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September 29, 1998

VIA HAND DELIVERY

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Ms. Blanca Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Complaint of D.R. Horton Custom Homes, Inc. against Southlake Utilities, Inc.; PSC Docket No. 980992-WS

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket, please find the original and fifteen copies of D.R. Horton Custom Home's Reply To Affirmative Defenses.

Should you have any questions regarding this matter, please do not hesitate to contact me at your earliest convenience.

Sincerely,

ROSE, SUNDSTROM & BENTLEY, LLP

John L. Wharton, Esq.
For The Firm

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cc: Mr. Ralph Spano
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of D.R. Horton Custom Homes, Inc. against Southlake Utilities, Inc.	)	Docket No. 980992-WS

D.R. HORTON CUSTOM HOMES, INC.'S REPLY TO AFFIRMATIVE DEFENSES

Pursuant to Rule 25-22.037, Florida Administrative Code, and Rule 1.140(a), Florida Rules of Civil Procedure, D.R. Horton Custom Homes, Inc. ("hereinafter "Horton"), hereby files with the Florida Public Service Commission (hereinafter "Commission" or "PSC") this Reply To Affirmative Defenses raised by Southlake Utilities, Inc. in its Answer and support thereof states as follows:

1. On August 4, 1998, the undersigned filed on behalf of Horton a Complaint with this Commission objecting to certain practices of Southlake relative to its charging of AFPI charges to persons seeking service within its territory.

2. On September 3, 1998, Southlake filed its responsive pleading to that Complaint. Paragraphs 1 through 13 of that pleading specifically responded to the issues raised by the Complaint. Paragraphs 14 through 19 provided what are in effect and reality affirmative defenses. The Florida Rules of Civil Procedure specifically provide for a response to such affirmative defenses and such a response is particularly appropriate in this case. See, e.g., Rule 1.140(a)(1), Fla. R. Civ. P.

3. Horton hereby files its Reply To Affirmative Defenses of Southlake Utilities as follows:

a. Southlake's reference to a 1991 Commission docket authorizing the collection of AFPI charges has little relevance to

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this issue. What constitutes AFPI charges and what constitutes guaranteed revenues is well-established in Commission policy, Administrative Code Rule, and Commission orders. Southlake's existing AFPI tariff was specifically canceled by Commission order on October 22, 1996 (Order No. PSC-96-1082-FOF-WS) and, therefore, Southlake's interpretation of an order five years before that date has no relevance to the issues in this case.

b. Numbered paragraph 15 incorrectly cites the case of *H. Miller and Sons v. Hawkins*, 373 So.2d 913 (Fla. 1979), as having some application to the issues raised by Horton's Complaint. The Supreme Court in *H. Miller and Sons* was reviewing the propriety of a Commission order which, in effect, modified a private contract between a developer and utility by increasing service availability charges after the developer had completed payment of the contractual amount for increase in plant capacity necessitated by proposed development. The Supreme Court determined that the Commission order was a valid exercise of the police power, and that the same did not constitutionally impair the contract.

H. Miller and Sons in no way stands for the proposition that Southlake apparently seeks to imply it does: That a PSC-regulated utility may simply infer authority to collect guaranteed revenues where no such authority has been granted by the Commission. This is not a case where one party has contracted to supply service at an established rate or charge and the PSC later authorizes an increase in that rate or charge. The issue in this case is whether Southlake may impose or assess a charge which is neither authorized by its tariff nor by any rule or regulation of

the PSC. *H. Miller and Sons* does not speak to the principles and policies here at issue.

c. It is interesting that in paragraph 16 Southlake has relied upon an order issued in the case of *In Re: Application for approval of allowance for funds prudently invested (AFPI) by Southlake Utilities, Inc. in Lake County*, Docket No. 95093-WS, Order No. PSC-96-1082-FOF-WS (8/22/96). In that case, the Commission issued an order denying Southlake Utilities' proposed AFPI tariff and canceled Southlake's existing AFPI tariff, refused to waive a provision of the AFPI rule, and required a refund of previously collected AFPI charges. As Southlake's own response and the above-referenced order clearly note, Southlake's application was filed under Rule 25-30.434, appropriately entitled **Application for Allowance for Funds Prudently Invested (AFPI) Charges**. Southlake did not seek the approval of guaranteed revenues within that docket, the Commission did not approve for Southlake a charge for guaranteed revenues within that docket, and Southlake's tariff does not, and cannot, authorize the collection of guaranteed revenues.

Additionally, if Order No. PSC-96-1082-FOF-WS is intended, as Southlake suggests, to grant to Southlake the right to collect the equivalent of guaranteed revenues (under another name), then customers of Southlake such as Horton certainly never received notice of such an utility or Commission intent to do so. If Southlake would have applied for, and the Commission would have authorized, a guaranteed revenue charge, then those parties who would be substantially affected by a Southlake tariff which

authorizes the collection of guaranteed revenues (as opposed to AFPI charges) might have exercised their rights under the Administrative Procedure Act to protest said charge. In fact, the order itself evidences that this was not the Commission's intent. The Commission, within the context of that order, stated that Southlake would be entitled to collect AFPI for a designated amount of equivalent residential connections. In that regard, the Commission stated,

> When 940 and 375 equivalent residential connections for water and wastewater, respectively, ***are collected***, the AFPI charges shall cease. (emphasis added)

It is notable that the Commission did not say that AFPI charges would only cease when the designated ERC's were "connected," but rather that the same would cease when the designated ERC's were "collected."

While the phrase quoted by Southlake from Order No. PSC-96-1082-FOF-WS perhaps is somewhat ambiguous, a reading of the total order and a consideration of long-standing and well-established PSC policy and practice reveals that it was not the Commission's intent to grant to Southlake the right to collect guaranteed revenues.

d. Numbered paragraph 17 is incorrect for all the reasons referenced hereinabove. Southlake does not follow the directives of the Commission or its Administrative Code Rules in effectively assessing guaranteed revenue charges when none are approved by its tariff or any Commission order. If Southlake seeks guaranteed revenues, it should apply for the same under the

Commission's Administrative Code Rules and substantially-affected parties will have an opportunity to assess and ultimately test the validity of any Commission order granting or denying the same.

e. In numbered paragraph 18, Southlake's reliance upon a letter written by a PSC employee who was not a member of the Commission's technical staff, as "approval" of "Southlake's procedures" by the "Staff of the Commission" is misplaced. Initially, the staff of the Commission cannot, under the Florida Administrative Procedure Act or the tenets of Florida law, "approve" such "procedures" on the part of a regulated utility. Additionally, the attachments of Southlake are nothing but self-serving statements produced by the utility itself with a cursory correspondence from a consumer complaint specialist for the Commission ostensibly resolving the controversy. While the intent of the individual on the Commission staff who wrote the letter is unknown and cannot be ascertained from the attached correspondence, it is possible that this staff member relied upon the same ambiguous statement in the Commission's order which Southlake maintains authorizes it to assess guaranteed revenue charges even though it has never applied for the same and the Commission has never knowingly approved the same. No matter what the case, an interpretation by a staff member of these matters, which touch upon legal and factual issues as alleged in Horton's Complaint, cannot serve as any "precedent" in any true sense of the word as to the resolution of Horton's Complaint.

DATED this 29th day of September, 1998.

F. Marshall Deterding, Esq.
John L. Wharton, Esq.
ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by regular U.S. Mail to Samantha McRae, Florida Public Service Commission, Legal Division, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850 and Scott G. Schildberg, Esq., Martin, Ade, Birchfield & Mickler, P.A., 3000 Independent Square, Jacksonville, FL 32202 on this 29th day of September, 1998.

John L. Wharton, Esq.

drhorton\defenses.rep