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Ms. Carlotta S. Stauffer
Florida Public Service Commission
Commission Clerk
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

February 28, 2014

Re: Docket No. 130223-EI, Response in Opposition to Florida Power & Light's
("FP&L") Motion to Dismiss

Dear Ms. Stauffer,

Attached is the MARTIN, Et Al. Response in Opposition to FP&L's Motion to
Dismiss.

If you should have any questions, please do not hesitate to contact me at (914) 244-
0783.

Sincerely,

/s/ Marilynne Martin

Attachments

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION (FPSC)

In Re: Petition for approval of optional |
Non-standard meter rider, by Florida |
Power & Light Company |

DOCKET NO.130223-EI

FILED: February 28,2014

**MARTIN, Et. Al.'s RESPONSE IN OPPOSITION TO FLORIDA POWER & LIGHT'S
MOTION TO DISMISS**

Petitioners MARTIN Et. Al. by and through undersigned Qualified Representative, hereby file this Response in Opposition to FP&L's Motion to Dismiss and respectfully requests the FPSC to deny the FP&L motion. In support thereof, the Petitioners state as follows:

FP&L's Motion to Dismiss argues that the Petition filed by MARTIN, Et. Al. 1) fails to meet the requirements of Rule 28-106.201, F.A.C., except for cost basis claims 2) that the allegations and relief sought goes beyond the scope of the Order, 3) seeks to litigate issues outside the Commission's jurisdiction, 4) attempts to re-litigate the propriety of the smart meter deployment and 5) seeks to dismiss 15 of the Petitioners for lack of standing. As such, FP&L requests that the FPSC dismiss the petition or alternatively dismiss all portions not relating to cost basis of the proposed tariff. The Petitioner's disagree with FP&L's assertions and arguments and request the FPSC deny their Motion for Dismissal in its entirety.

Background

1. In 1987, FP&L filed a petition¹, which essentially transferred the ownership, and the associated cost burden of maintenance of self enclosed meter enclosures to the customer. In Order No. 18893², the FPSC granted that transfer of ownership and stated that the “self-contained meter enclosures are ***not part of the utility function, but simply house the meter itself***”. (Emphasis added).

2. On November 17, 2008 FP&L filed for a general rate increase³, which included cost recovery for its Advanced Metering Infrastructure (“AMI”) project. In September 2009 FP&L began deploying smart meters. **After deployment commenced**, on March 17, 2010, the FPSC issued Order No. PSC-10-0153-FOF-EI (“March 2010 Order”) that approved cost recovery for FP&L’s AMI project. On or before August 2010, FP&L established a “postpone” list⁴ allowing those not consenting to the new AMI equipment to retain their analog as well as allowing those who had the AMI equipment installed to have it removed and replaced with an analog or non-communicating meter. On September 20, 2012, FPSC staff conducted a Smart Meter Workshop (“Workshop”) and issued a Briefing Report with recommendations on February 11, 2013 that was presented to the FPSC Commissioners on February 19, 2013. On August 21, 2013, FP&L filed its petition for approval of optional non-standard meter rider (“NSMR”) , which established the AMI meter as “standard meter service” and imposed fees on those refusing to consent to its installation. On

¹ Docket No. 870225-EI, Petition of Florida Power & Light Company for Authority to Require Customers

² Order No. 18893, Docket No. 870225-EI, Issued 2-22-88 “Order Granting Petition”

³ Docket No. 080677-EI,

⁴ Docket No. 130223, Petition for approval of optional non-standard meter rider, Response to Staff First Data Request, Request #31, Attachment No. 1

January 14, 2014 the FPSC issued Order No. PSC-14-0036-TRF-EI approving FP&L's petition.

RESPONSE ARGUMENTS REFUTING FP&L'S CLAIMS

3. At the heart of FP&L's arguments to dismiss the petition is that this NSMR is only about costs and any dispute of material fact unrelated to costs, does not meet the requirements of Rule 28-106.201 and should be dismissed. The Petitioner's adamantly disagree. This NSMR designates the AMI equipment ("smart meter") as the "standard meter" for which lack of consent will require imposition of a punitive and arbitrary fee. Such imposition of fees, when consent is not present, results in injury (revocation of ownership rights and financial penalties) to the Petitioners. The Petitioners have rightfully challenged whether this equipment, that FP&L purports to be just a meter, meets the requirements under FPSC current rules and previous FPSC Orders and such rules and orders were stated in the petition providing a cause of action.

4. As stated in the petition, under the existing and fully effective FPSC Order No. 18893⁵, the Petitioners received ownership rights and obligations for the meter enclosures with the understanding that such enclosures will house **simply a meter** and would **not be involved in the utility function**. FP&L is now claiming rights to compel the Petitioners, who are the owners of such enclosures, to accept equipment

⁵ Docket No. 870225-EI, Petition of Florida Power & Light Company for Authority to Require Customers to Obtain Their Own Self-Contained meter Enclosures, Issued 2-22-88

that clearly does more than measure energy and which contains optional components, outside metrology functions. The equipment will establish an unsafe wireless communication network that operates as part of a Neighborhood Area Network, to perform utility functions. It also includes another component (i.e. zigbee chip) that will operate a Home Area Network for which third party vendors will be using for their services, clearly outside of the utility function. The equipment does NOT meet the definition of a “meter” as defined by FPSC Rule 25.6-.003(c) “a device used for measuring the service rendered” and as such the petitioners rightfully dispute its designation as “standard” service and provided the cause of action.

5. FP&L is claiming that the Petitioners are attempting to re-litigate the propriety of FP&L’s smart meter deployment. This is not the case. The Petitioners are rightfully disputing that the March 2010 Order did not designate the smart meter as “standard service”. FP&L, as well as Staff’s recommendations for this docket, tries to establish the March 2010 Order as the authority to justify the smart meter as the standard meter service. The Petitioners dispute that approval for cost recovery and determining a project “prudent” supports that fact as presented in the Staff Briefing Report. We note that nowhere in that March 2010 Order does the FPSC rescind, repeal, amend or reference Order No. 18893. In fact, in two subsequent petitions⁶ filed and Orders issued, both FP&L & the FPSC reaffirm the existence, intact, of

⁶ Docket No. 110033-EI, Petition for declaratory statement regarding the repair and replacement of meter enclosures for smart meters by FP&L, and Docket No. 130160 Petition for declaratory Statement Regarding the Inspection, Repair and replacement of Meter Enclosures for Smart Meter Analytical Tool.

Order No. 18893 as originally issued. FP&L's new standard meter does not comply with facts (terms and conditions) assigned to customers in FPSC Order No. 18893.

6. We also ask that the FPSC consider the customer service hearings held in connection with Docket No. 870225-EI. FP&L repeatedly told its customers in each service area they were "introducing smart meters"⁷. "Introducing" is a far cry from mandatorily replacing 4.5 million meters, regardless of their condition, at a cost of \$600 million and without consent. "Introducing" implies customer choice. The petitioners are not attempting to re-litigate that case. The petitioners are disputing FP&L's assertion the March 2010 Order establishes the authority for the smart meter to be mandated as the "standard meter service" and thus compels the petitioners to relinquish its ownership rights granted under Order No. 18893.

7. The Commission should consider that if FP&L were to be correct, and the March 2010 Order did mandate these meters, then why did FP&L create a postpone list and wait until the end of the entire deployment in order to file this tariff? Why didn't FP&L assert its rights earlier? FP&L's smart meter deployment was not contingent upon all 4.5 million meters being installed before the system was activated. FP&L installed smart meters by service area and then activated the system for each such service area separately. FP&L did not seek a tariff after the first service area was turned on or during its 2012 rate case but chose to file this tariff "consistent with a position and recommendation" made in a Staff Briefing Report. By creating a

⁷ Docket No. 870225-EI, Transcripts of Customer Service Hearings, , June 19, 2009 Ft Myers, pg., 26, Sarasota, pg. 16, June 23, 2009, Daytona Beach, pg. 16, June 24, 2009, West Palm Beach, pg.18, Melbourne, pg. 16, June 25, 2009, Miami, pg. 18, Ft. Lauderdale, pg. 17, June 26, 2009, Plantation, pg. 20

postpone list FP&L recognized the petitioners right of refusal of this equipment. The Petitioners are rightfully disputing the Staff Briefing Report since FP&L has stated in its filing that it is using such report as the basis to usurp our rights of ownership and refusal of the smart meter without imposition of fees. This docket filing is the appropriate proceeding for the Petitioners to dispute these facts.

8. The Petitioners further note that if the March 2010 Order did mandate these meters as FP&L asserts, and upon which the Petitioners dispute, then there would have been no confusion as to jurisdiction at the May 9, 2012 Internal Affairs Meeting which subsequently set up the Workshop. The first item on the agenda at the Workshop was indeed “jurisdiction” and the utilities invited and present were asked under what jurisdiction they were installing smart meters. This would not be necessary if the March 2010 Order clearly did establish smart meters as standard service as FP&L purports.

9. The cost causer principle is being disputed because it is a principle that is not being uniformly and fairly applied. FP&L has failed to justify in its NSMR petition the use of such principle when a customer refuses equipment not in compliance with current FPSC rules. Rates cannot be set in an arbitrary and discriminatory manner, which is another cause of action stated within the petition.

10. Assuming again if FP&L is correct that such equipment is qualified as a “standard meter”, which the petitioners do not agree, the matters of safety and

privacy are relevant to be heard in this proceeding. When an agency such as the FPSC is endowed with authority to compel use of products/equipment, which this NSMR clearly does, that authority also places them in a fiduciary role with responsibilities. FPSC and FP&L have received many complaints from FP&L customers over the past several years of real, immediate, harmful physical effects being experienced today as a result of the smart meters. These are not speculative as FP&L purports. FPSC has jurisdiction over safety, another cause of action, which was stated in the petition. Compelling customers to accept equipment without a safety review and without appropriate privacy protections in place is not consistent with the FPSC missions and functions. The petitioners note that no safety review was performed by the FPSC on this equipment in the 2009 rate case. A similar situation occurred in Maine. When challenged in court by Maine customers, the Maine Supreme Court ordered the Maine Public Utility Commission to conduct a review⁸. Clearly just being FCC approved does not constitute a proper safety review as argued by FP&L in their motion to dismiss. Since this tariff compels the Petitioners to accept this meter or pay financial penalties, it is within the scope of this proceeding to hear these arguments.

11. And if it were true, as FP&L argues and the Petitioners dispute, that the FPSC has no jurisdiction over privacy rights and that the Federal Trade Commission solely promulgates such rights, we ask why has the National Association of Regulatory Commissioners issued a multiple of resolutions on privacy over the past ten years?

⁸ MAINE SUPREME JUDICIAL COURT, Decision 2012 ME 90, Docket PUC-11-532, July 12, 2012

Clearly regulatory commissions play a role in protecting consumer privacy rights when they compel them to accept a service. By the nature of the FPSC Commissioners oath of office, which includes a pledge to uphold the Florida State constitution, there is authority and jurisdiction over these matters.

12. FP&L's motion to dismiss is challenging the petitioners standing. The petition stated customer names and services addresses, which provided sufficient evidence that a customer relationship with FP&L exists. FP&L's motion does not provide support to indicate these service addresses are outside their territory. The petitioners, as FP&L customers and rightful owners of the meter enclosures and who have not consented to the smart meter installation, will be compelled to accept such meter under this NSMR or face financial injury through the imposition of arbitrary charges. The petitioners assert as rightful owners of the meter enclosures each have a substantial interest since the terms and conditions of ownership are being changed by this NSMR. We also assert that the cost basis issues contained in the petition apply to all 20 petitioners, not just the five petitioners that FP&L has identified in its motion.

WHEREFORE, Petitioners respectfully request the Commission to deny the FP&L Motion to Dismiss because the Petitioners' petition is sufficient and states a cause of action upon which relief may be granted and each of the Petitioners have provided sufficient standing in this matter.

Dated February 28, 2014, at Venice, FL

/s/ Marilynne Martin

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**CERTIFICATE OF SERVICE
DOCKET NO. 130223-EI**

I HEREBY CERTIFY that a true copy of the foregoing Proposed Issues List has been furnished by electronic mail on this 28th day of February 2014, to the following:

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