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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No.: 050694
Filed: October 10, 2005

MEMORANDUM OF LAW

KW Resort Utilities Corp., by and through its undersigned counsel, hereby submits its Memorandum of Law in support of the Petition for Declaratory Statement filed in the above docket.

1. The instant proceeding poses the question whether KW Resort Utilities Corp. (Petitioner) is required as a matter of law to allow Roy's Trailer Park, Inc. (Developer) to amortize payment of certain service availability charges associated with the connection of Developer's mobile home park known as Roy's Trailer Park (the Property) to Petitioner's central wastewater system.

2. Petitioner maintains that the authority of the Florida Public Service Commission (the Commission) over the foregoing question is exclusive; that Petitioner's Commission-approved Wastewater Tariff requires payment of such service availability charges in full upon connection of the Property; and that no amortization requirement applies.

3. Developer has taken the position that an eight-year amortization requirement applies, relying upon 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

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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.

Developer has further relied upon Section 723.004(2)¹, 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.

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

4. A careful reading of the statutory authority relied upon by Developer reveals that no conflict of laws issue is presented. The clear language of Section 723.046, Florida Statutes, provides for amortization of certain capital costs of utility

¹ See also Sec. 723.045, Florida Statute, **Sale of utilities by park owner or developer.** – No mobile home park owner or developer who purchases electricity or gas (natural, manufactured, or similar gaseous substance) from any public utility or municipally owned utility or who purchases water from a water system for the purpose of supplying or reselling the electricity, gas, or water to any other person to whom she or he leases, lets, rents, subleases, sublets, or subrents the premises upon which the electricity, gas, or water is to be used shall charge, demand, or receive, directly or indirectly, any amount for the resale of such electricity, gas, or water greater than that amount charged by the public utility or municipally owned utility from which the electricity or gas was purchased or by the public water system from which the water was purchased. However, as concerns the distribution of water, the park owner may charge for maintenance actually incurred and administrative costs. This section does not apply to a park owner who is regulated pursuant to chapter 367 or by a county water ordinance.

improvements “at the same rate as allowed for a single-family home under the local government ordinance” and that if no amortization is provided then the period of amortization “by **the municipality, county, or special district** shall be not less than 8 years.” (emphasis provided) The limited scope of this mandated amortization period is further clarified by the following sentence of the statute: “**The amortization requirement established herein shall be binding upon any municipality, county, or special district serving the mobile home park.**” (emphasis provided) Petitioner is an investor-owned wastewater utility, subject to the regulatory jurisdiction of the Commission. It is not a municipality, county or special district, and is therefore not subject to Section 723.046(1), Florida Statutes.²

5. Chapter 723, Florida Statutes, governs the relationship between the Developer and its tenants, not the Developer and a Commission regulated service provider. The "preemptive" language of Section 723.004(2), Florida Statutes, relates to the "regulation and control of mobile home lot rents...and all those other matters and things relating to **the landlord-tenant relationship** treated by or falling within the purview of this chapter." (emphasis added) Service availability charge payment terms by a mobile home park owner to a Commission-regulated, investor-owned wastewater utility which is not a "landlord" simply does not involve "the landlord-tenant relationship." Compare the instant controversy with case law involving the regulatory interplay of Chapters 367 and 723 where the Commission-regulated utility is the landlord. Sandpiper Homeowners Association, Inc. v. Lake Yale Corp., 667 So.2d 921 (Fla. 5th DCA 1996) (Although the PSC has exclusive jurisdiction under

² Such governmental authorities themselves would be exempt from regulation by the Commission and not subject to the provisions of Chapter 367, Florida Statutes. Section 367.022(2), Florida Statutes.

Chapter 367 to entertain actions involving utilities with regard to authority, services and rates, the circuit court is vested with jurisdiction under Chapter 723 to hear matters outside of that realm such as a mobile home park owner's breach of a prospectus and settlement agreement where, following a rate increase granted by the PSC to that park owner (which was a PSC-regulated water and sewer utility), the park owner unilaterally determined the amount by which to adjust monthly mobile home lot rental costs). See also State of Florida, Public Service Commission v. Lindahl, 613 So.2d 63 (Fla. 2d DCA1993) (PSC authority under Chapter 367 to raise or lower water and wastewater rates of a PSC-regulated utility which was also a mobile home park developer upheld as preemptive, even where previous rates were established by deed restrictions.)

6. Further, the express preemptory power under Chapter 723.004(2), Florida Statutes, over "(e)very unit of local government" is wholly inapposite here, as the Commission is a regulatory body of the State of Florida.

7. It is the Commission which has exclusive and plenary jurisdiction over Petitioner, a wastewater utility regulated by the Commission, with respect to its authority, service and rates. Section 367.011(2), Florida Statutes. This unequivocally extends to the service availability charges at issue in this proceeding. Section 367.101(1), Florida Statutes; Hill Top Developers v. Holiday Pines Service Corporation, 478 So.2d 368 (Fla. 2d DCA 1985); Lindahl at 63.

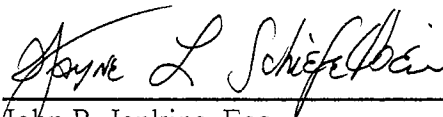
8. As the Petitioner's Commission-Approved Wastewater Tariff requires payment of the service availability charges in full upon connection of the Property, and given the clear inapplicability of the provisions of Chapter 723, Florida Statutes,

to the instant situation, no amortization requirement should be imposed on Petitioner in the instant case. In closing, Petitioner respectfully submits that allowing an off-tariff amortization of service availability charges not otherwise required by law would be unduly discriminatory, and may open the floodgates to additional requests for amortization by other developments, thus potentially rendering the approved tariff provision meaningless.

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 10th day of October, 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