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November 25, 2008

VIA HAND DELIVERY

Ms. Ann Cole, Director
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, FL 32399-0850

RECEIVED-FPSC
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COMMISSION
CLERK

Re: *In Re: Application for increase in water and wastewater rates in Alachua, Brevard, DeSoto, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc., Docket No. 080121-WS*

Dear Ms. Cole:

On behalf of Aqua Utilities Florida, Inc. ("AUF"), enclosed for filing is an original and (7) copies of AUF's Request for Official Recognition of the State of Florida Commission on Ethics Advisory Opinion, CEO 08-21 (Sept. 10, 2008).

Please acknowledge receipt of this filing and this letter by stamping the extra copy of this letter "filed" and returning the copy to me. Thank you for your assistance.

Sincerely,

HOLLAND & KNIGHT LLP


Gigi Rollini

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Enclosures

cc: Ralph Jaeger, Esq.
Katherine Fleming, Esq.
Caroline Klancke, Esq.
Erik Sayler, Esq.
Charles Beck, Esq.
Cecilia Bradley, Esq.
Kimberly A. Joyce, Esq.

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for increase in water and)
wastewater rates in Alachua, Brevard, DeSoto,) DOCKET NO. 080121-WS
Highlands, Lake, Lee, Marion, Orange,)
Palm Beach, Pasco, Polk, Putnam,) FILED: November 25, 2008
Seminole, Sumter, Volusia, and Washington)
Counties by Aqua Utilities Florida, Inc.)
_____)

**AQUA UTILITIES FLORIDA, INC.'S
REQUEST FOR OFFICIAL RECOGNITION**

Aqua Utilities Florida, Inc. ("AUF"), pursuant to Section 120.569(2)(i), Florida Statutes, requests the Commission to take official notice of the State of Florida Commission on Ethics Advisory Opinion, CEO 08-21, rendered on September 10, 2008. A copy of Advisory Opinion CEO 08-21 is attached as Exhibit "A."

Respectfully submitted this 25th day of November, 2008.

HOLLAND & KNIGHT LLP



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Attorneys for Aqua Utilities Florida, Inc. DOCUMENT NUMBER - DATE

10954 NOV 25 08

FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by electronic transmission and U.S. Mail to **Charles Beck, Esq., Office of Public Counsel**, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400, **Ralph Jaeger, Esq., Katherine Fleming, Esq. Caroline Klancke, Esq., Erik Sayler, Esq., Office of General Counsel, Florida Public Service Commission**, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and **Cecilia Bradley, Esq., Office of the Attorney General**, The Capitol – PL01, Tallahassee, FL 32399-1050, this 25th day of November, 2008.



Attorney

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CEO 08-21 - September 10, 2008

POST-EMPLOYMENT RESTRICTIONS**UTILITY COMPANY EMPLOYEE APPEARING BEFORE PSC
IN RATE CASE AFTER PARTICIPATING IN
EARLIER RATE CASE AS A PSC EMPLOYEE**

To: Lawrence E. Sellers, Jr., Esquire (Tallahassee)

SUMMARY:

A former PSC employee would not be prohibited by Section 112.313(9)(a)4, Florida Statutes, from representing a utility company in a rate case before the PSC within two years of his termination because he is grandfathered-in. His employment with the PSC began in November 1987, and Section 112.313(9)(a)4, Florida Statutes, is inapplicable to PSC employees who held their positions as of December 31, 1994. Section 350.0605(2), Florida Statutes, prohibits a former PSC employee from "switching sides" and coming back before the PSC representing a utility on the same matter that he had been involved in as a PSC employee. However, the 2008 rate case that the former employee is now involved in as an employee of the utility company is not the same matter as the 2006 rate case that he was involved in as a PSC employee. Therefore, the former PSC employee's involvement in the 2008 rate case does not violate Section 350.0605(2), Florida Statutes.

QUESTION:

Would a former employee with the Florida Public Service Commission be prohibited by Sections 112.313(9)(a)4 and 350.0605(2), Florida Statutes, from participating in a rate case on behalf of a utility company when he had previously worked on a different rate case for the same utility company as a PSC employee?

Based upon the specific facts presented, your question is answered in the negative.

In your letter of inquiry, you relate that Mr. William T. Rendell has authorized your firm to seek an advisory opinion on his behalf concerning the post-employment provisions in Sections 112.313(9) and 350.0605(2), Florida Statutes. By way of background, you explain that from November 1987 until January 2008, he was employed by the Florida Public Service Commission (PSC), most recently as the Public Utilities Supervisor in the Division of Economic Regulation, Bureau of Rate Filings, Surveillance, Finance & Tax. Upon leaving the PSC, he became the Manager of Rates with a utility company that provides water and wastewater services to approximately 117,000 Florida residents through its ownership of 72 water systems and 31 wastewater systems in 17 different counties. These systems were acquired from other companies in recent years and many need major improvements. You indicate that some systems applied for rate increases 10 years ago but for others, it has been 15 years since they sought an increase.

Rates for investor-owned water and wastewater utility companies are set and regulated by the PSC pursuant to Chapter 367, Florida Statutes. By law, those rates are to be set at a level that gives the utility an opportunity to recover its "cost of service," namely, the costs it incurs in providing service plus a reasonable return ("rate of return") on its "rate base." A utility company may apply to the PSC for a rate increase by filing certain records-known as "Minimum Filing Requirements" (MFRs)-that show its current rates do not allow for it to recover its "cost of service." This type of filing is referred to as a "rate case" or "rate proceeding," and in order to accurately address a utility's "cost of service" as part of a rate case, a "test year" period is chosen that is representative of the utility's current (and expected future) operations

in terms of revenues, operation and maintenance expenses, taxes, depreciation, and a fair return on investment.¹

On December 1, 2006, the utility company filed an application for an increase in the interim and final water and wastewater rates based on a historical test year period ending December 31, 2005, with some projected adjustments. This filing was assigned Docket No. 060368-WS, and covered 80 systems (56 water and 24 wastewater) in 15 counties throughout Florida. The utility's MFRs predicted that its earnings during the test year would fall below the earnings level authorized by the PSC. In addition to requesting a rate increase, the utility also requested a county-wide uniform rate structure as a result of grouping its facilities into 15 geographic regions within county boundaries, with each county having its own unique rates. You advise that, eventually, interveners in the case filed a joint motion to dismiss the rate case on several grounds, including assertions that the utility company's MFRs for its operating expenses were flawed. Thereafter, PSC staff recommended that the joint motion to dismiss be granted. Instead of seeking to amend its application to address the alleged deficiencies in its MFRs, the utility company filed a notice of voluntary dismissal on August 27, 2007, which was acknowledged by the PSC at its agenda conference the following day, and which was codified in Order No. PSC-07-0773-FOF-WS on September 24, 2007.²

With regard to the utility company's 2006 rate case, you advise that the employee was primarily responsible for supervising the accounting aspects of the case, and that he shared supervisory responsibilities with another supervisor on the engineering data. A third supervisor from a different section handled the cost of capital issues, and a supervisor and bureau chief from another bureau were assigned to the rate issues, including rate structure. You advise that the employee had no direct responsibilities in either the cost of capital or rate structure issues. Nearly three months after the entry of Order No. PSC-07-0773-FOF-WS, the employee was approached by the utility company regarding prospective employment. In accordance with internal PSC procedures, he notified his supervisor and immediately terminated any on-going involvement with Docket No. 060368-WS, including participation in staff conferences or meetings with the utility company. He also has had no involvement with Docket No. 060368-WS as a utility company employee, we are advised.

On May 22, 2008, the utility company filed a new, different application for an increase in interim and final water and wastewater rates based on a historic test year period ending December 31, 2007. The 2008 case was assigned Docket No. 080121-WS, and encompasses 57 water systems and 25 wastewater systems in 16 counties. With its new application, the utility company submitted new MFRs to support its request for a rate increase-MFRs that are distinct and different from the MFRs filed under the previous docket-and with different data and financial projections. The utility company also seeks to adopt a "consolidated" statewide uniform rate structure for all of its customers instead of the varying rate structures for its systems that it presently employs. This would allow the utility company to take advantage of economies of scale and share the cost of running the business over its entire customer base and minimize the financial impact on customers for expenditures that benefit only a single system. The proposed statewide uniform rate structure is materially different from the 15 separate county-wide rate structures it sought under the prior docket.

With this extensive background, we are asked to decide whether "switching sides" by the former PSC employee violates the post-employment provisions in either the Code of Ethics or Chapter 350, Florida Statutes.

The applicable language in Section 112.313(9)(a), Florida Statutes, provides:

4. An agency employee, including an agency employee who was employed on July 1, 2001, in a Career Service System position that was transferred to the Selected Exempt Service System under chapter 2001-43, Laws of Florida, may not personally represent another person or entity for compensation before the agency with which he or she was employed for a

period of 2 years following vacation of position, unless employed by another agency of state government.

6. This paragraph is not applicable to:

c. A person who was a defined employee of the State University System or the Public Service Commission who held such employment on December 31, 1994;

Section 112.313(9)(a)4., Florida Statutes, prohibits certain "defined employees" from personally representing a person or entity for compensation before their former agency for a period of two years after they terminate their employment. When this prohibition was initially enacted, it did not cover PSC employees. However, with the enactment of Chapter 94-277, Laws of Florida, the Legislature made PSC (and State University System) employees subject to the prohibition but grandfathered-in those who were in their positions as of December 31, 1994. Since you have advised that the employee began working for the PSC in November 1987 and remained there until January 2008, he clearly is grandfathered-in and not in violation of Section 112.313(9)(a)4, Florida Statutes, as a result of his personal representation of the utility company before the PSC within two years of his departure.

Chapter 350, Florida Statutes, also contains standards of conduct that are applicable to PSC members and staff and, pursuant to Section 350.043, Florida Statutes, we have jurisdiction to interpret and advise persons of these provisions. Section 350.0605(2), Florida Statutes, restricts the representation of clients before the PSC by former employees. It provides:

Any former employee of the commission is prohibited from appearing before the commission representing any client regulated by the Public Service Commission on any matter which was pending at the time of termination and in which such former employee had participated.

This provision prohibits a PSC employee from "switching sides" in a proceeding and coming back before the PSC representing a utility on the same matter that he had been involved in as a PSC employee.

It is undisputed that the former PSC employee participated in the utility company's 2006 rate case while he was employed by the PSC. It also is undisputed that the former PSC employee is presently participating in the utility company's 2008 rate case as a utility company employee. The issue, then, is whether his previous and current participation in the two proceedings involve the same "matter" for purposes of Section 350.0605(2), Florida Statutes. Chapter 350, Florida Statutes, does not define the term "matter." However, we note that a similar type of prohibition contained in the Rules Regulating The Florida Bar, particularly Rule 4-1.11(e) (Special Conflicts of Interest for Former and Current Government Officers and Employees), contains the following definition:

Matter Defined. As used in this rule, the term "matter" includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 4-1.11 contains the following Comment on Subdivision (e):

For purposes of subdivision (e) of this rule, a "matter" may continue in another form. In determining whether 2 particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Clearly, the Rules Regulating The Florida Bar are not applicable to the employee since he is not an attorney; nor would we have the authority to interpret them even if he was. However, we note that Bar rules governing conflicts of interest are designed to protect client confidentiality, Estright v. Bay Point Improvement Association, Inc., 921 So.2d 810 (Fla. 1st DCA 2006).³ Since Rule 4-1.11 has a purpose similar to Section 350.0605(2), Florida Statutes, its definition of "matter" is helpful in resolving our issue, and it also favors using the PSC's case docketing system as a "bright-line test" for determining whether something is the same "matter." In CEO 91-33, we observed that

a "docketed case" or "docket" is established to record and identify any matter of official commission interest or concern which may be addressed by the PSC in formal proceedings. Matters to be docketed can include letters, petitions, applications, complaints, and staff reports or filings which involve the exercise of the commission's statutory authority. . . . It is also our understanding that a docket generally entails a formal proceeding, with the filing of pleadings and documents by interested parties. We are advised that the PSC's Division of Records and Reporting serves as a clerk to the commission, and assigns docket numbers as well as maintains the working files for all docketed cases. As in most formal proceedings, either administrative or judicial, when a party to a PSC docket files a document or pleading, the pleading contains a docket number, is filed in the clerk's office, and is also served on the other parties to the proceeding. . . .

CEO 91-33 addressed the statutory obligations of PSC members with regard to ex parte communications and, in that opinion, we equated the term "proceeding" with "docket." Further, we are advised that the PSC uses the terms "matter" and "docket" synonymously and interchangeably to mean a specific legal proceeding.

You also assert that the 2008 rate case is significantly different from the 2006 rate case. Even though the same utility company was the subject of both proceedings, the 2008 rate case constitutes a different docket/legal proceeding and involves a materially different subject than the 2006 Rate Case. Among other things, the 2008 case involves:

- a different application,
- a different number of systems in a different number of counties,
- different financial data,
- different engineering data,
- different MFRs based on a different test year,
- a different rate structure,
- a different rate increase,
- different customer service hearings and different customer comments, and
- different testimony.

Based upon all of the foregoing, we believe that the Legislature clearly intended the word "matter" in Section 350.0605(2), Florida Statutes, to denote a specific legal proceeding and, in practice before the PSC, a specific legal proceeding is referred to as a "docket." Consequently, we find that the 2006 rate case and the 2008 rate case are not the same "matter," and that the former PSC employee did not violate

Section 350.0605(2), Florida Statutes, by his participation in the 2008 rate case on behalf of his employer, the utility company.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 5, 2008 and **RENDERED** this 10th day of September, 2008.

Cheryl Forchilli, *Chair*

^[1]Part V of Chapter 25-30, F.A.C., contains the procedural requirements for seeking rate increases by water and wastewater utilities.

^[2]We are advised that even though Docket No. 060368-WS was effectively concluded with the entry of Order No. PSC-07-0773-FOF-WS, it remained open administratively so that staff could confirm that customers received refunds of the interim rate increases they paid during the pendency of the proceeding.

^[3]There is no suggestion that the employee disclosed confidential information to the utility company that he obtained as a PSC employee, which is prohibited by Section 112.313(8), Florida Statutes.