

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: April 24, 2014

TO: Office of Commission Clerk (Stauffer)

FROM: Division of Economics (Draper, King, Rome) *EID*
Office of the General Counsel (Brownless) *J.W.D.*
Office of Industry Development and Market Analysis (Clemence, Marr) *ABW JCO*
EDH

RE: Docket No. 130223-EI – Petition for approval of optional non-standard meter rider, by Florida Power & Light Company.

AGENDA: 05/09/14 – Regular Agenda – Motions for Reconsideration Prior to Hearing –Oral Argument Requested; Participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: 12 month deadline pursuant to Section 366.06(3), F.S. has been waived through December 31, 2014

SPECIAL INSTRUCTIONS: None

Case Background

The Commission approved for recovery through base rates the costs of Florida Power & Light Company’s (FPL or Utility) Advanced Metering Infrastructure (AMI) and associated smart meters in Order No. PSC-10-0153-FOF-EI.¹ FPL has completed the installation of approximately 4.5 million smart meters for residential and small business customers.

On August 21, 2013, FPL filed a petition for approval of an optional Non-Standard Meter Rider (NSMR) tariff. The tariff would be available to customers who elect to keep their non-communicating meters in lieu of the standard communicating smart meters.

¹ Order No. PSC-10-0153-FOF-EI, issued March 17, 2010, in Docket No. 080677-EI, In re: Petition for increase in rates by Florida Power & Light Company.

By Order No. PSC-13-0437-PCO-EI, issued on September 24, 2013, the Office of the Public Counsel (OPC) intervened in this docket. On January 14, 2014, the Commission issued Order No. PSC-14-0036-TRF-EI (Tariff Order), denying FPL's tariff request. It did, however, provide an option for FPL to file a revised non-standard meter rider tariff, provided the revised tariff contained three Commission recommended adjustments. FPL filed a revised non-standard meter rider tariff on January 17, 2014. Pursuant to Order No. PSC-14-0036-TRF-EI, the revised tariff shall become effective once FPL notifies Commission staff that the billing system changes have been implemented.

On February 4, 2014, two separate groups of FPL customers (Protestors) filed protests through their respective representatives citing concerns over a wide range of issues, including the basis for the tariff as well as the costs, terms and conditions outlined in the proposed tariff. The Petition for Relief from Automated Metering Infrastructure ("AMI") System and Coercion Thereto and for a Formal Evidentiary Proceeding (Ahn Petition or Petition) was filed by Attorney Nicholas Jones on behalf of Lucy Ahn and 96 others. Marilynne Martin filed the Petition for a Formal Evidentiary Proceeding Based on Disputed Issues of Fact (Martin Petition) on behalf of herself and 19 others. Marilynne Martin was granted qualified representative status by Order No. PSC-14-0103-FOF-OT, issued February 18, 2014 in Docket No. 140008-OT. On February 21, 2014, FPL filed two motions to dismiss substantial portions of each protest, generally based upon the position that many of the proposed issues are either outside the jurisdiction of the Commission or are outside the scope of the present docket. Both Protestors timely filed responses in opposition to FPL's motions to dismiss.

On April 1, 2014, the Prehearing Officer issued Order Nos. PSC-14-0145-FOF-EI and PSC-14-0146-FOF-EI granting in part and denying in part FPL's Motions to Dismiss the Ahn and Martin petitions, respectively. On April 11, 2014, the Ahn Protestors and Ms. Martin timely filed a Motion for Reconsideration of Order No. PSC-14-0145-FOF-EI Granting in Part and Denying in Part FPL's Motion to Dismiss the Ahn Petition (Ahn Motion) and Motion for Reconsideration of Order No. PSC-14-0146-FOF-EI Request for Clarification on the Order and Request for Oral Arguments (Martin Motion), respectively. On April 17, 2014, FPL timely filed its response in opposition to the Ahn and Martin motions for reconsideration and a motion to strike their requests for oral argument.

The purpose of this recommendation is to address each Protestor's request for oral argument and reconsideration of Order Nos. PSC-14-0145-FOF-EI (Order No. 14-0145) and Order No. PSC-14-0146-FOF-EI (Order No. 14-0146). The Commission is vested with jurisdiction over this matter pursuant to Chapters 120 and 366, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission grant the request for oral argument?

Recommendation: Yes. Oral argument will aid the Commission in understanding and evaluating the issues to be decided and should be granted. However, staff recommends that the time granted be limited to ten minutes per side. (Brownless)

Staff Analysis: Pursuant to Rule 25-22.0022(3), F.A.C., the Commission has the sole discretion to grant or deny requests for oral argument. Requests for oral argument are to be filed on a separate pleading and are to state with specificity how the oral argument will aid the Commissioners in understanding and evaluating the issues to be decided. Rule 25-22.0022(1), F.A.C.

Neither Protestor filed a separate written pleading requesting oral argument and therefore, neither Protestor has technically complied with the requirements of Rule 25-22.0022(1), F.A.C.² Both Protestors did, however, clearly request oral argument in their motions for reconsideration. [Ahn Motion at 12; Martin Motion at 10] The Ahn motion does not provide any reason why oral argument would aid the Commissioners in understanding and evaluating the issues raised.³ Ms. Martin, however, noted that oral argument “will aid the Commission by understanding how the Petitioner’s due process rights have been violated through lack of proper notice and improper rule making” and allow the Commissioners to evaluate “the importance of non-cost issues” raised by the Protestors in the case, i.e., potential health and safety issues associated with AMI technology. Based on the failure of both the Ahn and Martin motions to fully comply with the requirements of Rule 25-22.0022, F.A.C., FPL urges the Commission to strike the requests and deny oral argument.

This is the first time that the Commission has considered a NSMR tariff and the non-cost issues raised by the Protestors are significant. Additionally, in their present form Order Nos. 14-0145 and 14-0146 prohibit the Protestors from presenting evidence on these non-cost issues at the final hearing currently scheduled for September 23 and 24, 2014. These unique facts, taken together, support staff’s recommendation to allow oral argument on the Protestors’ motions. Should the Commission grant oral argument, staff recommends that it be limited to ten minutes per side.

² Florida Power & Light Company’s Response to Petitioners Ahn’s and Martin’s Motions for Reconsideration and Motion to Strike Requests for Oral Argument (FPL Response) at page 5.

³ FPL Response at page 5.

Issue 2: What action should the Commission take regarding the Ahn Motion?

Recommendation: The Commission should deny the Ahn Motion since the Protestors have not identified any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering her order. (Brownless)

Staff Analysis:

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order.⁴ The alleged overlooked fact or law must be such that if it was considered, the Commission would reach a different decision than the decision in the order.⁵ In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.⁶ Nor is it necessary to respond to every argument and fact raised by each party as “[a]n opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant.”⁷

Overlooked Items

The Ahn Motion raises six items that the Ahn Protestors contend were overlooked by the Prehearing Officer in rendering Order No. 14-0145:

1. That an AMI meter does not meet the definition of “meter” in Rule 25-6.003, F.A.C., since it contains more than measuring capabilities. As such, adoption of an AMI meter as the “standard” meter constitutes an impermissible rule change.
2. That the Commission has the authority to set terms and conditions for the NSMR tariff imposing exemptions for medical conditions, warning labels, limitations on banked meters and FPL’s use of remote disconnection.
3. That Protestors are legally entitled to determine what goes into their meter box since Order Nos. 18893 and PSC-95-0131-FOF-EI established that the meter box is the property of, and the responsibility of, the customer not the utility.
4. That placement of AMI meters on the Protestor’s property is an unlawful taking of Protestor’s health, safety and privacy without consent or compensation.
5. That the order classifies the health, safety and privacy issues raised by the Protestors as “re-litigation” when those issues have never been litigated before the Commission.

⁴ See: Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981).

⁵ See: Diamond Cab Co. v. King, 126 So.2d 889 (Fla. 1962).

⁶ See: Sherwood v. State, 111 So.2d 96 (Fla. 3d DCA 1959, citing State ex rel. Jaytex Realty Co. v. Green (Jaytex Realty), 105 So.2d 817 (Fla. 1st DCA 1958); Order No. PSC-07-0783-FOF-EI, issued September 26, 2007, in Docket No. 050958, In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company.

⁷ Jaytex Realty, 105 So.2d at 818.

6. The Protestor's proposal that pursuant to Section 366.015, F.S., the Commission is required to "liaise" with the Florida Department of Health to address perceived health issues with regard to the non-thermal effects of radio frequency radiation (RF).

FPL Response

FPL states that the Ahn Motion is simply reargument of the positions previously presented on which the Protestors were unsuccessful, e.g., health, safety and privacy issues. FPL contends that all of the legal and factual issues raised in the reconsideration motion were considered and ruled upon in Order No. 14-0145. In sum, FPL contends that the Ahn Protestors have failed to meet the well-established standard for reconsideration and their requests should be denied.

Discussion

A close reading of Order No. 14-0145 reveals that the issues raised in the Ahn Motion were, in fact, addressed by the Prehearing Officer. Ahn Issues Nos. 1, 3 and 4 relate to AMI meters and the ability of FPL to use them as its "standard meter." The ability of the Protestors to contest the deployment of the AMI meters throughout FPL's system was specifically addressed by the Prehearing Officer:

The costs associated with the deployment of FPL's AMI meters were approved in Order No. PSC-10-0153-FOF-EI. Concerns regarding the deployment should have been raised in that proceeding. As a result, the doctrine of administrative finality bars the Protestors from relitigating the prudence of the Advanced Metering Infrastructure project.

Order No. 14-0145 at page 11.

Ahn Issue No. 2 regarding the terms and conditions of the NSMR tariff essentially deals with the Protestor's desire to litigate health, safety and privacy issues in this proceeding. The ability of the Commission to address health, safety and privacy issues associated with AMI meters in this proceeding was also specifically addressed by the Prehearing Officer:

Injuries related to health, safety, and privacy are not of a type or nature that this proceeding is designed to protect. This proceeding is designed to address the approval of the revised NSMR tariff and its associated costs. Therefore, I find that the Protestors have demonstrated that they have standing with regard to protesting the proposed tariff on its merits as they relate to costs, and that such arguments are within the scope of Order No. PSC-14-0036-TRF-EI.

Order No. 14-0145 at page 9.

With regard to Ahn Issue No. 5 stating that health, safety and privacy issues were rejected by the Prehearing Officer on the basis that those issues had been previously litigated, it is unclear what is meant. There does not appear to be any statement in Order No. 14-0145 to that effect. To the contrary, the order discusses at great length the basis for the Prehearing Officer's conclusion that the Commission lacks statutory authority and therefore jurisdiction over these issues.

The Protestors' case for jurisdiction rests on the notion that in the absence of proper regulatory oversight, the Commission has the authority to fill this regulatory vacuum in order to address what the Protestors believe is a grave situation with regard to health and welfare. I could find no support for the Protestors' arguments. In fact, the opposite is true as the Commission's authority is derived from its delegated legislative power in Chapter 366, F.S. Nothing in that Chapter grants the Commission the authority to assume regulatory jurisdiction over issues beyond what is contained within its authorizing statutes.

Order No. 14-0145 at page 10.

With regard to Ahn Issue No. 6, it appears that the Ahn Protestors believe that the Commission has a statutory duty under Section 366.015, F.S., to petition other state agencies who do have statutory authority over health, safety and privacy issues on behalf of the Protestors. A plain reading of the statute reveals that not to be the case. Section 366.015, F.S., allows the Commission to engage in "active participation" in "other agencies' public hearings" to "transmit the commission's policy positions and information requirements, in order to provide for more efficient regulation." Subsumed in the Prehearing Officer's conclusion that the Commission lacks jurisdiction over health, safety and privacy issues associated with AMI meters is a rejection of this argument as well.

Conclusion

The Commission should deny the Ahn Motion for failure to identify any errors or omissions in Order No. PSC-14-0145-FOF-EI that require modification or reversal of the order.

Issue 3: What action should the Commission take regarding the Martin Motion?

Recommendation: The Commission should deny the Martin Motion since the Protestors have not identified any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering her order. (Brownless)

Staff Analysis:

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order.⁸ The alleged overlooked fact or law must be such that if it was considered, the Commission would reach a different decision than the decision in the order.⁹ In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.¹⁰ Nor is it necessary to respond to every argument and fact raised by each party as “[a]n opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant.”¹¹

Overlooked Items

The Martin Motion also raises Issues Nos. 1 and 2 identified in the Ahn Motion discussed above and three additional items that the Martin Protestors contend were overlooked by the Prehearing Officer in rendering Order No. 14-0146:

1. That Protestors were not given proper notice in the last rate case (Docket No. 080677-EI) that AMI meters would be considered the “standard meter” if cost recovery for the AMI deployment was approved and therefore had no opportunity to contest this issue in the last rate case.
2. That the Commission has the authority to set terms and conditions for the NSMR tariff imposing ADA accommodations.
3. That the Commission has jurisdiction over health, safety and privacy issues under the “standards of quality” language found in Section 366.05, F.S.

Additionally, the Martin Motion seeks clarification regarding whether the issue of cost causation will be addressed, i.e., who is the “cost causer” responsible for paying any additional costs if additional costs associated with maintaining analog meters are ultimately proven.

⁸ See: Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981).

⁹ See: Diamond Cab Co. v. King, 126 So.2d 889 (Fla. 1962).

¹⁰ See: Sherwood v. State, 111 So.2d 96 (Fla. 3d DCA 1959, citing State ex rel. Jaytex Realty Co. v. Green (Jaytex Realty), 105 So.2d 817 (Fla. 1st DCA 1958); Order No. PSC-07-0783-FOF-EI, issued September 26, 2007, in Docket No. 050958, In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company.

¹¹ Jaytex Realty, 105 So.2d at 818.

FPL Response

FPL states that the Martin Motion is simply reargument of the positions presented previously on which the Martin Protestors were unsuccessful, e.g., health, safety and privacy issues. FPL contends that all of the legal and factual issues raised in the Protestors' reconsideration motion were considered and ruled upon in Order No. 14-0146. In sum, FPL contends that Martin Protestors have failed to meet the well-established standard for reconsideration and their requests should be denied.

Discussion

A close reading of Order No. 14-0146 reveals that the issues raised in the Martin Motion were, in fact, addressed by the Prehearing Officer. Martin Issue 1 relates to AMI meters and the ability of FPL to use them as its "standard meter." The ability of the Protestors to contest the deployment of the AMI meters throughout FPL's system was specifically addressed by the Prehearing Officer:

The costs associated with the deployment of FPL's AMI meters were approved in Order No. PSC-10-0153-FOF-EI. Concerns regarding the deployment should have been raised in that proceeding. As a result, the doctrine of administrative finality bars the Protestors from relitigating the prudence of the Advanced Metering Infrastructure project.

Orders Nos. 14-0146 at page 11.

Martin Issue No. 2 regarding the terms and conditions of the NSMR tariff essentially deals with the Protestors' desire to litigate health, safety and privacy issues in this proceeding. The ability of the Commission to address health, safety and privacy issues associated with AMI meters in this proceeding was also specifically addressed by the Prehearing Officer:

Injuries related to health, safety, and privacy are not of a type or nature that this proceeding is designed to protect. This proceeding is designed to address the approval of the revised NSMR tariff and its associated costs and cost allocations. Therefore, I find that the Protestors have demonstrated that they have standing with regard to protesting the proposed tariff on its merits as relates to costs or cost allocation which are within the scope of Order No. PSC-14-0036-TRF-EI.

Order No. 14-0146 at page 9.

With regard to health, safety and privacy issues, Order No. 14-0146 also discusses at great length the basis for the Prehearing Officer's conclusion that the Commission lacks statutory authority and therefore jurisdiction over these issues.

[N]one of the Commission's authorizing statutes confers upon it jurisdiction over the personal health, safety or privacy issues raised by the Protestors. Nor is the Commission authorized to enforce these extra-jurisdictional issues, which are the purview of the other agencies.

Order No. 14-0146 at page 10.

Martin Issue No. 1 is covered in both orders by the Prehearing Officer's discussion of the administrative finality of Order No. PSC-10-0153-FOF-EI as discussed above. Martin Issues Nos. 2 and 3 are covered in Order No. 14-0146 by the Prehearing Officer's discussion of the Commission's jurisdiction. With regard to ADA compliance terms and conditions, customers of FPL who believe that the terms and conditions of the NSMR tariff violate their ADA rights are able to sue in federal district court for both exemption from the tariff and recovery of any monetary damages incurred as a result of the violations of the ADA. Neither the Commission nor any other state agency is the proper forum for the relief that the Protestors appear to be seeking.

Conclusion

The Commission should deny the Martin Motion for failure to identify any errors or omissions in Order No. PSC-14-0146-FOF-EI that require modification or reversal of the order.

Issue 4: Should this docket be closed?

Recommendation: No. This docket should remain open for the Commission to conduct the requested administrative hearing. (Brownless)

Staff Analysis: No. This docket should remain open for the Commission to conduct the requested administrative hearing.