

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition by Florida Power & Light )  
Light Company for Rate Unification and for ) DOCKET NO. 20210015-EI  
Base Rate Increase ) FILED: August 11, 2021  
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**FLORIDIANS AGAINST INCREASED RATES, INC.'S RESPONSE  
TO FPL'S MOTION FOR SUMMARY FINAL ORDER**

Floridians Against Increased Rates, Inc. ("FAIR"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby files its Response to FPL's Motion for Summary Final Order filed in this proceeding on Wednesday, August 4, 2021. (For convenience, FAIR's response is abbreviated as "Response" and FPL's motion is abbreviated as "FPL's Motion." FAIR's Response includes the Affidavit of John Thomas Herndon and Affidavit of Lynne Ann Larkin, which are appended hereto and incorporated by reference into FAIR's Response.) In summary, FPL's Motion is legally inappropriate because there are disputed issues of material fact that remain to be determined in this docket, based on evidence to be developed in the evidentiary record at hearing, and FPL's Motion should be denied summarily for this reason alone. Additionally, for similar reasons, FPL's motion should be denied because it is premature: what FPL has done is to submit its argument, as that would be submitted in its post-hearing brief after the hearing, and again, based on the evidence in the record developed at hearing.

Further, FPL's legal arguments are inapposite and generally based on certain factors sometimes considered in federal administrative law cases but not part of Florida standing law: FAIR satisfies all requirements of Florida standing law, including those set forth in Agrico<sup>1</sup> and Florida Home Builders.<sup>2</sup> Finally, FPL's argument that FAIR's motion to intervene should be dismissed because, according to FPL, FAIR did not have "official" members when FAIR filed its motion to intervene on May 4, 2021 (which FAIR disputes in any event), is based on inapplicable civil case law: FAIR did not initiate this proceeding, but rather, as an intervenor, FAIR took the case at it existed on May 19, 2021, when the Commission granted FAIR's intervention.<sup>3</sup> Moreover, in the FAIR Intervention Order, the Commission clearly assigned and afforded to FAIR the burden of proving its standing, which can ONLY be done in the evidentiary record developed at hearing.

FPL's conclusory allegations that FAIR is run by others and does not represent its members' interests are baseless and unsupported by any evidence whatsoever. FAIR's Board of Directors, which consists of three exceptionally qualified and experienced persons who have decades of experience serving Florida's citizens with

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<sup>1</sup> Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982).

<sup>2</sup> Florida Home Builders Ass'n v. Dep't of Labor and Employment Security, 412 So. 2d 351, 353-54 (Fla. 1982).

<sup>3</sup> Order No. PSC-2021-0180-PCO-EI, Order Provisionally Granting Floridians Against Increased Rates, Inc.'s Motion to Intervene (Fla. Pub. Serv/ Comm'n, May 19, 2021) (hereinafter, "FAIR Intervention Order").

respect to electric utility matters, makes all decisions, and FAIR's Board and FAIR's experts represent its members' interests. Despite FPL's protestations that FAIR lacks "basic indicia" of being an actual operating entity or association, e.g., a formal office, direct employees, or a telephone number, and its claims that FAIR's members do not have characteristics that some members of some organizations have, all of which are irrelevant to FAIR's standing in any event, FAIR has everything it needs to represent its members' substantial interests in receiving safe and reliable electric service with the lowest possible rates: a highly qualified and knowledgeable board of directors and highly qualified expert witnesses. In fact, FAIR's effectiveness in representing the interests of its many members who are FPL customers is amply demonstrated by the fact that FPL has devoted much time and significant expense in its attempts to prevent the Commission from receiving FAIR's arguments and from considering the testimony and exhibits of FAIR's team of experts in this case.

### **FACTUAL BACKGROUND**

FPL initiated this proceeding on March 12, 2021, by filing its petition, testimony, exhibits, and Minimum Filing Requirements seeking more than \$6 billion of additional base rate revenues over the period 2022 to 2025.

FAIR is a Florida not-for-profit corporation. FAIR was incorporated on March 16, following preliminary, pre-incorporation consideration by the board members beginning at least as early as the beginning of March 2021. (Herndon Affidavit at 1.) FAIR's purposes as an organization are to advance the welfare of the State of Florida,

all Florida citizens and businesses generally, and all customers of electric utilities whose rates are set by the PSC, by advocating for governmental policies and actions that will lead to retail electric rates that are as low as possible while ensuring safe and reliable electric service, and by advocating against and opposing any governmental policies and actions that are likely to result in electric rates being greater than necessary. (Watkins Exhibit NHW-2 at pages 1-2.) FAIR's purposes and activities are thus contemplated to include general rate cases and the fully panoply of other governmental policies and actions that impact electric rates. FAIR's Board of Directors consists of Michael R. Hightower, who served for 16 years on the Board of JEA, including 4 years as the chairman of the JEA Board, as well as service on the Florida Public Service Commission Nominating Council and on the Florida Energy Study Commission; John Thomas "Tom" Herndon, whose public service in Florida includes four years as a Commissioner on the Florida PSC, six years as the Executive Director of the Florida State Board of Administration, which manages Florida's pension funds and certain other funds, and service as the Director of the Office of Planning and Budget and as Chief of Staff to two Florida Governors (Herndon Direct Testimony at 2); and Frederick M. Bryant, who served as the general counsel of the Florida Municipal Power Agency for 40 years.

Shortly after it was incorporated, FAIR developed a membership application and began recruiting members, at first using a paper or "pdf" form of the application (Watkins Exhibit No. NHW-4), and later using a nearly identical application form that

can be accessed electronically. (Watkins Exhibit No. NHW-5.) In joining FAIR, a member makes the representations, request, and authorization set forth in FAIR's membership application as follows:

**I hereby request to become a member of Floridians Against Increased Rates, Inc. (FAIR).** I confirm that I am a customer of the Florida electric utility identified below. I support FAIR's purposes of (a) advocating by all lawful means for the lowest possible electric rates that are consistent with my utility providing safe and reliable electric service, and (b) opposing by all lawful means utility proposals for rates and rate increases that are greater than necessary for my utility to provide safe and reliable service. I request and authorize FAIR to represent my interests in having the lowest possible rates for my electric service that are consistent with my utility providing safe and reliable service. I understand that no payment of dues is required for my membership in FAIR. I consent to FAIR's collection and use of my personal information provided below for the purposes associated with my membership as described in my application.

Id.

The first member of FAIR was Lynne Ann Larkin, a resident of Vero Beach, who has been a customer of FPL since FPL acquired the Vero Beach electric utility system in 2018; Ms. Larkin joined on April 17, 2021. (Larkin Affidavit at 1-2.) Membership during the early phase of recruitment was by word of mouth. Ms. Larkin recruited additional members who submitted their applications as pdf files. (Larkin Affidavit at 2.) As of May 3, 2021, FAIR had 16 members who had joined by submitting their applications in pdf format. (Herndon Affidavit at 1, para. 6.)

On behalf of those 16 members as of May 3, FAIR moved to intervene on May 4, 2021. FAIR continued to receive some pdf applications and later activated its

website. As of June 15, FAIR had 513 members, of whom approximately 80 percent were FPL customers. As of July 25, FAIR had more than 770 members, of whom approximately 615 (approximately 80 percent) were FPL customers, with customers of the other four Florida investor-owned utilities making up the other 150-plus members of FAIR. (FAIR's Amended and Supplemental Response to FPL's Request for Production of Documents No. 4, Bates Nos. 002562-002571.) Notwithstanding the fact that FAIR considered all of those on the roster to have been members as of the date on which they submitted their signed membership applications (Herndon Affidavit at 2), on July 27, by written action in lieu of meeting, the FAIR Board took the formal, ministerial action of admitting and electing those persons who had applied as of July 25 to membership. (Herndon Affidavit at 2; FAIR's Amended and Supplemental Response to FPL's Request for Production of Documents No. 4, Bates Nos. 002543-002545.)

Consistent with the FAIR Intervention Order, FAIR has participated actively in this proceeding and filed, on June 21, 2021, the testimonies and exhibits of three experts, including former Commissioner Herndon; Timothy J. Devlin, who served the PSC as Director of Auditing and Financial Analysis, Director of Economic Regulation, and as the Executive Director of the PSC Staff; and Breandan Mac Mathuna, an experienced witness and analyst on cost of capital issues. FAIR also submitted the testimony of Nancy H. Watkins, which addressed the status of FAIR's members as of June 15, 2021.

## STANDARD OF REVIEW

The standard of review applicable to a motion for summary final order was recently set forth in detail by the Commission. In re: Petition for Establishment of Regulatory Assets for Expenses Not Recovered During Restoration for Hurricane Michael, by Florida Public Utilities Company (hereinafter, “FPUC Storm Costs”), Docket No. 20190155-EI, Order No. PSC-2020-0216-PCO-EI, Order Denying Motion for Partial Summary Final Order at 2-3 (Fla. Pub. Serv. Comm’n, June 29, 2020). In denying the Public Counsel’s motion for partial summary final order in that proceeding, the Commission set forth the standard of review as follows.

Section 120.57(1)(h), F.S., requires that, in order to grant a motion for summary final order, it must be determined from “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.” This Commission has previously stated that “the standard for granting a summary final order is very high.”

In general, “a summary judgment should not be granted unless the facts are so crystalized that nothing remains but questions of law,” and “must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought.” *Moore v. Morris (Moore)*, 475 So. 2d 666, 668 (Fla. 1985); see also *City of Clermont, Fla. v. Lake City Util. Servs., Inc.*, 760 So. 2d 1123, 1124 (Fla. 5th DCA 2000), and *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29 (Fla. 1977). If the record “raises even the slightest doubt” that an issue of material fact may exist, a summary final order would not be appropriate. *Albelo v. S. Bell (Albelo)*, 682 So. 2d 1126, 1129 (Fla. 4th DCA 1996). Even if the parties agree as to the facts, “the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts.” *Albelo*, 682 So. 2d at 1129. This Commission has also previously found that “it is premature to decide whether a genuine

issue of material fact exists when [a party] has not had the opportunity to complete discovery and file testimony.”

In addition, this Commission has acknowledged that the purpose of summary final order is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the light most favorable toward FPUC, against whom the summary judgment is to be entered. OPC carries a heavy burden to present a showing that there is no genuine issue as to any material fact. Subsequently, the burden shifts to FPUC to demonstrate the falsity of the showing. If FPUC does not do so, summary judgment is proper and should be affirmed. Even if the facts are not disputed, a summary judgment is improper if different conclusions or inferences can be drawn from the facts.

FPUC Storm Costs at 2-3 (footnotes omitted).

### **SUMMARY OF ARGUMENT**

FPL’s Motion should be denied because there are at least several disputed issues of material fact that must be decided relative to FAIR’s standing, including how many members FAIR has, when they became members, whether they were members as of the date on which FAIR filed its motion to intervene, and others. Following the Commission’s standard of review in FPUC Storm Costs, at a minimum there are different inferences that can be drawn from the facts regarding FAIR’s membership, and because all inferences must be drawn in favor of FAIR, FPL’s Motion must be denied. FPL’s Motion should also be denied because the Commission has assigned FAIR the burden of proof to demonstrate its standing, which can only be done in the

evidentiary hearing to be held in this case. FPL has not adduced any evidence of its own, even though of course it could have done so.<sup>4</sup>

FPL's effort is also contrary to the fundamental purpose of motions for summary final order, which is expressly to avoid the time and expense of hearing. There will be a hearing on FPL's proposed rate increases, whether based on FPL's originally filed case or on the settlement submitted to the PSC on August 10, 2021, in any event.

Notwithstanding FPL's attempts to rewrite Florida standing law, FAIR satisfies all applicable requirements of Chapter 120, Agrico, and Florida Home Builders. Notwithstanding FPL's baseless conclusory allegations regarding FAIR's purposes and activities, FAIR's actions are controlled by FAIR's Board of Directors in the service of FAIR's members – that is, in this case, striving to protect the substantial interests of its members who are FPL's customers. Notwithstanding FPL's spurious efforts to mislead the Commission by touting irrelevant facts, e.g., that FAIR has no office, no direct employees, and no telephone number, FAIR has everything it needs to diligently and effectively represent the interests of its members who are FPL customers: a highly qualified, experienced, and dedicated board of directors with

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<sup>4</sup> FAIR provided FPL, subject to a non-disclosure agreement between the parties, its confidential membership roster in unredacted and highlighted format, which included members' names and addresses, in response to FPL's first set of interrogatories on June 18, 2021. FPL has thus had ample opportunity to determine whether a substantial number of FAIR's members are FPL customers.

decades of service to the citizens of Florida on electric utility matters and a team of highly qualified experts addressing key issues in this case. That FAIR is effectively representing the interests of its many members who are FPL customers is amply demonstrated by the fact that FPL has devoted much time and significant expense in its attempts to prevent the Commission from receiving FAIR's arguments and from considering the testimony and exhibits<sup>5</sup> of FAIR's team of experts in this case.

The Commission should deny FPL's Motion.

### **ARGUMENT**

#### **I. FPL's Motion Should be Denied Because Disputed Issues of Material Fact Regarding FAIR's Membership Must Be Decided.**

FPL's Motion should be denied because disputed issues of material fact regarding FAIR's membership remain to be decided. Since all inferences in this procedural context must be resolved or determined in favor of the non-moving party, FPL's motion must be denied. FPL relies on an overly technical interpretation of FAIR's bylaws and on a civil foreclosure case for its ultimate claim, namely that FAIR did not have any "official" members when it filed its motion to intervene. FAIR believes, as does its first member, that members became members when their membership applications were received, and FAIR treated them accordingly.

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<sup>5</sup> See FPL's Motion at 1, footnote 1, where FPL requests that the testimony and exhibits of FAIR's witnesses be stricken at the conclusion of the hearing.

(Herndon Affidavit at 2, Larkin Affidavit at 2.)<sup>6</sup> FAIR further asserts that the written board action of formally admitting and electing members was simply a ministerial act. (Herndon Affidavit at 2.) Moreover, by any standard, even FPL's technically tortured argument that FAIR did not have "official" members when it moved to intervene, FAIR has more than 770 members now, including approximately 615 FPL customers among its membership (FAIR's Amended and Supplemental Response to FPL's Request for Production of Documents No. 4, Bates Nos. 002562-002571), and the only time and opportunity that FAIR will have to satisfy its burden of proof as to its standing is in the evidentiary record of the hearing.

FPL's Motion should also be denied because it is untimely on its face, and because it is a motion to strike in disguise. In footnote 1 on page 1 of its Motion, FPL "requests" that the Commission strike FAIR's substantive testimony at the conclusion of the hearing. This is relief that FPL might seek in its post-hearing brief on the issue of FAIR's standing, but it is not proper for a motion for summary final order once a hearing has been held. In re: Petition for Increase in Rates by Florida Power & Light Company, Docket No. 20120015-EI, Order No. PSC-2012-0652-PCO-EI, Order Denying Summary Final Order at 2 (Fla. Pub. Serv. Comm'n, December 12, 2012) ("A summary final order is not appropriate in this case because the administrative

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<sup>6</sup> Not only did Ms. Larkin believe and understand that she was a member, but at her request, FAIR's counsel assisted her in obtaining an appointment to testify at a customer service hearing when her initial efforts to sign up for such an appointment were unsuccessful. (Larkin Affidavit at 2.)

hearing has already been held and a summary final order would be untimely.”) It appears that what FPL has really attempted here is to file an improper motion to strike the testimonies of FAIR’s witnesses. On its face, FPL has requested the Commission to strike FAIR’s testimonies based on an untimely motion for summary final order; a request for an order is, by definition, a motion, see Rule 28-106.204(1), F.A.C., and FPL did not comply with the requirements of Rule 28-106.204(3), F.A.C., to confer on this request. FAIR expected FPL’s positions to be more or less what it has argued here, but it expected them at the conclusion of the hearing, in FPL’s brief; FAIR did not expect to have to respond to an advance brief with a disguised motion to strike embedded therein.

## **II. FAIR Satisfies All Standing Requirements of Applicable Florida Law.**

FAIR satisfies all applicable standing requirements of Chapter 120, Florida Statutes, and applicable case law including Agrico and Florida Home Builders. FPL’s legal arguments – e.g., that Florida Home Builders requires an association seeking standing to be a “trade or professional” organization, that FAIR had no “official” members when it filed its motion to intervene and thus its motion was invalid, and that FAIR does not represent a “specialized segment” of some relevant population – are misplaced and should be rejected.

### **A. FAIR Satisfies All Standing Requirements of Applicable Florida Law.**

The requirements for standing as an intervenor under Chapter 120 are clear and well-settled: the intervenor must demonstrate that it will suffer a sufficiently

immediate injury in fact that is of the type the proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997); Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982). To establish standing as an association representing its members' substantial interests, an association such as FAIR must demonstrate three things: that a substantial number of its members would be substantially affected by the agency's decisions; that intervention by the association is within the association's general scope of interest and activity; and that the relief requested is of a type appropriate for an association to obtain on behalf of its members. Florida Home Builders Ass'n v. Dep't of Labor and Employment Security, 412 So. 2d 351, 353-54 (Fla. 1982).

The Commission recognized that FAIR satisfies all of the foregoing standing criteria in the FAIR Intervention Order, subject to FPL's being allowed to conduct discovery and to present testimony and evidence challenging FAIR's standing. FPL has presented no testimony or evidence of its own. The testimony and exhibits of FAIR's witnesses demonstrate, and will demonstrate when entered into the record, that FAIR satisfies all applicable standing criteria. FPL's Motion should be denied.

FPL's attempts, see, e.g., FPL's Motion at 10, 13, 14, to characterize Florida Home Builders as applying only to trade or professional organizations is misplaced. Standing in administrative proceedings has clearly been extended by Florida courts to other types of organizations than the strict "trade or professional" organization scope

that FPL attempts to freight in. NAACP v. Florida Board of Regents, 863 So. 2d 294 (Fla. 2003); Booker Creek Preservation, Inc., v. Dep't of Env'l Regulation, 415 So. 2d 781 (Fla. 1st DCA, 1982). In fact, in this docket, the Commission has granted standing to an “ad hoc association,” the Florida Industrial Power Users Group, which, like FAIR, seeks “reliable service at the lowest rates possible.” Order No. PSC-2021-0133-PCO-EI, Order Granting Florida Industrial Power Users Group’s Petition to Intervene at 1, 2 (Fla. Pub. Serv. Comm’n, April 16, 2021). Florida administrative law clearly recognizes that associational standing is appropriate for organizations other than strictly trade or professional organizations. Similarly, FPL’s argument that “FAIR does not represent a specialized segment of the community like a trade or professional association” is meritless and misplaced. In this proceeding, FAIR represents the substantial interests of its members who are FPL customers; thus, the segment that FAIR represents directly are those customers who subscribe to FAIR’s policy goals – safe and reliable electric service at the lowest possible cost – and who have specifically asked and authorized FAIR to represent them and their interests.

**B. FPL’s “No Official Members” Argument is Misplaced.**

FPL’s “no official members” argument is based on inapposite principles not applicable here. The centerpiece of FPL’s legal argument is a decision in a civil lawsuit, wherein the case was dismissed because the plaintiff (a trustee of a mortgage holder) initiated a civil lawsuit to foreclose on a mortgage without having established standing as the owner or holder of the mortgage. LaFrance v. US Bank National

Association, Inc., 141 So. 3d 754, 755 (Fla. 4th DCA 2014). In clear distinction to the facts in LaFrance, FAIR did not initiate this proceeding – this docket was initiated by FPL’s petition seeking more than \$6 billion of its customers’ money over the next four years. FAIR properly moved to intervene and was properly granted intervention by the FAIR Intervention Order, subject to FPL’s right to challenge standing in the hearing process and also subject to FAIR’s being assigned and afforded the burden of proving its standing at hearing.

FAIR can only prove its standing, and the Commission can only make a determination on FAIR’s standing, based on the record evidence developed at the hearing. Aside from the fact that FAIR regarded all those who submitted applications as being members as of the dates when their applications were received (Herndon Affidavit at 2, see Larkin Affidavit at 2), FAIR has, since July 27, 2021, had members that even FPL’s technically tortured argument would have to concede. FAIR has standing to represent its members’ interests now, on the eve of hearing, under any theory. FPL’s Motion should be denied.

C. FPL’s Arguments for Additional Membership Criteria Have No Basis in Florida Law and Should be Rejected.

A great deal of FPL’s efforts are directed at trying to establish criteria for membership based on federal cases that have never been applied or followed in Florida, and which are therefore irrelevant to the actual standing criteria followed in Florida law. See FPL’s Motion at 11-13, citing Gettman v. Drug Enforcement

Admin., 290 F.3d 430 (D.C. Cir. 2002); Fund Democracy LLC v. SEC, 278 F.3d 21, 26 (D.C. Cir. 2002); American Legal Found. v. FCC, 808 F.2d 84 (D.C. Cir. 1987); Washington Legal Found. v. Leavitt, 477 F.Supp.2d 202 (D.D.C. 2007). In the FAIR Intervention Order, the Commission clearly stated that “it appears that FAIR meets the three-prong associational standing test established in Florida Home Builders,” and continued to explain exactly how FAIR meets these criteria. FAIR Intervention Order at 2-3. These are the applicable standing criteria under Florida law, and FAIR meets them all. FPL is trying to create new criteria, and accordingly, the Commission should follow established Florida law, as consistently followed in its own orders, and deny FPL’s Motion.

Among other things, FPL argues – as though this were somehow relevant – that FAIR is not “an actual operating entity or business of any type,” FPL Motion at 10, specifically because FAIR has no office, no employees, no telephone number, and no email address. Aside from conveniently overlooking the fact that FAIR is a Florida corporation, and thus obviously a registered business entity in the records of the Florida Department of State, FPL goes on to argue that FAIR is not an association because its members do not vote for the directors, FPL Motion at 11, and that FAIR cannot represent its members’ interests because FAIR does not know how much they pay in electric bills. FPL Motion at 12. FPL’s arguments are specious – they may sound significant to FPL, but they abjectly fail to recognize the over-arching, longstanding experience and competence of FAIR’s Board in promoting exactly the

interests that its members have asked FAIR to protect. What FPL ignores are the facts that:

1. Each of FAIR's members has specifically requested and authorized FAIR to represent their interests in obtaining and ensuring, by all lawful means, the lowest possible electric rates consistent with safe and reliable service. FAIR's membership application, (Watkins Exhibit No. NHW-5.)
2. FAIR's Board of Directors consists of three recognized, respected, and qualified persons who have, individually and collectively, broad, deep, and temporally long experience with Florida electric utility matters. Collectively, FAIR's Directors have literally decades of experience serving the citizens of the State of Florida with regard to electric utility matters.
3. FAIR has engaged highly competent expert witnesses to represent its members' interests in the lowest possible rates consistent with safe and reliable service, including a former PSC Commissioner, Tom Herndon; and Timothy J. Devlin, a 35-year employee of the Commission who served in responsible positions in accounting, finance, and economic regulation, and whose service culminated in service as the Executive Director of the entire PSC Staff; and Breandan Mac Mathuna, an experienced witness on cost of capital issues.

In summary, FAIR has everything it needs to represent its members' interests: the members' express request and authorization to do so, a highly qualified and dedicated Board of Directors to direct FAIR's activities, and highly qualified experts

to present testimony and exhibits in support of the lowest possible rates consistent with safe and reliable service. It simply does not matter whether a former PSC Commissioner, or a former chairman of the JEA Board, or a former general counsel of the Florida Municipal Power Agency are FPL customers: these persons know Florida electric utilities, and they know what it means to seek, in support of FAIR's members' interests, the lowest possible rates that are consistent with safe and reliable service. Nor does it matter whether FAIR has an office, or a telephone, or direct employees – FAIR has what it needs to represent its members' interests, and FAIR does exactly that. FPL's arguments are at best specious, and as discussed below, some are outright baseless. FPL's Motion should be denied.

**III. The Commission Should Disregard FPL's Misplaced Attempts to Distract the Commission from the Real Issues In This Case.**

FPL's extensive attempts to cast aspersions on FAIR's intentions are no more than name-calling distractions, veritable red herrings, irrelevant to FAIR's standing under applicable Florida law, and unsupported by any evidence whatsoever. Besides touting minor aspects of FAIR's membership and operational structure (e.g., no office and no telephone), FPL spews out conclusory allegations that are wholly unsupported by any factual evidence. For example, at page 10 of its Motion, FPL asserts that FAIR “is not the functional equivalent of a traditional association, because it is structured in such a way that it represents the control group of the corporation and their undisclosed third-party funders, not the members.” (Emphasis supplied.)

However, FPL offers not a scintilla of evidence in support of this allegation, which has no basis in anything other than FPL's wishful thinking.

At page 12 of its Motion, FPL refers to FAIR as being "funded by secretive third parties, not by its members." Similarly, at several places in its Motion, FPL calls FAIR "a shell," FPL's Motion at 1, 7, 10, 14, and further attempts to assert that FAIR represents the interests of its donors where it argues that FAIR "is a shell organization that is run and financed by a group of individuals who are not affected by FPL's rate petition." FPL's Motion at 14. While it is true that none of FAIR's Board of Directors are FPL customers, this also is irrelevant to whether FAIR is acting to protect its members' interests. FAIR acknowledges that, like many similar organizations, it does not disclose the identities of its donors, and like other organizations, FAIR does not charge dues. However, FPL's arguments are simply misplaced and ignore what is really important to representing the interests of FAIR's members: It does not matter who funds the activities, what matters is who decides how funds are spent and how those funds are in fact spent. Here, it is undisputed that those decisions are made by FAIR's Board of Directors, period. (Herndon Affidavit at 2), FAIR's Directors have decades of service to the citizens of the State of Florida – not to the shareholders of any public utility or its parent. Further, the testimonies and exhibits of FAIR's witnesses in support of the lowest possible FPL rates consistent with safe and reliable services speak for themselves.

Aside from the ambiguity as to what a “traditional association” might be, given that associations can and do exist for many purposes, and in many forms and incarnations depending on the circumstances and their goals, e.g., FIPUG has been granted standing in this rate case as an “ad hoc association” that meets the standing criteria of Agrico and Florida Home Builders, FPL’s conclusory allegation that FAIR “is structured in such a way that it represents the control group of the corporation and their undisclosed third-funders, not the members,” is unsupported by any evidence other than FPL’s wishful thinking. FAIR’s Board of Directors represents its members; FAIR’s expert witnesses, engaged by FAIR, are presenting their testimony and exhibits in support of the interests of FAIR’s members who are FPL customers in having their rates be the lowest possible while supporting safe and reliable service, which is completely consistent with FAIR’s corporate purposes and completely consistent with FAIR’s members’ expectations as set forth on the membership applications that they signed.

Among the numerous irrelevant fact-lets touted by FPL in attempting to criticize FAIR and mislead the Commission are these: FAIR was incorporated after FPL filed its petition seeking approval to take more than \$6 billion of its customers’ money over the 2022-2025 period. FPL’s Motion at 3. FAIR’s Board members are not FPL customers. FPL’s Motion at 11. FAIR has no office, no telephone number, no direct employees, and no email address. FPL’s Motion at 10. Funding for FAIR’s activities comes from undisclosed third parties. FPL’s Motion at 3, 14. These are all

specious attempts to distract the Commission from the real issues relative to FAIR's standing: FAIR does not need an office, direct employees, or telephone to represent its members' interests. It does not matter whether FAIR's Board members are FPL customers, as long as they are knowledgeable of utility rates and act in the best interests of FAIR's members. And it does not matter where funding comes from, as long as it is used lawfully and consistently with FAIR's articles of incorporation and its commitments to FAIR's members in accordance with their expectations. Finally, in response to FPL's conclusory allegation that FAIR's members have no substantive rights in the organization, FAIR observes that its members have the right to be represented in accordance with the expectations set forth in their membership applications: that FAIR will work by all lawful means to seek the lowest possible rates consistent with their utility providing safe and reliable service.

The critical fact is this: FAIR is obviously doing a good enough job at representing the interests of its FPL customer-members that FPL is devoting tremendous amounts of time and effort (and, in the bargain, causing FAIR to incur significant expense) in FPL's efforts to keep FAIR's witnesses from testifying in this case. This is a powerful indication that FAIR is doing a good job of representing its members' interests, which is what FAIR exists to do.

### **CONCLUSIONS AND RELIEF REQUESTED**

As demonstrated on the face of the pleadings, affidavits, answers to interrogatories, and other documents on file, FPL's motion for summary final order is

legally inappropriate because there are disputed issues of material fact that remain to be determined based on the record evidence in this proceeding. FPL's motion is also premature in that it is, substantively, what FPL should file – assuming that it has evidence to support it – as its post-hearing brief on the issue of FAIR's associational standing, based on evidence of record developed at the hearing.

FAIR satisfies all applicable requirements of Florida standing law and is fully prepared to prove its burden in the hearing. The Commission properly recognized this in the FAIR Intervention Order, and the Commission should deny FPL's motion for summary final order.

FPL's main legal argument is specious and misplaced. As readily distinguished from the facts in LaFrance, FAIR did not initiate this proceeding, FPL initiated it with its petition for rate increases. As an intervenor, FAIR takes the case as it finds it, but FAIR most certainly did not initiate this case. Moreover, FAIR has been granted the opportunity – and assigned the burden of proof – to prove its standing at the hearing in this case, which, as demonstrated herein, FAIR will do. The Commission can only make a decision based on record evidence, and that evidence does not exist until the hearing is held.

FPL's "no official members" argument is at best irrelevant. FAIR considered all of its members to be members as of the time that their membership applications were received, and even relative to FPL's technically tortured argument, FAIR has at least 770 members as of July 27, 2021, including all of the members that were

included in the 513 members listed on the membership roster submitted as Ms. Watkins' Exhibit No. NHW-3 on June 21, 2021.

FPL's attempts to distract the Commission with irrelevant facts and assertions are no more than specious red herrings, with no evidentiary support whatsoever that is relevant to FAIR's standing. FPL could, for example, have attempted to present evidence that some of FAIR's members shown as FPL customers are not. FPL had ample opportunity to do so, but FPL has furnished no such evidence. Rather, FPL is hanging its hat on distractions and tortured theories that have never been followed in Florida law.

**WHEREFORE**, Floridians Against Increased Rates, Inc., respectfully requests that the Commission deny FPL's motion for summary final order and decide this matter in due course at the conclusion of the hearing, based on the record evidence presented.

Respectfully submitted this 11th day of August, 2021.

**/s/ Robert Scheffel Wright**

Robert Scheffel Wright

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Attorneys for Floridians Against Increased Rates, Inc.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished

by electronic mail on this 11th day of August, 2021, to the following:

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Represents: Florida Rising, Inc./League of  
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Environmental Confederation of  
Southwest Florida, Inc.

**Environmental Confederation of Southwest Florida**

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**/s/ Robert Scheffel Wright**  
ATTORNEY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

|| In re: Petition by Florida Power & Light Company for Rate Unification and for Base Rate Increase || DOCKET NO. 20210015-EI ||  
|| DATED: AUGUST 11, 2021 ||

**AFFIDAVIT OF JOHN THOMAS HERNDON**

1. My name is John Thomas Herndon, I am over eighteen years of age, and I make this affidavit of my own free will and personal knowledge in support of the response of Floridians Against Increased Rates, Inc. (FAIR) in opposition to the motion for summary final order submitted by Florida Power & Light Company (FPL) in Florida Public Service Commission (PSC) Docket No. 20210015-EI, In re: Petition by Florida Power & Light Company for Rate Unification and for Base Rate Increase.

2. I reside in Tallahassee, Florida, and I am a director of FAIR and its secretary. Additionally, I am familiar with the substantive issues in this rate case based on my prior service as a member of the Florida Public Service Commission and as the executive director of the Florida State Board of Administration, which manages the State's pension funds and certain other State funds. I also have extensive experience in general matters of public policy in Florida, having served as senior staff in the Florida Legislature, as the director of the Office of Planning and Budget, and as the chief of staff to two Florida Governors.

3. In March 2021, after preliminary meetings to discuss the prospects of forming an organization to promote lower electric rates in Florida, I joined with two other directors, Michael R. Hightower and Frederick M. Bryant, to form the initial board of directors of FAIR. I have known Mr. Hightower casually and professionally for many years, well enough to know that he served on the JEA Board for many years, including service as its chairman, and also that he served for some time on the Florida Public Service Commission Nominating Council. I have also known Mr. Bryant casually for some years, well enough to know him as the respected general counsel for the Florida Municipal Power Agency for many years.

4. FAIR was formally incorporated on March 16, 2021, and FAIR exists for the specific purposes of promoting, by all lawful means, electric rates for the customers of Florida investor-owned utilities that are the lowest possible while being consistent with the utility providing safe and reliable service.

5. FAIR developed a membership application in March and April, and FAIR began recruiting members by what can be described as "word of mouth" recruitment. While I was not directly involved in those efforts, our counsel and contractors kept me informed.

6. I have subsequently reviewed the 16 membership applications that FAIR had received as of May 3, 2021, including the email messages by which those applications were delivered to FAIR's counsel or contractors. These application forms and the emails appear to me to be what they are represented to be; the emails bear standard email time-and-date stamps and do not appear altered in any way. Thus, on May 3, 2021, FAIR had 16 members.

7. As of April 2021, it was my understanding and belief that persons applying for membership in FAIR would be deemed to be members, and would be treated as members, as of the dates on which their applications were received. To the best of my knowledge, everyone associated with FAIR treated them as such.

8. On July 27, 2021, the FAIR Board of Directors, by written action in lieu of meeting, took what I consider to be the ministerial action of formally admitting and electing all those who had applied for membership as of July 25, 2021, to membership.

9. FAIR's Board of Directors makes all decisions regarding FAIR's participation in Docket No. 20210015-EI, regarding any other activities that FAIR may undertake, and regarding FAIR's budget and overall expenditures. None of FAIR's donors has any role whatsoever in directing FAIR's activities or in determining how FAIR spends its funds.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]**

10. The information contained in this affidavit is true and correct to the best of my personal knowledge.

John Thomas Herndon

John Thomas Herndon

**CERTIFICATE**

STATE OF NORTH CAROLINA

COUNTY OF MACON

The foregoing affidavit was executed and acknowledged before me this 10 day of August, 2021, by John Thomas Herndon, who is personally known to me or who produced \_\_\_\_\_ as identification.



Jennifer Alice Royce  
Commission Expires:

09/05/2021

Jennifer Alice Royce

(Seal)

Signature of Notary Public

*Jennifer Alice Royce*  
Typed or Stamped Name of Notary

Macon County, NORTH CAROLINA

Commission expires: 09/05/2021



**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition by Florida Power & Light  
Company for Rate Unification and for Base  
Rate Increase

DOCKET NO. 20210015-EI

DATED: AUGUST 11, 2021

**AFFIDAVIT OF LYNNE ANN LARKIN**

1. My name is Lynne Ann Larkin, I am over eighteen years of age, and I make this affidavit of my own free will and personal knowledge in support of the response of Floridians Against Increased Rates, Inc. (FAIR) in opposition to the motion for summary final order submitted by Florida Power & Light Company (FPL) in Florida Public Service Commission (PSC) Docket No. 20210015-EI, In re: Petition by Florida Power & Light Company for Rate Unification and for Base Rate Increase.

2. I reside in Vero Beach, Florida, and I am currently and have been a retail customer of FPL continuously since FPL acquired the Vero Beach electric utility system in 2018.

3. In March 2021, I read a news article announcing that FPL had filed a petition with the Florida Public Service Commission (PSC), in which it was and is seeking certain rate increases. I reviewed the article and FPL's petition, and as a customer, I believed and continue to believe that FPL's requests are excessive. At that time, that is, in March 2021, I called Mr. Robert Scheffel Wright, whom I knew from the years in which he served the City of Vero Beach as an outside attorney on utility matters, to ask him whether anyone was going to oppose FPL's requests. He advised me that he believed that a group was being formed that would, among other things, oppose FPL's rate increase requests.

4. Subsequently, in April 2021, I again spoke with Mr. Wright, who advised me that the organization, Floridians Against Increased Rates, Inc. (FAIR) had been incorporated, and I asked if I could join the organization. He said that he would send me a membership application, which he did on or about April 13, 2021. I completed the application and returned it to Mr. Wright by email as a "pdf" file on April 17, 2021. I have attached a true and correct copy of my application to this affidavit.

5. Among other things, the application that I signed stated the following:

**I hereby request to become a member of Floridians Against Increased Rates, Inc. (FAIR).** I confirm that I am a customer of the Florida electric utility identified below. I support FAIR's purposes of (a) advocating by all lawful means for the lowest possible electric rates that are consistent with my utility providing safe and reliable electric service, and (b) opposing by all lawful means utility proposals for rates and rate increases that are greater than

necessary for my utility to provide safe and reliable service. I request and authorize FAIR to represent my interests in having the lowest possible rates for my electric service that are consistent with my utility providing safe and reliable service. I understand that no payment of dues is required for my membership in FAIR. I consent to FAIR's collection and use of my personal information provided below for the purposes associated with my membership as described in my application.

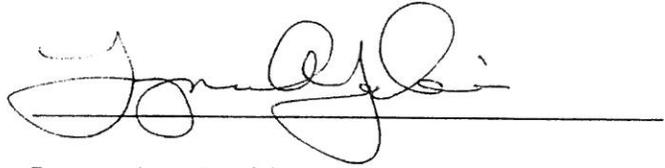
6. At the time that I signed the application, and continuing through the date of this affidavit, I considered and continue to consider myself to be a member of FAIR.

7. I also contacted, by electronic mail and by telephone, other FPL customers in Vero Beach whom I knew to be concerned about potential increases in their electric bills and asked if they would be interested in joining FAIR; several of them were, and I obtained their signed membership applications and sent those to Mr. Wright via email as pdf files.

8. On June 9, 2021, FAIR notified me by email that the PSC would be conducting customer hearings on the FPL case, and informed me as to how to sign up to testify at such hearings. When I was having difficulty getting through to sign up on the appointed date (June 10, 2021), at my request, Mr. Wright contacted the PSC to attempt to find out whether something was wrong, and after I received an email from the PSC later that day, I was eventually able to sign up for a time to testify at a hearing on June 24, 2021.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]**

9. The information contained in this affidavit is true and correct to the best of my personal knowledge.



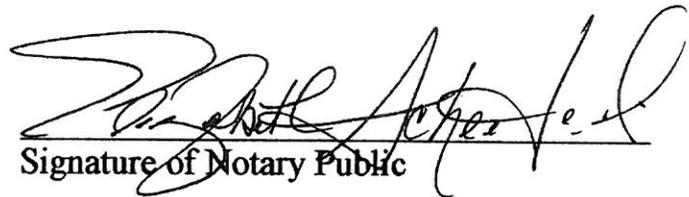
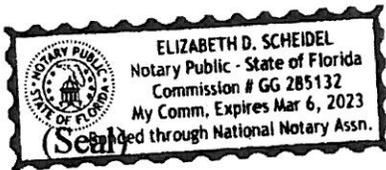
Lynne Ann Larkin

**CERTIFICATE**

STATE OF FLORIDA

COUNTY OF INDIAN RIVER

The foregoing affidavit was executed and acknowledged before me this 9<sup>th</sup> day August of 2021, by Lynne Ann Larkin, who is personally known to me or who produced St. of FL ID. as identification.



Signature of Notary Public

Typed or Stamped Name of Notary



**I hereby request to become a member of Floridians Against Increased Rates, Inc. (FAIR).**

I confirm that I am a customer of the Florida electric utility identified below. I support FAIR's purposes of (a) advocating by all lawful means for the lowest possible electric rates that are consistent with my utility providing safe and reliable electric service, and (b) opposing by all lawful means utility proposals for rates and rate increases that are greater than necessary for my utility to provide safe and reliable service. I request and authorize FAIR to represent my interests in having the lowest possible rates for my electric service that are consistent with my utility providing safe and reliable service. I understand that no payment of dues is required for my membership in FAIR. I consent to FAIR's collection and use of my personal information provided below for the purposes associated with my membership as described in my application.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

LYNNE A. LARKIN

Business Name: \_\_\_\_\_

(Only if joining as a business electric customer)

Address: \_\_\_\_\_

5690 HIGHWAY A-1-A

(Location where you receive your utility service)

Address Line 2: \_\_\_\_\_

#101

City: \_\_\_\_\_

VERO BEACH

ZIP Code: \_\_\_\_\_

32963

Email: \_\_\_\_\_

lynne.larkin@bellsouth.net

Name of Utility: \_\_\_\_\_

FPL

Please note: We respect your privacy. We will not send you hard copy mail. We need your address in case FAIR is required to prove that its members are customers of utilities in proceedings before the Florida Public Service Commission (PSC), including cases before the PSC where your utility is seeking to increase your rates. As unlikely as this may sound, we have to recognize that when FAIR challenges a utility's proposed rate increases, the utility may try to keep FAIR from intervening to represent customers' interests. We also represent that FAIR will not share your information with others unless FAIR is required by law, rule, or order to do so, and if we are required to provide such information in legal proceedings before the PSC, FAIR will seek to protect the confidentiality of your information.

Floridians Against Increased Rates, Inc.  
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