

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: May 21, 2013
TO: Ann Cole, Commission Clerk - PSC, Office of Commission Clerk
FROM: Caroline Klancke, Senior Attorney, Office of the General Counsel *CK*
RE: Docket No. 130086-EU - Complaint of K W Resort Utilities Corp. against Monroe County, Florida for alleged entitlement to collect certain capacity reservation fees for excess capacity used.

The attached information was provided by K.W. Resort Utilities Corp. in response to a request for clarification of the application made by staff on or about May 7, 2013. In particular, staff inquired about the number of customers served within the Jail Complex property identified in the application. Please place the attached documents in the correspondence side of the above-referenced docket file. Thank you.

CMK

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13 MAY 22 AM 11:05
COMMISSION CLERK

DOCUMENT NUMBER-DATE

02816 MAY 22 12

FPSC-COMMISSION CLERK



KW Resort Utilities, Corp.

**6630 Front Street
Key West, FL 33040
305.295.3301
FAX 305.295.0143
www.kwru.com**

VIA EMAIL

May 7, 2013

State of Florida Public Service Commission
Division of Economic Regulation
Lydia Roberts Regulatory Analyst
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: KW Resort Utilities Corp. v. Monroe County – 130086-SU

Dear Ms. Roberts,

Pursuant to your request for additional information as to KW Resort Utilities Corp.'s ("KWRU") preliminary determination of where additional wastewater flows have been generated by Monroe County, I submit the following information for your review.

First, KWRU's agreement with Monroe County Agreement dated August 2001 ("Agreement") states:

6(b) (County Capacity) 454 ERC's based upon an average flow of 83,000 gpd from the County Jail and an estimated flow from the addition to the juvenile detention center of 10,045 gpd. Cost for said hookups is \$1,225,800.

Therefore, to derive total capacity reserved per August 2001 contract:

$$454 \text{ ERC's} \times \$2700/\text{ERC} = \$1,225,800$$

To derive Capacity Reserve Requirement:

$$(\text{Total Capacity in gallons per day}) \times (1.0 \text{ ERC} / 205 \text{ gallons per day}) = \text{Total ERC's reserved}$$

$$83,000 \text{ gpd} + 10,045 \text{ gpd} = 93,045 \text{ gpd} \times (1.0 \text{ ERC} / 205 \text{ gpd}) = 454 \text{ ERC's}$$

The Contract Capacity Requirement and the affiliated payment (\$1,225,800) were based off of the following components providing wastewater flows:

- 1) The County Jail and Bayshore Manor (83,000 gpd)

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2) Juvenile Detention Facility (10,045 gpd)

The following were NOT factored into the Capacity Requirement and were connected after the Agreement was executed in August 2001:

- County Animal Shelter – lift station built and connected in 2002
- County Overnight Temporary Shelter (180 person per night homeless shelter with commercial laundry facilities) – connected in 2004

County Animal Shelter

Pursuant to the Agreement, the County built a lift station on the animal shelter property. The additional flows from the animal shelter were not contemplated in the Agreement. The County never purchased Capacity to account for these additional flows.

Capacity of Animal Shelter is calculated as follows:

$$\begin{aligned} \text{Highest three month average flow} &= 40,400 \text{ gpd} \times (1.0 \text{ ERC} / 205 \text{ gpd}) = 197 \text{ ERC's} \\ 197 \text{ ERC's} \times (\$2,700 / \text{ERC}) &= \$532,097^1 \end{aligned}$$

KW Resort Utilities has identified this capacity as not being accounted for or paid under the Agreement.

County Overnight Temporary Shelter

In 2004, Monroe County leased property to be used as a homeless shelter. The shelter holds up to 180 persons and has commercial laundry facilities, men's and women's bath houses with multiple showers, sinks, and toilets. Upon connecting this facility the County paid for 4.0 ERC's. This payment reserved 820 gallons per day. The Engineering Firm KWRU employs, Weiler Engineering Corp., estimates the peak flow from this facility to be 12,000 gallons per day. This is 14.6 times more Capacity than was paid for this facility. The difference (unpaid) is 54.5 ERC's which costs \$147,150.

This increase in use has never been paid for by Monroe County. Monroe County acknowledged and fully expected the homeless shelter use to increase and contractually agreed to pay for more capacity as the shelter expanded, as this is written into the Homeless Shelter Contract. As of today, the County has not paid for any increase in use beyond the 820 gallons per day originally reserved.

¹ See a copy of the three month average flows from the Animal Shelter attached to this letter.

KW Resort Utilities has identified this capacity has not been accounted for or paid under the Agreement.

Additional County Building Uses

It should also be noted that since the Agreement's execution, the County has relocated several of its other offices to the Juvenile Detention Center that were formerly located in other places. A few examples include the County Building Department and the County Code Compliance Offices (relocated in 2010). Any additional flows that these offices and their activities bring in beyond what was originally reserved in August 2001 would also be considered as additional flows.

Total Peak Flows

Pursuant to KWRU's complaint, KWRU has determined the three month peak monthly average flows for the Monroe County Detention Center to be 4,044,467 gallons, Bayshore Manor 97,167 gallons, and the Animal Shelter as 40,400 gallons. This equates to a daily average flows of 139,401 gallons per day or 45,156 gallons per day more than capacity has been reserved.

It should be noted that KWRU has not requested the total additional flows generated from the homeless shelter, additional uses at the detention center and animal shelter, but has used the actual average flows increase to determine the amount of additional capacity used which has not been paid for by Monroe County. KWRU has requested Monroe County pay \$594,729.00 for the additional 220.27 ERCs of capacity. Based on just the Animal Shelter and Homeless Shelter's additional usage, the total amount of capacity that potentially could be used and should be reserved is 251.57 ERCs or \$679,247.00 in capacity reservation fees.

KW Resort Utilities is asking Monroe County to recognize and pay for flows that are above and beyond what was reserved in the August 2001 Contract.



MCDC AVERAGE GALLONS PER DAY

Read Date	8" Gallons	2" Gallons	Total MCDC	Bayshore Manor	SPCA
4/14/2009	36,000	3,614,600	3,650,600	106,000	17,700
5/13/2009	279,000	3,023,800	3,302,800	35,600	15,200
6/15/2009	435,000	3,554,000	3,989,000	42,600	19,300
7/14/2009	369,000	3,320,000	3,689,000	34,900	22,000
8/17/2009	374,000	4,060,800	4,434,800	44,600	23,500
9/15/2009	314,000	2,277,500	2,591,500	39,300	23,700
10/15/2009	64,000	3,111,699	3,175,699	39,300	24,600
11/16/2009	280,000	2,871,200	3,151,200	42,100	24,600
12/10/2009	241,000	1,995,000	2,236,000	33,200	15,300
1/14/2010	260,000	2,948,400	3,208,400	46,300	26,900
2/16/2010	331,000	2,517,500	2,848,500	46,400	24,600
3/15/2010	207,000	2,529,400	2,736,400	41,700	18,500
4/15/2010	169,000	2,448,900	2,617,900	49,400	20,200
5/17/2010	294,000	2,654,500	2,948,500	50,900	24,000
6/15/2010	306,000	2,696,700	3,002,700	41,600	22,200
7/15/2010	421,000	2,863,320	3,284,320	44,600	23,900
8/16/2010	415,000	3,012,900	3,427,900	47,500	26,900
9/15/2010	428,000	2,508,500	2,936,500	41,100	23,000
10/18/2010	454,000	2,411,500	2,865,500	44,100	28,500
11/16/2010	315,000	2,261,700	2,576,700	42,100	22,800
12/15/2010	333,000	2,388,000	2,721,000	41,700	39,400
1/13/2011	371,000	2,195,900	2,566,900	44,300	28,000
2/14/2011	984,000	2,379,860	3,363,860	52,800	29,800
3/15/2011	440,000	2,098,700	2,538,700	47,500	26,400
4/13/2011	146,000	2,417,200	2,563,200	53,700	27,400
5/12/2011	431,500 *	2,204,400	2,204,400	56,600	29,500
6/14/2011	421,200	2,111,646	2,532,846	66,200	30,300
7/13/2011	606,800	2,688,851	3,295,651	61,100	29,100
8/12/2011	1,008,000	2,256,500	3,264,500	74,300	36,400
9/13/2011	967,700	2,741,900	3,709,600	84,600	41,000
10/13/2011	247,100	2,720,900	2,968,000	87,000	35,700
11/14/2011	484,000	3,078,800	3,562,800	41,200	39,000
12/15/2011	421,000	2,611,000	3,032,000	98,500	36,000
1/13/2012	271,000	2,642,800	2,913,800	31,100	38,900
2/14/2012	381,100	2,468,700	2,849,800	27,300	40,800

Highest 3 Month Average	4,044,467	97,167	40,400
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Total 3 Month Average	4,182,033
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Total Gallons per Day	139,401
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* No FKA read and KWRU was told there will not be one. Usage for May is previous 6 month average (11/10 thru 4/11)

UTILITY AGREEMENT

THIS UTILITY AGREEMENT ("Agreement"), dated as of the 16th day of August, 2001, by and between KW Resort Utilities Corp., a Florida corporation, having its office(s) at 6450 Junior College Road, Key West, Florida, 33040 ("Service Company"), and The County of Monroe, Florida, a Florida County having its office(s) at 5100 College Road, Key West, FL 33040, ("County").

R E C I T A L S

- A. County is the owner of certain real property more particularly described on Exhibit "A", attached hereto and made a part hereof (the "Property").
- B. County currently operates a jail and detention center on the Property ("Detention Facility"), which requires sanitary sewer service.
- C. County currently operates public facilities at the Public Service Building, Bayshore Manor, and the Animal Shelter, all along College Road ("Public Buildings"), which requires sanitary sewer service.
- D. County requests that Service Company provide central sewage collection services in and upon the Property.
- E. Service Company owns, operates, manages and controls a central sewage system and is willing to provide sanitary sewer services pursuant to this Agreement.

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. On-Site Facilities

The County owns and operates the following facilities, which it agrees to convey at no charge to the Service Company:

- A. Lift station serving the Detention Facility Treatment Plant.
- B. Lift station serving the Public Buildings and sewer main from the lift station to the Detention Facility Treatment Plant.

The County shall construct the following facilities, which it agrees to convey at no charge to the service company at the time of connection to the Service Company's system:

- A. A second lift station serving the Public Buildings located at the Animal Shelter.
- B. A sewer main from the second lift station to the existing sewer main serving the Detention Facility.

The three County lift stations and appurtenant facility to be conveyed to Service Company are hereinafter referred to as "On-Site Facilities". All On-Site Facilities, laterals and Property Installations shall be in good working order upon connection to Service Company's system. Prior to commencing construction on the second lift station serving the Public Buildings, County shall provide Service Company with construction plans for approval by

Service Company, which approval shall not be unreasonably withheld. If the Service Company discontinues service to the County property for whatever reason (other than nonpayment or default by County) then the on-site facilities will be reconveyed by the Service Company to the County at no charge.

Service Company shall construct a reuse ("graywater") line to Detention Facility, and agrees to make available a minimum of 32,000 gallons per day ("gpd") of graywater to County, but no more than 60,000 gallons per day. Graywater shall meet all reuse water quality standards required by law.

2. 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.

"Central Sewage System" - shall mean the central sewage system owned and operated by the Service Company.

"Customer" - shall mean the County.

"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 205 gallons per day per residential connection).

"Point of Delivery" - shall mean the point at which the county lines enter the three-lift station conveyed to the Service Company.

"Property Installations" - shall mean any service lines located on individual lots or parcels of the Property, on the County side of the Point of Delivery.

"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.

"System" - shall mean all pipes, lines, manholes, lift or pump stations, reservoirs or impoundments constructed or installed on the Property in public rights-of-way or easements dedicated to Service Company, or on lands conveyed to Service Company by deed in fee simple, including, without limitation, Central Connection Lines.

"Tariff" - shall mean Service Company's existing and future schedules of rates and charges for sewer service.

3. System Construction

Service Company shall design and construct at its sole expense offsite facilities to connect the county lift station at the Detention Facility to the Central Sewage System (the "Project"). Said Project shall commence 30 days after execution hereof and be completed 180 days after commencement. County upon completion shall immediately provide all of its domestic wastewater to Service Company for treatment at Service Company's applicable tariff. The Service Company's current tariff is \$605.52

for a 4" meter base facility charge per month and \$2.92 per 1000 gallons measured off of water consumption. Additional wastewater services at the Public Service Building, Bay Shore Manor, the Animal Shelter and other shall pay the applicable tariffs. For instance if the Detention Center uses a 4" meter and the Public Service Building has a 2" meter then the County's rate shall be \$605.62 + \$196.35 plus \$2.92 per thousand gallons per month. Notwithstanding Utility's Tariff, Utility agrees to treat all of County's re-use water, including air conditioning re-use water. County agrees to pay Utility for treating re-use water based upon a four-inch meter and Utility's current tariff, the re-use meter shall be read daily. The County represents that no re-use water is disposed via shallow injection well.

4. System Decommissionary

County currently operates a .105 MGD wastewater treatment plant on the property. After commencement of service by Service Company, County at its sole expense may at its option decommission and remove said plant. Notwithstanding the foregoing, Service Company agrees to assist County in said decommissionary by contributing to the cost of the engineering, permitting, and removing the existing plant the lesser of \$10,000 or the sum of said costs.

5. Property Rights

Prior to Service Company's construction of the Project, County shall convey

- a) A non-exclusive easement in the form attached hereto as Exhibit "B" in and to any and all portions of the On-Site Facilities not located in public rights-of-way, of sufficient size to enable Service Company ingress and egress and to operate, maintain and replace such portions of the On-Site Facilities not located within public rights-of-way for Service Company, other uses of Service Company's system and its successor and assigns. If the Service Company discontinues service to the County property for whatever reason, then the easements granted to this section will lapse and expire and the County property so encumbered will be free and clear of such easements. Language similar to the foregoing must appear in the easements filed for record. The Service Company agrees to provide and execute the documents necessary to extinguish such easements.
- b) Service Company at its sole discretion shall be permitted to pump other customer's wastewater through said lift station and force main and County shall provide easements for said connections at request of Service Company without any additional charge.
- c) A bill of sale conveying title to On-Site Facilities free and clear of all liens and encumbrances.

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) County 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. connections to be reserved by County to serve the Property (individually, a "Connection", collectively, the "Connections").

The initial reservation shall be for 454 ERC's based upon an average flow of 83,000 gallons per day from the county jail and an estimated flow from the addition to the juvenile detention center of 10,045 gallons per day. Cost for said hook-ups is \$1,225,800. Any additional flows of wastewater from the Detention Facility, Public Buildings, or expansions thereof, animal shelter or in excess of the estimated flow shall require additional capacity fee, which shall be based upon Florida Code Statute 64E-6.

- c) The Capacity Reservation Fee for each connection shall be payable by County to Service Company as follows:

- (i) 1/3, upon completion of the connection (estimated at this time to be \$408,600).
- (ii) 1/3, one year after connection completion.
- (iii) 1/3, two years after connection completion.

- d) Service Company hereby agrees to reserve such capacity for the benefit for County subject to the provisions of this Section 5, provided, however, that such reservations shall not be effective until Service Company has received the initial installment of the Capacity Reservation Fee in accordance with Section 6 © (I) hereof, and provided, further, that Service Company shall have the right to cancel such reservations in the event of County's failure to comply with the terms of this Agreement

- e) In addition to the above charges, upon delivery hereof, County shall also pay Service Company \$.40 per thousand gallons for "graywater" provided to County pursuant to Paragraph 1 herein.

- f) In the event of default by County in the payment of Capacity Reservation Fee hereunder, which default is not cured as provided in paragraph 12, hereof, Service Company may cancel this agreement by giving thirty (30) days written notice of default and retain all payments hereunder as liquidated damages.

7. The capacity reservation fee described in paragraph 6(c)(i), hereafter 6(c)(i) funds (minus the cost incurred by Service Company to complete the Project including the graywater line), when due, must be deposited in an interest bearing escrow account with a federally insured financial institution that has an office in Key West, Florida. The mention of 6(c)(i) funds includes all accumulated interest. The terms of the escrow are as follows:

- a) When the Service Company begins substantial physical construction to expand the capacity of its wastewater treatment plant or to extend its wastewater collection infrastructure to serve additional areas in South Stock Island or other islands then the escrow agent will release the 6(c)(i) funds to the Service Company in the following manner: the payments will be made monthly equal amounts based

on the expected completion date of the expansion as set forth in the Service Company's construction documents. Release of said funds shall be made by escrow agent upon presentation of construction invoices (including costs of real estate acquisition, purchase or installation of pipes and lift stations, and professional services; provided that such costs are exclusively attributable to such expansion of capacity or extension of collection infrastructure) to be paid by Service Company along with a statement from Service Company describing the construction for which the invoices seek payment. County hereby agrees to enforce, through Code Enforcement proceedings, its ordinance requiring all property owners located within Service Company's service area to connect to Service Company's System and to pay the tariff applicable to such connection. In the event of breach hereof by County which breach continues after notice and reasonable opportunity to cure as provided in Paragraph 12, below, all escrowed funds shall be released to Service Company.

- b) However, if the Service Company agrees to sell its wastewater treatment plant and collection infrastructure to the FKAA before the Service company completes the construction just described, then the 6(c)(i) funds (or the balance then remaining undisbursed) must be transferred to the FKAA upon the completion of the actions needed to consummate the sale of the wastewater treatment plant and collection infrastructure to the FKAA. For the purposes of this paragraph 7, *sale* means the sale of physical assets, an equity purchase (and/or debt assumption or purchase) resulting in the FKAA acquiring a controlling interest in the Service Company, a long-term lease of the physical assets, or any other transaction that results in the FKAA assuming the obligation to operate the Service Company's wastewater treatment plant and current collection infrastructure.
- c) If the Service company has not commenced expansion of the wastewater treatment plant or collection infrastructure by the year 2006 or, if the FKAA has not purchased the Service Company's assets as described above by the year 2006, then the escrow agent must release the 6(c)(i) funds to the Service Company.

8. **Absolute Conveyance**

Except as provided elsewhere in this contract regarding the reconveyance of property and the extinguishment of easements if service is discontinued, County understands, agrees and acknowledges that County's conveyance of the On-Site Facilities and any and all easements, real property or personal property, or payment of any funds hereunder (including, without limitation, the Capacity Reservation Fee), shall, upon acceptance by Service Company, be absolute, complete and unqualified, and that neither County nor any party claiming by or through County 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; Maintenance**

- a) Upon connection as provided in section 1, Service Company shall provide service to the Point of Delivery in accordance with the terms

of this Agreement and all applicable laws and regulations and shall operate and maintain the System in accordance with the terms and provisions of this Agreement. Service Company shall use its best efforts to provide service prior to February 15, 2002. In the event that Service Company is unable to provide service on February 15, 2002 thru no fault of Service Company, then all cost of alternative sewage disposal shall be County's until service is provided. Service means that the Service Company will process, treat and dispose of wastewater and will operate its system: in compliance with the quality and process standards required by DEP and the Service Company; in accordance with industry standards as they develop and any FCAA, County, or City of Key West requirements; and, in a manner that does not pose or cause health or environmental risk or damage (provided, that should any violation of health or environmental rule or law occur, service company shall be in compliance herewith if service company promptly undertakes and completes any necessary remedial action). Service also means the furnishing of graywater, described in section 1, meeting industry standards.

- b) County shall, at its sole cost and expense, own, operate and maintain all Property Installations, which have not been conveyed to Service Company pursuant to the terms and conditions of this Agreement.
- c) In the event County desires additional services over and above that reserved herein and provided Service Company has additional uncommitted capacity, Service Company shall provide said additional capacity provided County pays the additional connection fees required under Chapter 64E-6 F.A.C.
- d) County shall pay for any extra expense of operating the Detention Center lift station resulting from prisoner or staff disposal of debris into the system or failure to maintain its grease trap. Service Company shall have the right to inspect the grease traps in order to insure their continued maintenance by County.
- e) County shall only provide domestic waste water for treatment by Service Company. No water from air conditioning systems or swimming pools shall flow into the wastewater disposal system.
- f) The Service Company agrees to keep its system in good repair, in full operating condition in compliance with applicable law and to promptly remedy all breakdowns, spills, contaminations and other acts of environmental damage or pollution.

10. **Repair of System**

In the event of any material damage to or destruction of any of the lift stations located on County property operated or maintained by Service Company due to any acts or omissions by County, or its agents, representatives, employees, invitees, licensees, detainees or inmates, Service Company shall repair or replace such damaged or destroyed portion of the System at the sole cost and expense of County. County shall pay all costs and expenses associated with such repair or replacement within thirty

(30) days after receipt of any invoice from Service Company setting forth any such costs and expenses.

11. Term

This Agreement shall become effective as of the 15th day of Aug, 2001, and shall continue for 99 years so long as Service Company, its successor or assignees, provides sewer service to the County, and the County's successors and assigns. WJH

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 fifteen (15) 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 County fails to timely pay all fees, rates and charges pursuant to the terms of this Agreement. The County, however, may withhold payment, without default, if the Service Company through no fault of the County: fails to provide consistent minimum wastewater and graywater services as required by section 9; causes or permits unexcused delays or interruptions in service or commencing service; cause or permits repeated or chronic failures to maintain quality standards; causes or permits damage to County property; causes or permits adverse health effects to the public or system users; causes or permits environmental damage; or, exposes the County or its officials and employees to suits or liability attributable to the Service Company's conduct.

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. If the Service Company intends to claim force majeure as an excuse for nonperformance, then it must so notify the County in writing within ten business days of the force majeure event. The Service Company must also undertake all reasonable measures, at its expense, to restore full service at the earliest practical date. The

County is not obligated to pay any Service Company tariff, charge or fee until service is restored.

b) Governmental Acts

If for any reason during the term of this Agreement, other than for due conduct of the Service Company and its agents and representatives, and except for the lawful actions and decisions of the County in the exercise of its governmental powers, 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 County 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 County and County 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 provided that service is restored within 24 hours:

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.

14. Successors and Assigns

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

- a) To the extent authorized by Section 768.28, FS, the County agrees to indemnify and hold harmless the Service Company for claims, demands,

causes of action, losses, damages, and liabilities that arise out of the negligent act(s) or omission(s) of any County officer, employee, contractors (including subcontractors employed by a County contractor) and agents, in connection with the use of the system, the operation of the system, or the occupancy of the Property.

b) The Service Company agrees to indemnify and hold harmless the County for claims, demands, causes of action, losses, damages and liabilities that arise out of the negligent act(s) or omission(s) of any Service Company officer, employee, contractors (including subcontractors employed by a Service Company contractor) and agents in connection with the maintenance, expansion and operation of the system, including those acts or omissions that result in environmental damage or pollution.

16. 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: KW Resort Utilities Corp.
6450 Junior College Road
Key West, Florida 33040
Fax (305)294-1212

With a copy to: W. Smith
11 E. Adams, Suite 1400
Chicago, Illinois 60603
Fax (312)939-7765

If to County: County Administrator
Public Service Building
5100 College Road
Key West, FL 33040

With a copy to: County Attorney
PO Box 1026
Key West, FL 33041

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) The parties hereto do hereby knowingly, voluntarily, intentionally, unconditionally and irrevocably waive any right any party may have to a jury trial in every jurisdiction in any action, proceeding or counterclaim brought by either of the parties hereto against the other or their respective successors or assigns in respect of any matter arising out of or in connection with this agreement or any other document executed and delivered by either party in connection therewith (including, without limitation, any action to rescind or cancel this agreement, and any claim or defense asserting that this agreement was fraudulently induced or is otherwise void or voidable). This waiver is a material inducement for the parties hereto to enter into this agreement.

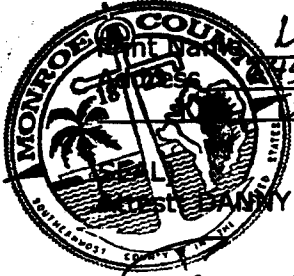
- k) In the event of any litigation arising out of or connected in any manner with this Agreement, the non-prevailing party shall pay the costs of the prevailing party, including its reasonable counsel and paralegal fees incurred in connection therewith through and including all other legal expenses 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 (k) shall survive the termination of this Agreement.

- l) 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.

IN WITNESS WHEREOF, Service Company and Developer have executed this Agreement

as of the day and year first above written.

KW RESORT UTILITIES CORP.



William L Smith Jr
450 Jr College Rd
West, Fla 33040

By: [Signature]
Title: President

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

ANNY L. KOLHAGE, Clerk
By: [Signature]
Deputy Clerk

By: [Signature]
Mayor/Chairman

STATE OF ILLINOIS)
COUNTY OF COOK) ss:

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY.
By: [Signature]
ROBERT N. WOLFE
DATE 8-28-01

The foregoing instrument was acknowledged before me this 23rd day of August, 2001, by William L Smith, Jr. as President of KW Resort Utilities Florida corporation, on behalf of said corporation. He/she is personally known to me or who has produced Driver's License as identification. [Signature]

My Commission Expires:



STATE OF FLORIDA)
COUNTY OF MONROE) ss:

The foregoing instrument was acknowledged before me this _____ day of July, 2001, by _____, as Mayor of Monroe County, a political subdivision of the State of Florida. He is personally known to me.

My Commission Expires:

JdconKWUtilities2

FOR RECORD
01 AUG 30 PM 4: 53
ANNY L. KOLHAGE
CLERK
MONROE COUNTY, FLA.

B.E.P. Jr.
M.M.P.

Addendum A

J.B.

A parcel of land, formerly submerged in the Bay of Florida, and being a part of Trustee of the Internal Improvement Trust Fund of the State of Florida (TIIF) Deed Number 19725, and said parcel being in Section 27, Township 67 South, Range 25 East and in Monroe County, Florida; and said parcel being more particularly described by metes and bounds as follows: COMMENCE at the intersection of the center line of the right of way of U. S. Highway No. 1, also known as the center line of the Florida East Coast Railroad; and the center line of the right of way of "Old Country Club Road" (OCCR), also known as Junior College Road (JCR) as these two center lines exist as of May 16, 1990, said intersection being known as Point #1 and having coordinates of N-85889.70' & E-251292.03' based on the Mercator Projection for the East Zone of Florida; and run thence N 20° 11' 57" W (all bearings in this legal description are also based on the said Mercator Projection) along the center line of the OCCR for a distance of 230.44 feet to Point #2 (N-87205.96' & E-251213.25'); thence N 52° 51' 57" W along the center line of the OCCR for a distance of 330.00 feet to Point #3 (N-87405.16' & E-250960.18'); thence N 39° 38' 57" W along the center line of the OCCR for a distance of 300.00 feet to Point #4 (N-87636.17' & E-250758.75'); thence N 30° 49' 57" W along the center line of the OCCR for a distance of 265.00 feet to Point #5 (N-87865.72' & E-250622.93'); thence N 03° 33' 57" W along the center line of the OCCR for a distance of 152.00 feet to Point #6 (N-88015.42' & E-250613.48'); thence N 19° 47' 03" E along the center line of the OCCR for a distance of 122.56 feet to Point #7 (N-88130.76' & E-250654.96'); thence N 60° 20' 57" W for a distance of 200.00 feet to Point #8 (N-88229.69' & E-250481.15') and the SE 1/4 corner of the lands described in the said TIIF Deed No. 19725; thence N 29° 39' 03" E along the SE 1/4 boundary line of the lands described in the said TIIF Deed No. 19725 for a distance of 962.72 feet to Point #9 (N-89066.35' & E-250967.42') and the POINT OF BEGINNING of the parcel of land being described herein said Point of Beginning being marked by an iron pipe; thence N 63° 32' 06" W for a distance of 206.48 feet to Point #10 (N-89158.37' & E-250772.57'); thence S 40° 23' 19.5" W for a distance of 108.08 feet to Point #11 (N-89076.04' & E-250762.54'); thence S 56° 13' 32" W for a distance of 241.24 feet to Point #12 (N-88941.93' & E-250502.01') and the Approximate Mean High Tide Line of Florida Bay (MHTL); thence S 27° 02' 03" W and along the said MHTL for a distance of 179.70 feet to Point #13 (N-88781.87' & E-250420.33'); thence S 31° 02' 03" W and along the said MHTL for a distance of 137.17 feet to Point #14 (N-88664.35' & E-250349.62'); thence S 41° 02' 02" W and along the said MHTL for a distance of 103.25 feet to Point #15 (N-88506.44' & E-250281.83'); thence S 51° 32' 03" W and along the said MHTL for a distance of 146.23 feet to Point #16 (N-88495.48' & E-250167.33'); thence N 52° 27' 57" W and along the said MHTL for a distance of 193.38 feet to Point #17 (N-88613.29' & E-250013.09'); thence N 30° 27' 57" W and along the said MHTL for a distance of 315.40 feet to Point #18 (N-88885.14' & E-249854.07'); thence N 20° 27' 57" W and along the said MHTL for a distance of 280.40 feet to Point #19 (N-89147.84' & E-249766.03'); thence N 01° 32' 03" E along the said MHTL for a distance of 165.00 feet to Point #20 (N-89312.78' & E-249760.45'); thence N 16° 27' 56" E and along the said MHTL for a distance of 77.62 feet to Point #21 (N-89387.22' & E-249782.45'); thence N 16° 46' 52" W and along the said MHTL for a distance of 57.66 feet to Point #22 (N-89441.81' & E-249763.91'); thence N 14° 57' 57.5" W and along the said MHTL for a distance of 128.46 feet to Point #23 (N-89565.90' & E-249730.78'); thence N 30° 26' 33" E and along the said MHTL for a distance of 165.00 feet to Point #24 (N-89695.14' & E-249835.32'); thence S 62° 04' 36" E for a distance of 195.00 feet to Point #25 (N-89575.29' & E-249987.14') and a concrete monument; thence S 13° 16' 39" W for a distance of 22.30 feet to Point #26 (N-89553.59' & E-249982.02') and a concrete monument; thence S 44° 52' 02" E for a distance of 269.09 feet to Point #27 (N-89322.88' & E-250171.86') and a concrete monument; thence N 74° 46' 08" E for a distance of 80.26 feet to Point #28 (N-89383.96' & E-250249.30') and a concrete monument; thence S 56° 50' 29" E for a distance of 483.59 feet to Point #29 (N-89119.46' & E-250654.14') and a concrete monument; thence N 40° 23' 19" E for a distance of 157.23 feet to Point #30 (N-89239.22' & E-250756.02') and a concrete monument; thence S 63° 32' 06" E for a distance of 316.58 feet to Point #31 (N-89098.15' & E-251039.42') to the Westerly and curved right of way line of the said Junior College Road and a concrete monument, said curve being concave to the Southeast and having a radius of 984.84 feet; thence SW 1/4 along the said curved right of way line for and arc distance of 66.04 feet to Point #32 (N-89045.11' & E-251000.06') and a concrete monument; thence N 63° 32' 06" W for a distance of 47.66 feet back to Point #9 and the POINT OF BEGINNING, said parcel containing 13.943 acres (607.363 square feet), more or less.

Exhibit B

THIS INSTRUMENT PREPARED BY:

John R. Jenkins, Esquire
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555

GRANT OF EASEMENT

THIS GRANT OF EASEMENT is made this ____ day of _____, 200__, by _____ (AGrantor@), whose address is _____ to K. W. Resort Utilities Corp., (AGrantee@), whose address is 6450 Junior 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 AA@ attached hereto and made a part hereof (Property@). Notwithstanding the foregoing, in the event Grantee discontinues service for any event other than non-payment or default by Grantor then the easement granted shall lapse and expire.

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 and collection facilities, reuse transmission and distribution facilities and all appurtenances thereto, and all appurtenant equipment 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 established generally accepted practices of the water and 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 any 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 surface of the easement area shall be limited to the replacement of sod and/or pavement, and 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 this ____ day of ___, 200__.

ed, and delivered in our presence.

S:

Print Name: _____

STATE OF FLORIDA
COUNTY OF MONROE

The foregoing instrument was acknowledged before me this ____ day of _____, 200__, by _____ who is personally know to me or who has produced as identification.

My Commission Expires:
NOTARY PUBLIC