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October 7, 2005

Blanca Bayo
Division of Commission Clerk
And Administrative Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: In Re: Petition of KW Resort Utilities Corp For Declaratory Statement Regarding Service Availability Charges
Docket #050694-SU

Dear Ms. Bayo:

Enclosed is a memorandum of law filed on behalf of Roy's Trailer Park, Inc., ("Developer") in opposition to the petition for declaratory statement filed in the above-styled matter as referenced in paragraph 15 thereof.

Please contact me if you have any questions regarding this memorandum.

Sincerely,

Richard P. Lee

cc: Michael Browning

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: PETITION OF KW RESORT UTILITIES CORP. FOR DECLARATORY STATEMENT REGARDING SERVICE AVAILABILITY CHARGES	)	Docket # 050694-SU

MEMORANDUM OF LAW IN OPPOSITION TO CLAIM OF AUTHORITY BY THE PSC OVER SECTION 723.046, FLORIDA STATUTES

Pursuant to Section 367.011(2), Florida Statutes, the Florida Public Service Commission (hereinafter "the PSC") has exclusive jurisdiction over each regulated utility with respect to its authority, service and rates. The matter of the amortization by a utility provider of an undisputed PSC-approved service availability charge applicable to a mobile home park, as required by section 723.046, Florida Statutes, impacts neither the authority, service or rates of the utility provider and thus is not a matter subject to the jurisdiction of the PSC.

In paragraph 3 of its Petition for Declaratory Statement, Petitioner states that disposition of its petition will determine "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." On the contrary, the instant matter has nothing to do with whether Petitioner will receive payment of such charges or of the amount of such charges. Those charges have been approved by the PSC and neither the legality nor the amount of the charges is in dispute in the instant matter. This case addresses only the issue of the time period over which such charges may be collected from a mobile home park owner by the utility provider. The existence of a PSC-approved wastewater tariff does not automatically render all matters affecting that tariff within the exclusive jurisdiction of the PSC. As stated by the court in *Radio Telephone Communications, Inc. v.*

Southeastern Telephone Co., 170 So.2d 577 (Fla. 1965), "[i]f there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." Further, the fact that the service availability charge at issue was approved as part of Petitioner's wastewater tariff is not dispositive of the matter. That fact was recognized by the court in *Cohee v. Crestridge Utilities Corp.*, 324 So. 2d 155 (Fla. 2d DCA 1975). Regarding the effect of the issuance of a water certificate by the PSC, the court in *Cohee* noted that:

> Because of this court's concern that our opinion might affect the jurisdiction of the Florida Public Service Commission, an order was entered affording the Commission an opportunity to express its views through the filing of an amicus curiae brief. The Commission chose to file such a brief in which it stated that its issuance of the water certificate to Crestridge did not constitute the setting of rates. The Commission asserts that it merely approved what it believed to be the rates which were being charged and collected on the jurisdictional date.

Sandpiper Homeowners Association, Inc., v. Lake Yale Corp., 667 So.2d 921 (Fla. 5th DCA 1996), clearly established that matters related to the authority, service and rates of a regulated water utility may fall outside of the jurisdiction of the PSC. In *Sandpiper,* a mobile home park owner was directed by the St. Johns River Water Management District to install water meters and to begin charging for water based on an inverted rate in an effort to promote water conservation. An appropriate rate structure was then established by the PSC. Residents objected to the change from "free" water to metered water claiming that the change to metered water and imposition of the inverted rate structure was in violation of the community's prospectus and of a settlement agreement entered into with the community owner whereby increases in lot rental amount were to be limited to the annual increase in the consumer price index (CPI). The matter was taken to circuit court where the community owner prevailed on a motion for summary judgement based on a claim that the issues raised by the home owners were subject to the exclusive jurisdiction of the PSC and thus were not

properly reviewable by the circuit court. The home owners appealed.

At issue on appeal was whether the circuit court has jurisdiction to hear issues related to water rates established by the PSC under its authority granted by Chapter 367, Florida Statutes, or related to changes in home owner rent structures resulting from the establishment of metered water subject to PSC established water rates. The court ruled that while the PSC has exclusive jurisdiction regarding issues concerning utilities with regard to the utilities' authority, services, and rates, the circuit court has jurisdiction to consider related matters such as whether a mobile home community owner breached the terms of his community's prospectus, and the settlement agreement entered into with community home owners. The court also held that rental costs do not involve matters of authority, services or rates under Chapter 367, Florida Statutes, and thus are within the jurisdiction of the circuit court.

The authority of the PSC to establish rates to be charged by a regulated utility is preemptive. *Hill Top Developers v. Holiday Pines Service Corporation*, 478 So.2d 368 (Fla. 2d DCA 1985). Likewise, the PSC has exclusive jurisdiction over raising or lowering such rates. *Public Service Commission v. Lindahl*, 613 So.2d 63 (Fla. 2d DCA 1993). Nonetheless, the present matter does not involve the setting of rates or the raising or lowering thereof. Rather this matter involves a dispute concerning the right of Roy's Trailer Park, as established by section 723.046, Florida Statutes, to insist that its contract for service with a regulated utility include the amortization of the service availability charge. As stated by the PSC in PSC Order No. PSC-94-0171-WS:

> With respect to agreements between utilities and customers or other parties, contract disputes are matters which must be settled by the circuit court.

That "no statutory authority permits the PSC to interfere with a contract between private parties" was reiterated by the court in *United Telephone Company v. Public Service Commission*, 496 So.2d 116

(Fla. 1986).

Section 723.046

Previously, a direct conflict existed between provisions of Chapter 367, Florida Statutes, and Chapter 723, Florida Statutes ("the Florida Mobile Home Act") regarding the regulation of the sale of utilities by a mobile home park owner. That conflict resulted in a review of both statutes and ultimately the 1997 amendment of section 723.045, Florida Statutes, by the addition of the following sentence:

> This section does not apply to a Community owner who is regulated pursuant to chapter 367 or by a county water ordinance.

However, section 723.046, which was in effect at the same time that section 723.045 was being amended to eliminate the statutory conflict, was not amended. The clear reason for that lack of amendment was that section 723.046 does not involve the authority, service or rates of a utility provider. Thus an express reference to Chapter 367 as per section 367.011(4) is not required. Because section 723.046 addresses a significant potential problem - the charging to mobile home owners and/or park owners of large and unanticipated governmental or utility charges to be paid in a lump sum or over a short period of time. Problems such as this were considered significant enough by the legislature that all matters involving rents in mobile home parks and other matters addressed in Chapter 723 have been preempted to the state. Thus, section 723.004 provides in relevant part:

> (1) The Legislature finds that there are factors unique to the relationship between a mobile home owner and a mobile home park owner. . . The Legislature recognizes that mobile home owners have basic property and other rights which must be protected. The legislature further recognizes that the mobile home park owner has a legitimate business interest in the operation of the mobile home park as part of the housing market and has basic property and other rights which must be protected.
>
> (2) 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 ordinances with respect to the matters and things hereby preempted to the state.

The history of Florida law relative to obligations for payment of governmental charges is relevant to an understanding of the application of section 723.046 and to an understanding of why that section is not subject to the jurisdiction of the PSC.

Prior to the enactment of Chapter 723, Florida Statutes, mobile home parks in Florida were regulated pursuant to Part III of Chapter 83, Florida Statutes. One of the basic concepts embodied in that earlier statute was that home owners were only obligated to pay to park owners those fees and charges which were disclosed to them in writing prior to the initiation of their tenancy. Nonetheless, the legislature also recognized that certain types of fees and charges resulting from government action could not be readily anticipated by park owners and thus that home owners could be made responsible for payment of same even without prior disclosure. The clear notion was that the revenue annually received by a park owner from operation of his mobile home park should not be negatively impacted by the cost of unforseen charges imposed by or resulting from governmental action. Thus, section 83.760(3) provided in relevant part:

> The lease shall contain the amount of the rent, any security deposit, installation charges, fees, assessments, and any other financial obligations of the mobile home owner. *However this provision shall not be construed to prevent any mobile home park owner from passing on to the mobile home owner any costs, including increased cost for utilities, which are incurred due to the actions of any state or local government.* (Emphasis added.)

With the enactment of Chapter 723 in 1984, this concept was carried forward in Section 723.031(5)(1984), which likewise provided:

> The rental agreement shall contain the amount of the rent, any security deposit, installation charges, fees, assessments, services included, and any other financial

> obligations of the mobile home owner. However, for a tenancy in existence on the effective date of this act and until the term of the existing rental agreement expires, *this provision shall not be construed to prevent any mobile home park owner from passing on to the mobile home owner any costs, including increased cost for utilities, which are incurred due to the actions of any state or local government.* (Emphasis added.)

In 1986 the above-quoted provision was repealed and section 723.031(6) was added. By this revision home owner obligation for payment of previously undisclosed fees and charges was limited to "pass through charges." The pertinent portion of section 723.031(6) provides:

> (6) *Except for pass-through charges*, as defined in this chapter, failure on the part of the mobile home park owner or developer to disclose fully all fees, charges, or assessments prior to tenancy, . . . shall prevent the park owner or operator from collecting said fees, charges, or assessments . . . ." (Emphasis added.)

The statutory definition of "pass through charge" first appeared in 1986 as Section 723.003(9), Florida Statutes. The term "pass through charge" is currently defined in Section 723.003(10), Florida Statutes, as:

> the mobile home owner's proportionate share of the necessary and actual direct costs and impact or hookup fees for a governmentally mandated capital improvement, which may include the necessary and actual direct costs and impact or hookup fees incurred for capital improvements required for public or private regulated utilities.

Based on the above-quoted provisions it is clear that since the inception of state regulation of mobile home parks in Florida, even without prior disclosure to home owners, park owners have had the right to pass on and home owners are obligated to pay, charges resulting from governmentally mandated capital improvements to the park. The timing by which that right may be implemented was not questioned until 1992 through the enactment of section 723.046, Florida Statutes.

Section 723.046 itself was actually the result of *MLH Property Managers, Inc., v. Cox*, Case No. 92-636-CA-19 (Fla. 19th Cir. Ct. 1993) which upheld the park owner's right to pass on impact fees and construction costs and to individually meter water service in the community. Even before

a final judgment had been rendered in the case, the home owners had contacted a local legislator who proposed legislation which ultimately became section 723.046, Florida Statutes. The compelling reason for that legislation was that payment over a short period of time for capital costs for utility improvements resulting from governmental action should not be required of either park owners or home owners. Section 723.046 states:

> 723.046 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 or if such expenses shall be required of 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.

Based on this provision it is clear that the legislative goal of protecting the revenue annually received from operation of a mobile home park for unanticipated governmental action remains the law of this state.

Section 723.046 limits the timing of the obligation of both home owners and park owners to pay the capital costs of utility improvements required by governmental action. The "amortization requirement" of section 723.046 which is binding upon local governments and special districts serving the mobile home park, requires local governments to allow payment to be made over a period of not less than eight years. The obvious intent of this provision is that home owners should be allowed to pay their share of capital costs for utility improvements over the same amount of time the park owner is allowed to make payment. The statute provides that the amortization requirement set forth therein is binding upon any local government serving the mobile home park. That is, if the local government

does not already have an ordinance allowing payment of the capital costs of utility improvements to be made over a period of time not less than eight years, then the minimum payment period must be eight years.

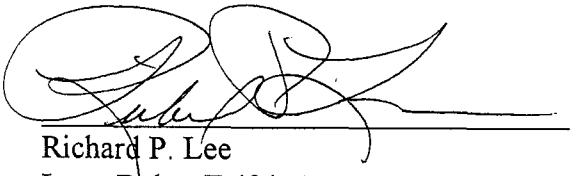
Section 723.046 presupposes that home owners are obligated (and thus may be charged) to pay capital costs of utility improvements. When such an obligation does not exist [as when the cost is not governmentally mandated (not a "pass through" charge)] and the home owner's lot rental agreement or prospectus does not expressly disclose that it is the home owner's obligation to pay such charges, that obligation falls to the park owner without redress to the home owners. In the case of mobile home parks, local governments generally seek to impose capital costs of utility improvements on the owner of the land and not on lessees who may reside there. Those costs are primarily based on the number of homes in the community. Thus, by reference to amortization as "provided for a single house," and not ownership of a single house, this statute applies to both home owners and park owners.

In sum, section 723.046 is the culmination of a history of legislative action intended to prevent mobile home park owners and mobile home owners from being required to pay over a short period of time, governmental or utility costs which cannot be reasonably anticipated or predicted. The service availability charge here at issue is such a charge and like "impact or hookup fees" classified as pass-through charges under section 723.003(10), are subject to amortization pursuant to section 723.046, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, a true and correct copy of the foregoing has been served upon Wayne L. Schiefelbein, Esq., Rose, Sundstorm & Bently LLP, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301.

Respectfully Submitted,



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