

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

FILED: October 27, 2014

**CITIZENS' POST-HEARING STATEMENT OF POSITIONS
AND POST-HEARING BRIEF**

Pursuant to Order No. PSC-14-0504-PHO-EI, issued September 23, 2014, the Office of Public Counsel (“Citizens”, “OPC”, or “Public Counsel”) hereby submits this Post-Hearing Statement of Positions and Post-Hearing Brief on the disputed issues pertaining to the Petition for approval of optional non-standard meter rider (“NSMR”), by Florida Power & Light Company, Inc. (“FPL” or “Company”) (“Petition”).

PRELIMINARY STATEMENT

The OPC will limit its post-hearing comments to Issue 11. For all other issues, the OPC restates and incorporates herein by reference its positions shown in Order No. PSC-14-0504-PHO-EI.

The Florida Public Service Commission (“Commission”) should be mindful of the diversity of the 4.5 million customers that FPL serves around the state. Each customer is entitled to take service from FPL in a manner that is least intrusive to his or her life and is consistent with FPL’s obligations to provide service to all customers in the most economic and reliable manner. The Commission has the opportunity to examine the evidence presented by the Company and the intervenors and make a determination about the proper cost recovery in a way that balances the interests of all the customers and the Company’s.

POSITIONS AND ARGUMENT ON DISPUTED ISSUES

Issue 11: Based on the resolution of the previous issues, what are the appropriate NSMR charges?

OPC: *The Public Counsel submits that any tariff the Commission finally approves for customers to take service through a meter other than a “Smart Meter” should be reasonably cost-based and not impose unwarranted costs on any FPL customers, including those who are being served through the “Smart Meter.” Tariff charges should – at a minimum – be established consistent with this principle.*

ARGUMENT

FPL has acknowledged that the customers who do not want smart meters are sincere in their beliefs and need for the non-smart meters. (TR 90) Given the genuine nature of the need, the Commission should be sensitive to the pricing of the service that – regardless of the sincerely held beliefs of the subscribers about smart meters – is essential to taking service from FPL. Since the customers do not have a choice of electricity providers, the Commission’s obligation is to insure that the subscribers of the NSMR do not pay more than their fair share of the essential service while also not imposing extra costs on the customers who have accepted the standard meters. This concept is embedded in the basic position that the OPC has taken in this docket.

While the OPC is not advocating a specific rate structure, the OPC can offer the observation that the Commission has the discretion, evidence, and tools available to consider a range of pricing structures for the NSMR. This flexibility can yield a tariff that facilitates service on a reasonable basis for customers who have a genuine need to take service without imposing an unreasonable financial burden – if any – on the balance of FPL’s customers.

The OPC neither takes a position nor makes comment here about the route upon which all the parties arrived to this point via two prior rate cases, workshops, and other related

proceedings. At this point, this is a hearing on a tariff that has been requested by the petitioning intervenors (Martin, et al). All revenues are subject to refund during the pendency of this hearing. Citizens v. Wilson, 567 So2d 889, at 892. This proceeding has been established for the purpose of determining the appropriateness of the NSMR tariff and rates and charges. The customers who have protested the tariff have taken varied positions regarding the pricing that the Commission should adopt.

For the Public Counsel, the fundamental issue for the Commission to consider and decide is whether charging the enrollment fee and the monthly recurring rate are appropriate and required for an NSMR subscriber, taking into consideration the interests of the balance of customers who take service utilizing the smart meter. The OPC submits that the key considerations for evaluating the pricing proposed by FPL are as follows: (1) whether the costs are truly incremental (i.e., are they being recovered in base rates or not?); (2) are there costs caused by the provision of the NSMR that are being borne by the standard meter customers? (i.e., is subsidization occurring?); (3) whether collection of the NSMR costs is necessary to meet any legal obligation of the Commission to provide FPL the opportunity to earn rates that are compensatory, such that the non-collection of the NSMR costs would not cause FPL's earnings to fall below the floor of the authorized rate of return and trigger the need for a rate increase; and (4) whether there is any legal requirement for the NSMR rates to be at any particular level or to cover certain costs.

As to the first issue, FPL's witnesses testified that the rates were designed to cover incremental costs, and that these rates were not included in the costs upon which rates were based in the last rate case. (TR 88) However, as noted by FPL witness J. Terry Deason, given that the decisions in the Docket No. 120015-EI rate case were not based strictly on the costs filed

by the Company (TR 234), there is really no concrete way for the Company to demonstrate the “incremental” nature of the costs with any level of certainty. At the hearing, FPL witness Robert Onsgard, who was the only Company witness testifying about the development of costs, never offered definitive *proof* that the costs were not embedded in rates as established pursuant to Order No. PSC-13-0023-S-EI. Mr. Onsgard testified that the costs were not included in base rates (TR 88) and were incremental in the sense that they “would not have been incurred but for the existence of [the NSMR].” (TR 73) Such an assertion is hard to verify, even if true, given the timing of the last rate case test year (2013) and the fact that the Commission did not set rates based on specific costs, but rather based on a stipulation amongst a select group of parties.¹

Intervenor witness Marilynne Martin appears to contend that the costs included in the tariff are not incremental. (TR 358) Given the testimony of FPL’s witnesses and the contention of witness Martin, the Commission must satisfy itself that FPL has met its burden of demonstrating that the costs identified for NSMR recovery have not been included in base rate recovery. To the extent that the Commission is not fully satisfied that the burden has been met or even if it has satisfied itself that the costs fall outside of base rate recovery, it should nevertheless further consider the other factors (i.e., subsidization, non-compensatory, and/or legally required rate levels), which are identified above.

Regarding the other three basic considerations, FPL witness Deason provided the Company’s position on considerations that it contends the Commission should be mindful of and adopt as governing the evaluation of the NSMR costs. Central to his testimony on these points is that the Commission should determine whether the Company’s rates are compensatory and/or non-discriminatory and whether the remaining residential customers would be subsidizing the

¹ The OPC is not suggesting that FPL is wrong or misstating facts. The simple matter is that it is nearly impossible to verify whether the NSMR costs are completely incremental. However, the OPC does not here contest the representations made and assumes that the costs are truly incremental for purposes of the remaining analysis.

NSMR customers IF the identified NSMR costs are not recovered through a separate tariff. Witness Deason seemed to suggest to the Commission that it should consider whether a company was earning a compensatory return if “incremental” costs were not collected from the cost causers. (TR 223-224) Mr. Deason also sought to advise the Commission that it should consider special stand-alone statutes, including Section 366.81, F.S., (relating to the Florida Energy Efficiency and Conservation Act, or “FEECA”) and Section 366.051, F.S., (relating to cogeneration and small power production), as applying to the circumstances of the NSMR tariff by prohibiting one class of customers from subsidizing other classes. (TR 222-223)

The fundamental considerations that Mr. Deason urged upon the Commission were primarily anti-subsidy driven. He suggests primarily that failure to collect the costs identified as “incremental” to the NSMR would: (1) result in “cross-subsidies” (TR 237); (2) not be fair; (3) place upward pressure on rates; and (4) send an improper pricing signal to customers. (TR 237-238) Mr. Deason also suggested that certain legal principles embedded in various provisions of Chapter 366, F.S., prohibit discrimination by one class of customers against another class of customers. (TR 222) Mr. Deason also seems to imply – but does not demonstrate – that failure to collect the “incremental” costs identified as caused by the NSMR could somehow mean that FPL’s rates will “not be compensatory.” (TR 223-224) Regardless of the suggestive nature of the legal analysis he presented, witness Deason was careful not to assert that the cited statutes were in any way binding upon the Commission’s decision on the NSMR or that they dictate a specific outcome. (TR 254-256)

Although the OPC is not advocating for a change in the NSMR tariff rates, it is important to re-emphasize that our basic position is that any tariff the Commission finally approves for customers to take service through a meter other than a “Smart Meter” should be reasonably cost-

based and not impose unwarranted costs on any FPL customers, including those who are being served through the “Smart Meter.” NSMR tariff charges should – at a minimum – be established consistent with this principle. Having reiterated this, the OPC is compelled to urge the Commission to be cautious about adopting the regulatory/legal advice offered by FPL through witness Deason, insofar as that advice would be construed to suggest that Chapter 366, F.S., imposes a legal mandate to collect the costs that FPL attributes to the non-standard meter service from NSMR subscribers.

While the Commission can certainly follow the advice and recognize the principles advocated by Mr. Deason, it is not bound to do so. The Commission has this flexibility not only because it has wide latitude in setting rates for a discretionary tariff like the NSMR, but also because FPL has not pointed to any binding authority that restricts the Commission to only approving the rates and charges that FPL has submitted in the tariff. Mr. Deason acknowledges that the Commission has significant discretion in fashioning appropriate charges and in applying the principles that he advocates. (TR 256) Nowhere does he advance a statute, rule, or decisional precedent that is mandatory and that restricts the Commission’s discretion such that it dictates that the NSMR tariff must be sustained as filed.

For example, although he states in his prefiled rebuttal testimony that the FEECA statute is “applicable” to the NSMR, witness Deason acknowledged on the stand that the FEECA statute does not apply in a legal sense to the tariff. He admitted that he offered it as essentially instructive to the Commission. (TR 255-256) Even if one were to concede the applicability of the FEECA statute, Mr. Deason also confessed that he could not point to a decision by the Commission that found that a discretionary category of customers (such as the current and future

NSMR tariff subscribers) constitute a “class” within the meaning of the admittedly non-binding FEECA statute. (TR 255)²

Witness Deason also acknowledged that FPL is under a base rate freeze and that base rates will not likely change until January 1, 2017 at the earliest. (TR 258-262, 267) He further agreed that FPL’s authorized Return on Equity (ROE) range is 9.5% to 11.5%, with current earnings at an 11.29% ROE. (TR 262-263) This earnings level equates to 179 basis points, or \$286 million above the floor, that would trigger a base rate increase opportunity for FPL. (TR 263) Mr. Deason also acknowledged that the costs of the NSMR were about \$4 million (\$3 million in capital and about \$1 million in recurring operations and maintenance expenses, or O&M). (TR 261) Based on these numbers and the base rate freeze in place, it does not appear that FPL’s base rates would “not be compensatory” if the costs attributable to the non-standard meter service were not collected during the pendency of the base rate freeze. Furthermore, when pressed about whether the non-NSMR customers could be deemed to “subsidize” customers when their rates cannot change for at least two years due to the base rate freeze and given the very healthy – \$286 million – margin above the bottom of the range, Mr. Deason stubbornly refused to acknowledge the obvious – that no subsidies can flow from one customer group to another absent a rate change. (TR 258-261)

Taking into consideration the state of the record and the current base rate freeze, the Commission can decide for itself whether it wants to accept FPL witness Deason’s theoretical “subsidy” (when no one’s rates can or will change) or the pragmatism that a subsidy cannot in reality exist where no one is making a payment or is being deprived of a cost reduction (or offset) in the face

² The notion of the existence of “classes” of customers is integral to FPL’s assertion that discrimination and subsidization occur if the NSMR subscribers do not pay the incremental costs of the new service. FPL cited no authority or precedent for the notion that each segment of customers subscribing to tariffed service constitutes a “class” for purposes of the statutory provisions cited. Mr. Deason admitted that the notion has not been “traditionally” used. (TR 254)

of the non-collection of assumedly incremental NSMR costs from the non-standard meter customers. This is indeed part of the discretion that the agency possesses. Mr. Deason acknowledges this discretion. (TR 221, 253, 256, 285-286, 300-301, 325-326)

The OPC's observations are, in summary, that the Commission has options and can choose among them. It can leave the NSMR tariff in place as filed. The record fully supports such a choice if the Commission adopts this approach. At the other end of the spectrum, it can decide that customers do not need to pay the enrollment fee at all. The record supports this as another option, given that there are no binding precedential LEGAL mandates that the costs must be recovered from a specific set of customers or that one segment of the residential class can subsidize another segment of the residential class. (TR 254) Clearly, no argument can be sustained that the failure to collect the supposedly incremental costs will render FPL's rates non-compensatory given the very healthy achieved ROE that the Company has recently reported.

Another option within these bookends is that the Commission could, for example, choose to delay implementing the NSMR tariff until the Company files for new base rates. This could occur even if the Commission decides that: (1) the FEECA statute applies; AND (2) that it binds the Commission; AND (3) that the subset of a traditional customer class is contained within the FEECA "class vs. class" subsidy prohibition; AND (4) that the non-collection of incremental costs can theoretically force one customer subset to subsidize another subset; BUT (5) it does not accept the notion that impermissible subsidies flow if rates cannot be changed or price reductions can be forced.

The OPC believes that the Commission has a full range of options and is not constrained by the philosophical or regulatory standards that FPL has advanced through Mr. Deason. Again, the OPC is neither recommending that a specific rate structure be adopted, nor is the Public

Counsel taking the position that the rates and charges in the FPL NSMR tariff are unlawful. To the contrary, these rates and charges conform to Commission precedent and policy; however, that conformance is only one point on a broad continuum of rate-setting discretion that the Commission possesses. The OPC urges the Commission to be deliberative and to consider all its options and weigh them in the interest of all FPL customers.

CONCLUSION

While the OPC has not taken a position supporting a specific rate structure – if any – as a result of this hearing, the OPC has taken the position that the evidence and Commission authority give it latitude under the circumstances of this case to adopt a wide range of solutions. The Commission has ample record basis to adopt FPL’s tariff rates and charges as proposed, or to adopt no rates and charges at this time and revisit this tariff when FPL files its next general base rate increase request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF** has been furnished by electronic mail on this 27th day of October, 2014, to the following:

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