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July 9, 2001

VIA FEDERAL EXPRESS

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

Re: Request by St. Johns County, Florida for
Declaratory Statement concerning a special
service availability contract with United
Water Florida Inc., Docket No. 010704-SU

RECEIVED
FLORIDA PUBLIC
SERVICE COMMISSION
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MAIL ROOM

Dear Ms. Bayo:

In connection with the above-referenced matter, please find enclosed an original and seven (7) copies of the Response to Petition for Declaratory Statement ("Response") filed on behalf of United Water Florida Inc., together with a diskette containing the Response.

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

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

Sincerely yours,

Scott G. Schildberg

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Enclosures

Cc: Gary R. Moseley
Samantha Cibula
Suzanne Brownless

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Request by St. Johns County,) DOCKET NO. 010704-SU
Florida for declaratory statement)
concerning a special service) DATE SUBMITTED
availability contract with United) FOR FILING: JULY 9, 2001
Water Florida Inc.)
_____)

RESPONSE TO PETITION FOR DECLARATORY STATEMENT

United Water Florida Inc. ("United Water Florida" or "Respondent"), by and through its undersigned attorneys, hereby files this Response to the Petition for a Declaratory Statement ("Petition") by St. Johns County, Florida, ("County" or "Petitioner") and states as follows:

1. The name, address, and telephone number of the Respondent are as follows:

United Water Florida Inc.
1400 Millcoe Road
Jacksonville, FL 32225
Phone: (904) 725-2865

2. The name, address, telephone number, and facsimile number of the attorney of the Respondent are as follows:

James L. Ade
Scott G. Schildberg
Ade & Schildberg, P.A.
One Independent Drive, Suite 2000
Jacksonville, FL 32202
Phone: (904) 358-8818
Fax: (904) 354-5842

DOCUMENT NUMBER-DATE

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FISCAL-RECORDS/REPORTING

3. Representatives of the County have requested that United Water Florida enter into a lease agreement and a service agreement with the County whereby the County will fund the extension of United Water Florida's wastewater system from its existing facilities to and throughout the Ponte Vedra Municipal Service District ("Ponte Vedra MSD") ("Extended Facilities") and the County will lease the Extended Facilities to United Water Florida for a nominal rental amount. The lease will include a bargain purchase option to be exercised after the conclusion of the term for the County's financing instruments. United Water Florida would maintain and operate at its cost the Extended Facilities to provide wastewater service to residents of the Ponte Vedra MSD at the rates set forth in its tariff.

4. United Water Florida does not object to general arrangement described in Paragraph 3 above. However, United Water Florida does not intend to enter into the Lease Agreement and Special Service Availability Contract as proposed by the County. Whether the service agreement should be deemed to be a developer agreement under Rule 25-30.515(6), FAC, or a Special Service Availability Contract under Rule 25-30.515(18), FAC, United Water Florida's position is that regardless of the designation, the agreement will be basically United Water Florida's standard developer agreement with as few revisions as possible. The County

is stepping into the position of a developer and except for the changes required to address the use of a long-term lease of the Extended Facilities and addressing only wastewater service (United Water Florida's standard developer agreement addresses water and wastewater service), United Water Florida intends to treat the County as such a developer. For example, United Water Florida does not intend to waive its right to recover administrative, inspection and legal fees from the County. The County has made numerous revisions for United Water Florida's developer agreement to which United Water Florida does not agree. United Water Florida does not intend to enter into the agreements as attached to the Petition.

5. Under Florida law, a party seeking declaratory relief must show:

1. there is a bona fide, actual, present practical need for the declaration;
2. that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts;
3. that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts;
4. that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law;
5. that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice

by the courts or the answer to questions propounded from curiosity. Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 600 So.2d 400, 404 (Fla. 1996).

"These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts. Id.

6. Unlike the case cited by the County, In re: Joint petition for approval of agreement for water and wastewater service to the Flagler County Airport by Palm Coast Utility Corporation and Flagler County Board of County Commissioners, 96 FPSC 4:409, the parties in this matter have not entered into an agreement. Furthermore, United Water Florida does not intend to enter into the agreement as proposed by the County. Accordingly, there is no "present, ascertained or ascertainable state of facts or present controversy as to a state of facts" for a declaratory judgment regarding the terms of the agreement. In fact, the relief sought would be "merely giving of legal advice" regarding the terms of the agreement. As noted by the Florida Supreme Court in Santa Rosa County v. DOAH, 661 So.2d 1190, 1193 (Fla. 1995):

[a]dditionally, it is well settled that, "Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only contingent, uncertain, [and] rest in the future." La Bella v. Food Fair, Inc., 406 So. 2d 1216, 1217 (Fla. 3d DCA 1981) (quoting Williams v. Howard, 329 So. 2d 277, 283 (Fla. 1976)); see

also American Indemnity Co. v. Southern Credit Acceptance, Inc., 147 So. 2d 10, 11 (Fla. 3d DCA 1962) (holding that, in a declaratory action case, "courts may not be required to answer a hypothetical question or one based upon events which may or may not occur").

The Commission should not answer a hypothetical question regarding the specific terms of agreements which will not occur.

7. United Water Florida does not intend to enter into the agreements as written by the County. Because the agreements will not occur, whether the agreements are acceptable to the Commission should not be considered by the Commission in a Petition for Declaratory Statement. United Water Florida objects to the use of a declaratory statement on the irrelevant and inappropriate issue regarding the acceptability of the specific agreements.

8. Although the specific agreements should not be the subject matter of the declaratory action, the Petition also raises for consideration in the declaratory action two general matters:

- (1) whether the capping of service availability charges is appropriate; and
- (2) whether the use of a lease arrangement will require the use of a special service availability contract.

Although United Water Florida will not enter into the specific agreements proposed by the County, United Water Florida acknowledges that it may enter into a lease arrangement concerning the Extended Facilities and that the County also may require

guidance on the prohibition against the capping of service availability charges.

9. Before addressing the other two issues in the Petition, there are some errors in the Petition relating to United Water Florida's service availability policy which United Water Florida is compelled to address.

10. The following statement in Paragraph 4(e) of the Petition is incorrect:

Pursuant to UWF's wastewater service availability policy, UWF is obligated to provide wastewater service upon the written application of either property owners or their duly authorized agents.

As set forth in United Water Florida's service availability policy:

Service Company shall be obligated to furnish wastewater service to a Property Owner only (1) as a result of and under the terms of a properly executed Service Agreement (also known as a Developer Agreement) and (2) when it is economically feasible to do so. No letter of intent or letter of available capacity given at the request of Property Owner shall obligate Service Company to provide service or be relied on by any third party as a representation that Service Company is obligated to provide service. United Water Florida's Wastewater Tariff, Sheet No. 28.12, Rule A.3.

As also set forth in United Water Florida's service availability policy:

Service Company reserves the right to refuse connection and to deny the commencement of service

to any Property Owner seeking to be connected to portions of the wastewater collection system of Service Company until such time as the provisions of this Service Availability Policy and the Service Agreement, Developer Agreement or Special Service Availability Contract have been fully met by Property Owner. United Water Florida's Wastewater Tariff, Sheet No. 28.12, Rule A.4.

Contrary to the Petition's statement, a mere application is not sufficient to obligate United Water Florida to provide service. The property owner must first enter into an agreement with United Water Florida, and then satisfy the provisions of United Water Florida's service availability policy and the agreement.

12. The listing in Paragraph 4(f) of the Petition of the costs to be paid by the Property Owners or their authorized agents is incomplete. Some of the costs to be paid by the Property Owners or their authorized agents but omitted from the list include, but are not limited to, the following: Administrative Fees (See United Water Florida's Wastewater Tariff, Sheet No. 28.5, Rule A.8, Sheet No. 28.14, Rule A.27, and Sheet No. 28.17, Rule C.2); Inspection Fees (See United Water Florida's Wastewater Tariff, Sheet No. 28.12, Rule A.23, and Sheet No. 28.20, Rule C.10); and Legal Fees (See United Water Florida's Wastewater Tariff, Sheet No. 28.14, Rule A.27, and Sheet No. 28.17, Rule C.2).

13. The statements in Paragraph 4(g) of the Petition are not completely accurate. For example, the issue is not whether the

force main is capable of providing service to other developments, but whether it will be used to provide service to future developments. As set forth in United Water Florida's Wastewater Service Availability Policy, Sheet No. 28.18, Rule C.7:

It is Service Company's policy to apportion the cost of off-site main facilities pro-rata to the developer owning property receiving service from such lines located outside of Developer's property. Since each Developer draws from the capacity of such lines, each Developer shall pay its property's share of the cost of the off-site main transmission, collection or distribution lines and other facilities through which service is rendered to Developer's property. This portion of Service Company's Service Availability Policy is referred to herein as "Developer's Line Demand Cost."

United Water Florida is not aware of any property in addition to the property in the Ponte Vedra MSD which would be served by the proposed force main because it is United Water Florida's understanding that the proposed force main will not pass any property which is not already being provided wastewater service through existing facilities. Accordingly, only the Ponte Vedra MSD property owners would be receiving service through the proposed force main, and, therefore, they should be allocated its entire cost. The County has not yet provided United Water Florida with final plans for the force main to enable United Water Florida to confirm its understanding of the location of the force main, the status of the neighboring property, or the estimated cost of the force main. United Water Florida does agree that the cost of

extending the wastewater system to the Ponte Vedra MSD must be borne by the Ponte Vedra MSD property owners or their authorized agent.

14. With respect to the issue of whether a service agreement may cap the amount of service availability charges, there are two subissues. The first subissue relates to the number of equivalent residential connections ("ERCs") for which plant capacity charges are to be paid. Assuming that the County will pay wastewater plant capacity charges for 715 ERCs, then the agreement should reserve only 715 ERCs of capacity. If more than 715 ERC of connections are made in the Ponte Vedra MSD, then wastewater plant capacity charges should be charged and collected for the connections in excess of 715 ERCs. The agreement should not effectively cap the number of capacity charges by prohibiting future collections of plant capacity charges for the entire Ponte Vedra MSD without a limitation on the number of connections as the County is proposing. The second subissue relates to capping the amount of the wastewater plant capacity charge that is to be paid. Florida law provides that the amount of service availability charges is to be determined at the time of connection. See H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979); Christian and Missionary Alliance Foundation, Inc. v. Florida Cities Water Co., 386 So.2d 453 (Fla. 1980). The Commission held In re: Complaint of Naples Orangetree,

Ltd. against Orange Tree Utility Company in Collier County for Refusal to Provide Service, 95 F.P.S.C. 2:342 (1995):

Even though developers may have reserved capacity through pre-payment of CIAC, if the charges are increased, they will be responsible for paying the amount of the increase for any unconnected ERCs to be connected. Likewise, if the charges are decreased, the developers would be due refunds for any then-connected ERCs.

Accordingly, United Water Florida believes that United Water Florida is required under Florida law to collect any increases in service availability charges from unconnected ERCs in the Ponte Vedra MSD at the time of connection. Moreover, United Water Florida believes that the Commission should not approve such provision in an agreement, regardless of whether the agreement is a special service availability contract, because the provision is contrary to Florida law and Commission policy.

15. The remaining issue is whether "with regard to United Water Florida's lease of the wastewater collection facilities and the requirement that UWF maintain facilities that it does not hold legal title to, in light of the particular facts of this case, are significant enough to necessitate the use of a 'special service availability contract' under Rule 25-30.515(18), Florida Administrative Code, requiring prior Commission approval before it can become effective." Petition, Page 9.

16. Unlike the agreement in Flagler County Airport, the proposed arrangement does not change United Water Florida's charges for the extension of service. In Flagler County Airport, the agreement included a mechanism to reduce Flagler County's wastewater usage billing. In the matter in this docket, the County will "pay the full charge" for the line extension to United Water Florida. The only question will be one of timing. Either the County will be deemed to make such a payment at the time of the execution of the lease with a bargain purchase option or at the time when United Water Florida exercises that option. In either event, the County will pay the full charge for the line extension as set forth in United Water Florida's service availability policy. Accordingly, the leasing arrangement will not result in "charges for the extension of service which is not provided for in the utility's service availability policy." Therefore, the lease arrangement will not require Commission approval as a Special Service Availability Contract.

Respectfully submitted,

ADE & SCHILDBERG, P.A.

By: 
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Suite 2000

Jacksonville, FL 32202

Telephone: (904) 354-8818

**Attorneys for United Water
Florida Inc.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Response to Petition for Declaratory Statement has been furnished by Federal Express this 9th day of July, 2001, to Blanca Bayo, Director, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and a copy of the foregoing has been furnished to Suzanne Brownless, Esquire, Suzanne Brownless, P.A., 1311-B Paul Russell Road, Suite 201, Tallahassee, Florida 32301, and Samantha Cibula, Esquire, Florida Public Service Commission, Tallahassee, Florida 32399-0850, by U.S. Mail and fascimile, this 9th day of July, 2001.


Attorney