

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 CBO
ORDER NO. PSC-14-0146-FOF-EI
ISSUED: April 1, 2014

ORDER GRANTING IN PART AND DENYING IN PART FPL'S MOTION TO DISMISS
THE MARTIN 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 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) 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 or 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 deadline and provide additional time to prepare for a hearing on this matter. This motion was granted by Order No. PSC-14-0123-PCO-EI, issued on March 7, 2014.

This Order addresses FPL's Motion to Dismiss the Martin Petition and the Protestor's 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).

Martin Petition

The individuals represented in the Petition 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 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 revised 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 smart meters and the subsequent creation of an opt out policy is 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, Florida Administrative Code (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.

The Protestors also raise a wide range of concerns related to health, safety and privacy as they relate to smart meters. They allege that the Commission has failed to consider the adverse health effects attributed to the electromagnetic fields emanating from the smart meter. They assert that the smart meters transmit data about individual customers' power consumption and that such data is transmitted in the open by radio frequency transmissions which may be easily intercepted and misused by third parties. Furthermore, they contend that the data, once collected by the Utility, is not properly safeguarded and that there are no standards to prevent the data from being transferred, sold or stolen by third parties who do not have the consent of the customers to obtain or use this data.

There are also a number of related arguments alleging that the proposed 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, and creates conflicts between the property rights of landlords and tenants.

The relief sought by the Protestors is to deny the proposed tariff in its entirety and to issue an order reversing or suspending the Tariff Order. Additionally, the Protestors request that the Commission halt FPL's enrollment process into its Non-Standard Meter Program and instruct the Utility to cease installing smart meters unless requested by a customer. Finally, the Protestors request the Commission convene a formal hearing under a new docket so that the disputed facts and other smart meter consumer issues can be appropriately addressed.

FPL's Motion to Dismiss the Petition

FPL contends that if the Commission determines that it is appropriate to conduct an administrative hearing, the issue to be decided should be the cost basis of its tariff and the assessment of those costs on the cost causing opt-out customers. 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 and allocation of those costs to the opt-out customers) 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, fifteen of twenty Protestors lack standing.

FPL argues that the Petition fails to satisfy the pleading requirements of Rule 28-106.201, F.A.C., and fails to state a cause of action upon which relief may be granted. FPL asserts that the Petition, purports to satisfy the requirements of the rule through the provision of its "summary of disputed material facts;" however, FPL argues that a complete reading of that portion of the Petition deals with subject matters outside the Commission's jurisdiction, with the exception of the cost basis and the allocation of costs 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 provide a concise statement of the ultimate facts alleged. FPL asserts that aside from the alleged facts involving the cost basis of the NSMR Tariff, none of the allegations recited in the Petition constitute the type of "ultimate facts" that could warrant reversal or modification of the agency's Tariff Order. Therefore, FPL contends that the Petition should either be dismissed in its entirety for failure to comply with Rule 28-106.201, F.A.C., or alternatively should be dismissed in part, leaving the cost-based nature of the tariff, as well as the propriety of assessing the fees only on the opt-out customers, as the only issues to be determined at an administrative hearing.

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 as follows: a hearing on an objection to proposed action of the 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 which 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 petition 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 and allocation of 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 that derives its powers from the Legislature. The jurisdiction and powers of the Commission are 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 a workshop on smart meters, Commission staff submitted a memorandum summarizing the workshop to the 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 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 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 throughout the Petition are instead an 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's costs giving rise to cost-based fees and allocation of those costs - is barely mentioned. FPL contends that the doctrine of administrative finality bars the Petitioners 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.

FPL asserts that fifteen of the twenty Protestors lack standing and should be dismissed. This assertion is based on pages four through nine of the Petition, which identifies the individual Protestors and their substantial interests. Each paragraph of that section briefly describes one or two protestors and highlights each of their specific concerns or injuries which they believe are related to smart meters. FPL notes that only five of the twenty Protestors mention cost in this section of the petition. FPL contends that because of this, fifteen of the Protestors do not qualify as having standing, since even if they have suffered an injury, that injury is not of the type or nature that this proceeding is designed to protect.

Protestors' Response in Opposition to the Motion to Dismiss

The Protestors request the Commission deny the FPL Motion to Dismiss in its entirety. At the heart of their response is the fundamental assertion that this case is not limited to the costs associated with the proposed tariff, but includes issues involving health, safety and privacy that have not been, but should be, addressed by the Commission.

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.

The Protestors state that the Utility is attempting to force the Protestors to receive equipment that does not meet the standard definition of a meter as defined by Rule 25-6.003, F.A.C., in that the smart meters include additional components to perform tasks outside the definition of a meter. This includes components that will establish unsafe neighborhood area networks and home area networks that are accessible by third party vendors.

The Protestors also argue that they are not attempting to relitigate the propriety of FPL's smart meter deployment as Order No. PSC-10-0153-FOF-EI did not designate smart meters as standard service or specifically approve the use of smart meters. The Protestors dispute the finding of prudence of the Advanced Meter Infrastructure and the approval of cost recovery found in Order No. PSC-10-0153-FOF-EI. They note that in those dockets, FPL stated that it was "introducing" not establishing a program with what amounts to a mandatory replacement of 4.5 million meters, and thus is beyond the scope and authority granted in that Order.

The Protestors argue the cost causer principle is not being uniformly and fairly applied. They contend the Utility failed to justify the use of the cost causer principle in its NSMR petition.

The Protestors restate their initial argument that the Commission has jurisdiction over health, safety and privacy issues. They contend that when an agency, such as the Commission, has the authority to compel customers to use certain kinds of products (i.e., smart meters), then that same agency has the inherent jurisdiction to consider health, safety and privacy issues that may arise from the compulsory use of these devices. The Protestors claim that both the Utility and Commission have received more than a sufficient number of complaints from FPL customers on this matter to justify a hearing on health, safety and privacy issues. The Protestors state that the Commission performed no safety review during FPL's most recent rate case. They also note that the Commission's claim that privacy issues fall within the jurisdiction of the Federal Trade Commission belie the fact that the National Association of Regulatory Utility Commissioners (NARUC) has issued multiple resolutions concerning privacy over the past decade.

Finally, the Protestors state that dismissal of fifteen of the twenty Protestors is improper, as they have provided sufficient information to establish standing. Furthermore, they state unequivocally that the cost basis issues contained in the petition apply to all twenty Protestors.

Analysis and Decision

I. 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 ten broad categories, and that of these ten categories, only two of those categories – "the propriety of assessing fees to opt-out customers," and "the cost basis of the NSMR tariff," 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 substantially complies with the requirements of Rule 28-106.201, F.A.C. The Protestors have made a good faith effort to provide a summary of material facts to satisfy the rule and establish the material facts relevant to their pleading. In doing so, the Protestors have provided a summary of facts that satisfies the minimum pleading requirements set forth in the 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. Point-by-point, through most of the 47-page petition, 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. While the Protestors' petition does not contain a separately labeled section devoted to identifying the rules and statutes that entitle them to relief, it more than adequately identifies such rules and statutes. On page 16 of the petition, the Protestors contend that Rule 25-6.003 F.A.C., which defines what constitutes a meter, was improperly considered. On page 16 of the petition, the Protestors assert the Commission failed in its fiduciary obligations under Section 366.04(6), F.S. The Petitioners' protest also cites Rule 25-6.099, F.A.C., as the basis for retaining older digital or analog meters. The Protestors' petition also cites violations of the Americans with Disabilities Act.³ Accordingly, I find that the Protestors' petition substantially complies with this pleading requirement.

Based on the foregoing analysis, I find that the Protestors' petition substantially complies with the applicable pleading requirements in Rule 28-106.201, F.A.C., and therefore, FPL's Motion to Dismiss shall be partially denied as relates to the sections of the Motion to Dismiss pertaining to Rule 28-106.201, F.A.C.

II. Scope and Jurisdiction of this Proceeding

A. The Scope of the Tariff Order

FPL alleges that, with the exception of references to costs and allocations of costs within the proposed tariff, the relief sought by the Petition is outside the scope of Order No. PSC-14-0036-TRF-EI. FPL proposes that under 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. It 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-permitted 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 save for the possible exception of references to cost and allocation of costs.

The Protestors counter by claiming that customers who have not consented to smart meter installation are being compelled to accept such meters and if they refuse, will face financial injury through the imposition of such charges. The Protestors further allege that the cost causer principle has not been properly applied in this instance since the customer is simply

³ 42 USC §12101 et seq.

refusing to use a smart meter that the Protestors contend is not in compliance with current Commission rules.

The Protestors also assert that many of their concerns related to health, safety and privacy are based on the premise that the smart meters do not meet the definition of a meter as defined by Rule 25-6.003, F.A.C., and that the 2010 order did not designate the smart meter or the AMI program as “standard service.” In the absence of a finding to the contrary, they contend such issues are still ripe for consideration. The Protestors also restate the rationale for including health, safety and privacy issues as laid out in their original petition.

Section 120.80(13)(b), F.S., states 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 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 proposed Non-Standard Meter Rider Tariff. The subject of the Order is concerned with the costs and cost allocation for the proposed tariff, and the modifications suggested by the Commission if the Utility wished to submit a revised Non-Standard Meter Rider 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 ratepayers. Issues involving health, safety or privacy were not the subject of the 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 approval of the revised NSMR tariff, and its associated costs and cost allocations. Therefore, I find that the Protestors have demonstrated that they have standing with regard to protesting the revised tariff on its merits as relates to costs or the cost allocation which are within the scope of Order No. PSC-14-0036-TRF-EI. As discussed in greater detail subsequently, 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 and any other non-tariff related issue, but shall be denied in part on issues involving the revised tariff and its costs or cost allocation.

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, and that privacy rights are the purview of the Federal Trade Commission.

The Petition asserts that smart meters do not meet the definition of a meter as defined by Rule 25-6.003, F.A.C. The definition of a "meter" as defined by Rule 25-6.003, F.A.C., "...shall be construed to mean any device used for the purpose of measuring the service rendered to a customer by a utility." By applying a plain reading to the language of this rule, I find that the definition of a "meter" includes the devices commonly referred to as smart meters.

The Petition also contends that when an agency, such as the Public Service Commission, is endowed with the authority to compel the use of certain products, that authority also places it in a fiduciary role with oversight over said products. As a result, the Protestors contend that compelling customers to accept the installation of smart meters without a safety review or appropriate privacy protections is not consistent with the Commission's mission and functions. Since such health, safety or privacy concerns have not yet been addressed by the Commission, the Protestors contend this is the appropriate venue to raise these issues which the Protestors believe are within the Commission's jurisdiction. However, none of the Commission's authorizing statutes confers upon it jurisdiction over the personal health, safety or privacy issues raised by the Protestors. Nor is the Commission authorized to enforce these extra-jurisdictional issues, which are the purview of the other agencies.

I therefore find that the Utility's Motion to Dismiss shall be partially granted as it relates to dismissing the Protestors' health, safety and privacy claims in this instance, as they fall outside the scope of the Commission's jurisdiction.

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

FPL states that the prudence of deploying smart meters under the AMI program was approved in Order No. PSC-10-0153-FOF-EI, issued on March 17, 2010 in Docket Nos. 080677-EI and 090130-EI. FPL contends that most of the Petition is a collateral attack on the

deployment of smart meters, far beyond the scope of the issues addressed by the Tariff Order. FPL does acknowledge that a 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 the Commission issuing an order finding the smart meter project prudent and directing the Utility to proceed.

The Protestors dispute this position by pointing out that the March 17, 2010 Order did not designate the smart meter as “standard service,” and that any reliance on the March 17, 2010 Order as the basis for the Commission’s approval of smart meters is improper. The Protestors have noted that the March 17, 2010 Order does not specifically approve any kind of smart meter. The Protestors also note the March Order does not reference, affirm, or rescind Order No. 18893.⁴

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 (p. 96). 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. I find that 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.

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).

⁴ Issued February 22, 1988, in 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. This order established the mandate that as a condition of receiving service, any utility customer may be required to purchase, attach and maintain a suitable meter enclosure on the premises.

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 and any other issue settled by Order No. PSC-10-0153-FOF-EI.

III. Standing of Fifteen Specific Petitioners

FPL asserts that fifteen of the twenty Protestors lack standing and should be dismissed from the protest. This assertion is based on pages four through nine of the Pleading that identifies the individual Protestors and their substantial interests. Each paragraph of that section briefly describes one or two protestors and highlights each of their specific concerns or injuries which they believe are related to smart meters. FPL is correct in noting that only five of the twenty Protestors specifically mention cost in this section of the petition. FPL contends that because of this, fifteen of the Protestors do not meet the Agrico test, because even if they have suffered a health, safety or privacy related injury, that injury is not of the type or nature that this proceeding is designed to protect.

The Protestors, in their response to FPL's motion, unequivocally state that the cost basis issues contained in the petition apply to all twenty Protestors.

If pages four through nine of the Petition were considered independent of the rest of the Pleading, it is arguable that FPL's Motion to Dismiss on these grounds could be valid. However, the Petition must be considered in its entirety, and I find that a plain reading of the document shows that the facts and allegations contained therein are shared and supported by all twenty of the Protestors. Furthermore, there is no language in the petition which would suggest any intent to limit the individual Protestors to certain kinds of relief should any of them prevail in this matter.

As a result, I find that all twenty of the Protestors have met the two prongs of the Agrico test, in that the Petition has sufficiently alleged a substantial injury of a type or nature which this proceeding is designed to protect. Therefore, I partially deny FPL's Motion to Dismiss with regard to the standing of fifteen of the twenty Protestors.

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 Martin 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.

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

Lisa Polak Edgar
LISA POLAK EDGAR

Commissioner and Prehearing Officer
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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

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.