CORRESPONDENCE
4/9/2018
DOCUMENT NO. 02833-2018

Brandy Butler

From: Office of Commissioner Brown
Sent: Monday, April 09, 2018 11:15 AM
To: Commissioner Correspondence
Subject: FW: Public Services Commission update
Attachments: Fwd Appeal; Fwd UIF RATE CASE - UIF's Status report re marginal quality of service issues; Initial Brief as Filed DOC000.pdf

Good Morning,

Please place the following e-mail and attachments in Docket Correspondence, Consumers and their Representatives, in Docket No. 20160101-WS.

Thank you,
Shalonda

From: Constantine, Lee [mailto:lconstantine@seminolecountyfl.gov]
Sent: Friday, April 06, 2018 4:42 PM
To: Lee Constantine (yahoo, personal); Venn, Gretchen; Constantine, Lee
Subject: FW: Public Services Commission update

As you are aware, Commissioner Constantine promised to keep you informed about the Utilities Inc./Public Service Commission rate increase. Attached is the most recent information from Eric Sayler, Public Counsel representing rate-payers and Ralph Terrero, Seminole County's Environmental services Director. At Commissioner Constantine's bequest, Mr. Terrero requested an update on the appeal process from Bill Bilenky, our outside counsel. The bottom line is that we don't know when the appeal will be heard as we have no control over the Fifth District Court appeal calendar. The hearing could be in a few months or as long as a year away, however, we will keep you informed as we get additional information. Be assured that Commissioner Constantine as well as the other Commissioners continue to support this appeal.

The initial brief filed in December 2017 is also attached for your review. If any previously sent correspondence/information is needed please contact our office.

As always, if our office can be of assistance to you in this or any other matter, please do not hesitate to contact us at 407-665-7207 or Commissioner Constantine personally at 407-221-5551.

Gretchen R Venn
Executive Assistant
District 3 – Commissioner Constantine
Seminole County BCC
1101 E. 1st Street
Sanford, FL 32771

Office: 407-665-7207

****Florida has a very broad Public Records Law. Virtually all written communications to or from State and Local Officials and employees are public records available to the public and media upon request. Seminole County policy does not differentiate between personal and business emails. E-mail sent on the County system will be considered public and will only be withheld from disclosure if deemed confidential pursuant to State Law.****

Brandy Butler

From: Terrero, Ralph <rterrero@seminolecountyfl.gov>
Sent: Friday, March 30, 2018 5:19 PM
To: Constantine, Lee
Cc: Applegate, A. Bryant
Subject: Fwd: Appeal

Follow Up Flag: Flag for follow up
Flag Status: Flagged

Commissioner, attached is the answer from our attorney. If you have any questions please feel free to contact me, best, Ralph

Sent from my iPhone

Begin forwarded message:

> **From:** Bill Bilenky <BBilenky@mansonbolves.com>
> **Date:** March 30, 2018 at 4:13:35 PM EDT
> **To:** "rterrero@seminolecountyfl.gov" <rterrero@seminolecountyfl.gov>
> **Subject: Appeal**
>
> Hi Ralph – my disclaimer is, of course, everything is a guess.
> We should hear in the next three weeks or so if we will get oral argument – I just had a denial to grant argument and it was 6 weeks after I asked.
> If Oral Argument is granted it will be scheduled two to three months after we hear on our request.
> Decision can be anywhere from a week (if we lose and don't get an opinion – what is called a "Per curium affirmed") to a month to three or four months after the argument if they write an opinion. If they write an opinion it may affirm the Commission or reverse the Commission.
> That is about the best I can say.
> Bill
>
> BILL BILENKY
> **MEMBER**
> **MANSON BOLVES DONALDSON VARN, PA**
> 109 N. BRUSH STREET.
> SUITE 300
> TAMPA, FLORIDA 33602
> BBILENKY@MANSONBOLVES.COM

Brandy Butler

From: Bill <wshallcross@cfl.rr.com>
Sent: Thursday, March 22, 2018 9:26 AM
To: Constantine, Lee
Subject: Fwd: UIF RATE CASE - UIF's Status report re: marginal quality of service issues
Attachments: Status Rpt Marginal Systems (3-21-18).pdf

Follow Up Flag: Flag for follow up
Flag Status: Flagged

Sent from my iPhone

Begin forwarded message:

> **From:** "Sayler, Erik" <SAYLER.ERIK@leg.state.fl.us>
> **Date:** March 22, 2018 at 9:20:28 AM EDT
> **To:** Lee Constantine <lee.constantine22@yahoo.com>, "Jack Mariano (jmariano@pascocountyfl.net)" <jmariano@pascocountyfl.net>, "Ann Marie Ryan (amr328@hotmail.com)" <amr328@hotmail.com>, Flip Mellinger <flipmellinger@pascocountyfl.net>, Bill <wshallcross@cfl.rr.com>, "Lorraine Mack (l.e.mack@hotmail.com)" <l.e.mack@hotmail.com>, "Terry & Wilber Copenhafer" <tkd712@yahoo.com>, "rhalleen1@tampabay.rr.com" <rhalleen1@tampabay.rr.com>, "clark@resortrealtyflorida.com" <clark@resortrealtyflorida.com>
> **Cc:** "Kelly, JR" <KELLY.JR@leg.state.fl.us>, "Vandiver, Denise" <VANDIVER.DENISE@leg.state.fl.us>
> **Subject: UIF RATE CASE - UIF's Status report re: marginal quality of service issues**
>
> Hi all,
> Due to your interest in the recent UIF rate case, thought you might be interested in the "status report" UIF filed yesterday with the FPSC. If you have any questions or concerns, please let me know.
>
> As you may know, the FPSC's final order in the UIF rate case is currently on appeal to the First District Court of Appeal. The appeal is still in the briefing stage. If you are interested in any of the briefs filed to date by the parties, please let me know.
>
> Best regards,
> Erik
>
> ***Erik L. Sayler***
> *Associate Public Counsel*
> *Office of Public Counsel*
> *111 West Madison Street, Room 812*
> *Tallahassee, FL 32399-1400*
> *850-717-0337 (direct)*
> *850-488-9330 (main)*
> *850-487-6419 (fax)*
> *Sayler.Erik@leg.state.fl.us*

****
Please note: Florida has a very broad public records law and e-mail communication may be subject to disclosure.

From: Martin S. Friedman [mailto:mfriedman@ff-attorneys.com]
Sent: Wednesday, March 21, 2018 9:32 PM
To: Sayler, Erik <SAYLER.ERIK@leg.state.fl.us>; Walter Trierweiler <wtrierwe@psc.state.fl.us>; Brian Armstrong <brian@brianarmstronglaw.com>; Bill Bilenky <BBilenky@mansonbolves.com>; Douglas Manson <dmanson@mansonbolves.com>; Debbie Cantwell <DCantwell@mansonbolves.com>; EdP IV <edupontiv@gmail.com>; nporter@dgfirm.com
Cc: John Hoy <jphoy@uiwater.com>; Patrick Flynn <pcflynn@uiwater.com>; Jared Deason <JDeason@uiwater.com>; Phil Drennan <PJDrennan@uiwater.com>
Subject: FW: FPSC Electronic Filing Submission: ID=13755 UIF RATE CASE

PLEASE NOTE OUR NEW OFFICE LOCATION

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Shareholder

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ATTORNEYS AT LAW

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mfriedman@ff-attorneys.com
Facebook | ff-attorneys.com

From: noReply@psc.state.fl.us [mailto:noReply@psc.state.fl.us]
Sent: Wednesday, March 21, 2018 9:28 PM
To: Martin S. Friedman <mfriedman@ff-attorneys.com>
Subject: FPSC Electronic Filing Submission: ID=13755

Greetings:

Your document as identified below has been received by the Office of Commission Clerk.

Docket: 20160101
Description: Status Report on marginal systems
Primary File Name: Status Rpt Marginal Systems (3-21-18).pdf
Additional Dockets? No
Received Date: 3/21/2018 9:28:20 PM
Tracking Number: 13755

This document will be reviewed for compliance with the Commission's e-filing requirements, and you will be notified by email once the filing has been accepted.
Should you not receive notification of acceptance, please contact the Office of Commission Clerk at clerk@psc.state.fl.us or 850-413-6770.

This is an unattended mailbox. **Please do not reply to this email.**

Sincerely,

Office of Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
clerk@psc.state.fl.us
850-413-6770

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

Seminole County,
Appellant/Intervenor,

v.

Florida Public Service Commission,
Appellee.
_____/

DCA Case No: 17-4438
LT Case No : 20160101-WS
PSC-2017-0361-FOF-WS

INITIAL BRIEF OF THE APPELLANT

Douglas Manson, FBN 542687
William S. Bilenky, FBN 0154709
Manson Bolves Donaldson Varn, P.A.
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Counsel to Appellant/Intervenor
Seminole County, Florida

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Public Service Commission Orders

PRELIMINARY STATEMENT

The Parties:

Appellant/Intervenor, Seminole County will be referred to as the "Appellant" or "Seminole County."

Appellee, FLORIDA PUBLIC SERVICE COMMISSION will be referred to as the "Appellee" or the "Commission."

Brief References:

Appellant refer to the Record on appeal as [R: ___] with the appropriate page number(s) inserted. Where appropriate, specific paragraph numbers will be designated following the page number in the following format: [R: ___ p. __,].

References to the Final Order appealed from, PSC-2017-0361-FOF-WS, shall be in the form "Final Order at p. ____" or as to the record [R: ___].

References to the May 8, 2017 – May 10, 2017, hearing transcripts shall be of the form "[Vol. XX, p. ___]".

Citations to the Florida Statutes will be designated at "Fla. Stat." and will refer to the 2016 version unless otherwise stated.

Citations to the Florida Administrative Code will be designated as "section" or "§" together with a number and "F.A.C." e.g.: "section 28-106.XXX, F.A.C."

ISSUE ON APPEAL

WHETHER THE COMMISSION AUTHORIZED RATES THAT CONFORM TO THE ESSENTIAL REQUIREMENTS OF LAW

STATEMENT OF THE CASE

This is an appeal of a final order issued on September 25, 2017, by the Florida Public Service Commission in Docket No. 20160101 concluding the proceeding filed by Utilities Incorporated of Florida (UIF) for an increase in rates.

Timely Notice of Appeal was filed on October 20, 2017, by Seminole County, Florida seeking a review of that portion of the final order that allocated the increase in revenue requirements through rates approved by the Commission to be charged by the various water and wastewater utilities owned and operated by UIF. Seminole County took no position of the Commission's determination of the appropriate amount of increases in revenue sought by UIF (except as to certain penalty calculations) and is challenging the rate design and process for establishing rates.

Timely Notice of Appeal was filed on October 20, 2017, by the Office of Public Counsel (OPC) seeking review of that portion of the final order that established the increase in revenue requirements approved by the Commission to be recovered through rates to be charged the various water and wastewater customers of UIF. Case No. 17-4425 - *Citizens of State of FL v. FL Public Service*

Commission: Order No. PSC 2017-0361-FOF-WS. The OPC took no position on the Commission's rate design and process for establishing rate levels sought by UIF.

While both appeals deal with the same final order, the relevant issues and facts being relied upon by Seminole County for review are separate and distinct from the issues and facts OPC relies upon for its appealing and seeking review.

STATEMENT OF FACTS

Utilities Inc. of Florida (UIF) is a corporation owning twelve water and fifteen wastewater utilities in ten counties; some of those systems provide both water and wastewater service, while others provide only one service. None of the utilities are interconnected. [R – 190860 & 190860]

In April 2016, UIF requested approval of a "test year" for the establishment of a point in time snapshot of where the entire company's costs and revenues could be established as a basis for calculating necessary increases in revenues to be generated by increases in rates. [R – 1-7]. For the test year, UIF showed adjusted earnings of $13.74 million for water services and $15.55 million for wastewater services for a company-wide annual revenue of $29.29 million. It sought increases of $2.63 million in its water revenues and $4.27 million for its wastewater services for a total increase of $6.9 million. [R – 191586] UIF was requesting to treat all

of the 12 water utilities as one water utility and 15 wastewater utilities as one wastewater system solely for the purpose of consolidating their rates into a single rate structure for each. In recent appearances before the Commission, UIF sought discrete rate increases on a system-by-system basis. Of the twelve water utilities, ten were not producing sufficient revenues to cover their costs of service. Of the twelve utilities two should have seen their rates decrease, Polk County and Seminole – Sanlando since they were generating more revenues than authorized and UIF was over-earning on those two water systems. The remaining ten utilities should have seen their rates increase since they were under-earning and not meeting the costs of providing services. Remarkably, the Commission authorized an increase in rates for Seminole – Sanlando and reductions in rates to all eleven other water utilities.

Of the fifteen wastewater systems, four Seminole, Pasco – Labrador, Lee County (Eagle Ridge) and Lake County – Pennbrooke were over-earning and should have seen their rates decrease while eleven were not producing sufficient revenues to cover their cost of providing service and should have seen their rates increase. Curiously, three of the four will see a reduction in rates while one, Lake – Pennbrooke will see an increase in rates. Of the remaining utilities six others that were under-earning will also see their rates decrease. [R – 191540]

UIF sought a single consolidated rate schedule for all systems irrespective of the wide-spread in the costs of providing services for each. Such an averaging of costs in no way reflected the differences in the costs of service and inherently subsidized high cost systems with additional revenues collected through higher than justified rates from low-cost utilities.

Common costs for all the systems such as the cost of capital and the administrative costs such as billings and collections have already be implemented by UIF. [R: 191257, line 19 *et seq.*] Under the current stand-alone rate structure each utility shares equally the common costs while system-specific costs are paid through discrete rates collected from those customers whose service directly incurred those costs; those are direct costs typically volumetrically based and include electric power and chemical costs related to the operations.

The staff recommended approval of UIF's request for a single consolidated rate for water utilities and for wastewater utilities and the Commission approved the consolidation of rates. The Commission's decision results in the rates for eleven of the twelve water utilities reduced and all of those revenue reductions representing uncompensated costs being transferred to the customers of Seminole – Sanlando who will now be further subsidizing all other water systems' operations. On top of that, the entire increase in revenues authorized for UIF's water utilities

above the test year earnings are also included in the rates charged to Seminole – Sanlando. This double impact on those customers is imposed despite the fact that going into the rate case, rates for Seminole – Sanlando customers were already paying rates that produced excessive revenues and should have been reduced based upon its cost of service. That increase amounts to over 1.9 million dollars in revenue increases together with approximately 1.0 million dollars of costs currently being incurred by the other 11 water utilities.

The basic characteristic of all subsidies is to reduce the market price of an item below its cost of production.[1] No justification was given why the rates for the other 11 systems were being further reduced below the cost of providing service. UIF justified this massive subsidy by claiming that Seminole - Sanlando was an aging system and the funds were intended to pay for system improvements.

For wastewater utilities the mix was slightly different but the same pattern of subsidization occurs. Customer of five wastewater utilities will see their rates go up under the consolidated single rate; Lake Placid, Lake County – Pennbrooke, UIF Pasco – Orangewood; Pinellas Mid County, and Seminole – Sanlando. Of the four, one, Lake County – Pennbrooke, was overearning and should have seen its rates reduced. Remarkably, the customers of the ten remaining wastewater utilities will see their rates decline despite the fact that those utilities were under-earning

[1] http://www.businessdictionary.com/definition/subsidy.html

and producing insufficient revenues to cover their cost of providing services. With the approval of a consolidated rate, approximately four million dollars of costs currently incurred by those 10 under-earning wastewater utilities for the provision of service are being shifted to the rate-payers of the five utilities and away from customers who were not fully paying for the cost of their service before the rate change. In addition to the four million dollars in subsidies being paid, the Commission approved including all of the nearly 3.3 million dollars in revenue increases in the rates to be charged to customers of the five wastewater utilities.

In the past when the Commission consolidated utilities for the purpose of utilizing fewer rates, it usually grouped the utilities by similar costs of service so as to minimize the cross-subsidies. The approach called banded rates, was approved in concept by this Court because it minimized the cross-subsidy when grouping like-cost utilities together and could be justified if the subsidies were "reasonable."

In the staff's recommendation to the Commission they included a schedule for banded rates for water [Table 61-1, R:191607] and a schedule for banded rates for wastewater [Table 64-1, R: 191619].[2] The proposal depicted three groupings each of similar cost utilities in lieu of a single consolidated rate. The tables showed that the levels of subsidies were less for each utility while still returning the same revenues

[2] The schedules were prepared and filed after the hearing after the close of the receipt of evidence and post-hearing proposed recommended orders and the parties' briefings.

approved by the Commission. No staff testimony addressed that exhibit and no staff witness advocated use of the banded rates. No party had the opportunity to comment in writing or during the Commission's consideration of the staff's exhibits on the banded rate. The Commission addressed the banded rates in its final order and rejected their use in a single sentence. [R: 191619].

Commissioner Brisé during the Commission's deliberations correctly concluded that these 12 water and 15 wastewater utilities are not interconnected like an electric utility where a consolidated rate is justified. He recognized that the revenues generated are the same regardless of the rate structure selected and that there are "no benefits … gained from one system to the next." [R: 191265, line 12 – 14]

At the conclusion of deliberation, the Commission approved the staff recommendation to consolidate all of the water and wastewater utilities' rates into single consolidated rates and this appeal ensued.

STANDARD OF REVIEW

A reviewing court will disturb the Commission's findings and conclusions if they are clearly erroneous or they are not supported by competent substantial evidence in the record. To prevail on appeal a party must demonstrate that the Commission has departed from the essential requirements of law. *Id.* (citing

AmeriSteel Corp. v. Clark, 691 So.2d 473, 477 (Fla.1997)). *Choctawhatchee Elec. Co-op., Inc. v. Graham*, 132 So.3d 208, 212 (Fla. 2014).

The standard of review for an agency's conclusions of law is *de novo*. *Padron v. Dep't of Envtl. Prot.*, 143 So. 3d 1037, 1040 (Fla. 3d DCA 2014); *Florida Dep't of Highway Safety & Motor Vehicles v. JM Auto, Inc.*, 977 So. 2d 733, 734 (Fla. 1st DCA 2008). In reviewing the Commission's interpretation and determination of issues of law, "[t]he standard of review . . . is whether the agency erroneously interpreted the law and, if so, whether a correct interpretation compels a particular action." § 120.68(7)(d), Fla. Stat.; *Florida Hospital v. Agency for Health Care Admin.*, 823 So. 2d 844, 847 (Fla. 1st DCA 2002).

SUMMARY OF THE ARGUMENT

In the past, corporations owning multiple water and wastewater utilities in different counties have sought consolidation of the rates charged by the separate utilities for simplifying the administration of billing and collection services. The Commission has employed non-rule policies for reducing the number of rate structures employed by the corporations that find their authority in § 367.081(2)(a), Fla. Stat. The polestar for the Commission is that rates must be "just, reasonable, compensatory, and not unfairly discriminatory." "Fair" and "just" carry with them the concept of "equality;" and, the legislature has required an "equality" in setting

rates. The Commission is required to "consider" the costs of providing services in setting rate levels. It was impossible for the Commission to "consider" the cost of providing services by each utility unless UIF prepared and filed such studies. The Company did not file a system-by-system cost of service study as required in § 367.081(2)(a), Fla. Stat. where it says the Commission: "shall consider the ... the cost of providing the service." The failure of UIF to perform a cost of service study in this proceeding and the absence of such a study for consideration by the Commission is a departure from "the essential requirements of law."

The Commission over the last thirty or forty years has adopted four non-rule policies for considering how to consolidate rates by companies holding multiple water and wastewater utilities. Those policies include setting rates so as to: recover the "costs from the cost causer;" minimize the subsidies that result from consolidating rates for utilities with different costs of services; group "like-cost" utilities to minimize the rate shock of grouping very disparate rates together; and taking into consideration the "criteria unique to those systems." The Commission's own rules require that the minimum filing requirements require the submission of the information for each utility separately if it is seeking to consolidate rates.

The Commission instead of grouping the utilities according to similar costs of service consistent with its non-rule policies, it combined all of the utilities thereby maximizing the subsidies, ignored the costs of providing the services, grouped large, low-cost, and stable customer bases with small, high-cost systems with very seasonal customer bases together thereby failing to consider the unique characteristics of the systems. It justified this departure by reducing the revenues from systems that were failing to produce sufficient revenues and by imposing higher than justified rates on only one water utility that might need system improvements at some indeterminate time in the future. That rationalization has no basis in the testimony in the record since all rates structures are designed to recover the same amount of revenue. As long as UIF is allowed to subsidize the operational costs of eleven high-cost water utilities there isn't and never will be any incentive to reduce those costs and improve the efficiency of those utilities.

The staff witness on rate design conceded that stand-alone rates were the best method for allocating the cost of service and to recover the company's revenue requirements. In order to deviate from established non-rule policy, the agency must "adequately address the evidence presented to explicate its decision" to deviate from its non-rule policy. It did not justify placing the entire increase in revenues on just Seminole – Sanlando water customers. In addition, it did not

justify placing a reallocation of costs to provide service from the other ten water high-cost utilities that were under-earning only on the customers of Seminole – Sanlando. It maximized the levels of subsidies being totally paid by Seminole – Sanlando water customers. It treated all water utilities as if they were in the same geographic area, incurred the same cost of service while ignoring the criteria unique to those other systems.

The Commission calculating a penalty separately for those utilities with poor quality of service while treating the utilities together for the purpose of consolidating their rates. Penalties are intended to punish a company for poor management. No explanation was given for treating the systems as discrete for purpose of imposing a penalty while the same management advocated that all systems should be consolidated and charged the same rates.

Evidence was tendered by staff showing that consolidated rates could be and were offered that would comply with the Commission's stated policies of minimizing subsidies. The staff took into consideration the costs of service of each utility and recognizing the unique characteristics of each utility. In doing so they tendered a cap band set of rates that produced the required revenues and reduced the level of subsidies. That recommendation could not be addressed by the parties

having been prepared and provided at the request of a Commissioner after the close of the evidence.

The cap band schedule was discussed by the Commission at the agenda conference where no party was permitted to participate in the discussion or address the Commissioners on the staff's exhibits.

ARGUMENT

WHETHER THE COMMISSION AUTHORIZED RATES THAT CONFORM TO THE ESSENTIAL REQUIREMENTS OF LAW

Overview of Rate Setting

Historically utilities have operated as monopolies to avoid the inefficient duplication of facilities for the provision of competing services that would be of indistinguishable quality. Regulation of utilities was legislatively authorized to prevent utilities from reaping monopoly profits with the tradeoff being that regulation would authorize rates at levels to be a surrogate for the competitive model.[3] In setting rates, the Commission is guided by the delegation of regulatory authority found in in § 367.081, Fla. Stat.:

> (2)(a)1. The commission shall, either upon request or upon its own motion, fix rates which are just, reasonable, compensatory, and not unfairly discriminatory. In every such proceeding, the commission shall consider the value and quality of the service and the cost of

[3] pubs.naruc.org/pub/537D0CA2-2354-D714-511F-8E0975FCA6AC, Ratemaking and Price Regulation, Objectives and Regulated Sectors, Gallagher, James, Director, james_gallagher@dps.state.ny.us

> providing the service, which shall include, but not be limited to, debt interest; the requirements of the utility for working capital; maintenance, depreciation, tax, and operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in property used and useful in the public service.

The Commission is authorized to review a company's investment in plant to establish the "used and useful" facilities available to provide service in order to provide a return on that invested equity and recover the carrying cost and retire the principal of borrowed debt.[4] Regulators look to the financial markets to estimate the appropriate capital structure between debt and equity and to set the appropriate cost of equity capital to apply to rate base so as to reduce the financial risk of investing in the business while at the same time attracting the necessary capital to finance the operations prospectively.[5] Finally, the Commission looks at the discrete costs of operations and allows a company to recover only those costs that are reasonable and necessary for the provision of service to the customer.[6] In establishing rates to return the approved revenue requirement, the form or the relative structure of the rates is irrelevant as to the recovery of the needed revenues

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[4] Section 376.081(2)(a)1., *supra.*

[5] See, e.g.: *Citizens of State v. Public Service Com'n*, 425 So.2d 534, 538 (Fla. 1982); *Westwood Lake, Inc. v. Metropolitan Dade County Water and Sewer Bd.*, 71 P.U.R. 3d 260 (1967).

[6] See, e.g.: *North Florida Water Co. v. City of Marianna*, 235 So.2d 487, 489 (Fla. 1970).

since every appropriately designed set of rates by the Commission is intended to recover the company's entire revenue requirement.[7]

Once the revenue requirement is calculated, the allocation of those revenues through rates charged for service is governed by statutory principles. As the surrogate for the competitive market, the Commission must apply factors that would cause customers to change service providers as if alternative competitors were available. Those are typically considerations such as the quality of those services and whether there are excessive charges or rates for the services.

First, the statute requires that the rates be "just, reasonable, compensatory, and not unfairly discriminatory;"[8] and the second the Commission *must consider* the "cost of providing service."[9] The Commission has over time adopted four non-rule policies to consider in the establishment of rates and consolidation of rates to be applied that meet and are consistent with the statutory requirements:

1. Rates must be designed to place the costs incurred by a utility on the customers who cause the costs to be incurred (the "cost causers); [10]

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[7] [Vol II, p. 219, lines 10 – 12; Vol. VI, p. 1006, 1041]
[8] Section 367.081(2)(a)1., Fla. Stat.
[9] *Id.*
[10] In re; Petition for approval of optional nonstandard meter rider, by Florida Power & Light Company, Docket No. 130223-EI, Order No. PSC-14-0146-FOF-EI, at p. 3; April 1, 2014.

2. Rates should be designed to minimize subsidies between customer classes;[11]

3. The Commission should group "like-cost" utilities when seeking to consolidate rates for the same class of customer in different utilities;[12] and,

4. The Commission should base the rates upon "criteria unique to those systems" when seeking to group utilities for the setting of consolidated rates.[13]

The Commission is required to "explicate its decision" and present evidence just as if the policies had been established by rule when it diverges from each of these accepted and announced non-rule policies. In this case, the Commission was required to justifying why it shifted costs from the cost causer; maximized instead of minimized the subsidies between customers of the same class; consolidated rates for utilities with widely divergent costs of service; and failed to take into consideration criteria unique to each system before it consolidated their rates. The Commission committed reversible error when it failed to conform to these standards:

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[11] Final Order, at p. 190; citing to: Order No. PSC-96-1320-FOF-WS, p. 227.

[12] 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.; and PSC-12-0102-FOF-WS, issued March 5, 2012, in Docket No. 100330-WS, at p. 138.

[13] Final Order at p. 189; citing to Sunshine Utilities, Inc.; In re: Request of Sunshine Utilities, Inc. for Staff Assistance on a Rate Increase to Customers in Marion County, Florida.

> (The DOT) fails to find a predicate in the record in that it does not adequately address the evidence presented to *explicate its decision.* Where, as here, an agency elects to proceed through non-rule policy it assumes the burden of articulating the rule applicable in the case with the same specificity as if it were an adopted rule.[14]

Commission staff conceded that most of the benefits as to the financial, operational and administrative functions of the utilities have already been realized and equally spread among the utilities by UIF.

> But the consolidation that the company has already implemented in terms of their, you know, accounting and -- and financing and so forth -- those benefits are already flowing through to all of the systems in the sense that, you know, they can borrow, as a corporate entity, at a much lower rate than LP, for example, that you considered earlier today.[15]

The Commission articulated the only remaining benefit of consolidating the rates and abandoning the stand-alone rates for UIF is the reduction in the processing cost of administering a single rate.

> The primary benefit of consolidated rates for UIF is the ease of administration for billing and accounting purposes and mitigation of the associated costs.[16]

The Commission staff witness Daniel's prefiled testimony rationalized the benefit to the customers as:

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[14] *City of Delray Beach v. Department of Transportation,* 456 So.2d 944, 946 (Fla. 1st DCA 1984).
[15] [R: 191257 – 8].
[16] [Vol V, at p. 975].

> The most important benefit of consolidated rates for customers is that the cost of system upgrades can be spread over a larger number of customers, mitigating the impact of those costs on customers.[17]

Stated another way, staff's justification is that consolidated rates shift the costs of a system upgrade, basically capital investment, away from the utility needing the upgrade to customers of other systems. But the staff's rationalization does not address the Commission's decision to shift the direct costs of providing service away from high cost utilities to low cost utilities. Consolidation doesn't produce any more or less revenue for capital improvements by UIF and when properly done minimizes cross-subsidization among utilities. All rates when designed properly will not produce any more or any less revenues for the investment in system upgrades.[18] Designing consolidated rates is all about creating "fair" non-discriminatory rates. Under the competitive model, the Commission's decision to quadruple the rates for Seminole – Sanlando would encourage the utility customers to leave UIF and seek service in the marketplace from another competing utility providing like-service.

UIF rate consultant Guastella used the wrong test for setting rates and refused to acknowledge that a subsidy was created.

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[17] *Id.*
[18] [Vol VI, p. 1041].

> Q Okay. Great. I'm going to -- let me go back to your testimony. What is an unduly discriminatory rate?
>
> A One that creates a subsidy. So if rates are not *unduly* discriminatory, there is no subsidy.[19] [Emphasis supplied]
>
> Q Do you believe that the unified rate here doesn't create a subsidy?
>
> A Absolutely does not.

[Vol. II, p. 253 – 254]

Commission witness Daniel defined "subsidy" to mean:

> A. It's a difference -- there's a difference in the amount a customer would pay with respect to a standalone rate versus a consolidated rate. That's the, the consideration I was using when I referred to the word "subsidy." [Vol VI, p. 1029].

The statute requires that [t]he commission shall, …, fix rates which are just, reasonable, compensatory, and not ***unfairly*** discriminatory." The statute requires that rate not be "unfairly" discriminatory and not "unduly" as advocated by UIF rate witness Guastella. "Unduly" means "to an unwarranted degree; inordinately" whereas "unfairly" connotes the concept of equality: "in a manner that is not in accordance with the principles of equality and justice."[20] UIF witness Guastella

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[19] Subsidy is defined as: Monetary assistance granted by a government to a person or group in support of an enterprise regarded as being in the public interest; and Financial assistance given by one person or government to another. https://www.thefreedictionary.com/subsidy

[20] https://www.google.com/search? Definition of "unfairly"

starts with the incredible assumption that the highly subsidized rate proposal is not "*unduly* discriminatory" and therefore concludes that magically "there is no subsidy." This subsidy is being placed upon Seminole – Sanlando customers who are currently paying rates that are excessive and exceed the statutory requirement for being "just, reasonable, compensatory, and not ***unfairly*** discriminatory."

The Commission's final order is supposed to set forth the grounds and reasons for deviation from its stated non-rule policies. In *McDonald v. Department of Banking and Finance*, 346 So.2d 569, 582 (Fla. 1st DCA 1977), this Court articulated what was expected of the Commission in deviating from its non-rule policies:

> The agency's final order in 120.57 proceedings must describe its "policy within the agency's exercise of delegated discretion" sufficiently for judicial review. Section 120.68(7). By requiring agency explanation of any deviation from "an agency rule, an officially stated policy, or a prior agency practice," Section 120.68(12)(b) recognizes there may be "officially stated agency policy" otherwise than in "an agency rule"; and, since all agency action tends under the APA to become either a rule or an order, such other "officially stated agency policy" is necessarily recorded in agency orders.

Deviation from each of the policies adopted in the past by the Commission is discussed as follows.

Policy 1: "Place the costs incurred by the utility on the customers who cause the costs:"

In *Southern States Utility*[21], the Commission found that "... stand-alone rates ... results in the closest approximation of the true cost of service of each service area." There, this Court found in reviewing the Commission's decision *headlined* its opinion by stating that: "Cost Of Service Remains Starting Point." Here, the staff testimony recognized this finding but still proceeded to deviate from that principle in advocating for a consolidated rate.[22]

In its final order in *Southern States*, the Commission's own witness Shafer, testified that: "[t]he most efficient way to ensure accountability is to force a utility to look at these decisions as they relate to the costs and benefits of the particular service area rather than on a total company basis where individual investment decisions often appear immaterial."[23] It is about traceability and accountability to ensure the company places emphasis on reducing costs of service for high-cost utilities. As long as UIF is allowed to subsidize the operational costs of eleven high-cost water utilities there isn't and never will be any incentive to reduce those costs and improve the efficiency of those utilities.

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[21] *Southern States Utilities v. Florida Public Service Com'n*, 714 So.2d 1046, 1053 (Fla. 1st DCA 1998)
[22] [Vol V, p. 973].
[23] Order No. PSC-96-1320-FOF-WS, *supra* at p. 272

UIF has the burden of providing a cost of service study to be considered by the Commission.[24] UIF did not perform a cost of service study for any of its Florida utilities or for the Company as a whole. [MFL, Vol. I, Schedule E-12, p. 102; Vol. II, p. 222, lines 9 – 14]. While the Commission does not have to apply a strictly cost of service test, it is mandatory that the Commission "consider" the cost of service in setting rates: "... [T]he commission shall consider ... the cost of providing the service ... ." §367.081(2)(a)1., Fla. Stat. The failure of UIF to perform a cost of service study in this proceeding and the absence of such a study for consideration by the commission is a departure from "the essential requirements of law." *Abbey v. Patrick*, 16 So.3d 1051, 1053 (Fla. 1st DCA 2009) (The phrase "departure from the essential requirements of law" is defined in this context as " 'a violation of a clearly established principle of law resulting in a miscarriage of justice.' " *Byrd v. Southern Prestressed Concrete, Inc.*, 928 So.2d 455, 457 (Fla. 1st DCA 2006) (applying the definition in *Combs v. State,* 436 So.2d 93 (Fla. 1983)).

UIF rate witness Guastella abandoned performing a system-wide cost of service study and instead did a simple mathematical averaging which he described as:

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[24] *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982) (It is the Utility's burden to prove that its costs are reasonable); *Sunshine Utilities v. Florida Public Service Com'n,* 577 So.2d 663, 665 (Fla. 1st DCA 1991).

> "all of the costs of providing service are totaled for all operations, and when applied to the total billing units in terms of numbers of bills or units of consumption, the resulting rates represent an average rate per service among all of the operations." [Vol II, p. 222].

In doing so, a miscarriage of justice occurred. Prior to this rate case, Seminole – Sanlando's approved rates met or exceeded the profit UIF was entitled to earn from those customers. Those rates produced revenues that resulted in returns on equity that exceeded the rate or return authorized by the Commission; and, those rates were excessive even before the rate case was filed.[25] All of the approved revenue increases sought by UIF of over 1.9 million dollars together with approximately one million dollars of costs incurred by the other 11 water utilities were included by the Commission in the rates to be charged to Seminole – Sanlando customers.[26]

In addition, none of the costs shifted to Seminole – Sanlando were costs to be incurred from the operation of the Sanlando utilities. No legitimate explanation was offered to justify diverging from both the statutory requirement to undertake a cost of service study and the Commission's non-rule policy to allocate the costs to the particular system causing the costs. The Commission's own rules require that the minimum filing requirements require the submission of the information for each

[25] Order No. PSC-15-0233-PAA-WS on June 3, 2015. The utility was earning more revenues than were authorized and the customers were entitled to a refund.
[26] For the wastewater utilities the subsidy was over $4.0 million – [Vol VI, p. 1044].

utility separately if it is seeking to consolidate rates. Section 25-30.443, F.A.C. provides:

> [I]f a utility is requesting uniform rates for systems that are not already combined in a uniform rate, the information required by this rule must be submitted on a separate basis for each system that has not already been combined in a uniform rate.

All Guastella did was total the costs as if it were "already been combined in a uniform rate and divide that total by the total consumption to arrive at a rate. The Supreme Court of Florida opined that the explanation by the agency of its deviation, required by § 120.68, Fla. Stat., is essential for fundamental due process in an administrative proceeding.

> These provisions ensure that agency action is the product of due process rather than arbitrary and uneven in its application, as well as in reviewable form for courts to enforce that due process. In the heavily referenced case of McDonald v. Department of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1977),(citation omitted) the First District Court of Appeal carefully articulated the principles that require agency action to be set aside when insufficiently explained:
>
> > Section 120.57 requires agency explanation of its discretionary action affecting a party's substantial interests, and Section 120.68 subjects that explanation to judicial review. [Emphasis in original].[27]

The Commission here departed from both its statutory obligations and its policies by designing rates violating its statutory directives and its own policy.

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[27] *Citizens of State v. Graham*, 213 So.3d 703, 711 (Fla. 2017)

Policy 2: Design rates so as "to minimize subsidies between like – customers":

Each of UIF's 27 utilities has stand-alone rates that from the Commission's own witness's testimony conceded that: "*Each system currently has unique rate structures and rates that reflect the characteristics of those customers and each system's costs.*"[28] Nowhere has the Commission demonstrated that the agency's exercise of discretion in doing away with the stand-alone rates that "*reflect the characteristics of each systems costs,*" and substituting a rate calculated simply upon pure averages is "(in)consistent with officially stated agency policy or a prior agency practice," without explaining the "deviation therefrom." § 120.68(7)(d)3., Fla. Stat.

The Commission maximized the subsidy when it authorized the entire increase in the revenue requirement for all twelve water utilities to be included in the rates charged to the ratepayers of Seminole – Sanlando and reducing costs to the other utilities. There was no justification except to grant to UIF its request for a consolidated rate, shifting costs being incurred to provide water service to the eleven other utilities on to the backs of Seminole – Sanlando customers. The rates thus charged exceed rates that meet the Commission's statutory requirement for returning all "operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in

[28] [Vol. V, p. 971, lines 21 – 23].

property used and useful in the public service."[29] The water and wastewater services provided by UIF are not interconnected and, as will be discussed later, the quality of the water service is not consistent.

In the past, the Commission has undertaken consolidation on a county-wide basis by grouping like-cost utilities within a larger portfolio of utilities held by a single corporation having systems in more than one county, similar to and including UIF. The first Commission decision cited in the Final Order in support of consolidation of rates was Sunshine Utilities, Inc.;[30] a small utility entirely within Lake County "composed of eighteen subdivisions, which were served by twelve water plants having a total of 915 customers."[31]

The Commission found that Sunshine Utilities, Inc., a wholly owned subsidiary of larger company (Utilities, Inc.), was being operated within a single county as a stand-alone utility. The Commission appropriately found that based upon the record:

> The way LUSI is arranged from an operational and financial standpoint supports the notion that customers of all subdivisions benefit from the consolidation of these efforts. A uniform rate

[29] Section 367.081(2)(a)1., Fla. Stat.
[30] In re: Request of Sunshine Utilities, Inc. for Staff Assistance on a Rate Increase to Customers in Marion County, Florida; Docket No. 960444-WU; Order No. PSC-97-0531-FOF-WU; Issued: MAY 9, 1997.
[31] *Id.* at p. 2.

> properly reflects the way the utility is operated and managed. Therefore, we find that a uniform rate structure is appropriate.[32]

The Commission restricted the consolidation of rates to the services provided within a county and did not consolidate the rates across county boundaries for all systems owned by Utilities, Inc.

The next case cited dealing with consolidation is the 2002 UIF rate case: "In re: Application for rate increase and for increase in service availability charges in Lake County by Lake Utility Services, Inc."[33] In that case, the utility had four stand-alone rates for utilities within Pasco County and two stand-alone rates for utilities in Seminole County comprised of one stand-alone rate for eight utilities and a separate rate for a ninth utility. The utility sought to combine the four rates in Pasco County into one consolidated county-wide rate and the two in Seminole into another consolidated county-wide rate.[34] Staff testified that it "is important to evaluate the level of subsidization to determine whether the consolidated rates are unfairly discriminatory."

After calculating the subsidies resulting from combining the four utilities in Pasco County, the Commission found that for "a consolidated rate structure, the average monthly residential bill for the Wis-Bar, Buena Vista, and Summertree

[32] *Id.* at p. 34.
[33] Order No. PSC-03-1440-FOF-WS, issued December 22, 2003, in Docket No. 020071-WS.
[34] *Id.* at p. 135.

systems increases by $0.29, $0.23, and $0.64 respectively, while the average monthly residential bill for the Orangewood system decreases by $1.42.[35] That level of subsidy was found not to be discriminatory. For Seminole County, the Commission found that the county-wide consolidation was not unfairly discriminatory when "the average monthly residential bill for the 225 customers of the Oakland Shores system increases by $2.60 and decreases by $.29 for customers of the other eight consolidated systems."[36]

Here, the staff's exhibit shows that the subsidy of $96.96 paid by Seminole – Sanlando customers is two orders of magnitude larger than those in the Lake County case and are thus clearly excessive.

Policy 3: Design rates so as group "like-cost" systems:

The Commission's order articulates its recognition of the non-rule policies listed above for establishing rates for like-cost utilities. However, the Commission's justification for deviating from those articulated policies and adopting a consolidated rate for all UIF systems does not acknowledge or address any of those policies in the design of the rates and thereby fails to meet the statutory criteria in § 120.68(7)(e)3., Fla. Stat. and are contrary to the essential requirements of law.

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[35] *Id.* at p. 140.
[36] *Id.* at p. 137.

> (7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
> ...
> (e) The agency's exercise of discretion was:
> ...
> 3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency.

There is no explanation or demonstration in the order how the rates for water or for wastewater are designed for "like cost" utilities. The Commission's witness Daniel testified that:

> The UIF service areas include ten counties; some of the systems within those counties provide both water and wastewater service, while others provide only one service. The households include retirement communities, RV parks, single and multi-family homes, and apartment and condominium complexes in both rural and urban areas. *Each system currently has unique rate structures and rates that reflect the characteristics of those customers and each system's costs.*[37]

The Commission previously undertook a policy of grouping utilities together for the purpose of reducing the number of similar rates charged for "like-cost" utilities and establishing bands.

Cap band rates are a rate structure where the Commission attempts to group various stand-alone systems irrespective of county boundaries by similar costs

[37] [Vol. V. at p. 971].

thereby reducing the number of stand-alone rates while minimizing the cross subsidization.[38]

Southern States Utilities, Inc. provided water and wastewater service to 152 service areas in 25 counties. In attempting to move toward a single system-wide rate, the Commission examined a hybrid stand-alone system where rates were capped and the under-earning were spread over utilities for those companies where costs exceeded the caps. The Commission found that:

> This structure resulted in what we found to be too great a level of subsidy for these remaining service areas when compared to their stand alone bill. For example, the structure would result in 12 water service areas paying subsidies greater than 10 percent, including six which would pay subsidies greater than or equal to 50 percent. Of these six, one plant pays a subsidy over 100 percent.

In fact, this Court when it addressed the cap band methodology used by the Commission agreed with the limit imposed on the subsidy based upon a cost of service allocation.

> The order under review sets rates so that no ratepayer's rates for wastewater exceed by more than seven per cent what they would have been if each system's rates had been set on a stand alone, cost of service basis. This modest deviation from a pure cost of service basis

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[38] In Re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties; Docket No. 950495-WS, Order No. PSC-96-1320-FOF-WS, Issued: October 30, 1996, p. 227.

> for individual rates pales by comparison to the magnitude of inevitable intra-system subsidization.[39]

Here the subsidy paid by Seminole – Sanlando customers is more than 219% which is neither a *modest deviation* nor within the 7.0% the Court recognized as reasonable.[40]

Under the Commission's order here, the customers of Seminole – Sanlando will be paying a subsidy to return the entire 1.9 million dollars in revenue increases together with over a million dollars in other costs incurred for the provision of water incurred by the other 11 water utilities. The resulting subsidies are far in excess of those the Commission authorized in the *Southern States Utility* case. Remarkably the Commission relies upon the *Southern States Utility* case as a precedent for its decision herein.

In a more recent decision, the Commission relied upon the *Southern States Utility* case authority to reject implementing a single system-wide rate for each of the water and wastewater systems for Aqua Utilities Florida, Inc. (AUF).[41] The

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[39] *Southern States Utilities*, *supra.* at p. 1053.

[40] For wastewater, the Commission has similarly used a single system wide rate where excessive subsidies exist but not to the same magnitude as for the water system. The highest subsidy is for Lake Placid paying an additional 40.2% more than justified by a stand-alone cost of service analysis with each Sandalhaven customer receiving a $91.04 monthly subsidy or 61.3% of its rates being paid by other utility customers.

[41] In re: Application for increase in water and wastewater rates in Alachua, Brevard, DeSoto, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco,

AUF case dealt with setting water and wastewater rates for 44 of the 138 systems that were previously owned by Southern States Utility and were subject to the cap band rates previously approved for those 138 utilities. AUF sought to have a single system rate established for both the water and wastewater systems based upon the proffered single cost of service which the company alleged "will allow for more affordable rates, and make regulation simpler, more efficient, and less costly to its customers." The Commission rejected the request:

> We disagree ... . [F]rom the information provided by AUF, we are unable to determine what, if any, cost savings associated with the requested single cost of service will inure to the ratepayers. The Utility has the burden of proving that its request for a single cost of service is reasonable. See Cresse, 413 So. 2d at 1191. We find that AUF has not met its burden of proof with regard to its requested single cost of service; therefore, that request is denied.[42]

Here, UIF provided an average cost study not unlike AUF. The Commission rejected using the rate grouping and instead set rates by calculating the individual revenue requirements for each system:

> Because the 44 systems referenced above represent a minority proportion of the original SSU systems, we do not find that basing a subsidy analysis in the instant case on the old rate groupings from the SSU case would be appropriate.
> ... .

Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.; and PSC-12-0102-FOF-WS, issued March 5, 2012, in Docket No. 100330-WS.

[42] *Id.* at p. 132.

> We agree with witness Franceski that the use of the individual revenue requirement per system is the appropriate basis for the calculation of rates.[43]

In AUF, the Commission ended up approving grouping the water utilities into four like-cost bands and the wastewater utilities into three like-cost bands with a General Service band.[44] The objective of establishing different bands in not based upon the number of utilities but on the relative costs of each utility so as "to minimize subsidies, with utilities included in each band that had similar costs of providing service."[45]

In this proceeding, neither UIF nor the staff at the Commission advocated using a cap band approach to set water and wastewater rates. Instead, UIF proposed a single system rate for both water and wastewater based upon a simple consolidation of all costs to produce an average rate.

No effort at consolidating "like-cost" utilities was made here and no authority exists for corporate-wide consolidation of all utilities absent a determination of like-costs. Commission staff testified at the agenda conference that Seminole – Sanlando was different than other customers of UIF and the system serves:

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[43] [R: 191255]

[44] While it is true that one of the water and one of the wastewater bands had more utilities than all of the utility systems in this proceeding, the other six bands had fewer systems. It is just a matter of how many utilities had similar costs of service.

[45] [R: 191263].

> higher-income-type residents in that area I know that the water that's coming out of the ground is pretty nice – and it's not expensive to treat. So, that's, you know, a major factor in why that is such a low-cost system and – and obviously, price is going to influence your usage pattern to some degree.[46]

Curiously the staff prepared two separate documents after the hearing and after the close of the record at the request of Commissioner Brisé,[47] and provided them to the parties, one in the staff recommendation and one, a separate filing, setting out rates for a cap band grouping of utilities. Both filings demonstrate that it was conceivable to design rates that more evenly and fairly distributed costs and that would reduce the amounts of the subsidies.[48] Those documents grouped the 12 water utilities into three groups based upon comparable costs and the 15 wastewater utilities into three similar groupings.

With the banded rates, six utilities paid a subsidy ranging from a high of $11.04 to a low of $0.29 and those receiving a subsidy went from a high of $26.75 to a low of $1.35. This is contrasted to the consolidated water rates, where the subsidies ranged from Seminole – Sanlando being the only utility paying a subsidy of $12.50 and all other water utilities having a reduction in rates ranging from a high of $97.11 to a low of $1.90. In all cases the cap band range of subsidies were less than for the

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[46] [R: 191256 – 7].
[47] [R: 191247].
[48] [R: 190858 for water; and, R: 190870 for wastewater; and in the "Staff Oral modification to recommendation 06452-20171," [R: 191033] water; and, [R: 191043] for wastewater.

consolidated rates, while moving toward the objective of minimization and closer to parity among rates.[49] No party had the opportunity to comment on the filings and little consideration or discussion was undertaken by the Commission at its agenda conference where the rate request was considered.

Staff acknowledged that cap band rates were more beneficial in meeting the Commission's goals of minimizing subsidies:

> The Commission found that the cap band rates represented a significant move toward a long-term goal of uniform rates and minimized the amount of subsidies paid by customers. Subsidies were determined based on the difference between bills at proposed stand-alone rates and bills at the proposed consolidated rate for each system.[50]

When asked for a justification for the selection of the consolidated rates over the cap band, staff stated that:

> For customers in lower cost systems, consolidated rates will result in a disproportionate share of the revenue requirements being included in their rates in the short term, although as previously mentioned, this may be offset in the future if significant capital improvements are needed in the lower cost systems.[51]

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[49] For wastewater utilities, under the consolidated rates, seven wastewater utility customers paid subsidies that ranged from a high of $17.06 to a low of $1.57, while eight utilities received subsidies ranging from a high of $90.81 to a low of $7.59. With the banded rates, six utilities paid a subsidy ranging from a low of $0.29 to a high of $11.04. Under the cap band, the range for paying a subsidy was about the same, with a high of $18.00 and a low of $2.12 but was much smaller for receiving a subsidy with a high of $26.36 and a low of $8.15.

[50] [Vol V, p. 972].

[51] *Id.* at p. 975.

This directly conflicts with the same witness testifying that regardless of the rates charged, UIF receives the same amount of revenue available for meeting its requirements for system upgrades.[52] It is clear from staff's own testimony that the ordered rates are a deviation from the policy of placing the costs on the "cost causer."[53]

In keeping with its averaging of costs, the Commission relied upon two demonstrative exhibits looking at average consumptions, Tables 55 and 56 in the Final Order.[54] The comparison presented demonstrates what charges customers for each utility would pay if it is assumed that each would consume an average of 7,000 gallons per month ("gpm"). The Tables suffer from the same deficiency that using an average cost of service suffers from in that it fails to provide evidence to support the Commission's objective of placing the cost on the cost causer.

Tables 55 and 56 have no probative value[55] since few if any systems use were 7,000 gallons per month. The Tables do not answer how does the consolidate rate compare to the stand-alone rate for actual consumptions by the various water utilities in the system. Table 55 shows that the customers of Seminole – Sanlando

[52] [Vol VI, p. 1041].
[53] In re; Petition for approval of optional nonstandard meter rider, by Florida Power & Light Company, Docket No. 130223-EI, Order No. PSC-14-0146-FOF-EI, at p. 3; April 1, 2014.
[54] [R: 191540].
[55] https://www.law.cornell.edu/wex/probative_value; The ability of a piece of evidence to make a relevant disputed point more or less true.

would pay only $10.52 ***IF*** they consumed 7,000 gallons per month while the customer of UIF – Pinellas would pay $119.95 ***IF*** they too consumed 7,000 gallons per month. Looking at the actual consumption for just the utilities at the extremes in Table 55, a different picture emerges. Seminole – Sanlando 10,172 customers each actually consume on average 15,695 gallons per month so their actual average bill under the existing stand-alone rate would be approximately $33.86 per month.[56] UIF – Pinellas has 501 customers and each consumes on average 2,100 gallons per month so their average bill under the existing stand-alone rate would be approximately $24.43 per month; a spread of only $9.43.[57]

Under the consolidated rates as approved, Seminole Sanlando customers would increase on average to approximately $49.18 per month[58] while UIF – Pinellas customers would decrease on average to $14.01; that spread increases to 35.17.[59] The adoption of a consolidated rates structure causes greater separation and no "equality" in treatment. The consolidation increases the subsidy among utilities and shifts the costs from the cost causers in contravention of the Commission's own policy.

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[56] ORDER NO. PSC-15-0233-PAA-WS, at p. 57
[57] ORDER NO. PSC-14-0025-PAA-WS; calculated as $30.92 (per 3,000 gpd) minus $6.49 (per 1,000 gpd since average consumption is 2,000 gpd), at p. 93.
[58] [R: 191674].
[59] [R: 191688].

Policy 4: Rates are required to be based upon "criteria unique to those systems:"

The Commission has consolidated water and sewer rates in the past but not without consideration of one other factor.

> We have approved consolidated rates for water and wastewater systems in the past, *based on criteria unique to those systems.*[60]

The unique "criteria" that the Commission considered for each system have not been codified in a rule despite the many years of having a policy relating to factors Commission witness Daniel described including: different usage characteristics such as lot size, apartments and condos versus single family dwellings. Seven of the utilities use an average of 2,735 gallons per month or less with three of those using less than 2,000 gallons per month. Seven have fewer than 1,000 customers, with a low of 113 customers and seven have seasonal customers in excess of 20% with a high of 38% of their customer base. Two utilities have more than 9,600 customers and have 5.0% or fewer seasonal customers; while three have average consumptions over 10,300 gallons per month with the highest being 15,695. Therefore it is essential for the Commission to understand criteria it has applied in the past on a case-by-case basis.

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[60] [R: 191537].

The Commission treated the 12 water systems as a single utility for the design of rates but as discrete utilities for the imposition of penalties for poor quality of service. In examining the quality of service for each utility the Commission has reduced the authorized return on equity invested *not for UIF* but for the return on equity set for each utility that has "marginal or unsatisfactory" quality of services. "A uniform rate properly reflects the way the utility is operated and managed."[61] Since it is uniformly managed it was incumbent upon the Commission to consider the penalty on a consolidated basis if its rates are consolidated.

Commission staff testified that nine systems should have a quality of service designated as "marginal" or "unsatisfactory". These nine systems are Cypress Lakes, Labrador, LUSI, Mid-County, Pennbrooke, Sandalhaven, Sanlando, UIF – Pasco – Summertree, and UIF – Seminole.[62] The Commission authorized a penalty adjustment on the equity on a discrete utility basis and not on a system-wide basis.

> Additionally, the revenue requirement impact associated with an ROE reduction for Summertree customers is $38,650. Further, the revenue requirement impacts associated with the 50 basis point ROE reductions for Cypress Lakes-Water, Cypress Lakes-Wastewater, Mid-County, Pennbrooke-Water, and Pennbrooke-Wastewater are $2,344, $7,475, $18,431, $3,837, and $3,993, respectively.[63]

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[61] In re: Request of Sunshine Utilities, Inc. for Staff Assistance on a Rate Increase to Customers in Marion County, Florida; *supra.*
[62] [R: 191362].
[63] [R: 191533].

Treating them as separate and distinct utilities diluted the penalty and is an insignificant penalty when compared to the $34,502,574 in revenues being authorized company-wide in this proceeding.[64]

The Commission in the past has imposed penalties in the form of reduction in *overall* company rate of return on equity for mismanagement.[65] As Commissioner Brisé discussed at the agenda conference, a consolidated rate was appropriate for electric utilities where all the customers are interconnected but not for separate utilities. The Commission imposed a consolidated rate structure as if it were an electric utility but deviated from its own policy of penalizing the entire utility when imposing a penalty.

The Commission decision is arbitrary and ignores the fact the same management is responsible for the mismanagement of the nine utilities out of the 27 utilities for the sake of imposing penalties. This divergent treatment of UIF is a "lose-lose" for ratepayers. The treatment of penalties on a utility by utility basis reduces the penalty for a Company-wide penalty from "more than $700,000"[66] for

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[64] [R: 191586].

[65] *Gulf Power Co. v. Wilson,* 597 So.2d 270, 273-74 (Fla. 1992) (This concept of adjusting a utility's rate of return on equity based on performance of its management is by no means new to Florida or other jurisdictions. [Citations Omitted])

[66] [R: 191133, lines 21-23].

UIF's history of marginal or unsatisfactory quality of service to 0.2% of its earnings.

The Commission elected to treat the customers with a double standard both of which inured to the benefit of UIF and failed to meet the statutory requirements and essential requirements of law.

Stand-Alone Tariff:

Only stand-alone rates are defensible in that they are based upon valid cost of service studies that were filed and approved in previous rate cases. Utilizing that rate structure here is simply an incremental increase to reflect the additional revenue requirement authorized in this proceeding. Using the stand-alone rates would accurately produce the same revenues requested and meet the statutory test.

> Q ... In other words, if we folded in the rate increases exactly the way the previous rates were set, they would be fair, just, reasonable, and not unfairly discriminatory, in your opinion?
>
> A Each of these systems' rates were uniquely designed to reflect the customer demand and the various attributes of a particular system. You're asking me if folding all of that in together would result in rates that are not unfairly discriminatory. And given the wide variety of decisions that were made for each individual system, that -- I believe you're right, but there are a lot of moving pieces in rate design.
>
> Q ... If we used the same system of allocation for cost of service that was used in previous rate cases in applying the revenue requirement that comes out of the other folks at this hearing, we would follow the

> cost of service allocations. They would be, in your opinion, fair, just, reasonable, and not unfairly discriminatory. Is that better?
>
> A Unless there have been perhaps changes in the demand patterns of a particular system. There are a number of current issues that we would want to look at as well.

[Daniel, Vol. VI, pp. 1025 – 1027, lines 1 – 1].

The stand-alone rate structure advocated by Seminole County would meet the concerns raised by the Court in the *Southern States Utilities*, case that there be minimal deviation from the true cost of service allocations if at all and would not produce a "subsidy" and would be consistent with the Commission's four non-rule policies discussed herein.

The only rate structure discussed and supported by competent, credible evidence is the stand-alone rates recognizing the appropriate adjustments recognized in the revenue requirement determination and their adoption would comply with the essential requirements of law. [Daniel, Vol. VI, pp. 1026 – 1027, lines 12 – 1].

CONCLUSION

The Commission's findings and conclusions deviate from established policies without justification and as a result its final order does not comply with the essential requirements of law and are clearly erroneous. This Court must reverse the Commission's decision and remand the matter back to the Commission to

adopt the stand-alone rate structure as the appropriate rate design consistent with its established non-rule policies.

Respectfully submitted,

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/s/ William S. Bilenky

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a) of the *Florida Rules of Appellate Procedure*.

/s/ William S. Bilenky

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2017, a copy of the foregoing was electronically served on the parties of record.

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