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Public Service Commission

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DATE: October 6, 2011

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Barrera, Crawford)
Division of Economic Regulation (Slemkewicz) JS

RE: Docket No. 100410-EI – Review of Florida Power & Light Company's earnings.

AGENDA: 10/18/11 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\100410.RCM.DOC

Case Background

Rule 25-6.1353, Florida Administrative Code (F.A.C.), requires investor-owned electric utilities, not subject to an earnings cap, to file an annual Forecasted ESR each year by March 1 of the forecasted year. By Order No. PSC-05-0902-S-EI,[1] the Commission approved a stipulation by Florida Power & Light Company (FPL) and parties to FPL's 2005 rate proceeding, making FPL's rates subject to an earnings cap and revenue sharing mechanism. Thus, no return on

[1]Order No. PSC-05-0902-S-EI, issued September 14, 2005, in Docket Nos. 050188-EI, In re: Petition for rate increase by Florida Power & Light Company, and 050188-EI, In re: 2005 comprehensive depreciation study by Florida Power & Light Company.

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equity (ROE) was set. By Order No. PSC-10-0153-FOF-EI,[2] issued March 17, 2010 (Final Order), FPL's current Commission-authorized rates were established and an ROE of 10 percent was set. Reconsideration Motions were filed with respect to the Final Order, but were resolved through approval of a joint Stipulation and Settlement by the parties (Stipulation) which ratified the ROE established in the Final Order.[3]

On September 14, 2010, FPL submitted its May and June 2010 Earnings Surveillance Reports (ESR) as required by Rule 25-6.1352, F.A.C. Per these reports, FPL's actual achieved returns on equity (ROE) were 11.28 percent and 11.43 percent for May and June 2010, respectively. These returns exceeded the top of FPL's currently authorized ROE range of 9.00 percent to 11.00 percent, with a 10.00 percent midpoint.

The instant case was initiated pursuant to staff's request to establish a docket filed September 30, 2010, opening a docket to request that the Commission initiate an investigation into FPL's earnings. On October 4, 2010, staff filed its recommendation. Subsequent to the original October 4, 2010, filing date of staff's recommendation, FPL filed its ESRs for July, August, September and October 2010 as well as its 2010 Forecasted ESR.[4] The reported actual earned ROEs were 11.68, 11.79, 11.34, and 11.16 percent, respectively. FPL forecasted that it would earn an ROE of 11.00 percent for the year ending December 31, 2010.

The Commission's consideration of staff's October recommendation was delayed because this and other FPL dockets were stayed by the First District Court of Appeal pending its consideration of a Petition for Writ of Prohibition filed by FPL in September 2010. The Court acknowledged FPL's voluntary dismissal of its petition by order dated January 4, 2011, and the Commission considered staff's recommendation at its January 11, 2011, Agenda Conference.

The October staff recommendation incorrectly stated that the item would be a proposed agency action (PAA). Prior to the January 11, 2011 Agenda Conference, staff corrected what it considered to be a typographical error, and deleted "PAA" from the recommendation. Staff recommended that the Commission:

- Initiate a review of Florida Power & Light Company's earnings.
- Order FPL to hold earnings, for the 12-month period ending March 31, 2011, in excess of the authorized 11.00 percent maximum of the ROE range subject to refund under a corporate undertaking.

[2] Order No. PSC-10-0153-FOF-EI, issued March 17, 2010 (Final Order), in Docket Nos. 080677-EI, In re: Petition for increase in rates by Florida Power & Light Company and 090130-EI, In re: 2009 depreciation and dismantlement study by Florida Power & Light Company.

[3] Order No. PSC-11-0089-S-EI, issued February 1, 2011, in Docket Nos. 080677-EI, In re: Petition for increase in rates by Florida Power & Light Company and 090130-EI, In re: 2009 depreciation and dismantlement study by Florida Power & Light Company.

[4] ESR filing dates: July 2010 – October 18, 2010; August 2010 – November 12, 2010; September 2010 – November 12, 2010; October 2010 – December 13, 2010; and Forecasted 2010 – December 17, 2010.

- Hold the docket open until staff reviewed FPL's historical earnings data for the year ending March 31, 2011, and the Commission determined the amount and appropriate disposition of overearnings.

At the January 11, 2011, Agenda Conference, the parties and intervenors responded to Commissioners' questions and were afforded the opportunity to address the Commission. FPL and the Office of Public Counsel (OPC) contended that the terms of the Stipulation were intended to alleviate the issue of potential overearnings.

The Commission issued an Order Declining to Initiate Earnings Review[5] and closed the docket, finding that it was appropriate and in the public interest to decline to initiate to investigate FPL's 2010 earnings.[6] The Commission stated that:

> Of great significance to our decision was the parties' argument that the terms of the Stipulation would prevent the Company from earning more than the 11 percent top of the range. We note that our decision herein is unique to the circumstances of this case, and shall not set precedent for earnings reviews or the use of rate cap letters in future proceedings of this Commission.

Order No. PSC-11-0103-FOF-EI, pp. 2-3.

On February 9, 2011, Mr. Daniel R. Larson and Ms. Alexandria Larson (Petitioners) filed a Petition to Intervene, Motion for Reconsideration, Notice of Protest and Request for Formal Hearing (Petition). In their Petition, the Larsons assert that, as residential customers of FPL, they are substantially affected by the Commission's action declining to initiate an earnings investigation, that Order No. PSC-11-0103-FOF-EI should have issued as proposed agency action (PAA), and that they are entitled to request a hearing on the matter. FPL timely filed a response in opposition to the Larson's Petition on February 16, 2011.

On February 21, 2011, Mr. Frank Woods and Ms. Kelly Sullivan filed a Petition to Intervene, Motion for Reconsideration, Notice of Protest, and Request for Formal Hearing (Sullivan-Woods Petition). Their Petition asserts that, as residential customers of FPL, Mr. Woods and Ms. Sullivan are substantially affected by the Commission's action declining to initiate an earnings investigation, that Order No. PSC-11-0103-FOF-EI should have issued as proposed agency action (PAA), and that they are entitled to request a hearing on the matter. FPL timely filed a response in opposition to the Sullivan-Woods Petition on February 28, 2011.

On February 28, OPC filed a Notice of Intervention and Limited Response with regard to the pending Larson and Sullivan-Woods Petitions. OPC states in its response that it takes no position on the various pleadings and responses in this docket, but urges the Commission to explain or clarify the circumstances surrounding the change in designation of staff's October recommendation from PAA to regular agenda conference leading to issuance of a final order.

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[5] Order No. PSC-11-0103-FOF-EI, issued February 7, 2011 in this docket.

[6] Order No. PSC-11-0103-FOF-EI, issued February 7, 2011, in Docket No. 100410-EI, In re: Review of Florida Power & Light Company's earnings.

Also on February 28, the Florida Industrial Power Users Group (FIPUG) filed a Petition to Intervene and Protest of Order No. PSC-11-0103-FOF-EI. In its petition, FIPUG contends that Order No. PSC-11-0103-FOF-EI did not afford an appropriate point of entry for affected parties. However, on March 7, 2011, FIPUG filed a Notice of Administrative Appeal of Order No. PSC-11-0103-FOF-EI with the First District Court of Appeal. However, FIPUG withdrew its appeal and the Court dismissed the action by Order dated June 16, 2011.

Staff notes that the filings referenced above are all are based upon the correction of an error in staff's recommendation, originally filed on October 4, 2010. FPL had filed a Petition for Writ of Prohibition in the First District Court of Appeal. The recommendation was deferred five times as the case was stayed while FPL's Petition for Writ of Prohibition was pending at the First District Court of Appeal. Once the stay was lifted, the matter on the FPL overearnings was scheduled to be heard at the January 11, 2011, Agenda Conference. During the course of preparing for the Agenda, staff realized that the recommendation was improperly designated as a PAA item, rather than a procedural recommendation. Upon staff's request, the clerk made a hand-written correction to staff's original recommendation on January 7, 2011, which was then made publicly available in its corrected form on the Commission's docket system and website. As discussed above, the Commission declined to initiate an earnings review, and so the order issued as final agency action.

On August 1, 2011, staff held a noticed telephonic conference with Ms. Alex Larson, Mr. Robert Smith, Ms. Kelly Sullivan, FIPUG, and FPL. In that meeting, staff explained the reasons staff's recommendation had been corrected to designate it as a recommended procedural item rather than as PAA. Pursuant to this conversation, Ms. Sullivan agreed to file a withdrawal of the Woods/Sullivan February 21 Petition. FIPUG and OPC stated they would not pursue their petitions if this recommendation addressed the issue of proposed agency action versus final agency action. However, Ms. Larson expressed a desire that staff proceed on her February 9 Petition.

This recommendation addresses the February 9 Petition filed by Mr. and Mrs. Larson. As discussed above, FIPUG, Mr. Woods and Ms. Sullivan-Woods,[7] and OPC, have chosen not to pursue their petitions with regard to Order No. PSC-11-0103-FOF-EI. The Commission has jurisdiction over this matter pursuant to Chapter 366, Florida Statutes (F.S.), including Sections 366.041, 366.06, 366.07, and 366.071, F.S.

[7] At the August 1 telephonic conference, Ms. Sullivan-Woods indicated that she intended to withdraw her petition. Staff later contacted Ms. Sullivan-Woods about filing a written withdrawal of her Petition;. She indicated she will as soon as she recovers from an illness. To date no withdrawal has been filed.

Discussion of Issues

Issue 1: Should the Commission grant the Petition to Intervene, Motion for Reconsideration, Notice of Protest, and Request for Formal Hearing filed by Mr. and Ms. Larson?

Recommendation: No. The Commission should deny the Petition to Intervene, Motion for Reconsideration, Notice of Protest, and Request for Formal Hearing. (Barrera, Crawford)

Staff Analysis:

Summary of Petitioners' Petition to Intervene, Motion for Reconsideration, Notice of Protest and Request for Formal Hearing

On February 9, 2011, Petitioners filed a Petition to Intervene, Motion for Reconsideration, Notice of Protest and Request for Formal Hearing (Petition) challenging Order No. PSC-11-0103-FOF-EI. Petitioners were not present at the January 11, 2012 agenda.

Petitioners allege they should be allowed to intervene and protest the Commission Order as they are FPL customers and have a substantial interest in any refund amount as a result of overearnings. The Petition alleges that the Commission should have adopted the staff recommendation to continue to monitor FPL and "preserve and protect the ability of the Commission to authorize refunds."[8]

The Petition repeatedly alleges that the Commission denied Petitioners a point of entry when the staff recommendation proceeded as a regular agenda item rather than a PAA and the change was made 3 days before the Agenda and without notice. Specifically, the Petition states:

> Fundamental principals [sic] of due process require a point of entry, proper notice, and an opportunity to be heard in matters before the Florida Public Service Commission. . . . It stands to reason that the Commission cannot materially change the character and nature of the proceeding in a manner than adversely impacts the petitioners' substantial interests and due process rights without proper notice.

Petition, page 4.

The Petition requests reconsideration of the Commission's order. As grounds for reconsideration, the Petition makes the same allegations and adds that the change from PAA to regular agenda item is reversible error[9] by denying Petitioners an opportunity to request a formal hearing "if the decision of the Commission affected the petitioner's substantial interests." Petition, page 6 (emphasis added.)

[8] It is well established that, pursuant to Section 366.06, F.S., regardless of Order No. PSC-11-0103-FOF-EI, the Commission continues to have jurisdiction over investor-owned electric utilities to set, change or modify rates. Petitioners are not prohibited from bringing before the Commission an independent petition to review FPL's rates.

[9] "Reversible error" is a legal term of art defined as a legal mistake made in a Commission Order which is so significant that it must be reversed by the appellate court.

In support of Petitioners' notice of protest and request for formal hearing, the Petition alleges that the Commission's order "irreparably harmed" the substantial interests and due process rights of the Petitioners.[10] Petitioners state that the disputed issues of material fact include but are not limited to:

- Should the Commission initiate a review of FPL's earnings?
- Should FPL be allowed to make a weather related normalization adjustment to reduce its earnings and the corresponding return on equity (ROE), reported on its earnings surveillance reports?
- Should the Commission order FPL to hold earnings, for the 12 month period ending March 31, 2011, in excess of the authorized 11.00 percent maximum of the ROE range subject to refund under bond or corporate undertaking.

As relief, Petitioners request that the Commission vacate or amend the Order to a PAA and grant Petitioners' hearing request.

FPL's Response to Larson's Petition

FPL contends the Petition merely speculates on the possible occurrence of an injurious event thereby failing to meet the two-prong standing test, set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), that a petition must allege substantial interests of sufficient immediacy to satisfy standing. In support, FPL states Petitioners are speculating that FPL will fail to maintain its ROE under 11 percent, in spite of the terms of the Joint Stipulation and Settlement and FPL's earning forecasts. FPL argues that Petitioners also speculate the Commission will order a refund of excess earnings in this docket which solely entailed a proceeding to conduct an earnings review investigation. FPL states the Commission action, to decline to investigate FPL's earnings, not require FPL to hold specified earnings, and close the docket, is not an action affecting the substantial interests of Petitioners.

In response to the motion to intervene, FPL asserts that Petitioners' intervention serves no purpose as the issue is being dealt with by the terms of the Stipulation and Settlement. FPL also asserts that the motion to intervene is untimely under Rule 25-22.039, F.A.C., and that intervenors take the proceedings as they find it, and, in this case, the final order has already been issued.

In response to the motion for reconsideration, FPL states that Petitioners fail to allege any point of fact or law which the Commission overlooked or failed to consider when the Commission declined to conduct an investigation. FPL also asserts that a motion for reconsideration can only be filed by parties to an action under Rule 25-22.060(1), F.A.C.

[10] The Petition seemingly contests the actions of the Office of Public Counsel which are not addressed herein as inapposite to this proceeding.

In response to the notice of protest and request for formal hearing, FPL provides 5 arguments.

- There is no provision allowing a protest of final agency action.
- The Commission's decision not to initiate an earnings review does not affect the rights or remedies available to Petitioners or any other consumer under Chapter 366, F.S.
- Petitioners had ample opportunity to appear at the noticed January 11, 2011 agenda and present arguments.
- The Commission has no obligation to initiate an earnings review, thus Petitioners' argument concerning the change in staff's recommendation, proceeding as a regular agenda item rather than a PAA, is a "red herring."
- A formal administrative hearing would serve no purpose as the Petition's 3 disputed issues of material fact do not present a factual dispute.

<u>OPC's Response to Larson's Petition</u>

The office of Public Counsel (OPC), states that the Stipulation is the appropriate vehicle for regulating FPL's rate of return during the period of the stipulation. OPC further states that it does not take a position on the substance of the Petition and Response. OPC requests that the Commission explain the circumstances under which a Commission ruling during an agenda conference will or will not lead to the issuance of a PAA.

<u>Staff Analysis</u>

<u>Petition to Intervene</u>

Rule 25-22.039, (F.A.C.), provides that:

> Persons, other than the original parties to a pending proceeding, who have a <u>substantial interest</u> in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene. Petitions for leave to intervene must be filed at least five (5) days before the final hearing, must conform with Uniform subsection 28-106.201(2), F.A.C., and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the <u>substantial interests</u> of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

(Emphasis added.)

A person whose substantial interests are to be determined by agency action and who requests a hearing before an agency must meet the two-prong standing test set forth in <u>Agrico Chemical Company v. Department of Environmental Regulation</u>, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Petitioners must show that they will suffer injury in fact which is of sufficient immediacy to entitle them to a Section 120.57 hearing, and that the substantial injury is of a type

or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990).

Petitioners allege they should be allowed to intervene as they are FPL customers and have a substantial interest in any refund amount as a result of overearnings. Staff believes that whether the requested investigation would have resulted in proceedings where the Commission ordered FPL to issue refunds is mere speculation. Such speculation is too remote to establish an "injury in fact" to satisfy the test for standing. See: Order No. PSC-01-1629-PCO-T, issued August 9, 2001, in Docket No. 010782-TL, In re: Petition for generic proceedings to establish expedited process for reviewing North American Plan Administration (NANPA) future denials of applications for use of additional NXX Codes by BellSouth Telecommunications, Inc., (speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process).[11] Thus, in this case, the Commission should rule that Petitioners lack standing to intervene.

Further, Rule 25-22.039, F.A.C., requires that petitions for leave to intervene be filed at least five (5) days before the final hearing and that intervenors take the case as they find it. In this case, the Petitioners filed their motion to intervene after the Agenda Conference held on January 11, 2011 and after the final order was issued closing the docket. The case, as Petitioners find it, is closed. Thus, the motion should be denied as untimely filed.

Motion for Reconsideration

Rule 25-22.060(1)(a), F.A.C., addresses motions for reconsideration of final orders, and provides that "[a]ny party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order." (Emphasis added).

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order. See: Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So.2d 96 (Fla. 3d DCA 1959) (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958)). Also, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

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[11] See also Ameristeel Corp. v. Clark, 691 So.2d 473 (Fla. 1997)(threatened viability of plant and possible relocation do not constitute injury in fact of sufficient immediacy to warrant a Section 120.57, F. S. hearing); International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So.2d 1224, at 1225-1226 (Fla. 3rd DCA 1990); and Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So.2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So.2d 1063 (Fla. 1987).

Petitioners state that the point of law on which their motion is based is that the final agency action denied Petitioners due process affecting their substantial interests and right to be heard in the proceedings. Petitioners' point of law has no basis in law or fact as regards these proceedings. As stated above, Petitioners have no standing to intervene in this cause and it therefore follows that they are not parties to the action. As discussed below, the Commission's order is not adverse agency action requiring notice and a hearing.[12] The Commission should deny Petitioners' motion on the basis that the Petitioners are not parties to the instant action, did not raise a point of law or fact that the Commission should have considered, and were not adversely affected by the Commission's order.

Notice of protest and request for formal hearing

Section 120.57(1), F.S., proceedings are invoked when an agency takes adverse action affecting the substantial interests of a party and there are disputed issues of material fact. Section 120.569(1), F.S. It is established law that in taking adverse action affecting the substantial interests of a party, an agency must grant the affected parties a clear point of entry to formal or informal proceedings under Section 120.57. Capeletti Brothers v. State, Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978), cert. denied, 368 So.2d 1374 (Fla. 1979).

Section 120.57(5), F.S., states "[t]his section does not apply to agency investigations preliminary to agency action." Thus, there is no right to a hearing when an agency conducts an investigation until and unless the investigation is completed and the agency proceeds to take action adversely affecting a party's substantial interests. In this case, in declining to exercise its investigatory discretion, the Commission did not take adverse action affecting the substantial interests of Petitioners and was not required to provide Petitioners a point of entry into 120.57(1), F.S., formal proceedings pursuant to section 120.57(5), F.S. The Petition, while alleging that the substantial interests of Petitioners were adversely affected, does not dispute that, in this case, the Commission staff requested permission from the Commission to investigate FPL's overearnings and the Commission declined. Since the only matter before the Commission was a request to initiate an investigation, the Commission's ruling did not and could not lead to the issuance of a PAA order or the opportunity to request an administrative hearing.

Petitioners' substantial interests were not affected by the Commission Order

There is a fundamental concept which the Petitioners' contention, that Order No. PSC-11-0103-FOF-EI should have issued as PAA, overlooks. The decision of whether to initiate an earnings investigation is a matter of agency discretion. No party is invested with the right to request a hearing on whether the Commission decides to initiate such a proceeding. In this case, the proceedings were a request to the Commission by staff to authorize the opening of an investigation to monitor FPL overearnings. Should the Commission have approved the initiation of the investigation, only procedural rights would have attached to the Commission's order, as the only action taken would have been to authorize the investigation and monitoring, and to hold

[12] Staff notes that the Commission's January 11, 2011 Agenda Conference was noticed and interested persons were allowed to participate.

FPL funds subject to refund pending the results of the investigation. The Commission's order would not be adverse agency action as the order would not have addressed whether FPL customers were entitled to a refund. An order authorizing or denying an investigation does not afford hearing rights to the Petitioners as would a PAA decision. Section 120.57(5), F.S. In U.S. Sprint Communications v. Nichols, 534 So. 2d 698 (Fla. 1988), the Supreme Court held that the Commission's order denying a hearing request was proper where the Commission's action did not establish a new tariff or represent a new Commission action, where the action did not represent a modification of or amendment to an earlier decision, and where the action was merely a directive ordering compliance with access rates that were previously authorized. The Commission's action, in the instant case, did not direct FPL to take any action which would have affected Petitioners' substantial interests, either by ordering or denying a refund. The Commission did not change or modify an earlier Commission decision; instead, it recognized that its prior order approving the Stipulation addressed the issue of FPL's overearnings should they occur.

Change from PAA to regular agenda

The legal standard applicable to the determination of whether the Commission's action in the instant case should have been characterized as a PAA, procedural, or final item is dependent on an analysis of the Administrative Procedures Act, Chapter 120 F.S. These requirements form the fundamental basis of the Petitioners' claim and must be the starting point of staff's analysis of the nature of the proceedings.

The Commission is an agency under and subject to control of the Administrative Procedures Act. Van Gorp Van Service, Inc. v. Mayo, 207 So. 2d 425 (1968). Pursuant to section 120.52(3), F.S., the agency head is the person or collegiate body statutorily responsible for final agency action. The Commissioners, acting in concert, are the agency head of the PSC. Only the agency, in this case the Commission, can take agency action giving right to an administrative hearing where the agency action adversely affects a person's substantial interests. Sections 120.569(1), 120.57(1), F.S.

Commission staff makes every effort that its recommendations are factually and legally complete and correct. However, errors do sometimes occur. Whether the error involves the computation of a number or a legal citation, staff endeavors to correct the error as quickly as it is discovered. Commission staff recommendations are not agency action. No rights attach to a staff recommendation and it may be accepted, modified, or rejected by the Commission. Indeed, staff's recommendation was rejected by the Commission's decision to decline to investigate alleged FPL overearnings. The fact that staff's initial recommendation incorrectly indicated that the action was a PAA did not establish the character of the action or affect the rights of any party specifically because only a Commission order adversely affecting a person's substantial interests is an agency action triggering the right to a Section 120.57, F.S., hearing and providing a point of entry into administrative proceedings.

The Commission addressed this principle in Order No. PSC-07-0816-FOF-EI, issued October 10, 2007, in Docket No. 060658-EI, In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million. Progress

Energy Florida, Inc. (PEF) had argued that by submitting records and discovery to Commission staff during the course of the annual fuel proceeding, PEF placed sufficient evidence before the Commission to establish the prudence of its fuel costs. The Commission disagreed:

> We cannot delegate our ratemaking authority to administrative staff. See Order No. 6986, issued October 30, 1975, in Docket No. 74807-EU, In re: Petition of Florida Power Corporation for authority to increase its rates and charges, in which we stated:
>
>> In essence, Movant has predicated its request on the premise that the staff operates as the alter ego of the Commission or that the Commission delegates de facto authority to its staff to act in its stead. Such an assertion is patently incorrect for it overlooks the fact that staff members are not public officers of the State, elected or appointed. They exercise no sovereign powers of the State. They have no decisional powers, either by Statute or Rule, and no decisional powers have been delegated to them by the Commissioners. For that matter, we are unaware of any lawful basis by which such authority could be delegated.
>
> See also, Citizens v. Wilson, 567 So. 2d 889, 892 (Fla. 1990) (explaining that, only by specific direction, could Commission staff perform the "ministerial task of seeing whether these [revised supplemental service rider] conditions were met"). Only the Commission may make a finding of prudence. Proof of our finding of prudence would be explicitly set forth in prior fuel orders, or implicitly set forth in transcripts of prior fuel proceedings. PEF has provided no proof that the Commission has made any findings of prudence for the events and time period at issue here.

Order No. PSC-07-0816-FOF-EI at p. 12.

Point of entry into proceedings

Petitioners assert that when the Commission's Order declining to investigate FPL's overearnings was not issued as a PAA, it denied Petitioners a clear point of entry into the proceedings and the notice required by due process. A clear point of entry need not be provided where the Commission engages in investigatory or information-gathering activities,[13] which are otherwise characterized as "free form" proceedings. See Capeletti Brothers v. State, Department of Transportation, 362 So. 2d at 348. In Capeletti, the Court described "free-form" proceedings as nothing more than "the necessary or convenient procedures by which an agency transacts its day-to-day business." Id. at 348 (citing H. Levinson, Elements of the Administrative Process, 26 Amer.L.Rev. 872, 880, 926 et seq. (1977).) "In free-form proceedings the agency is therefore at liberty to adopt any procedure it wishes, or no procedure at all." Id. at 348. The Capeletti Court concluded that without "free form" proceedings, such as letters, telephone calls, and other

[13] In this case, the Commission declined to investigate. See also Section 120.57(5), F.S.

conventional communications, "the wheels of government would surely grind to a halt." Id. at 348.

Under Capeletti, a clear point of entry is only provided at the point where the free form proceeding evolves into a decision affecting a person's substantial interests. Id. at 348. In Commission proceedings, where the proceedings constitute "free form" action, no PAA is required. [14] In this case, where the Commission declined to initiate an investigation, a final order was issued. Also, in this case, the Commission's agenda conference, held to determine whether an investigation should be conducted into FPL earnings, constituted "free form" proceedings, there being no other way for staff to bring up the request before the Commissioners, acting in concert, to discuss the matter.[15] Had the Commission authorized the investigation, the order would not have been final but would still have been procedural as the case would have continued until the Commission made a decision, after investigation, affecting a party's substantial interests. Only then would the Commission be required to issue a PAA providing a point of entry and notice. See Capeletti, supra at 348.

Staff notes that FPL submitted its March 2011 Earnings Surveillance Report on May 12, 2011 covering the 12 month period that staff suggested be used to evaluate any overearnings. The Report showed that there were no overearnings, thereby eliminating the need for an investigation.

The Commission should find that Petitioners were not entitled to an administrative hearing in this cause as the Commission's denial of the investigation was a procedural matter that did not give rise to hearing rights under 120.57(5), F.S. For the reasons stated above, the Commission should deny the Petitioner's petition to intervene, motion for reconsideration, notice of formal protest, and request for formal hearing. Additionally, for the reasons stated above, the Commission should deny all pending petitions.

[14] This concept is codified in Section 120.57(5), F.S., which provides that agency investigations do not give hearing rights under the Administrative Procedures Act.

[15] Florida's Government in the Sunshine Law applies to any gathering of two or more Commissioners to discuss some matter which will foreseeably come before the Commission for action. Section 286.011, F.S. Thus, unlike agencies where there is a single agency head, in order for staff to request the Commission to initiate an investigation and for Commissioners to discuss and decide, the request must come before the Commission at its agenda conferences, which are publicly noticed.

Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission denies the Petition and dismisses all pending petitions, this docket should be closed. (Barrera)

Staff Analysis: Yes. If the Commission denies the Petition and dismisses all pending petitions, this docket should be closed.