

State of Florida



Public Service Commission

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

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

DATE: August 1, 2013

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Clemence) *S.M.C.*
Division of Engineering (C. Lewis, Matthews, Vickery) *CKL*
Office of Industry Development and Market Analysis (Clemence) *TW* *MT*

RE: Docket No. 130160-EI – Petition for declaratory statement regarding the inspection, repair and replacement of meter enclosures for smart meter analytical tool, by Florida Power & Light Company.

AGENDA: 08/13/13 – Regular Agenda – Decision on Declaratory Statement – Participation is at the discretion of the Commission and depends on the Commission’s vote on Issue 1

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: 09/04/13 (Final Order must be issued by this date pursuant to Section 120.565(3), Florida Statutes)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\130160.RCM.DOC

Case Background

On June 6, 2013, pursuant to Section 120.565, Florida Statutes (F.S.), and Rule 28-105.002, Florida Administrative Code (F.A.C.), Florida Power & Light Company (FPL) filed a Petition for Declaratory Statement (Petition) regarding the application of Order Nos. 18893,¹

¹ Issued February 22, 1988, Docket No. 870225-EI, In re: Petition of Florida Power & Light Company for authority to require customers to obtain their own self-contained meter enclosures.

PSC-95-0131-FOF-EI,² and PSC-11-0194-DS-EI³ (collectively referred to as the “Orders”) to FPL’s planned repair and/or replacement of customer-owned meter sockets and bases (“meter enclosures” or “enclosures”) in conjunction with a one-time FPL inspection project of approximately 400 deployed smart meters and enclosures “to further validate and refine a predictive tool the Company is developing to identify probable future smart meter communications failures likely to be caused by conditions within the customer-owned enclosure,” including, but “not limited to corrosion, broken meter blocks and loose connections”⁴ (the “Project”).

FPL poses two questions. First, FPL requests a declaratory statement that it is consistent with the Orders that the approximately 400 individual customers whose meter enclosures will be inspected, repaired or replaced in conjunction with the Project should not individually bear the cost of such inspection, repair or replacement. Second, FPL requests a declaratory statement that it is consistent with the Orders that the individual customers participating in the Project maintain ownership of the meter enclosures and will retain the sole obligation to inspect, repair or replace their meter enclosures, if necessary, once the Project has been completed.

Pursuant to Rule 28-105.0024, F.A.C., a Notice of Declaratory Statement was published in the June 10, 2013, edition of the Florida Administrative Register, informing interested persons of the Petition. On June 27, 2013, the Office of Public Counsel (OPC) filed a Notice of Intervention pursuant to Section 350.0611, F.S. An Order Acknowledging Intervention was issued June 28, 2013.⁵

On June 27, 2013, staff requested additional information from FPL in order to clarify statements made in the Petition. FPL provided its response to Staff’s First Data Request on July 10, 2013.

On July 1, 2013, OPC filed a motion pursuant to Sections 120.569 and 120.57, F.S., for an evidentiary hearing⁶ on what it alleges is FPL’s request to allow FPL to impose on individual customers the costs of repairing or replacing meter housings necessitated by smart meter installation and/or incompatibility (“motion for evidentiary hearing”). FPL filed a response to OPC’s motion for evidentiary hearing on July 8, 2013 (“Response”).

This recommendation addresses both FPL’s Petition for Declaratory Statement and OPC’s motion for evidentiary hearing. Pursuant to Section 120.565(3), F.S., and Rule 28-105.003, F.A.C., an agency must issue a declaratory statement or deny the petition within 90 days after the filing of the petition. Thus, the Commission must issue an order on the Petition by

² Issued January 26, 1995, Docket No. 941205-EI, In re: Petition for authority to require customers to obtain, maintain, repair, and replace their own instrument transformer-rated meter enclosures, by Florida Power and Light Company.

³ Issued April 13, 2011, Docket No. 110033-EI, In re: Petition for declaratory statement regarding the repair and replacement of meter enclosures for smart meters by Florida Power & Light Company

⁴ Petition, p. 5.

⁵ Order No. PSC-13-0299-PCO-EI.

⁶ “Office of Public Counsel’s Motion for an Administrative Hearing on Florida Power & Light Company’s Petition for Declaratory Statement Regarding the Inspection, Repair and Replacement of Meter Enclosures for Smart Meter Analytical Tool.”

September 4, 2013. The Commission has jurisdiction pursuant to Section 120.565, and Chapter 366, F.S.

Discussion of Issues

Issue 1: Should the Office of Public Counsel's motion for an evidentiary hearing on FPL's Petition for Declaratory Statement be granted?

Recommendation: No, the Commission should deny the Office of Public Counsel's motion for an evidentiary hearing. The Commission should, consistent with Rule 28-105.003, F.A.C., rely on the facts set forth in FPL's Petition and response to Staff's First Data Request without taking a position on the validity of the facts. However, staff recommends that the Commission allow each party 10 minutes to present oral argument at the agenda conference. (Cowdery)

Staff Analysis: Declaratory statements are governed by Section 120.565, F.S., and by the Uniform Rules of Procedure in Chapter 28-105, F.A.C. The purpose of a declaratory statement is to answer questions or doubts concerning the applicability of an agency's statutes, rules, or orders to the petitioner's particular circumstances.⁷ Persons whose substantial interests may be affected by a petition for declaratory action may be granted intervention and may petition for administrative hearing.⁸ Rule 28-105.003, F.A.C., states:

The agency may hold a hearing to consider a petition for declaratory statement. If the agency is headed by a collegial body, it shall take action on a petition for declaratory statement only at a duly noticed public meeting. The agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts. Within 90 days of the filing of the petition, the agency shall render a final order denying the petition or issuing a declaratory statement.

The Commission has recognized that the only type of hearings allowed for declaratory statements are those not involving disputed issues of material fact.⁹ Evidentiary hearings that determine fact-driven issues are not afforded in declaratory statement proceedings. Lennar Homes, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Fla. Land Sales, Condo's & Mobile Homes, 888 So. 2d 50, 53 (Fla. 1st DCA 2004).

OPC has requested an evidentiary hearing pursuant to Sections 120.569 and 120.57, F.S., on FPL's Petition for Declaratory Statement. In support of its motion, OPC states that it believes that the relief sought by FPL's Petition may adversely affect the rights and obligations of its customers and that a declaratory statement may be inappropriate. OPC specifies that it requests a hearing on what it alleges is FPL's request to overturn the obligation of FPL to replace the smart meter housings pursuant to Order No. PSC-11-0194-DS-EI. Furthermore, OPC "asks the Commission to determine if FPL's request and the facts and circumstances in it constitute changed circumstances, such that the basis for authorizing the smart meter implementation costs to be borne by FPL's customers in the manner approved in the 2010 rate case orders may no

⁷ Rule 28-105.001, F.A.C.

⁸ Rules 28-105.0024(6) and 28-105.0027, F.A.C.

⁹ Order No. PSC-04-0063-FOF-EU, 2004 WL 239416, issued January 22, 2004, Docket No. 031017-EU, In re: Request for declaratory statement by Tampa Electric Company regarding territorial dispute with City of Bartow in Polk County (dismissing the petition for declaratory statement in part because "reaching the merits would bring an adjudicatory element into a proceeding where it has no place").

longer be valid.”¹⁰ Issue 2 addresses OPC’s arguments concerning whether the Commission should issue or deny the Petition for declaratory statement.

In its Response, FPL notes that although Rule 28-105.003, F.A.C., indicates that an agency may hold a hearing to consider a petition for declaratory statement, it does not describe the nature of that hearing. FPL further notes that both the rule and the statute require that the Commission act on the petition within 90 days of the filing of the petition. FPL states that there is no provision in Section 120.565, F.S., for the evidentiary hearing sought by OPC and that neither the statute nor the rule contemplates evidentiary hearings. FPL also points out that OPC’s motion fails to allege any disputed issues of material fact and that, instead, OPC questions the intent and precedential value of the Orders. As such, FPL concludes, even if an evidentiary hearing is appropriate in a declaratory statement proceeding, OPC’s motion fails to satisfy the requirements for a petition for hearing set forth in Section 120.569, F.S., and Rule 28-106.201, F.A.C. FPL suggests that if the Commission finds it appropriate, OPC’s concerns may be addressed through oral argument at the August 13, 2013 Agenda Conference.

FPL contends that OPC’s request for the Commission to determine if the Petition and the “facts and circumstances in it constitute changed circumstances, such that the basis for authorizing the smart meter implementation costs to be borne by FPL’s customers in the manner approved in the 2010 rate case orders may no longer be valid” is so completely without factual or legal support and is so far afield from the pending request that it should not even be considered by the Commission. FPL further states that the repair and replacement costs associated with the two specific circumstances addressed in Docket No. 110033-EI were identified in FPL’s Minimum Filing Requirements filed in conjunction with FPL’s 2010 rate case.¹¹

OPC requests in its motion for evidentiary hearing that the Commission “determine if FPL’s request and the facts and circumstances in it constitute changed circumstances, such that the basis for authorizing the smart meter implementation costs to be borne by FPL’s customers in the manner approved in the 2010 rate case orders may no longer be valid.” The facts and circumstances that were the subject of FPL’s 2010 rate case were extensive, and none of those facts and circumstances have been alleged or described in FPL’s Petition or OPC’s motion for evidentiary hearing. Furthermore, a review and comparison by the Commission of the facts and circumstances raised in the Petition with unidentified facts relied upon in the 2010 rate case would necessarily involve an adjudicatory proceeding involving disputed issues of material fact. Such an adjudicatory proceeding is inappropriate for a declaratory statement proceeding.

In addition, even if, contrary to staff’s recommendation, an evidentiary hearing were appropriate for this docket, the Commission has previously recognized that a declaratory statement should address only those orders that have been specified in the petition as applying to the petitioner’s particular set of circumstances.¹² The Petition does not request a declaratory

¹⁰ Motion for evidentiary hearing, p. 3, para. 9.

¹¹ FPL cites in this regard to Order No. PSC-11-0914-DS-EI, p. 5, and FPL’s February 10, 2011 Responses to Staff’s Data Request No. 1 in Docket No. 110033-EI.

¹² See Order No. PSC-06-0306-DS-TL, issued April 19, 2006, Docket No. 060049-TL, In re: Petition for declaratory statement by Board of County Commissioners of Broward County (finding that the declaratory statement should only address the tariff provisions and rules specifically referenced in Broward County’s petition, and should not

statement regarding the Commission's opinion as to the applicability of the 2010 rate case orders to FPL's circumstances. Further, in declaratory statement proceedings, the validity of the statute, rule or order being addressed is assumed.¹³ Therefore, even if the 2010 rate case orders were properly before the Commission in this docket, review of the validity of those orders is not allowed in a declaratory statement proceeding.

Because evidentiary hearings are not appropriate for declaratory statement proceedings, staff recommends that OPC's motion for an evidentiary hearing on FPL's petition for declaratory statement should be denied. Consistent with Rule 28-105.003, F.A.C., staff recommends that the Commission rely on the statements of fact set out in FPL's Petition for declaratory statement and FPL's response to Staff's First Data Request without taking any position with regard to the validity of the facts.

The Commission has the discretion to hear oral argument at the Agenda Conference.¹⁴ The Commission routinely considers the arguments of intervenors in declaratory statement proceedings.¹⁵ Staff recommends that the Commission allow each party 10 minutes to present oral argument at the Agenda Conference.

address a general statement that no existing tariff, statute, rule or order is applicable to Broward County's circumstances).

¹³ Id.; Retail Grocers Assn. of Fla. Self Insurers Fund, v. Dept. of Labor & Employment Sec., Div. of Workers' Comp., 474 So. 2d 379, 382 (Fla. 1st DCA 1985)(where the court concluded that "the declaratory statement petition is not a vehicle for testing the validity of the matter on which the declaration is sought").

¹⁴ See Rules 25-22.0021(7) and 25-22.0022(2), F.A.C.

¹⁵ Order No. PSC-08-0374-DS-TP, issued June 4, 2008, Docket No. 080089-TP, In re: Petition for declaratory statement by Intrado Communications, Inc.; Order No. PSC-08-0295-DS-EI, issued May 5, 2008, Docket No. 080083-EI, In re: Petition for declaratory statement by Florida Power & Light Company (denying OPC's request for a separate hearing on FPL's petition for declaratory statement, noting that OPC was provided with the opportunity to address the Commission at the agenda conference on FPL's Petition).

Issue 2: Should the Commission issue a declaratory statement in response to FPL's Petition?

Recommendation: Yes, the Commission should issue a declaratory statement that, applying Order Nos. 18893, PSC-95-0131-FOF-EI, and PSC-11-0194-DS-EI to FPL's set of circumstances, for the limited purpose of FPL developing a predictive tool for the benefit of all customers, it would be consistent with the Orders that 1) the approximately 400 individual customers participating in the Project not be charged by FPL for Project expenses related to inspection, repair, or replacement of their individual meter enclosures; and 2) FPL's inspection, repair, or replacement of the approximately 400 meter enclosures as part of the Project would not result in FPL obtaining any ownership interest in those meter enclosures or an obligation to repair or replace any of those meter enclosures due to wear or obsolescence after the Project has been completed. This declaratory statement should not be construed as addressing or approving the Project or future use of any predictive tool developed by FPL. Moreover, this declaratory statement does not address what may be the cause of any meter communication problems that may be identified by FPL or prejudice any cost recovery the utility might seek in relation to the Project's costs. (Cowdery, Clemence)

Staff Analysis: Section 120.565, F.S., governs the issuance of a declaratory statement by an agency. In pertinent part it provides that:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides that:

[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002, F.A.C., requires a petition for declaratory statement to include a description of how the orders on which a declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances. The petition must demonstrate a present, ascertained state of facts and may not be merely a hypothetical situation.¹⁶ The Courts and the Commission have recognized that a purpose of the declaratory statement procedure is to

¹⁶ Santa Rosa County, v. Dep't of Admin. Hearings, 661 So. 2d 1190, 1193 (Fla. 1995); Order No. PSC-01-1611-FOF-SU, issued August 3, 2001, Docket No. 010704-SU, In re: Petition for declaratory statement by St. Johns County (petition for declaratory statement denied as constituting a mere hypothetical situation).

resolve an ambiguity in the law and to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation.¹⁷

Pursuant to Rule 28-105.003, F.A.C., an agency may rely on the statements of fact contained in the petition for declaratory statement without taking a position on the validity of the facts. In Issue 1, staff recommends that the Commission rely on the specific statements of fact set forth in FPL's Petition and FPL's response to Staff's First Data Request without taking a position on the validity of the facts. If the Commission issues a declaratory statement, the order will be controlling as to those alleged facts, and not as to other, different or additional facts.

FPL's Statements of Fact

The Petition and FPL's response to Staff's First Data Request set forth the following statements of fact. As part of FPL's most recent rate case, the Commission reviewed and approved a smart meter deployment project,¹⁸ which involved installation of approximately 4.5 million smart meters from September 2009 to February 2013. During this process, FPL established processes to monitor and maintain consistent communications with all activated smart meters. Through these processes, FPL saw that some smart meters stopped communicating after activation. The communications failures were intermittent, geographically diverse, and without an obvious explanatory pattern. According to FPL, on average on any given day, 0.14 percent, or approximately 6,300 smart meters lose communications with the network at any given time, for a variety of reasons, including obstructions around the meter, power outages, customer tampering, network coverage issues, and communications module failure. The ability of the meter to accurately record customer energy use is not affected by these communications failures, but only the ability to remotely communicate.

FPL reports that in 2011, 9,286 non-communicating smart meters were removed from various service locations and evaluated at FPL's Meter Technology Center in Miami. FPL determined that of these, 693 displayed visual evidence of some type of external heat damage to the base of the meter and/or the blades on the back of the meter. This visual evidence, coupled with the fact that this is the area of a meter most exposed to customer-owned meter enclosures when installed, led to the initial hypothesis by FPL that the damage to the meters was potentially being caused by conditions within customer-owned meter enclosures.

FPL states in its response to Staff's First Data Request that problems with meter enclosures, including thermal build up, generally stem from the poor condition of the meter enclosure components and connections, which can occur as a result of age, wear and tear, and tampering. FPL further explains that these problems can arise because of "environmental

¹⁷ See e.g., Fla. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutual Wagering v. Investment Corp., 747 So. 2d 374, 381, 384 (Fla. 1999); Adventist Health Sys./Sunbelt, Inc. v. Agency for Health Care Admin., 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007); Order No. 03-1063-DS-TP, issued September 23, 2003, Docket No. 030346-TP, In re: Petition for declaratory statement by NPCR, Inc. d/b/a Nextel Partners and Docket No. 030413-TP, In re: Petition for declaratory statement by ALLTEL Communications, Inc.; Order No. PSC-02-1459-DS-EC, issued Oct. 23, 2002, Docket No. 020829-EC, In re: Petition for declaratory statement by Fla. Keys Elec. Coop. Ass'n.

¹⁸ Order No. PSC-10-0153-FOF-EI, issued March 17, 2010, Docket No. 080677-EI, In re: Petition for increase in rates by Fla. Power & Light Co., and Docket No. 090130-EI, In re: 2009 depreciation and dismantlement study by Fla. Power & Light Co.

conditions such as heat and rain which may cause rapid aging . . . the condition of connections (corroded, contaminated, loose or damaged), fatigue or degradation of components, and stresses on components and connections that occur over time.” The most common cause of thermal build up is degraded or poor electrical connections and components in the meter enclosure, causing electrical resistance to increase and generate heat with electrical load. FPL states that these conditions are normally addressed by maintenance, repair and/or replacement of meter enclosures by licensed electricians hired by individual customers.

Further, FPL states that meters do not cause damage to the meter enclosures in which they are installed. If poor conditions within the meter enclosure are left unaddressed, thermal build-up may occur that may, in turn, cause increasing damage to other components within the enclosure. Exposure of meters to elevated temperatures for extended periods of time may cause the smart meter communications module to stop working.

FPL’s Meter Technology Center determined that of the 693 non-communicating meters showing evidence of heat damage to the base or blades, 46 percent, or about 319, exhibited a data pattern that was generally occurring in the pre-failure communications from the meter. After reaching this conclusion, FPL randomly identified 46 communicating meters that were displaying the pre-failure communications data pattern in Broward and Miami-Dade Counties. These meters and the associated enclosures were analyzed in the field by FPL. FPL determined that in 70 percent of the cases, or about 32 of the 46 cases analyzed, the damage within the meter enclosures was caused by overheating that in turn caused communications failure and the probable ultimate failure of the meter. However, the small size of the original sample of 46 meters and enclosures resulted in a 15 percent margin of error in the findings.

In light of its findings, FPL developed the Project to study a random sample of approximately 400 deployed smart meters displaying the pre-failure communications data pattern and their associated meter enclosures. FPL plans to inspect and, where necessary, repair or replace the meter enclosures on a one-time basis at no cost to the individual customers. Project field testing is expected to be complete in the first quarter of 2014. Thereafter, FPL will finalize its analyses of all of the Project data.

The purpose of FPL’s Project is to “further validate and refine a predictive tool that FPL is developing to identify probable future smart meter communications failures likely to be caused by conditions within the customer-owned enclosures.” FPL states that this predictive tool is for the benefit of the system as a whole and all present and future customers. Once the Project is complete, FPL plans to continue to analyze smart meter transmissions on a regular basis and notify customers whose meter transmissions are indicative of conditions caused by meter enclosure failure, thus allowing customers to make repairs to the meter enclosure “before there is an actual failure of the meter enclosure.”

Order Nos. 18893, PSC-95-0131-FOF-EI and PSC-11-0194-DS-EI

As previously described, FPL seeks a declaratory statement about three Orders which address customer-owned meter enclosures. Order No. 18893 allowed FPL to stop providing residential and small commercial self-contained meter enclosures. In that Order, the Commission found that:

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.

(emphasis added). By Order No. PSC-95-0131-FOF-EI, the Commission similarly found, for instrument transformer meter enclosures commonly used in large industrial applications, that:

Instrument transformer meter enclosures should be provided by the customer for the same reasons stated in Docket No. 870225-EI for self-contained meter enclosures. Instrument transformer meter enclosures are not part of the utility function, but simply house the meter itself. As such, it is appropriate for customers to provide these enclosures and meter sockets since it is more closely related with construction of the customer's building. We therefore find that such costs shall 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, and not by the general body of ratepayers.

(emphasis added).

The third order on which FPL seeks a declaratory statement is Order No. PSC-11-1094-DS-EI. That order was issued in Docket No. 110033-EI, which addressed FPL's petition for declaratory statement concerning the appropriate application of Order Nos. 18893 and PSC-95-0131-FOF-EI, to FPL's ongoing installation of smart meters. Specifically, FPL sought the Commission's acknowledgement that repair or replacement of otherwise functional meter enclosures in connection with the installation of new smart meters, at no cost to the individually affected customers, was consistent with the principles established in Order Nos. 18893 and PSC-95-0131-FOF-EI.

In Docket No. 110033-EI, FPL stated that as a result of the system-wide installation of smart meters, FPL repaired or replaced the meter enclosures where there was doubt about the continued viability of the existing meter enclosure. This was done in order to avoid a situation where an individual customer could experience problems with the meter and/or meter enclosure within a relatively short time following the change-out. FPL stated that standard meter enclosures housing the traditional electromechanical meters found throughout the FPL system were clearly not obsolete, as evidenced by the fact that in more than 99.6 percent of the cases, those meter enclosures had been perfectly safe and appropriate receptacles for the new smart meters. Additionally, FPL stated that the very small percentage of meter enclosures that had to be repaired or replaced were not being repaired or replaced due to wear, as evidenced by the fact that prior to the change-out, those meter enclosures were functional and would likely have remained so for any number of years into the future, but for the act of FPL pulling out the old electromechanical meter to install the new smart meter. FPL further stated that the costs related to the necessary repair and/or replacement of meter enclosures associated with smart meter installations were part of the overall smart meter implementation plan benefitting the general body of customers.

Based on the facts presented in Docket No. 110033-EI, the Commission concluded in Order No. PSC-11-0194-DS-EI that individual customers whose meter enclosures must be repaired or replaced in conjunction with the installation of the smart meters should not individually bear the expenses associated with that repair or replacement, and that charging the costs to the program as a whole was not inconsistent with Order Nos. 18893 and PSC-95-0131-FOF-EI.¹⁹

FPL's Questions for the Declaratory Statement

FPL's Petition for Declaratory Statement asks for the following:

In light of the foregoing, FPL seeks a declaratory statement that individual customers whose meter enclosures will be inspected, repaired or replaced for a limited period of time in conjunction with the further validation of the predictive tool, as more fully described above, should not individually bear the expenses associated with inspection or necessary repair or replacement, and that such action is consistent with Order No. 18893, Order No. PSC 95-0131-FOF-EI, and Order No. PSC-11-0194-DS-EI. FPL further requests a declaratory statement that notwithstanding FPL's inspection of a small number of meter enclosures and, where appropriate, repair and/or replacement of those customer-owned meter enclosures in connection with this project, the goal of which is to provide customers with the information necessary to potentially prevent or at least mitigate the impacts associated with a meter enclosure failure, individual customers participating in this project maintain ownership of the meter enclosures and related equipment and retain the sole obligation to inspect, repair and where necessary to replace their meter enclosures once this project has been completed, consistent with Order No. 18893, Order No. PSC 95-0131-FOF-EI, and Order No. PSC-11-0194-DS-EI.

Petition, pp. 9 – 10, para. 24. FPL has not asked for a declaratory statement concerning the Project, and therefore the Project is not being addressed by this recommendation.

OPC's Motion for Evidentiary Hearing and FPL's Response

OPC raises arguments as to the propriety of the Petition for Declaratory Statement that staff believes the Commission should consider in its decision on this matter. OPC alleges that FPL is requesting that it be allowed to impose on individual customers the costs of repairing or replacing meter housings necessitated by smart meter installation and/or incompatibility. OPC further alleges that FPL's request, if granted, would overturn FPL's obligation to replace meter housings pursuant to Order No. PSC-11-0194-DS-EI. OPC believes that the relief sought by

¹⁹ In Docket No. 110033-EI, FPL's petition for declaratory statement alleged that the repair and replacement rate for meter enclosures of .39 percent through year end 2010 represented 5,191 meter enclosures, most of which were residential. The Petition further stated that \$1.5 million was included in FPL's most recent rate case for repair and replacement of unsafe meter conditions for the test year 2010, and that FPL expected that annual amount would be sufficient to cover all replacement/repair expenses for the duration of the project, which was scheduled to be completed in 2013.

FPL's Petition may adversely affect the rights and obligations of its customers and that a declaratory statement may be inappropriate. OPC alleges that the Petition is less of an effort to seek clarification or resolution of a doubt as to FPL's circumstances and more of an effort to seek reconsideration of a prior order that recognized that customers should be held harmless in implementation of the FPL Smart Meter Program.

In its Response, FPL denies OPC's allegation that FPL is requesting that it be allowed to impose on individual customers the costs of repairing or replacing meter housings necessitated by smart meter installation and/or incompatibility. FPL states that this is an incorrect assertion and that it is doing "nothing of the sort." FPL responds that: 1) Order No. PSC-11-0194-DS-EI did not create any obligation on the part of FPL, but instead found that FPL's repair or replacement of customer-owned meter enclosures in two specific situations was not inconsistent with prior Commission orders; 2) FPL has now completed the work addressed in that order; and 3) FPL is not asking the Commission to overturn any order. FPL reaffirms the Petition's request that it seeks a declaratory statement that the approximately 400 individual customers who agree to allow FPL to inspect and where necessary repair and/or replace customer-owned meter enclosures should not be charged for those repair and/or replacement costs. FPL states that thereafter, if the enclosures owned by these customers need to be repaired or replaced due to obsolescence or wear, the individual customers will be responsible for that work.

FPL further responds that the Petition meets the requirements of Section 120.565, F.S., and Rule 28-105.001, F.A.C., because it states with particularity FPL's set of circumstances and specifies the Commission orders that it believes may apply to that set of circumstances. FPL contends that OPC has mischaracterized the Petition and that FPL in no way seeks to alter, amend or modify Order No. PSC-11-0194-DS-EI.

Application of the Orders to FPL's particular set of circumstances

The authority of the Commission to issue a declaratory statement in this docket is limited by Section 120.565, F.S., to a determination of the application of the Orders to FPL's particular set of circumstances.²⁰ The petitioner is required by Section 120.565(2), F.S., to "state with particularity the petitioner's set of circumstances" and "specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances." Staff believes that the Petition meets the requirements of Section 120.565, F.S., and Rule 25-105.002, F.A.C., because FPL requests a declaratory statement regarding the Commission's opinion as to the applicability of Order Nos. 18893, PSC-95-0131-FOF-EI, and PSC-11-0194-DS-EI to FPL's particular set of facts and circumstances.

Staff believes that OPC mischaracterizes the questions raised by FPL in its Petition. OPC alleges that FPL's Petition is a request to allow FPL to impose on individual customers the costs of repairing or replacing meter housings necessitated by smart meter installation and/or incompatibility, contrary to Order No. PSC-11-0194-DS-EI. However, the plain language of the Petition and FPL's Response to the motion for evidentiary hearing do not support OPC's allegation. Contrary to OPC's allegation, FPL states that it:

²⁰ See Lennar Homes, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Fla. Land Sales, Condo's & Mobile Homes, 888 So. 2d 50, 53 (Fla. 1st DCA 2004).

seeks a declaratory statement that the individual customers who agree to allow FPL to inspect and where necessary repair and/or replace customer-owned meter enclosures in the approximately 400 cases to be studied should not be charged for those repair and/or replacement costs. Thereafter, if the meter enclosures owned by this small group of customers need to be repaired or replaced due to obsolescence or wear, the individual customers will be responsible for that work.

Furthermore, OPC's assertion that FPL's Petition for Declaratory Statement is an effort to seek reconsideration of Order No. PSC-11-0194-DS-EI is not supported by the plain language of the Petition. Contrary to OPC's charges, FPL is specifically asking for a declaratory statement that it would be consistent with the Orders if, during the course of the Project, approximately 400 individual customers not be charged for any repair or replacement of meter enclosures which may occur. Consistent with the Orders, once the Project is complete, those individual customers would once again be responsible for maintenance and replacement of meter enclosures due to obsolescence or wear.

In addition, the Petition is not requesting that any customers be responsible for repair or replacement of meter enclosures necessitated by smart meter installation and/or incompatibility, and that question, therefore, is not before the Commission. The Project as described by FPL in the Petition and response to Staff's First Data Request is not part of the smart meter deployment and installation which is the subject of Order No. PSC-11-0194-DS-EI. However, the Project is related to the smart meter installation program in that it involves development of a new predictive tool for analyzing smart meter transmissions for the purpose of helping customers identify and prevent problems within customers' meter enclosures before they occur. Therefore, staff recommends that the Commission issue a declaratory statement that it would be consistent with the Orders for the approximately 400 individual customers participating in the Project not to be charged by FPL for Project expenses related to inspection, repair, or replacement of their individual meter enclosures.

Moreover, the Orders clearly state that individual utility customers own the meter enclosures associated with their electric meters. None of the Orders gives any indication that ownership of meter enclosures is transferred to FPL if a meter is replaced or repaired by FPL for any reason. OPC's motion for evidentiary hearing does not argue to the contrary. For these reasons, staff recommends that the Commission issue a declaratory statement that FPL's inspection, repair, or replacement of the approximately 400 meter enclosures as part of the Project would not result in FPL obtaining any ownership interest in those meter enclosures.

Therefore, for the reasons set forth above, staff recommends that the Commission should issue a declaratory statement²¹ that, applying Order Nos. 18893, PSC-95-0131-FOF-EI, and PSC-11-0194-DS-EI to FPL's set of circumstances, for the limited purpose of FPL developing a predictive tool for the benefit of all customers, it would be consistent with the Orders that: 1) the

²¹ The appropriate action for an agency to take on a petition for declaratory statement is to either issue a declaratory statement and answer the question or deny the petition and decline to answer the question. Section 120.565(3), F.S., and Rule 28-105.003, F.A.C.

approximately 400 individual customers participating in the Project not be charged by FPL for Project expenses related to inspection, repair, or replacement of their individual meter enclosures; and 2) FPL's inspection, repair, or replacement of the approximately 400 meter enclosures as part of the Project would not result in FPL obtaining any ownership interest in those meter enclosures or an obligation to repair or replace any of those meter enclosures due to wear or obsolescence after the Project has been completed. This declaratory statement should not be construed as addressing or approving the Project or future use of any predictive tool developed by FPL. Moreover, this declaratory statement does not address what may be the cause of any meter communication problems that may be identified by FPL or prejudge any cost recovery the utility might seek in relation to the Project's costs.

Staff notes that FPL states that when the Project has been completed, FPL will provide a written report of the results to the PSC, along with the plan for future use of the predictive tool model it is developing.

Issue 3: Should this docket be closed?

Recommendation: Yes, the docket should be closed. (Cowdery)

Staff Analysis: Whether the Commission acts to either grant or deny the Petition, in whole, or in part, a final order may be issued, no further action will be necessary, and the docket should be closed.