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February 9, 1999

FEDERAL EXPRESS

Honorable Jon S. Wheeler
Clerk of the Court
District Court of Appeal
First District - State of Florida
301 Martin L. King, Jr. Boulevard
Tallahassee, Florida 32399-1850

Re: DCA Case No. 98-4164

971596

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FEB 10 PM 3:17
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Dear Mr. Wheeler:

Enclosed please find an original and one (1) copy of United Water Florida Inc.'S Reply to the Florida Public Service Commission's Response to Order to Show Cause ("Response") in connection with United Water Florida Inc.'s appeal to the First District Court of Appeal of the Florida Public Service Commission's Order No. PSC-98-1243-FOF-WS.

Please file the original and distribute the copy in accordance with your established procedures.

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

Sincerely yours,

Scott G. Schildberg

- ACK _____
- AFA _____
- APP _____
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- CMU _____
- CTR _____
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- OPC _____
- RCH _____
- SEC _____
- WAS _____
- OTH _____

SGS:dws
Enclosures

cc: Mr. Walton F. Hill
Mr. Robert J. Iacullo
Mr. Gary R. Moseley
Ms. Mary Anne Helton
Ms. Rosanne G. Gervasi
Mr. Harold McLean
Ms. Carol Webb

99 FEB 10 PM 1:30

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FPSC-RECORDS/REPORTING

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIRST DISTRICT
TALLAHASSEE, FLORIDA

CASE NO.: 98-4164

L.T. CASE NO. 971596-WS

UNITED WATER FLORIDA INC.,)
)
 Appellant,)
)
 vs.)
)
 FLORIDA PUBLIC SERVICE)
 COMMISSION, A State Agency,)
)
 Appellee.)
)
 _____)

UNITED WATER FLORIDA INC.'S REPLY TO THE
FLORIDA PUBLIC SERVICE COMMISSION'S
RESPONSE TO ORDER TO SHOW CAUSE

Appellant, United Water Florida Inc. ("United Water Florida"), hereby replies to Appellee Florida Public Service Commission's Response to Order to Show Cause and states as follows:

1. On January 8, 1999, the District Court of Appeal, First District ("Court"), issued a show cause order to the Florida Public Service Commission ("Commission") which stated in part:

It appears to the court that the procedure employed by the Commission in this cause impermissibly combines a notice of proposed agency action and a final order. A final order must be rendered by filing with the agency clerk on the effective date of that order. See s. 120.52(7), Fla. Stat. (1997); Fla. R. App. P. 9.020(h) and 9.110(c). Accordingly, the Commission shall show cause

within 15 days of date of this order why jurisdiction should not be relinquished with directions to enter a final order.

2. On January 25, 1999, the Commission filed Appellee Florida Public Service Commission's Response to Order to Show Cause ("Response").

3. In Section IV of the Response entitled "The Anomaly Created by United Water's Appeal," the Commission argues that if there is a problem with the order, it is because United Water Florida did not seek a de novo hearing. However, United Water Florida followed the procedures set forth in the notice section of Order No. PSC-98-1243-FOF-WS ("Order").

4. Section 120.569(1), Florida Statutes (1997), provides in part that "[e]ach notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply."

5. The notice section in the Order clearly provided two separate and mutually exclusive alternatives. One alternative was to request a hearing on the proposed agency action. The other alternative was to appeal the Order as a final order. The notice section did not state that United Water Florida was required to request a hearing and obtain a final order following a hearing before filing an appeal. Under that scenario, the order to be appealed would be a new order, not the existing one. Therefore, if

United Water Florida were required to request a hearing before an appeal, the portion of the notice section in the Order which states that a party substantially affected may request judicial review of the Order is meaningless and misleading.

6. United Water Florida has a right to judicial review of the final order. "Review of final agency action taken under the Administrative Procedure Act is, moreover, a matter of right." Hill v. Division of Retirement, 687 So.2d 1376, 1377 (Fla. 1st DCA 1997). As set forth in Chapter 120, Florida Statutes (1997), "[a] party who is adversely affected by final agency action is entitled to judicial review." Section 120.68(1), Florida Statutes (1997). See also Rules 9.110(c) and 9.190(b)(1), Fla. R. App. P. United Water Florida was adversely affected by the final agency action of the Commission in this matter and is entitled to judicial review.

7. The Response also indicates that United Water Florida has not exhausted its administrative review remedy. However, there is no administrative review remedy for proposed agency action before the Commission. First, the Commission's rules prohibit a party from seeking reconsideration of a proposed agency action. As set forth in Rule 25-22.060, Florida Administrative Code ("FAC"):

The Commission will not entertain a motion for reconsideration of a Notice of Proposed Agency Action issued pursuant to Rule 25-22.029, regardless of the form of the Notice and regardless of whether or not the proposed action has become effective under Rule 25-22.029(6).

Second, the other alternative "review remedy" is not an administrative review remedy at all. It is a hearing de novo on the issues objected to in the proposed agency action. See Sections 120.569, 120.57, and 120.80(13)(b), Florida Statutes (1997). When there is "no provision for subsequent administrative review, such an order constitutes 'final agency action' ... which is appealable to this court." Torres v. HRS, 384 So.2d 978 (Fla. 3d DCA 1980).

8. Furthermore, the two cases referred to by the Commission regarding the exhaustion of administrative review remedies are not applicable in this case. In both Phillips v. Santa Fe Community College, 342 So.2d 108 (Fla. 1st DCA 1977), appeal dismissed, 345 So.2d 426 (Fla. 1977), and Brooks v. School Board of Brevard County, 382 So.2d 422 (Fla. 5th DCA 1980), the courts were dealing with situations in which a lower administrative tribunal's final order was reviewed by a higher administrative tribunal. In the instant case, the agency head (i.e., the Commission) has issued a final order which is not subject to review by a higher administrative tribunal.

9. In Phillips, a final order of the lower tribunal, the Board of Trustees of Santa Fe Community College ("Trustees"), was reviewed by the State Board of Education ("Board"). 342 So.2d at 109. The petitioner argued that the Board's order sustaining the decision by the Trustees was the final order and the Board's order did not meet the requirements for a final order. Id. at 110. The court determined that (i) the order by the Trustees was the final

agency action; (ii) the administrative review by the Board tolled the time for judicial review of the final agency action by the Trustees; (iii) the petitioner's petition for judicial review was filed more than thirty (30) days after the Board's decision to sustain the final agency action (which tolled the time for appeal of the final agency action by the Trustees); and (iv) therefore, the petition was untimely because it was filed more than thirty (30) days after the Board's decision. Id.

10. In Brooks, the petitioner concurrently filed two appeals of his discharge by the School Board. One appeal was filed with the court and the other appeal was filed with the Department of Education ("Department"). 382 So.2d at 422. The Department agreed to review the School Board's decision. Id. The court stated:

in view of the administrative appeal which appellant has requested and which the Department of Education has agreed to hear, it does not appear that we have jurisdiction to retain the appeal in this court.

. . . .

The aggrieved employee may not appeal to this court until the administrative appeal to the Department is concluded.

382 So.2d at 422, 423.

11. United Water Florida did not have a right of administrative appeal. The notice in the Order provided United Water Florida with two mutually exclusive options: appeal a final order or request a hearing de novo. United Water Florida selected the option of appealing the final order. With respect to the final

order issued by the agency head, United Water Florida did exhaust its administrative remedies--it had no right for reconsideration nor any right to an administrative review of the final order.

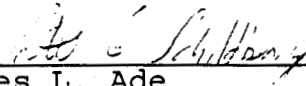
12. As stated above, United Water Florida selected the option of appealing the final order which eliminated the possibility of requesting a de novo hearing. Even if the option to request a de novo hearing was an administrative remedy, it would have been a futile option for United Water Florida to exhaust. The agency head had unanimously decided against United Water Florida and it would be the same body to hear the same issues that it had already decided. There is no requirement to exhaust an administrative remedy where it would be futile. Tallahassee Memorial Regional Medical Center v. Cook, 109 F.3d 693, 702 (11th Cir. 1997); Linfors v. United States, 673 F.2d 332, 334 (11th Cir. 1982); Bruce v. City of Deerfield, 423 So.2d 404, 406 (Fla. 4th DCA 1982); Halifax Area Council on Alcoholism v. City of Daytona Beach, 385 So.2d 184, 186 (Fla 5th DCA 1980).

13. United Water Florida has timely filed its Notice of Appeal for the final agency action in this matter. The Commission has not even argued that United Water Florida has not timely filed its notice of appeal. If the Court determines that the thirty (30) day time period for appeal ran from the date the Order was issued, or that the statements by the Commission in the Order as to the availability of and time limits for judicial review are incorrect, it should quash the Order and remand the matter to the agency with

direction to enter a new final order complying with the statutory requirements.

Respectfully submitted this 9th day of February, 1999.

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

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Attorneys for United Water
Florida Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and one (1) copy of United Water Florida Inc.'S Reply to the Florida Public Service Commission's Response to Order to Show Cause have been furnished to Honorable Jon S. Wheeler, Clerk of the Court, District Court of Appeal, First District - State of Florida, 301 Martin L. King, Jr. Boulevard, Tallahassee, Florida 32399-1850 by Federal Express, on this 9th day of February, 1999; and copies of the foregoing have been furnished to Mary Anne Helton, Florida Public Service Commission, 2450 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, Rosanne G. Gervasi, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, Harold McLean, Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, Florida 32399-1400, and Carroll Webb, Executive Director and General Counsel, Administrative Procedures Committee, The Holland Building, Room 120, Tallahassee, Florida 32399-1200, by U.S. mail, on this 9th day of February, 1999.


Attorney