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December 10, 1998

VIA FEDERAL EXPRESS

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

Re: In re: Emergency Petition by D. R. Horton Custom
Homes, Inc., to Eliminate Authority of Southlake
Utilities, Inc., to Collect Service Availability
Charges and AFPI Charges in Lake County
Docket No. 980992-WS

981609

Dear Ms. Bayo:

In connection with the above-referenced matter, please find enclosed for filing an original and seven copies of Southlake Utilities, Inc.'s Motion to Dismiss D.R. Horton Custom Homes, Inc.'s Emergency Petition to Eliminate All Service Availability and AFPI Charges ("Motion to Dismiss"). Also enclosed is a WordPerfect 6.1 formatted, high double density diskette which contains a copy of the Motion to Dismiss.

Please file the original and distribute the copies in accordance with your usual procedures.

- ACK _____
- AFA _____
- APP _____
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- CTR _____
- EAG _____
- LEG | _____
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- RCH _____
- SEC | _____
- WAS | _____
- OTF _____

If you have any questions or comments regarding this matter, please do not hesitate to call.

Sincerely yours,

Scott G. Schildberg
Scott G. Schildberg

SGS/dws
Enclosures
cc: Samantha McRae, Esquire
F. Marshall Deterding, Esquire
Mr. Robert L. Chapman, III

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DOCUMENT NUMBER-DATE

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FLORIDA RECORDS/REPORTING

In re: Petition of D.R. Horton)	
Custom Homes, Inc., for)	DOCKET NO. 981609-WS
Elimination of Service)	
Availability Charges and)	
AFPI Charges for Southlake)	DATE SUBMITTED FOR FILING:
Utilities, Inc., in Lake County)	December 10, 1998
_____)	

**MOTION TO DISMISS D.R. HORTON CUSTOM HOMES, INC.'S
EMERGENCY PETITION TO ELIMINATE ALL SERVICE
AVAILABILITY AND AFPI CHARGES BY SOUTHLAKE UTILITIES, INC.**

Pursuant to Rule 28-106.204, Florida Administrative Code ("FAC"), Southlake Utilities, Inc. ("Southlake"), by and through the undersigned attorneys, hereby files this Motion to Dismiss D.R. Horton Custom Homes, Inc.'s Emergency Petition to Eliminate All Service Availability and AFPI Charges and states as follows:

General Information

1. D.R. Horton Custom Homes, Inc. ("Horton"), filed an Emergency Petition to Eliminate All Service Availability and AFPI Charges ("Petition") on or about November 16, 1998. The Petition has been assigned to Docket No. 981609-WS.

2. According to the Certificate of Service in the Petition, the Petition was served on Southlake by U.S. mail on November 16, 1998.

3. The Petition alleges the following:

a. Horton owns properties within the certificated service area of Southlake, and as such, is substantially affected by the charges imposed as a precondition of receiving water and wastewater service from Southlake.

b. Horton is unaware of any disputed issues of material fact in this case at this time.

c. The rules of the Florida Public Service Commission ("Commission") state that a utility service availability policy shall be designed such that the maximum amount of contributions-in-aid-of-construction ("CIAC"), net of amortization, should not exceed seventy-five percent (75%) of the total original cost, net of accumulated depreciation, of the utility's facilities and plant when the facilities and plant are at their designed capacity.

d. The Commission shall, upon request or upon its own motion, investigate agreements or proposals for charges and conditions for service availability and, by rule, set standards for and levels of service availability charges and service availability conditions.

e. That, based on Southlake's 1997 Annual Report, Southlake has collected in excess of the maximum authorized by Commission rule.

f. The Commission has the authority and the responsibility to immediately and on an emergency basis completely eliminate Southlake's service availability charges and Allowance for Funds Prudently Invested ("AFPI") charges.

g. The failure of the Commission to take immediate and emergency action in this regard will result in irreparable harm to Horton.

4. The Petition does not seek either an investigation of or a hearing on Southlake's collection of service availability charges and AFPI charges. The Petition is seeking the extraordinary remedy of having Southlake's ability to collect Commission approved service availability charges and AFPI charges immediately and permanently terminated without a hearing. In essence, the Petition is seeking a temporary and permanent injunction against Southlake in its collection of service availability charges and AFPI charges without even giving Southlake the opportunity to contest the Petition.

Failure to State a Cause of Action

5. The Petition should be dismissed because it fails to state a cause of action.

6. In order to obtain the extraordinary remedy of a temporary injunction, the petitioning party is required to prove the following:

- a. The likelihood of irreparable harm;
- b. The unavailability of an adequate remedy at law;
- c. Substantial likelihood of success on the merits (i.e., a clear legal right to the relief granted); and
- d. Considerations of public interest.

See, Spradley v. Old Harmony Baptist Church, Case No. 98-585, 1998 WL 427253 (Fla. 1st DCA 1998). See also, Duryea v. Slater, 677 So.2d 79, 81 (Fla. 2nd DCA 1996) ("[a] temporary injunction is an extraordinary remedy that should be granted sparingly and only

after the moving party has alleged and proven facts which entitle him to relief").

7. According to Rule 1.610, Florida Rules of Civil Procedure, no such temporary injunctive relief shall be given unless the petitioner gives bond in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined.

8. Horton has not offered to post any bond, including a bond in the full amount of the service availability charges and AFPI charges it is requesting that Southlake be compelled to forego. Horton's Petition does not even provide for Southlake to be given a hearing whereby Southlake can contest Horton's allegations.

9. The Petition only provides a bare allegation that Horton will suffer irreparable harm. Horton has provided no ultimate facts supporting its allegation. A complaint must contain ultimate facts supporting each element of the cause of action. Weaver v. Leon County Classroom Teachers Association, 680 So.2d 478, 481 (Fla. 1st DCA 1996). Southlake, on the other hand, will suffer irreparable harm if it is prevented from collecting its service availability charges and AFPI charges. Furthermore, the amount of money to be lost by Southlake is far greater than the cost sought to be avoided by Horton because these are more developers than Horton served by Southlake.

10. Horton has an available remedy at law. It can file a complaint against Southlake before the Commission and request a hearing. In fact, Horton has already filed a complaint against

Southlake with the Commission in connection with the AFPI charges. See Docket No. 980992-WS. Further, it is a cardinal rule of Florida law that an injunction is not available for money only damages.

11. Horton has shown no clear legal right to the relief requested. In the Petition, Horton states that the Florida Statutes provide that "the Commission shall, upon request or upon its own motion, investigate agreements or proposals for charges and conditions for service availability." While such a statement is contained in Section 367.101, Florida Statutes (1997), the statute by no means provides the Commission with the responsibility or even the authority to immediately terminate a utility company's service availability charges without an investigation or hearing. Section 367.101, (1), Florida Statutes (1997), requires to Commission to set just and reasonable rates. The Commission has established Southlake's service availability and AFPI charges by order. The Commission is not allowed to reset service availability charges and AFPI charges without determining that the new charges are just and reasonable. Such a termination of Southlake's service availability charges and AFPI charges would be unjust and unreasonable and would affect Southlake's substantial interest. Southlake is entitled to protection from such an action under Section 120.569, Florida Statutes (1997), including the right to a hearing.

12. Also in connection with Horton's lack of a clear legal right, the Petition misstates Rule 25-30.580, Florida Administrative Code ("FAC"), as setting forth a maximum authorized

level of CIAC. The rule merely provides guidelines for designing a service availability policy. In addition, such guidelines are not always required to be followed. Rule 25-30.580(2), FAC, provides that in any case where compliance with the guidelines introduces unusual hardship or unreasonable difficulty, and it is not in the best interests of the customers of the utility to require compliance, the Commission may exempt the utility from the guidelines. Horton has not alleged that the elimination of the charges is in the best interests of the existing and future customers. Furthermore, the Commission effectively revised Southlake's CIAC level in Order No. PSC-96-1082-FOF-WS, in which the Commission required Southlake to treat as CIAC any unrefunded AFPI charges as well as the Commission designed CIAC charges.

13. Horton has not alleged how it is in public interest for Southlake's service availability charges and AFPI charges, which were duly adopted by the Florida Public Service Commission in proceedings in which Horton had the opportunity to participate, to be immediately terminated without providing for either an investigation or hearing.

14. Horton has not sufficiently alleged ultimate facts to support its allegation that its substantial interests are affected, especially if the service availability charges and AFPI charges are collected subject to refund.

Failure to Join Indispensable Parties

15. In addition, Horton seeks only to affect a part of Southlake's rates and charges by eliminating charges paid by

Horton. Any effective resolution of Southlake's rates and charges will require revisions to all of Southlake's rates and charges. As such, Horton's proposed remedy will adversely impact Southlake's existing and future customers without providing such people notice or an opportunity to be heard. Accordingly, the Petition also should be dismissed for failure to join indispensable parties.

Mootness

16. Furthermore, the Staff of the Commission is recommending an investigation of Southlake's service availability charges and AFPI charges. In the event that the Commission conducts such an investigation, the Petition should be dismissed as moot, or, at a minimum, be held in abeyance until the completion of the investigation.

Request for Relief

17. For the reasons set forth above, Southlake requests the Commission to dismiss the Petition, or, at a minimum, abate the action on the Petition.

18. Southlake does not object to an investigation of its service availability charges and AFPI charges as discussed in the December 3, 1998 Staff Recommendation issued in this docket. However, Southlake objects to the use of the escrow fund arrangement set forth in the Staff Recommendation and requests that it be allowed to file a corporate undertaking as security to guarantee the amount of the prospective service availability charges and AFPI charges collected subject to refund.

DATED this 10th day of December, 1998.

Respectfully submitted,

MARTIN, ADE, BIRCHFIELD &
MICKLER, P.A.

By: 

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Attorneys for Southlake
Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Motion to Dismiss D.R. Horton Custom Homes, Inc.'s Emergency Petition to Eliminate All Service Availability and AFPI Charges have been furnished to Ms. Blanca Bayo, Director, Department of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by Federal Express, this 10th day of December, 1998, and that copies of the foregoing have been furnished to Samantha McRae, Attorney, Florida Public Service Commission, Legal Division, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and F. Marshall Deterding, Rose, Sundstrom & Bentley, LLP, 2548 Blaiirstone Pines Drive, Tallahassee, Florida 32301, by United States Mail this 10th day of December, 1998.


Attorney