

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Approval of Optional)
Non-Standard Meter Rider)

Docket No. 130223
Filed February 28, 2014

**OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS
PETITION FOR RELIEF FROM AUTOMATED METERING INFRASTRUCTURE
("AMI") AND COERCION THERETO, AND FOR A FORMAL EVIDENTIARY
HEARING, OR ALTERNATIVELY FOR PARTIAL DISMISSAL OF PETITION**

COME NOW, Petitioners, by and through the undersigned attorney, who file this Response to Florida Power & Light Company's ("FPL") Motion to Dismiss Petition for Relief from AMI Infrastructure and Coercion thereto, and for a Formal Evidentiary Hearing, or Alternatively for Partial Dismissal of Petition ("Motion to Dismiss"), and in support thereof, state the following:

1. Petitioners through counsel, filed their Petition of February 4, 2014, which, as an initial matter, sought compliance with Rule 28-106.201, but also addressed objections that were as varied as the Petitioners herein.
2. While the issue of the cost basis of FPL's tariff is not in dispute, Petitioners seek the Florida Public Service Commission's (the "Commission," or "FPSC") review of other pertinent matters, with which FPL has voiced objection, particularly through its Motion to Dismiss.
3. FPL believes the following deficiencies exist with respect to Petitioner's Petition:
 - a. Its failure to satisfy the pleading requirements of Rule 28-106.201, F.A.C., with the exception of the cost basis of the Non-Standard Meter Rider ("NSMR") tariff;
 - b. The allegation of speculative harm and matter beyond the scope of the Commission's Order Denying NSMR Tariff ("Tariff Order");
 - c. The apparent litigation of issues that fall outside the Commission's jurisdiction, including the propriety of the "smart meter" itself, and its widespread deployment; and

- d. The stated lack of standing of Petitioners in all matters not related to the NSMR tariff's cost basis.
4. For the following reasons, Petitioners argue for the denial of FPL's Motion to Dismiss.
5. Because FPL has apparently stipulated to the appropriateness of Petitioners' cost-based issues, those will not be addressed below.

I. Petitioners complied with the purview of Rule 28-106.201

6. FPL argues that Petitioners have failed to adhere to the requirements of Rule 28-106.201, F.A.C. in the filing of their Petition. But, as will be described below, Petitioners have complied with Rule 28-106.201:
 - a. The name and address of each agency affected and each agency's file or identification number appears on pages 2 and 3 of the Petition;
 - b. The name, address, email address, facsimile number and telephone number of petitioners' attorney appears on the penultimate page of the Petition;
 - c. A statement of when and how Petitioners received Notice of the agency decision is included in ¶18 on page 9 of the Petition;
 - d. A statement of all disputed issues of material fact appears on pages 11 through 15 of the Petition;
 - e. A concise statement of the ultimate facts alleged is included in pages 15 through 56 of the Petition. "Concise" is a subjective term, given the voluminous, nearly five-year history of this matter, the statement of ultimate facts is concise. That FPL believes these types of facts warrant reversal is not an element of Rule 28-106.201(e);
 - f. A statement of the applicable rules and statutes Petitioners contend require reversal or modification of the agency's proposed action is found on pages 56 through 58; and

- g. A statement of the specific rules or statutes Petitioners contend require reversal or modification of the agency's proposed action can be found on page 58 of the Petition. Again, that FPL is not in agreement with the proposed actions Petitioners wish FPSC to take does not render the requested actions in noncompliance with Rule 28-106.201(f)

II. FPSC's delegation of its responsibility to address and monitor documented hazards violates the public trust and contradicts the mission of the Commission

7. Petitioners maintain that FPSC exercises regulatory authority over consumer safety objections posed by the reception of electrical services:

Florida Public Service Commission is committed to making sure that Florida's consumers receive some of their most essential services -- electric, natural gas, telephone, water, and wastewater - in a safe, affordable, and reliable manner. In doing so, the PSC exercises regulatory authority over utilities in one or more of three key areas: rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.¹ (Emphasis added.)

8. It bears noting that the words "safe" and "safety" both appear in FPSC's own description of what it essentially does. The Commission, additionally, expresses a commitment to ensuring and monitoring consumer reception of safe electrical services. Where hazards related to AMI are documented, as is the case in many instances pertaining to Petitioners and other Floridians, or even claimed with only partial substantiation, while there has been no official hearing, FPSC has not fulfilled the "safety" obligation of its mission.
9. To that end, FPSC's mission statement is "[t]o facilitate the efficient provision of safe and reliable utility services at fair prices," with a stated goal of "[p]rovid[ing] appropriate regulatory oversight to protect consumers."² (Emphasis added.)

¹ Overview and Key Facts, Florida Public Service Commission,

² Mission Statement and Goals, Florida Public Service Commission, <http://www.psc.state.fl.us/about/overview.aspx#five>, accessed 28 February 2014

10. FPL customers have consistently raised valid objections over the safety of the “smart meters” that have been installed in millions of homes throughout FPL’s service area, including prolonged exposure to radiofrequency (“RF”) radiation and the prospect of meter housings catching fire. Even where the Commission believes it has no jurisdiction over the health effects of “smart meters,” it is incumbent upon FPSC, by its own words, to make sure customers receive safe electric services, and that the monitoring of safety indeed occurs.
11. If customers raise valid safety objections, FPSC’s mission requires that it take some action, whether direct or indirect, to ensure the safe provision of electric services. In the absence of intervention, the commitment FPSC professes to have to Florida’s consumers is nothing more than a nominal representation that, without action, betrays the public’s trust and confidence.
12. As stated in Petitioner’s Petition, the Maine Supreme Court, in July 2012, following a challenge from customer of Central Maine Power (“CMP”), ordered that the Maine Public Utility Commission (“MPUC”) to reconsider its dismissal of the petitioner’s complaint that requested an evidentiary hearing into the health effects of RF emissions.³ Much like FPSC, the Maine Supreme Court found that

the [MPUC] concluded that the health and safety concerns raised in that motion did not ‘warrant reconsideration of [the Commission’s] conclusions as to smart meters’ because “the appropriate entity to consider potential RF health impacts is the [Federal Communications Commission] ... Yet, nowhere in the Aug. 24 Order, nor in the notices of the Opt-Out Investigation, nor in its other orders addressing this issue, did the Commission conclude that smart meter technology is not a credible threat to the health and safety of CMP’s customers. In fact, the Commission explicitly declined to decide this issue in the Opt-Out Investigation: “In initiating this investigation, we make no determination on the merits of health, safety, privacy or security concerns, the adequacy of existing studies or which federal or state agency has the jurisdiction

³ *Friedman v. Maine Public Utility Commission*, Docket Number PUC 11-532, Decision 2012 ME 90
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to make these determinations and this investigation will not include such matters.⁴

13. Ultimately, the Maine Supreme Court would not permit the MPUC to shirk its responsibilities to ensure that public utilities provide “safe, reasonable and adequate service” to customers.⁵ The facts of the Maine case are strikingly similar to those present herein, and Petitioners urge the Commission to take note of the holding above.

14. Furthermore, as stated at the February 19, 2013 Workshop, and argued in Petitioners’ Petition, the Federal Communications Commission (“FCC”) “does not look into the non-thermal effects [of RF radiation].” By “non-thermal,” Petitioners are referring to the direct biological effects of RF radiation, which are well established in scientific literature. Petitioners provided ample and as-yet-uncontroverted support that such non-thermal effects are hazardous to the health, and thus safety, of those exposed to it. Thus FPSC’s disregard of the substantiation on record jeopardizes the safety of those exposed to such radiation.

15. FPSC’s designation of the FCC as having sole jurisdiction over the health effects of RF radiation is, at best, an incomplete assessment, creating a jurisdictional vacuum. Petitioners proposed that FPSC, congruent with its mission, engage the Florida Department of Health (“FDOH”), which, pursuant to §501.122, Fla. Stat. (2013), “shall adopt rules as necessary to protect the health and safety of persons exposed to nonionizing radiation, including the user or any others who might come in contact with such radiation,” and liaise “with, and receive information from, industry, industry associations, and other organizations or individuals relating to present or future radiation-producing products or devices.”

⁴ *Id.*

⁵ *Id.*

16. Finally, given the hazardous nature of AMI, which is not limited to the pulsed, centimeter RF radiation deployed by AMI meters and infrastructure, but also extends to home fires and more, the Commission must be required to add to its review how persons with who become injured by AMI RF radiation, have existing medical conditions that produce adverse medical reactions to RF radiation, use electronic medical devices that can be made faulty or even dysfunctional by way of exposure to AMI radiation, or households or businesses that include such persons as occupants can be required to pay the NSMR tariff under the Americans with Disabilities Act (“ADA”), which outlaws the imposition of a “surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures.”⁶

17. Petitioners’ argument, thus, is that the Commission has a stated obligation and commitment to ensuring that Florida’s consumers of electric services receive such services safely. Even where the Commission does not believe it has jurisdiction to proceed, it cannot take a passive stance where harm could come to consumers, especially when a jurisdictional vacuum exists or an agency with jurisdiction can be consulted.

III. Petitioners have complied with §120.80(13)(b), Fla. Stat. (2013)

18. An unambiguous statute is not subject to construction; it must be given its plain and ordinary meaning. See *Streeter v. Sullivan*, 509 So.2d 268, 271 (Fla.1987); *Mayo Clinic Jacksonville v. Department of Professional Regulation, Board of Medicine*, 625 So.2d 918, 919 (Fla. 1st DCA 1993).

19. Section 120.80(13)(b), Fla. Stat. (2013) is such a statute, and states, “[n]otwithstanding ss. 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in

⁶ 42 U.S.C. § 12182

dispute. Issues in the proposed action which are not in dispute are deemed stipulated.”

20. Accordingly, any issue not raised or placed in dispute, is deemed stipulated under §120.80(13)(b), and the same does not, in itself, limit the scope of an objection.

21. FPL argues that in raising disputed issues of material fact, as required by Rule 28-106.201, Petitioners have ostensibly exceeded the scope of the Tariff Order, and failed to comply with §120.80(13)(b), Fla. Stat. (2013).

22. While counsel for Petitioners was unable to access Docket No. 981016-TX, Order No. PSC-99-0146-FOF-TX, a plain reading of §120.80(13)(b), Fla. Stat. (2013) does not support FPL’s conclusion, as it merely requires a hearing on objections to be limited to those stated objections.

IV. The matters raised by Petitioners are within the jurisdiction of the Commission

23. FPL cites §§366.04 and 366.05, Fla. Stat. (2013) as providing the Commission with its prescribed jurisdiction and power, and nothing therein precludes FPSC from investigating and monitoring the non-thermal or direct effects of RF radiation.

24. As stated *supra*, FPSC cedes jurisdiction to the FCC over the effects of RF radiation, but, again, the FCC does not monitor the non-thermal effects described in Petitioners’ Petition, and thus, at least to that extent, the Commission, if it so chose, could exercise jurisdiction.

25. Moreover, §366.015, Fla. Stat. (2013), entitled “Interagency liaison,” states,

The commission is directed to provide for, and assume primary responsibility for, establishing and maintaining continuous liaison with all other appropriate state and federal agencies whose policy

decisions and rulemaking authority affect those utilities over which the commission has primary regulatory jurisdiction. This liaison shall be conducted at the policymaking levels as well as the department, division, or bureau levels. Active participation in other agencies' public hearings is encouraged to transmit the commission's policy positions and information requirements, in order to provide for more efficient regulation.

26. FPL argues that the “enabling statutes clearly define the scope of the Commission’s jurisdiction,” but do not cite the particular statute that prevents FPSC from taking jurisdiction over the non-thermal effects of RF radiation.

27. Again, Petitioners not only raised as an issue the fact that the FCC does not monitor non-thermal effects of RF radiation, but that where such a jurisdictional vacuum exists, it should be taken up by either the Commission, in furthering its commitment to safety, or through a liaison with the Florida Department of Health, authorized by both §§366.015 and 501.122, Fla. Stat. (2013).

28. Additionally, where the National Electric Safety Code does not address radio frequencies, §366.05, Fla. Stat. (2013) includes in the Commission’s powers “the ability to adopt construction standards that exceed the National Electrical Safety Code, “ and “provi[sion] for the examination and testing of all meters used for measuring any product or service of a public utility.”⁷

⁷ §366.05(3), Fla. Stat. (2013).

29. While Staff has stated that the above matters are outside the scope of the Commission's jurisdiction, Petitioners maintain that they are not, and have provided support for that position.

V. Petitioners have standing to bring issues addressed in their Petition

30. FPL argues that, under *Department of Health and Rehabilitative Servs. V. Alice P.*, 367 So.2d 1045, 1052 (Fla. 1st DCA 1979), it is incumbent upon Petitioners to prove standing to participate in a case. Moreover, Petitioners have a two-prong test that must be met, showing "they will suffer an injury in fact which is of sufficient immediacy to entitle them to a hearing pursuant to Section 120.57, Florida Statutes," and that the "substantial injury is of a type or nature which the proceeding is designed to protect." *See Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981).

31. Here, addressing the first prong, the Petitioners are the various customers of or those who reside in households receiving services from FPL. The financial and physiological injuries cited by Petitioners in their Petition are of such sufficient immediacy to entitle them to a hearing under §120.57, Fla. Stat. (2013).

32. With regard to the second prong, Petitioners maintain that the Tariff Order cannot simply ignore FPSC's stated mission to facilitate the provision of safe utility service by deferring to an agency in FCC who, by FPL and FPSC's admission does not monitor the type of harm Petitioners seek to avoid. Even where FPSC may decline jurisdiction over Petitioners' health, it is charged with "establishing and maintaining continuous liaison with all other appropriate state and federal agencies whose policy decisions and rulemaking authority affect those utilities over which the commission has primary regulatory jurisdiction." §366.015, Fla. Stat. (2013).

33. Petitioners, thus, argue that FPSC's guiding principles are enumerated in its mission, and thus, safety considerations are inherently present in any Order rendered by the Commission.

WHEREFORE, for the foregoing reasons, Petitioners, believing they have stated sufficient causes of action, and mindful of the Commission's obligation to accept all allegations as true and viewed in a light favorable to the petitioners, move the Commission to deny FPL's Motion to Dismiss, or to the extent that FPL's Motion is granted, for Petitioners to ameliorate whatever deficiencies upon which a dismissal may be based, so that Petitioner's objections may be evaluated on their merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to the following parties on the 28th day of February 2014:

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