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MEMORANDUM

COMMISSION  
CLERK

TO: PSC Clerk

FROM: Wayne L. Schiefelbein  
Of Counsel *WLS*

RE: KW Resort Utilities Corp.  
Our File No.: 34000.01

DATE: September 29, 2005

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050694-SU

On behalf of KW Resort Utilities Corp., enclosed for filing are an original and 15 copies of a Petition of KW Resort Utilities Corp. For Declaratory Statement Regarding Service Availability Charges. I have also included one copy to be date stamped and returned to me.

**PLEASE OPEN A NEW DOCKET TO PROCESS THE PETITION.**

If you have any questions, please feel free to call.

WLS/dcr  
Enclosures  
G:\KWRESORT\Roy's Dec Action\Clerk memo.wpd

RECEIVED & FILED  
*WLS*

FPSC-BUREAU OF RECORDS

Rose, Sundstrom & Bentley, LLP  
2548 Blairstone Pines Drive, Tallahassee, Florida 32301

DOCUMENT NUMBER-DATE

09299 SEP 29 05

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: PETITION OF )  
KW RESORT UTILITIES CORP. )  
FOR DECLARATORY STATEMENT )  
REGARDING SERVICE AVAILABILITY )  
CHARGES. )  
\_\_\_\_\_ )

Filed: September 29<sup>th</sup>, 2005

PETITION FOR DECLARATORY STATEMENT

KW Resort Utilities Corp. (Petitioner), by and through its undersigned counsel, pursuant to Section 120.565, Florida Statutes and Rules 28-105.001, Florida Administrative Code, et seq., petitions the Commission for a declaratory statement, and in support states the following:

1. The name and address of the Petitioner are:

KW Resort Utilities Corp.  
6450 College Road  
Key West, FL 33040

2. The name, address, telephone number and facsimile number of Petitioner's counsel are:

John R. Jenkins, Esq.  
Wayne L. Schiefelbein, Esq., Of Counsel  
Rose, Sundstrom & Bentley LLP  
2548 Blirstone Pines Drive  
Tallahassee, Florida  
(850) 877-6555  
(850) 656-4029

3. The Commission's disposition of the instant petition will affect the Petitioner by determining whether the Petitioner is entitled to collect certain service availability charges from Roy's Trailer Park, Inc., as provided for in its current Commission-approved Wastewater Tariff, or

whether it must accept amortized payments of same.

4. The statutory provision on which the declaratory statement is sought is Section 367.011, Florida Statutes.

5. Petitioner provides wastewater service to the public in an area of Monroe County, Florida known as Stock Island pursuant to Certificate of Authority No. 168-5, which service territory is more specifically set forth in First Revised Sheets 3.0 and 3.1 of its Commission-approved Wastewater Tariff.

6. Roy's Trailer Park, Inc. ("Developer"), owns and operates a mobile home park known as Roy's Trailer Park (the "Property"), consisting of 103 mobile homes which currently receive wastewater service from an onsite sewage treatment and disposal system. Developer's business address is 6500 Maloney Ave, Key West, Florida 33040. The Property is situated in its entirety within Petitioner's certificated service territory.

7. On or about September 28, 2005 Petitioner and Developer entered into a Utility Agreement a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference. Pursuant to the terms of the Utility Agreement Developer is taking its onsite sewage treatment and disposal system off line and interconnecting the existing collection system serving the mobile homes located on the Property to with Petitioner's central wastewater system.

8. Prior to entering into the Utility Agreement Petitioner advised Developer that, as a precondition to connecting the Property to the Petitioner's central wastewater system, Developer must pay to Petitioner certain service availability charges, as provided for in Petitioner's Tariff. Such charges include Petitioner's Plant Capacity Charges of \$2700 per equivalent residential connection, pursuant to Original Sheet No. 18.0 of the Tariff. The Plant Capacity Charges due for wastewater

service availability to the 103 mobile homes on the Property is \$278,100.

9. Developer has taken the position that it must be allowed to amortize service

Availability charges pursuant to Section 723.046, Florida Statutes which states:

**Capital costs of utility improvements** - In the event that the costs for capital improvements for a water or sewer system are to be charged to or to be passed through to the mobile home owners in a mobile home park owned all or in part by the residents, any such charge exceeding \$200 per mobile home owner may, at the option of the mobile home owner, be paid in full within 60 days from the notification of the assessment, or amortized with interest over the same duration and at the same rate as allowed for a single-family home under the local government ordinance. If no amortization is provided for a single house, then the period of amortization by the municipality, county, or special district shall be not less than 8 years. The amortization requirement established herein shall be binding upon any municipality, county, or special district serving the mobile home park.

Under such statute, Developer has asserted that it is entitled to amortize payment of the aforesaid Plant Capacity Charges over a period of 8 years.

10. Petitioner's Commission-approved Wastewater Tariff does not provide for amortization of service availability charges including Plant Capacity Charges.

11. Petitioner has advised Developer of Petitioner's position that the Commission's authority over the rates and charges Petitioner may collect is exclusive and preemptive of any other provision of law, citing Section 367.011(2) and (4), Florida Statutes. These sections provide as follows:

**Jurisdiction; legislative intent-**

...

(2) The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates.

...

- (4) This chapter shall supersede all other laws on the same subject, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. This chapter shall not impair or take away vested rights other than procedural rights or benefits.

12. In response, Developer has relied in part upon Section 723.004(2), Florida Statutes, which provides:

There is hereby expressly preempted to the state all regulation and control of mobile home lot rents in mobile home parks and all those other matters and things relating to the landlord-tenant relationship treated by or falling within the purview of this chapter. Every unit of local government is prohibited from taking any action, including the enacting of any law, rule, regulation, or ordinance, with respect to the matters and things hereby preempted to the state.

See also Section 723.045, Florida Statutes. Accordingly, Developer has referred to the provisions of Section 723.046, Florida Statutes, as pre-emptive.

13. In light of this disagreement over the amortization issue, Petitioner and Developer have entered into the Utility Agreement, provided for interconnection of the Property, and agreed in section 7 of the Utility Agreement to submit this matter to the Commission for determination:

**7. Payment of Capacity Reservation Fees**

(a) The parties agree that the Property is subject to mandatory hook-up to the Central Sewerage System, pursuant to Sec. 381.0065, Florida Statutes. However, the parties disagree on the due date for payment of the \$278,000 in Capacity Reservation Fees due under this Agreement. Service Company requires payment upon execution of this Agreement, while Developer asserts the right to an amortization period of a minimum of 8 years. Therefore, the parties agree to connect the Property in an expeditious manner as provided for in this Agreement while concurrently filing a Petition for Declaratory Statement with the Florida Public Service Commission ("PSC") in the form attached hereto as Exhibit "C" as to the appropriate payment/amortization protocol. The parties agree to be bound by the decision of the PSC (subject to appeal) for resolution of this dispute. The Service Company shall file the Petition For Declaratory Statement within ten days of the execution of this Agreement. The Developer and Service Company shall each then have ten days to file a Memorandum of Law with the PSC in support of its respective position on the

issue. Each party shall pay its own attorneys fees for this proceeding. In the event either party appeals the decision of the PSC, the party prevailing on appeal will be entitled to reimbursement of its attorney's fees and costs on appeal.

(b) Beginning November 1, 2005, and continuing during the pendency of the Petition for Declaratory Statement (and thereafter if the PSC so rules), Developer shall pay a monthly Capacity Reservation Fee of \$3,653. This fee is based on an eight-year amortization period at an interest rate of six percent (6.0%) per annum. In addition, to secure Developer's continued payment, upon execution of this Agreement, Developer shall provide unconditional personal guarantees of Michael L. Browning and Thomas J. Siresi in favor of the Service Company for any and all unpaid Capacity Reservation Fees due hereunder. Such unconditional personal guarantees shall be in form satisfactory to Service Company, and shall provide that in the event of any default in payment hereunder by Developer, the Service Company may, at its option, proceed directly against the guarantors under said unconditional personal guarantees without proceeding against or exhausting any other remedies which it may have against the Developer or otherwise. In the event that the PSC determines that Capacity Reservation Fees should be paid up front, with no amortization period, Developer agrees to pay to Service Company the balance due on Capacity Reservation Fees within ninety (90) days of the date of issuance of the PSC final order on the case, or, if appealed, within ninety-days (90) of issuance of the Court's mandate or its equivalent.

14. Petitioner and Developer are in agreement as to the facts stated in this Petition. There are no disputed issues of material fact.

15. The Petitioner and Developer have agreed to submit to the Commission memoranda of law in support of their respective legal positions on the amortization issue. These memoranda of law must be filed within ten (10) days of filing the instant Petition.

16. Petitioner acknowledges that pursuant to Section 120.565(3), Florida Statutes, and Rule 28 105.003, Florida Administrative Code, the Commission is subject to a 90 day requirement within which to issue a declaratory statement or to deny the petition. In view of the 10-day timeframe to file memoranda of law, Petitioner and Developer agree to a 10-day extension to such 90-day requirement, to enable the Commission to consider the respective memoranda of law to be

filed.

PRAYER FOR RELIEF

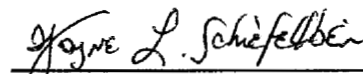
Petitioner requests that the Commission:

1. Grant this Petition for Declaratory Statement;
2. Permit Petitioner and Developer to address the Commission at a regularly scheduled Agenda Conference in support of their respective positions;
3. Issue a Declaratory Statement determining as a matter of law what if any amortization period is required to be applied to the Plant Capacity Charges to which the Developer is subject; and
4. Grant such other relief as may be just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, a true and correct copy of the foregoing has been served upon Richard P. Lee, Esq., at Lutz, Bobo, Telfair, Eastman & Lee, 2155 Delta Boulevard, Suite 210-B, Tallahassee, Florida 32303 via regular U. S. Mail, on this 29<sup>th</sup> day of September, 2005.

Respectfully submitted



\_\_\_\_\_  
John R. Jenkins, Esq.  
Wayne L. Schiefelbein, Esq., Of Counsel  
Rose, Sundstrom & Bentley LLP  
2548 Blairstone Pines Drive  
Tallahassee, Florida 32301  
(850) 877-6555  
Attorneys for KW Resort Utilities Corp.  
Petitioner

## UTILITY AGREEMENT

**THIS UTILITY AGREEMENT** (Agreement), dated as of the 4<sup>th</sup> day of August 2005, by and between KW Resort Utilities Corp., a Florida corporation, having its office(s) at 6450 College Road, Key West Florida 33040, (Service Company) and, Roy's Trailer Park Inc., 6500 Maloney Ave. Key West Florida 33040, having its office(s) at 402 Applerouth Lane, Key West Florida 33040 (Developer).

### R E C I T A L S

- A. Developer is the owner of certain real property more particularly described on Exhibit A, attached hereto and made a part hereof (the Property).
- B. Service Company owns, operates, manages and controls a Central Sewage System and valve pits on private property and is willing to provide sanitary sewer services pursuant to this Agreement.
- C. Developer requests that Service Company provide central wastewater service to the Property as indicated on the plans prepared by Weiler Engineering for The South Stock Island sewer expansion. (Copy of plan sheet included as an exhibit "A").

**NOW, THEREFORE**, in consideration of Ten Dollars (\$10.00), and the mutual covenants and agreements hereinafter set forth, and intending to be legally bound thereby, it is agreed as follows:

#### **1. Definitions**

Business Day shall mean any day of the year in which commercial banks are not required or authorized to close in New York, New York.

Capacity Reservation Fee as such term is defined in Section 6 hereof shall be used interchangeably herein with " Plant Capacity Change," as that term is used in Service Company's Wastewater Tariff.

Central Sewage System shall mean the central collection, transmission, treatment and disposal system and appurtenant facilities owned and operated by the Service Company.

Connection as such term is defined in Section 6 hereof.

Customer shall mean any person, firm, association, corporation, governmental agency or similar organization who has an agreement to receive wastewater service from the Service Company and who is liable for the payment of that wastewater service.

Equivalent Residential Connections (ERC), shall be defined as one individual residential connection or, for commercial and other uses, the estimated flow based on the use and Chapter 64E-6 F.A.C., divided by the most recently approved Capacity Analysis rate per residential connection (currently 250 gallons per day per residential connection) also known as E.D.U.:

Plans and Specifications as such term is defined in Section hereof.



Point of Delivery shall mean the point where Developer's pipes connect to Utilities pipes located at the property line.

Property as such term is defined in the Recitals hereof.

Property Installations or System shall mean any service lines located on individual lots or parcels of the Property or to buildings located on the Property that connect to the Central Sewage System, (i.e. the equivalent of the term "Customer's Installation" as defined in Service Company's Wastewater Tariff and may include facilities located outside the Property, required to be installed by Developer, to connect facilities on the Property to the Central Sewage System.

Service Company's Affiliates shall mean any disclosed or undisclosed officer, director, employee, trustee shareholder, partner, principal, parent, subsidiary or other affiliate of Service Company.

Tariff shall mean Service Company's Wastewater Tariff, as approved by the Florida Public Service Commission .

## 2. New System Construction

- (a) Prior to the construction and installation of the System, Developer shall, at its sole cost and expense, cause to be prepared and provide to Service Company plans and specifications of the System (Plans and specifications), which Plans and Specifications shall be prepared by engineers reasonably acceptable to Service company, and in accordance with all policies and practices of Service Company and all applicable laws and regulations and standards adopted by the Department of Environmental Protection and Monroe County.
- (b) Service Company shall approve or disapprove of the Plans and Specifications within thirty days (30) of receipt thereof by written notice to Developer.
- (c) Upon Developer's receipt of Service Company's written notice of disapproval of the Plans and Specifications, Developer shall promptly revise the Plans and Specifications in accordance with any requirements set forth by Service Company in its written notice of disapproval, and re-submit such revised Plan and specifications to Service Company for approval or disapproval. Service Company shall approve or disapprove of any revised Plans and Specifications with five (5) business days of receipt thereof by written notice to Developer.
- (d) Upon Developer's receipt of Service Company's written notice of approval of the Plans and Specifications, Developer may proceed with the construction and installation of the System. Developer shall notify Service Company seventy-two (72) hours prior to beginning construction. Construction and Installation shall be completed within six (6) months of Service Company's written notice of approval of the Plans and Specifications. All work shall be inspected by licensed and insured contractors and engineers reasonably acceptable to Service Company. In accordance with Chapter 62-604 F.A.C., Developer shall provide, at its sole cost, a Professional Engineer Registered in Florida to provide on-site observation during construction and testing and to certify that the System is constructed in compliance with the approved Plans and Specifications. All materials employed by Developer for the System shall be reasonably acceptable to Service Company.

No portion or element of the System shall be covered or concealed until inspected by Service Company. Developer shall notify Service Company of Developer's readiness for inspection of the System, and Service Company shall inspect the System within two (2) business days after each such notice. Any portion of the System not inspected by Service Company within said time period, shall be deemed to have been accepted by Service Company. In the event that Service Company determines through any such inspection that any portion of the System does not fully comply with the Plans and specific conditions or applicable laws and regulations, Service Company shall notify Developer in writing of such noncompliance not more than two (2) business days after any such inspection and Developer shall immediately modify the System to insure that the System fully complies with the Plans and Specifications and applicable laws and regulations.

- (e) In the event Service Company discovers that any portion or element of the System has been installed, covered or concealed without the prior approval of Service Company, Developer shall, upon written demand by Service Company, immediately dismantle or excavate such portion of the System at its sole cost and expense.

### 3. System Records

Prior to Service Company's acceptance of all or any portion of the System for service, operation and maintenance or for service only, Developer shall deliver the following records and documents to Service Company:

- (a) Copies of all invoices and/or contracts for the construction and installation.
- (b) An affidavit signed by the Developer stating that there are no parts or portions of the System which are not included in the invoices and contracts noted in subsection (a) above, that said invoices and contracts accurately and fully reflect the total cost of the System and that the System is free and clear of all liens and encumbrances.
- (c) Lien waivers from all contractors, subcontractors, material people, and any other parties that provided labor, services or materials in connection with the construction of the System.
- (d) A reproducible Mylar and two (2) sets of blue line copies, accurately depicting all of the System as constructed and installed, and signed and sealed by the engineer and surveyor of record for the System.
- (e) Copies of the results of all tests conducted on the System.
- (f) Any other records or documents required by applicable law or required under the Tariff.

A certificate of completion of the System signed and sealed by the engineer of record.

- (h) A copy of the Department of Environmental Protection permit to construct the System and all inspection reports and approvals issued by the Engineer and the Department of Environmental Protection and any other applicable governmental authority or agency.

- (i) A bill of sale, in recording form, conveying all right, title and interest in and to the System, to Service Company free of any and all liens and encumbrances for that portion of the System located on the Service Company side of the Point of Delivery.
- (j) A one-year guarantee against defects in workmanship and materials, in accordance with Tariff Sheet 24.0, par A(b).

#### 4. Property Rights

In those cases in which Service Company accepts all or any portion of the System for service, operation and maintenance, Developer shall convey the following property rights and interests for that portion of the System to Service Company:

- (a) A non-exclusive easement, in the form attached as Exhibit "B", for that portion of the Property of sufficient size to enable Service Company ingress and egress and to operate, maintain and replace such portions of the System not located within public rights-of-way. The foregoing easement shall be in effect for a period of time not less than the period during which the Service Company shall use the System to provide service to Customers.
- (b) A non-exclusive easement, in the form attached as Exhibit "B", of sufficient size to enable ingress, egress and access by Service Company personnel or vehicles to any lift or pump station located on the Property. The foregoing easement shall be in effect for a period of time not less than the period during which the Service Company shall use the System to provide service to Customers.
- (c) Notwithstanding the foregoing easements, Developer retains all rights and privileges to utilize the Property in any manner it deems appropriate provided such use is not inconsistent with the purposes intended for such easements.

#### 5. Section Intentionally Deleted.

#### 6. Rates, Fees, Charges

- (a) All Customers will pay the applicable fees, rates and charges as set forth in the Tariff. Nothing contained in this Agreement shall serve to prohibit Service Company's right to bill or collect its rates and charges from Customers, nor to require compliance with any provision of its Tariff.
- (b) Developer shall pay to Service Company a reservation fee (Capacity Reservation Fee), in the amount of Two Thousand Seven Hundred (\$2,700.00) dollars per E.R.C. connection to be reserved by Developer to serve the residential or commercial structures now existing or to be constructed in or upon the Property (individually, a Connection, collectively, the Connections). Prior to execution of this agreement, Developer has previously supplied Service Company access and information necessary to determine number of ERC's proposed. From this information it has been determined:

103 Mobile homes

Total 103 ERC's

Developer's payment of said Capacity Reservation fees shall be subject to Paragraph 7 herein.

- (c) Service Company shall have the right to cancel such reservation in the event of Developer's failure to comply with the terms of this Agreement. In the event there is additional water usage over and above the amount reserved in paragraph 6b above, (based on an annual review) the Developer shall remit additional capacity reservation fees to Service Company 30 days after notice by Service Company of additional fees due.
- (d) Omitted.
- (e) Developer shall pay to Service Company, for engineering services and applicable administrative fees necessary to review and approve construction plans and documents and for periodic inspection during construction and testing in the amount of ten percent (10%) of Developer's actual costs of connecting the Property to the Central Sewage System. Said payment is to be made upon submission of plans and documents.
- (f) In the event of default by Developer and the payment of fees hereunder, Service Company may cancel this agreement by giving 30 (thirty) days written notice of default and retain all payments hereunder as liquidated damages.
- (g) Developer agrees that in the event of a change of use or any change that might affect the flows (e.g. Addition of a restaurant) Service Company will be notified and the applicable Capacity Reservation fees will be paid prior to discharge to the Central Sewage System.

**7. Payment of Capacity Reservation Fees**

- (a) The parties agree that the Property is subject to mandatory hook-up to the Central Sewerage System, pursuant to Sec. 381.0065, Florida Statutes. However, the parties disagree on the due date for payment of the \$278,000 in Capacity Reservation Fees due under this Agreement. Service Company requires payment upon execution of this Agreement, while Developer asserts the right to an amortization period of a minimum of 8 years. Therefore, the parties agree to connect the Property in an expeditious manner as provided for in this Agreement while concurrently filing a Petition for Declaratory Statement with the Florida Public Service Commission ("PSC") in the form attached hereto as Exhibit "C" as to the appropriate payment/amortization protocol. The parties agree to be bound by the decision of the PSC (subject to appeal) for resolution of this dispute. The Service Company shall file the Petition For Declaratory Statement within ten days of the execution of this Agreement. The Developer and Service Company shall each then have ten days to file a Memorandum of Law with the PSC in support of its respective position on the issue. Each party shall pay its own attorneys fees for this proceeding. In the event either party appeals the decision of the PSC, the

party prevailing on appeal will be entitled to reimbursement of its attorney=s fees and costs on appeal.

- (b) Beginning November 1, 2005, and continuing during the pendency of the Petition for Declaratory Statement (and thereafter if the PSC so rules), Developer shall pay a monthly Capacity Reservation Fee of \$3,653. This fee is based on an eight-year amortization period at an interest rate of six percent (6.0%) per annum. In addition, to secure Developer's continued payment, upon execution of this Agreement, Developer shall provide unconditional personal guarantees of Michael L. Browning and Thomas J. Siresi in favor of the Service Company for any and all unpaid Capacity Reservation Fees due hereunder. Such unconditional personal guarantees shall be in form satisfactory to Service Company, and shall provide that in the event of any default in payment hereunder by Developer, the Service Company may, at its option, proceed directly against the guarantors under said unconditional personal guarantees without proceeding against or exhausting any other remedies which it may have against the Developer or otherwise. In the event that the PSC determines that Capacity Reservation Fees should be paid up front, with no amortization period, Developer agrees to pay to Service Company the balance due on Capacity Reservation Fees within ninety (90) days of the date of issuance of the PSC final order on the case, or, if appealed, within ninety-days (90) of issuance of the Court's mandate or its equivalent.
- (c) The parties agree that Developer shall be responsible for the physical connection of its existing collection and transmission system to a point of connection in the Central Sewerage System agreed to by the parties. Service Company shall reimburse Developer for that portion of the cost of connection, which covers off-site facilities constructed in the road right-of-way and conveyed to the Service Company in the manner provided for herein. The parties have agreed that the estimated cost of the facilities to be paid for by the Service Company is approximately half of the cost to interconnect. Developer shall remain responsible for the cost of any abandonment or decommissioning of its on-site facilities as a result of the interconnection.

8. **Absolute Conveyance**

Developer understands, agrees and acknowledges that Developer's conveyance of any and all easements, real property or personal property (including, without limitation, the System), or payment of any funds hereunder (including, without limitation, the Capacity Reservation Fee and Connection Charges), shall, upon acceptance by Service Company, be absolute, complete and unqualified, and that neither Developer nor any party claiming by or through Developer shall have any right to such easements, real or personal property, or funds, or any benefit which Service Company may derive from such conveyance or payments in any form or manner.

9. **Delivery of Service; Operation and Maintenance**

- (a) Upon Developer's full performance of its obligations under this Agreement, Service Company shall provide service to the Point of Delivery in accordance with the terms of this Agreement, all applicable laws and regulations and shall operate and maintain the Central Sewage System to the Point of Delivery in accordance with the terms and provisions of this Agreement.

- (b) Developer shall, at its sole cost and expense, own, operate and maintain any part of the System that has not been conveyed to Service Company pursuant to the terms and conditions of this Agreement.
- (c) Developer acknowledges that certain water quality standards must be met prior to influent entering the wastewater treatment plant (primarily chloride levels and excessive flows) and agrees to allow Service Company to monitor flows and water quality at Service Company's discretion at a point on the Developer's side of the Point of Delivery. If it is determined that substandard influent or excessive flows are entering the Central Sewage System via Developer's System, Developer agrees to isolate the source and to repair or replace the portion or portions of the faulty System in a manner acceptable to Service Company in accordance with this agreement.
- (d) In the event any portion of the Property is developed as a condominium, the condominium association shall be required to execute a maintenance agreement with respect to any portion of the System not conveyed to Service Company. Such maintenance agreement shall provide that if the condominium association fails to adequately maintain and repair the System, Service Company shall have the right to maintain and repair such System at the sole cost and expense of the condominium association.

10. **Repair of System**

In the event of any damage to or destruction of any portion of the Central Sewage System due to any acts or omissions by Developer, any Customer or their respective agents, representatives, employees, invitees or licensees, Service Company shall repair or replace such damaged or destroyed facilities at the sole cost and expense of responsible party. Developer shall operate, maintain and repair all other portions of the System not conveyed to Service Company at its sole cost and expense.

11. **Term**

This Agreement shall become effective as of the date first written above, and shall continue for so long as Service Company provides sewer service to the public.

12. **Default**

In the event of a default by either party of its duties and obligations hereunder, the non-defaulting party shall provide written notice to the defaulting party specifying the nature of the default and the defaulting party shall have five (5) days to cure any default of a monetary nature and thirty (30) days for any other default. If the default has not been cured within the applicable period (time being of the essence), the non-defaulting party shall be entitled to exercise all remedies available at law or in equity, including but not limited to, the right to damages, injunctive relief and specific performance. Service Company may, at its sole option, discontinue and suspend the delivery of service to the System in accordance with all requirements of applicable law and the Tariff if Developer fails to timely pay all fees, rates and charges pursuant to the terms of this Agreement.

13. **Excuse from Performance**

- (a) Force Majeure. If Service Company is prevented from or delayed in performing any act required to be performed by Service Company hereunder, and such prevention or delay is caused by strikes, labor disputes, inability to obtain labor, materials or equipment, storms, earthquakes, electric power failures, land subsidence, acts of God, acts of public enemy, wars, blockades, riots, acts of armed forces, delays by carriers, inability to obtain rights-of-way, acts of public authority, regulatory agencies, or courts, or any other cause, whether the same kind is enumerated herein, not within the control of Service Company (Force Majeure), the performance of such act shall be excused for a period equal to the period of prevention or delay.
- (b) Governmental Acts If for any reason during the term of this Agreement, other than the fault of Developer, any federal, state or local authorities or agencies fail to issue necessary permits, grant necessary approvals or require any change in the operation of the Central Sewage System or the System (Governmental Acts), then, to the extent that such Governmental Acts shall affect the ability of any party to perform any of the terms of this Agreement in whole or in part, the affected party shall be excused from the performance thereof and a new agreement shall be negotiated, if possible, by the parties hereto in conformity with such permits, approvals or requirements. Notwithstanding the foregoing, neither Developer nor Service Company shall be obligated to accept any new agreement if it substantially adds to its burdens and obligations hereunder.
- (c) Emergency Situations Service Company shall not be held liable for damages to Developer and Developer hereby agrees not to hold Service Company liable for damages for failure to deliver service to the Property upon the occurrence of any of the following events:
1. A lack of service due to loss of flow or process or distribution failure;
  2. Equipment or material failure in the Central Sewage System or the System, including storage, pumping and piping provided the Service Company has utilized its best efforts to maintain the Central Sewage System in good operating condition; and
  3. Force Majeure, unforeseeable failure or breakdown of pumping, transmission or other facilities, any and all governmental requirements, acts or action of any government, public or governmental authority, commission or board, agency, agent, official or officer, the enactment of any statute, ordinance, resolution, regulation, rule or ruling, order, decree or judgment, restraining order or injunction of any court, including, without limitation, Governmental Acts.
- (d) Notwithstanding any excuse of performance due to the occurrence of any of the foregoing events, Developer shall not be excused from payment of any fees, charges and rates due to Service Company under the terms of this Agreement (including without limitation, the Capacity Reservation Fee and Connection Charges).

This Agreement and the easements granted hereby, shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

15. **Indemnification**

Developer shall indemnify, defend and hold Service Company and Service Company's Affiliates harmless from and against any and all claims, demands, causes of action, losses, damages, liabilities, costs and reasonable expenses, including, without limitation, attorneys fees and disbursements, suffered or incurred by Service Company or any of Service Company's Affiliates and arising out of or in connection with use, occupancy, or operation of the System, the Property, or the activities, errors, or omissions of Developer, its agents, employees, servants, licensees, invitees, or contractors on or about the Property, pursuant to terms and conditions of this Agreement. Developer's duty to indemnify shall also include, but not be limited to, indemnification from and against any fine, penalty, liability, or cost to Service Company arising out of Developer's violation or breach of any law, ordinance, governmental regulation, this Agreement requirement or permit applicable to the System or Developer's activities on or about the Property. The provisions of this Section 15 shall survive the termination of this Agreement.

16. **Assignment of Warranties and Bonds**

Developer shall assign any and all warranties, maintenance, completion and performance bonds and the right to enforce same to the Service Company which Developer obtains from any contractor constructing the System. Developer shall obtain a written warranty, completion, performance and maintenance bonds from its contractor for a minimum period of twenty four (24) months. If Developer does not obtain such written warranty and performance and maintenance bonds from its contractor and deliver same to Service Company, then in such event, Developer agrees to warrant the construction of the System for a period of twenty four (24) months from the date of acceptance by the Service Company.

17. **Notices**

All notices, demands, requests or other communications by either party under this Agreement shall be in writing and sent by (a) first class U.S. certified or registered mail, return receipt requested, with postage prepaid, or (b) overnight delivery service or courier, or (c) telefacsimile or similar facsimile transmission with receipt confirmed as follows:

If to Service Company:

Mr. Doug Carter, General Manager  
6450 Junior College Road  
Key West, Florida 33040  
Fax (305) 294-1212

With a copy to:

Mr. Jeff Weiler, P.E.  
Weiler Engineering  
20020 Veterans Blvd.  
Port Charlotte, Florida 33954



Fax (941) 764-8915

If to Developer: Mr. Michael Browning  
Roy's Trailer Park Inc.  
402 Applerouth Lane  
Key West, Florida 33040

18. Tariff

This Agreement is subject to all of the terms and provision of the Tariff. In the event of any conflict between the Tariff and the terms of this Agreement, the Tariff shall govern and control.

19. Miscellaneous Provisions

- (a) This Agreement shall not be altered, amended, changed, waived, terminated or otherwise modified in any respect or particular, and no consent or approval required pursuant to this Agreement shall be effective, unless the same shall be in writing and signed by or on behalf of the party to be charged.
- (b) All prior statements, understandings, representations and agreements between the parties, oral or written, are superseded by and merged in this Agreement, which alone fully and completely expresses the agreement between them in connection with this transaction and which is entered into after full investigation, neither party relying upon any statement, understanding, representation or agreement made by the other not embodied in this Agreement. This Agreement shall be given a fair and reasonable construction in accordance with the intentions of the parties hereto, and without regard to or aid of canons requiring construction against Service Company or the party drafting this Agreement.
- (c) No failure or delay of either party in the exercise of any right or remedy given to such party hereunder or the waiver by any party of any condition hereunder for its benefit (unless the time specified herein for exercise of such right or remedy has expired) shall constitute a waiver of any other or further right or remedy nor shall any single or partial exercise of any right or remedy preclude other or further exercise thereof or any other right or remedy. No waiver by either party of any breach hereunder or failure or refusal by the other party to comply with its obligations shall be deemed a waiver of any other or subsequent breach, failure or refusal to so comply.
- (d) This Agreement may be executed in one or more counterparts, each of which so executed and delivered shall be deemed an original, but all of which taken together shall constitute but one and the same instrument. It shall not be necessary for the same counterpart of this Agreement to be executed by all of the parties hereto.
- (e) Each of the exhibits and schedules referred to herein and attached hereto is incorporated herein by this reference.
- (f) The caption headings in this Agreement are for convenience only and are not intended to be a part of this Agreement and shall not be construed to modify, explain or alter any of the terms, covenants or conditions herein contained.

- (g) This Agreement shall be interpreted and enforced in accordance with the laws of the state in which the Property is located without reference to principles of conflicts of laws. In the event that the Florida Public Service commission loses or relinquishes its authority to regulate Service Company, then all references to such regulatory authority will relate to the agency of government or political subdivision imposing said regulations. If no such regulation exists, then this Agreement shall be governed by applicable principles of law.
- (h) Each of the parties to this Agreement agrees that at any time after the execution hereof, it will, on request of the other party, execute and deliver such other documents and further assurances as may reasonably be required by such other party in order to carry out the intent of this Agreement.
- (i) If any provision of this Agreement shall be unenforceable or invalid, the same shall not affect the remaining provisions of this Agreement and to this end the provisions of this Agreement are intended to be and shall be severed. Notwithstanding the foregoing sentence, if (I) any provision of this Agreement is finally determined by a court of competent jurisdiction to be unenforceable or invalid in whole or in part, (ii) the opportunity for all appeals of such determination have expired, and (iii) such unenforceability or invalidity alters the substance of this Agreement (taken as a whole) so as to deny either party, in a material way, the realization of the intended benefit of its bargain, such party may terminate this Agreement within thirty (30) days after the final determination by notice to the other. If such party so elects to terminate this Agreement, then this Agreement shall be terminated and neither party shall have any further rights, obligations or liabilities hereunder, except for any rights, obligations or liabilities which by this specific terms of this Agreement survive the termination of this Agreement.
- (j) In the event of any litigation arising out of or connected in any manner with this Agreement, the non-prevailing party shall pay the costs of the prevailing party, including its reasonable counsel and paralegal fees incurred in connection therewith through and including all other legal expenses and the costs of any appeals and appellate costs relating thereto. Wherever in this Agreement it is stated that one party shall be responsible for the attorneys fees and expenses of another party, the same shall automatically be deemed to include the fees and expenses in connection with all appeals and appellate proceedings relating or incidental thereto. This subsection (j) shall survive the termination of this Agreement.
- (k) This Agreement shall not be deemed to confer in favor of any third parties any rights whatsoever as third-party beneficiaries, the parties hereto intending by the provisions hereof to confer no such benefits or status.
- (l) Developer agrees that Service Company may, at its sole discretion, require certain allocations to the proposed collection and transmission systems for future connections. Developer further agrees that Service Company may, at its sole discretion, extend the sewer line for any reason. It is understood that there will be no reimbursement or additional credit.

IN WITNESS WHEREOF, Service Company and Developer have executed this Agreement as of the day and year first above written.

SERVICE COMPANY:

Key West Resort Utilities Corp.  
By: [Signature]  
Print Name: Doug Carter  
Title: GM, KWRU  
Address: Key West Resort Utilities Corp.  
6450 Junior College Road  
Key West, Florida 33040

DEVELOPER:

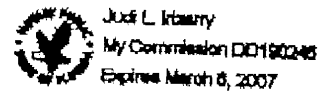
Roy's Trailer Park, Inc  
By: [Signature]  
Print Name: Michael L. Browning  
Title: President  
Address: 402 Appelrouth Lane  
Key West, FL 33040

STATE OF FLORIDA )  
 ) ss:  
COUNTY OF MONROE )

The foregoing instrument was acknowledged before me this 28 day of September, 2005, by Doug Carter, as KWR Resort Utilities Corp, a Florida corporation, on behalf of said corporation. He/she is personally known to me or who has produced as identification.

My Commission Expires: 03/06/07

Judi L. Ufford  
(SEAL)

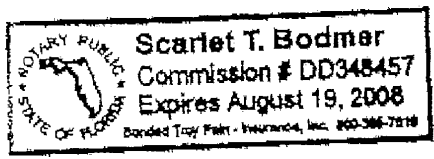


STATE OF FLORIDA )  
 ) ss:  
COUNTY OF MONROE )

The foregoing instrument was acknowledged before me this 22nd day of Sept., 2005, by Michael L. Browning, as President, Roy's Trailer Park, Inc, a Florida corporation, on behalf of said corporation. He/she ~~is personally known to me~~ or who has produced as identification.

My Commission Expires: 8-19-2008

Scarlet T. Bodmer  
(SEAL)



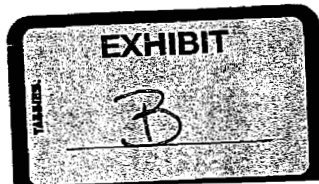
**EXHIBIT "A"**  
**(To Be Provided)**

**GRANT OF EASEMENT**

THIS GRANT OF EASEMENT is made this \_\_\_\_\_ day of \_\_\_\_\_, 2003,  
by \_\_\_\_\_ ("Grantor"), whose address is \_\_\_\_\_  
\_\_\_\_\_ to KW Resort Utilities Corporation, ("Grantee"), whose  
address is 6450 College Road, Key West, Florida 33040.

WITNESSETH, that Grantor, its successors and assigns, for and in consideration of the sum of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration to it in hand paid by Grantee, the receipt and sufficiency of which is hereby acknowledged, grants and conveys a utility easement, in perpetuity, over, in, through and under the property described in Exhibit "A" attached hereto and made a part hereof ("Property").

1. Grantor permanently grants, sets over, conveys and delivers to Grantee, its successors and assigns, the nonexclusive right, privilege and easement to construct, reconstruct, lay and install, operate, maintain, relocate, repair, reconnect, replace, improve, remove and inspect sewer transmission, collection, and vacuum facilities, reuse transmission and distribution facilities and all appurtenant facilities, in, under, upon, over and across the Property with full right to ingress and egress through the Property for the accomplishment of the foregoing rights.
2. This Grant of Easement is a reservation and condition running with the Property and shall be binding upon the successor and assigns of Grantor, all purchasers of the Property and all those persons or entities acquiring right, title or interest in the Property by, through or under Grantor.
3. The Grantor warrants that it is lawfully seized in fee simple of the land upon which the above described easement is situated, and that it has good and lawful authority to convey said land or any part thereof or interest therein, and said land is free from all encumbrances and that Grantor will warrant and defend the title thereto against the lawful claims of all persons whomsoever.
4. All easements and grants herein shall be utilized in accordance with the established generally accepted practices of the sewer industry and all rules, regulations, ordinances, and laws established by governmental authorities having jurisdiction over such matters.
5. Grantor retains, reserves and shall continue to enjoy the use of the surface of the above described property for any and all purposes that do not interfere with Grantee's use of the subject easement, including the right to grant easements for other public utility purposes. Grantor, its successors or assigns, may change the grade above Grantee's installed facilities, or perform any construction on the surface of the above described property which is permitted hereunder, however, if the change in grade and/or construction requires the lowering relocation and/or protection of Grantee's installed facilities (such protection to include but not limited to the construction of a vault to protect the pipes), such lowering, relocation and/or protection shall be performed at the sole cost and expense of Grantor, its successors or assigns.



6. If in the future the portion of any driveways, sodded areas, gardens or plantings shall be destroyed, removed, damaged or disturbed in any way by Grantee as a result of Grantee installing, excavating, repairing, maintaining, replacing, reconnecting or attaching any underground sewer mains, lines or related facilities within the foregoing described easement, Grantee's sole obligation to restore the easement area shall be limited to the replacement of sod and/or pavement, and the Grantee shall have no obligation, nor be responsible or liable for any expense incurred in the replacement of gardens, plantings or trees or any boundary wall, building or structure located in the said easement area which may have been destroyed, removed, damaged or disturbed.

IN WITNESS WHEREOF, the undersigned has executed this instrument the date first written above.

Signed, sealed, and delivered in our presence.

WITNESS:

Print Name \_\_\_\_\_

Print Name \_\_\_\_\_

Print Name \_\_\_\_\_

STATE OF FLORIDA  
COUNTY OF MONROE

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2003,  
by \_\_\_\_\_ of \_\_\_\_\_ corporation,  
on behalf of said corporation.

\_\_\_\_\_  
Notary Public

My Commission Expires:

EXHIBIT "C"

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: PETITION OF )  
KW RESORT UTILITIES CORP. ) Filed: September \_\_\_\_, 2005  
  
FOR DECLARATORY STATEMENT )  
REGARDING SERVICE AVAILABILITY )  
CHARGES. )  
\_\_\_\_\_ )

**PETITION FOR DECLARATORY STATEMENT**

KW Resort Utilities Corp. (Petitioner), by and through its undersigned counsel, pursuant to Section 120.565, Florida Statutes and Rules 28-105.001, Florida Administrative Code, et seq., petitions the Commission for a declaratory statement, and in support states the following:

1. The name and address of the Petitioner are:

KW Resort Utilities Corp.  
6450 College Road  
Key West, FL 33040

2. The name, address, telephone number and facsimile number of Petitioner's counsel

are:

John R. Jenkins, Esq.  
Wayne L. Schiefelbein, Esq., Of Counsel  
Rose, Sundstrom & Bentley LLP  
2548 Blairstone Pines Drive  
Tallahassee, Florida  
(850) 877-6555  
(850) 656-4029

3. The Commission's disposition of the instant petition will affect the Petitioner by determining whether the Petitioner is entitled to collect certain service availability charges from

Roy's Trailer Park, Inc., as provided for in its current Commission-approved Wastewater Tariff, or whether it must accept amortized payments of same.

4. The statutory provision on which the declaratory statement is sought is Section 367.011, Florida Statutes.

5. Petitioner provides wastewater service to the public in an area of Monroe County, Florida known as Stock Island pursuant to Certificate of Authority No. 168-5, which service territory is more specifically set forth in First Revised Sheets 3.0 and 3.1 of its Commission-approved Wastewater Tariff.

6. Roy's Trailer Park, Inc. ("Developer"), owns and operates a mobile home park known as Roy's Trailer Park (the "Property"), consisting of 103 mobile homes which currently receive wastewater service from an onsite sewage treatment and disposal system. Developer's business address is 6500 Maloney Ave, Key West, Florida 33040. The Property is situated in its entirety within Petitioner's certificated service territory.

7. On or about September 28, 2005 Petitioner and Developer entered into a Utility Agreement a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference. Pursuant to the terms of the Utility Agreement Developer is taking its onsite sewage treatment and disposal system off line and interconnecting the existing collection system serving the mobile homes located on the Property to with Petitioner's central wastewater system.

8. Prior to entering into the Utility Agreement Petitioner advised Developer that, as a precondition to connecting the Property to the Petitioner's central wastewater system, Developer must pay to Petitioner certain service availability charges, as provided for in Petitioner's Tariff. Such charges include Petitioner's Plant Capacity Charges of \$2700 per equivalent residential connection,



pursuant to Original Sheet No. 18.0 of the Tariff. The Plant Capacity Charges due for wastewater service availability to the 103 mobile homes on the Property is \$278,100.

9. Developer has taken the position that it must be allowed to amortize service Availability charges pursuant to Section 723.046, Florida Statutes which states:

**Capital costs of utility improvements** - In the event that the costs for capital improvements for a water or sewer system are to be charged to or to be passed through to the mobile home owners in a mobile home park owned all or in part by the residents, any such charge exceeding \$200 per mobile home owner may, at the option of the mobile home owner, be paid in full within 60 days from the notification of the assessment, or amortized with interest over the same duration and at the same rate as allowed for a single-family home under the local government ordinance. If no amortization is provided for a single house, then the period of amortization by the municipality, county, or special district shall be not less than 8 years. The amortization requirement established herein shall be binding upon any municipality, county, or special district serving the mobile home park.

Under such statute, Developer has asserted that it is entitled to amortize payment of the aforesaid Plant Capacity Charges over a period of 8 years.

10. Petitioner's Commission-approved Wastewater Tariff does not provide for amortization of service availability charges including Plant Capacity Charges.

11. Petitioner has advised Developer of Petitioner's position that the Commission's authority over the rates and charges Petitioner may collect is exclusive and preemptive of any other provision of law, citing Section 367.011(2) and (4), Florida Statutes. These sections provide as follows:

**Jurisdiction; legislative intent-**

...  
(2) The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority,

service, and rates.

...

- (4) This chapter shall supersede all other laws on the same subject, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. This chapter shall not impair or take away vested rights other than procedural rights or benefits.

12. In response, Developer has relied in part upon Section 723.004(2), Florida Statutes, which provides:

There is hereby expressly preempted to the state all regulation and control of mobile home lot rents in mobile home parks and all those other matters and things relating to the landlord-tenant relationship treated by or falling within the purview of this chapter. Every unit of local government is prohibited from taking any action, including the enacting of any law, rule, regulation, or ordinance, with respect to the matters and things hereby preempted to the state.

See also Section 723.045, Florida Statutes. Accordingly, Developer has referred to the provisions of Section 723.046, Florida Statutes, as pre-emptive.

13. In light of this disagreement over the amortization issue, Petitioner and Developer have entered into the Utility Agreement, provided for interconnection of the Property, and agreed in section 7 of the Utility Agreement to submit this matter to the Commission for determination:

**7. Payment of Capacity Reservation Fees**

(a) The parties agree that the Property is subject to mandatory hook-up to the Central Sewerage System, pursuant to Sec. 381.0065, Florida Statutes. However, the parties disagree on the due date for payment of the \$278,000 in Capacity Reservation Fees due under this Agreement. Service Company requires payment upon execution of this Agreement, while Developer asserts the right to an amortization period of a minimum of 8 years. Therefore, the parties agree to connect the Property in an expeditious manner as provided for in this Agreement while concurrently filing a Petition for Declaratory Statement with the Florida Public Service Commission ("PSC") in the form attached hereto as Exhibit "C" as to the appropriate payment/amortization protocol. The parties agree to be bound by the decision of the PSC (subject to appeal) for resolution of this dispute. The Service Company shall file the Petition For Declaratory Statement within ten days of the execution of this

Agreement. The Developer and Service Company shall each then have ten days to file a Memorandum of Law with the PSC in support of its respective position on the issue. Each party shall pay its own attorneys fees for this proceeding. In the event either party appeals the decision of the PSC, the party prevailing on appeal will be entitled to reimbursement of its attorney's fees and costs on appeal.

(b) Beginning November 1, 2005, and continuing during the pendency of the Petition for Declaratory Statement (and thereafter if the PSC so rules), Developer shall pay a monthly Capacity Reservation Fee of \$3,653. This fee is based on an eight-year amortization period at an interest rate of six percent (6.0%) per annum. In addition, to secure Developer's continued payment, upon execution of this Agreement, Developer shall provide unconditional personal guarantees of Michael L. Browning and Thomas J. Siresi in favor of the Service Company for any and all unpaid Capacity Reservation Fees due hereunder. Such unconditional personal guarantees shall be in form satisfactory to Service Company, and shall provide that in the event of any default in payment hereunder by Developer, the Service Company may, at its option, proceed directly against the guarantors under said unconditional personal guarantees without proceeding against or exhausting any other remedies which it may have against the Developer or otherwise. In the event that the PSC determines that Capacity Reservation Fees should be paid up front, with no amortization period, Developer agrees to pay to Service Company the balance due on Capacity Reservation Fees within ninety (90) days of the date of issuance of the PSC final order on the case, or, if appealed, within ninety-days (90) of issuance of the Court's mandate or its equivalent.

14. Petitioner and Developer are in agreement as to the facts stated in this Petition. There are no disputed issues of material fact.

15. The Petitioner and Developer have agreed to submit to the Commission memoranda of law in support of their respective legal positions on the amortization issue. These memoranda of law must be filed within ten (10) days of filing the instant Petition.

16. Petitioner acknowledges that pursuant to Section 120.565(3), Florida Statutes, and Rule 28 105.003, Florida Administrative Code, the Commission is subject to a 90 day requirement within which to issue a declaratory statement or to deny the petition. In view of the 10-day timeframe to file memoranda of law, Petitioner and Developer agree to a 10-day extension to such

90-day requirement, to enable the Commission to consider the respective memoranda of law to be filed.

PRAYER FOR RELIEF

Petitioner requests that the Commission:

1. Grant this Petition for Declaratory Statement;
2. Permit Petitioner and Developer to address the Commission at a regularly scheduled Agenda Conference in support of their respective positions;
3. Issue a Declaratory Statement determining as a matter of law what if any amortization period is required to be applied to the Plant Capacity Charges to which the Developer is subject; and
4. Grant such other relief as may be just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, a true and correct copy of the foregoing has been served upon Richard P. Lee, Esq., at Lutz, Bobo, Telfair, Eastman & Lee, 2155 Delta Boulevard, Suite 210-B, Tallahassee, Florida 32303 via regular U. S. Mail, on this \_\_\_\_\_ day of September, 2005.

Respectfully submitted

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John R. Jenkins, Esq.  
Wayne L. Schiefelbein, Esq., Of Counsel  
Rose, Sundstrom & Bentley LLP  
2548 Blairstone Pines Drive  
Tallahassee, Florida 32301  
(850) 877-6555  
Attorneys for KW Resort Utilities Corp.  
Petitioner