

State of Florida



## Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** August 27, 2021

**TO:** Office of Commission Clerk (Teitzman)

**FROM:** Office of the General Counsel (Brownless, Lherisson, Stiller) *JSC*  
Division of Accounting and Finance (Mouring) *ALM*  
Division of Economics (Draper, McNulty) *JQH WBM*  
Division of Engineering (King) *LVK TB*  
Office of Industry Development and Market Analysis (Eichler) *BC*

**RE:** Docket No. 20210015-EI – Petition for rate increase by Florida Power & Light Company.

**AGENDA:** 09/08/21 – Regular Agenda – Motion for Reconsideration – Oral argument has not been requested; Participation is at the Commission’s Discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Clark

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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### Case Background

On June 18, 2021, pursuant to Section 366.093, Florida Statutes (F.S.), and Rule 25-22.006, Florida Administrative Code (F.A.C.), Floridians Against Increased Rates, Inc. (FAIR) filed a request for confidential classification of information contained in its response to Florida Power & Light Company’s (FPL) First Request for Production of Documents to FAIR, No. 4 (Document No. 06234-2021). On July 23, 2021, FAIR filed a Corrected Request for Confidential Classification (Corrected Request) of information contained in its response to FPL’s First Request for Production of Documents to FAIR, No. 4 (Document 08288-2021). In FAIR’s Corrected Request, FAIR stated that the purpose of the Corrected Request is to withdraw FAIR’s

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original request (Document No. 06234-2021) and replace it with the Corrected Request (Document 08288-2021). This request was filed in Docket No. 20210015-EI.

On June 21, 2021, pursuant to Section 366.093, F.S., and Rule 25-22.006, F.A.C., FAIR filed a Second Request for Confidential Classification (Second Request) of information contained in the Exhibit NHW-3 to the testimony of FAIR's witness Nancy H. Watkins, filed on June 21, 2021 (Document No. 06506-2021). This request was also filed in Docket No. 20210015-EI.

The information that is the subject of the Corrected Request and the Second Request (jointly as Requests) are substantially the same with a few minor differences. Both of the filings consist of FAIR's membership roster. The differences in the filings appear to be the removal of duplicated members, the addition of new members, and the addition of business names for some of the members.

On August 6, 2021, the Prehearing Officer issued Order No. PSC-2021-0299-PCO-EI<sup>1</sup> denying FAIR's requests for confidential classification of Document Nos. 06506-2021 and 08288-2021, finding that FAIR had not demonstrated how the information asserted to be confidential qualifies as confidential under the statute or applicable rule. The order further required that these documents be kept confidential until the time for filing an appeal of the order expired, or, if sought, through completion of judicial review. On August 16, 2021, FAIR timely filed a Motion for Reconsideration of Order No. PSC-2021-0299-PCO-EI (Motion). FAIR did not file a request for oral argument regarding the Motion.<sup>2</sup> On August 17, 2021, FAIR filed a Notice of Conferral Regarding the Motion for Reconsideration, in which FAIR discussed the parties of record's positions on FAIR's Motion.

This recommendation addresses FAIR's Motion for Reconsideration. The Commission has jurisdiction over this matter pursuant to Sections 366.04 and 366.05, F.S.

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<sup>1</sup> Order No. PSC-2021-0299-PCO-EI, issued August 6, 2021, in Docket No. 20210015-EI, *In re: Petition for rate increase by Florida Power & Light Company*.

<sup>2</sup> Rule 25-22.0022(1), F.A.C., provides, in pertinent part, "[f]ailure to timely file a request for oral argument shall constitute waiver thereof." Staff notes that waiver does not limit the Commission's discretion to grant or deny oral argument. Rule 25-22.0022(3), F.A.C. If the Commission decides that oral argument would aid in its understanding and disposition of the underlying matter, staff recommends that the Commission allow FAIR three minutes.

## Discussion of Issues

**Issue 1:** Should the Commission grant FAIR's Motion for Reconsideration of the Final Order Denying Confidential Classification?

**Recommendation:** No. FAIR's Motion for Reconsideration should be denied because it does not meet the required standard for a motion for reconsideration. FAIR has failed to identify a point of fact or law that was overlooked or that the Prehearing Officer failed to consider in rendering Order No. PSC-2021-0299-PCO-EI, the Order Denying FAIR's Request for Confidential Classification of Document Nos. 06506-2021 and 08288-2021. (Lherisson)

### Staff Analysis:

#### Standard of Review

Pursuant to Rule 25-22.0376, F.A.C., any party adversely affected by a non-final order may seek reconsideration by the Commission by filing a motion within ten days after issuance of the order. The appropriate standard of review in a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or that the Prehearing Officer failed to consider in rendering the Order. See Steward Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Steward Bonded Warehouse, 294 So. 2d 315, 317 (Fla. 1974).

#### FAIR's Motion for Reconsideration

By Order No. PSC-2021-0299-PCO-EI, the Prehearing Officer denied confidential classification for the information contained in FAIR's responses to FPL's First Request for Production of Documents No. 4 and in Exhibit NHW-3 to the testimony of FAIR's witness Nancy H. Watkins. In its Motion for Reconsideration, FAIR argues that the Prehearing Officer failed to consider or "misapprehended the factual nature of the information for which FAIR seeks confidential classification, which FAIR submits is, on its face, the 'sensitive personally identifiable information' of FAIR's members." FAIR asserts that the "Order overlooked, as a point of law, that FAIR's requests for confidential classification fall squarely within the scope of, and satisfy, the basic requirements of Section 366.093, [F.S.]."

FAIR asserts that the two sets of its "membership rosters," for which confidentiality was requested, include "the members' names, mailing street addresses, email addresses, business address if applicable, and (for a significant number of members), telephone numbers." FAIR argues that Order No. PSC-2021-0299-PCO-EI "overlooked the relevant legal facts that FAIR's claims are squarely within the non-exclusive scope of Section 366.093, [F.S.], and that FAIR's assertion that its membership roster comprises FAIR's trade secret information should result in the Commission granting confidential classification as requested." FAIR states, in part, that

“[w]hile more detail might have been desirable, FAIR believes and respectfully submits that the information for which confidential protection is sought qualifies on its face as appropriately protected confidential information. . . .” FAIR argues that its “allegations provide sufficient bases upon which the Commission should grant the requested treatment.” FAIR asserts that the Commission should consider the harms that would result from denial of confidential classification:

First, the information in FAIR’s membership rosters is, for all practical purposes, a *mailing list* with the members’ street addresses and email addresses, and denial of FAIR’s Requests would result in making FAIR’s members being exposed to direct mailings and e-mailings. Second, disclosing FAIR’s membership roster, which is directly analogous to the “list of customers” that is expressly within the scope of protected, or at least protect-able, information under Section 812.081, Florida Statutes, would harm FAIR’s interests in conducting its business operations by revealing its members’ sensitive personal confidential information contrary to FAIR’s policy not to disclose it and also by exposing FAIR to the consequences of anyone using FAIR’s membership roster – the equivalent of a customer list – to directly contact members for whatever reasons anyone gaining access to the list might have.

FAIR argues that its “membership roster is, for all practical purposes, and on its face, the equivalent of a ‘list of customers,’ which is one of the identified types of trade secret information in Section 812.081, [F.S.]” FAIR asserts that “FAIR’s declarant stated that the information contains FAIR’s trade secrets” and that FAIR has a “policy not disclosing this information.” FAIR argues that its membership roster “is FAIR’s trade secret information, the disclosure of which would harm FAIR’s operations, by disclosing FAIR’s members’ personal information to unauthorized persons and likely by impairing FAIR’s ability to recruit members.” FAIR alleges that it treats the membership lists as confidential proprietary information, and that it constitutes FAIR’s trade secret information; therefore, FAIR requests that the Commission grant reconsideration of the Order Denying Confidential Classification and grant the requested confidential classification of its membership lists.

### **Parties’ Response to Motion**

No party to this docket has filed a response in support or opposition to FAIR’s Motion, and the time for doing so has expired. On August 17, 2021, FAIR filed a Notice of Conferral Regarding Motion for Reconsideration<sup>3</sup> stating that FAIR conferred with the parties to this docket as required by Rule 28-106.204(3), F.A.C.; however the conferral occurred after the Motion was filed. The parties’ responses as reflected in FAIR’s Notice of Conferral are as follows: (1) FPL agrees with the Commission’s order and does not believe that FAIR has met the standard for reconsideration; (2) the Florida Retail Federation, the Federal Executive Agencies, Vote Solar, the Southern Alliance for Clean Energy, and the CLEO Institute support FAIR’s Motion; and (3) Daniel and Alexandria Larson, the Office of Public Counsel, the Florida Industrial Power Users Group, Florida Rising, League of United Latin American Citizens of Florida, Environmental

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<sup>3</sup> Document No. 09455-2021.

Confederation of Southwest Florida, the Florida Internet and Television Association, and Walmart take no position on FAIR's motion.

### **Analysis**

In denying confidential treatment to FAIR's responses to FPL's First Request for Production of Documents No. 4 and Exhibit NHW-3 to the testimony of FAIR's witness Nancy H. Watkins, the Prehearing Officer found that the information was not proprietary confidential business information. Specifically, the Prehearing Officer stated:

Although FAIR asserts in its Corrected Request and Second Request that the documents are proprietary confidential business information, FAIR fails to provide any details on how the documents contain information relating to trade secrets and competitive interests, the disclosure of which would impair the competitive business of the provider of the information. Nor does FAIR explain what its competitive business interests are that would be harmed should the information be disclosed.

Order No. PSC-2021-0299-PCO-EI, p.3.

With one exception, the points raised by FAIR in its Motion are rearguments of the positions stated in FAIR's Requests for confidential classification, which the Prehearing Officer ruled upon. Thus, the points are reargument, and are not proper matters to be raised in a motion for reconsideration. Staff believes that one point raised by FAIR merits discussion. FAIR claims that the Prehearing Officer failed to consider that FAIR's "membership roster" is "directly analogous to the 'list of customers' that is expressly within the scope of protected, or at least protect-able, information under Section 812.081, [F.S.]." FAIR did not reference Section 812.081, F.S., in its Requests, but instead makes the reference for the first time in its Motion. Upon review of Section 812.081, F.S., staff believes that the Commission is not bound by Section 812.081, F.S., which is the definitions and penalty statute dealing with theft, robbery, and related crimes. Even if this argument was raised in FAIR's initial Requests, staff would have recommended that the Commission deny FAIR's Requests for confidential classification because the Commission is not authorized to enforce the provisions of Chapter 812, F.S., Theft, Robbery, and Related Crimes.<sup>4</sup> Instead the Commission is bound by Chapter 366, F.S., Public Utilities, to determine what qualifies as proprietary confidential business information under Section 366.093, F.S.

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<sup>4</sup> If the Commission was bound by Chapter 812, F.S., FAIR would have to show, in its Requests for confidentiality, that its "list of customers" is a trade secret under Section 812.081, F.S., because the list is considered to be: secret; of value; for use or in use by the business; and of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. Section 812.081(1)(c), F.S. Absent FAIR's proof that its "list of customers" met each of the trade secret requirements in Section 812.081(1)(c), F.S., the Commission, if it were bound by Chapter 812, F.S., could not find that the list constituted trade secrets.

### *Trade Secret*

The Florida Legislature has exempted trade secrets from the public records law,<sup>5</sup> because “the public and private harm in disclosing trade secrets significantly outweighs any public benefit derived from disclosure, and the public’s ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets.”<sup>6</sup> Staff notes that neither Section 366.093, F.S., nor Rule 25-22.006, F.A.C., provide a definition as to what constitutes a trade secret.<sup>7</sup> “A customer list can constitute a ‘trade secret’ where the list is acquired or compiled through the industry of the owner of the list and is not just a compilation of information commonly available to the public.” E. Colonial Refuse Serv., Inc. v. Velocci, 416 So. 2d 1276, 1278 (Fla. 5th DCA 1982). Chapter 688, Uniform Trade Secrets Act, Section 688.002(4), F.S., states:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

See also Templeton v. Creative Loafing Tampa, Inc., 552 So. 2d 288 (Fla. 2d DCA 1989) (considering, in deciding whether a customer list is a trade secret, whether the list is product of great expense and effort and is confidential); Dicks v. Jensen, 768 A. 2d 1279 (Vt. 2001) (stating that a list of potential or existing customers which is not readily ascertainable has value and can be a trade secret). In East v. Aqua Gaming, Inc.,<sup>8</sup> the Second District Court of Appeal of Florida held that there was enough evidence to support a finding that a corporation’s customer list was trade secret, where the corporation showed that the “customer list was the product of great expense and effort, that it included information that was confidential and not available from public sources, and that it was distilled from larger lists of potential customers into a list of viable customers for [a] unique business.”<sup>9</sup>

Given that FAIR is adamant about maintaining that its membership lists are immune to disclosure, it is incumbent upon FAIR to demonstrate that the lists constitute trade secrets. See New York State Businessmen’s Group, Inc. v. Dalton, 154 A.D. 2d 801, 801 (1989); and Herbst by Herbst v. Bruhn, 106 A.D. 2d 546, 549 (1984). To meet its burden, FAIR offers conclusory statements, contained in FAIR’s declarant statement, declaring that the lists are “proprietary

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<sup>5</sup> See Section 815.045, F.S.

<sup>6</sup> Id.

<sup>7</sup> On July 6, 2021, the Florida Legislature passed H1055 enacting Section 119.0715, F.S., to exempt trade secrets held by agencies from public record requirements, and states that “‘trade secret’ has the same meaning as in s. 688.002.” H1055; Ch 2021-223, Laws of Florida.

<sup>8</sup> East v. Aqua Gaming, Inc., 805 So. 2d 932, 934 (Fla. 2d DCA 2001).

<sup>9</sup> East, 805 So. 2d at 934. See also MNM & MAK Enterprises, LLC v. HIIT Fit Club, LLC, 134 N.E. 3d 242 (Ohio Ct. App. 2019) (holding that a Boxing franchise’s client list was trade secret under Trade Secrets Act since the list was protected by password, the franchise owner spent years compiling the list, the list contained contact information for every person who ever signed up to take class or become member, list was unique to franchise, list was result of years and funds expended to market and attract business, result of these efforts was membership base that generated \$8,000 to \$10,000 worth of monthly revenue, and there was no public record of list, nor was list ever used in public way or provided to any mailing company).

confidential business information” that “contain FAIR’s trade secrets and competitive business information,” which is insufficient. See Rooney v. Hunter, 26 A.D. 2d 891, 891, 274 N.Y.S. 2d 376 (1966) (holding that a statement of appellant’s attorney, made upon information and belief, that the contents of appellant’s product is a trade secret, is insufficient to establish such fact). Staff believes that FAIR’s mere assertion that its membership roster comprises FAIR’s trade secret information is not enough to persuade the Commission to grant confidential classification as requested. Staff believes that FAIR has failed to provide any details which demonstrates how the documents contain information relating to trade secrets and competitive interests, the disclosure of which would impair the competitive business of the provider of the information.

### *Public Record*

Chapter 119, F.S., Florida’s Public Records Law, establishes a statutory right of access to records of agencies made or received pursuant to law or ordinance or in connection with the transaction of official business. Rule 25-22.006(4)(c), F.A.C., implementing applicable statutes within the rule, provides that the utility or other person shall “demonstrate how the information asserted to be confidential qualifies as one of the statutory examples listed in Section 364.183(3), 366.093(3) or 367.156(3), F.S.,” or the utility or other person must explain how “the ratepayers or the person’s or utility’s business operations will be harmed by disclosure.” Section 119.01, F.S., provides that documents submitted to governmental agencies shall be public records. As provided by Section 119.071, F.S., certain information maintained by state agencies is exempt from public disclosure, and is therefore deemed confidential. This includes social security numbers, and medical and financial information. Section 119.071(4)(d), F.S., additionally provides for the exemption of home addresses and telephone numbers from public disclosure for certain occupational groups, such as, but not limited to: active and former law enforcement personnel, correctional probation officers, Department of Health personnel, Judges, Magistrates, public defenders, etc. However, FAIR has not demonstrated how the information asserted to be confidential qualifies as confidential under any statute or applicable rule, much less provided any information to indicate that its membership list contains the telephone number or home address of those exempt from public disclosure under Section 119.07, F.S.

Pursuant to Section 668.6076, F.S. “[u]nder Florida law, e-mail addresses are public records.” In accordance with that statute, the Florida Public Service Commission website states, in part, that “[i]nformation submitted through this Web site may be subject to disclosure pursuant to a public records request.” The Government-in-the Sunshine Manual (2021) states:

In the absence of [a] statutory exemption, home addresses, telephone numbers, photographs, and dates of birth of public officers and employees are not exempt from disclosure. See [Florida Attorney General Advisory Legal Opinion] AGO 96-88 (home addresses and telephone numbers and business addresses and telephone numbers of members of state and district human rights advocacy committees are public records); Browning v. Walton, 351 So. 2d 380 (Fla. 4th DCA 1977) (city cannot refuse to allow inspection of records containing the names and addresses of city employees who have filled out forms requesting that the city maintain the confidentiality of their personnel files). And see United Teachers of Dade v. School Board of Dade County, No. 92-17803 (01) (Fla. 11th Cir. Ct. Nov. 30, 1992) (home telephone numbers and addresses of school district

employees not protected by constitutional right to privacy; only the Legislature can exempt such information). Cf. AGO 85-03 (list containing names and addresses of subscribers to state magazine is a public record).<sup>10</sup>

Additionally, in a case that staff believes is analogous to FAIR's Requests, the Florida Attorney General issued Advisory Legal Opinion AGO 85-03, regarding the applicability of public records law on the mailing list of a state magazine, stating that:

The Federal Privacy Act of 1974 does not require the exclusion of the name and address of a private citizen at the request of the affected private citizen from such public records of the Game and Fresh Water Fish Commission as may be furnished pursuant to Ch. 119, F.S., since the commission is not [a] [Federal] "agency" within the meaning of that act nor is the commission authorized to sell or rent such names and addresses as may be contained in such public records.<sup>11</sup>

In AGO 85-03, the Attorney General made reference to Public Law 93-579,<sup>12</sup> quoting "(n) Mailing lists.--An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public." The Florida Attorney General further opined in Advisory Legal Opinion AGO 96-88 that "[i]n the absence of an exemption removing such information from disclosure under Chapter 119, [F.S.], the home addresses and telephone numbers and the business addresses and telephone numbers of members of [non-personnel of a state agency] are public records." Therefore, staff believes that the information FAIR asserts to be confidential does not qualify as confidential under the statute or applicable rule.

## Conclusion

The purpose of reconsideration is to bring to the Commission's attention a specific point that, had it been considered when presented in the first instance, would have required a different decision. State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) (Wigginton, J., concurring); Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959).

In the Order Denying FAIR's Requests for Confidential Classification,<sup>13</sup> the Prehearing Officer considered FAIR's assertions that the information: is FAIR's trade secrets and competitive business information; is protected by Section 366.093(3)(a) and (e), F.S.; is intended to be and is treated as private confidential information by FAIR; has not been voluntarily disclosed to the public; and disclosure would cause harm to FAIR's business operation and its members. In review of all of FAIR's claims, the Prehearing Officer denied FAIR's Requests for Confidential

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<sup>10</sup> Government-in-the-Sunshine Manual, at p. 139,  
[http://myfloridalegal.com/webfiles.nsf/wf/mnos-b9qq79/\\$file/sunshinemanual.pdf](http://myfloridalegal.com/webfiles.nsf/wf/mnos-b9qq79/$file/sunshinemanual.pdf)

<sup>11</sup> However, 5 U.S.C. s. 552a(a)(1) provides that for purposes of the Federal Privacy Act, the term "agency" means agency as defined by 5 U.S.C. s. 552(e). That section defines the term "agency" as defined in 5 U.S.C. s. 551(1) to include certain agencies of the executive branch of the Federal Government.

<sup>12</sup> Public Law 93-579, s. 3, December 31, 1974, 88 Stat. 1896, as amended by Pub.L. 94-183, s. 2(2), December 31, 1975, 89 Stat. 1057, the Federal Privacy Act of 1974, and codified at 5 U.S.C. s. 552a.

<sup>13</sup> Order No. PSC-2021-0299-PCO-EI.

Classification because FAIR failed to establish: (1) how the documents contained information relating to trade secrets and competitive interests, the disclosure of which would impair the competitive business of the provider of the information; (2) what its competitive business interests are that would be harmed should the information be disclosed; and (3) how the information asserted to be confidential qualifies as confidential under the statute or applicable rule.

In FAIR's Motion for Reconsideration, FAIR reargued, with the exception discussed above, the same points raised in its Requests. Staff has reviewed all arguments raised by FAIR in FAIR's Motion, and staff believes that FAIR has not brought to the Commission's attention any specific point that, had it been considered when presented in the first instance, would have required a different decision. Based on the information provided in FAIR's Requests and Motion, staff believes that FAIR has not demonstrated how the information asserted to be confidential qualifies as confidential under the statute or applicable rule. Staff recommends that FAIR's Motion for Reconsideration be denied because it fails to identify a point of law the Prehearing Officer overlooked or failed to consider by issuing Order No. PSC-2021-0299-PCO-EI.

**Issue 2:** Should this docket be closed?

**Recommendation:** No. This docket should remain open for the Commission to address the pending rate case proceeding. (Lherisson)

**Staff Analysis:** This docket should remain open for the Commission to address the pending rate case proceeding.