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PUBLIC UTILITY COMMISSION  
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PROJECT NO. 40199

PETITION FOR INITIATION OF  
RULEMAKING PROCEEDINGS  
REGARDING SMART METERS

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PUBLIC UTILITY COMMISSION  
OF TEXAS

**INITIAL COMMENTS OF  
TEXAS-NEW MEXICO POWER COMPANY**

As requested, Texas-New Mexico Power Company (TNMP) files the following comments to the Petition for Initiation of Rulemaking Proceedings of Devvy Kidd *et al.* (“Petition”) (collectively, Devvy Kidd, *et al.*, to be referred to as “Petitioners” hereafter).

**Initial Statement and General Comments**

The implication that the deployment of advanced meters in Texas is a recent, hurried development (or, without considered oversight) is either consciously disingenuous or willfully uninformed. Beginning in 2005, the Texas Legislature chose to encourage deployment of advanced meters with its unanimous approval of HB 2129.<sup>1</sup> In approving subsequent amendments to PURA § 39.107<sup>2</sup> in 2007, the Legislature reaffirmed its desire to foster advanced meter system deployment by declaring, “*it is the intent of the legislature that net metering and advanced meter information networks be deployed as rapidly as possible to allow customers to better manage energy use and control costs, and to facilitate demand response initiatives.*”<sup>3</sup> This Commission is well aware of the proceedings initiated to adjust its rules to accommodate that intent.

<sup>1</sup> Acts of 2005, 79th Leg., R.S., ch. 1095, § 7, 2005 Tex. Gen. Laws 3617, 3618.  
<sup>2</sup> See TEX. UTIL. CODE ANN § 39.107 (Vernon 2007 and Supp. 2011) (PURA).  
<sup>3</sup> Acts of 2007, 80th Leg., R.S., ch. 939, § 20, 2007, Tex. Gen. Laws 3247.

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Further, each utility currently deploying advanced meter systems (“AMS”), filed deployment plans and received approval through contested proceedings before the Commission.<sup>4</sup> The first proceedings began in May 2008,<sup>5</sup> with each separate case being duly noticed and receiving active participation from numerous intervenors.<sup>6</sup> Nor were the proceedings unduly expedited. TNMP’s case actually took almost 14 months to complete. Given the span of the related proceedings, legislative enactments, and regulatory rulemakings, the assertion that the AMS deployments were not the result of an open, carefully considered process is utterly baseless.

Consequently, TNMP appreciates the opportunity to comment on the Petition submitted in this proceeding. Accordingly, the Petition should be dismissed because, in addition to procedural infirmities, it requests relief that contravenes TEX. UTIL. CODE ANN § 39.107 and the majority of Petitioners’ claims are either preempted by federal law or constitute collateral attacks

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<sup>4</sup> *Application of CenterPoint Energy Houston Electric, LLC for Approval of Deployment Plan and Request for Surcharge for An Advanced Metering System*, Docket No. 35639, Final Order, Item 219, Dec. 22, 2008; *Oncor Electric Delivery Company LLC's Request For Approval Of Advanced Metering System (AMS) Deployment Plan And Request For Advanced Metering System (AMS) Surcharge*, Docket No. 35718, Final Order, Item 102, Aug. 29, 2008; *AEP Texas Central Company And AEP Texas North Company's Request For Approval Of Advanced Metering System (AMS) Deployment Plan And Request For AMS Surcharges*, Docket 36928, Final Order, Item 109, Dec. 17, 2009; *Texas New-Mexico Power Company's Request For Advanced Meter Deployment and AMS Surcharge*, Docket No. 38306, Final Order, Item 257, July 7, 2011.

<sup>5</sup> *Application of CenterPoint Energy Houston Electric, LLC for Approval of Deployment Plan and Request for Surcharge for An Advanced Metering System*, Docket No. 35639, Item 1, May 5, 2008.

<sup>6</sup> *Application of CenterPoint Energy Houston Electric, LLC for Approval of Deployment Plan and Request for Surcharge for An Advanced Metering System*, Docket No. 35639, Final Order, Item 219, FoFs 2,4; Dec. 22, 2008; *Oncor Electric Delivery Company LLC's Request For Approval Of Advanced Metering System (AMS) Deployment Plan And Request For Advanced Metering System (AMS) Surcharge*, Docket No. 35718, Final Order, Item 102, FoF 2,9; CoL 3; Aug. 29, 2008; *AEP Texas Central Company And AEP Texas North Company's Request For Approval Of Advanced Metering System (AMS) Deployment Plan And Request For AMS Surcharges*, Docket 36928, Final Order, Item 109, FoFs 2,6,7; CoL 3; Dec. 17, 2009; *Texas New-Mexico Power Company's Request For Advanced Meter Deployment and AMS Surcharge*, Docket No. 38306, Final Order, Item 257, FOFs 5, 7; COL 3, 4, July 7, 2011.

on prior Commission orders. The viability or form of any AMS opt-out option is better addressed in the Commission's pending Project No. 40190.<sup>7</sup>

### **Specific Comments**

#### **A. Procedural Defect.**

As a threshold matter, TNMP notes that PUC PROC. R. 22.281 requires that any petition for a rulemaking include both the "...the statutory authority for such a rule or amendment, and complete proposed text for the rule."<sup>8</sup> The Petition does neither and therefore forces respondents to divine any underlying authority for Petitioners pleading. The lack of a complete proposed text for a new rule, ultimately leaves to the Commission the task of creating new language in a proceeding that it did not initiate and whose scope lacks the benefit of cited authority. This infirmity justifies dismissal.<sup>9</sup>

#### **B. Requested relief contravenes Texas Utility Code § 39.107**

As noted above, TEX. UTIL. CODE ANN § 39.107(i) expresses the Legislature's intent that advanced meter deployments occur as rapidly as possible. Conversely, Petitioners' request to prohibit deployment of further advanced meters and remove any deployed meters directly contradicts that intent. The Commission has already reviewed and approved the deployment of meters and imposed a process of over-site for such deployments.<sup>10</sup> Petitioners' attempt to circumvent the previously noticed and determined proceedings would only erode the system-wide benefits that the Commission found in approving each deployment. The Commission

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<sup>7</sup> Texas-New Mexico Power reserves the right to file comments at a later date in this referenced docket.

<sup>8</sup> See also TEX. GOV'T. CODE § 2001.024.

<sup>9</sup> TNMP would further note that in the event that this proceeding continues, Petitioners' attorney affirmatively reflects that he is licensed in the State of Louisiana, not Texas. As the unauthorized practice of law by a non-resident attorney is forbidden under Texas law, Petitioners' counsel should satisfy the Commission that he has complied with the Texas Governing Admission to the Bar, R. XIX as well as TEX. GOVT. CODE § 82.0361, before continuing to act in this proceeding.

<sup>10</sup> E.g., *Texas New-Mexico Power Company's Request For Advanced Meter Deployment and AMS Surcharge*, Docket No. 38306, Final Order, Item 257; *See also*, PUC SUBST. R. 25.130.

should deny Petitioners' primary request for relief.

### **C. Petitioners Primary and Secondary Relief Preempted.**

Petitioners primarily seek is a "permanent prohibition and mandated removal of smart meters" and other related technology.<sup>11</sup> Alternatively, Petitioners request that the Commission impose rules on the safe implementation of smart meters and related technology.<sup>12</sup> However, these requests are apparently based upon Petitioners' view of radio frequency ("RF") emissions and the purported harm Petitioners attribute to such emissions. To the extent Petitioners seek for the Commission to determine its own safety standards for digital meters and related technology, the relief requested is already preempted by federal law. The Federal Communications Commission ("FCC") already regulates the RF emissions from such devices. Therefore, any determination by the Commission which contradicts the regarding the level or effect of RF emissions contravene the FCC's uniform regulatory scheme for the nation.

The Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, invalidates state law that "interferes with or is contrary to federal law."<sup>13</sup> Since 1985, the FCC has regulated human exposure to RF emissions.<sup>14</sup> More recently, when faced with complaints almost identical to the allegations urged in the Petition, the Third Circuit ended the action on preemption grounds because imposing such liability would upset the RF emission balance struck by the FCC and undermine a single national standard.<sup>15</sup>

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<sup>11</sup> Petition at 19.

<sup>12</sup> *Id.*

<sup>13</sup> See *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *Farina v Nokia*, 695 F.3d. 97 ( 3<sup>rd</sup> Cir. 2010) *Cert Denied* 132 U.S. 365.

<sup>14</sup> See *In re Responsibility of the F.C.C. to Consider Biological Effects of Radiofrequency Radiation*, 100 F.C.C. 2d 543, 544 (1985)

<sup>15</sup> See *Farin*, 695 F.3d. at 125–26.

Tellingly, Petitioners fail to present any evidence that the AMS technologies deployed violate the FCC's standards. They fail to even recognize or address the extensive RF regulations promulgated by the FCC.<sup>16</sup> Instead, Petitioners would ask the Commission to develop on its own acceptable RF emission levels and either prohibit AMS deployments or create new regulations RF emissions safety related to AMS technologies. However, since the RF emissions are the purview of the FCC, Petitioners concerns regarding RF emission levels should be raised with FCC and not this Commission. Accordingly, Petitioners allegations regarding RF emissions do not support their requested relief and justify dismissal of the Petition.

**D. Petitioners requested relief collaterally attacks the Commission's prior decisions.**

The remainder of Petitioners' justifications amount to no more than impermissible collateral attacks on the prior Commission orders approving AMS deployments and utility tariffs. As indicated previously, notice of the AMS proceedings was issued as required law and Petitioners failed to intervene.<sup>17</sup> Their current Petition provides no basis for the Commission to revisit the decisions made through prior contested cases.

It is well established that an agency's final order, like a final judgment of a court of law, is immune from collateral attack.<sup>18</sup> Collateral attacks on final judgments are generally disallowed because it is the policy of the law to give finality to judgments.<sup>19</sup> Petitioners apparently seek to revisit the accuracy or meter technology, the benefits of AMS deployment, and the security of data transmitted through advanced meter technology. However, Petitioners fail to address or

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<sup>16</sup> See 47 U.S.C. § 151.

<sup>17</sup> E.g., *Texas New-Mexico Power Company's Request For Advanced Meter Deployment and AMS Surcharge*, Docket No. 38306, Final Order, Item 257, FOFs 5, 7; COL 3, 4, July 7, 2011.

<sup>18</sup> See *State v. Trim Oil and Gas, Inc.*, 966 S.W.2d 123, 126 (Tex. App.-Austin 1998, no pet.).

<sup>19</sup> See *Tice v. City of Pasadena*, 767 S.W.2d 700, 703 (Tex. 1989).

offer any evidence that the Commission's prior decisions concerning these issues are insufficient.

In fact, in 2010 the Commission addressed accuracy and data security for the existing AMS deployments. The Commission has previously conducted a study addressing accuracy complaints. That study found the AMS meters to be quite accurate.<sup>20</sup> Additionally, the Commission has ordered that similar studies be conducted in due course for TNMP's deployment.<sup>21</sup> Likewise, the Commission has provided for protection of sensitive customer data by requiring AMS-specific security assessments.<sup>22</sup> Without any evidence that such regulation is improper, Petitioners present no basis for either prohibiting deployment or creating additional rules for that process.

Finally, the Commission has repeatedly analyzed each deployment and expressly determined that the approved deployment would achieve specific customer benefits.<sup>23</sup> Such benefits include recognizing that an advanced metering system would (i) encourage dynamic pricing and demand response, (ii) improve the deployment and operation of generation, transmission, and distribution assets; (iii) provide more choices for electric customers; and (iv) ultimately increase the reliability of the regional electrical network.<sup>24</sup> Further, in prior rulemaking contained in Project No. 31418 regarding advanced meters, the Commission recognized that the Legislature has made a policy decision on the benefits of advanced metering systems.<sup>25</sup> Thus, any attempt to revisit the question of benefits not only

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<sup>20</sup> Navigant Consulting (PI), LLC, *Evaluation of Advanced Metering System (AMS) Deployment in Texas: Report of Investigation*, July 30, 2010.

<sup>21</sup> *Texas New-Mexico Power Company's Request For Advanced Meter Deployment and AMS Surcharge*, Docket No. 38306, Final Order, Item 257, July 7, 2011.

<sup>22</sup> *Id.*

<sup>23</sup> E.g., *Id.* FOF 14.

<sup>24</sup> *Id.*

<sup>25</sup> See *Rulemaking Related to Advanced Metering*, Project No. 31418, Order Adopting New § 25.130 and Amendments to §§ 25.121, 25.123, and 25.346 as Approved at the May 10, 2007 Open Meeting at 26-28, 33-34.

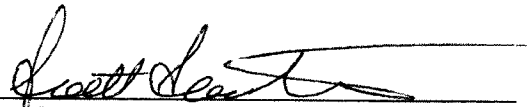
attacks the Commissions' prior decisions, but the expressed intent of the Legislature as well. Such complaints fail to support the relief requested by Petitioners. The Petition should be dismissed.

**E. Conclusion**

For the reasons set forth above, the Petition fails to establish any need to revisit the Commission's prior decision or institute a parallel, disjointed proceeding when the question of the viability and form of any opt-out provision is already pending in Project 40190. The Petition should be dismissed. Consequently, TNMP appreciates the opportunity to comment on this matter and anticipates a fuller, structured discussion of any pertinent issues related to an AMS opt-out in Project 40190.

Dated: March 30, 2012

Respectfully submitted,



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