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January 25, 1997

VIA FEDERAL EXPRESS

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

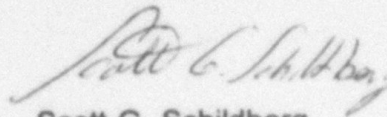
RE: Application by United Water Florida Inc. for
Adjustment of Rates, Docket No. 960451-WS

Dear Ms. Bayo:

In connection with the above-referenced matter, please find enclosed for filing an original and seven copies of Memorandum of United Water Florida Inc. in Response to Motion to Strike Testimony. Please file the original and distribute the copies in accordance with your usual procedures.

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

Sincerely yours,



Scott G. Schildberg

- ACK _____
- AFA 1
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG 1
- LIN 5
- OPC _____
- RCM _____
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SGS/msa
Enclosures

- cc: Ms. Rosanne G. Capeless (via facsimile and U.S. mail)
- Mr. Harold McLean (via facsimile and U.S. mail)
- Mr. David E. Chardavoyne
- Mr. Richard A. Hensch (via hand delivery)
- Mr. Walton F. Hill (via hand delivery)
- Mr. Robert J. Iacullo (via hand delivery)
- Mr. Frank J. McGuire (via hand delivery)
- Mr. Munipalli Sambamurthi (via hand delivery)
- Mr. James L. Ade (via hand delivery)

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Rate Increase in)
Duval, Nassau and St. Johns Counties)
by United Water Florida Inc.)
_____)

DOCKET NO. : 960451-WS

Date Submitted for
Filing: January 25, 1997

**MEMORANDUM OF UNITED WATER FLORIDA INC.
IN RESPONSE TO MOTION TO STRIKE TESTIMONY**

Pursuant to Rule 25-22.037(2) (b), Florida Administrative Code ("FAC"), United Water Florida Inc. ("United Water Florida" or the "Company"), by and through their undersigned attorneys, hereby files this Memorandum in Response to the Motion to Strike Testimony by the Office of Public Counsel ("OPC"), and states as follows:

1. On July 30, 1996, United Water Florida Inc. ("United Water Florida"), submitted the Application of United Water Florida For Rate Adjustment ("Application"), for filing with the Florida Public Service Commission ("Commission"). Accompanying the Application were the proposed minimum filing requirements ("MFR's"), including the direct testimony of its witnesses as required by Rule 25-30.436(2), FAC. The Application and MFRs were accepted by the Staff and the Official Date of Filing was established September 3, 1996.

2. In the Application, United Water Florida proposed the use of a phased-in set of rate increases utilizing a verification of plant additions and retirements ("Phase In and Verification Approach"). See Application, paragraph 13. United Water Florida provided an explanation of the Phase In and Verification Approach in the Direct Testimony of Robert J. Iacullo ("Iacullo"). See Iacullo Direct Testimony, p. 4-5. The

overall organization of United Water Florida's case has been based upon such approach.

3. OPC has acknowledged and approved the Phase In and Verification Approach. See Prehearing Order, Order No. PSC-97-0073-PHO-WS, Issue No. 71, OPC Position. OPC has even submitted testimony that the Phase In and Verification Approach is reasonable: "Citizens agrees that it would be reasonable to adopt a phase in of the rate increase. The second phase should occur after the completion of the calendar year 1997 in order to verify the actual amounts of plant additions and retirements." Testimony of Hugh F. Larkin, Jr. ("Larkin"), p. 6, lines 14-17, (Emphasis added).

4. Accordingly, all of the parties have understood since the filing of the Application that additional plant information would be forthcoming and reviewed.

5. On July 30, 1996, United Water Florida was required to file its direct testimony with its Application, See Rule 25-30.436(2), FAC. Such testimony included the Direct Testimony of Thomas F. Cleveland ("Cleveland"). Cleveland's testimony was provided in support of the plant component of the water and wastewater rate base developed by Frank McGuire and provided descriptions and details of the major capital expenditure projects and programs which were anticipated to be completed and in service by December 31, 1996, and December 31, 1997. See Cleveland's Direct Testimony, p. 2, line 22 through p. 3, line 3. Cleveland's testimony included Exhibit TFC-1, a three page document which listed all capital projects and programs for these periods and showed the amounts forecast to be closed to plant in 1996 and 1997, based on the

Company's construction program at that time. See Cleveland's Direct Testimony, p. 3, lines 9-17.

6. On December 11, 1996, OPC filed testimony and exhibits of Larkin and Donna DeRonne ("DeRonne"). In DeRonne's testimony, she testified that revisions should be made to United Water Florida's plant in service. See DeRonne Testimony, p. 3, line 11 through p. 9, line 18. DeRonne sought to reduce the water plant in service by \$3,176,951 and wastewater plant in service by \$2,610,939. See DeRonne Testimony, p. 8, lines 12-21. OPC relied on the Company's response to Interrogatory No. 78, which reflected actual construction expenditures through September 1996, but objects to the Company's attempt to supply even more recent, more reliable figures in Cleveland's Rebuttal Testimony.

7. On December 20, 1996, OPC included this new issue in its prehearing statement: "Is the projected level of additions to plant in service appropriate for inclusion in rate base?" Citizens' Prehearing Statement, Issue No. 3. Neither United Water Florida nor the Staff of the Commission proposed this issue in their prehearing statements. The issue is set forth in the Prehearing Order as Issue No.5.

8. On January 10, 1997, United Water Florida submitted for filing the Rebuttal Testimony of Thomas F. Cleveland to show why the proposed revisions to plant in service suggested by DeRonne in her testimony should not be made and to address Issue No. 5.

9. Cleveland's Rebuttal Testimony demonstrates that DeRonne's proposed revisions would understate the level of additions to plant in service for 1996 and 1997.

10. The evidence in Cleveland's rebuttal testimony did not exist at the time his direct testimony was prepared and filed; therefore, it could not have been included in his direct testimony. Such evidence is new and is not cumulative.

11. United Water Florida has the right to rebut OPC's testimony. "Each party shall have the right ... to rebut the evidence presented against it." Rule 25-22.048(2), FAC. Accord Reeder v. Edward M. Chadbourne, Inc., 338 So.2d 271, 275 (Fla. 1st DCA 1976)("[t]he right to call a rebuttal witness should not be denied without good cause.")

12. United Water Florida has timely and appropriately filed its rebuttal testimony. See Ahearn v. Florida Power and Light Co., 113 So.2d 751, 753 (Fla. 2d 1959), quashed, 118 So.2d 21 (Fla. 1960), ("It is well recognized that a plaintiff is entitled to offer rebuttal testimony after a defendant has put forward and rested his case.") See also Order No. PSC-96-1230-PCO-WS, Order Establishing Procedure, Docket No. 960451-WS, as amended.

13. As discussed above, the rebuttal testimony addresses a new issue raised by OPC in its testimony and the proposed revisions to plant in service could not have been anticipated at the time United Water Florida filed its direct testimony.

14. During the defendant's case in McFall v. Inverrary Country Club, Inc., 622 So.2d 41 (Fla. 4th DCA 1993), the defendant called an expert witness during its case who testified that approaching traffic in a roadway would have been heard by a golf cart driver even if it had not been seen. Following the conclusion of the defendant's case, the plaintiff sought to recall his expert back as a rebuttal witness to address the issue of sound. The lower court refused to allow the rebuttal testimony. The appellate court

reversed. "Even if ... [the plaintiff's] lawyers had actually known before trial that the defense expert might testify that the golf cart driver could have heard the oncoming traffic and was thus negligent in failing to stop at the crossing, we do not believe that ... (the plaintiff) had a burden of addressing that subject during his own case." Similarly, as to the issue of whether revisions would occur later in the year, United Water Florida's witnesses could not anticipate the amount, nature, scope, or type of revisions which would be suggested by OPC's witnesses when OPC's witnesses had not filed their testimony and would not file it until more than four months after United Water Florida filed its direct testimony. See Young-Chin v. City of Homestead, 597 So.2d 879 (Fla. 3rd DCA 1992). See also Jacksonville Racing Association, Inc. v. Harrison, 530 So.2d 1001 (Fla. 1st DCA 1988).

15. In its Motion to Strike, OPC's position appears to be that it should be able to utilize more current and, therefore, more reliable information than the filing to propose revisions, but that United Water Florida should not be allowed to oppose the revisions with the use of even more current, and, therefore, even more reliable information to rebut the revisions.

16. OPC devotes much of its Motion to Strike to discuss the discovery process, measures to avoid "trial by ambush," and OPC's preparations and participation in this proceeding. OPC does not discuss the purpose of this proceeding--to enable the Commission to establish rates which are "just, reasonable, compensatory, and not unfairly discriminatory." See Section 367.081(2)(a), Florida Statutes. The Commission has been given a broad grant of authority to hear evidence--"Any relevant evidence shall

be admitted if it is the sort of evidence which is normally admissible in civil trials in Florida or which reasonably prudent persons are accustomed to relying upon in the conduct of their affairs." Rule 25-22.048(3), FAC. See also Section 120.58(1)(a)(1), Florida Statutes. The evidence in the rebuttal testimony is this sort of evidence--further, it is more current and reliable than the evidence offered by OPC. The Commission should consider the rebuttal testimony in its decision in this proceeding.

17. OPC has not been prejudiced. OPC has had this testimony since January 10, 1997. The rebuttal testimony will not be a surprise to OPC at the hearing. OPC had the opportunity to conduct discovery regarding the rebuttal testimony. Moreover, Cleveland will be testifying at the hearing and OPC will have the opportunity to subject him to cross examination.

18. As discussed above, United Water Florida proposed a Phase In and Verification Approach in the Application and has intended to do so throughout this proceeding. In such an approach, the rates established for 1997 would be based on the actual verifiable 1996 year end plant in service and the rates established for 1998 would be based on the actual verifiable 1997 year end plant in service. See Prehearing Statement of United Water Florida Inc., Statement of Basic Position, p. 13. The projected 1997 capital improvements would not be used to establish the rates for 1997.

This approach would avoid the need to utilize estimated projected additions to capital improvements and the arguments over which set of projections should be used to set rates.

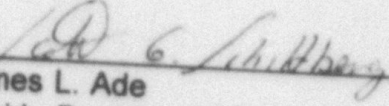
19. United Water Florida's Phase In and Verification Approach, as stated in United Water Florida's Prehearing Statement, is the best approach because it makes the most of the significant expense of this case by extending its effect over a longer period of time. The alternative proposal of using the thirteen month average ratebase for 1997 will result in an earlier need for additional rate relief and greater regulatory expense. The Phase In and Verification Approach was the product of much discussion by United Water Florida in an attempt to recover the costs associated with its long term capital program with as little rate case expense as possible. For these reasons, the Commission should consider all the evidence supporting the plan, including Cleveland's Rebuttal Testimony, so as to be able to weigh the benefits.

20. In conclusion, Cleveland's Rebuttal Testimony should not be stricken. It is proper rebuttal testimony offered at the proper time. It would be prejudicial to United Water Florida not to allow the testimony to be entered in the record. Such evidence is the type of evidence which the Commission should hear.

21. Therefore, for the reasons set forth above, the Commission should deny OPC's Motion to Strike Testimony.

Respectfully Submitted,

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

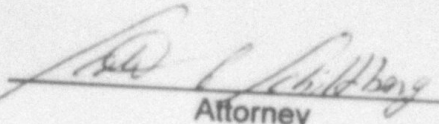
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Attorneys for United Water
Florida Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of Memorandum of United Water Florida Inc. In Response to Motion to Strike Testimony have been furnished to Blanca Bayo, Director, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Betty Easley Conference Center, Room 110, Tallahassee, Florida 32399-0850, by Federal Express this 25th day of January, 1997, and copies of Memorandum of United Water Florida, Inc. In Response to Motion to Strike Testimony have been furnished to Rosanne G. Capeless, Attorney for the Staff of the Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and to Harold McLean, Esquire, Office of the Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, Florida 32399-1400, by Facsimile and U.S. Mail, this 25th day of January, 1997.


Attorney