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January 22, 1997

VIA FEDERAL EXPRESS
AND VIA FACSIMILE (904) 413-7118

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 United Water Florida Inc.'s Memorandum of Law on Issue No. 80. 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
Scott G. Schildberg

- ACK _____
- AFA _____
- APP _____
- CAF _____ SGS/dws
- CMU _____ Enclosure
- CTR _____ cc: Ms. Rosanne G. Capeless (via facsimile)
- EAG _____ Mr. Harold McLean (via facsimile)
- LEG 1 Mr. David E. Chardavoyne
- LIN [initials] Mr. Walton F. Hill
- OPC _____ Mr. Robert J. Iacullo
- RCH _____ Mr. Frank J. McGuire
- SEC 1 Mr. Munipalli Sambamurthi
- OTH _____ Mr. James L. Ade

WAS *Willis*

DOCUMENT NUMBER-DATE
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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
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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 22, 1997

UNITED WATER FLORIDA INC.'S
MEMORANDUM OF LAW
ON ISSUE NO. 80

United Water Florida Inc. ("UWF"), pursuant to the Prehearing Officer's request at the Prehearing Conference held in this matter on January 17, 1997, and Rule 25-22.038(3), Florida Administrative Code, hereby submits this Memorandum of Law on Issue No. 80, as identified at the Prehearing Conference, and states as follows:

1. Issue. The issue presented is whether the First District Court of Appeal's ("First DCA") decisions in Hernando County v. Florida Public Service Commission, 21 Fla. L. Weekly D. 2625 (Dec. 12, 1996), and Sugarmill Woods Civic Association, Inc. v. Southern States Utilities, 21 Fla. L. Weekly D. 2627 (Dec. 12, 1996), have any effect on this proceeding.

2. Facts. The Official Date of Filing for the Application of United Water Florida, Inc. for Rate Adjustment ("Application") was established as September 3, 1996, by the Florida Public Service Commission ("Commission").

Subsequent to the filing of the Application and prior to the Prehearing Conference, the First DCA issued the Sugarmill Woods and Hernando County decisions. The Commission has filed a Motion for Rehearing with respect to the Sugarmill Woods decision and a Motion for Clarification and for Rehearing with respect to the Hernando

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County decision. In addition, Southern States Utilities, Inc., filed Motions for Rehearing *En Banc*, Rehearing and Clarification with regard to the Hernando County decision. According to the office of the Clerk of the First DCA, the court has not ruled on any of the aforementioned motions.

3. Applicable Law and Analysis.

A. Doctrine of Stare Decisis.

The effect of the Sugarmill Woods and Hernando County decisions in this proceeding depends on whether such decisions may properly be considered as binding precedent (or stare decisis) in the Commission's adjudication of UWF's Application.

Literally translated, stare decisis commands one to let that which has been decided stand undisturbed. 13 Fla. Jur. 2d Courts and Judges, §136. The rule stands for the proposition that when a point of law has been settled by decision of a superior court, it forms a precedent which is generally not afterwards to be departed from. McGregor v. Provident Trust Co. of Philadelphia, 162 So. 323, 328 (Fla. 1935).

Generally, the rule of stare decisis is only applicable to issues properly decided and disposed of by an appellate court. Bunn v. Bunn, 311 So. 2d 387, 389 (Fla. 4th DCA 1975).

The granting of a motion for rehearing arrests or suspends the previous appellate judgment pending the rehearing and reconsideration of the case. Florida Motor Lines, Inc. v. Hill, 106 Fla. 37, 143 So. 261 (Fla. 1932), vacated on other grounds, 126 Fla. 586, 143 So. 262 (Fla. 1932).

The Florida Law Weekly acknowledges the effect of rehearings on the first page of its sections containing decisions of District Courts of Appeal: "Cases not final until time expires to file rehearing petition and, if filed, determined." See e.g., 21 Fla. L. Weekly D. 2601 (Dec. 20, 1996).

Accordingly, because of the pending motions for rehearing, the precedential effect of the First DCA decisions in Sugarmill Woods and Hernando County upon this proceeding is questionable and the effect, if any, can not be determined until after the First DCA has resolved the motions for rehearing and any related motions.

B. Determining Finality of Judgments and Decrees.

In determining whether an order or decree is final, the traditional test is whether the order in question marks the end of the judicial labor in the case, and nothing further remains to be done by the court to fully effectuate a termination of the cause as between the parties directly affected. Pruitt v. Brock, 437 So. 2d 768, 773 (Fla. 1st DCA 1983).

A judgment entered by a trial court is not final while a timely motion for rehearing remains pending. Johnson v. Feeney, 507 So. 2d 722, 723 (Fla. 3d DCA 1987). Similarly, a previous decision by an appellate court is arrested and suspended by the granting of a motion for rehearing. Florida Motor Lines, 143 So. at 262.

An appellate court has broad discretion in rehearing its decision:

We have examined the treatment of this question in many jurisdictions, and the rule seems will-nigh universal that, in the absence of statutory or constitutional provision controlling, prior to the adjournment of the term or other time fixed in which the cause passes beyond the jurisdiction of the court and becomes final, any court of record has full control over its judgments or decrees and can set them aside or reform them as it may deem right and legal. The rule applies to civil and criminal cases alike and may be effected on the court's own motion or on being advised by any party in interest. Lake v. State, 100 Fla. 373, 129 So. 827, 829 (Fla. 1930), adhered to 100 Fla. 383, 131 So. 147 (Fla. 1930).

Because of the pending motions for rehearing and the appellate court's broad discretion in rehearings, the Commission should not rely upon the decisions in Sugarmill Woods and Hernando County as final. However, as discussed below, such decisions may become final during the pendency of this proceeding.

C. Retrospective Effect and Law at the Time of Final Decision.

It is possible that the Sugarmill Woods and Hernando County decisions may become final and constitute binding precedent prior to the Commission's final order on UWF's Application.

The general rule is that judicial decisions in the area of civil litigation have retrospective as well as prospective application unless declared by the opinion to operate prospectively only. City of Daytona Beach v. Amsel, 585 So. 2d 1044, 1046 (Fla. 1st DCA 1991); Black v. Nesmith, 475 So. 2d 963 (Fla. 1st DCA 1985). Moreover, it is well settled that appellate courts are required to apply the law in effect at the time of its decision

rather than the law prevailing at the time the action was commenced or the time that judgment entered below. Hillhaven Corporation v. Department of Health and Rehabilitative Services, 625 So. 2d 1299, 1302 (Fla. 1st DCA 1993); In re forfeiture of 1985 Mercedes, 596 So. 2d 1261, 1264 (Fla. 1st DCA 1992).

Accordingly, the Commission's final order in this docket will be based upon the decisional law in effect at the time its decision is rendered.

4. Conclusion

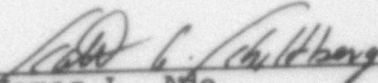
Because the decisions in Sugarmill Woods and Hernando County are subject to motions for rehearing, the effect of the decisions upon this proceeding can not be fully evaluated at this time. Such decisions may become final and binding precedent during the course of this proceeding. On the other hand, the decisions may be reheard and revised.

Therefore, a decision on Issue No. 80 is premature at this time. However, in the interests of judicial economy and because it may be necessary for the Commission to consider the Supplemental Direct Testimony of Philip Heil to render its decision, the Commission should grant the Motion for Leave to File Supplemental Testimony of Philip Heil.

Dated this 22 day of January, 1997.

Respectfully submitted,

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

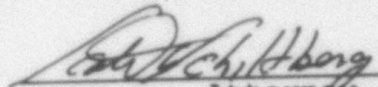
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Attorneys for United Water
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of United Water Florida Inc.'s Memorandum of Law have been furnished by Federal Express this 2nd day of January, 1997, to Blanca Bayo, Director, Division of Records and Reporting, Florida Public Service Commission, 2450 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and a copy of the foregoing has been furnished to Blanca Bayo, Director, Division of Records and Reporting, Florida Public Service Commission, 2450 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, Florida 32399-1400, by Facsimile and U.S. Mail, this 2nd day of January, 1997.


Attorney