

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 *PCO CPO*
ORDER NO. PSC-14-0145-FOF-EI
ISSUED: April 1, 2014

ORDER GRANTING IN PART AND DENYING IN PART FPL'S MOTION TO DISMISS
THE AHN PETITION

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.

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, currently expected to be on or about April 1, 2014.

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 nineteen 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.

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.

On February 25, 2014, the Utility filed a motion for a limited waiver of time for Commission action in order to waive the statutory 12 month time frame pursuant to Section 366.06, F.S., in order to provide additional time to prepare for a hearing on this matter. The motion was granted by Order No. PSC-14-0123-PCO-EI issued on March 7, 2014.

This Order addresses FPL's Motions to Dismiss the Ahn Petition and the Protestors' response to the motion. This Order is issued pursuant to the authority granted by Rule 28-106.200, F.A.C., which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition. the standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). When making this determination, only the petition and documents incorporated therein can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

Ahn Petition

The Protestors are FPL residential customers who are opposed to the installation of smart meters on their residences, and most are opposed to the deployment of smart meters throughout their community.

The Protestors allege that the Utility has failed to justify any basis for the proposed tariff. In particular, they claim that opting out of the installation of a smart meter and retaining a non-communicating or analog meter is not a "non-standard service." Therefore, the proposed tariff unfairly discriminates against residential customers who want to continue to use a non-communicating meter that is already installed on their property and has previously been used by the Utility throughout its service territory for years, if not decades.

The Protestors further allege that various cost components and the amounts FPL included in developing the charges for the NSMR tariff are incorrect or improperly considered by the Commission resulting in tariff terms, conditions, and charges that overcharge the customer. The Protestors also allege that the proposed tariff fails to incorporate savings the Utility would achieve by not installing a new smart meter on the residential property and leaving the existing, functioning meter in place. The Protestors allege that the proposed tariff fails to incorporate savings, if any, from the deployment of smart meters throughout their service territory and that such savings should offset any costs associated with allowing some customers to opt out of having a smart meter.

Furthermore, the Protestors allege that the Commission's practice that the cost causer should pay the associated costs is incorrectly applied in this case. The Protestors believe that the Utility was not obligated to deploy smart meters, and that any costs caused by the deployment of the smart meters and the subsequent creation of an opt-out policy are the direct result of the Utility's decisions. The Protestors assert that FPL's decision to deploy smart meters and mandate their use by each residential customer makes the Utility the cost causer.

The Protestors further allege that the smart meters in question are not metering devices as defined by Rule 25-6.003, F.A.C., and that the Commission's decisions in this docket were based in part on information and decisions made as the result of a September 20, 2012 Commission staff workshop. The Protestors allege that if the Commission used this workshop to reach decisions on smart meter policy, this would constitute an improper rulemaking forum and any decisions made based on policies derived from this workshop would be invalid.

There are also a number of related arguments alleging that the tariff or the general deployment of smart meters raises certain constitutional issues at the state and federal level, does not comply with the Americans with Disabilities Act, violates state and federal consumer protection laws.

The relief sought by the Protestors is to deny the proposed tariff. Additionally, the Protestors request the Commission acknowledge the customers' right to refuse smart meter installation without incurring a financial penalty. They request the Commission take jurisdiction over the effects of radio frequency (RF) emissions and convene a docketed evidentiary hearing on the adverse effects of RF emissions. The Protestors also ask the Commission to remove the smart meter health and safety data posted on the Commission web site. Furthermore, the Protestors request the Commission liaise with the Department of Health on this matter.

FPL's Motion to Dismiss the Petition

FPL contends that if the Commission determines that it is appropriate to conduct an administrative hearing, the sole issue to be decided should be the cost basis of its tariff. FPL asserts that the Petition is legally deficient because of the following reasons: (A) it 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), fails to state a cause of action upon which relief may be granted; (B) the Petition alleges speculative harm and matters that are well beyond the scope of the Tariff Order; (C) the Petition seeks to litigate issues that fall outside the Commission's jurisdiction; (D) the Petition attempts to relitigate FPL's now completed smart meter deployment to its residential and small business customers; and (E) on all allegations other than those related to the cost basis of the Tariff Order, Petitioners lack standing.

FPL argues that the 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 (the cost basis of the NSMR tariff), fails to state a cause of action upon which relief may be granted. FPL contends that the Protestors have failed to satisfy the requirements of Rule 28-106.201(2)(c), F.A.C., by failing to provide a statement of when and how petitioners received notice of the agency action. FPL

further asserts that the Petition fails to provide an adequate summary of disputed facts as required by Rule 28-106.201(2)(d), F.A.C., claiming that a complete reading of the relevant portion of the Petition deals with subject matters outside the Commission's jurisdiction, with the exception of the cost basis of FPL's tariff. FPL contends that the Petition fails to satisfy Rule 28-106.201(2)(e), F.A.C., which requires a petitioner to provide a concise statement of the ultimate facts alleged. FPL asserts that the great majority of pleaded facts in the Petition are outside the scope of the narrow issues involved in this docket. FPL also contends that the Petition fails to satisfy Rule 28-106.201(2)(g), F.A.C., which requires a petitioner to provide a statement of the relief sought, "stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action." FPL asserts that the only issue that could give rise to an administrative hearing is the cost-based nature of the NSMR tariff. Moreover, FPL contends that ignoring the technical defects and assuming arguendo that all allegations contained in the Petition are true, 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. All other assertions or allegations are completely outside the scope of the subject Tariff Order, beyond the jurisdiction of the Commission, or relate to matters that have been decided by this Commission in a prior docket.

FPL also argues that the allegations in the Petition and the relief sought are well beyond the scope of the Tariff Order. FPL contends that Section 120.80(13)(b), F.S., prescribes the scope applicable to protests of proposed agency action, in that a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute, and issues in the proposed action which are not in dispute are deemed stipulated. FPL asserts that Order No. PSC-14-0036-TRF-EI is limited in scope because in that 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. Also, the Commission further found that FPL provided substantial support for its proposal, though the Order reflected proposed modifications that FPL subsequently incorporated into its revised tariff. In addition, the Order provided Commission staff with authority to administratively approve the revised tariff once FPL notifies Commission staff that the billing system changes have been implemented. Thus, FPL contends that notwithstanding the limited scope of FPL's opt-out tariff and the Tariff Order, the Petition addresses a multitude of issues irrelevant to this proceeding, none of which – with the possible exception of the references to costs – are addressed by the Commission in its Order. Therefore, with the possible exception of references to costs, the Petition should be dismissed for failure to satisfy the requirements of section 120.80(13)(b), F.S., as the Petition fails to "address the issues in dispute."

FPL argues that the Petition should be dismissed because it seeks to litigate issues that fall outside the Commission's jurisdiction. FPL contends that the Commission is a creature of statute, which derives its powers from the Legislature. The jurisdiction and powers of the Commission are prescribed and defined in Sections 366.04 and 366.05, F.S., which direct the Commission to regulate and supervise each public utility with respect to its rates and services. FPL asserts that the Commission has jurisdiction in regard to the cost recovery for smart meters. Thus, with the possible exception of references to costs of the NSMR tariff, the Petition should

be dismissed. As part of an internal workshop on smart meters, Commission staff submitted a memorandum of its findings to this Commission on February 11, 2013. This memorandum included a brief analysis of the limits of the Commission's jurisdiction with regard to smart meters. FPL contends that this Commission staff memorandum filed February 11, 2013 for the February 19, 2013 Internal Affairs meeting, correctly noted a similar discussion concerning Commission jurisdiction, and the narrow scope of the Commission's Tariff Order suggests the Commission's agreement with this legal principle.

FPL also argues that the Petition should be dismissed because it attempts to relitigate the propriety of FPL's now completed smart meter deployment to its residential and small business customers. FPL contends that 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.² FPL asserts that a reading of the Petition makes it clear that the Protestors are actually attempting to challenge the Tariff Order in an effort to unwind the entire FPL smart meter program. FPL contends that the Petition purports to request an administrative hearing on the Tariff Order, but in fact raises a number of irrelevant issues well beyond the scope of that order. FPL argues that the "substantial interests" identified at page 2, and throughout the Petition, are instead a collateral attack on the overall deployment and use of smart meters. In support, FPL contends that the narrow issue addressed by the Tariff Order - quantification of FPL costs giving rise to cost-based fees – is barely mentioned. FPL states that the doctrine of administrative finality bars the Protestors from attempting to relitigate 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.

Finally, FPL also argues that the Petition should be dismissed because on all allegations other than those related to the cost basis of FPL's revised tariff, Petitioners lack standing. FPL contends that 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). FPL asserts that to prove standing, the Protestors 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, F.S. Second, the Protestors must demonstrate that the substantial injury is of a type or nature that the proceeding is designed to protect. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). FPL argues that the Protestors lack standing on all matters in the petition, with the exception of the cost basis for the NSMR tariff. While the Protestors could conceivably satisfy the first prong of the Agrico test by alleging that they will be required 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. Therefore, FPL requests that the Commission dismiss the Petition in its entirety for failure to comply with Rule 28-106.201, F.A.C., or alternatively that the Commission dismiss all portions of the Petition aside from those deemed to be requesting an administrative hearing on the cost analysis and cost basis of the

² In re: Petition for increase in rates by Florida Power & Light Company and In re: 2009 depreciation and dismantlement study by Florida Power & Light Company.

NSMR tariff. Additionally, FPL requests that the Commission find that the Protestors lack standing on all allegations other than those related to the cost basis of FPL's revised tariff.

Protestors' Response in Opposition to the Motion to Dismiss

The Protestors dispute FPL's assertion that they have failed to comply with Rule 28-106-201, F.A.C., and identify the page number and paragraph in their protest that contain the information needed to satisfy the disputed pleading requirements.

The Protestors argue that the Commission's delegation of its responsibility to address and monitor documented hazards violates the public trust and contradicts the mission of the Commission. They point out that the Commission's own mission statement and promotional materials frequently reference safety as one of the common goals and objectives of the Commission. They state that when customers raise valid safety objections, the Commission's mission requires it to take action to investigate and ensure the safe provision of electric service.

The Protestors also restate their argument that while the FCC does have jurisdiction over RF emissions, it does not consider the effects of non-thermal radiation. The Protestors maintain that most of the health effects they are concerned with in their protest are the result of non-thermal radiation. Since the FCC does not consider these health effects, the Protestors contend the Commission has both the authority and a duty to investigate these matters or engage with the Florida Department of Health to ensure that they pursue this matter under the auspices of Section 501.122, F.S., which grants the Department of Health the authority to adopt rules as necessary to protect the health and safety of persons exposed to non-ionizing radiation.

The Protestors argue that Section 120.80(13)(b), F.S., states that issues not in dispute are merely stipulated and that this does not limit the scope of a protest. They contend that the statute does not support the Utility's conclusion that the issues in this proceeding must be limited to those issues arising from the proposed tariff. The Protestors argue that the statute merely requires a hearing on objections to be limited to those stated objections and does not limit the issues a protestor may raise.

Citing Sections 366.04 and 366.05, F.S., the Protestors argue that the Commission's enabling legislation provide jurisdiction over utility matters that involve non-thermal or direct effects of RF radiation. They note that where the National Electric Safety Code does not address RF radiation, Section 366.05, F.S., provides the ability of the Commission to adopt standards that exceed the safety code.

Finally, the Protestors assert that they do have standing in that all of the Protestors have or will suffer financial or physical injuries of a type sufficient to merit a hearing under Section 120.57, F.S. Furthermore, they maintain that the proposed Tariff Order cannot simply ignore the Commission's stated mission to facilitate the provision of safe utility service by deferring to another agency.

Analysis and DecisionI. Compliance with Rule 28-106.201, F.A.C.

The pleading requirements for a protest of a proposed agency action are set forth in Rule 28-106.201(2), F.A.C., which states:

- (2) All petitions filed under these rules shall contain:
 - (a) the name and address of each agency affected and each agency's file or identification number, if known;
 - (b) the name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
 - (c) A statement of when and how the petitioner received notice of the agency decision;
 - (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
 - (e) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and
 - (f) A demand for relief.

Subsection (4) of the rule states that a petition may be dismissed if it is not in "substantial compliance" with these requirements or if it has been untimely filed. Subsection (1) of the rule defines a petition as "any document that requests an evidentiary hearing and asserts the existence of a disputed issue of material fact." Each of FPL's alleged deficiencies are discussed as follows.

First, FPL alleges that the Protestors' petition is deficient because it does not contain a statement of all disputed issues of material fact, as required by Rule 28-106.201(2)(d), F.A.C., FPL maintains that facts contained in the "disputed issues of material fact" section of the Petition may be grouped into seven broad categories and that of these seven categories only one of those categories relate to the issues addressed in the subject Tariff Order. As a result, FPL contends that none of the remaining assertions raise an issue upon which relief may be granted.

I find that the Protestors' petition is substantially compliant with the rule. In their response, the Protestors noted that pages eleven through fifteen of their protest is a statement of all disputed issues of material fact. In doing so, the Protestors have provided a summary of facts that satisfies the minimum pleading requirements set forth in this rule.

Second, FPL alleges that the Protestors' petition is deficient because it does not contain a concise statement of the ultimate facts alleged, as required by Rule 28-106.201(2)(e), F.A.C. The "ultimate facts" are those, which if proven, would support the relief requested by the Protestors. While the Protestors' petition does not contain a separately labeled section devoted to identifying the ultimate facts alleged, it describes in detail the facts upon which its request for relief is based. The Protestors address what they believe are the facts that will ultimately justify the relief they have requested. Accordingly, I find that the Protestors' petition substantially complies with the pleading requirement of Rule 28-106.201(2)(e) F.A.C.

Third, FPL alleges that the Protestors' petition is deficient because it does not contain 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," as required by Rule 28-106.201(2)(f), F.A.C. The Protestors cite a number of rules and statutes throughout their protest in support of its proposed remedies. Furthermore, in their response, the Protestors state that pages 56 through 58 of their pleading satisfy this rule. Therefore, the Protestors' petition substantially complies with this pleading requirement.

Fourth, FPL alleges that the Protestors' failed to comply with Rule 28-106.201(2)(c), F.A.C., by failing to include a statement of when and how the Protestors received notice of the agency action. The Protestors point out that they stated on page nine of their protest that they obtained copies of the Tariff Order and the revised tariff from the Commission's website.

Based on the foregoing, I find the Protestors have substantially complied with Rule 28-106.201, F.A.C., for the purposes of meeting the minimum pleading requirements. Therefore the Motion to Dismiss shall be partially denied as to FPL's Motion to Dismiss based on a failure to comply with Rule 28-106.201.

II. Scope and Jurisdiction of this Proceeding

A. The Scope of the Tariff Order

FPL alleges that, with the exception of references to costs within the proposed tariff, the relief sought by the Petition is outside the scope of Order No. PSC-14-0036-TRF-EI. FPL contends that pursuant to Section 120.80(13)(b), F.S., a hearing on a proposed action is limited only to those issues in the proposed action that are in dispute. FPL describes the scope of Order No. PSC-14-0036-TRF-EI as limited to the Commission's decisions related to denial of the proposed non-standard meter tariff rider and the Commission directed modifications that were incorporated into the Utility's revised tariff. FPL specifically notes that the Order states that "the option to opt out from the standard 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 Utility concludes that given this limited scope, the Petition should be dismissed with the possible exception of references to costs.

The Protestors argue that Section 120.80(13)(b), F.S., states that issues not in dispute are merely stipulated and that this does not limit the scope of an objection. They contend that the

statute merely requires a hearing on objections to be limited to those stated objections and does not limit the issues a protestor may raise.

Section 120.80(13)(b), F.S., states that that “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.” As a result, a viable protest may only address those issues which are directly related to the proposed agency action. Furthermore, in determining whether or not an individual has standing to bring a cause of action, or in this instance raise a certain issue, they must first demonstrate that they will suffer an injury in fact which is of sufficient immediacy to entitle them to a hearing, and second, that the substantial injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d. 478 (Fla. 2d DCA 1981).

The Agrico test must be applied to the facts and allegations in this matter in a light most favorable to the Protestors. If I assume, for the sake of argument, that the facts alleged by the Protestors are true, it is reasonable to conclude that they would suffer a financial burden in the form of fees improperly levied for retaining a non-standard meter. Therefore, for the purposes of the Motion to Dismiss, I find the Protestors have alleged sufficient facts showing that they will suffer an injury that is of sufficient immediacy to entitle them to a hearing.

However, pursuant to Section 120.80(13)(b), F.S., any protest is limited to those issues that are in dispute, and in this instance, the subject of Order No PSC-14-0036-TRF-EI is limited to FPL’s revised Non-Standard Meter Rider Tariff. The subject of this Order is generally concerned with the costs and cost allocation for the revised tariff and the modifications suggested by this Commission if the Utility wished to submit a revised NSMR Tariff. The Order does briefly address the issue of requiring the cost causer to bear the costs of opting out of the smart meter program rather than having those costs borne by the general body of ratepayers. Issues involving health, safety, or privacy were not the subject of the Order, nor was there any substantial investigation, discussion or consideration of these issues as part of the proceeding that gave rise to this Order.

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. As discussed subsequently in greater detail, all health, safety and privacy concerns, however, appear to be outside the scope of Order No. PSC-14-0036-TRF-EI.

I find that FPL’s Motion to Dismiss shall be granted in part as it relates to the Protestors’ health, safety, privacy issues, but shall be denied in part on issues involving the revised tariff and its costs.

B. Commission Jurisdiction

The Utility contends that the Petition seeks to litigate issues that fall outside the Commission's jurisdiction. The Utility points out that as a creature of statute, the Commission's jurisdiction is defined in Sections 366.04 and 366.05, F.S. Furthermore, the Utility cites Order No. PSC-14-0036-TRF-EI, which referenced Commission staff's Internal Affairs memorandum filed on February 11, 2014. That memorandum contained Commission staff comments concerning possible limits to the Commission's jurisdiction over smart meters. FPL notes that Commission staff, in that same memorandum, stated that radio frequency (RF) emission standards are established by the Federal Communications Commission (FCC) and that the National Electrical Safety Code identified in Section 366.05, F.S., does not address radio frequencies. Similarly privacy rights are the purview of the Federal Trade Commission.

Citing Sections 366.04 and 366.05, F.S., the Protestors argue that the Commission's enabling and jurisdictional legislation provide jurisdiction over utility matters that involve non-thermal or direct effects of RF radiation. They note that where the National Electric Safety Code does not address RF radiation, Section 366.05, F.S., provides the Commission with the ability to adopt standards that exceed the safety code. I note, however, that no such standards have been adopted and are well beyond the scope of this proceeding.

The Protestors also restate their argument from their protest, that while the FCC does have jurisdiction over RF emissions, it does not consider the effects of non-thermal radiation effects. The Protestors maintain that most of the health effects they are concerned with in their protest are the result of non-thermal radiation. Since the FCC does not consider these health effects, the Protestors contend the Commission has both the authority and a duty to investigate these matters, or engage with the Florida Department of Health to ensure that they pursue this matter under the auspices of Section 501.122, F.S., which grants the Department of Health the authority to adopt rules as necessary to protect the health and safety of persons exposed to non-ionizing radiation. The Commission's jurisdiction regarding safety is limited to the provisions in Section 366.04(6), F.S., regarding enforcement of federal and state safety standards for transmission and distribution facilities. This does not extend to issues relating to the physical health and safety of individuals concerned with RF emissions. Further, this Commission lacks jurisdiction to enforce statutes under the Department of Health's authority.

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.

Furthermore, Rules 25-6.049 through 25-6.060, F.A.C., are the rules and regulations for measuring customer service by an electrical utility, including the standards concerning meter type, accuracy, location, and testing. These rules were promulgated under the statutory authority

of Section 366.05(1), F.S., through a comprehensive rulemaking process and have generally been in effect, in one form or another, since 1969. These rules reflect the jurisdiction of the Commission. To read these rules in a light most favorable to the Protestors does not change that the health, safety and privacy concerns raised by the Protestors remain outside the jurisdiction of this Commission.

Therefore, I grant the Utility's Motion to Dismiss as it relates to dismissing the Protestor's claims regarding health, safety, and privacy claims, as they fall outside the Commission's jurisdiction.

C. Relitigation of Order No. PSC-10-0153-FOF-EI

FPL states that the prudence of deploying smart meters was determined in Order No. PSC-10-0153-FOF-EI, issued March 17, 2010 in Docket Nos. 080677-EI and 090130-EI. FPL contends that most of the Petition is essentially a collateral attack on the deployment of smart meters far beyond the scope of the issues addressed by the Tariff Order. FPL does acknowledge, for the purposes of this argument, that a small portion of the Petition relates to the quantification of costs giving rise to cost-based fees and the allocation of those costs. That said, FPL maintains that the doctrine of administrative finality bars the Protestors from attempting to relitigate the case that resulted in this Commission issuing an order finding the smart meter project prudent and directing the Utility to proceed.

Order No. PSC-10-0153-FOF-EI found the costs for AMI implementation were appropriate and were appropriately included in rate base for the test year. Pursuant to Section 366.06(1), F.S., the Commission must fix rates that are fair, just, and reasonable, and the costs approved thereby must be prudently incurred by the public utility company for property used and useful in serving the public. Therefore, costs approved through a rate petition pursuant to Section 366.06, F.S., must be approved as prudent, whether or not the word "prudence" is expressly stated. Further, none of the Commission's authorizing statutes endows it with the authority to enforce issues regarding health, personal safety, or privacy. The Commission's jurisdiction regarding safety is limited to the provisions in Section 366.04(6), F.S., regarding enforcement of federal and state safety standards for transmission and distribution facilities.

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. As noted by the Supreme Court of Florida:

...orders 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.

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McCaw Communications of Florida, Inc. v. Clark et al, 679 So.2d 1177, 1178-1179 (Fla. 1996).
See also Austin Tupper Trucking, Inc. v. Hawkins et al, 377 So.2d 679 (Fla 1979).

Therefore, I partially grant FPL's Motion to Dismiss to the extent it seeks dismissal of those issues related to the prudence of the Advanced Metering Infrastructure as settled by Order No. PSC-10-0153-FOF-EI.

III. Standing

The Utility argues that the Protestors lack standing in that they have failed to satisfy the second prong of the Agrico test in that, while they may have suffered an injury, it is not an injury of the type or nature that this proceeding is designed to protect.

The Protestors assert that they do have standing in that all of the Protestors have or will suffer financial or physical injuries of a type sufficient to merit a hearing under Section 120.57, F.S. Furthermore, they maintain that the proposed Tariff Order cannot simply ignore this Commission's stated mission to facilitate the provision of safe utility service by deferring to another agency.

To the extent that the Protestors' injuries are related to the costs of the proposed tariff, I find that this type of injury satisfies both the first and second prong of the Agrico standard. To that end, I find the Protestors have sufficient standing to bring this protest, notwithstanding any other decision to dismiss the portions of this protest related to jurisdiction, scope, health, safety, and privacy.

Therefore, I partially deny the Utility's Motion to Dismiss as to the Protestors' lack of standing.

Based on the foregoing, it is

ORDERED by Commissioner Lisa Polak Edgar, as Prehearing Officer, that Florida Power and Light's Motion to Dismiss the protest is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that the docket shall remain open to proceed to hearing on the remaining protested issues.

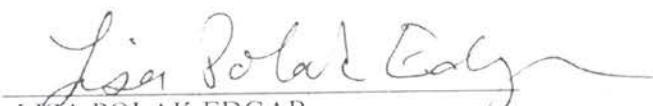
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By ORDER of Commissioner Lisa Polak Edgar, as Prehearing Officer, this 1st day of
April, 2014.


LISA POLAK EDGAR
Commissioner and Prehearing Officer
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

MTL

PCO (68)

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.