed development as described below.

C. Impact Fees - In addition to the monthly service rate, Mad Hatter agrees to pay impact fees to the County as follows:

(a) New Development - Mad Hatter agrees that any new development within its service area will pay to the County, uniform commitment and impact fees in an amount equivalent to fees charged by the County for its retail utility customers as established from time to time by the Board of County Commissioners, which fees will be collected by the County in accordance with its Sewer Use Ordinance. However, in the event the County adopts a bulk wastewater treatment impact fee for new developments subsequent to the execution of this Agreement, said new development shall pay the bulk impact fees established by the Board of County Commissioners from time to time for connections made to Mad Hatter's systems after such adoption. Said fee shall be paid to the County prior to the connection of any new development to Mad Hatter's system and will be collected by the County in the same manner as the County collects impacts fees for its utility system.

(b) Existing Development - Mad Hatter and the County agree that no separate, up-front impact fees will be charged for existing structures or development as of the date of this Agreement which are presently connected to Mad Hatter's system.

(c) Committed Development - Mad Hatter and the County agree that no separate, up-front impact fees will be charged for that development which has paid or partially paid Mad Hatter for service commitments and which is specifically identified on Exhibit "1" attached hereto and incorporated herein by reference; provided, however, any funds owed to Mad Hatter by developers who have partially paid for commitments, as identified on Exhibit "2", shall be paid to the County in a time frame consistent with the existing agreements with Mad Hatter.

D. Excess Capacity - The County agrees to treat wastewater in excess of 350,000 gallons per day pursuant to this Agreement provided sufficient unused and uncommitted capacity is available at the County's wastewater treatment facilities, as determined by the

County, and all appropriate permits have been obtained by Mad Hatter from State regulatory agencies. Mad Hatter agrees to pay the per thousand gallon rate for such services as set forth above.

E. Discharge Regulations - Mad Hatter agrees to abide by the Pasco County Sewer Use Ordinance including the Regulations for Discharge to Pasco County Wastewater System in its entirety and as it may be changed from time to time by requirement of federal or state authorities and/or by the County.

F. Coordination of Flows - Mad Hatter will cooperate in every possible way with the County to coordinate flows into the plant so that they shall not exceed the permitted per-day maximum for the plant.

G. Notwithstanding any other provisions contained herein, the County shall not be liable for any damages as the result of the inability or failure to provide sewage treatment services pursuant to this Agreement either on a temporary, emergency, or permanent basis. The County shall use its best efforts to provide the treatment capacity needed by Mad Hatter to service its customers. Notwithstanding the foregoing, the County reserves the right to proportionately reduce the gallonage made available under this Agreement to comply with reduced treatment capacity as restricted from time to time by governmental regulatory authorities.

H. Public Sewer Collection System - Mad Hatter shall, at its expense:

1. Purchase, install, repair, or maintain its entire wastewater collection system, including all sewer lines, pump

stations, and other facilities and appurtenances that may be necessary in order to tap into or make connections with the County's wastewater system.

2. Cause to be conducted all investigations and testing that may be required in order for Mad Hatter to tap into said system, including all design, construction, repair and maintenance of said connection equipment.

3. Cause all sewer lines, pump stations, and all other facilities required for the connection to the County system to be repaired and maintained in accordance with appropriate standards and specifications.

I. Permits - Mad Hatter shall have the responsibility of securing and maintain all necessary permits from all governmental agencies having regulatory authority of Mad Hatter's public sewer collection system. The County shall have the same responsibility as to its sewer system.

J. Quantity Deficiencies - The County shall not be liable in damages to Mad Hatter in the event that the quantity of sewage to be treated under this Agreement shall be curtailed or diminished at no fault of the County.

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A. These conditions are binding upon the successors and assignees of the parties hereto. Whenever one (1) party gives notice to the other party concerning any of the provisions of this Agreement, such notice shall be given by certified mail, return receipt required. Said notice shall be deemed given when it is

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G. The Utility agrees that immediately upon execution of the Bulk Wastewater Agreement the Utility will file the same with the Florida Public Service Commission and, in the event Commission approval is required, the Utility shall use its best faith efforts to obtain such approval. Notwithstanding any other provision of the Agreement, in the event the Commission approval of this Agreement is required prior to its effectiveness, the same must be approved in its entirety as a condition precedent to the County's obligations hereunder. The Commission must also approve the

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[SEAL]

BOARD OF COUNTY COMMISSIONERS
OF PASCO COUNTY, FLORIDA

ATTEST:

By _____
Jed Pittman, Clerk
By: _____

By _____
Mike Wells, Chairman

WITNESSES:

MAD HATTER UTILITY, INC.

By _____
President

APPROVED AS TO LEGAL FORM AND CONTENT
Office of the County Attorney

By _____
Attorney