BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power & Light Company's earnings.	DOCKET NO. 100410-EI ORDER NO. PSC-11-0524-FOF-EI ISSUED: November 7, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING MR. DANIEL R. LARSON AND MS. ALEXANDRIA LARSON'S PETITION TO INTERVENE, MOTION FOR RECONSIDERATION, NOTICE OF PROTEST AND REQUEST FOR FORMAL HEARING

BY THE COMMISSION:

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] we 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 equity (ROE) was set. By Order No. PSC-10-0153-FOF-EI,[2] issued March 17, 2010 (Final Order), FPL's current 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,

[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.

[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.

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 our staff's request to establish a docket filed September 30, 2010, requesting that we 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.

Our 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 we considered staff's recommendation at our 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 we:

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

At the January 11, 2011, Agenda Conference, the parties and intervenors responded to our questions and interested persons were afforded the opportunity to address this 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.

We issued an Order Declining to Initiate Earnings Review[5] (Order), 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] In the Order, we stated that:

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[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.
[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.

> 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 our action declining to initiate an earnings investigation, that the Order 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 our action declining to initiate an earnings investigation, that we 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 us 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.

Also on February 28, the Florida Industrial Power Users Group (FIPUG) filed a petition to intervene and protest the Order. In its petition, FIPUG contends that we did not afford an appropriate point of entry for affected parties. However, on March 7, 2011, FIPUG filed a notice of administrative appeal of the Order with the First District Court of Appeal. FIPUG withdrew its appeal and the Court dismissed the action by Order dated June 16, 2011.

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 earnings was scheduled to be heard at our January 11, 2011, Agenda Conference. During the course of preparing for the Agenda, Commission staff realized that the recommendation was improperly designated as a PAA item, rather than a procedural recommendation. Upon staff's request, the Commission 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 our docket

system and website. As discussed above, we declined to initiate an earnings review, and so the order issued as final agency action.

On August 1, 2011, Commission staff held a noticed telephonic conference with OPC, 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. Ms. Sullivan agreed to file a withdrawal of the Woods/Sullivan February 21 Petition and filed her notice of withdrawal on October 17, 2011. 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 Order addresses the February 9 Petition filed by Mr. and Mrs. Larson. As discussed above, FIPUG, Mr. Woods and Ms. Sullivan, and OPC, have chosen not to pursue their petitions with regard to our February 7, 2011 Order. We have 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.

Decision

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 the Order. Petitioners were not present at our January 11, 2012 Agenda Conference.

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

The Petition repeatedly alleges that Petitioners were denied a point of entry when the staff recommendation proceeded as a regular agenda item rather than a PAA, and that the change was made only 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 also requests reconsideration of our Order. As grounds for reconsideration, the Petition makes the same allegations and adds that the change from a PAA to regular agenda item is reversible error 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.

In support of Petitioners' notice of protest and request for formal hearing, the Petition alleges that the Order "irreparably harmed" the substantial interests and due process rights of the Petitioners.[7] Petitioners state that the disputed issues of material fact include but are not limited to:

- Should we 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 we 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 we 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 we will order a refund of excess earnings in this docket which solely entailed a proceeding to conduct an earnings review investigation. FPL states our action, to decline to investigate FPL's earnings, to not require FPL to hold specified earnings, and to 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.

[7] The Petition seemingly contests the actions of the Office of Public Counsel, which we do not address herein as inapposite to this proceeding.

In response to the motion for reconsideration, FPL states that Petitioners fail to allege any point of fact or law which we overlooked or failed to consider when we 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.

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.
- Our 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 Conference and present arguments.
- We have 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.

OPC's Response to Larson's Petition

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 we explain the circumstances under which a Commission ruling during an Agenda Conference will or will not lead to the issuance of a PAA.

Petition to Intervene

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

> Persons, other than the original parties to a pending proceeding, who have a substantial interest 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 substantial interests 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 Agrico

Chemical Company v. Department of Environmental Regulation, 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. Whether the requested investigation would have resulted in proceedings where we 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).[8]

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.

We find that Petitioners lack standing to intervene and that the motion was untimely filed. Thus, Petitioners' motion to intervene is hereby denied.

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 we overlooked or failed to consider in rendering our 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

[8] 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).

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).

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. We find that 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 Order is not adverse agency action requiring notice and a hearing, even though the January 11, 2011 Agenda Conference was noticed and interested persons were allowed to participate. We therefore 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 we should have considered, and were not adversely affected by the 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 our investigatory discretion, we did not take adverse action affecting the substantial interests of Petitioners and were 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 our permission to investigate FPL's overearnings, which we declined. Since the only matter before us was a request to initiate an investigation, our 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 Order

There is a fundamental concept which the Petitioners' contention, that the Order 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

we should decide to initiate such a proceeding. In this case, the proceedings involved Commission staff's request to authorize the opening of an investigation to monitor FPL overearnings. Should we have approved the initiation of the investigation, only procedural rights would have attached to our order, as the only action taken would have been to authorize the investigation and monitoring, and to hold FPL funds subject to refund pending the results of the investigation. Our order would not be adverse agency action as it 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 Florida Supreme Court held that our order denying a hearing request was proper where action did not establish a new tariff or represent a new 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 Order, 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. We did not change or modify an earlier decision; instead, we recognized that our 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 our 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 our analysis of the nature of the proceedings.

This 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. Commissioners, acting in concert, are the agency head of the Commission. 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, our 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 we may accept, modify, or reject it. Indeed, we rejected staff's recommendation in our 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.

We 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 us to establish the prudence of its fuel costs. We 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:
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> > 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.
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> 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 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,[9] 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

[9] In this case, we declined to investigate. See also Section 120.57(5), F.S.

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 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. [10] In this case, where we declined to initiate an investigation, a final order was issued. Also, in this case, the 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 us, acting in concert, to discuss the matter.[11] Had we authorized the investigation, the order would not have been final but would have been procedural, as the case would have continued until we made a decision, after investigation, affecting a party's substantial interests. Only then would we be required to issue a PAA providing notice and a point of entry. See Capeletti, supra at 348.

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. However, our consideration of the Larson Petition is purely procedural and does not reach the merits of the matter.

We find that Petitioners were not entitled to an administrative hearing in this cause as our denial of the request to investigate was a procedural matter that did not give rise to hearing rights under 120.57(5), F.S. It is well established that, pursuant to Section 366.06, F.S., regardless of Order No. PSC-11-0103-FOF-EI, we continue to have jurisdiction over investor-owned electric utilities to set, change or modify rates. Petitioners are not prohibited from bringing before us an independent petition to review FPL's rates.

For the reasons stated above, we 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, we deny all pending petitions.

Based on the foregoing, it is

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[10] 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.

[11] 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 this Commission for action. Section 286.011, F.S. Thus, unlike agencies where there is a single agency head, in order for staff to request that we initiate an investigation and for Commissioners to discuss and decide the matter, the request must come before this Commission at our Agenda Conferences, which are publicly noticed.

ORDERED by the Florida Public Service Commission that Mr. Daniel R. Larson and Ms. Alexandria Larson's petition to intervene, motion for reconsideration, notice of formal protest and request for formal hearing is hereby denied. It is further

ORDERED that all pending petitions are denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 7th day of November, 2011.

ANN COLE
Commission Clerk
Florida Public Service Commission
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Tallahassee, Florida 32399
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MFB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.