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December 21, 1998

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

971596-WS

Dear Ms. Bayo:

As I discussed with Linda Williams of your office last week, United Water Florida Inc. arranged for the transcription of the Florida Public Service Commission's ("Commission") Agenda Conference deliberations regarding the Petition for Limited Proceeding Regarding Other Postretirement Employee Benefits and Petition for Variance From or Waiver of Rule 25-14.012, Florida Administrative Code, by United Water Florida Inc., Docket No. 971596-WS. Pursuant to my conversation with Ms. Williams, enclosed are the following original transcripts for entry into the record:

1. Florida Public Service Commission's July 21, 1998 Agenda Conference, Item No. 22**PAA

2. Florida Public Service Commission's August 18, 1998 Agenda Conference, Item No. 22**PAA

3. Florida Public Service Commission's September 1, 1998 Agenda Conference, Item No. 24**PAA

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

Sincerely yours,

Scott G. Schildberg

Scott G. Schildberg

SGS:dws
Enclosures

cc: Mr. Robert J. Iacullo
Mr. Walton F. Hill
Mr. Gary R. Moseley
Mr. Jack Schreyer
Ms. Mary Anne Helton
Ms. Rosanne Gervasi
Mr. Harold McLean

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Petition for limited proceedings regarding other postretirement employee benefits and petition for variance from or waiver of Rule 25-14.012, F.A.C., by United Water Florida Inc.

DOCKET NO. 971596-WS

BEFORE:	CHAIRMAN JULIA A. JOHNSON COMMISSIONER J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER JOE GARCIA COMMISSIONER E. LEON JACOBS
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	22**PAA
DATE:	July 21, 1998
PLACE:	4075 Esplanade Way, Room 148 Tallahassee, Florida

JANE FAUROT, RPR
P.O. BOX 10751
TALLAHASSEE, FLORIDA 32302
(850) 561-5598

APPEARANCES:

JAMES L. ADE, Esquire, Scott Schildberg, Esquire, Walton Hill, and Bob Iakula, representing United Water Florida Inc.

STAFF RECOMMENDATION

Issue 1: Should the utility's Petitions for Limited Proceeding regarding OPEBs and for Variance from or Waiver of Rule 25-14.012, Florida Administrative Code, be approved?
Recommendation: No. UWF's Petitions for Limited Proceeding regarding OPEBs and for Variance from or Waiver of Rule 25-14.012, Florida Administrative Code, should be denied.
Issue 2: Should this docket be closed?
Recommendation: Yes. This docket should be closed if no person whose interests are substantially affected by the proposed action files a protest within the 21-day protest period.

P R O C E E D I N G S

CHAIRMAN JOHNSON: 22.

COMMISSIONER GARCIA: Move staff.

COMMISSIONER CLARK: I have a feeling people want to talk on this.

COMMISSION STAFF: We have -- yes, the utility is represented and wishes to address the Commission on Item 22.

COMMISSIONER CLARK: Where is Mr. Ade, I saw him earlier?

UNIDENTIFIED SPEAKER: We're trying to find out.

CHAIRMAN JOHNSON: Does staff want to make any preliminary --

COMMISSIONER GARCIA: Why don't we just TP it until we get Mr. Ade, because then we have to do this twice, and Mr. Ade is certainly not going to allow us to just skip him altogether.

COMMISSIONER CLARK: Well, the next one is going to be --

COMMISSIONER GARCIA: You're right, it is.

CHAIRMAN JOHNSON: Here he is, he is coming. Did staff have any preliminary statements?

COMMISSION STAFF: Commissioners, Item 22 is a petition by United Water of Florida, Inc. to recover other post-retirement employee benefit, or OPEB costs incurred in years prior to the last rate case test year. This would be in addition to the OPEB costs approved by the Commission for the test year.

The utility also seeks to modify the rate base reduction for accumulated unfunded OPEB liability approved in the last rate case. If the Commission determines that the requested action cannot be approved without a waiver of or variance from Rule 25-14.012, Florida Administrative Code, United Water Florida has requested that a waiver or variance be granted. Staff has recommended denial of the petition and of the rule waiver or variance.

Jim Ade is here on behalf of the utility and would like to address the Commission.

CHAIRMAN JOHNSON: Mr. Ade.

MR. ADE: I'm James L. Ade of the firm of Martin, Ade, Birchfield and Mickler, and I have with me this morning Mr. Scott Schildberg from our firm. Next to him is Mr. Walton Hill, who is the vice president for regulatory law for United Waterworks, and next to him is Mr. Bob Iakula (phonetic), who is vice president for regulatory business for United Waterworks. And we, of course, are here representing United Water of Florida.

I would like to see if we can simplify this matter that is before us today, because I think I and the staff have sort of lent to making it much more complicated than it needs to be. I think there are some things that we can all agree to very easily, and I would like for us just to review those things, and then let's see if we can come to a proper conclusion. One I believe that (tape changed) -- rate case, and commissions throughout the country have also established that principle.

Secondly, I think that everybody would agree that the utility company should not be required out of its own funds to pay the OPEB costs, but should recover those costs in its rates.

Next, I believe we can all agree that until 1993 United Water Florida and most public companies, not only regulated companies but public companies in whatever industry they might be in, accounted for their OPEB costs on a pay-as-you-go or cash basis of accounting. Effective approximately January 1, 1993, the Financial Accounting Standards Board, who I like to refer to as the ivory tower boys, dictated that OPEB costs should be accounted for on an accrual basis of accounting.

And I think there are two things about this statement that the financial accounting board put out that we need to keep in mind. One, it had nothing to do with how OPEB costs were treated for regulatory purposes. It was an accounting principle, it was a change in accounting method, and that is all it was. It became -- and that was done in Statement of Financial Accounting Standards 106, which I will probably just refer to as 106.

Next, the Commission adopted its rule to implement 106, and I think the other thing we need to keep in mind is that the amount of costs of these OPEBs did not change. None of this has to do with effecting the amount of the cost. It has to do only with the timing of the accounting of the costs. The costs will always be the same whether you follow the practice that was in effect before 106 came out, or the practice that 106 dictated.

I think everybody would agree also that as of this moment, this hearing, United Water Florida has incurred under the principles of 106 approximately $1,100,000 worth of OPEB costs that it has not recovered in its rates. And that unless this Commission takes some action, United Water Florida will never recover in its rates. And this is --

COMMISSIONER CLARK: Mr. Ade, just so I am clear, it's the amount between when, 19 -- what date and what date?

MR. ADE: Well, 19 -- the years involved are really 1994, 1995, 1996, and through May of 1997. And as some of you know, the reason for the May 1997 date is that is when the Commission authorized United Water Florida's last rate increase, and the annual costs were included in that order.

COMMISSIONER CLARK: Well, let me ask another question. As I understood the staff recommendation, you had not asked for those costs, because you initially thought they were de minimis, is that correct?

MR. ADE: That is correct.

COMMISSIONER CLARK: All right. When did you -- when did you discover they were not de minimis?

MR. ADE: In the 1994 time frame, and if time becomes -- dates become important here, Mr. Iakula or Mr. Hill can give us better dates than I can, but in that time frame you all will remember that General Waterworks was being merged with United Water. And it was subsequent to the merger.

COMMISSIONER CLARK: It is important to me from the standpoint that I view what staff is saying, and the gist of what has gone on here is you had an opportunity to ask for it, you didn't exercise that opportunity. It's not up to us now to make you whole for that mistake. I take that to be their general thing.

If you had come to us in a timely way and said you needed to recover it, but it was a mistake you all made. You are in charge of the books, you are in charge of running the company. You should have asked for it at the appropriate time. When you didn't ask for it at the appropriate time, you lost your opportunity to get it recovered through rates.

MR. ADE: I believe that is the staff's position, Commissioner.

COMMISSIONER CLARK: Why isn't that fair?

MR. ADE: This Commission has the power to correct that. I believe that $1,100,000 is much too high a penalty to impose on United Water Florida for its failure to timely act on this matter. And that's what it really amounts to. The Commission today has the authority to make United Water Florida whole here, and that is what we are asking them to do. Under the rule waiver provision of the APA, you can waive that rule. And I believe that United Water Florida qualifies, and we can go into that in a little more detail, if you want to.

But I think we qualify for that rule waiver. I just think it's too high a penalty. You know, we can call it anything we want to. It was an oversight, it certainly wasn't intentional. But the fact is that United Water Florida did not come in and do it before the middle of the last rate case. And some of you all are familiar with that whole process.

COMMISSIONER CLARK: And it's staff's position, if I'm correct, that we had a rule that went into effect. And when that rule went into effect, you could have come in and said, "We need to start accounting for this. And, if so, change our rates to recover it."

MR. ADE: That is correct. That's --

COMMISSION STAFF: Yes, ma'am.

(Simultaneous conversations.)

MR. ADE: Excuse me.

COMMISSION STAFF: I'm sorry. That question was directed to staff, and that is right.

COMMISSIONER CLARK: When did the rule go into effect?

COMMISSION STAFF: In 1992.

MS. MERCHANT: August '93.

COMMISSION STAFF: Excuse me.

COMMISSIONER CLARK: And when did you come to us and ask for this initially?

MR. ADE: Well, it was during the last rate case, which must have been prior to May of '97, because that was the date of the order.

COMMISSIONER CLARK: Okay. Thank you.

MR. ADE: I think that you have probably asked the, maybe the diamond-point question, and maybe we ought to just go to your question without any more background. I always hate to do this, because there are four other people up there who may or may not be where the rest of us are.

COMMISSIONER CLARK: I think you can come assuming we have read the recommendation.

MR. ADE: I'm sure you have. We have done a little chart to sort of show the effect of what we are talking about. And I would like, with the Chairman's permission, to pass this chart to the Commission and to the staff.

And as you can see, what we have really presented to you is a comparison of what would happen under SFAS 106 and what would happen under United Water's request today. We have picked 1960 as a beginning point, because that is approximately the date that General Waterworks acquired the systems that are today known as United Water Florida. That is really kind of the beginning of this company.

From that date under SFAS 106, from that date to 1993, OPEB costs were accounted for on a cash basis. In other words, when a post-retirement benefit was paid to an employee, it was charged to an expense. In the course of the rate case that expense was picked up and was included in the rates, and that was what most all companies, both regulated and unregulated companies did.

SFAS said in 1993 what we want you to do is to go back and recalculate what your OPEB costs should have been -- and I'm going to say from 1960, actually it goes back forever -- but from 1960 through 1992. On this accrual basis of accounting, go back and figure out what those should have been. What should you have charged the customers over those 33 years.

We then want you to amortize those expenses or those costs for 20 years from 1993 through 2013. In other words, from 1993 through 2013, those customers are going to pay 1/20th of the accrual for all of those previous years.

COMMISSIONER CLARK: Let me ask a question. Why is it a ten-year amortization?

MR. ADE: It's 20. Did I say --

COMMISSIONER CLARK: No, I added wrong. It's always a 20-year amortization.

MR. ADE: Well, that's what SFAS said.

COMMISSIONER CLARK: 106 said that.

MR. ADE: Yes, ma'am.

COMMISSIONER CLARK: Okay.

MR. ADE: And then in 2013 -- and during that 20-year period, you are not only charging the customers for what you didn't charge them for for the previous years, the red years here, but you are also charging them what you have calculated is the proper charge for each year of that 20-year period.

So those customers during that 20-year period are being charged that year's expense as well as an allocated part of the previous year's expenses, that is the green line. Then in 2013 you have completely amortized the red line underaccruals, and you begin where the blue line is, and you are then charging the customers only for each year's allocated expense. So in 2013 the customers are paying only for one year as they go.

COMMISSIONER DEASON: Mr. Ade, what are you currently recovering in your rates as a result of the last rate case?

MR. ADE: We are recovering only --

COMMISSIONER DEASON: The equivalent of the blue line?

MR. ADE: Yes, sir.

COMMISSION STAFF: Commissioner Deason, the rates that were approved for the test year include the amortization of the transition liability.

COMMISSIONER DEASON: So there is transition amortization within the current rates?

COMMISSION STAFF: Yes, sir.

MS. MERCHANT: The only portion that is missing is from 1994 to the first few months of 1995, when all the other companies that came in --

COMMISSIONER CLARK: 1997 I thought you said.

MS. MERCHANT: Excuse me, from 1994 through the first several months of 1997.

COMMISSIONER DEASON: So let me be -- the transition as been recognized, is being amortized that is currently in rates.

MS. MERCHANT: That's correct.

COMMISSIONER DEASON: And, of course, the ongoing accrual is currently being recovered in rates.

MS. MERCHANT: That's correct.

COMMISSIONER DEASON: What is not in rates is the period '94 through May of '97.

MS. MERCHANT: That's correct.

COMMISSIONER DEASON: That's correct. Okay.

MR. ADE: That's correct. And on this chart that is the little arrow.

COMMISSIONER DEASON: Okay.

MR. ADE: That is correct.

COMMISSIONER DEASON: Thank you.

MR. ADE: And what we are asking you to do today is to waive your rule that would have required prior approval for the accruals and to allow the company to amortize those years -- in the company's case it's really '94 through May of '97, over the remaining 15 years up to 2013. And that's simply the request that we have made.

And that would put us in 2013, that would make us even where we should be under the 106 requirement. And from that point forward we would go forward, we would go on. That difference that Commissioner Deason has pointed out is the $1,100,000 in round numbers.

I think there is an alternative, if you would prefer to do it this way. I think we could take that $1,100,000, it's really the little extension of the red line there, and we could start today and instead of doing that in 15 years to the 2013 year, we could -- if you felt like the 20-year amortization was a more appropriate time, we could spread that over 20 years. Under either system, though, the customers from 1993 forward are paying part of past costs, because the ivory tower boys said start in '93 and catch this up.

And I think that this chart illustrates that what we are really asking for --

COMMISSIONER CLARK: You better be careful, Mr. Ade, there may be some accountants who just don't like to be called that or referred to as living in an ivory tower.

MR. ADE: Well, I'm one, too. So I feel like as long as I throw rocks at myself, I can throw rocks at the rest of them.

And I think you clearly have the power under the rule waiver of the APA to do this. And your question to me, which I think is the diamond-point issue, is what is fair. And I think it really boils down to this, Commissioner Clark. If you don't waive the rule, you get the wrong answer. The wrong answer is that the company has to pay this $1,100,000. If you waive the rule, you get the right answer. The right answer is that $1,100,000 should be included in rates and should be recovered in rates.

If you believe that the company may have made a mistake back in 1993, 1994, 1995, and 1996 to pay a million dollar penalty, you ought to deny it, you ought to deny it. But I think it's all out of proportion to what happened. The customers were always, even before 106 was ever passed, the customers were going to pay these costs. They have always paid these costs. It is proper that they pay these costs. It has never been proper for the company to pay these costs. 106 simply made an accounting change. And we missed it. And that's all there is to it.

COMMISSIONER DEASON: Mr. Ade, as I understand the scenario, when FAS 106 became effective, the company complied, set up the transition amount and began accounting for OPEB costs on an accrual basis, is that correct?

MR. ADE: Could I get Mr. Iakula to answer that question, because he knows more about that.

COMMISSIONER CLARK: Commissioner Deason, would you ask your question again so I can --

COMMISSIONER DEASON: Okay. The question is, I think it has been indicated that the -- it was in '93 that 106 became effective, and it required a certain accounting treatment for these costs. Basically a change from pay-as-you-go to an accrual basis. My question is did the company comply with that requirement at that time?

MR. IAKULA: No, Commissioner, not at that time. At that time General Waterworks had the belief that the FAS 106 expense was not materially different than its pay-as-you-go expense. Subsequent to the merger with United Water Resources in April of 1994 --

COMMISSIONER DEASON: And did FAS 106 give you the option of not complying with that requirement?

MR. IAKULA: Commissioner, I'm not sure if we had the option --

COMMISSIONER DEASON: I am talking about for financial reporting purposes, when FAS 106 became effective, how did you react to that? Did you change your financial reporting?

MR. IAKULA: Well, Commissioner, if it wasn't a material difference, there would be no financial reporting implications of that. But at the time subsequent to the merger with United Water Resources an actuarial valuation was done at that time and it was indicated that there was a material difference.

COMMISSIONER DEASON: So at that point you made an evaluation, and it was your estimate, which proved to be wrong, but nevertheless it was your estimate that the accrual was not materially different than the pay-as-you-go, and that you were adequate recovering that within your current rates. Is that a fair assessment, a fair representation of what happened?

MR. IAKULA: Prior to April of 1994, that would be correct. Subsequent to April of 1994, when the valuation was done, that's when it was determined it was a material difference. And the company in December of 1994, which was when the actuarial valuation was completed, we were able to book the liability as of the date of the merger, April of 1994. And it was at that time that the company recorded its liability and then also recorded a deferred expense.

COMMISSIONER DEASON: So at the time of the merger in April of 1994, you recognized the liability and made the entry.

MR. IAKULA: That's correct. But just to clarify, Commissioner, the actual recording of the liability was in December of 1994, but it was recorded as of that effective date because we were still within that same year.

COMMISSIONER DEASON: Thank you.

COMMISSIONER CLARK: Just so I'm clear, so in April of '94 you were recognizing on your books the higher liability?

MR. IAKULA: That is correct.

COMMISSIONER CLARK: And when did you --

MR. IAKULA: The actual recording, though --

COMMISSIONER CLARK: Was in January, I understand that.

MR. IAKULA: No, was in December of '94. But we accrued from April of that because we were still within that same fiscal period.

COMMISSIONER DEASON: And at that time were you unaware of the requirements of our rule?

MR. IAKULA: Yes, Commissioner.

COMMISSIONER DEASON: You were unaware of that?

MR. IAKULA: That's correct. And we had no rate proceeding at that time.

MS. MERCHANT: Commissioners, I think the company became aware of the rule in the middle of the rate case when staff took a position that rate base should be reduced by the unfunded portion of the prior year's expenses. And they were -- they had asked for the current expense in the rate case on a going-forward basis. That was part of their rate case filing. But they did not -- they were not aware of the portion that reduced rate base for the unfunded portion. So I believe that they were taken -- they were taken aback and went, oh. And then they realized that --

COMMISSIONER CLARK: That brings up a point I wanted to ask. You have reduced their rate base as if they had recovered it in rates.

MS. MERCHANT: That's correct.

COMMISSIONER CLARK: Shouldn't you do one or the other but not both? I mean, if they didn't recover it, should you not have reduced their rate base? Is that another way to deal with it?

MS. MERCHANT: I don't think so. I think that all the other companies -- we only have four companies, water and wastewater companies in Florida that actually have OPEB costs; that's Southern States, Florida Water, Florida Cities Water Company and Poinciana. And Poinciana is owned by Avitar (phonetic), which is the parent company of Florida Cities. So all three of those companies came in shortly after the rule was enacted and were denied the accrual for prior periods. So what we are going here today is consistent with what we did for Southern States --

COMMISSIONER CLARK: What did you do to their rate base, did you assume that they had accrued it?

MS. MERCHANT: In all of those rate cases we did. As if all the prior periods from the date before -- until it was effective. It's completely consistent with what we did in the United Water Florida rate case.

COMMISSIONER DEASON: And that's based upon the language of the rule?

MS. MERCHANT: That's correct. It doesn't depend on the amount, it's the methodology used. That's what the rule states, and that's part of the contention that's in this case here. But we were --

COMMISSIONER CLARK: Trish, you have to explain that to me. And I saw that in your thing, the notion of the distinction between the amount -- or the cost and the methodology, I'm not sure how you put it in the -- why is it appropriate to reduce the rate base by the unfunded liability? And I understand that to mean that we are not -- we are not allowing them to set up a separate fund to cover this. That's what you mean, not that it's unfunded by the rates.

MS. MERCHANT: Funded means that they have a special trust set aside.

COMMISSIONER CLARK: Why is it appropriate to reduce the rate base by amounts they didn't recover? I mean, I would assume you would reduce it by amounts that they would have paid under the pay go, because you can assume that's in rates. But if it's more, why is it appropriate to reduce the rate base?

MS. MERCHANT: I think what happened when the rule, during the time that the rule was being issued was they wanted everybody who had OPEBs to come in up front and get approval. They didn't want them to defer them and have to deal with it after the fact.

And I think you've got a case of every test year that goes on, you've got an increased level of expenses that has been accrued, and you may have -- it depends on what you funded, what portion you funded. But every year that balance can change.

And they didn't want to just look at the test year amount, they wanted to look at what had happened since FAS 106 went into effect. And I guess -- I wasn't actually involved in the docket for the rulemaking proceeding, but I was assuming that it was to be -- to have consistency between all the companies, to make sure that the Commission was aware of what types of OPEBs were out there so that everybody came in around that time and asked for it and got approval of it through their rates. And --

COMMISSIONER CLARK: Well, I agree with you that it was important to get it recognized and get it taken care of appropriately so that on a going-forward basis we are doing the right accounting, and we are also allowing it to be recovered in rates the right way. But talk to me about the equity of doing it in this instance?

MS. MERCHANT: I think the equity and fairness part is that we have done the same thing to all the other companies. If we -- but why do we actually do that, why did we actually reduce rate base for all the years prior to that point? Number one, the other companies it wasn't that much time, so we are not talking -- it wasn't that much time. And this company just waited 4-1/2 years before they came in, so obviously the amount of money, the difference is greater in this company.

But at any given point in time you would look at a company to see what their earnings are for that one year. If they didn't come in for a rate case last year, you may not -- we would not have made a determination of what the actual earnings was then or not. So did they really recover their expense in that prior period, we don't know. So we didn't make a determination. So that's kind of the prior period, or the retroactive ratemaking point of it.

We didn't look at it. It might have been recovered, it might have not been recovered. But we didn't address the point.

COMMISSIONER CLARK: Well, isn't that same true -- couldn't the same thing be said about the entire transition amount? In effect, you are asking -- people had to estimate what their liability was that wasn't funded under a pay-as-you-go basis. And we recognize that, as I understand it from what Mr. Ade said, and are going to recognize it until 2013.

MS. MERCHANT: That's correct. But that was a major accounting change in methodology that everybody had to comply with. There was just -- that was the cut-off time from that -- from the beginning to the beginning of FAS 106, so --

COMMISSIONER CLARK: I understand that, but what I'm asking you is if that isn't retroactive ratemaking, then why would this be retroactive ratemaking? Because it is recognizing an expense from a prior period.

COMMISSION STAFF: Commissioners, I think the distinction is the issue of control and opportunity to control costs. And the transition obligation was, in effect, mandated for everyone. No one had any control over the existence of that obligation at the time that it came into effect. So other states and this Commission have taken the position that that was -- it might be, it might appear to be retroactive ratemaking, but because of the lack of control, there was an exception made.

As far as ongoing costs from the effective date, those are subject to the control and the opportunity to come to the Commission to recover those costs has been available to all of the utilities.

And with respect to the reduction in rate base, it appears to be analogous to the concept of depreciation where if a utility failed to record depreciation or come in to request recovery of it over a period of years, the rate base would nonetheless reflect the accumulated depreciation that they should have reported during that period. MR. ADE: Commissioner, may I address some of those questions?

COMMISSIONER DEASON: Let me ask one quick question of staff before you get into that.

MR. ADE: Certainly.

COMMISSIONER DEASON: The transition amount which is currently being amortized and is currently being recovered in rates, that amount, how is it reflected on the company's books, is it a regulatory asset?

COMMISSION STAFF: Yes, I believe they did record it as a --

COMMISSIONER DEASON: Is that included in rate base as a positive amount in rate base?

COMMISSION STAFF: I believe that in the case of United Water Florida, it was not specifically -- that part was not specifically included in the rate base, or it was assumed that it would be offsetting -- there would be an offsetting liability. The only thing that was actually considered in the last rate case was the accumulated portion from 1994 forward, not the initial transition obligation.

COMMISSIONER DEASON: Right. I'm talking about the initial transition which is currently being recognized in rates.

COMMISSION STAFF: That's correct.

COMMISSIONER DEASON: It's your understanding that is a regulatory asset, and that it's being offset against the liability for rate base purposes?

COMMISSION STAFF: Yes, sir.

COMMISSIONER CLARK: Commissioner Deason, are you saying that we reduced the rate base by that amount, but we recognize an increase to the rate base?

COMMISSIONER DEASON: Well, it's two different amounts. One is the transition, and we have recognized that. And as staff has indicated, that's something no one had any control over, it was a change in accounting methodology which created that.

COMMISSIONER CLARK: And that is the regulatory asset.

COMMISSIONER DEASON: That is my question. And I've been told that it's a regulatory asset, and that it most likely has been treated as an offset against the liability.

MR. IAKULA: Commissioner, if I could just clarify, the transition obligation is not a regulatory asset on the company's books.

COMMISSIONER DEASON: How do you account for the transition?

MR. IAKULA: It's part of the overall FAS 106 liability. And I guess in the actuarial valuations it's included, you know, in addition to the current service costs and the interest and so forth, but it's not recorded on the company's books as a regulatory asset. The only item that has been recorded on United Water Florida's books as a regulatory asset is the deferred expense since 1994 through May of 1997. And that regulatory asset was not included as a portion, or as a component of the company's rate base in the last proceeding.

COMMISSIONER DEASON: Could you explain to me again the transition amount? You indicate it's not a regulatory asset, but it is being included in the overall.

MR. IAKULA: When the actuary does his valuation of the company's plan and the benefits and determines what the year-to-year liability and expense should be, he had to determine what that transition obligation was as of the date the company adopted 106, and then is amortizing that amount over a 20-year period. I think that's approximately equal to the average employee service life.

And that's part of the overall cost that is actuarially determined. Now, when we get our amount from the actuary, that is a component of the cost including, you know, the net periodic cost, the interest cost, and a portion of that then is the amortization of the transition obligation. But that amount is not recorded on United Water Florida's books, whatever that initial transition obligation was for United Water Florida as a regulatory asset.

COMMISSIONER DEASON: But it's included in the actuarial determination?

MR. IAKULA: Yes, that's correct.

COMMISSIONER DEASON: Okay. And the result of that actuarial determination, is that a liability which shows up on the company's books?

MR. IAKULA: That's correct. It would be part of the liability.

COMMISSIONER DEASON: All right. Now, how does that liability compare to the company's position that there is 1.1 million in OPEB costs that have not been recovered for the period '94 through May of '97?

MR. IAKULA: Well, the 1.1 million is an accumulation of the year-to-year liability. I mean, the liability should roughly equal the company's periodic expense. So that 1.1 million is the aggregate of those number of years from 1994 through May of 1997,

COMMISSIONER DEASON: And is that included within the actuarial determination of your overall liability for OPEB?

MR. IAKULA: Well, yes. Each year, 1994 through, again, May of 1997 was based on an actuarial valuation as to what the company's periodic costs would be and what its expense was to be.

COMMISSIONER DEASON: And according to our rule that liability is a reduction to rate base, is that correct?

MR. IAKULA: The unfunded portion, as I understand it --

COMMISSIONER DEASON: You have no funded portion, is that correct?

MR. IAKULA: No, we do have a portion that is funded.

COMMISSIONER DEASON: You do have a funded portion?

MR. IAKULA: Yes. And we started funding, I believe, in 1995, prior to any rate recovery.

COMMISSIONER CLARK: Is that VIVA (phonetic)?

MR. IAKULA: Yes. We have a VIVA trust account. We fund to the extent that it's tax deductible.

COMMISSIONER DEASON: But it's your position that there is -- of your unfunded liability, there is a component which is in that liability related to the years '94 through May of '97, and that amount equals 1.1 million?

MR. IAKULA: That would, in fact, be the total liability for those years, whether it was funded or unfunded. What staff did in the rate case, the prior rate case was take the portion of those years that was unfunded and use that as a rate base deduction.

COMMISSIONER DEASON: Do we know what portion of that 1.1 million has been funded at this point?

MR. IAKULA: Yes, we do, Commissioner. Unfortunately, I don't have the amount at my fingertips. Maybe staff does. But that amount was used in the prior rate case as the rate base deduction.

COMMISSIONER DEASON: Back to the 1.1 million for the years '94 through '97, through May of 1997, it's the company's position that that has not been recovered through rates?

MR. IAKULA: That's correct, Commissioner.

COMMISSIONER DEASON: Rates were established at a previous time recognizing the pay-as-you-go expenses, correct? And those rates continued for the years '94 through May of '97, did they not?

MR. IAKULA: Yes. Presumably -- the company's last rate case had been in, I think, 1980 or '81 prior to its most recent one. If, in fact, at that point in time there was some level of pay-as-you-go expenses, presumably it was included in rates, and that was being recovered through those years. But that was materially different than the FAS 106 expense as of 1994.

COMMISSIONER DEASON: But there was an amount in rates being recovered to pay OPEB expenses.

MR. IAKULA: The 1.1 million would reflect that incremental difference between what was already being recovered or what our pay-as-you-go expense was in 1994, and subsequently. So it is the incremental portion.

COMMISSIONER CLARK: Does staff agree with that?

COMMISSIONER DEASON: That the 1.1 million is the incremental difference between pay-as-you-go and the accrual.

MS. MERCHANT: For those 3-1/2 years. Commissioners, I went back to a point -- you asked if it was -- the regulatory asset was included in rate base in the last proceeding, and I'm not sure. I know that we used the balance sheet approach for working capital, and I don't recall that there was an issue on that. But I could look it up. I would have to go back in the file and look that up, but I know that we specifically -- the Commission specifically did not address that. And there weren't that many issues in the balance sheet approach to working capital, so --

MR. IAKULA: Commissioner, I do know that as a separate component of rate base, we had not asked for recovery of the regulatory asset.

COMMISSIONER DEASON: But you indicated that it was part of the overall actuarial computation which resulted in your overall liability, and that it's only that unfunded liability which is the reduction to rate base.

MR. IAKULA: During the hearings, the company had asked for recovery of that $1.1 million that it had deferred over a period of years, 15 years I believe it was. We had not, though, asked for an increment to rate base for that regulatory asset that was set up.

CHAIRMAN JOHNSON: Any other questions, Commissioners?

MR. ADE: I would like to address some of the questions that Commissioner Clark raised, if I could.

CHAIRMAN JOHNSON: Okay.

MR. ADE: I have forgotten exactly what Commissioner Clark's question was, but it involved -- yes, this case being consistent with previous cases where the Commission has dealt with this. And I think there are two substantial differences here, Commissioner.

In the previous cases, the Commission made a point of pointing out in its orders involving those cases that the amount involved did not reach the materiality standard. That the Commission had adopted the 100 basis points and, therefore, that was at least one of the reasons that the Commission didn't grant any relief.

I think the more significant reason, difference, though, is that when those cases were decided we didn't have the rule waiver rule in the APA that we now have available to us. And today you are very clearly given the right. In fact, the rule says shall, and I'm not here to tell you you've got to do anything, but that is what the rule says. It says that the regulatory body shall waive the rule when there needs to be a waiver.

But we didn't have that rule back then, and I think that is a material difference. Mr. Iakula referred to other states, something about other states, and I think it would be interesting for you to know that United Waterworks didn't just pick on Florida to miss on this matter, it picked all of the states where it was operating, obviously, because it wasn't aware of it. And he can tell you, if you are interested, exactly what has happened in each of those other states where we have had this very same problem.

I can tell you, generally speaking, that in almost every case we have been allowed to recover the period, the 3-1/2 year period that we have missed that we are talking about here today. Somebody made reference to the effect on the rate base, and analogized it to depreciation.

I think there is one big difference here. When we depreciate an asset, we have an asset in rate base, and we take out some every year to recognize the part of that asset that's used up. In this case, we have never put anything into the company for the 1.1 million, and so when we take it out of rate base we are taking out something that never was there.

However, if the Commission were to waive the rule and allow United Water to amortize these costs over the 15 or 20 years, what we have proposed on the rate base handling of that which would be to amortize that over the 15 or 20 years would handle the rate case problem there. I do believe with Commissioner Clark it is absolutely inconsistent to take that whole amount out of rate base and never have allowed the company to recover it.

COMMISSIONER CLARK: I have a question to ask staff about, if we are done with questions on that subject.

I have a question on -- when you were talking about -- in your recommendation starting on Page 18 you were talking about the fact that this is consistent with what we have done in other cases. And you say at the bottom of 19, the Commission has consistently considered not only the potential financial effect of denying the opportunity to recover. And then later you later on go to talk about the impact on the finances of the company.

When you looked at United Water to determine whether it was material or not, it was not clear to me whether you were looking at the company, its parent or its grandparent when you were saying it's material or not. Tell me for each one, is it material, is it material to the utility?

MS. MERCHANT: I think that you can look at all three of them. I think the reason -- we went to the utility, we looked at the utility, but the utility does not issue its own debt.

COMMISSIONER CLARK: I appreciate that. But it seems to me that when we have done -- when we look at utilities, we look at them as if they were on a stand-alone basis, unless there is a compelling reason not to when we do the parent/debt adjustment. And it seems like every time we want to recognize that they have a parent, there is a compelling reason to do that.

MS. MERCHANT: In this case, in the last rate case we used the parent's capital structure for this company. So that was one thing that we actually went above to the parent.

COMMISSIONER CLARK: What was the effect on the utility, assuming it had no parent?

MS. MERCHANT: I beg your pardon?

COMMISSIONER CLARK: Did you give an analysis of the impact on the utility as a stand-alone basis?

MS. MERCHANT: I think that we looked at it, that they said it would be 135 basis points, and I don't think that we disagreed with that, if you took the hit in one year. I don't think --

COMMISSIONER CLARK: What do you mean if you took the hit in one year?

MS. MERCHANT: If they wrote it off all in one year, that the total company would suffer 135 basis points.

COMMISSIONER CLARK: Is that the analysis that you did for the other companies, it was a one-year basis?

MS. MERCHANT: Well, honestly I can't remember exactly how we did it in the other cases, but I know that we wouldn't really look at 3-1/2 years worth of a hit to a company in one year. I would think you would probably go back and look at each year, and what type of hit it would have been in each of the -- in '94, in '95, in '96 and '97. And I guess we didn't do that. We didn't go back to look at that. We have not audited those numbers. We audited them as part of the rate case, but a lot of the rate case was projected.

It's similar to, in my mind it's similar to having a plant addition. I know we talked about how it was similar to accumulated depreciation, but if you added an asset one or two years before a test year, and your rates did not recover the depreciation expense, or the increased depreciation expense for that asset until you had a rate case two years down the road, you still would have your accumulated depreciation. It would be reduced for each of those two years. And that is where we are coming from here.

If a company desires to have the increased depreciation expense, they should come in, they should ask for a projected test year, or they should come in soon after that year is finished and ask for recovery of that increased depreciation expense, because they didn't recover it in the prior year. If they didn't come in and do that, we would not allow them to make up that lost return in the year, in the test year. Those two years are gone and rate base is reduced by that.

So for financial purposes, you have to record that depreciation expense and accumulated depreciation is increased, and the same thing for regulatory purposes. So that's where -- that's where we are analyzing. If they had come in and asked for the increased rates in 1995 or in 1994, then they would have already had that expense, then it would have taken care of (tape changed) --

COMMISSIONER CLARK: -- came in and asked for it.

MS. MERCHANT: But they all had rate cases shortly after that, too. All three of those companies had rate cases.

COMMISSIONER CLARK: So the amount in question was less.

MS. MERCHANT: That's correct. But they were all aware that the rule was coming down, and they all came in -- it wasn't immediately after that. I think it was maybe three or four months after that. But they all came in and asked for it. And to our knowledge that was the only companies that we had out there that had OPEBs.

COMMISSIONER CLARK: Well, let me ask you one other thing. Getting back to the 100 basis points test, how did you apply it in the other cases? Are you saying there are three other cases?

MS. MERCHANT: There is Southern States --

COMMISSIONER CLARK: Avitar.

MS. MERCHANT: Florida Cities, which is owned by Avitar, and then there is Poinciana, which is owned by Avitar.

COMMISSIONER CLARK: And in each of those cases, you did not recognize in the transmission -- in the transition amount or any other way that the amount between when the rule went into effect and they finally came in and asked for it.

MS. MERCHANT: Right. We are not talking the transition part, it is the part from when FAS 106 went into effect until they came in and got rate relief to cover the increased expense. And in each of those cases we also lowered rate base for that.

COMMISSIONER CLARK: I understand. What you are recommending here is consistent with what you did there. Now I want to ask you, how much was the amount in each of those cases, and what was its impact on equity -- on rate of return. Because it appears you did that analysis in each of those cases.

MS. MERCHANT: I know we discussed it in the order in two of the cases, and I also recall the companies had argued that the impact was higher than 100 basis points, but what we did is we actually lowered the impact, and it wasn't as high as what the company had said. How we actually did that, I can't remember.

COMMISSIONER CLARK: Well, I just want to know what the amount was and the impact on their return on equity, because those are -- apparently those are -- that was part of the rationale, and that's part of what the company is hanging their hat on here.

MR. IAKULA: Commissioner, if I could just clarify a point. The 130 basis points was the impact on the overall rate of return, not the return on equity. The return on equity impact would be much more significant, probably over 200 basis points.

COMMISSIONER CLARK: Well, let me ask a question to staff. Isn't that the relevant -- isn't it more relevant to look at the rate of return on equity, what it means to the company as opposed to the overall rate of return which includes debt? I mean, what is the appropriate basis points to look at as it effects equity or as it effects their overall rate of return?

MS. MERCHANT: I think -- you have an overall range, it is based -- and I don't think it really --

COMMISSIONER CLARK: I know there is an overall range, but it seems to me what we always look at, what we are looking at when we determine what they should earn is the equity, and then the others are fallout.

MS. MERCHANT: That's correct.

COMMISSIONER CLARK: And so for this, for the purpose of determining the impact on their finances, is it appropriate to look at equity only, or is it appropriate to look at overall cost of capital?

MS. MERCHANT: As my boss just said, yes.

COMMISSIONER CLARK: That's an either/or, you can't say yes to that question.

MS. MERCHANT: I think the impact is on equity because everything else remains --

COMMISSIONER CLARK: Right, I agree with you. I think it should be equity, and that's probably what we should look at for those other cases, too.

Commissioners, while they are looking at that, I'm -- I don't know what to do. I have -- I have some sympathy for the fact that it is a large amount, it is a cost that we would normally allow. On the other hand, you are a big company, you should have come in and asked for it. And I don't think you should get the whole amount, quite frankly. There ought to be some penalty for not coming in here.

Mr. Ade, you suggested it ought not be a 1.1 million penalty, and that -- you know, I'm struggling with what is the appropriate thing to do in this case. And I want to make sure that -- make sure of the rationale in the other cases, and that it is appropriate here.

MS. MERCHANT: I think if you were to go back and look at the actual impact on the return on equity, I think that you would have to look at each of the years. I don't think that you can take the loss in one year and measure the impact. Because we do not set rates based on -- we would annualize the cost over a time frame. And I think the real test would have been to go back in each of those years to see whether they did not earn a fair rate of return in each of those years, which we have not done. Staff has not done that.

COMMISSIONER CLARK: And what you are saying is even if you look -- for instance, if in, say, 1995 it was X amount that they should have been recovering in rates, if we assume they weren't recovering it and subtracted it from this profits, you would look and say if they are still earning within their range, so be it, that they are fine, we shouldn't do anything. If they earn less than their range, maybe we should do something.

MS. MERCHANT: If they ask for it.

COMMISSIONER CLARK: Well, they have asked for it.

MS. MERCHANT: Well, then. And what I'm saying is if they were earning outside of their range also in 1995, which we are not making a finding of that either, but had they been earning outside of the range on equity in 1995, we would not be able to go back and get excess earnings at that point in time, either.

COMMISSIONER CLARK: I understand that.

MS. MERCHANT: And that is the point where I believe that it is retroactive ratemaking, to go back and reach back to a prior time period and to make a decision whether or not they would have been earning within the range, under the range, or over the range.

COMMISSIONER CLARK: Well, I appreciate that, and

I appreciate the fact that staff thinks the distinction is they had the opportunity to come in here and control it and control the amount. And the reason why OPEBs is not is that was something that was changed, and they had no opportunity before that point to request it.

COMMISSION STAFF: Commissioner, let me suggest -- and, Madam Chairman, let me suggest that we defer this item and give us a chance to look at it a little more and bring it back to the next agenda. I think that the company has raised some concerns that we need to look at what is maybe fair, maybe something along the line of maybe them not taking four years worth of hit, but maybe just one years worth of hit, or something along that line. But let us look at it, let us compare those equity basis point changes to the other companies.

COMMISSIONER CLARK: I will be frank. Commissioner Deason, I'm looking for you, the accountant, to step up here and sort this out, because --

COMMISSIONER DEASON: I just reside in an ivory tower, so I -- (laughter).

COMMISSIONER CLARK: I mean, the court has told us in GTE and other cases that there is an equity consideration here, and I don't dispute, and I don't think the staff disputes this is a cost of doing business, you should get it in rates. And it sort of turns on a mistake by the management for not having come in, and so what is the penalty for doing that?

COMMISSION STAFF: And that's what I was asking, if we can -- you know, if we can defer the item, that maybe we could come up with an appropriate or a fair amount.

COMMISSIONER CLARK: You know, maybe it is fair to deny it. I read this, and I have come to a conclusion. And I just --

COMMISSIONER DEASON: Well, let me say that, Commissioner Clark, I appreciate you asking the questions that you did, because I had the same questions. And I had a meeting with a member of the AFAD staff who had worked back in the rule proceeding, and I asked the same questions about it. It appeared that it is a penalty to have a rate base reduction for an amount which basically had not been contributed through rates by customers.

And I got a little bit of history on the rule, and a little bit about the factual situation here. And to me, let me say on the surface it does appear that -- I think we have got two components here. We have got the expense component, and there is the rate base effect of the liability. I am persuaded by staff's argument on this expense portion. I think it was incumbent upon the company to look at their operations, to be aware of the FASB 106, and to be aware of our rule proceedings, and to make the appropriate decision as to how they should approach the problem and whether there needed to be a change in rates. They failed to do that. For whatever reason they failed to do that. And it's within our rule that it was incumbent upon them to do that.

Then there is the question -- so my sentiments, I tend to agree with staff. And, you know, this is just one example, it just so happens that these are expense amounts that are associated with a change in accounting. But the truth of the matter is we recognized the part that the company had no control over, the transition amount when there is a change in accounting. We have already allowed that in rates.

The question is this period of years after the provision went into effect, the company failed to take any action. I don't think it's our responsibility to make the company whole for that action or lack of action. And I think there is a problem with retroactivity, and there is a problem with asking current ratepayers to pay expenses which were incurred a number of years ago, and you have problems with intergenerational inequities and things of that nature, as well. So for those reasons, I don't have a problem with denying the expense recovery.

I also find it curious that there was an ongoing amount of expense recovery based upon pay-as-you-go. Even though it's not likely, there is always the possibility the company could change their OPEB plans and things of that nature, and the going-forward accruals could be less than the pay-as-you-go.

And I wonder if the company would be in here now saying we want to give money back to the customers because we collected more on the pay-as-you-go as we now have as our current accrual, and we want to give that money back to the customers for years '94 through '97. I would seriously doubt that.

COMMISSIONER CLARK: Let me hold off. What you are saying is that this is not an exact science. That those -- they estimate every year what their liability is going to be and address their accrual that way.

COMMISSIONER DEASON: It's like any other expense. Expenses go up and down. Some things are in control of management, some aren't. The fact that these expenses were at the level they are, that was management's decision to have their benefit plans what they were, and they were recovering in an amount in rates, there was a change in accounting procedure, a transition amount, we recognized that was not within the company's discretion, and we have allowed recovery of that. And I think that was the appropriate thing to do. I think this is a different -- these expenses for these years are different, and it was incumbent upon the company to request that recovery.

The problem that I -- the difficulty I have, though, is with the next step, and that is with the recognition of the liability as a reduction to rate base. The principle is that when the company, when the customers pay monies basically in advance, they pay money to the company, to their utility company for expenses that are being accrued, but that money is not currently being paid out. That is a source of capital, it is a zero source of capital, it should be a reduction to the rate base or at least recognized in the capital structure as zero cost of capital.

That's a fundamental principle that we have adhered to, and I think it's the correct thing to do. The only flaw in that now, though, is that it has been presented, and I don't think the staff disagrees with this, is that for the years '94 through '97, the amount the customers were paying was not sufficient to cover that liability, and there was really not an advanced payment for accrued expenses which would be paid subsequently. That's where I have the difficulty.

COMMISSIONER CLARK: So you are thinking that we should adjust -- the adjustment to rate base.

COMMISSIONER DEASON: Well, that is the only thing that I question. I have no concern about the expense portion -- I say no concern. I mean, there is a concern there, but I think the staff's recommendation is correct. The only thing that I was having difficulty with, and the thing that I wanted to talk to staff about was the rate base effect.

The 1.1 million reduction to rate base which is for the years '94 through '97. That's -- perhaps I could use some more, some additional information on that, but having listened to staff's discussion here today, I think that their recommendation is correct. You know, if it is the desire of the Commission to seek more information or more alternatives, you know, I certainly welcome that. I won't say that we've got to make a decision today.

But based upon what I have heard here today, I think it's consistent that it was still incumbent upon the company to come in and to seek recovery of this, and that we had a rule there and the rule is very specific. It says that this amount shall be a reduction to the rate base. Then, of course, there is another question about whether there should or should not be a rule waiver.

And, here again, if we want more information on the impacts and return on equity during these years, looking at it on a year-by-year basis, I'm not opposed to doing that either. But I sense that you were asking for me to say something.

COMMISSIONER CLARK: Yes. I think --

COMMISSIONER DEASON: I am saying that if I was going to vote right here today, I would move to approve staff's recommendation.

COMMISSIONER CLARK: I think it would be beneficial to get the impact on return on equity for those years, also do the analysis for the other companies. Because there is an implication that it was fairly de minimis. And look at what changes, what is the effect of changing the rate base such that you don't recognize that amount, the 1.1 million in the rate base adjustment.

COMMISSIONER DEASON: I think another question is, though, how do you account for that on a going-forward basis every year? How much then do the customers pay towards the 1.1 million, and was it funded or unfunded. It may be an accounting nightmare to keep track of that. The simple thing to do is to say to the company, you should have asked for it, you didn't, our procedures are when ask you for recovery, you get it, and the liability is deducted from rate base, and just go forward.

And I think staff needs to consider that, too. If you are going to try to segregate that from an equity and fairness standpoint, how are you going to continue to account for it on a going-forward basis? It's not going to be an easy thing to do, I don't suspect.

COMMISSIONER CLARK: Well, then in that case I would move for deferral just -- can you do it the next agenda? It doesn't matter to me, but fairly quickly.

COMMISSION STAFF: Well, Commissioner, because of the fact that there is a rule waiver request, I think we would need the company to agree to waive the statutory deadline until the next agenda, or until we come back for a decision on this, because the 90-day period is already up. They did waive that deadline so that all of their requests could be addressed in one recommendation, but I think we probably would need to get an affirmative extension to that rule waiver.

But one other thing I thought I would just raise as an idea for your consideration, it seems to me that all of these concerns that you have go to the portion of the requirement under 120 that if you are to waive a rule, that you need to find an application of the rule would create a substantial hardship. And I'm not even sure that we need to reach that question. Because if you look at the standard for rule waiver, the requirement is that the waiver shall be granted -- the first thing you need to do is to determine whether the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means.

And then if you determine that that's true, you would go on to determine whether or not there is a financial -- or a substantial hardship, financial or otherwise. And what we are recommending here is that -- well, first of all, if you look at the underlying statute, the underlying statute is Section 367.121, which provides that the Commission shall have the power to prescribe fair and reasonable rates and charges.

And our recommendation is that it would not -- that if you were to waive this rule that the purposes of that underlying statute would not be met, therefore you wouldn't need to go further and even look at the substantial hardship. Because what we are recommending is that it wouldn't be fair for current and future ratepayers to pay for costs of providing service in 1994, '95, '96, and a portion of '97 when those costs could reasonably have been recovered from ratepayers during the time period, during that time period had the utility come in in a timely manner to request the recovery.

So you may not even need to reach the question of whether there was a substantial hardship if you find that the purposes of the underlying statute were not achieved.

COMMISSIONER CLARK: Well, what you are saying is we wouldn't reach the question because they don't even qualify in the first instance for the waiver?

COMMISSION STAFF: Exactly.

COMMISSIONER DEASON: You can look at our rule as an invitation to companies to come in and declare your situation and get your rates right and let's go forward and do good. And this company failed to do that.

COMMISSIONER CLARK: I understand that. I still think we might benefit from a little bit more information.

CHAIRMAN JOHNSON: Any response from the company on the waiver?

MR. ADE: The rule waiver? Sure. I think the rule waiver is very clear, and I think --

COMMISSIONER CLARK: Mr. Ade, I think she was just asking if you will waive the 90 days.

CHAIRMAN JOHNSON: No, no, no, not the substantive matter. Yes, waive the 90 days, not the substantive matter.

MR. ADE: Oh. Mr. Lowe and I were just talking about dates, and he thought that the next agenda conference, because of when the recommendation needs to be submitted, might be a little tight for us to do the computations. And we have no objection to going to the following --

MR. LOWE: Which is the 18th.

CHAIRMAN JOHNSON: August 18th?

MR. LOWE: 18th of August.

CHAIRMAN JOHNSON: Okay.

COMMISSIONER GARCIA: I just want to state for the record that I feel comfortable with staff recommendation. So, you know, I would like to see some options, that's fine.

COMMISSIONER CLARK: I will withdraw my --

COMMISSIONER GARCIA: No, no, I don't have a problem with them coming back, and I'm sure we can spare the attack on the accountants on the next presentation and we'll move forward from there. But I can understand that Commissioner Clark wants -- I can see her point clearly. However, in these matters, I generally defer to our resident accountant. But nonetheless, let's take a look at it. We may -- we may find some other way to do this.

COMMISSIONER DEASON: I must say that normally it is the attorneys who are the target of comments, and so I guess it's only fair for the accountants to get their portion, as well.

CHAIRMAN JOHNSON: Show this matter deferred until August 18th. Thank you.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages number 1 through 52 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 9th day of December, 1998.

Jane Faurot

JANE FAUROT, RPR
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Petition for limited proceeding regarding other postretirement employee benefits and petition for variance from or waiver of Rule 25-14.012, F.A.C., by United Water Florida Inc.

DOCKET NO. 971596-WS

BEFORE:	CHAIRMAN JULIA A. JOHNSON COMMISSIONER J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER JOE GARCIA COMMISSIONER E. LEON JACOBS
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	22**PAA
DATE:	August 18, 1998
PLACE:	4075 Esplanade Way, Room 148 Tallahassee, Florida

JANE FAUROT, RPR
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TALLAHASSEE, FLORIDA 32302
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APPEARANCES:

JAMES L. ADE, Esquire, representing United Water Florida, Inc.

STAFF RECOMMENDATION

Issue 1: Should the utility's petitions for limited proceeding regarding OPEBs and for variance from or waiver of Rule 25-14.012, Florida Administrative Code, be approved?
Recommendation: No. UWF's petitions for limited proceeding regarding OPEBs and for variance from or waiver of Rule 25-14.012, Florida Administrative Code, should be denied.
Issue 2: Should this docket be closed?
Recommendation: Yes. This docket should be closed if no person whose interests are substantially affected by the proposed action files a protest within the 21-day protest period.

P R O C E E D I N G S

CHAIRMAN JOHNSON: Item 22.

COMMISSIONER GARCIA: We pulled this, didn't we?

CHAIRMAN JOHNSON: There is going to be a request, I believe Mr. Ade's. We will want to hear from staff first.

MS. GERVASI: Commissioners, Item 22 is United Waters -- United Water Florida's petition for limited proceeding and for variance or waiver from Rule 25-14.012. The utility has requested that the item be deferred to the next agenda.

CHAIRMAN JOHNSON: Mr. Ade.

COMMISSIONER GARCIA: Excuse me, wait. If we asked to defer --

COMMISSIONER CLARK: Now they are requesting for a deferral.

CHAIRMAN JOHNSON: Our staff is not asking for a deferral, the company is going to ask for deferral. And we have a couple of issues, a continuing waiver of our rule, and we need to get some of that on the record.

COMMISSIONER GARCIA: Okay.

CHAIRMAN JOHNSON: Mr. Ade.

MR. ADE: Yes. Madam Chairman, what Ms. Gervasi stated was correct, the company has requested that this be deferred until the next agenda, or whatever is convenient for the Commission. There really are two primary reasons that we have asked for the deferral. This has been before the Commission before, and the Commissioners struggled with what is fair to do here, and left us with several questions to get some additional information on.

One of the issues was for us to explore some alternatives for granting less than all of the request that the utility had made. We have not yet had an opportunity to do that. We believe it would be fruitful to at least try.

And the second reason is that the Commissioners asked us to determine what United Water Florida's rate of return equity was in these past years. United Water Florida prepared some schedules of its return on equity for 1994, 1995, 1996, and through May the 30th of 1997, submitted them to the staff. The staff made some calculations that came out in the staff recommendation.

The utility was not able to determine how the staff had arrived at the numbers that it did. We asked for the staff's workpapers, which we have now gotten, but have not yet had an opportunity to study and analyze, and we think that it would be profitable for us to look into those two issues before we come back to the Commission. And the utility would be willing to waive both the 90-day statutory time limit for Florida Statute 120.542(7), and the 60-day statutory time limit of Florida Statute 367.081(6).

CHAIRMAN JOHNSON: Thank you. There is a request for a deferral. I can handle it or have the full Commission -- do you want a motion?

COMMISSIONER CLARK: Well, I guess this request was made of staff at some point and staff doesn't think there is any reason to --

COMMISSION STAFF: The request was made yesterday, and we are ready to go forward now. We believe that the request constitutes retroactive ratemaking no matter how the numbers fallout.

COMMISSIONER GARCIA: Well, let me just add to this by saying, Commissioner, somehow I had on my schedule that this was going to be pulled. So I am not prepared to go forward. I don't mind if we hold it out one more, if we have to do it on my going. I'm sorry it's going to cost the company more, and I'm sorry that staff was ready for --

COMMISSIONER CLARK: The company has asked for it.

COMMISSIONER GARCIA: Okay. Well, then --

CHAIRMAN JOHNSON: So is that a motion to defer?

COMMISSIONER GARCIA: Yes, defer it one. If staff is ready, and Mr. Ade says he can be ready the next agenda, then one agenda is fine. We're going to come back to deal with the same thing, right?

CHAIRMAN JOHNSON: Is one fine?

MR. ADE: Yes, ma'am.

CHAIRMAN JOHNSON: To the next agenda.

COMMISSIONER CLARK: I will second the motion.

CHAIRMAN JOHNSON: So we will show the waiving of the statutory requirements through to the next agenda, and then we will be prepared to deal with the issue.

MR. ADE: The next agenda falls around Labor Day. Have you all determined when that agenda will be held, or will it? I think it would fall on September 1, is that when --

COMMISSIONER CLARK: Labor Day is the next one, I think, the next Monday.

CHAIRMAN JOHNSON: Yes, the next agenda is September 1st.

MR. ADE: So it will be through September 1.

CHAIRMAN JOHNSON: Very good. Show the item then deferred.

MR. ADE: Thank you, Commissioners.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 9th day of December, 1998.

Jane Faurot

JANE FAUROT, RPR
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Tallahassee, Florida 32302

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Petition for limited proceeding regarding other postretirement employee benefits and petition for variance from or waiver of Rule 25-14.012, F.A.C., by United Water Florida Inc. (Deferred from the 8/18/98 Conference)

DOCKET NO. 971596-WS

BEFORE: CHAIRMAN JULIA A. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER JOE GARCIA
COMMISSIONER E. LEON JACOBS

PROCEEDING: AGENDA CONFERENCE

ITEM NUMBER: 24**PAA

DATE: September 1, 1998

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

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APPEARANCES:

JAMES L. ADE, Esquire, SCOTT SCHILDBERG, Esquire, WALTON HILL, and BOB IAKULA, representing United Water Florida Inc.

STAFF RECOMMENDATION

Issue 1: Should the utility's Petitions for Limited Proceeding regarding OPEBs and for Variance from or Waiver of Rule 25-14.012, Florida Administrative Code, be approved?
Recommendation: No. UWF's Petitions for Limited Proceeding regarding OPEBs and for Variance from or Waiver of Rule 25-14.012, Florida Administrative Code, should be denied.
Issue 2: Should this docket be closed?
Recommendation: Yes. This docket should be closed if no person whose interests are substantially affected by the proposed action files a protest within the 21-day protest period.

P R O C E E D I N G S

CHAIRMAN JOHNSON: 24.

COMMISSION STAFF: Commissioners, Item 24 is a deferral from the July 21st and August 18th of a petition by United Water Florida Inc. to recover other post-retirement employee benefits or OPEB costs incurred in years prior to the last rate case test year. This would be in addition to the OPEB costs approved by the Commission for the test year. The utility also seeks to modify the rate base reduction for accumulated unfunded OPEB liability approved in the last rate case.

If the Commission determines that the requested action cannot be approved without a waiver of or variance from Rule 25-14.012, Florida Administrative Code, United Water Florida has requested that a waiver or variance be granted.

Staff has recommended denial of the petition and of the rule waiver or variance.

We have representatives of the utility here today. Mr. Bob Iakula, and Mr. Walton Hill, who I understand are here to answer questions, and Mr. Scott Schildberg and Mr. Jim Ade who would like to address the Commission.

CHAIRMAN JOHNSON: Mr. Ade.

MR. ADE: Commissioners, I'm Jim Ade of the firm of Martin, Ade, Birchfield and Mickler. And with me today is Mr. Scott Schildberg of our firm, Mr. Bob Iakula, which is vice president of United Waterworks, and Mr. Walton Hill, who is vice president for regulatory business for United Water Management Services Company, in reverse order at that end I might add.

What I would like to do today is really make three points. I would like, first, to address some principles that are involved in this matter that I think we can all agree on, that there really is no dispute about. I then would like to address the waiver of Rule 25-14.012, pursuant to the waiver of rule statute, which is, of course, in the Administrative Procedure Act, 120.542. And then I would like to spend just a minute or two on the issue of retroactive ratemaking.

I think the principles that we can all agree on are fairly simple. I think this Commission has held on many occasions and Commissions around the country have held, in fact, this Commission held in our last rate case, in United Water Florida's last rate case that utility companies should recover their OPEB costs in the rates that they charge, and that the shareholders of the utility company should not be required to pay for those OPEB costs.

Until 1993, United Water Florida and most public companies accounted for their OPEB costs on the cash basis of accounting. In other words, if a person retired and he was paid -- medical expenses were paid for him or medical insurance was paid for him or her, that expense was charged to expense in the year that it was actually paid, and that was the standard practice for most companies and most regulated companies.

In 1993, the Financial Accounting Standards Board decided that those expenses should be accrued year-by-year as they were earned, and not done on the cash basis of accounting. They should be done on an accrual basis of accounting. So what this really did was create an accounting problem. And I think that is what we are here about today, we are here about an accounting problem.

It did not change the total number of dollars that were going to be paid by one penny, nor did it change, as a result of the rule that was adopted by this Commission and other commissions, nor did it change by one dollar the amount of these OPEB costs that were going to be included in rates. So we are really dealing with an accounting problem.

It did change the timing of how those expenses would be paid, not to how they would be paid but how they would be accrued for accounting purposes. I think we also do not agree -- do not disagree that United Water Florida has incurred approximately $1,100,000 of these OPEB costs from January the 1st of 1994 through May the 30th of 1997 that have not been recovered in rates.

Now, this is an important issue for the company because of the FSAS 106 accounting rule. I'm not talking ratemaking now, I'm talking about accounting. If the Commission does not grant the company's request today, the company is going to have to write off for accounting purposes this $1,100,000 this year, the whole year. If the Commission grants the company's request today, the company will not be required to write off that entire $1,100,000 in one year.

Now, the staff -- I think we also have no real dispute, no dispute at all, really, over the fact that this is broken -- this $1,100,000 problem, accounting problem is broken into two pieces. One piece is should the company be allowed to accumulate or accrue that liability and write it off over some period of time. And that part of it I will call the amortization part of the problem.

And the staff has quantified that part of the problem for us from a revenue standpoint of $90,000, that is a $90,000 revenue problem. The other part of the problem is the rate base part of the problem, should the company be required to reduce its rate base by the unfunded liability for these OPEB costs. And that is the -- the staff, again, has quantified that for us as a $98,000 revenue problem. Both issues are very important to the company, of course, because they affect revenues.

The more serious problem, the more -- well, the major problem, let me say, which is the accounting problem unrelated to rates is solved if we can solve the amortization part of that problem, the small part of it, the $90,000 part of it. That solves the accounting problem for the company, even if the rate base part of the problem is not resolved. And I don't think there is any real question about that.

The Commission has a rule that says if you accrue these OPEB expenses, you should come in and get prior approval to do that. There is no doubt the company did not do it. The company did not intentionally not do it, it simply was unaware of the rule. The staff even said they thought probably it was in the middle of the last rate case that the company became aware of the rule, and I think that is probably accurate.

But there was no intention to do anything illegal, immoral, or fattening on the part of the company. The company's failure to follow that rule did not result in any benefit to the company. It's not a case of not following a rule. The one that comes to my mind, only because I hear about it here sitting in these agenda conferences, not because I know anything about it, are the slamming cases. There companies are violating your rules for their own personal profitable gain. But there is no possible gain to the company here for this rule that it violated.

So the conclusion I think that I reach of these things that we agree on, is that the Commission does have the right to waive this rule for the company. The statutory right to do that is there. And if the Commission waives the rule, then we get the right answer. The right answer is the OPEB costs are included in the rates, and the shareholders don't have to pay the OPEB costs.

If the Commission denies United Water Florida's request, then we get the wrong answer. The wrong answer is the OPEB costs for that period of time are not included in the rates, and the company shareholders have to pay it.

So I think that pretty much is the part that we call the first part that has to do with what we can agree on. Let's look at the waiver of the rule. And the Commission was blessed last agenda conference with Florida Power & Light's presentation of this rule waiver, and it was a good presentation, and I think the Commission became very familiar with the fact that you are sort of setting territory here for yourselves. There has been no litigated case about when you waive the rules and when you don't.

But you did take a look at the statute itself, 120.542. And the legislative intent in passing that rule is set forth very clearly in that statute. It says the legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.

Now, what are the such cases. The such cases are cases where strict application of a uniformly applicable rule leads to unreasonable, unfair, and unintended results. And I think that is what we have before us today. I think we have results that were not intended when this Rule 25-14.012 was adopted.

When the governor signed that statute, his comment on it was that the waiver and variance provision loosens the chains that had bound our agencies for too long. It gives them the flexibility to use a more common sense approach encouraging State employees to solve problems rather than to create roadblocks. And I think that's exactly what we have in this rule waiver request today.

I think that the staff has done a good job for us in the staff recommendation, and they look back at the staff recommendation when this rule was adopted, and I think they found some very interesting information. First, they quoted part of that staff recommendation that says, therefore, since the expense would already have been recovered through rates, so there is the first premise here of this rule. The expense has already been recovered through rates. That has not occurred in this present case.

The accrued liability shown on the balance sheet should be used to reduce rates in some way. And I certainly think that is a good principle. The staff went on to say, the staff infers from the above explanation, that I've just read to you, that it was never contemplated that utilities, even if unaware of the rule, would attempt to record a regulatory asset for deferred OPEB costs pursuant to SFAS 106 without seeking Commission approval.

Well, United Water Florida did. But I think the important part here is that the staff, that the staff is saying to the Commission we never contemplated that when we adopted this rule. We didn't try to solve that problem when we adopted this rule. The rule wasn't adopted to solve the problem we are today facing.

The staff went on to make another inference from that. It says it was never contemplated that utilities would fail to follow Paragraph 2 which requires prior approval before you accrue those expenses, thereby creating the apparent mismatch of recovering costs versus the rate base reduction.

So I think what we have here is a very clear statement that what the rule was adopted to do was not to deal with today's problem. And I think that only tells us again, and more clearly, that waiving the rule where it's going to give us a result that was unintended when the rule was adopted only makes common sense and does allow the Commission to solve this problem.

COMMISSIONER DEASON: Mr. Ade, wouldn't you agree that the unintended result is caused by the fact that the company did not comply with the rule?

MR. ADE: No question about it. No question about it. I wouldn't even argue that point.

I have told you a little bit about the impact of the rule. What does the statute require to waive a rule? It requires one thing and gives you an alternative on two others. First, it requires that the purpose of the underlying statute be accomplished in some other way. Well, the underlying statute that this rule is designed to accomplish are the ratemaking statutes, the fair and reasonable rates.

And I think that by waiving this rule we do get the fair and reasonable rates. And so I think the purpose of the statute is accomplished. I think not waiving the statute gives us a violation of or a contradiction to the underlying statute, which is that the rates would be fair and reasonable.

The other thing, the second item is a substantial hardship. There is no doubt at all that the company is going to not collect $1,100,000 in these OPEB costs that it will pay some day and has accrued up to this moment. And I submit to you that's a substantial hardship. It's going to write those off in one year, and we can make some computations any way we want to, but the fact is we are going to write those off in one year, and I think that is a hardship.

If we look at the other side of the equation, what we are doing for the company on a positive way, what are we doing to the customers? Well, if there never had been a rule, a FSAS 106, future customers would have paid these expenses because the expenses were being included in rates as they were paid. They would not have been paid by past customers, they would be paid by future customers.

The impact of -- the combination of the accrual part of the rule, of the issue, and the rate base part of the issue is about 7/10th of 1 percent of a rate increase for the customers. It is not a large rate increase. If the Commission were to take only part of that, it would obviously be less than that.

I think the rule is written in very broad language about the substantial hardship. I mean, the statute. It talks about demonstrated economic or other hardship giving you unintended results. I do not believe, and I don't think the staff believes that this rule was designed to address what is before us today, and I certainly don't think it was designed to keep utility companies from including these OPEB costs in their rates.

Another benefit of the rule waiver is that if we waive the rule, we avoid the whole issue of retroactive ratemaking. Because if the rule is waived, then we don't have to do -- United Water Florida does not have to do what arguably might be retroactive ratemaking. But I would submit to you that retroactive ratemaking is a nonissue.

I hesitate to use the word red herring, because it indicates some ill motive on somebody's part, and I don't mean that. But it is a red herring issue in this case. It is simply not an issue. And let me explain to you why. We have got a chart here that we had passed out once before, you all have seen, you probably don't have it with you now, and I would like to take this opportunity to rehand you a copy, if we could do that, Madam Chairman.

And while we are beginning to look at this chart, I want to emphasize that I think this is a nonissue in this case. But because the staff has raised the retroactive ratemaking issue, I think I need to address it. What you have here is a time line starting in 1960 and going through 2040. I think the three significant dates there are 1993, 1997 and 2013.

The effect of SFAS 106 was to take all of the expenses, all of the costs that the accountants said accrued from 1960 through 1993, that is the red part of the top line. Now, those are all back expenses.

Those were -- under the new accounting procedure, those costs were incurred from 1960, and I use 1960 because that's about the time United Water Florida was originally organized as a utility company in Florida. That is the significance of that, no other significance, particularly. But from the beginning of the company through 1993, the red line. And 106 says you accumulate all of those costs, and you amortize them for 20 years between 1993 and 2013.

So what they -- what the rule -- and bear in mind 106 had nothing to do with ratemaking, 106 was purely an accounting/reporting procedure. It took all of those expenses for, in our case, 33 years, wrote them off over the next 20 years, and then the blue line shows that you are back on equilibrium and you go forward.

The second line shows what United Water Florida is asking the Commission to waive the rule and do. Start from the beginning. Don't go to 1993, go to 1997. And that little additional red line there is all that we are talking about. Accumulate those expenses, write those off over the next 15 years, which would get them written off, charged into rate at 2013, just like 106 did, and then you would you be on even keel again and your blue line would be just the same as it is.

Now, is this retroactive ratemaking? Look at 106 and what the Commission authorized in the rule that it adopted. It said take the red line, write it off over the green line. Now, that may or may not be retroactive ratemaking. I do not believe that it is, but you categorize it any way you want to. That is what this Commission and commissions all over the country allowed to happen, and authorized to happen. And if that is not retroactive ratemaking, then the bottom red line written off over the green line is not retroactive ratemaking, either. You can't have it both ways. It is simply not retroactive ratemaking.

COMMISSIONER CLARK: But I think the staff has made the case for a distinction. In one case it was you were complying with the accounting rules, and it was pay as you go. It changed, it was something beyond your control and therefore an extraordinary expense in effect that you should be allowed to recover as a result of the change.

And the difference between '93 and '97 was you didn't come in and get the expenses that you should have been getting in that period.

MR. ADE: But I think that goes to the rule waiver issue. I don't think that those expenses between '93 and '97 become retroactive ratemaking because of that.

In other words, if these --

COMMISSIONER CLARK: You were given the opportunity to recover those expenses by way of the rule, and you didn't exercise that opportunity.

MR. ADE: That is correct. But what I'm saying is I don't think that that makes it retroactive ratemaking. Retroactive ratemaking is adopting a rate and applying it to past service, past -- well, service, usage, past use, consumption, whatever might be the word that was used in the industry. And whether we collected it in 1993 or 1997 and charged it to the customers on the green line isn't any different than charging -- starting in 1993 and charging it to the customers in the green line. It's either retroactive or it isn't, in my opinion.

I think that you may want to say what you said, and that would be true, what you said would be true, Commissioner Deason said the same thing. The company missed it. But is it fair to impose the hardship on the company because they missed it of $1,100,000. And I submit to you that that's the wrong answer. We did miss the rule. We didn't do it intentionally, we didn't have any ill motive about it, we just missed the rule. But that (tape changed) -- off the track in the recommendation.

You know, the Supreme Court has defined retroactive ratemaking, it says where a new rate is requested and then applied retroactively. We are not doing that. We are asking for a new rate and applying it prospectively to water that is used in the future, to wastewater service that's provided in the future. There is nothing retroactive about those rates.

This Commission has said technically retroactive ratemaking occurs when an additional charge is made for past use of utility service. We are not doing that. We are not applying anything to past use. You said in another order -- that was the Tampa Electric order in 1981. In the SSU order in 1995 you said retroactive ratemaking occurs when new rates are applied to prior consumption. We are not asking that that be done.

And I think that the transition cost issue here has clouded our thoughts on this retroactive ratemaking issue. Just to sort of wind this --

COMMISSIONER CLARK: Mr. Ade, the logic of your argument, if you extend it, is any time you discover the expenses you had for a prior period exceeded that which you recovered in rates plus a fair rate of return, you are entitled to charge, to put them in a new period and charge -- on a forward-going basis for those expenses that you didn't recover.

MR. ADE: I would not go quite that far. This is an extraordinary expense. And I think one of the exceptions to the whole retroactive ratemaking issue is an extraordinary expense. If you were talking about chemical costs, or electric costs, or something, I think you would have a whole different issue. This is an extraordinary expense.

I think everybody recognized that the accounting change that 106 made was extraordinary, and it was extraordinary for us through 1997. So I don't think you have to take that giant step from where we are to every expense. I do not believe that. I think if we came back to you and said, gee whiz, our chemical costs were six times what we thought they would be, I think that would not be proper.

At the two agenda conferences ago, the Commissioners asked the staff to make some additional research and to find out a couple of things. And one of them was what is the effect on the company's rate of return if you make these adjustments for these OPEB costs in the years that they occurred.

Under the staff's calculation, I think they show that 1995, if you remember, the benchmark we were sort of kicking against there was 100 basis points, and while we really don't quite agree with the approach the staff took, even taking the staff's approach, they found that in 1995 the difference between the achieved rate of return and the achieved rate of return adjusted for the OPEB costs was more than 100 basis points. We do believe there is an error in the staff's calculations that raises it a little bit.

In 1996, the staff found that there was a 95 point basis, 95 basis point difference. I think if you make the correction that we believe should be made, that 1996 would give you 107 basis points. 1995 would give you 108 basis points. For the two partial years of 1994 and 1997, while the numbers we get aren't quite the same, we don't get to 100 basis points on those two years under the way the staff calculated it.

So I would simply submit to you that the fairness and equity just requires that the Commission waive this rule for United Water Florida, and let it recover these costs, accumulate them, accrue them, and amortize them over we have suggested five years only because it takes us to 2013 where we are back on kilter like SFAS 106 requires.

CHAIRMAN JOHNSON: Were you going to add something?

MR. ADE: I'm sorry, Scott is telling me 15 years from now to is 2013, that is correct, not five.

CHAIRMAN JOHNSON: Okay. Further comments?

MR. ADE: Anybody have anything? Walton or Bob?

MR. HILL: (Microphone not on.)

CHAIRMAN JOHNSON: Off is on.

MR. HILL: Off is on.

A question from Commissioner Clark. Staff in its report has analogized this to routine taking of depreciation on plant additions throughout the years, and that adjustments aren't made in between rate cases for those types of things. We submit, really, that that's -- that is a routine matter for most utilities, especially for our utility. And that what we are really faced with here is a situation that is much more similar to something like storm damage, or flood damage, or freeze up costs in that the events causing the need to defer or accrue expenses are truly extraordinary.

We believe that FAS 106, the enactment of FAS 106 is an extraordinary item, like a storm, or a flood, or a freeze up, and not at all like routine depreciation on plant or plant additions.

That's all I have. Thank you.

CHAIRMAN JOHNSON: Thank you. Staff, any response?

COMMISSION STAFF: Commissioners, I would first like to address one issue that Mr. Ade raised on principles that we can all agree on, and that is the question that -- or the belief that the total dollars eventually expended and recovered in costs will be the same whether you use SFAS 106 or the cash pay-as-you-go method. And I would just modify that slightly by saying that the costs that are recovered would be those costs that are approved by the Commission in either case. They still must be reasonable and prudent. And the Commission would normally exercise its right to approve these costs before they are recovered.

And this goes to what I think is the real crux of the concept of avoiding retroactive ratemaking, and that is that the Commission and the public and the ratepayers all should have a right to be involved in the setting of rates before the recovery of costs is approved.

Regarding the rule waiver, I think the Commission in enacting the rule was very much aware of the intent of the rule and intended for it to do just what it has done. I think the Commission was correct in adopting SFAS 106. I think it was correct in adopting this rule to set very specific guidelines as to how these types of costs would be handled, and how they would be used in the ratemaking process.

And I believe the Commission has been correct in consistently applying this rule in cases that have come before it since the rule was implemented. Granting these requests would be the first significant departure from that consistent process.

In the analogy to -- in Mr. Hills' analogy to comparing the routine costs such as depreciation, or contrasting those costs to something such as storm damage, we believe that, once again, the issue is control. The management has no control over a natural disaster. It does have control over seeking rate relief for expenses that it incurs.

And the whole issue of SFAS 106 is not all that sudden. It was promulgated in 1990 after years of discussion. It was given a prospective treatment for accounting purposes. The Commission adopted its rule beginning in 1992, and made it effective in 1993, which was before the time that United Water incurred significant costs according to it's information. So we do not believe that that analogy is correct. We do believe that the analogy of things such as depreciation on plant that is placed in service between rate cases is very appropriate.

Finally, we do believe that retroactive ratemaking is very much an issue, and we think this would be a classic case. These costs were incurred beginning in 1994, there was no opportunity for the Commission to approve or disapprove the reasonableness and prudency of these costs during this time period. The utility had every opportunity to come to us and get recovery of those costs approved.

COMMISSION STAFF: And if I could add just a couple of points to that. Mr. Ade indicated that somehow if the rule were waived that that would take care of the retroactive ratemaking problem. And I don't believe that that's true, because when you waive a rule, when you determine that a rule -- that it's appropriate to waive a rule, you don't waive it out of existence or waive it retroactively, you are waiving it today. It would be merely an acknowledgment that although the rule exists, that it shouldn't be applied in a particular instance today when the requirements for the rule waiver are met. And we don't believe in this case, for the reasons set forth in the recommendation, that the requirements for rule waiver have been met in this particular instance.

The fact remains that the utility is requesting amortization of OPEB costs that were already incurred for prior periods, and that we believe this request constitutes retroactive ratemaking, which is impermissible by law.

The other thing I wanted to just kind of reiterate is something that Commissioner Clark pointed out, which is that we strongly believe that there is a clear distinction between the transition costs which the utility has already received and is receiving recovery of through rates and the costs that they are requesting here.

Their transition costs were extraordinary costs, because the implementation of the rule was beyond the utility's control. But the utility's failure to seek approval to include the costs that it is requesting recovery of here, we don't believe is an extraordinary reason for somehow making this an exception to retroactive ratemaking.

CHAIRMAN JOHNSON: Any questions, Commissioners? Do you want to add one other thing?

MS. MERCHANT: I have just a couple more comments I would like to make. The very first comment that Mr. Ade said was that we all agree that OPEB costs should be recovered in rates. And maybe this is a play on words, but I think that a utility is allowed the opportunity to recover its prudent expenses in its rates, it's not guaranteed recovery of its expenses. And it's up to the company to come in and ask for it. And I think that is a slight distinction, but I thought that that was important.

The other point is that we have a lot of other water and wastewater companies and some other industries that have already come in and asked for this, and if we change our policy right here today, then we are inviting those other companies to come back in and get what they didn't get before, because we were consistent in applying the rules. So I think it is very important, number one, that we are consistent with the application of the rule, and further, that it is retroactive ratemaking, whether you waive the rule or not, in our opinion, that you are asking for prior losses to be recovered through future rates of the company.

The same thing, the flip side of that would be past overearnings to be spread back in lower rates in the future, if they occurred. That is the other side of retroactive ratemaking. I think that both of those would be -- are inappropriate, are not allowed by the courts.

CHAIRMAN JOHNSON: Thank you. Commissioners, any questions?

COMMISSIONER CLARK: I move staff.

CHAIRMAN JOHNSON: There is a motion to approve staff.

COMMISSIONER DEASON: Second.

CHAIRMAN JOHNSON: Motion and a second. Any further discussion? Seeing none, all those in favor signify by saying aye.

(Unanimous affirmative vote.)

CHAIRMAN JOHNSON: Opposed? Show it approved on a 5-to-0 vote.

Thank you for your participation and the comments.

MR. ADE: Thank you.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages number 1 through 27 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 9th day of December, 1998.

Jane Faurot

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