

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of:

DOCKET NO. 20180141-WS

PROPOSED ADOPTION OF RULE  
25-30.4575, F.A.C.,  
OPERATING RATIO  
METHODOLOGY.

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PROCEEDINGS: COMMISSION CONFERENCE AGENDA  
ITEM NO. 2

COMMISSIONERS  
PARTICIPATING: CHAIRMAN ART GRAHAM  
COMMISSIONER JULIE I. BROWN  
COMMISSIONER DONALD J. POLMANN  
COMMISSIONER GARY F. CLARK  
COMMISSIONER ANDREW G. FAY

DATE: Tuesday, December 11, 2018

PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: ANDREA KOMARIDIS  
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the State of Florida at Large

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1 P R O C E E D I N G S

2 CHAIRMAN GRAHAM: As I said before, 15, 16,  
3 17, 18, we had pulled off move staff.

4 So, let's circle back around to the top of our  
5 agenda, Item No. 2. And just to let everybody  
6 know, we are going to have IA immediately following  
7 this agenda here in this room, about ten minutes  
8 after. And then we'll have the hearing immediately  
9 after IA.

10 MS. HARPER: Good morning, Commissioners. I'm  
11 Adria Harper with the general counsel's office.

12 In Item No. 2, staff is recommending that the  
13 Commission propose the adoption of a new rule,  
14 Rule 25-30.4575, for the operating ratio  
15 methodology.

16 This rule is for those water and wastewater  
17 utilities that have a rate base that is small or  
18 negative and the operating ratio methodology can be  
19 used to determine the revenue requirement in a  
20 staff-assisted rate case.

21 The operating ratio methodology is an  
22 alternative to the traditional calculation of  
23 revenue requirement and substitutes the utility's  
24 operation and maintenance expenses for rate base in  
25 calculating the amount of return.

1           The proposed rule is summarized as follows.  
2           Subsection 1 provides that, in determining the  
3           revenue requirement, staff will apply a margin of  
4           12 percent of the utility's operation and  
5           maintenance expenses. Subsection 1 also provides  
6           the 15,000 margin cap.

7           Subsection 2 provides operating ratio  
8           methodology may only be used for those utilities  
9           whose rate base is no greater than 125 percent of  
10          the operation and maintenance expenses. And  
11          Subsection 2 also provides that the methodology may  
12          only be used for utilities that continue to qualify  
13          for a staff-assisted rate base -- or rate case,  
14          excuse me.

15          At the last agenda, OPC asked the Commission  
16          to defer the item so that OPC and staff could  
17          further discuss the potential compromise on rule  
18          language. The Commission deferred the item, and  
19          staff held an informal meeting on the rule with OPC  
20          and other stakeholders. The rule staff is  
21          recommending includes changes discussed with OPC  
22          and the other stakeholders at the informal meeting.

23          Staff believes the rules recommended will  
24          accomplish the goal, providing the financially-  
25          distressed utilities with a lifeline to stay in

1 business, to be able to provide safe and reliable  
2 water and wastewater service to customers, and will  
3 allow the troubled systems to become financially  
4 viable so they can, again, return to a traditional  
5 revenue-requirement calculation.

6 Staff is available for any questions.

7 CHAIRMAN GRAHAM: Well, staff, I have to tell  
8 you, in my eight and a half years, this is the  
9 first time I've seen 11 or 12 staff members sign  
10 off on a recommendation.

11 (Laughter.)

12 CHAIRMAN GRAHAM: Mr. Rehwinkel.

13 MR. REHWINKEL: Charles Rehwinkel, Deputy  
14 Public Counsel.

15 I'm only here to do three things: To thank  
16 you for the opportunity to sit down with staff and  
17 the other parties; to address our concerns; and to  
18 thank the staff for sitting down and -- and doing  
19 what they said, address our concerns and -- and put  
20 it in a recommendation. And I'm just here to  
21 support the rule.

22 We think it is a reasonable compromise. It --  
23 it modernizes a rule that's been -- a policy that's  
24 been around for 21 years. And we thank the  
25 Commission for undertaking this rulemaking at our

1 request.

2 Thank you very much.

3 CHAIRMAN GRAHAM: Thank you.

4 Commissioner Brown.

5 COMMISSIONER BROWN: Thank you.

6 And staff, I do think it is appropriate to  
7 codify our long-standing practice and policy here;  
8 although, I don't think developing a rule is  
9 necessarily -- should be based on compromise. It  
10 should be based on good practice and sensible,  
11 sound policy.

12 Can you kind of walk us through -- or walk me  
13 through here how you got to the language  
14 specifically putting a cap? The original language  
15 that was proposed by staff gave the Commission more  
16 flexibility in helping the viability of these  
17 distressed utilities in this alternative rate-  
18 making -- rate-setting procedure. And I felt  
19 comfortable with that, your original proposal,  
20 because we don't know what is to come in the  
21 future.

22 Can you walk us through how you came to agree  
23 with -- on a cap?

24 MS. HARPER: The cap was a -- the -- the  
25 biggest concern to OPC. It's something that we

1 looked at with -- at the meeting and -- or  
2 discussed at the meeting, the informal meeting.  
3 And it's something that we ran numbers on, and  
4 looked at how many --

5 COMMISSIONER BROWN: Ran numbers on  
6 existing --

7 MS. HARPER: Yes.

8 COMMISSIONER BROWN: -- companies.

9 MS. HARPER: And -- and the companies, yes,  
10 that we're looking at now, existing companies, like  
11 those that are in the chart that are attached to  
12 the recommendation.

13 As far as the implication of the cap  
14 numerically on these companies, Cissy could  
15 probably give more detail on that.

16 MS. GALLOWAY: Commissioner, OPC expressed  
17 concern that -- with our having no cap, that there  
18 would be unintended consequences --

19 COMMISSIONER BROWN: Such as?

20 MS. GALLOWAY: I don't know exactly what they  
21 were concerned about, possibly over-earnings. And  
22 I'll let OPC express what their thoughts were about  
23 unintended consequences.

24 We -- we believed that, with the \$300,000  
25 revenue qualification for a SARC, that there was an

1 implicit cap; however, I think OPC had very strong  
2 concerns about there being no cap and, in the  
3 spirit of compromise, we felt like a \$15,000 cap  
4 would be acceptable.

5 COMMISSIONER BROWN: And -- and again,  
6 I just -- and just a -- a sentiment here.  
7 Obviously, big proponent of compromise and  
8 settlement, but not when we're in a rulemaking  
9 posture. And we have to do this -- what's best for  
10 the State of Florida and for these distressed  
11 utilities as well.

12 So, I would be curious to hear what the  
13 unintended consequences are.

14 MR. REHWINKEL: Well, first of all, let me  
15 preface this by saying that the fundamental concern  
16 of the Public Counsel has about this is that this  
17 award, if you will, of an operating margin is not  
18 based on cost. And the State of Florida is a cost-  
19 based rate-making state.

20 So, what you have developed over the last 21  
21 years is a policy that balances the viability of  
22 certain marginal utilities with the award of  
23 customer monies based on something that is not  
24 based on cost. So, there's a bit of an art to what  
25 goes on here in the first place.

1           So, our concern is that, since the operating  
2           margin is a percentage of O & M, and that there are  
3           certain utilities that have affiliated interests,  
4           they might have excessive family membership on the  
5           board and the officer board, that there is an  
6           incentive, if there's not a cap in there, to  
7           overstate O & M and put pressure on your staff to  
8           go and ferret out improper O & M costs. And if  
9           they don't do that, you award this bonus of  
10          operating margin based on an improper base of  
11          O & M.

12           So, I -- I understand about the compromise  
13          concern, but this is, by its nature, a policy that  
14          is borne of -- of compromise and balance in the  
15          first place. So, we strongly supported the --  
16          the -- moving up the cap from 10,000 to 15,000.  
17          That's a 50-percent increase in -- in -- in an  
18          award that's not based on cost.

19           So, that was our No. 1 concern, is that it  
20          would create a potential for -- for some utilities  
21          to overstate their O & M costs.

22           COMMISSIONER BROWN: Mr. Chair- -- would you  
23          like to respond to any of the points that were just  
24          raised?

25           MS. HARPER: I -- I recall that concern being,

1           you know, raised in the meeting. There were also  
2           representatives of the utilities at the meeting as  
3           well. They, obviously, did not feel like that was  
4           a legitimate concern.

5           COMMISSIONER BROWN: And you looked at other  
6           states as well that are cost-based regulation and  
7           that also have this alternative rate-making  
8           abilities.

9           MS. HARPER: We did. We did. And we tried to  
10          balance the interest of both sides and find  
11          something that was workable and still more modern  
12          and usable for us than what we were using for the  
13          last 21 years.

14          MS. GALLOWAY: Commissioner, I would just like  
15          to point out that, of the 23 operating-ratio  
16          dockets that were approved by the Commission, I  
17          think there were only three where the cap was  
18          actually implemented, if that gives you any comfort  
19          level.

20          It's -- it's not something that we apply all  
21          the time out -- we don't need to apply it all the  
22          time. So, it's good to have it, if we needed it,  
23          but it's also not used very often.

24          COMMISSIONER BROWN: Thank you. And -- and  
25          like you point out in our recommendation, Florida

1 is in a unique situation on our regulation of water  
2 and wastewater. Companies and other states are  
3 looking at how we handle this particular rule.

4 MS. HARPER: Yes, and -- and to your point,  
5 Commissioner, when we had the last version of the  
6 rule, we looked at a cap and we didn't put one in  
7 because we felt like, if there were over-earnings,  
8 we would catch that in the over- -- in the annual  
9 reports.

10 COMMISSIONER BROWN: I -- you know what,  
11 Commissioners, I just -- I -- I fret, I worry that  
12 we're going to be in a position where we have an  
13 exceedingly-distressed utility that has been hit by  
14 hurricanes, for example, or some other major  
15 infrastructure problem that needs -- that puts them  
16 in a -- a poor situation where we don't have the  
17 flexibility. Once we codify the rule, we have a  
18 cap, and we will be limited to what the rule  
19 provides us.

20 And so, I -- I see circumstances where you  
21 have a failing utility that will go under and this  
22 rule will prevent us from doing as much as we --  
23 give us the latitude to do what we need to do in  
24 extraordinary circumstances.

25 MR. REHWINKEL: Mr. Chairman?

1           CHAIRMAN GRAHAM:   Sure.

2           MR. REHWINKEL:   Can I -- one of the things  
3           that I think is important to keep in mind is that,  
4           if you have a utility that comes in for a staff-  
5           assisted rate case, they have circumstances that  
6           cry out for attention.  Your staff and this  
7           Commission give them all of the -- the revenue  
8           requirement that they demonstrate based on O & M  
9           costs and -- and any other cost.

10                  This operating margin is really there, sort  
11                  of, because they don't have a rate base to earn on.  
12                  So, it is something that is to give them some  
13                  cushion.

14                  And, so, I don't think the concern -- and --  
15                  and over the 21 years, you don't have a situation  
16                  where you've had a -- a tragic failure.  This  
17                  rule -- this policy has worked.  And all we're  
18                  doing is making it just a little bit better without  
19                  giving the customers' money away without any  
20                  restraints because this is not a cost-based award.

21                  So, I don't think that there's a -- I don't  
22                  think there's a risk, based on the 21 years of  
23                  experience that you have, that -- that cries out  
24                  for something extravagant.

25                  I mean, we came here and agreed -- all we want

1 to do in the first place is just take the policy  
2 and put it in rule, but your staff convinced us  
3 that you needed to modernize it. And we've done  
4 that with this -- with this proposal here.

5 And -- and again, we did this in the spirit of  
6 avoiding a long litigation process that I think  
7 would -- would take another year. And I -- you  
8 know, I -- I fully believe that, if you've got  
9 examples where people are under-earning, those  
10 people come in, they get a rate -- they get their  
11 earnings -- if they have a legitimate loss, they  
12 get that covered, and then they get a little bit of  
13 cushion, which is the operating margin. That's  
14 what that's for. It's not really to address past  
15 problems.

16 CHAIRMAN GRAHAM: Staff, assuming there is  
17 some extraordinary circumstance -- God, I hate that  
18 word -- there is some extraordinary circumstance  
19 and you need to circumvent, waive -- what's the  
20 legal mechanism of dealing with the rule if we need  
21 to exceed that cap? How do you do that, if -- if  
22 at all possible?

23 MS. HARPER: Well, as Commissioner Brown  
24 stated, the -- once -- if the rule is in effect,  
25 then the rule is in effect. We can't waive it.

1           So, we'd have to in- -- do rulemaking again to  
2           change the rule to reflect what we think is a  
3           better version of --

4           MR. HETRICK: Commissioner --

5           MS. HARPER: -- the rule.

6           MR. HETRICK: Yeah, if I could add, there's  
7           always the opportunity in a particular case, under  
8           Chapter 122, where a utility could propose some  
9           sort of hardship, and we could waive the  
10          application in that particular instance.

11          Let me just talk for a second, maybe,  
12          hopefully, not out of bounds here, but the  
13          operating ratio adjustment, the \$15,000 that was in  
14          there -- or that's in there now, we -- we didn't  
15          have a cap in there at all, initially.

16          Originally, by case law or by Commission  
17          order, we start out with a \$10,000 cap. And that's  
18          been the practice. We felt that was too low. I  
19          think when we went into this rule negotiation -- or  
20          not negotiation, but this dialogue with OPC, and --  
21          and Andrew and I -- and we all discussed, we didn't  
22          want to compromise our principles. The operating  
23          ratio adjustment, as I understand it, will rarely  
24          exceed \$15,000.

25          We felt like the cap that we put in here of

1           \$15,000 was high enough. But yes, there may be a  
2           rare case or circumstance where the adjustment  
3           could slightly exceed \$15,000. It could be 16,  
4           \$17,000.

5           I think, from a technical side, based on  
6           Commission experience, we haven't seen that much.  
7           I don't know if we've seen it any. It could  
8           happen. I think Commissioner Brown raises a valid  
9           point about ultimate flexibility in terms of  
10          whether or not there should be a cap.

11          If there's no cap, you're still -- the way we  
12          start out with this -- if there's no cap, if  
13          there's no \$15,000 cap, we still think that it's  
14          rarely going to exceed 15,000, but you do -- would  
15          have, with no cap, the opportunity to approve an  
16          adjustment that may necessitate or -- or, by  
17          circumstances and facts in the case, it could be a  
18          16,000. So, you would have a little more  
19          flexibility. There's no question about that.

20          But the 15,000 cap that we put in, we didn't  
21          feel like we were compromising significantly on our  
22          principles because -- in terms of our intended use  
23          of this rule to capture those distressed utilities  
24          because we felt that 15,000 would capture most  
25          circumstances.

1           So, I think the solution is either to  
2           eliminate that sentence or bump it up to 16 or  
3           17,000 or leave it at 15,000, and then we can  
4           always, in a particular circumstance, waive that  
5           rule, based upon a hardship, if -- if that's the  
6           direction we want to go.

7           CHAIRMAN GRAHAM: So, the -- the 15,000 cap --  
8           it's there and it exists, but it's not an absolute,  
9           if, for some reason, something unforeseen, we can  
10          actually --

11          MR. HETRICK: Well, let me be clear on that:  
12          It is in the rule. So, under Chapter 120, in  
13          another portion of the rule, they would have to  
14          present some sort of particular hardship that they  
15          would have to -- and demonstrate by case law  
16          that -- to overcome the application. They --  
17          they'd have to seek a rule waiver. We've had those  
18          come before the Commission before. So, they'd have  
19          to -- a particular company.

20          And I see Commissioner Brown over there --  
21          that's a whole different procedure with different  
22          requirements of law. It is an option, but it's not  
23          automatic.

24          CHAIRMAN GRAHAM: Well, that's fine. I don't  
25          have a problem with it making -- making it a little

1 bit more difficult if you want to go beyond, you  
2 know, what -- seems like everybody right now seems  
3 comfortable.

4 Commissioner Polmann followed by Commissioner  
5 Fay.

6 COMMISSIONER POLMANN: Thank you,  
7 Mr. Chairman.

8 I -- I agree with Commissioner Brown's  
9 concern, essentially, in all regards. You know, I  
10 think the real issue here is -- is on the margin  
11 percentage. And I don't want to get into an -- you  
12 know, an argument back and forth here on -- on the  
13 words.

14 You know, I listened and I -- and I believe I  
15 understand Mr. Rehwinkel's comments and I -- I  
16 think I understand our -- say, our duty differently  
17 than the way you've stated it, our charge with  
18 regard to rate-making being cost-based and -- and  
19 operating ratio method being not cost-based because  
20 I see operating ratios as having a cost base with  
21 the operating costs. I'm not -- I don't understand  
22 how it's not based on costs.

23 You know, the cost base that you're referring  
24 to, as I see it, is, you know, based on the  
25 investment of the -- of the IOUs. You know, it's

1 an equity issue.

2 If we're using operating ratio method, we're  
3 talking about costs plus a margin. There are costs  
4 in this equation. And you can -- you can disagree  
5 with this, but costs come in here. We're not just  
6 making up numbers and suggesting that it becomes  
7 arbitrary in some regard. That they're going to  
8 pad their costs and -- and it makes our job harder,  
9 to me, concerns me.

10 Having a cap or not having a cap, to me, is  
11 not a big issue. It's -- it's the operating  
12 margin -- the operating expense plus a margin of  
13 12 percent, 15 percent, 10 percent. I -- I think  
14 it's worth arguing about.

15 Having a cap or not a cap, I don't think, is a  
16 big issue. And putting a number in here of a cap  
17 in the rule does put a particular constraint --  
18 I -- I've spent a great deal of time in my career  
19 in rulemaking. And -- and I agree with -- with  
20 what Counsel is -- is indicating. Once it's in a  
21 rule, it's in a rule, and it creates a great deal  
22 of -- of difficulty going forward. I'm very  
23 concerned about that.

24 Now, we can go on and on. I don't think this  
25 is the appropriate venue here and now to -- to

1 continue this discussion. Mr. Chairman, if we're  
2 not prepared here to have a straightforward  
3 approval of this, I -- I would recommend we defer  
4 this.

5 CHAIRMAN GRAHAM: Commissioner Polmann, I --  
6 let me give this a little bit more effort before we  
7 pull the trigger on deferral.

8 COMMISSIONER POLMANN: No, I understand.  
9 That's just my position right now.

10 CHAIRMAN GRAHAM: Okay. Mr. Rehwinkel.

11 MR. REHWINKEL: Mr. Chairman and  
12 Commissioners, let me be clear, what I -- our  
13 position about what's not cost-based is the margin,  
14 itself; not the base, but the margin.

15 These utilities do not have an investment.  
16 And that's why this operating margin is -- is  
17 given. It is not based on a cost that they have.  
18 A cost is -- is an expenditure that you have put  
19 out that you're asking for reimbursement for.

20 It is a liability of the company, whether it's  
21 debt or equity that's owed to the shareholders --  
22 these people have none of that, so they don't have  
23 a cost. And I think your staff would concur that  
24 it is not a cost that the utility has.

25 For 21 years, 10 percent -- I mean, \$10,000

1 was a cap and it worked fine. So, our position is,  
2 is that, whether you had it in a rule or a policy  
3 that was in an order that you followed for 21  
4 years, you have had a hard cap, and it has not been  
5 a problem.

6 So, what we feel like we've agreed to is a  
7 50-percent increase in a -- on a cap that has  
8 worked for 21 years. That -- that's -- that would  
9 be my response to that.

10 The base, the operating margin that the  
11 percentages apply to, is, after your staff looks at  
12 it, audits it, and makes a recommendation on the  
13 appropriate amount -- that is a cost that the  
14 utility has.

15 So, I would -- I would agree with that, that  
16 it is -- the base is a cost.

17 CHAIRMAN GRAHAM: Commissioner Fay.

18 COMMISSIONER FAY: Thank you, Mr. Chairman.

19 I also agree with Commissioner Brown's  
20 comments. I think part of the -- the rulemaking  
21 process can be challenging from the aspect that  
22 you -- you allow a process, sometimes extremely-  
23 long process to provide fairness and -- and due  
24 process to those individuals who might be impacted  
25 by the -- the implementation of that rule.

1           I think what I struggle with here is knowing  
2           that the small number that we've seen over these,  
3           from a long time period -- how many of these  
4           companies potentially are able to see the future  
5           and know that this type of change would impact  
6           them, based on the criteria that are laid out.

7           And I think that's -- that's, obviously, a  
8           small number, but I have concerns that are similar  
9           to Commissioner Brown's that I'm -- I'm not sure  
10          we're getting that -- that side of it or that  
11          position based on the fact that they may not know  
12          that it's appropriate to weigh in at -- at this  
13          time period.

14          What -- what gives me comfort in the language  
15          that's proposed before us that includes the \$15,000  
16          cap, is I think some threshold is appropriate. And  
17          I think this Commission -- including since I've  
18          been here -- have -- have operated within the 120  
19          rule waiver, which essentially our general counsel  
20          has -- have pointed out that there -- there's an  
21          undue hardship or burden similar to the fact  
22          pattern of a hurricane or something that would come  
23          forward.

24          And it also stays consistent with the -- with  
25          the intent of the rule. And I think there's been a

1 lot of discussion as to the intent of what the --  
2 this finalized -- finalized rule would look like.

3 My -- my final comment, Mr. Chairman, would  
4 just be that I -- I always worry when there's too  
5 many lawyers in the room, right, because I --

6 CHAIRMAN GRAHAM: Me, too.

7 (Laughter.)

8 COMMISSIONER FAY: It's very worrisome, right.  
9 And I think that -- that the rulemaking process  
10 can -- can inject that with even more criticism  
11 of -- of specific language and commas and potential  
12 hypothetical scenarios that would play out, that --  
13 that, to Commissioner Brown's very-valid point,  
14 might create a scenario that we -- we didn't  
15 intend.

16 And as -- as a rulemaking body, under 120, I  
17 think we have to take that very seriously. And so,  
18 I -- I feel confident with the -- the deviations  
19 that are allowed in 120, based on a rule waiver,  
20 that we would still be able to be consistent  
21 with what the Office of Public Counsel has stated  
22 as their intent to be pro- -- protecting consumers,  
23 from their perspective.

24 Well, to be fair, their perspective was a  
25 \$10,000 cap. And so, to be protective of consumers

1 at -- at a cap that they think is appropriate going  
2 forward seems fair to me.

3 And so, I would be inclined to support the  
4 language that's presented in front of us,  
5 Mr. Chairman, but I'll -- I'll defer to you on how  
6 to proceed.

7 CHAIRMAN GRAHAM: Sure.

8 Commissioner Brown.

9 COMMISSIONER BROWN: Thank you.

10 And Mr. -- Mr. Hetrick, I -- we should have  
11 had that discussion yesterday about the hardship.  
12 I think I would be more comfortable if we actually  
13 reference that rule in this rule because so many of  
14 these utilities are not aware of all of our other  
15 rules.

16 So, if we had language in there that  
17 referenced the hardship rule, that would give me a  
18 lot more comfort, if we're going to go ahead and  
19 keep a cap in here; although, you know, keep in  
20 mind, there is an implicit cap under the SARC  
21 statute to begin with. So, I really don't think  
22 it's necessary to put the cap in here, but if we're  
23 going to do and that, I think we need to reference  
24 the hardship rule to give us that maximum  
25 flexibility.

1 CHAIRMAN GRAHAM: Mary Anne?

2 MS. HELTON: I don't know if JAPC would be  
3 very happy with us including the rule-waiver  
4 provision or referencing the rule-waiver provision  
5 in this rule. I think it might create issues if  
6 you put it in this rule and you don't put it in all  
7 rules. And, in effect, the -- the rule-waiver  
8 provision is available and accessible to anyone who  
9 wants to petition for a rule waiver under any of  
10 our rules.

11 COMMISSIONER BROWN: But SARCs, by their very  
12 definition, are staff-assisted rate cases. So, so  
13 many of these companies do not -- are not aware of  
14 our rules.

15 MS. HELTON: Well, it would -- it would  
16 take -- because of the way the timing of all of  
17 this would work out, I think it would take staff  
18 working with the utility and letting the utility  
19 know we're up against this -- this -- this cap for  
20 you and -- so that we can -- if there's a desire to  
21 exceed that cap, I think we would have to let the  
22 utility know that they would need to file this  
23 petition so it could be filed in time to work the  
24 SARC.

25 CHAIRMAN GRAHAM: Braulio?

1 MR. BAEZ: (Indicating.)

2 COMMISSIONER BROWN: I -- I would like staff  
3 to look into this a little bit further to see if  
4 we -- I think having comfort -- the -- again, once  
5 a rule is a rule, a rule is a rule. So, I think we  
6 need to see if we can go ahead and include that  
7 language, maybe get an interpretation referencing  
8 this -- in this specific rule for the very purpose  
9 to give this Commission and future commissions and  
10 future utilities the ability to deviate. I think  
11 having -- having it referenced would -- I don't see  
12 how that could be a problem.

13 CHAIRMAN GRAHAM: Mr. Hetrick?

14 MR. HETRICK: On that basis, we could defer it  
15 for one -- one more agenda and bring it back. I do  
16 think that we need to, at some point, move forward  
17 with this rule because of the concerns we have out  
18 there about maintaining an unadopted rule practice.

19 But yes, we -- we -- we can defer it to look  
20 at -- see how we can build maybe some hardship  
21 provision, maybe have a conversation with JAPC. We  
22 can come back to you and, if we are unable to do  
23 that, you do have another option; and that is to go  
24 with the rule that was initially filed, which does  
25 give the ultimate flexibility I think you're

1 looking for that would capture, without any  
2 constraints, any -- any situation.

3 CHAIRMAN GRAHAM: Commission- --

4 MR. REHWINKEL: Mr. Chairman, may I suggest  
5 one thing with re- -- that might help Commissioner  
6 Brown?

7 CHAIRMAN GRAHAM: Sure.

8 MR. REHWINKEL: And -- and I think rather than  
9 reference that a waiver may be sought, would it be  
10 possible to have language that -- that, after the  
11 cap, said that your staff -- the staff may assist a  
12 utility with any needed -- with -- with any waiver  
13 request related to this provision. That way,  
14 you're not -- you're not saying that --

15 COMMISSIONER BROWN: The rule.

16 MR. REHWINKEL: You know, I -- I think  
17 Ms. Helton references an excellent point, is if you  
18 put it in here, but don't put it in all your other  
19 rules, then the implication would be, you can't get  
20 a waiver for those rules, but if -- if you just put  
21 in a provision to say the staff may assist in -- a  
22 utility with a waiver, I think that would do  
23 exactly what the staff explained they would do if  
24 they came up against a hard situation.

25 COMMISSIONER BROWN: Mr. -- Mr. Chair- --

1           CHAIRMAN GRAHAM:  Let's -- let's do this.

2           Let's take a five-minute break, and you guys talk  
3           about this.  And we'll decide if we can handle it  
4           in five minutes or we want to defer this until --

5           MR. HETRICK:  Sounds good.

6           CHAIRMAN GRAHAM:  Until next meeting.

7           But we'll take a five-minute break.  According  
8           to that clock back there, 10:30.

9           (Brief recess.)

10          CHAIRMAN GRAHAM:  Okay.  I -- I should have  
11          known better, taking out my hourglass, but I -- I  
12          thought maybe, because of the holidays, I would be  
13          more -- be more open with my time.

14          Mr. Polmann -- Commissioner Polmann has had  
15          his light on for a while, so before I hear what  
16          staff and everybody came up with, let's hear what  
17          Commissioner Polmann came up with.

18          COMMISSIONER POLMANN:  Thank you,  
19          Mr. Chairman.

20          Not specific to the language in the rule, but  
21          I am the Commissioner -- the Commission's  
22          representative on NARUC's water committee, and as  
23          we all know, in -- in Florida, we have many -- and  
24          I'll use this word -- troubled water and wastewater  
25          utilities that we regulate, in large part, because

1 many of them are -- are very small and -- and quite  
2 old, and need a lot of help, struggling with  
3 infrastructure issues, water-quality issues, and so  
4 forth.

5 And I mention the national water committee  
6 because this is not unique to Florida. We talk  
7 about this at -- at our meetings. And it's very  
8 difficult for these utilities to operate with  
9 little funding and -- and these difficulties of the  
10 commissions around -- around the country, trying to  
11 figure out how, for these owners and operators to  
12 maintain their systems and -- and do so without  
13 raising rates in such a dramatic fashion.

14 And ultimately, what we've talked about  
15 nationally is to maintain as much flexibility at  
16 the Commission level and to provide staff with all  
17 the tools that they need to make sound  
18 recommendations.

19 And -- and so, coming back to the rule issue  
20 here, I'm -- my comments today are -- are really  
21 oriented towards trying to provide us, the staff  
22 and the Commission, with opportunities to maintain  
23 all -- all of the flexibility that will help us  
24 help these utilities.

25 There's a big focus here in Florida, and I

1 think appropriately so, to improve the  
2 infrastructure, the reliability, and the safety.  
3 And I don't mean, here today, to be argumentative,  
4 and I ask that you -- that -- that no one take it  
5 that way. I -- I really am concerned that, moving  
6 forward, we try to maintain all of our options.

7 And -- and Mr. Chairman, I appreciate the  
8 opportunity to make those comments. I -- I'm just  
9 truly concerned that we not foreclose any  
10 flexibility that we -- that we may currently enjoy,  
11 and keep in mind that these utilities really do  
12 need help. And -- and that's my only purpose here  
13 in speaking.

14 So, thank you, Mr. Chairman.

15 CHAIRMAN GRAHAM: Thank you, Commissioner.  
16 Staff.

17 MR. MAUREY: Good morning. Andrew Maurey,  
18 Commission staff. I apologize for my voice. I'm  
19 dealing with a little bit of a head cold. Please  
20 bear with me.

21 When we were -- staff -- looking at the rule,  
22 it's important to look back at the history, the  
23 experience that the Commission had, but it's also  
24 important to look forward and see how the rule  
25 would be applied and how circumstances might

1 change.

2 In -- in fact, at the time of the Lake Osborne  
3 order, the threshold to participate in the staff-  
4 assisted rate case was 150,000 in annual revenue.  
5 The Legislature has seen fit to double that. It's  
6 300,000 today. So, what might be a reasonable  
7 \$10,000 cap 22 years ago, due to inflation and  
8 other reasons is -- it would be inadequate.

9 And that's why staff, in its initial rule,  
10 recommended an implicit cap -- not an explicit  
11 dollar amount, but an implicit cap because, at the  
12 end of the day, after the increase, the utility in  
13 question would still have to qualify for a SARC.  
14 So, there is a theoretical cap to the -- to the  
15 amount of an increase.

16 To the point about the rule working fine for  
17 the entire 20 years -- it has worked fine in a  
18 number of cases, but as you -- as you look at  
19 Attachment B, Page 16 of the staff recommendation,  
20 there's an awful lot of red on that schedule.

21 The -- those are utilities that are not just  
22 earning below the range, but are losing money under  
23 this program. And so, that comes and goes, but  
24 what we were trying to bring before the Commission  
25 was a recognition of a change in circumstance since

1 the Lake Osborne order and recommended an implicit  
2 cap.

3 The Commission has before it the -- as you  
4 said, wanted flexibility for those circumstances.  
5 In the past, there were only three -- of the 21  
6 utilities that were granted operating ratio  
7 methodology, only three exceeded the 10,000 cap and  
8 only one would have exceeded the 15,000 cap.

9 But that's not going to be the case going  
10 forward because, again, they were limited to  
11 150,000 in revenue back then; now they can have up  
12 to 300,000 in revenue. So, we see foresee upward  
13 pressure on -- on that cap at some point. And so,  
14 we recommended an implicit cap as the first rule.

15 CHAIRMAN GRAHAM: One more time? That last  
16 part.

17 MR. MAUREY: Oh, that's why we recommended an  
18 implicit cap as opposed to an explicit cap in the  
19 original rule.

20 MR. HETRICK: And to get to an implicit cap,  
21 you would need to just strike that last sentence of  
22 the Subsection 1, "The operating ratio adjustment  
23 shall be no more than 15,000." That would take you  
24 back to the original staff proposal on that issue,  
25 which was an implicit cap.

1                   CHAIRMAN GRAHAM: Mr. Rehwinkel.

2                   MR. REHWINKEL: I -- I -- I mean, our -- we  
3 stand by our -- our position here. If we need to  
4 go to hearing, we need to go to hearing, but, you  
5 know, the implicit cap is -- you know, is not  
6 something that's been needed.

7                   And you know, I don't think any utility staffs  
8 for their worst day. There's no -- to base a rule  
9 upon the -- the most egregious thing you can  
10 imagine is not good policy in any rulemaking.

11                  So, you know, I think, again, the policy  
12 worked and whatever red shows up on there is  
13 unaudited. It doesn't tell whether there's  
14 affiliated transactions. It doesn't tell whether  
15 the utility is associated with a developer, and  
16 they're happy to have red.

17                  It -- it doesn't -- and in any event, if  
18 you've got red, you come in for a SARC, you get  
19 that red wiped out and then you get a little bit  
20 more. So, that's not really the problem.

21                  And there's no -- it -- you could give a  
22 company the operating margin and they have no  
23 obligation to spend it on anything. They could  
24 spend it on a car for their -- their daughter's  
25 16th birthday, if they want to, because it's not

1 based on a cost. And I'm not saying anybody has  
2 ever done that, but you can't trace the level of an  
3 operating-margin award in the past to what they're  
4 showing on an unaudited self-reported annual  
5 report.

6 So, I -- I reject the notion that this is a  
7 problematic area. We've moved the ball forward,  
8 not taken it back.

9 CHAIRMAN GRAHAM: Commissioners.

10 Commissioner Polmann.

11 COMMISSIONER POLMANN: Thank you,

12 Mr. Chairman.

13 With regard to the implicit cap, could you  
14 just clarify that again? You mentioned that the --  
15 if I understood it, the \$300,000 is -- is the SARC  
16 upper limit for -- for revenue; is that -- is that  
17 correct? And then the implicit cap would be based  
18 on the percentage add-on to the -- let me just stop  
19 there.

20 MR. MAUREY: Okay.

21 COMMISSIONER POLMANN: Tell me what the  
22 implicit-cap calculation --

23 MR. MAUREY: The 300,000 is the revenue  
24 amount. O & M expenses would be something less  
25 than 300,000 because, as -- as Mr. Rehwinkel said,

1           they would get their cost -- now, in SARCs, we  
2           always use a historic test year. So, they're  
3           already a little bit behind in their costs because  
4           we're -- we're looking backward, not forward.

5           But their O & M expenses, it -- it will vary  
6           across the companies, but it will always be  
7           something less than revenue because there are other  
8           operating costs, depreciation, taxes other than  
9           income, RA- -- regulatory assessment fees, et  
10          cetera, that aren't part of O & M, but the sum of  
11          O & M and these other costs will equal the -- plus  
12          the margin will equal revenues.

13          So, there is a -- why we say an implicit cap  
14          is because 12 percent of whatever that O & M number  
15          is -- it's got to be less than 300,000. And in  
16          reality, it's going to be less than 250 -- or total  
17          revenue requirement, I'm speaking of here.

18          So, it's hard to back into what that implicit  
19          number would be, but it's -- it is a hard ceiling  
20          because you -- at the end of the day, the utility  
21          has to have less than 300,000 in revenue. And so,  
22          whatever, all in, is going to be less than that.

23                    COMMISSIONER POLMANN: Thank you.

24                    MR. REHWINKEL: Can I -- one caveat to that is  
25                    that, that would apply the next time, but you could

1 give a company close to \$30,000 for an operating  
2 margin based -- if they were at the high end  
3 because, when they came in, they were eligible for  
4 the SARC.

5 But the next time, if their revenues exceeded  
6 300,000, based on their expenses plus the award of  
7 the operating margin, they would be ineligible the  
8 next time, but in that case that you would be  
9 deciding, you could give close to \$30,000 to a  
10 utility.

11 We're talking about a cap from \$10,000 to  
12 basically tripling -- close to tripling what you  
13 possibly could give. And, you know, that's --  
14 that's -- that's a big concern. And I think that's  
15 a huge leap that's not been demonstrated to have  
16 any need, in reality, in the past.

17 CHAIRMAN GRAHAM: Commissioner Brown.

18 COMMISSIONER BROWN: Thank you.

19 And I just want to point out -- Mr. Maurey,  
20 thank you for your comments. I think you stated  
21 the most persuasive argument here today in support  
22 of the prior draft rule that you proposed, which  
23 deleted that -- that cap, based on future cases,  
24 not past cases. We're not setting a rule for past  
25 cases. We're setting a rule for future.

1           And I think your argument here -- or your --  
2           your position was very compelling. So, I -- I  
3           guess I'm of the opinion that you would prefer to  
4           go back to the original draft.

5           MR. MAUREY: We can support --

6           COMMISSIONER BROWN: Not to put you on the  
7           spot.

8           MR. MAUREY: We certainly would support our  
9           original rule. I mean, we -- we had our  
10          discussions with OPC in good faith, and -- but I  
11          have it on good authority -- staff makes  
12          recommendations. The Commission makes decisions.  
13          And your -- it's certainly -- we would support the  
14          rule -- the original rule, as well.

15          COMMISSIONER BROWN: Thank you.

16          CHAIRMAN GRAHAM: Guys, I'm waiting for a  
17          motion.

18          All right. I don't see any lights on. So,  
19          we'll defer this until next agenda.

20          Item No. 3.

21          MR. REHWINKEL: Thank you, Commissioners.

22          (Agenda item concluded.)

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