BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties, by Utilities, Inc. of Florida.	DOCKET NO. 20200139-WS FILED: June 25, 2021

THE CITIZENS' RESPONSE IN OPPOSITION TO UTILITIES, INC. OF FLORIDA'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-2021-0206-FOF-WS

The Citizens of the State of Florida ("Citizens"), through the Office of Public Counsel ("OPC"), pursuant to Rule 25-22.060(3) of the Florida Administrative Code, hereby submit their response in opposition to Utilities, Inc. of Florida's (UIF's) request that the Commission reconsider its Final Order, and state as follows:

1. UIF entered into to a stipulation regarding Issue 36, as reflected in the Prehearing Order No. PSC-2021-0064-PHO-WS issued January 29, 2021. OPC did not oppose UIF's agreement. The stipulation to Issue 36 resolved all rate design matters, including the reference to a repression adjustment listed in UIF's Application for Increase in Rates, which was filed June 30, 2020.

2. Moreover, UIF did not present testimony to explain or support a repression adjustment.[1] By its own admission, UIF simply "did not present evidence on repression." (Mot. for Recons. at 2). Therefore, even if the issue had not been resolved by UIF's stipulation, the utility failed to carry its burden of proof as to any claim for a repression adjustment.

[1] UIF's witnesses Swain and Seidman each referenced repression only tangentially in an exhibit schedule where the main issue concerned the Used and Useful ("U&U") status of just one of UIF's systems - Pennbrooke. While acknowledging demand had dropped at Pennbrooke, the witnesses proposed the U&U for that one system should remain at 100% "to reflect reduced demand due to repression and conservation." Swain Ex. DDS-1, page 276; Seidman Ex. FS-3, page 130.

3. No statute or administrative rule requires the Commission to apply a repression adjustment to rate increases of a particular numeric percentage point in all cases. Instead, application of a repression adjustment was subject to the discretion of the Commission. It follows that the law does not require a repression adjustment in cases where a utility failed to present testimony or evidence to support such an adjustment.

4. UIF's complaint that it may earn "closer to" the low end of its authorized range of return at some point within the next few years is not relevant, much less dispositive, on any issue. By UIF's own admission, it will earn within the authorized range of return, which is exactly what the law provides. The Commission is not required to let UIF unilaterally dictate a particular part of the authorized range within which it prefers to earn.

Legal Authorities

It is well-established that the burden of proof is always on a utility seeking a rate change. *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982).

UIF is wrong to suggest that merely listing a request in its Application for a repression adjustment is sufficient to carry its burden of proof. In its application, UIF specifically proposed to increase its water and wastewater rates by 17% and 32.2%, respectively. UIF's requested increases were well above the 10% they now claim is an uncodified threshold that the company claims should have triggered the Commission to act.[2] However, despite seeking the above-

[2] A search of the Commission's rules did not yield any rule adopted under the mandate of s. 120.54(1)(a), Fla. Stat. that would require the Commission to automatically apply a repression adjustment to rate increases of a certain amount. Therefore, UIF's allegation that it relied on Staff to include a repression adjustment has no legal basis. Additionally, UIF's stipulation, on top of the failure to produce evidence in support of an adjustment, negated any reliance on alleged but unfounded "long-standing Commission practice."

referenced huge rate increases, UIF admits it did not present evidence to satisfy its burden of proof on a repression adjustment.[3]

A dangerous precedent and substantive policy shift would be set if in this case a utility could merely list allegations or requests in a petition, fail to produce evidence, then expect all aspects of the petition to be granted, regardless of the lack of proof. The fundamental principles of utility regulation in Florida do not allow that result. *E.g., Cresse, supra*.

Nonetheless, after filing its Application for Increase in Rates and prior to the hearing, UIF agreed to a stipulation, by which the utility agreed to continue the rate structure that existed at the time of filing, such that any increase would be applied across the board.

UIF now further complains that the Commission did not discuss a repression adjustment during the Commission Conference. However, in light of the stipulation to which UIF agreed, there was no basis for the Commission to delve into the topic at the Commission Conference Agenda. In short, a repression adjustment was not at issue after UIF resolved the matter via stipulation. The lack of a particular discussion of one item in a document or proceeding is not presumptive proof that the item or matter not considered by the tribunal at all. *Cf., State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) (stating, "[c]ounsel should not from this fact draw the conclusion that the matters not discussed were not considered"). There is no reason to believe the Commission overlooked or failed to consider a repression adjustment. The record evidence shows all aspects of rate design were considered, and that UIF's stipulation fully addressed and resolved the issue.

[3] In its 2016 rate case, it appears UIF took measures to carry its burden of proof on a repression adjustment calculation, contrary to the record in the instant rate case. The Commission's 2017 Final Order discussed UIF's claim that "**evidence in the record** showed what has happened with repression over the last five years," and further referenced UIF's discussion of repression adjustment results. Order No. PSC-2017-0361-FOF-WS, at 199 (emphasis added).

UIF's Motion for Reconsideration presents the classic, if misguided, case of a litigant being dissatisfied with the result and improperly attempting to use reconsideration as a tactic to reargue the case or persuade the Commission change its mind in the absence of evidence to support the change. It is undisputed that such use of Rule 25-22.060, F.A.C. is contrary to law. *See, e.g.*, *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315, 317 (Fla. 1974); *Sherwood v. State*, 111 So. 2d 96, 97 (Fla. 3rd DCA 1959) (striking petition for rehearing for arguing a new position different from the one taken at hearing).

UIF's motion fails to meet the requirements for reconsideration under Rule 25-22.060, F.A.C. Nonetheless, assuming arguendo the Commission ignored UIF's stipulation, and even if UIF could otherwise satisfy the requirements of the Rule, UIF fails in its factual claim on the alleged merits, i.e., the unsubstantiated claim that it may earn *near the "lower end" of its authorized range of return* at some point within the next four years. (Mot. for Recons. at 3).

No utility is guaranteed a profit at a particular numeric target. *In Re: Southern Bell Telephone and Telegraph Co*., Order No. 4076, 1966 Fla. PUC LEXIS 2 at *152 (utilities are not guaranteed "…a return of some specified percentage"). Instead, in exchange for getting the benefit of monopoly service areas, utilities are provided only the *opportunity* to earn within an authorized range of return. *E.g.*, *Federal Power Commission v. Hope*, 262 U.S. 679 (1923); *In Re: Southern Bell Telephone and Telegraph Co*., *supra*. As a matter of law, UIF is wrong to suggest changing Commission policy so that it must be guaranteed to earn a specific profit point closer to the top of its authorized earnings range instead of elsewhere *within* the authorized range.[4] *In re: Pet. to*

[4] UIF did not specify the number of years it feels entitled to earn at the top of its authorized earnings range, and offered no citation to authority to support its speculative claim. However, precedent holds the test year is tool to give utilities the opportunity to earn within the authorized range (not a specific part of the range) for at least twelve months. *In re: Petition for Increase in Rates by Florida Power & Light Co.*, Order No. OSC-2010-0153-FOF-EI, 2010 Fla. PUC LEXIS 213, at *19).

Establish an Envtl. Cost Recovery Clause, Order No. PSC-1994-0044-FOF-EI, p. 3 (explaining the Commission establishes a range, not a single number, to allow a utility an opportunity to earn a fair rate of return). As such, a utility earning anywhere within the authorized range is unquestionably earning a fair return. UIF now offers an entirely speculative complaint that, despite being awarded a 10.20 percent increase in water rates and a 22.82 percent increase in wastewater rates, the Commission's decision somehow might deprive it of a fair opportunity to earn within a certain part of its authorized range. Considering the amount of the rate increases already granted, UIF's claims amount to a gross overreach.

UIF's extra-record attempt to change the Commission's policy on the reasonable range of return would effectively render the concept of an authorized range meaningless. If, as UIF suggests, it should be guaranteed to earn only near the top of its authorized range, then the top half effectively becomes the new range and renders the Commission's exercise of its discretion to designate a full authorized range null. Allowing this would be a departure from established Commission policy and reversible error.

Respectfully submitted,

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CERTIFICATE OF SERVICE
DOCKET NO. 20200139-WS

I HEREBY CERTIFY that a true and correct copy of the foregoing Citizens' Response in Opposition to Utilities, Inc. of Florida's Motion for Reconsideration of Order No. PSC-2021-0206-FOF-WS has been furnished by electronic mail on this 25th day of June 2021, to the following:

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