

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
Filed April 11, 2014

**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**

COME NOW, Petitioners, by and through the undersigned attorney, pursuant to Rule 25-22.0376, Florida Administrative Code, hereby move for reconsideration of that portion of Order No. PSC-14-0145-FOF-EI (hereafter, "Order"), issued on April 1, 2014, which grants in part FPL's Motion to Dismiss the Ahn Petition. The grounds for Petitioners' motion are as follows:

INTRODUCTION AND BACKGROUND

1. FPSC (the "Commission") approved for recovery through base rates the costs of Florida Power & Light Company's (FPL) Advanced Metering Infrastructure (AMI) and associated so-called smart meters in Order No. PSC-10-0153-FOF-EI.¹
2. On August 21, 2013, FPL filed a petition for approval of an optional, so-called Non-Standard Meter Rider (NSMR) tariff.
3. 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

¹ Order No. PSC-10-0153-FOF-EI, issued March 17, 2010, in Docket No. 080677-EI, In re: Petition for

the billing system changes have been implemented, currently expected to be on or about April 1, 2014.

4. On February 4, 2014, the undersigned attorney filed a protest on behalf of Lucy Ahn and 96 others, The Petition for Relief from Automated Metering Infrastructure (“AMI”) System and Coercion Thereto and for a Formal Evidentiary Proceeding (Ahn Petition or Petition), which outlined numerous objections related to a range of problems, including privacy, health, safety, Right to Refuse, the basis for the tariff as well as the costs, terms and conditions outlined in the proposed tariff.
5. On February 21, 2014, FPL filed a motion to dismiss substantial portions of The Ahn Petition, which ignored many substantive issues of fact and generally argued that many of the proposed issues are either outside the jurisdiction of the Commission or are outside the scope of the present docket.
6. On February 25, 2014, FPL 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.
7. On February 28, 2014, the undersigned attorney filed timely response in opposition to FPL’s motions to dismiss, “Opposition to Florida Power & Light Company’s Motion to Dismiss Petition for Relief from Automated Metering Infrastructure (‘AMI’) and Coercion Thereto, and for a Formal Evidentiary Hearing, or Alternatively for Partial Dismissal of Petition.”
8. On March 3, 2014, the undersigned attorney filed timely response in Opposition to Florida Power & Light Company’s Motion for Limited Waiver of Time for Final Commission Action.

9. FPL's Motion for a limited waiver of time for Commission action in order to waive the statutory 12-month time frame was granted by Order No. PSC-14-0123-PCO-EI issued on March 7, 2014.
10. On April 1, 2014, Commission issued Order PSC-14-0145-FOF-EI, Order Granting In Part And Denying In Part FPL's Motion To Dismiss The Ahn Petition ("Order").

I. The Reconsideration Standard of Review.

11. The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its order. See, e.g., *Diamond Cab Co. of Miami v. King*, 146 So.2d 889, 891 (Fla. 1962) (purpose of petition for reconsideration is to bring to an agency's attention a point of law or fact which it overlooked or failed to consider when it rendered its order); *Steward Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315, 317 (Fla. 1974) (granting petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review); see also, *In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light*; Docket No. 000824-EI; Order No. PSC-01-2313-PCO-EI, November 26, 2001.

II. General Matters upon which Petitioners Seek Review and Reconsideration.

12. As described below, the Order erred by overlooking, failing to consider, or both, specific points of fact and law raised by the Ahn Petitioners and set forth in the Record, which provides susceptibility for review.
13. Specifically, the Order:
 - a. Fails to cite any Order or Tariff superceding or negating prior Order No. 18893, which explicitly assigned ownership of the meter enclosure to FPL customers, not FPL. This omission of Order No. 18893, issued February

22,1988 in “Petition of Florida Power & Light Company for authority to require customers to obtain their own self-contained meter enclosures” is critically important for the following reasons:

- i. The Order defines the meter enclosure as housing a "meter" and in no way anticipates the so-called technological advancement of, nor requirement to permit placement of, an "optional communications module" as contained in FPL (and other utilities) AMI meters.
- ii. The 1988 rule has not been reversed or revised since 1988.
- iii. With regard to a device properly called a meter (metrology device), control over the meter enclosure continues to be the exclusive purview of the customer, according to PSC's own Rulemaking, and therefore the customer has authority to refuse installation or placement of an AMI device containing an optional communications module.

The primacy of Order 18893 has been reiterated since 1988. FPL, in its June, 2013, filing “Florida Power & Light Company’s Petition for Declaratory Statement Regarding the Inspection, Repair and Replacement of Meter Enclosures for Smart Meter Analytical Tool,” (“Petition for Declaratory Statement”) states in relevant part,

Order PSC 95-0131-FOF-EI concluded by explaining that the long term objective for the utility is to no longer own or maintain any meter enclosures. That objective is consistent with, and in fact supported by, the declaratory statement sought by this Petition.²

Subsequent to the entry of Order Nos. 18893 and PSC-95-0131-FOF-EI, FPL followed a policy whereby it no longer repaired, maintained, or replaced meter enclosures. Instead, the meter enclosures were treated as customer-owned

² Petition for Declaratory Statement, ¶ 8.

facilities, consistent with the referenced orders, and each individually affected customer was financially responsible for the installation, repair and/or replacement of his or her meter enclosure when that repair or replacement was required due to obsolescence or wear. (Emphasis added.) FPL supports the principles established in Order No. 18893 and Order No. PSC-95-0131-FOF-EI and believes that they continue to be relevant and appropriate.³

...

In short, customer-owned meter enclosures will remain the property and responsibility of the customer.⁴

Thus, congruent with FPL's intent, Petitioners and other customers should be under no legal obligation to permit the placement or installation of an AMI communications device in meter enclosures over which they have exclusive ownership. Again, this argument is supported in Commission staff memo dated March 24, 2011, "Re: Docket No. 110033-EI – Petition for declaratory statement regarding the repair and replacement of meter enclosures for smart meters by Florida Power & Light Company."⁵

The March 24, 2011 Commission Memo confirms the primacy of Order No. 18893 by referencing two additional, and more recent, Commission Rulings:

Issued January 26, 1995, in Docket No. 941205-EI, In Re: Petition for authority to require customers to obtain, maintain, repair their own instrument transformer-rated meter enclosures, by Florida Power and Light Company.

Issued March 17, 2010, in Docket Nos. 080677-EI, In Re: Petition for increase in rates by Florida Power & Light Company, and 090130-EI, In Re: 2009 depreciation and dismantlement study by Florida Power & Light Company.

³ *Id.* at ¶ 9.

⁴ *Id.* at ¶ 13.

⁵ <http://www.floridapsc.com/agendas/archive/110405cc/11040504.html>

- b. Ignores Order No. 18893's stated material fact that "metrology" is separate and distinct from "the utility function," and additionally, that FPL only has authority to place into the customer-owned meter enclosure, meters performing measurements, not, communications devices. Similarly, customers have responsibility to maintain meter enclosures in working order for metrology function in meters only, not for wireless communication networks such as AMI devices. FPSC Commission Order # 18893 confirms the above facts and states,

Since self-contained meter enclosures are not a part of the utility function, but simply house the meter itself, their costs should be borne by the customer when the Structure is initially wired for electric service or when it must be replaced due to obsolescence or wear. The burden of maintaining and repairing the enclosures must likewise rest with the customer.

As both Petitioners and FPL have maintained, the meter enclosure is the private property of the property owner, and its purpose is to house a meter, not the utility's wireless communication network. FPSC, thus, cannot mandate the acceptance of an "RF MESH" wireless communication network on private property.

- c. Failed to reconcile Order 18893 with the 2010 rate order, where, if the 2010 rate case order made AMI meters "standard," then petitioners received no notice that Order 18893 had been changed. Petitioners dispute that proper legal notice was ever provided, that the "smart" meter, or AMI device, would be considered the only "standard" meter, and that additionally, the non-standard meter would only be retained subject to a fee.
- d. Fails to provide a credible alternative interpretation, juxtaposed against that of Petitioners', of Rule 25-6.003 F.A.C., which defines a "meter" as "used for the purpose of measuring the service rendered." Petitioners

dispute that the equipment currently being placed in customer-owned meter enclosures meets such definition. The AMI "meter" that FPL deploys is a complex, two-way RF radiation communications network hub and computing device. While it contains metrology to measure usage, it also contains components such as transceivers, a service switch, computing and memory, a Switching Mode Power Supply (SMPS), and optionally, an electromagnetic switch for connecting and disconnecting electrical service. The Order's failure to contest or clarify Rule 25-6.003 F.A.C. is particularly striking in light of the Order's citation of Rules 25-6.049 through 25-6.060, F.A.C. in support of the Commission's assertion of its purported lack of jurisdiction over Petitioners' health, safety, and privacy claims.

- e. Entirely omits mention of, and fails to provide any legal justification for, the massive and unprecedented scope of FPL's "RF MESH" AMI program, FPL's own description of which proves that the AMI devices' technical capabilities vastly exceed the definition of a meter provided in Commission Rule 25-6.003, F.A.C.:

How do the smart meters transmit information? Could you explain how it works?

This technology is Internet Protocol (IP) based RF mesh. The RF capability means the meters communicate through radio frequency. Each meter is equipped with a full two-way 900 MHz radio transmitter that sends and receives information to an access point which is also radio-equipped. The access point is the collection point for the meter information that is sent back into an FPL system. Each access point, which is typically mounted on a power pole, is the size of a shoe box and can handle communications to thousands of meters. New RF mesh technology expands the ability of a meter to communicate to an access point by allowing the signal to be relayed off of other meters to find a path and maintain the connection required for communications.⁶

⁶ Florida Power & Light Company, <http://www.fpl.com/ami/qa.shtml#2>, accessed 4/10/14

- f. Ignores the clear and present danger that the massive deployment of FPL's "RF MESH" AMI devices is a virtual "taking," without compensation, of FPL customers' property, as literally each customer's premises has become a de facto, essential component of FPL's "RF Mesh Network," itself an expensive and energy consumptive, irradiating communications grid that FPL is deploying virtually "on top of" Petitioners' homes and businesses, without their consent, and without compensation for their loss in property, privacy, and health. Ahn Petition, p. 20.
- g. Classifies Petitioners' raising of issues related to health, safety and privacy as "re-litigation," when these issues were not previously addressed, and the Petitioners have had no meaningful opportunity to initially bring them to the Commission's attention.
- h. Fails to explain why Petitioners should be forced to pay FPL, an electric utility, not a telecom provider, a fee to avoid an RF radiation-emitting communications device on their premises under a contract of adhesion.
- i. Fails to address Petitioners' contention that §366.915, Fla. Stat. (2013) provides for FPSC's liaising with other state agencies, particularly the Florida Department of Health, "whose policy decisions and rulemaking authority affect those utilities over which the commission has primary regulatory jurisdiction." The Order argues, "this Commission lacks jurisdiction to enforce statutes under the Department of Health's authority," but Petitioners proposition in their Opposition to FPL's Motion to Dismiss that jurisdiction over the non-thermal effects of radiofrequency radiation ("RF") "should be taken up by either the Commission, in furthering its commitment to safety, or through a liaison with the Florida Department of Health, authorized by both §§366.015 and 501.122, Fla. Stat. (2013)," was

not addressed in the Order. (Emphasis added).

- j. Fails to reconcile the Commission's stated commitment to safety, and its refusal to act when ratepayers raise safety concerns that have yet to be investigated.
- k. Disregards the Commission's authority and prerogative to impose Terms and Conditions, including, *inter alia*, warning labels, medical exemptions for those with disabilities and medical conditions, limits upon banked meters in multi-dwellings, upon Tariffs that have been subject to Commission approval. For example, even the FCC warns purportedly enforces grant authorizations prescribing minimum safe distances for transmitting AMI devices; for example, see SSN NIC 514 co-location with other meters. In FPL's deployment of more than 4 million AMI devices, there will likely be locations where certain individuals be forced into contact with one or more "smart" meters. Petitioners assert that FPSC certainly has authority to require that FPL provide education and clear warnings in order to minimize the likelihood of its customers coming being less than 20 centimeters away from the "smart" meter. Furthermore, while FPL purports that the remote disconnect is a useful functionality that can be used in certain emergencies, Petitioners assert that it is incumbent upon FPSC to clearly state in its Terms and Conditions the limitations over FPL's use of this remote disconnect feature, so as to not only preclude abuse by FPL, but also avoid potentially hazardous situations in which a particularly vulnerable customer has her electricity cut off via the "remote disconnect," without the courtesy of a human visit to the home by an FPL employee.

IV. Specific Request for Reconsideration of Section II, B of the Order.

As touted in the literature displayed on its website, the

Florida Public Service Commission is committed to making sure that Florida's consumers receive some of their most essential services --

electric, natural gas, telephone, water, and wastewater -- in a safe, affordable, and reliable manner. In doing so, the PSC exercises regulatory authority over utilities in one or more of three key areas: rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.⁷ (Emphasis added.)

FPSC's mission statement charges the Commission with "facilitat[ing] the efficient provision of safe and reliable utility services at fair prices," with a stated goal of "[p]rovid[ing] appropriate regulatory oversight to protect consumers."⁸ (Emphasis added.)

While the above are not jurisdictional, *per se*, the Commission repeatedly professes its commitment to the safety of Florida's consumers. Assuming, *arguendo*, that the Commission lacks jurisdiction over health effects of non-thermal RF radiation, it has held itself out to the public as a champion of safety, and should be expected to act accordingly.

In its Order, the Commission states that its jurisdiction is confined to the provisions in §366.04(6), Fla. Stat. (2013), which addresses federal and state safety standards for transmission and distribution facilities. Order, p.10. Petitioners objection is founded upon an obvious conflict between this jurisdictional position, and the Commission professed commitment to the safety of Florida's consumers, not merely those involved in the operation of transmission and distribution facilities. If such protection of Florida's consumers is beyond the jurisdictional scope of the Commission, then its mission statement is a farce.

The Commission continues,

[t]he 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

⁷Overview and Key Facts, Florida Public Service Commission, <http://www.psc.state.fl.us/about/overview.aspx#five>, accessed 28 February 2014

⁸Mission Statement and Goals, Florida Public Service Commission, <http://www.psc.state.fl.us/about/overview.aspx#five>, accessed 28 February 2014

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 in the authorizing statutes.

Order, p. 10. Petitioners respectfully disagree.

First, the Commission fails to acknowledge the second of the two suggested avenues for the investigation and regulation of the non-thermal effects of RF radiation: (1) by the Commission itself, in furtherance of its commitment to safety, or (2) through liaison with the Florida Department of Health, authorized by both §§366.015 and 501.122, Fla. Stat. (2013). Thus, it was not Petitioners' sole argument that the Commission must take jurisdiction over the health effects of non-thermal RF radiation, though that appears to have been the only one addressed in the Order.

Second, Chapter 366, which is inclusive of §366.015, entitled "Interagency liaison," provides the following:

The commission is directed to provide for, and assume primary responsibility for, establishing and maintaining continuous liaison with all other appropriate state and federal agencies whose policy decisions and rulemaking authority affect those utilities over which the commission has primary regulatory jurisdiction. (Emphasis added.) This liaison shall be conducted at the policymaking levels as well as the department, division, or bureau levels. Active participation in other agencies' public hearings is encouraged to transmit the commission's policy positions and information requirements, in order to provide for more efficient regulation.

It remains Petitioners' position that §366.015 encourages the Commission to liaise with the Florida Department of Health on the issue of non-thermal RF radiation if direct jurisdiction is declined, and the Commission failed to address this eventuality in its Order.

Moreover, the Commission cites 25-6.060, F.A.C. as one of the “rules and regulations” flowing from the authority granted it by Chapter 366, Fla. Stat. Particularly, 25-6.060, F.A.C., entitled “Meter Test – Refereed Dispute,” states,

[i]n the event of a meter dispute upon request to the Commission by any customer, a test of the customer’s meter shall be made by the utility as soon as practicable. Said test shall be supervised and witnessed by a representative of the Commission. ... A report on the results of the test will be made by the Commission to the customer.

In a reading of the foregoing provision in a light most favorable to Petitioners, who, of course, are complaining of adverse health effects, then the abstinence of the Commission from participation in any vetting appears to violate 25-6.060, F.A.C.

In sum, the Commission’s treatment of its jurisdiction over the health effects of non-thermal RF radiation was so narrow that it omitted Petitioners contention FPSC’s liaising with the Florida Department of Health on the issue. Furthermore, there is ample support in Chapter 366, Fla. Stat., for such collaboration. Finally, under a generous reading of 25-6.060, F.A.C., a testing of the AMI meters for the radiation complained of is within the scope of the Commission’s authority.

Accordingly, Petitioners request that the “Commission Jurisdiction” section of the Order be reconsidered via written opinion, in light of the above.

WHEREFORE, for the foregoing reasons, Petitioners, seek review and reconsideration of the Commission’s April 1, 2014 Order Granting In Part And Denying In Part FPL’s Motion To Dismiss The Ahn Petition, and request oral arguments on the above issues presented.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to the following parties on the 11th day of April 2014:

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Respectfully submitted,

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