

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for approval of optional non-standard meter rider, by Florida Power & Light Company

Docket No. 130223-EI

Filed: February 21, 2014

**FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS  
THE PETITION FOR A FORMAL EVIDENTIARY PROCEEDING  
BASED ON DISPUTED ISSUES OF FACT, OR ALTERNATIVELY FOR PARTIAL  
DISMISSAL OF PETITION**

Florida Power & Light Company ("FPL" or "Company"), pursuant to Rules 28-106.201 and 28-106.204, Florida Administrative Code (F.A.C.), moves to dismiss the Petition For a Formal Evidentiary Proceeding Based on Disputed Issues of Fact ("Martin Petition") filed on February 4, 2014 on behalf of 20 individuals alleged to be FPL customers ("Martin Petitioners"), or alternatively for dismissal of all portions of the Martin Petition aside from those that may be construed to request an evidentiary hearing on the cost basis of FPL's Non-Standard Meter Rider ("NSMR") tariff and the allocation of those costs. In short, if the Commission determines that it is appropriate to conduct an administrative hearing, the sole issues to be decided should be the cost basis of FPL's tariff and the allocation of those costs to the opt-out customers.

The Martin Petition is legally deficient in the following respects: (A) the Martin Petition fails to satisfy the pleading requirements of Rule 28-106.201, F.A.C., and with the possible exception of a very narrow issue (i.e., the cost basis of the NSMR tariff and the allocation of those costs) fails to state a cause of action upon which relief may be granted; (B) the Martin Petition alleges speculative harm and matters that are well beyond the scope of the Commission's Order Denying a Non-Standard Meter Rider Tariff ("Tariff Order"); (C) the Martin Petition seeks to litigate issues that fall outside the Commission's jurisdiction; (D) the Martin Petition attempts to re-litigate the propriety of FPL's now completed smart meter

deployment to its residential and small business customers; and (E) 15 of the 20 petitioners completely lack standing while the remaining 5 petitioners lack standing on all allegations other than those related to the cost basis of the Tariff Order.

Based upon the foregoing, FPL seeks dismissal of the Martin Petition for failure to comply with Rule 28-106.201, F.A.C., or alternatively dismissal of all portions of the Martin Petition aside from those that may be construed to request an evidentiary hearing on the cost basis of FPL's NSMR tariff and the allocation of those costs.

### **BACKGROUND**

1. FPL's smart meter project was reviewed and approved by the Commission in FPL's 2009 rate case, as reflected in Order No. PSC-10-0153-FOF-EI, issued on March 17, 2010, in Docket Nos. 080677-EI and 090130-EI. The Commission found FPL's Advanced Metering Infrastructure ("AMI") project prudent and specifically indicated that the project should not be delayed. Consistent with that portion of the Commission's Order, FPL systematically deployed smart meters to its residential and small business customers.

2. During deployment, FPL voluntarily created a postpone list for those customers who objected to the installation of a smart meter and for customers who prevented access to their premises or whose structures prevented the installation of a smart meter.

3. In September of 2012, Commission Staff ("Staff") conducted a public workshop to gather information on smart meters and to address concerns raised by customers. A number of smart meter related subjects were addressed during the workshop, including the technology in use at that time, the status of deployments in Florida, benefits associated with smart meters and the smart grid in general, and a variety of other related matters. Topics also included the

jurisdiction of government agencies, health, privacy, data security, and alternatives to smart meters.

4. Following the public workshop, Staff issued its Memorandum on February 11, 2013 which was presented to the Commission at its February 19, 2013 Internal Affairs meeting. In that Memorandum, Staff outlined the parameters of the Commission's jurisdiction over smart meters and recommended that utilities should have the option to voluntarily provide their customers with an opt-out option under an appropriate, approved tariff. Staff further recommended that if a utility chose to offer such an option to its customers, any such tariff should be cost-based to avoid subsidization by the general body of customers. A copy of the February 11, 2013 Staff Memorandum is attached hereto and marked as Exhibit A to this Motion.

5. On the issue of jurisdiction, Staff's Memorandum properly defined the scope of the Commission's jurisdiction with reference to smart meters. Staff opined that "[T]he FPSC has jurisdiction over cost recovery of smart meters, but does not have specific statutory authority over the meters themselves." Staff acknowledged that members of the public voiced concerns regarding radio frequency emissions, alleged health issues, data privacy, and data security. However, Staff properly concluded that "[T]he issues that are of concern to consumers are outside the jurisdiction of the FPSC." Staff noted that radio frequency ("RF") emissions including those from cellphones, microwaves, walkie-talkies, computers, smart meters, and other such devices are regulated by the Federal Communications Commission ("FCC"). Staff also described the type of information transmitted by smart meters (i.e., encrypted usage data, with no personal customer information) and the fact that the Federal Trade Commission ("FTC") has regulations in place regarding the security of confidential data. In short, Staff acknowledged that

although the Commission has jurisdiction over the cost recovery aspects of smart meters, other regulatory agencies have jurisdiction over the various health and privacy issues raised by customers.

6. By the summer of 2013, FPL's deployment to residential and small business customers was substantially complete. As a result, it was the appropriate time for the Company to address the non-standard service that was being provided free of charge to customers on the postpone list and to customers who had prevented access to their premises or whose structures prevented the installation of a smart meter.

7. On August 21, 2013 FPL filed a Petition for Approval of Optional Non-Standard Meter Rider ("Opt-Out Petition"). The Opt-Out Petition sought permission to offer a choice to qualified FPL customers who did not want a smart meter but who instead chose to receive electric service through a non-standard meter. FPL proposed a cost-based tariffed rate consistent with the Staff Memorandum and the longstanding Commission principle that the costs associated with an available non-standard service should be borne by those customers receiving the non-standard service rather than by the general body of customers. The original NSMR tariff, along with the revised NSMR tariff now on file with the Commission, was designed to avoid subsidization by the general body of customers (i.e., the 99.5% of FPL residential and small business customers receiving service through the standard meter).

8. In Order No. PSC-14-0036-TRF-EI ("Order 14-0036" or "Tariff Order") dated January 14, 2014, the Commission denied FPL's Opt-Out Petition as filed, but ruled that FPL at its option could file a revised tariff that reduced the Enrollment Fee from \$105 to \$95 and the Monthly Surcharge from \$16 to \$13. FPL thereafter timely filed the revised tariff meeting the

conditions of the Commission's order. The Company plans to begin enrollment in March 2014, with billing for this non-standard service commencing in June 2014.

### LEGAL ARGUMENT

**A. The Martin Petition fails to satisfy the basic pleading requirements of Rule 28-106.201, F.A.C., and with one narrow exception (i.e., the cost basis of the NSMR tariff and allocation of those costs) fails to state a cause of action upon which relief may be granted.**

9. The Commission has held that “[A] motion to dismiss raises as a question of law the legal sufficiency of the facts alleged to state a cause of action. In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true, the petition still fails to state a cause of action for which relief may be granted.” Further, “all allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted.” *See In re: Petition for prudence determination regarding new pipeline system by Florida Power & Light Company*, Docket No. 130198-EI, Order No. PSC-13-0669-FOF-EI (F.P.S.C. December 18, 2013).

10. The requirements for a legally sufficient petition or protest are clearly identified in Rule 28-106.201, F.A.C. Among other requirements, a petitioner must include the following:

- “(2)(d) A statement of all disputed issues of material fact”
- “(2)(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency’s proposed action”

- “(2)(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency’s proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes”
- “(2)(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency’s proposed action.”

11. The Martin Petition presumably purports to satisfy the requirements of Rule 28-106.201(2)(d), F.A.C. through the provision of its “summary of disputed material facts” on pages 12 through 14. A complete reading of that portion of the Martin Petition suggests that the asserted “disputed issues of material fact” may be grouped into the following categories:

- The propriety of the September 2012 Smart Meter Workshop
- The propriety of installing smart meters in rental properties
- The Commission’s reliance on the FCC as the agency with jurisdiction over radio frequency emissions
- The classification of smart meters as “meters” and as FPL’s “standard service”
- Privacy rights
- Health and safety
- FPL’s communication plan
- Discriminatory treatment
- The propriety of assessing fees to opt-out customers
- The cost basis of the NSMR tariff

Even construing all material facts in a light most favorable to the Martin Petitioners, only the last two bulleted items in any way relate to the issues addressed by the subject Tariff Order.

As a result, none of the remaining assertions raise any issue upon which relief may be granted by the Commission.<sup>1</sup>

12. The Martin Petition also fails to satisfy Rule 28-106.201(2)(e), F.A.C. which requires petitioner to provide a “concise statement of the ultimate facts alleged.” Instead, pages 14 through 47 of the document include a 33 page section identified as “specific points of disputed material facts”, the great majority of which bear virtually no relationship to the narrow issues involved in this docket. As a result, aside from the cost basis of the NSMR Tariff, none of the allegations recited in that lengthy section of the Martin Petition constitute the type of “ultimate facts” that could “warrant reversal or modification of the agency’s” Tariff Order.

13. The Martin Petition also fails in all material respects to comply with the requirements of Rule 28-106.201(2)(f), F.A.C. Nowhere in the Martin Petition is there a single reference to any applicable “specific rules or statutes the petitioner contends require reversal or modification of the agency’s proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.”<sup>2</sup>

14. Even ignoring the technical defects and assuming *arguendo* that all allegations contained in the Martin Petition are true – and FPL vehemently denies that to be the case – the only allegations or assertions that could be construed to state a cause of action are those related to the cost basis of the NSMR tariff and the assessment of those costs on the opt-out customers. As described in the three subsections that follow, all other assertions or allegations are

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<sup>1</sup> The assertion concerning the Commission’s determination that the fees should be assessed only on the opt-out customers is not a disputed issue of material fact, but instead an issue of regulatory policy.

<sup>2</sup> Rule 28-106.201(2)(f), F.A.C. reads as follows: “All petitions filed under these rules *shall* contain (f) a statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency’s proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.” (Emphasis added). It is well settled that the use of the term “shall” denotes a mandatory requirement. *Saltzman v. Hadlock*, 112 So. 3d 772 (Fla. 5<sup>th</sup> DCA 2013).

completely outside the scope of the subject Tariff Order, clearly beyond the jurisdiction of the Commission, and relate to matters that have been decided by the Commission in a prior docket.

15. Therefore, assuming the Commission finds that the Martin Petition includes a request for a hearing on the cost basis of the NSMR tariff and the assessment of those costs to the opt-out customers, and conceding that point for purposes of this motion without waiving the argument that the entire Martin Petition should be dismissed, FPL submits that these are the *only* issues that fall either within the scope of Order 14-0036 or the Commission's jurisdiction. As a result, the Martin Petition should either be dismissed in its entirety for failure to comply with Rule 28-106.201, F.A.C., or alternatively should be dismissed in part, leaving the cost-based nature of the tariff, as well as the propriety of assessing the fees only on the opt-out customers, as the only issues to be determined through administrative hearing process.

**B. The allegations in the Martin Petition and the relief sought are well beyond the scope of the Tariff Order.**

16. Section 120.80(13)(b), Florida Statutes, prescribes the scope applicable to protests of proposed agency action as follows: "a hearing on an objection to proposed action of the Florida Public Service Commission *may only address the issues in dispute*. Issues in the proposed action which are not in dispute are deemed stipulated." (Emphasis added).

17. Order 14-0036 is limited in scope. In the Conclusion portion of the order, the Commission found that "the option to opt-out from the standard smart meter will require FPL to incur incremental costs, which would appropriately be borne by the cost causer and not the general body of ratepayers." The Commission further found that FPL provided substantial support for its proposal, though the order reflected proposed modifications which FPL subsequently incorporated into its revised tariff. Finally, the order provided Staff with authority



to administratively approve the revised tariff once FPL notifies Commission Staff that the billing system changes have been implemented.

18. Notwithstanding the limited scope of FPL's Opt-Out Petition and the Tariff Order, Petitioner Martin devotes approximately 50 pages to a multitude of issues wholly irrelevant to this proceeding, none of which – with the exception of the references to costs and assessment of the costs on the cost-causing opt-out customers - are in any way addressed by the Commission in its order. The Martin Petition strays far afield, asserting speculative consequences allegedly related to the use of smart meters, while almost completely ignoring the actual issues addressed by the Tariff Order. Thus, with the possible exception of references to cost and allocation of costs, the Martin Petition should be dismissed for failure to satisfy the requirements of section 120.80(13)(b), Florida Statutes, as the Petition fails to “address the issues in dispute”. *See In re Application for Certificate to Provide Alternative Local Exchange Telecommunications Service by American Phone Corp.*, Docket No. 981016-TX, Order No. PSC-99-0146-FOF-TX (F.P.S.C. Jan 25, 1999) (dismissing protest that raised only issues outside Commission's jurisdiction and failed to comply with Section 128.80(13)).

**C. The Martin Petition seeks to litigate issues that fall outside of the Commission's jurisdiction.**

19. The Florida Public Service Commission is a creature of statute which derives its powers from the legislature. §350.001, Florida Statutes. The jurisdiction and powers of the Commission are prescribed and defined in §§366.04 and 366.05, Florida Statutes. The statutes authorize and direct the Commission to “regulate and supervise each public utility with respect to its rates and service.” As with other administrative agencies, the enabling statutes clearly define the scope of the Commission's jurisdiction. *State Department of Financial Services v. Peter R.*

*Brown Construction, Inc.*, 108 So. 3d 723 (Fla. 1<sup>st</sup> DCA 2013); *Southwest Florida Water management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000); §120.

20. In its Memorandum issued February 11, 2013, Staff correctly noted that “RF emission standards are established by the Federal Communications Commission (FCC)” and that the National Electrical Safety Code (identified in §366.05, Florida Statutes) does not address radio frequencies. In Staff’s words, “Smart meter transmitters are certified for compliance with RF emissions by the FCC.” Permissible levels of RF emissions are established and monitored by the FCC, and the FPSC simply does not have jurisdiction to establish or alter these standards.

21. Similarly, customers’ concerns regarding privacy rights fall outside the jurisdiction of the Commission. The Federal Trade Commission (“FTC”) has promulgated regulations on this issue, while individuals who claim to suffer damages related to the unauthorized release or dissemination of personal, confidential information may seek redress in court. The Commission is not the agency with jurisdiction over this subject.

22. At page 7 of its Memorandum, Staff wrote that “[T]he issues that are of concern to consumers are outside the jurisdiction of the FPSC.” The Commission acknowledged in Order 14-0036 that at the February 19, 2013 Internal Affairs meeting, Staff conveyed that “[t]his Commission’s jurisdiction over smart meters is limited to cost recovery for the meters and ensuring the meters are commercially acceptable measuring devices owned and maintained by the utility.” The narrow scope of the Commission’s Tariff Order suggests the Commission’s agreement with this important legal principle.

**D. The Martin Petition attempts to re-litigate the propriety of FPL’s now completed smart meter deployment to its residential and small business customers.**

23. The prudence of FPL’s deployment of smart meters was determined in Order No. PSC-10-0153-FOF-EI, issued on March 17, 2010, in Docket Nos. 080677-EI and 090130-EI. A

complete reading of the Martin Petition makes it clear that petitioners are actually attempting to challenge *that* order in an effort to unwind the entire FPL smart meter program. The Martin Petition purports to request an evidentiary hearing on the Tariff Order but in fact raises a number of irrelevant issues well beyond the scope of that order. The “substantial interests” identified at pages 4 through 9 and throughout the Petition are instead an attack on the overall deployment and use of smart meters. The narrow issues addressed by the Tariff Order - quantification of FPL costs giving rise to cost-based fees and allocation of those costs – form only a very minor portion of the Martin Petition.

24. The doctrine of administrative finality bars Petitioner Martin from attempting to re-litigate the case that resulted in the Commission’s 2010 order finding the FPL smart meter project prudent and directing the Company to proceed with the project without delay. As noted by the Florida Supreme Court, “[O]rders of administrative agencies must eventually pass out of the agency’s control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.” *McCaw Communications of Florida, Inc. v. Clark et al*, 679 So. 2d 1177, 1178-1179 (Fla. 1996). See also *Austin Tupler Trucking, Inc. v. Hawkins et al*, 377 So. 2d 679 (Fla. 1979).

**E. 15 Martin Petitioners should be dismissed from this proceeding for lack of standing. On all allegations other than those related to the cost basis of FPL’s revised tariff and the allocation of those costs, the remaining five Martin Petitioners lack standing.**

25. When petitioners’ standing in an action is contested, the burden is upon the petitioners to demonstrate that they have standing to participate in the case. *Department of*

*Health and Rehabilitative Servs. v. Alice P.*, 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979). To prove standing, petitioners must demonstrate first that they will suffer an injury in fact which is of sufficient immediacy to entitle them to a hearing pursuant to Section 120.57, Florida Statutes (2013). Second, the petitioners must demonstrate that the “substantial injury is of a type or nature which the proceeding is designed to protect.” *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981).

26. Even a very liberal reading of the Martin Petition makes it clear that the petition completely fails in all material respects to satisfy the *Agrico* test for 15 of the 20 named petitioners (11 of the 15 “petitioners” as that term is used in the Martin Petition) by failing to allege any “substantial injury...of a type or nature which the proceeding is designed to protect.”

27. At pages 4 through 9 of the Martin Petition, the pleading purports to identify the individual petitioners and their “substantial interests.” For only 5 of the 20 identified individuals is there even a passing reference to the costs associated with the NSMR tariff as a factor.<sup>3</sup> The other 15 identified individuals note concerns about health, privacy, security, fire risk and landlord-tenant relations, but mention not a word about the costs associated with the NSMR tariff.<sup>4</sup>

28. For the reasons more fully addressed above, 5 Petitioners lack standing on all matters in the petition with the exception of the cost basis for the NSMR tariff and the assessment of the fees only on the opt-out customers. The remaining 15 petitioners simply have no standing to proceed. While the 5 Martin Petitioners who have identified the cost element could conceivably satisfy the first prong of the *Agrico* test by alleging that they will be required

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<sup>3</sup> Shari Anker, Patricia Denunzio, Martha Babson, Kathleen Bolam, and Jeri Friedman.

<sup>4</sup> Marilynne Martin, Alexandra Ansell, Stephanie Austin, Peter Austin, William G. Bigelow, Margo A. Bigelow, George Fuller, Cathy Grippi, Mario Grippi, Shirley D. Jackson, Jamie Lehman, Douglas Lehman, Victor Rohe, Sandra Smart and David E. Watkins.

to pay fees that are not cost-based, they simply cannot satisfy the second prong on any of the non-cost issues they have attempted to raise in their petition. Petitioners' concerns regarding non-cost issues, even if one assumed that they are well founded, clearly would not be within the Commission's jurisdiction or the scope of the Tariff Order. Because the alleged injuries are not "of a type or nature which the proceeding is designed to protect," nor are they of the type that can be redressed by the Commission, the Martin Petitioners do not meet the *Agrico* test on any of the non-cost issues. See *In re Application for Certificate to Provide Alternative Local Exchange Telecommunications Service by American Phone Corp.*, Docket No. 981016-TX, Order No. PSC-99-0146-FOF-TX (F.P.S.C. Jan 25, 1999) (party lacked standing to protest because Commission proceedings were not designed to address alleged misuse of proprietary information for competitive economic gain).

WHEREFORE, for the foregoing reasons, FPL respectfully requests that the Commission dismiss the Martin Petition in its entirety for failure to comply with Rule 28-106.201, F.A.C., or alternatively dismiss all portions of the Martin Petition aside from those deemed to be requesting an administrative hearing on the cost basis of the NSMR Tariff and the assessment of those costs on the cost-causing opt-out customers. Additionally, FPL respectfully requests that the Commission dismiss Marilynne Martin, Alexandra Ansell, Stephanie Austin, Peter Austin, William G. Bigelow, Margo A. Bigelow, George Fuller, Cathy Grippi, Mario Grippi, Shirley D. Jackson, Jamie Lehman, Douglas Lehman, Victor Rohe, Sandra Smart and David E. Watkins from this proceeding for lack of standing and find that the remaining Martin Petitioners lack standing on all allegations other than those related to the cost basis of FPL's revised tariff and the allocation of those costs.

Respectfully submitted this 21st day February 2014.

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CERTIFICATE OF SERVICE  
DOCKET NO. 130223-EI

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail and/or U.S. Mail to the following parties on this 21st day of February, 2014, to the following:

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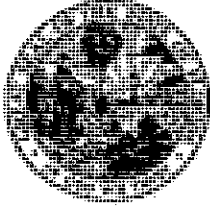
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# EXHIBIT A





# Public Service Commission

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

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**DATE:** February 11, 2013  
**TO:** Braulio L. Baez, Executive Director  
**FROM:** Walter Clemence, Public Utility Analyst II, Office of Industry Development and Market Analysis  
Michael T. Lawson, Senior Attorney, Office of the General Counsel *ML*  
**RE:** Briefing on Smart Meters: Technical Information and Regulatory Issues.

**CRITICAL INFORMATION:** Please place on the February 19, 2013 Internal Affairs. This item is being presented for briefing only.

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Florida Public Service Commission (FPSC) staff held a public workshop on September 20, 2012 to gather information on smart meters and to address concerns raised by consumers. Topics addressed during the workshop included jurisdiction of government agencies, health, privacy, data security, and alternatives to smart meters. Presentations were made by subject matter experts from utilities, transmitter manufacturers, and meter manufacturers. Twelve consumers provided public comment during the workshop and numerous customer contacts have been received. Staff is providing a summary of the issues that have been of concern to customers for briefing purposes.

### Introduction

The meters being installed by the investor-owned utilities are not identical and have been rolled out on different schedules. Florida Power & Light Company (FPL) uses advanced metering infrastructure (AMI) that utilizes Radio Frequency (RF) Mesh technology that provides two-way communications infrastructure to and from the customer's meter. FPL began installing meters in 2006 and plans to complete their installation of 4.6 million meters in May of 2013. Tampa Electric Company (TECO) uses an automated meter reading (AMR) meter that is capable of transmitting from the meter, but the meter is not capable of two-way communication. TECO started its AMR roll out in 2003 and completed the installation of approximately 682,000 meters in January 2012. Progress Energy Florida, Inc. (PEF) used a mix of cellular AMR for large customers, drive-by AMR for residential and small commercial customers, and AMI for medium size commercial customers. PEF began installing AMR meters for its industrial customers in the 1990's and plan to complete its installations with AMI meters in October of 2013. Gulf Power Company (Gulf) also uses AMI meters within its service territory. Gulf started its installation of AMI meters in 2007 and completed the installation of approximately 437,000 meters in 2012.

## **Jurisdiction**

The FPSC has jurisdiction over cost recovery of smart meters, but does not have specific statutory authority over the smart meters themselves. As required by Section 366.04, Florida Statutes, the FPSC has adopted and enforces the safety standards found in the National Electrical Safety Code (NESC) for all electric utilities. However, the NESC does not address radio frequency transmitted by devices such as smart meters. RF emission standards are established by the Federal Communications Commission (FCC).

Section 366.03, Florida Statutes (F.S.), requires the utilities to furnish to each customer reasonably sufficient, adequate, and efficient service upon terms as required by the FPSC. Section 366.04(1), F.S., indicates that the Commission has jurisdiction to regulate and supervise each public utility with respect to rates and service. Utilities present at the workshop agreed that the rates and services aspects of the statutes apply to smart meters.

Section 366.045, F.S., provides that the FPSC shall have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida. Section 366.05(1), F.S., discusses the FPSC's jurisdiction to prescribe fair and reasonable rates and charges, and classification standards of quality and measurements. Rule 25-6.049, Florida Administrative Code, requires utilities to use commercially acceptable measuring devices owned and maintained by the utility to measure their customers' energy usage. Meter manufacturers and utilities at the workshop stated that the meters being installed are commercially accepted measuring devices.

The participating utilities all indicate that the FCC has exclusive jurisdiction over any health effects from smart meters. The FCC's jurisdiction arose from the Federal Communications Act of 1934, continued with the Telecommunications Act of 1996. Workshop presenters agreed that the standards are uniformly adhered to by Florida's IOUs.

FPL presented information that the FCC corresponded with Florida Senator Bill Nelson in June of 2012 and reaffirmed that health issues related to smart meters are within their jurisdiction. Further, FPL indicated the FCC has stated that it has exercised its jurisdiction and will continue to exercise the FCC's jurisdiction over smart meter transmitters.

Commission staff invited the FCC and the California Council on Science and Technology (CCST) to attend the workshop. Both the FCC and CCST declined to attend the workshop.

## **Available Options**

Staff does not believe that jurisdictional issues addressed at the workshop require any FPSC action.

## **Health**

Smart meter transmitters are certified for compliance with RF emissions by the FCC. The transmitters within the meter have an FCC ID number that consumers could use to verify that it

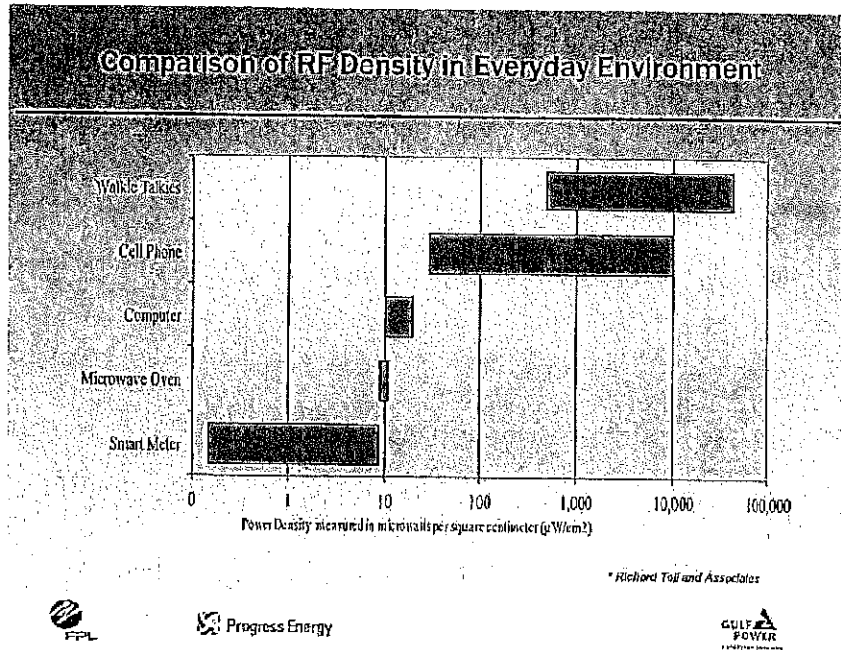
has been approved. RF emitting devices have been used since the 2<sup>nd</sup> World War and have been widely studied. The smart meter is a relatively new application of existing RF technology. Utilities and manufacturers presented information that smart meters are safe and operate within established authorized standards. However, during the public comment session, consumers presented information that the meters are unsafe and contended that the meters may operate outside the bounds of established standards.

The meter manufacturers who attended the workshop provided staff with an overview of the process for ensuring FCC RF compliance. First, the transmitter is tested by a third-party agency for compliance and then that information is filed with the FCC. Once approved, an FCC ID number is provided to transmitters that pass the test. Each FCC ID number is available to be verified on the FCC website, and consumers may reference the number that appears on any transmitter. In the event that a change is made to the transmitter, the testing and FCC filings must be resubmitted, and another FCC ID number would be assigned after compliance.

The effects of RF can be either thermal or non-thermal. At very low levels, RF can pass directly through the body and has no effect on a person. At higher levels, the RF can accumulate energy within the body, and this effect can raise body temperature. The standards set by the FCC focus primarily on the thermal effects from RF. The FCC does look at the non-thermal effects; however, it believes it is appropriate to use the thermal effects as a guide for setting standards. Non-thermal effects reported by customers include headaches and difficulty sleeping.

Comments were provided regarding multi-meter installations and the possible health effects from these meter banks. FPL conducted third-party testing and found that at a distance of one foot from 100 smart meters, the RF was 15% of the allowable exposure limit. The testing company also tested banks of 80 meters and came to the same conclusion. FPL's study found that the exposure from multi-meter installations was still well below the standards established by the FCC.

The following is a chart that was presented by the IOUs in a joint presentation at the workshop. The chart shows a comparison of RF emission levels from various devices typically found in a home.



Summary

The FPSC does not have regulatory authority over any potential health effects from smart meters; the FCC is the entity that has jurisdiction over the issue. However, staff will monitor the FCC for any updates to FCC standards.

Privacy

The IOUs all hold customer data confidentially, except for release for regulated business purposes and to comply with court orders. Municipal utilities must comply with Florida's Sunshine Law. Customer data that is maintained by a municipal utility must be disclosed as part of a public records request. The Florida Municipal Electric Association stated that it is considering seeking legislative support to allow for a delay in releasing interval data by 3 months, while maintaining the availability of current monthly data.

Smart meters do not transmit or store any personal customer identification information. The meters do not transmit customer names, billing information, or addresses. The Federal Trade Commission has regulations in place that are designed to prevent identity theft. The IOUs' privacy policies are designed to be consistent with Federal Trade Commission regulations. Further, the IOUs can use the FPSC confidentiality process to ensure that any customer information that is provided to the FPSC remains confidential.

The utilities were unanimous in their presentations that the only time customer data would be released to a third party is when it is specifically requested by the customer, unless required by law. However, the utilities look at ownership of the data differently; FPL and PEF see themselves as custodians of the data, TECO believes that it owns the information, and Gulf believes that the customer owns the data. In the future, commercial interests may want access to

this data and the ownership of the data may determine who receives any potential value from this data.

Customers expressed concern that the meter will indicate what appliances are being used and the information from the smart meter will be used to market items to consumers. Customers also expressed concern that smart meters are an attempt by United Nations Agenda 21 to regulate how consumers use electricity. The meter manufacturers stated that the meters only measure total usage and are unable to identify usage from specific appliances.

### Summary

The IOUs have all represented that they have privacy policies in place. Staff will monitor any legislative changes that may require the FPSC or the utilities to act.

### Data Security

The data transmitted by the smart meter does not contain any personal customer identification information. Smart meters only transmit information about usage, the meter number, meter type, tampering indications, and error checking information. Moreover, the information transmitted by the meters is encrypted, so if a person did intercept a signal, they would not be able to decipher it.

The utilities transmit the encrypted information securely, and have cyber and privacy policies in place. FPL, Gulf, and PEF have used third-party testing to ensure the security of their transmission of customer usage information from the meter to the utility. TECO's information technology staff consistently monitors their system to ensure security.

The National Institute of Standards Technology (NIST) is the leading board that promulgates security standards, and they have several working groups that promote and develop those standards. The NIST process is a collaborative one among private industry, public industry, and individuals who come together and establish standards for cyber security and interoperability.

During the last Congressional Session, several cybersecurity bills were before Congress; these bills did not pass.

### Summary

It appears existing data security protocols are being followed and staff will monitor for further enhancements to security requirements, including federal legislation.

### Alternatives

FPL commented during the workshop that it would be open to an alternative to requiring all customers to accept a smart meter. Gulf, TECO, and PEF do not believe that the FPSC should require a smart meter alternative. However, IOUs all appear to be in agreement that if an option is offered, the customer who requests an alternative type of meter should be responsible for all the related costs. The FPSC has a history of ensuring that the cost-causer pays the costs

associated with their request. Examples include undergrounding of distribution lines, distribution upgrades for net metering, and customer-requested electric line extensions.

Currently, FPL is placing customers who express concerns about smart meters on a "hold list" This delay allows FPL to temporarily delay the installation of a smart meter. FPL estimates it may have as many as 25,000 customers (.5% of all meter installations) on the hold list at the end of its smart meter deployment in May 2013. It is not known what FPL will do with these customers in May 2013. Currently, the costs to read these customers analog meters are being borne by the general body of ratepayers which reduces the overall savings that may be achieved by smart meters.

During the workshop, FPL indicated that allowing a customer to opt for a non-smart meter could cost as much as \$1,000 per customer over a five-year period. For FPL, or any utility, the question then becomes how to allocate these costs between an upfront cost and a monthly charge.

All customers who provided public comment at the workshop and many who have corresponded with the FPSC wish to have an alternative to a smart meter. Some advocated that before the smart meters were installed, there should have been an opt-in to the smart meter installation. The possible alternative includes a digital meter or the use of an analog meter. However, some customers expressed concerns about having a digital meter and only wanted an analog meter.

Providing an alternative to a smart meter would give customers a choice in their meter. Customer concerns about privacy, health, and data security might be alleviated. However, many of those customers that provided public comment did not want to be assessed a separate charge associated with their decision not to have a smart meter.

In California, Pacific Gas and Electric, Southern California Edison, and San Diego Gas & Electric all have a California Public Utilities Commission-approved opt-out program. Customers pay a \$75 fee to enroll and \$10 a month for meter reading. Low-income customers pay an initial fee of \$10 and \$5.00 a month for meter reading. Avista Utility in Oregon charges an upfront fee of \$221.61 and a monthly charge of \$50.88.

Not all opt-out programs come with a fee. Vermont's legislature passed a bill in 2012 that prohibits utilities from assessing fees from customers who opt out of a smart meter. The Vermont Department of Public Service staff had previously recommended the inclusion of guidelines that would have required cost-based fees for an opt out.

### Summary

Most of the IOUs at the workshop stated that an opt out is not needed at this time. FPL appears to be open to an alternative to smart meters. Therefore, it may be more appropriate for the utility to file a tariff for FPSC review and approval that addresses their situation. Staff will continue to monitor issues associated with alternatives to smart meters in Florida.

The FPSC does have authority to act on the issue of alternative types of meter installations. While staff believes that a utility seeking such an alternative should file a tariff, there are other actions the FPSC might take. The FPSC could initiate rulemaking on this topic; however, there

appears no consensus among the utilities on the issue of smart meter alternatives. Staff could bring an item to Agenda or Internal Affairs and request that Commissioners approve an item that would require IOUs to file tariffs offering an opt-out. Finally, utilities could continue to handle customer requests for smart meter alternatives as they are currently. The costs of continuing to serve customers who have not yet had a smart meter installed would be borne by all customers under existing rates.

### **Public Comment**

The most common concerns expressed by members of the public were health issues and privacy concerns. Presenters were concerned that: (1) the health effects have not been studied enough or that they are experiencing adverse effects from the meter; (2) utilities will know what appliances the customer is using and that usage information will be sold to third parties; and (3) that smart meters are a control device that will force them into time of use rates.

The most common concern expressed by customers in both the public comment section of the workshop and in post-workshop comments was the health effects of RF. As discussed earlier, the FPSC does not have authority over the health effects from smart meters.

Members of the public did provide studies to support their claims. However, while Commission staff does not have the expertise to evaluate and validate these or any health studies, staff would note that expert regulatory bodies have established standards to ensure that the transmissions from smart meters are safe.

### **Summary**

Consumers have raised concerns and would like the option to opt-out of a smart meter, primarily without being assessed an additional fee. Staff will continue to be available to consumers to answer questions and will continue to serve as a source for information.

### **Conclusion**

Staff does not believe that the FPSC needs to take any specific actions at this time to provide for an alternative to smart meters. The issues that are of concern to consumers are outside the jurisdiction of the FPSC. However, the FPSC should allow utilities to voluntarily provide their customers with new services under an appropriate, approved tariff. Staff would review any tariff that a utility files in response to smart meter concerns, and a recommendation on the filing would be brought before the FPSC at a scheduled Agenda Conference. As with any tariff, special attention would be paid to any charges requested by the utility. Staff believes all charges should be cost-based to ensure any subsidization is kept to a minimum. Further, the filing should clearly detail the purpose of offering the new tariff.

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