IN THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 160101-WS

APPLICATION FOR INCREASE IN WATER AND WASTEWATER RATES IN CHARLOTTE, HIGHLANDS, LAKE, LEE, MARION, ORANGE, PASCO, PINELLAS, POLK, AND SEMINOLE COUNTIES BY UTILITIES, INC. OF FLORIDA.
_____/

SEMINOLE COUNTY'S POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF

COMES NOW the Intervenor, Seminole County, Florida, a political subdivision of the State of Florida, (the "Intervenor" or "Seminole"), pursuant to Order No. PSC-17-0146-PCO-WS, Order No. PSC-17-0148-PHO-WS, and Section 28-106.215, F.A.C., by and through its undersigned counsel, hereby submits its Post-Hearing Statement of Positions and Post-Hearing Brief in the Utilities, Inc. of Florida ("UIF") rate case proceeding. A summary of the argument is appended to each issue and Seminole County has provided a comprehensive brief in support of its position after the Issues. Seminole's Proposed Findings of Fact and Conclusions of Law are attached.

Contested Issues and the Positions Taken by Seminole County

ISSUE 60: What, if any, limits should be imposed on subsidy values that could result if stand-alone rates are converted to a consolidated rate structure for the water and wastewater systems?

POSITION: *No subsidies should be permitted. Utility rates are justified when customer classes pay their respective cost of service incurred by the utility to deliver service. The practice of subsidizing the same customer class across operationally distinct utilities through a common rate is illegal and unfairly discriminatory by penalizing customers in low-cost utilities and unjustifiably benefitting customers in high cost utilities. There should be no consolidation of water rates based upon an averaging of costs.*

ARGUMENT: There is no evidence in the record to support any level of subsidy. Absent a rule to establish any subsidy level, the decision to authorize any subsidy must be based upon a preponderance of competent evidence advanced through an adversarial proceeding based upon reasonable parameters determined from cost of service studies. No party has put forward any testimony or evidence establishing a cost of service for any of UIF's utilities in this proceeding and no attempt has been made to evaluate the parity, variability or range of costs of service for groups of like-cost systems.

ISSUE 61: Which water systems, if any, should be consolidated into a single rate structure?

POSITION: *None. Each customer class within separate utilities should have its rates established based upon its utility's discrete cost of service. A consolidated single rate tariff across the same customer classes in distinctly separate and operationally independent utilities creates an illegal subsidy that is based upon an averaging of the costs of service and not the actual cost of service and is unfairly discriminatory to low-cost utility customers in contravention of Section 367.081(2)(a)l., Florida Statutes.*

ARGUMENT: There is no record support for consolidation of any water systems for the establishment of a common rate. See Argument in Issue 60 and as set out below in Seminole's brief.

ISSUE 62: What are the appropriate rate structures and rates for the water systems?

POSITION: *The existing rates should be adjusted on a pro rata basis to reflect that portion of the increase in revenue requirements approved by the Commission consistent with the "stand-alone rates" in Ms. Daniel's Exhibit 140. There should be no subsidy between utility systems. Current rates reflect the Commission's approval of rates based upon costs of service in UIF's previous rate cases.*

ARGUMENT: Water rates should be discrete to each water utility and not through a consolidated single tariff rate that creates a discriminatory cross-subsidy imposed upon a large number of low-cost service customers. The rates should be designed to recover the actual cost of service and provide an opportunity to earn a reasonable return, while at the same time encouraging conservation through inclining block rates to reduce demand and the volume of water sold. Subsidizing high-cost utility customers' rates sends inappropriate cost signals and is contra to encouraging conservation. Demand management is the cheapest form of extending existing capacity. Conservation is in the public interest. [Daniel, Vol. VI. Lines 7 – 17]. Further supporting argument is set out below.

ISSUE 64: Which wastewater systems, if any, should be consolidated into a single rate structure?

POSITION: *None. Each customer class within separate utilities should have its rates established based upon its utility's discrete cost of service. Consolidated single rate tariff across the same customer classes in distinctly separate and operationally independent utilities are illegally based upon an averaging of the costs that is inappropriate, unjust or unreasonable and is unfairly discriminatory in contravention of Section 367.081(2)(a)l., Florida Statutes.*

ARGUMENT: See Argument in **Issue 60** and set out below.

ISSUE 65: What are the appropriate rate structures and rates for the wastewater systems?

POSITION: *The existing rates should be adjusted to reflect a pro rata portion of the increased revenue requirements consistent with the "stand-alone rates" in Ms. Daniel's Exhibit 141. There should be no cross-subsidies.*

ARGUMENT: Wastewater rates are based upon water rates, and when consolidated into a single tariff, they exacerbate the discriminatory subsidy in the single tariff water rate. The cap on the quantity of wastewater billed should be based upon the realized volumes that each utility treats, and tariffed at a rate to cover the cost of service, and provide an opportunity to earn a reasonable return on investment used and useful in the provision of that service. There should be no averaging of costs across utility providers or cross-utility subsidies. Further supporting argument is set out below.

Supporting Argument

Overview – Rate Design

UIF Single Tariff Rate Structure:

The UIF justification in support of a single tariff rate structure is based upon three faulty suppositions:

- One – a single tariff rate structure will produce additional revenue for investment over that produced by discrete rates for each utility [Hoy, Vol. 1, p. 80. Lines 15 - 21;

- Two – a single tariff rate structure will decrease the number of rate cases the company will file [Hoy, Vol. 2 p. 189, lines, 7 – 11].

- Three – use of a single tariff rate structure will result in savings in corporate financing costs. [Guastella Vol. II, pp. 274 - 275, Lines 13 – 12]

All three propositions have no credible bases in fact, law or the record.

<u>One – No Additional Revenues Are Generated By Single Tariff Rate Structure</u>.

The first fallacy advocated by UIF to support the single tariff rate structure is that it somehow produces additional revenues for capital investment in the utility's facilities used to deliver service. Rate cases are generally divided into two functions. The majority of the time is spent on the first portion of the rate case; the determination of a revenue requirement based upon generally accepted accounting practices to:

> include, but not be limited to, debt interest; the requirements of the utility for working capital; maintenance, depreciation, tax, and operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in property used and useful in the public service. Section 367.081(2)(a)1., Fla. Stat.

Revenue requirements are determined prior to and are independent of the design of any rates established for the utility to recover the revenue increase authorized by the Commission. It is from the revenue requirements and not the rates that capital is authorized for additional investment in plant. Rates, whether stand-alone, cap band or single tariff, will produce exactly the same revenues if based upon reasonably consistent criteria relative to the demand and usage factors. [Daniel, Vol VI, p. 1072, lines 8 – 10].

UIF will realize precisely the same revenues through the new rates whether the stand-alone tariff endorsed by Seminole County or the single tariff rate recommended by the Company is adopted.

Q … If either rate structure is implemented by the Commission, if either one of them is, the rates would be designed, whether it's a stand-alone rate or a consolidated rate, if calculated correctly, should produce the exact same amount of money for the company; is that true?

A That's true.

[Daniel, Vol. VI, p. 1041, lines 2 – 8].

Two – Reduction In Number of Rate Cases.

The second faulty proposition is the unsupported contention that the single tariff rate structure will somehow reduce the number of rate cases the Company files. The frequency of rate cases is driven by macro-economic considerations and a rate case usually is filed when the rates are insufficient to produce the authorized rate of return. UIF will likely initiate a rate case for all utilities if there are significant changes in earnings caused by factors outside the control of the parent company and not by any operational cost factor in a single utility. This proceeding is the example of future rate cases the Commission could expect from UIF. It is unlikely that changes in a subsidiary utility's realized costs might cause a rate case to be initiated for that utility.

Costs of capital, be it equity or debt, drives the initiation of rate cases. Here, the parent company raises capital collectively for all its utilities. Most of the remaining costs are already averaged, indexed or subject to pass-thru provisions in the statutes and rules. See e.g.: Section 25-30.425, F.A.C. Administrative costs have been consolidated and applied uniformly since those costs are common to all utilities for all utilities within the UIF portfolio. Those costs for the most part are consolidated since they are generally unrelated to the discrete costs of the provision of service, customer demands or seasonality. [Daniel, Vol VI, p. 1020, lines 2 – 11].

> There are shared costs for administrative costs, administrative equipment, purchasing, financing, which is significant in this case. Accounting. Billing. They

> all share in those costs so that the individual system rates based on individual systems under a rate base rate of return are generating economies of scale that have benefited all of the systems under one corporate management.

[Guastella, Vol. II, p. 233, lines 2 – 9].

The Commission has the authority to annually index for major operating costs of the utility.

Section 367.081(4)(a), Fla. Stat. provides:

> (4)(a) On or before March 31 of each year, the commission by order shall establish a price increase or decrease index for major categories of operating costs incurred by utilities subject to its jurisdiction reflecting the percentage of increase or decrease in such costs from the most recent 12-month historical data available.

Factors that vary by utility, such as the costs of purchased power, purchased water or wastewater services, and taxes are direct pass-through for which the Commission has statutory authority to authorize without the need for a rate case. [Daniel, Vol. VI, pp. 1012 – 1014, lines 19 – 10]; Section 367.081(4)(b), Fla. Stat.

> (b) The approved rates of any utility shall be automatically increased or decreased without hearing, upon verified notice to the commission 45 days prior to its implementation of the increase or decrease that the utility's costs for any specified expense item have changed.
>
> > 1. The new rates authorized shall reflect, on an amortized or annual basis, as appropriate, the cost of or the amount of change in the cost of the specified expense item. The new rates, however, shall not reflect the costs of any specified expense item already included in a utility's rates.

Regardless of the rate structure employed, the frequency of rate cases will not change. They will occur when UIF undertakes to recover system-wide market-driven costs and not by discrete utility-driven costs of providing services.

Three – There Is No Record Evidence That the Single Tariff Rate Structure Will Produce Savings In Financing Costs.

Company witness Guastella testified that there were significant cost savings to the utility by having a unified rate in lieu of a stand-alone rate structure. Commissioner Polmann inquired of the witness whether he had any evidentiary support for that proposition; he responded:

> COMMISSIONER POLMANN: Okay. I think I've heard your testimony on that. On the issue of savings, and Mr. Bilenky made the point which I think you've responded to, that the idea of savings due to corporate financing and the notion that it's easier, perhaps cheaper, to generate capital based on the corporate financing, those things are already in place. Do you have -- and you've mentioned economies of scale. Do you have any information that is specific to the savings in this case that you're aware of that's in the docket? Is there evidence of those savings that has been presented? And I understand the concept. I'm just asking if you're aware of any evidence that's –
>
> THE WITNESS: No. My concept -- and I believe I testified to that. The cost of putting together this rate filing –
>
> COMMISSIONER POLMANN: Yes, sir. Yeah, I'm aware of that.
>
> THE WITNESS: Is much higher than it would otherwise be if this was single tariff pricing.
>
> COMMISSIONER POLMANN: Okay. I understand that. That is a concept. Are you aware of any evidence or numbers?
>
> THE WITNESS: No.

[Guastella Vol. II, pp. 274 - 275, Lines 13 – 12]

Further, when questioned by Commissioner Polmann about a reference Mr. Guastella made to rate stability being enhanced by a single tariff rate structure, the witness was unable to identify when that benefit might accrue. His only response was that: "Eventually it's going to happen sooner or later, eventually." [Guastella, Vol II, p. 276, lines 22 – 23]. That conclusion is speculative at best and is not competent evidence.

There is not a preponderance of competent evidence in the record to support any fiscal or operational benefits that would inure to UIF's benefit above those already being realized were the Commission to abandon the stand-alone rates.

Rate Setting – Cost of Service – Variability Across Utilities:

Clearly, to the extent practicable, UIF has applied those traceable and recoverable costs of service that are common to all utilities within its system in a uniform manner. The methodology for the allocations of cost is applied appropriately to reflect those costs that are not location-related, such as ad valorem taxes, or demand-related, such as customer type (e.g.: condominium, single family homes, high percentage seasonal housing or mobile home communities). System location and express demand-related costs are significantly different and distinct and must be charged to the customers of the discrete utilities specifically to avoid identifiable cross-subsidies to other utility customers in UIF's utilities in Florida.

In addition to taxes and express demand related factors such as seasonal variability, another significant and variable factor are the contributions made by the customers of those utilities in the form of Contributions In Aid of Construction ("CIAC"). [Daniel, Vol VI, pp. 1014 – 1016, lines 12 – 11]. These discrete costs are similar for both water and wastewater utilities and define significant variabilities between utilities. [Daniel, Vol VI, p. 1016 -1017, lines 2 – 9].

Two methodologies have been advocated and have record references for the establishment of rates in this proceeding, the single tariff rate structure advocated by the Company, and the stand-alone rate structure advocated by Seminole County. A third, the cap band methodology, had no active advocates in this hearing and there is an absence of competent evidence in the record to support its use. The Company's suggestion that a single tariff rate structure will produce addition revenue for investment over that produced by discrete rates, and

will provide savings in the Company's ability to raise capital is unsupported in the record and has been discredited.

Single Tariff Rate Structure:

The UIF has advocated and tendered testimony and associated exhibits seeking to support a request for a single tariff rate for all customers of the UIF irrespective of the currently approved rates for each of the water and wastewater utilities and their relative costs of service. The Company did not provide a cost of service study as part of its Minimum Filing Requirements. [MFL, Vol. 1, Schedule E-12, p. 102; Vol. II, p. 222, lines 9 – 14].

In *Southern States Utilities v. Florida Public Service Com'n.,* 714 So.2d 1046, 1052 (Fla. 1st DCA 1998), the Court emphasized that:

> Utilities should be prudent and efficient in their business operations.... The most efficient way to ensure accountability is to force a utility to look at these decisions *as they relate to the cost and benefits of the particular service area rather than on a total company basis* where the individual investment decisions often appear immaterial.

Company witness, Guastella advocated simply bundling all costs regardless of the utility that incurred them and allocating them on a uniform basis across all of UIF's utilities. That methodology fails to taken into consideration any of the discrete and extreme variability of the individual costs of service and demand characteristics in which the different utilities operated.

> **Q What you're doing is you're collecting all of the costs. You're taking the overall revenue requirement and dividing it uniformly and applying it at a common rate to all of the utilities?**
>
> A Correct.
>
> **Q And you're not recognizing the fact that some of the utilities have higher chemical costs or higher electrical costs because of where they're located?**
>
> A That's correct.

[Guastella, Vol. II, p. 258, lines 10 – 18].

That methodology may define uniform rates, but it does so by increasing the costs recovered from customers in low-cost utilities and provides a subsidy that decreases the relative revenues recovered from customers in high-cost utilities. That is an illegal subsidizing of costs. The Court in the *Southern States Utilities* case clearly stated that "[t]he most efficient way to ensure accountability is to force a utility to look at these decisions *as they relate to the cost and benefits of the particular service area rather than on a total company basis." Supra.*

For Seminole County and Sanlando Utilities' customers using the average cost system advocated by Company witness Guastella, the subsidy would be 144% on an average wastewater bill. [Daniel, Vol. VI, p. 1048, lines 3 – 7; Exhibit: 295] Based upon the information in the record and the calculation of staff witness Daniel, the impact of a 144% subsidy to customers of Sanlando Utilities is excessive. When that percentage is applied to the actual average bills based upon actual consumption, Sanlando customers would realize an increase in their actual bill from $26.53 to $64.75 (144.1%); in contrast, Sandalhaven customers will see a 53.8% decrease in their bills from $76.42 to $35.29. [Exhibit 295]

Currently, Sanlando customers pay in the aggregate for wastewater service on an annual basis of $4,079,000. [Daniel, Vol. VI, pp. 1041 & 1042, lines 21 – 22]. Witness Daniel calculated that applying the percentage increase that Sanlando would realize under the Company's single tariff rate would result in a subsidy of $6.0 million over the $4.0 million dollars it annually collects from its customers. [Daniel, Vol. VI, p 1044, lines 13 – 20] For that $6.0 million subsidy, customers receive nothing but a promise[1]. Company witness Hoy stated

[1] The Company indicated that the subsidy dollars provided by Sanlando customers would be returned to the system as upgrades. It provided no plans or written commitments to support that "promise" and he asked the customers simply "to trust us." [Hoy, Vol. II, p. 180, lines 5 – 12]

that these subsidy dollars would be used "to cover the capital expenditures that are required for the future (and Sanlando) will get that benefit." [Hoy, Vol. II, p. 180, lines 1 – 3] What those subsidy dollars are actually spent on are a portion of the costs incurred for the provision of service in high-cost utilities. Those subsidy dollars are no different from the same amount of revenue collected under a stand-alone rate, except that under the stand-alone rates, each utility would recover its costs of service with no subsidy.

The Company is simply trying to justify subsidizing the revenues of higher cost utilities by Sanlando customers so that rates for high-cost utilities in its system can be reduced through the single tariff rate. The subsidy from Sanlando alone would allow UIF to recover its entire rate base of $23 million for the Sanlando utility[2] and generate enough unjustified revenues to effectively replace the entire investments it currently books for its utility system in less than 4 years. [Daniel Vol VI, p. 1045, lines 13 - 20] There are no additional revenues for investment over that produced by stand-alone rates for each utility as advocated by UIF. [Hoy, Vol. 1, p. 80. Lines 15 – 21]. That argument was completely discredited by witness Daniel who testified that regardless of the rate structure employed, the Company would recover the same revenues. [Daniel, Vol VI, p. 1072, lines 8 – 10].

The UIF witness, Mr. Guastella, advocated a simplistic method of designing rates that ignored the different costs of service for each of the utilities owned by UIF and proposed a general averaging of all costs over all utilities. [Guastella Vol. II, p. 222, lines 9 – 13]. He acknowledged that what he did was not a cost of service study.

> Well, *this really isn't even a cost-of-service study*, per se, where I allocate costs among different classes of customers. I'm accepting the rate structures that the Commission now has for base facility charges, usage rates, bulk service, flat rate service. All of that I'm not changing. *I'm just recommending that the consolidated*

[2] [Daniel Vol VI, p. 1044, lines 21 – 25]

> *single tariff pricing is to take the entire revenue requirement and apply the same rates for the same service.*

[Guastella, Vol 2, p. 262, lines 11 – 19].

The statute is clear and requires that:

> The commission shall, either upon request or upon its own motion, fix rates which are just, reasonable, compensatory, and not unfairly discriminatory. In every such proceeding, the commission shall consider the value and quality of the service and the cost of providing the service … Section 367.081(2)(a)1, Fla. Stat.

The Company's single tariff rate does not in any manner relate to a cost of service study as evidenced by its own witness's testimony and does not meet the mandatory requirement in the statute.

Nor does the Company's witness consider the correct statutory test for the rates he is proposing. It is not an inadvertent error but a consistent reliance upon an improper standard. Mr. Guastella represented in his pre-filed testimony [Vol. II, pp. 223, lines 4, 8; 224, line 15] and throughout his direct testimony[3] that the appropriate test for establishing rates is whether they were "unduly discriminatory." Unlike the term "unfairly discriminatory" which the legislature established as the test for the acceptability of rate structures, "unduly discriminatory" (an undefined term in Section 367.081, Fla. Stat.) would apparently allow for subsidizing and discriminatory rates so long as they are not "unwarranted, excessive, and greater than is reasonable or necessary" if Mr. Guastella were credible.[4] The Company is advocating a single tariff rate structure that results in nearly a two hundred percent subsidy[5] for Sanlando's

[3] The record citations to the error are too numerous (twelve (12) references) for repetition but occur throughout his testimony.

[4] https://en.oxforddictionaries.com/definition/unduly; "to an unwarranted degree; inordinately; http://www.macmillandictionary.com/us/dictionary/american/unduly; "to a greater degree than is reasonable or necessary; https://www.merriam-webster.com/dictionary/unduly; "excessive."

[5] Sanlando has a +144.1% overpayment and Sandalhaven receives a – 53.8% under-payment for a net difference of 197.9% subsidy difference. Exhibit 295.

customers. That subsidy cannot be justified even using Mr. Guastella's own standard of not being "unduly discriminatory."

Mr. Guastella stubbornly refuses to even recognize that the single tariff rate structure created a subsidy by averaging the costs of service that makes low-cost system customers pay part of the high-cost system customers' costs of receiving service.

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

[Vol. II, pp. 253 – 254 lines 19 – 1].

Staff witness Daniel defined "subsidy" for this proceeding:

> It's a difference -- there's a difference in the amount a customer would pay with respect to a stand-alone rate versus a consolidated rate. That's the consideration I was using when I referred to the word "subsidy."

[Vol. VI, p. 1029, lines 15 – 19]

A one-hundred ninety-seven point nine percent shift in revenues from the Sanlando Utilities to the Sandalhaven Utilities[6] represents the largest single subsidy advocated by the Company and identified by the staff. A subsidy of that magnitude alone establishes conclusively that the Guastella single tariff rate structure is "unduly discriminatory" or to use the correct standard "unfairly discriminatory".

The Commission should reject using the single tariff rate structure.

[6] Staff Witness Daniel used the same methodology to calculate the range of subsidies: [Vol. VI, p. 1030, lines 2 – 6.]

Cap Band Rates:

The Commission has a great deal of discretion in setting certain parameters in a rate case, but the courts have recognized that discretion is not absolute nor does it apply to every element of a rate case.

> For the most part, the Legislature has committed used and useful calculations to the expertise and discretion of the PSC. Nothing we have said above should be understood otherwise. It is not for a reviewing court to dictate methodology or other policy within the PSC's "statutorily delimited sphere." *Florida Dep't of Ins. v. Bankers Ins. Co.,* 694 So.2d 70, 71 (Fla. 1st DCA 1997). As regards used and useful calculations, our concern thus far has been only that the PSC comply with the procedural requirements of the Administrative Procedure Act, chapter 120, Florida Statutes (1997), in making changes in policies governing these calculations. The PSC is, after all, subject to the Act.

Southern States Utilities v. Florida Public Service Com'n., supra at 1057.

In this proceeding, the record contains no testimony or exhibits demonstrating a methodology or recommendation for any grouping of like-cost utilities for the implementation of a cap band rate structure methodology. It is true that the Supreme Court of Florida has recognized that rate setting is a legislative function and the Court has limited authority to overturn decisions of the Commission within its statutory authority. Nonetheless, Commission decisions must be predicated upon record evidence before it.

> Ultimately, the Commission's actions are conditioned by statute (rates set must be fair, just, and reasonable) and its actions are subject to judicial review—the Commission cannot simply accept any settlement agreement devoid of record support as in the public interest. [Citations omitted and Emphasis supplied.]

Citizens of State v. Florida Public Service Com'n, 146 So.3d 1143, 1153 (Fla. 2014)

> Since the Commission's ruling on this issue is based on assumed facts that are not supported by competent, substantial evidence in the record, it must be reversed.

Marco Island Utilities, a Div. of Deltona Utilities, Inc. v. Fla. PSC, 566 So.2d 1325, 1330 (Fla. 1st DCA 1990).

The requirement in the "Administrative Procedure Act" for due process in an administrative proceeding is found in Section 120.57(1)(b), Fla. Stat. where in it states:

> 120.57 Additional procedures for particular cases.—
>
> (1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—
>
> …
>
> (b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative.

To set cap band rates absent an administrative rule, the Commission has to articulate in the record the criteria for the consolidation of utility customers into groups for the application of uniform rate structure across utility customers in each utility where it intended to apply the incipient policy. That was not done in this case. Absent a demonstration by a preponderance of the evidence that a cap band recommendation may be adopted by the Commission, application of rates for water or wastewater based upon a cap band methodology would be arbitrary and capricious and would violate Section 367.081(2)(a)1., Fla. Stat. Competent evidence must be established in the record to support the exercise of the Commission authority to establish rates:

> There was no question of either qualification or credibility per se of the expert witnesses. Rather, an analysis of the methods by, and the basis upon, which the experts had reached their respective opinions, was required to be made, a matter particularly within the range of the agency's putative expertise and specialized experience.
>
> The final order in this case, in accordance with the requirement explicated in *McDonald, supra,* sets forth in detail the agency's rationale for substituting its findings for those of the hearing officer, addressing and answering the countervailing views of the hearing officer's recommended findings. *The agency's substituted findings being supported by competent substantial evidence measured by McDonald standards, the agency's order is entitled to be and is, affirmed.*

Utilities, Inc., of Florida v. Florida Public Service Com'n, 420 So.2d 331, 333 (Fla. 1st DCA 1982).

In addition, the Commission has not advanced a policy for the application of the cap band methodology through rule making or the adoption of the criteria through incipient policy indicating the proximity or the breadth of the range of the costs of service for applicable grouping by their respective costs of service within this proceeding. While the Commission has, in previous rate cases, used cap bands methodologies,[7] there is no testimony in this case setting forth how that mechanism would be accomplished in this matter. In *Anheuser-Busch, Inc. v. Dept. of Business Regulation*, 393 So.2d 1177, 1183 (Fla. 1st DCA 1981), the Court described how non-rule policy has to be treated if the agency intends to rely upon developing policy that it has considered in earlier proceedings:

> Our decision here was foretold by McDonald:
>
> > 2. Sections 120.52(14) and .54 require that agency policy statements of general applicability be adopted as rules and Section 120.57 requires proof of incipient agency policy not expressed in rules and subjects it to countervailing evidence and argument.
> >
> > To the extent the agency may intend in its final order to rely on or refer to emerging policy not recorded in rules or discoverable precedents, Section 120.53(2), that policy must be established and may be challenged by proof. (Citations omitted)

The one judicial challenge to the cap band methodology is cited in the record as authority for its utilization of the rate design. In *Southern States Utilities v. Florida Public Service Com'n, supra.,* the Court examined the use of the cap band rate structure and concluded that:

[7] Witness Daniel cites to three Commission dockets as "authority" for the Commission's approval of a cap band methodology when in fact, those dockets do not evidence authority but represent the unchallenged development of incipient policy. [Daniel p. 1047, lines 10 – 19]. "Authority" is confirmed by a challenge and concurrence of a reviewing court and then the Commission is required to heed the Court's reservations resulting from that proceeding.

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

Id. at 1052 – 1053.

The Court went on to justify the seven or lower percent subsidy above the stand-alone rate on the basis that the difference was adjusted above a pure cost of service allocation based upon two factors:

> Nor is a pure cost of service basis as to each individual ratepayer mandated by a statute which directs that "the commission shall consider the value and quality of service and the cost of providing service."
> …
> A shift in the direction of "affordability" takes the value of service into account.

Id. at 1053.

Witness Daniel stated in her testimony that "value of service" was an appropriate consideration when the staff looks at the "quality of service"; [Daniel, Vol. VI, p. 1008 – 1009, lines 24 – 1] and, she clarified her testimony to say:

> So that as the revenue requirement is developed, you're considering the cost and the value of the service. When it comes to rate design, that's more of a cost allocation technique.

As for the criterion of "affordability" she stated that: "It is not typically applied in rate setting." [***Id.*** at p. 1009, line 15.]

The factors used as justification in the *Southern States Utilities* case cannot be relied upon here because the testimony indicates their use is not justified in this case. Here the evidence needed to be tendered as to the incipient policy the Commission intends to use to set cap band rates. That could have been done through a witness either for a party litigant or the

staff to demonstrate the criteria the Commission intended to employ in setting a cap band rate structure and for the grouping of utilities that may have been consolidated into a band. The demonstration would necessarily include a demonstration that whatever divergence from the straight cost of service methodology was used, the resulting subsidy was justified by articulated other rate setting factors. Setting such policy cannot be done in a vacuum without the parties' participation.

> We recognize that the Commission is an administrative agency created by the legislature, and as such "the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." *City of Cape Coral v. GAC Utilities, Inc. of Florida,* 281 So.2d 493, 496 (Fla. 1973). In carrying out its express or implied powers and duties, an administrative agency "may implement rules through incipient rule-making, e.g., ***through a case-by-case adjudicatory process***." *Florida Power Corporation v. State of Florida, et al.,* 513 So.2d 1341 (Fla. 1st DCA 1987). *See also Florida Cities Water Co. v. Florida Public Service Commission,* 384 So.2d 1280 (Fla. 1980); *Anheuser-Busch, Inc. v. Department of Business Regulation,* 393 So.2d 1177 (Fla. 1st DCA 1981); *McDonald v. Department of Banking and Finance,* 346 So.2d 569 (Fla. 1st DCA 1977), *cert. denied,* 368 So.2d 1370 (Fla. 1979).

Rolling Oaks Utilities, Inc. v. Florida Public Service Com'n, 533 So.2d 770, 773-4 (Fla. 1st DCA 1988).

The Commission provided no notice what it intended to do with regard to implementing a cap band rate structure. It provided no "adjudicatory process" where the parties had been offered an opportunity to advocate or support a cap band approach or were provided an opportunity to present evidence and witnesses, and to challenge consideration of the application of any incipient policy recommendation advocated by the Commission concerning a cap band rate structure. While Commission staff did discuss the possibility of grouping some utilities on the basis of common costs and having some utilities retain a stand-alone rate structure, [Daniel, Vol VI, p. 1074] at no point did the Commission quantify or identify any criteria or methodology for carrying out those allocations. It is for the Commission to set out its intended incipient policy

through sponsorship by a Commission witness(es) and allow for the parties to react to those considerations. It is not for the parties to try to anticipate what the Commission might do from its past practices if the Commission does not put forth notice and evidence supporting what it intends to consider.

The general comments incident to the staff's testimony are not what could be considered an "adjudicatory process" with notice and an opportunity to test the criteria and application of the incipient policy. The Court in *Florida Power Corporation v. State of Florida, et al., supra* at p. 1343, stated:

> We therefore follow those opinions recognizing that the non-rule policy of an agency *will not be invalidated if it is clearly explicated in an adjudicative setting and is supported by a record foundation*. Citing to: *Barker v. Board of Medical Examiners, Department of Professional Regulation,* 428 So.2d 720 (Fla. 1st DCA 1983). [Emphasis supplied].

In fact, when asked if she was providing testimony on the cap band methodology, Ms. Daniel testified:

> **Q Okay. Have you looked at the rates from a perspective of whether there is any grouping of uniform costs that you can reasonably make for this utility system?**
>
> A I did not do that analysis, no.

[Daniel, Vol. VI, p. 1049, lines 15 – 19].

Therefore, in this proceeding, the Commission has no record support to adopt any form of cap band rate structure.

Stand-Alone Tariff:

Only stand-alone rates are defensible in that they are based upon rate structures that were established in previous rate cases and are simply incrementally increased to reflect the additional revenue requirement authorized in this proceeding. Admittedly, some adjustments would be

necessary to address changes that have occurred since the last rate proceeding. Those adjustments have been identified through the first portion of the rate case where the revenue requirement was generated. Using the resulting stand-alone rates would accurately produce the same revenues requested and meet the statutory test.

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

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

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

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

[*Supra* at p. 1052 – 1053].

The only rate structure supported by competent, credible evidence is the stand-alone rates recognizing the appropriate adjustments recognized in the revenue requirement determination. [Daniel, Vol. VI, pp. 1026 – 1027, lines 12 – 1].

Recommendation

Only two rate structures were discussed in the record of this proceeding; the discredited single tariff rate structure and the stand-alone structure. No competent evidence was presented in the record to apply a cap band approach to rate setting. The stand-alone rate structure is the only rate structure that utilizes an approved cost of service basis for the recovery of the company's costs. The stand-alone methodology is supported by the only competent evidence in the record and should therefore be adopted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 20th day of June, 2017, that a true and correct copy of the foregoing has been served by electronic mail upon the following:

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