BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company	)	DOCKET NO. 20210015-EI

FLORIDA RISING'S, LEAGUE OF UNITED LATIN AMERICAN CITIZENS', & ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA'S RESPONSE IN OPPOSITION TO THE RELIEF REQUESTED IN FLORIDA POWER & LIGHT COMPANY'S MOTION FOR SUMMARY FINAL ORDER REGARDING FLORIDIANS AGAINST INCREASED RATES, INC.

The League of United Latin American Citizens of Florida ("LULAC"), Environmental Confederation of Southwest Florida ("ECOSWF"), and Florida Rising, pursuant to Rule 28-106.204(1) of the Florida Administrative Code, hereby file this response in opposition to Florida Power & Light Company's ("FPL's") extraordinary request for relief in footnote 1 of their motion for summary final order—namely, that after the close of evidence and after briefing has been completed based on that evidence,[1] that the Commission have any "substantive . . . testimony offered by [Floridians Against Increased Rates ("FAIR")] and any substantive evidence that they present at the hearing be *struck* from the record." FPL's Motion for Summary Final Order Regarding Floridians Against Increased Rates, Inc. at 1, n.1 [hereinafter "FPL's Motion"] (emphasis added). Although not spelled out in the footnote, it appears that FPL would like to have struck the testimony of the witnesses that Florida Rising, ECOSWF, and LULAC are co-sponsoring with FAIR, namely Mr. Herndon, Mr. Mac Mathuna, and Mr. Devlin, in addition to any substantive evidence FAIR introduces on cross-examination or otherwise at the evidentiary hearing. Such relief after the close of the evidentiary record, and after the

[1] In Footnote 1, "FPL recognizes that the Commission has decided to address the issue of FAIR's standing . . . at the conclusion of this hearing and as part of the resolution of Issue 9 in the Pre-Hearing Order," which will occur after briefing, with FPL "understand[ing] that the resolution of this motion will be held in abeyance until that time." FPL Motion at 1, n.1.

completion of briefing relying on that record, has no basis in Florida law (and FPL cites none), and will result in prejudice to all parties that will be relying on the evidentiary record as completed at the evidentiary hearing. The Commission must reject the extraordinary relief that FPL requested in footnote 1 of its motion.

BACKGROUND

FPL filed this petition to increase rates for its customers back in March. The Order Establishing Procedure in this case was filed on March 24, 2021. In accordance with the scheduling requirements outlined in the Order Establishing Procedure, on June 21, 2021, the pre-filed testimonies of Mr. Herndon, Mr. Mac Mathuna, and Mr. Devlin were filed in this docket. Florida Rising, ECOSWF, and LULAC filed their Prehearing Statement on July 14, 2021, as did the other parties. On August 2, 2021, the Prehearing Conference in this case was held, in preparation for a two-week evidentiary hearing that is scheduled to take place from August 16-27, 2021. On August 4, 2021, FPL filed its Motion for Summary Final Order regarding FAIR, including a request that after the evidentiary hearing and briefing has been concluded, that the Commission strike from the evidentiary record any evidence or testimony supported by FAIR, regardless of whether it is also supported or submitted by other parties or the prejudice it may cause other parties, and without citing any legal basis to support its requested relief.

ARGUMENT

I. FPL's Motion is Untimely

Pursuant to Order No. PSC-2021-0116-PCO-EI, the Order Establishing Procedure in this Docket, any "[m]otions to strike any portion of the prefiled testimony and related portions of exhibits of any witness shall be made in writing no later than the Prehearing Conference. Motions to strike any potion of prefiled testimony and related portions of exhibits at hearing

shall be considered untimely, absent good cause shown." Order Establishing Procedure at 8 (Fla. P.S.C. Mar. 24, 2021). Not only did FPL fail to move to strike the testimony in writing at the Prehearing Conference, FPL proposed to *stipulate* to all of the FAIR witnesses in question except for Mr. Herndon. This is far from meeting the timely objection requirements of the Order Establishing Procedure. *See Dowd v. Star Mfg. Co.*, 385 So. 2d 179, 181 (Fla. 3d DCA 1980) ("An untimely motion to strike [testimony] is not a substitute for a timely objection. . . . [Party's] failure to make timely objection results in this point on appeal not being properly preserved for our review.").

But more than saying that FPL will move to strike during the testimony of the witnesses at the evidentiary hearing, FPL asks that the testimony be struck *after* the close of the evidentiary record, the very record that intervenors will be relying on to conduct briefing. FPL cites no legal basis to support this relief, nor will it be able to find any, as it is improper to strike testimony after the close of the evidentiary record. *Jones v. State*, 701 So. 2d 76, 78 (Fla. 1997) (affirming trial court finding that motion to strike after completion of testimony was untimely as "objection is waived unless it is made at the time the testimony is offered"); *Platt v. Rowand*, 54 Fla. 237, 242 (1907) ("[W]hen evidence . . . has been admitted without objection, the witness being examined and cross-examined by the respective parties, it is not error to deny a motion to strike out such evidence, made after its tendency and effect have been disclosed."); *Wicoma Inv. Co. v. Pridgeon*, 137 Fla. 540, 544 (1939) ("Where no objections are interposed to questions and the testimony is admitted without objection, the party failing to object cannot, as a matter of right, have the responsive testimony stricken out on motion, though it may be irrelevant or incompetent, and open to attack by proper objection."); *Rojas v. Rodriguez*, 185 So. 3d 710, 711

(Fla. 3d DCA 2016) (failure to raise objection "prior to the conclusion of trial" was "fatal to the defendant's case" to have the testimony in question stricken).

Furthermore, chapter 120 provides no support for FPL's requested relief. *See* § 120.569(2)(g), Fla. Stat. ("Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but *all other evidence* of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, *whether or not such evidence would be admissible in a trial in the courts of Florida*.") (emphasis added). Additionally, Chapter 120 provides that the record of the proceeding "shall" include "[e]vidence admitted," and "[t]he official transcript," § 120.57(1)(f), Fla. Stat., and that the "agency shall accurately and completely preserve all testimony in the proceeding," § 120.57(1)(g), Fla. Stat. Notably, there is no mechanism for admitted evidence or testimony to be removed or excluded from the record after the fact, and FPL cites no basis for any such mechanism.

II. There Is No Legal Basis for Striking Co-Sponsored Testimony After the Close of the Record

Even if FPL's motion to strike was not untimely, considering that Florida Rising, LULAC, and ECOSWF are also calling the same witnesses and adducing the same testimony, FPL's requested relief has no basis. The Commission has already concluded that Florida Rising be allowed to co-sponsor the witnesses, as there is no basis for FPL to claim prejudice. Prehearing Order at 237, Order No. 20210015-EI (Fla. P.S.C. Aug. 10, 2021). Nor is it uncommon for witnesses to be adopted or called by other parties. *See, e.g.*, *Jones v. State*, 440 So. 2d 570, 576 (Fla. 1983) (defendant suffered no due process violation when cross-examination was limited based on scope objections as defendant could have called the witness "as his own witness"). This includes in the Chapter 120 context. *See, e.g.*, *Paul Still v. Suwannee River Water Mgmt. Dist.*, Case No. 14-1420RU, Final Order at 8 (Fla. DOAH, Sept.

11, 2014), *available at* https://www.doah.state.fl.us/ROS/2014/14001420.pdf (showing that petitioner Paul Still called several witnesses that had not been specifically listed as his witnesses, but had been listed by other parties, including respondents, as shown in the Amended Pre-Hearing Stipulation, *available at* https://www.doah.state.fl.us/DocDoc/2014/001420/14001420M-053014-10144514.PDF). *See also, e.g.*, *Okaloosa Cty. v. Dep't of Juvenile Justice*, Case No. 12-0891RX, Final Order, 2012 WL 2993757 at *2 (Fla. DOAH July 17, 2012) ("Bay County adopted the testimony of witnesses called by Okaloosa and Nassau Counties."); *Brown v. Dep't of Health & Rehab. Servs.*, Case No. 87-3405, Recommended Order, 1987 WL 488142 at *1 (Fla. DOAH, Nov. 13, 1987) ("Respondent adopted the testimony of all witnesses . . . ."); *Dep't of Comm. Affairs v. City of Tampa*, Case No. 08-4820GM, Respondent City of Tampa's Proposed Recommended Order, 2009 WL 2712064 at *2 (Fla. DOAH, Aug. 7, 2009) ("At the close of the hearing, the Department of Community Affairs adopted the testimony of the Department of the Air Force's witnesses. Similarly, the City adopted the testimony presented by Florida Risk and Tank Lines.").

As is common in the Chapter 120 context, LULAC, ECOSWF, and Florida Rising, in their Prehearing Statement, specifically listed under "Witnesses:" "All witnesses listed or presented by any other party or intervenor." Florida Rising, LULAC, & ECOSWF Prehearing Statement at 3, *available at* http://www.psc.state.fl.us/library/filings/2021/07939-2021/07939-2021.pdf. No objection to this listing has been received or noted. As a general matter, "a motion to strike out the entire testimony of a witness should be denied, if any part is admissible for any purpose." *Platt v. Rowand*, 54 Fla. 237, 241 (1907). As long as witnesses have relevant testimony to offer, parties can call whatever witnesses they like. Florida Rising, ECOSWF, and

LULAC are calling Mr. Herndon, Mr. Mac Mathuna, and Mr. Devlin to testify in this cause, and FPL has not cited any legal reason why Florida Rising, ECOSWF, and LULAC should not be allowed to do so. As the entirety of the witnesses' direct testimony was pre-filed on June 21, 2021, in accordance with the Order Establishing Procedure, leaving FPL ample time to conduct discovery on the substance of the testimony, FPL has no cause to object that additional parties are calling Mr. Herndon, Mr. Mac Mathuna, and Mr. Devlin to testify.

III. An Uncertain Evidentiary Record Will Prejudice All Intervenors

Even if FPL's motion to strike was not untimely, and even if Florida Rising, LULAC, and ECOSWF were not permitted to call Mr. Herndon, Mr. Mac Mathuna, and Mr. Devlin as witnesses, FPL's requested relief is still due to be denied due to the timing of the relief requested and how that timing prejudices intervenors. Florida Rising, LULAC, and ECOSWF intend to rely on the testimony of Mr. Herndon, Mr. Mac Mathuna, and Mr. Devlin in briefing. Calling into question the evidentiary record that will be relied on for briefing prejudices all parties and puts parties in a bind on how to conduct the evidentiary hearing.

The Prehearing Order prohibits duplicative cross-examination, *see* Prehearing Order at 5, Order No. PSC-2021-0302-PHO-EI (Fla P.S.C. Aug. 10, 2021), but in light of FPL's requested relief that post-briefing substantive evidence adduced by FAIR be excised from the record, intervenors will, of necessity, be required to duplicate FAIR's cross-examination in order to ensure that there is an evidentiary record that they can rely on. For example, as a hypothetical, if upon cross-examination by FAIR's counsel, Mr. Silagy admitted that there was no basis for FPL's requested rate increase, intervenors would be greatly prejudiced if they were uncertain whether they could rely on such an admission in briefing. Absent a timely objection to the testimony on an evidentiary ground, there would be no basis for striking Mr. Silagy's testimony

from the record, and FPL cites no such basis—yet that is exactly what FPL requests. Therefore, in order to create a proper and reliable evidentiary record, FPL's requested relief will require intervenors to create the record twice—once as FAIR introduces it at the evidentiary hearing—and a second time via other parties to ensure that the evidence will not be removed from the record post-briefing, hence invalidating said briefs. This required duplication will unnecessarily delay the evidentiary hearing in this case, and the uncertainty of being able to rely on the testimony of FAIR-sponsored witnesses, even co-sponsored by Florida Rising, ECOSWF, and LULAC, will prejudice intervenors in briefing as intervenors will be unsure what parts of the evidentiary record they will be allowed to rely on.

For all of these reasons, the requested relief in footnote 1 of FPL's Motion for Summary Final Order is due to be summarily denied. Due to the impending evidentiary hearing and the uncertainty FPL has created regarding the evidentiary record, Florida Rising, ECOSWF, and LULAC request that the Commission issue an expedited decision regarding FPL's motion to strike contained in footnote 1 of its Motion for Summary Final Order.

RESPECTFULLY SUBMITTED this 11th day of August, 2021.

/s/ Bradley Marshall
Bradley Marshall
Florida Bar No. 0098008
bmarshall@earthjustice.org
Jordan Luebkemann
Florida Bar No. 1015603
jluebkemann@earthjustice.org
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, Florida 32301
(850) 681-0031
(850) 681-0020 (facsimile)

Christina I. Reichert
Florida Bar No. 0114257
creichert@earthjustice.org

Earthjustice
4500 Biscayne Blvd., Ste. 201
Miami, Florida 33137
(305) 440-5437
(850) 681-0020 (facsimile)

Counsel for LULAC, ECOSWF, Florida Rising

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served on this 11th day of August, 2021, via electronic mail on:

Thomas A. Jernigan Holly L. Buchanan Robert J. Friedman Arnold Braxton Ebony M. Payton 139 Barnes Drive, Suite 1 Tyndall Air Force Base thomas.jernigan.3@us.af.mil holly.buchanan.1@us.af.mil robert.friedman.5@us.af.mil arnold.braxton@us.af.mil ebony.payton.ctr@us.af.mil ULFSC.Tyndall@us.af.mil	R. Wade Litchfield John T. Burnett Russell Badders Maria Jose Moncada Ken Rubin Joel T. baker Florida Power & Light Co. 700 Universe Blvd. Juno Beach, FL 33408-0420 wade.litchfield@fpl.com john.t.burnett@fpl.com russell.badders@nexteraenergy.com maria.moncada@fpl.com ken.rubin@fpl.com joel.baker@fpl.com
Biana Lherisson Jennifer Crawford Shaw Stiller Suzanne Brownless Florida Public Service Commission Office of the General Counsel 2540 Shumard Oak Boulevard Tallahassee, Florida 32399-0850 blheriss@psc.state.fl.us jcrawfor@psc.state.fl.us sstiller@psc.state.fl.us sbrownle@psc.state.fl.us	Richard Gentry Parry A. Christensen Charles Rehwinkel Anastacia Pirrello Office of Public Counsel c/o The Florida Legislature 111 W. Madison Street, Room 812 Tallahassee, FL 32399-1400 gentry.richard@leg.state.fl.us christensen.patty@leg.state.fl.us rehwinkel.charles@leg.state.fl.us pirrello.anastacia@leg.state.fl.us
Jon C. Moyle, Jr. Karen A. Putnal Moyle Law Firm, P.A. 118 North Gadsden St. Tallahassee, FL 32301 jmoyle@moylelaw.com kputnal@moylelaw.com mqualls@moylelaw.com	James W. Brew Laura Wynn Baker Joseph R. Briscar Stone Mattheis Xenopoulos & Brew, PC 1025 Thomas Jefferson St., NW Suite 800 West Washington, D.C. 20007 jbrew@smxblaw.com lwb@smxblaw.com jrb@smxblaw.com

Kenneth Hoffman 134 West Jefferson St. Tallahassee, FL 32301-1713 ken.hoffman@fpl.com	George Cavros 120 E. Oakland Park Blvd., Suite 105 Fort Lauderdale, FL 33334 george@cavros-law.com
William C. Garner Law Office of William C. Garner, PLLC The Cleo Institute Inc. 3425 Bannerman Road Unit 105, #414 Tallahassee, FL 32312 Email: bgarner@wcglawoffice.com	Katie Chiles Ottenweller1 Southeast Director Vote Solar 838 Barton Woods Road Atlanta, GA 30307 Email: katie@votesolar.org Phone: 706.224.8107
Nathan A. Skop, Esq. 420 NW 50th Blvd. Gainesville, FL 32607 Phone: (561) 222-7455 E-mail: n_skop@hotmail.com	Stephanie U. Eaton Spilman Thomas & Battle, PLLC 111 Oakwood Dr., Suite 500 Winston-Salem, NC 27103 seaton@spilmanlaw.com
T. Scott Thompson Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. 555 12th St NW, Suite 1100 Washington, DC 20004 sthompson@mintz.com	Robert Scheffel Wright John T. LaVia, III 1300 Thomaswood Dr. Tallahassee, FL 32308 schef@gbwlegal.com jlavia@gbwlegal.com
Madeline Fleisher Jonathan Secrest Dickinson Wright PLLC 150 E Gay St Suite 2400 Columbus, OH 43215 mfleisher@dicinsonwright.com jsecrest@dickinsonwright.com	Floyd R. Self Berger Singerman, LLP 313 North Monroe St., Suite 301 Tallahassee, FL 32301 fself@bergersingerman.com
Barry A. Naum Spilman Thomas & Battle, PLLC 110 Bent Creek Blvd., Suite 101 Mechanicsburg, PA 17050 bnaum@spilmanlaw.com	

DATED this 11th day of August, 2021.

/s/ Bradley Marshall
Attorney