BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Approval of Demand-side Management Plan of Florida Power & Light Company.

DOCKET NO.: 100155-EG

In re: Petition for Approval of Demand-side Management Plan of Progress Energy Florida, Inc.

DOCKET NO.: 100160-EG

SERVED: November 7, 2011

PEF'S REPLY BRIEF TO THE SOUTHERN ALLIANCE FOR CLEAN ENERGY'S BRIEF SUPPORTING THE PROTEST OF ORDER NOS. PSC-11-0346-PAA-EG AND PSC-11-0347-PAA-EG

Pursuant to Order No. PSC-11-0469-PCO-EG and Rule 25-22.028, F.A.C., Progress Energy Florida, Inc. ("PEF") hereby submits its Reply Brief to The Southern Alliance for Clean Energy's ("SACE") Brief Supporting the Protest of Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG (hereinafter referred to as "SACE Brief"). The Public Service Commission ("PSC" or "Commission") appropriately acted within the broad authority and discretion provided to it by Section 366.82 when issuing Order No. PSC-11-0347-PAA-EG (hereinafter "the PAA order").[1] Specifically, Section 366.82(7) authorizes the Commission to consider undue impact to the costs passed on to consumers when choosing the programs to implement goals, and the Commission properly exercised this right when it ordered the modification of PEF's DSM plan. Further, the PSC did not modify PEF's goals. SACE simply disagrees with the Commission's interpretation of Section 366.82(7) and the ultimate decision the PSC made and thus attempts to challenge the Commission's legal authority to make that decision. An agency's interpretation of a statute it is charged with implementing is entitled to great deference, unless the interpretation is

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[1] For purposes of this protest, the parties and the Commission have agreed to consolidate Docket 100160-EI (regarding PEF) and Docket 100155-EI (regarding Florida Power and Light ("FPL")). See Order No. PSC-11-0469-PCO-EG. PEF's reply brief will be limited to the issues raised by SACE with respect to PEF and the protest of Order No. PSC-11-0347-PAA-EG.

clearly erroneous. The Commission's interpretation of Section 366.82(7) was consistent with both its plain language and the legislative intent and therefore is not "clearly erroneous." The Commission fully complied with its statutory authority in issuing the PAA order and therefore the protest should be denied.

Procedural Background of the Proceeding and Regulatory Framework

The Commission is required by the Florida Energy Efficiency and Conservation Act ("FEECA") to adopt annual conservation goals for each of the FEECA utilities, including PEF. See §§ 366.80 through 366.85 and 403.519, Fla. Stat. The initial FEECA statutes were enacted in 1980. These statutes were amended in 2008. It is helpful to understand the context of the FEECA statutes, both the original statutes and the 2008 Amendments, when considering the Commission's authority to approve and modify DSM plans developed pursuant to the FEECA statutes. In essence, the 2008 Amendments only made some clarifying changes to the existing FEECA framework. There were no fundamental changes to the existing structure of the statutes governing the Commission's setting of DSM goals and programs.

Specifically, the legislative intent for FEECA is set forth in Section 366.81, Legislative findings and intent. Before the 2008 Amendments, the legislature intended that the PSC adopt goals and approve plans to conserve electric energy. The legislature had also recognized, even before the 2008 Amendments, that it was critical to utilize the most efficient and cost-effective energy conservation systems. Thus, the 2008 Amendments only made one real change to the legislative intent contained in section 366.81, which was to add "demand-side renewable energy systems" so that the FEECA statutes involved both energy conservation systems as well as demand-side renewable energy systems. Fl. Legis. 2008-277, H.B. 7135 (2008).

The 2008 Amendments also resulted in changes to Section 366.82. Specifically, subsection (1)(b) was added to define "demand-side renewable energy." Subsections (3) through (5) were also added, with other subsections re-numbered. The 2008 Amendments added additional factors for the PSC to consider when setting goals in Subsection (3). Subsections (4) and (5) regard funds to be appropriated for technical consulting assistance and participation by the Florida Energy and Climate Commission in the proceeding, respectively. The 2008 Amendments also re-numbered subsection (7), which largely stayed the same with the exception of two added sentences: "The commission may require modifications or additions to a utility's plans and programs at any time it is in the public interest consistent with this act. In approving plans and programs for cost recovery, the commission shall have the flexibility to modify or deny plans or programs that would have an undue impact on the costs passed on to customers." Finally, the 2008 Amendments added subsections (8) and (9), which state that the PSC is allowed, but not required, to establish financial rewards and penalties associated with the utilities' performance in relation to the goals.

Thus, the overall framework for establishing and implementing conservation goals had already been in place for decades before the 2008 Amendments. While the 2008 Amendments increased focus on demand-side renewable energy and provided additional guidance on what the PSC needed to consider when setting goals and adopting plans, they also provided the PSC with additional flexibility to consider things like cost and impacts to customers and explicitly provided mechanisms by which the Commission could modify DSM plans.

The Commission's first proceeding implementing goals after the 2008 Amendments was in Docket Number 080408-EG. The Commission issued Order PSC-09-0855-FOF-EG on December 30, 2009 and established goals for the FEECA utilities, including PEF. The

Commission complied with the requirements of Section 366.82(3), Fla. Stat., in evaluating and developing the goals.[2] PEF moved for reconsideration of this order based on a double counting error, and the Commission granted the motion and revised PEF's goals on March 31, 2010 in Order PSC-10-0198-FOF-EG.

On March 30, 2010, consistent with Rule 25-17.0021, F.A.C. and Section 366.82(7), PEF filed a petition for approval of its Demand Side Management ("DSM") plan. This docket, Docket 100160-EI, was established to consider PEF's DSM plan. On October 4, 2010, the Commission issued Order No. PSC-10-0605-PAA-EG, in which the PSC approved PEF's six solar pilot programs but directed the Company to submit a modified DSM plan that met the annual goals originally set. At the agenda conference for this order, the Commission also encouraged PEF to file another plan alternative that would reduce the rate impact of the DSM plan. PEF accordingly filed two plans on November 29, 2010, an Original Goal Scenario DSM and a Revised Goal Scenario Plan. The Company responded to nearly a hundred data requests and discovery questions and provided over 4,000 pages with respect to the three plans it submitted for consideration in Docket 100160-EI. The Commission considered these plans at its July 26, 2011 Agenda Conference and unanimously voted to "modify Progress' DSM Plan to match the plan currently in place." July 26, 2011 Agenda Tr. at p. 80. This vote was memorialized in the PAA order that is the subject of the SACE protest.

SACE's protest is explicitly limited to legal issues. Order No. PSC-11-0469-PCO-EG. Although SACE claims to disagree with the Commission's factual findings (and SACE brief refers to SACE's comments filed in the docket with respect to ratepayer costs), it admits

[2] No party is claiming that the Commission failed to implement this section of the FEECA statutes during the goal development proceeding.

that for purposes of the protest, it is not challenging those factual conclusions. Thus, SACE is now precluded from challenging those factual findings.

Issues and PEF Positions[3]

3. WHETHER THE COMMISSION VIOLATED FLA. STAT. § 366.82(7) BY ORDERING A "NEWLY MODIFIED DSM PLAN" FOR PEF THAT MATCHES ITS DSM PLAN CURRENTLY IN PLACE?

PEF Position: No. The Commission acted consistent with the broad discretion and flexibility afforded it by Section 366.82(7), Fla. Stat., in approving a newly modified DSM plan where the Commission found that PEF's other plans would have an undue impact on the costs passed on to PEF's customers. The PAA Order is consistent with the intent of the FEECA statutes. The Commission's interpretation of Section 366.82(7) is correct. The Commission did not set new goals, de facto or otherwise, when it approved PEF's currently approved DSM plan. The goals remain in place, as evidenced by the potential financial reward that PEF can receive only if it exceeds those goals. Thus, the Commission did not violate Section 366.82(7).

4. WHETHER THE COMMISSION VIOLATED FLA. STAT. § 366.82(7) BY NOT REQUIRING PEF TO SUBMIT A MODIFIED PLAN FOLLOWING THE DENIAL OF PEF'S "ORIGINAL GOAL SCENARIO DSM PLAN" AND "REVISED GOAL DSM PLAN" SUBMITTED ON NOVEMBER 29, 2010?

PEF Position: No. The Commission did not disapprove PEF's DSM plans; rather, it exercised its right to modify the plans pursuant to Section 366.82(7). Therefore PEF was not required to submit a modified plan. Even if Section 366.82(7) is deemed to require a modified plan, the PSC already had the modified plan (PEF's existing plan) in its possession. It would therefore elevate form over substance to require that PEF submit a plan when the PSC already knew what the plan contained.

Summary of Argument

The Commission fully complied with Section 366.82, Fla. Stat., when it issued the PAA Order. The PSC, in Docket Number 080408-EG, set goals after considering each factor listed in Section 366.82(3). Then, in Docket Number 100160-EG, the Commission considered PEF's DSM plans, which it submitted pursuant to Section 366.82(7). Pursuant to the broad authority provided to it in the second and third sentences of Section 366.82(7), the PSC found that the

[3] The first two issues raised in SACE's protest relate to FPL and thus are not addressed in this reply brief.

submitted plans would cause undue costs to PEF's customers and that modification would be in the public interest. Accordingly, it ordered that PEF's existing DSM plan, which includes the new solar pilot programs, be continued.

The Commission's actions were consistent with the intent of the FEECA statutes. Contrary to SACE's argument, the PSC's modification of PEF's plans did not modify the goals. The Commission did not use Section 366.82(7) to effectuate a "de facto" modification of PEF's goals. PEF is only eligible for a financial reward if it exceeds the goal, meaning that the goal is still in place. And, as PEF has previously done, it may voluntarily petition the Commission when circumstances change or when modifications or additions to the programs may increase energy savings in a cost-effective manner. Therefore the goal has not changed and PEF can continue to strive to meet it. Even if the goals are deemed modified, the PSC was authorized to make that change pursuant to Section 366.82(6).

Finally, the Commission did not violate Section 366.82(7) by not requiring PEF to submit a modified plan, because that requirement does not apply when the PSC modifies a submitted plan. Specifically, the sentence of Section 366.82(7) only applies where the Commission *disapproves* a submitted plan, not where it is modifying it. Even if the statute is deemed to apply in this situation, it would elevate form over substance to require PEF to submit its existing plan when the PSC already has the information on PEF's existing plan in its possession.

Argument

I. The Commission Properly Implemented Section 366.82(7) When it Ordered a Newly Modified DSM Plan for PEF that Matched its DSM Plan Currently in Place.

A. The Commission acted in Accordance with its Broad Statutory Authority in Interpreting and Applying Section 366.82

The Commission has broad authority with respect to implementation of the DSM goals. In the context of DSM goal setting, the legislature recognized the importance of the PSC's jurisdiction over rates, because the FEECA statutes specifically authorize the Commission in a number of places to consider rate impact of the proposed DSM plans and goals. See, e.g. § 366.81 (no rate or rate structure discrimination is permitted); § 366.82(3) (directing the Commission to consider costs to customers of measures); § 366.82(7) (providing PSC with flexibility to modify or deny programs "that would have an undue impact on the costs passed on to customers").

The FEECA statutes, specifically Section 366.82, also give the Commission much discretion when considering the adoption of DSM plans. While 366.82(3) sets forth various factors that the PSC must take into consideration when developing the goals, there is no set formula or weighting applied to those factors. The PSC is free to consider the factors in whatever fashion it believes best implements the statute. Indeed, even after the goals are developed, the Commission has discretion to change the goals or modify the plans implementing the goals. See, e.g. § 366.82(6) (permitting the Commission to change the goals for reasonable cause); § 366.82(7) (allowing the modification of DSM plans any time it is in the public interest and permitting consideration of undue cost impact to customers).

Courts recognize, and give deference, to the Commission in exercising this broad authority to interpret and implement the FEECA statutes. See, e.g. General Telephone Company of Fla. v. Marks, 500 So. 2d 142 (Fla. 1986) ("An administrative agency must have some discretion when a regulatory statute is in need of construction in its implementation."); Pan

American World Airways, Inc. v. Fla. Pub. Svc. Comm'n, 427 So. 2d 716 (Fla. 1983) ("We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous.").

The Commission properly exercised its right under Section 366.82(7) to approve a modified plan to limit undue impact on costs to PEF's customers. Section 366.82(7) states:

> "Following adoption of goals pursuant to subsections (2) and (3), the commission shall require each utility to develop plans and programs to meet the overall goals within its service area. The commission may require modifications or additions to a utility's plans and programs at any time it is in the public interest consistent with this act. In approving plans and programs for cost recovery, the commission shall have the flexibility to modify or deny plans or programs that would have an undue impact on the costs passed on to customers."

The PSC complied with the explicit language of Section 366.82(7). This subsection involves a two-step process. The first step is set out in the first sentence of the subsection – the utilities must submit plans designed to meet the goals. The next step involves the Commission's review of that plan and its authority to modify, or outright deny, the submitted plans. That step is set forth in the second and third sentences. The PSC complied with these separate steps in Section 366.82(7). First, it required PEF to develop a plan and programs to meet the goals set in Docket 080408-EG. PEF submitted two such plans for Commission review in Docket 100160-EG. It was these plans that the Commission considered when deciding whether the plan would cause undue cost impact.

The PSC also properly applied the second sentence of subsection (7) by requiring modifications to PEF's plan as "in the public interest consistent with" the FEECA statutes. The PSC's modification to the plan was within the public interest. As the Commission itself noted, "We find that the Programs currently in effect, contained in PEF's existing Plan, are cost

effective and accomplish the intent of the statute." Order 11-0347 at p. 7. It also explicitly found that "...the public interest will be served by requiring modifications to PEF's DSM Plan." Id. The PSC's approval of the modification to the currently approved programs is also consistent with the FEECA statutes. As noted by the Commission, and as shown in the ongoing FEECA reports filed by PEF each year with respect to its existing programs, PEF has consistently outperformed its goals and achieved higher energy savings year after year. Order 11-0347 at p. 7 (noting that PEF's existing programs "have yielded significant increases in conservation and decreases in the growth of energy and peak demand" and that these programs "are likely to continue to increase energy conversation and decrease seasonal peak demand."); Annual Report on Activities Pursuant to the Florida Energy Efficiency and Conservation Act, issued Feb. 2011, http://www.psc.state.fl.us/publications/pdf/electricgas/FEECA2011.pdf, p. 11, Table 4 (showing cumulative DSM achievements for 2005-2009 as compared to goals). The Commission's modification is also consistent with FEECA because it expressly maintained the solar pilot programs that had been previously approved and implemented. Order 11-0347 at p. 7. Again, a key change to the FEECA statutes brought about by the 2008 Amendments was to increase emphasis on demand side renewable energy systems. By approving solar programs, which are demand side renewable energy programs, the PSC's actions remain consistent with the FEECA statute.

Finally, the PSC complied with the third sentence of Section 366.82(7) because it found that both of PEF's proposed plans would have an undue impact on the costs passed on to consumers. Because SACE does not challenge the PSC's finding with respect to undue cost impact, this finding must be accepted as true. The PSC further concluded that "the rate impacts of the existing Plan are relatively minor." Order 11-0347 at p. 7. SACE also does not challenge

this factual determination in its protest. Accordingly, the PSC properly implemented Section 366.82(7).

B. The Commission did not Modify the Goals It Originally Set.

The Commission did not modify, "de facto" or otherwise, the goals set in Order No. PSC-09-0855-FOF-EG. The Commission explicitly maintained those goal levels. Order 11-0347 at p. 7 (specifically referring to the goals set in that order for purposes of financial reward). Indeed, the Commissioners discussed whether it was appropriate to re-visit the goals and specifically rejected that during the Agenda Conference. July 26, 2011 Agenda Tr. at pp. 27, 67-68; 81. What the Commission modified, pursuant to the flexibility provided in Section 366.82(7), were PEF's plans and programs. The Commission specifically found that both plans PEF submitted to meet the goals "would have an undue impact on the costs passed on to customers." § 366.82(7); Order 11-0347 at p. 7. Again, SACE does not challenge this factual conclusion.

SACE's entire argument on this issue is based on the incorrect assertion that the PAA order effectuated a "de facto" change in PEF's goals by impermissibly using Section 366.82(7). The PSC, however, did not modify PEF's goals. Specifically, while the PSC ordered that PEF's currently approved programs be continued, it also concluded "that the Programs currently in effect, even without modification, are likely to continue to increase energy conservation and decrease seasonal peak demand." Order at p. 7. In other words, the PSC chose a balance by keeping the original goals but implementing programs that it knows are cost effective and do not cause undue impact on costs passed to PEF's customers. This balance is reflected in the financial reward of penalty section of the PAA order. See Order 11-0347 at p. 7. Specifically, the Commission referenced the original goal set in 2009 when clarifying that PEF will not be eligible for a financial reward under Section 366.82(8) and (9) unless it exceeds that original

goal. This potential for reward is coupled with the protection that PEF will only be penalized if it does not meet the projected savings contained in the current DSM plan.

Contrary to SACE's argument that the Commission's approval of PEF's current programs means that the original goal has been changed, there is still a mechanism by which PEF could achieve the original goal. As the Commission recognized during the July 26, 2011 Agenda Conference, the DSM landscape frequently changes. It is possible that circumstances could change such that PEF's current programs would result in even higher than currently-projected savings. PEF is committed, as it always has been, to proactively responding to changes it sees in the market. For example, there have been several instances in which PEF realized that it could obtain more savings, in a cost-effective manner, by modifying existing programs and adding new programs. When PEF learned of such possibilities, it voluntarily petitioned the Commission for approval of those changes. See Order No. PSC-05-1031-PAA-EI (approving PEF's requested changes to its Low Income Weatherization Assistance Program to increase energy savings and cost-effectiveness of program); Order No. PSC-06-0537-PAA-EG (approving petition by PEF for modifications to several programs to increase participation based on additional information and changes in federal standards); and Order No. PSC-06-1018-TRF-EG (allowing PEF to add two new programs and modify six other programs where changes would "cost-effectively increase energy efficiency in homes and businesses, reduce PEF's coincidence peak load, and reduce customers' energy consumption."). In each of these situations, the Commission granted PEF's petition and as a result, PEF has achieved higher energy savings than originally projected. More recently, while administering the solar pilot programs approved by the Commission in Order No. PSC-10-0605-PAA-EG, PEF saw that certain programs had already reached participation limits while other programs did not have as

much market penetration as PEF projected. PEF informed the Commission that it planned to shift some dollars so that it could make most effective use of the available money and achieve the most impact from these pilot programs. See PEF's Letter to Beth Salak regarding Docket 100160, dated June 23, 2011.

Thus, PEF could see even higher energy savings than it currently projects. Indeed, as the Commission noted in its PAA order, PEF has consistently outperformed its projections using its currently-approved programs. It is also not unusual for the PSC to maintain the goal level even when the programs have changed. Specifically, when the PSC approved PEF's requested changes to its programs in 2005 and 2006, although additional energy savings were anticipated, the goals set in 2004 remained the same. Each year, when PEF reports its energy savings, it reports the savings as compared to the 2004 goals, not as compared to the additional savings it expected to achieve with the 2005 and 2006 changes. By providing the incentive to strive for the goals set in Order PSC-10-0198-FOF-EG, the Commission maintains those original goals and accomplishes the legislative intent of increasing energy conservation while also allowing for consideration of undue costs and the public interest.

SACE argues that the legislative history for the 2008 Amendments "required the Commission to set more meaningful conservation goals." SACE Brief at p. 17.[4] This is the crux of their argument that the Commission's alleged "de facto" modification of the goals is inconsistent with the FEECA statutes. This is a simplified, and wrong, characterization of the 2008 Amendments. The 2008 Amendments, as explained above, resulted in three main changes: (1) increased the focus on demand-side renewable energy; (2) identified specific factors for the

[4] The SACE Brief cites to a line item of HB 7135 in support of this point (see footnote 26 on page 17). This is merely a reference to the addition of subsection (3) to Section 366.82, which does not require more meaningful conservation goals. Rather, this subsection requires the PSC to consider additional factors when setting goals, without assigning any particular weight to any one factor.

PSC to consider when setting goals; and (3) explicitly gave the PSC the right to modify plans and award financial penalties/rewards. The PSC has met the first major objective established by the 2008 Amendments by approving PEF's six solar pilot programs, which should increase the Company's demand-side renewable energy portfolio. Order No. 10-0605; Order No. 11-0347. The Commission complied with the second change because it considered the requisite factors when setting the goal in Order No. PSC-09-0855-FOF-EG, as modified by Order No. PSC-10-0198-FOF-EG. Furthermore, as explained above, the PSC has not modified the goals. PEF will strive to meet the goals by implementing cost-effective programs that will result in continued increase energy savings. And the PSC properly exercised its rights under the third main change brought about by the 2008 Amendments, by modifying the DSM plan to eliminate the undue impact on costs. The overall result of the Commission's order is consistent with the FEECA statutes when read as a whole, rather than considering just pieces of the statutes, as SACE does.

Furthermore, the PAA order does not create an "absurd result." SACE argues that the PSC, by modifying the goals through the modification provisions of subsection (7), renders the goal-setting subsections (2), (3), and (6) meaningless. SACE Brief at p. 11. This argument again assumes that the PSC modified the goals, which, as explained above, it did not. But even considering this argument at face value, it must fail because there is no "absurd result." The legislature clearly contemplated that the PSC would have broad modification powers when it reviewed DSM plans. What would be an "absurd result" is SACE's interpretation, which would impermissibly hamper the PSC's ability to respond to changes and make modifications to plans based on the public interest and undue costs passed to consumers. The plain language of Section 366.82(7) does not support such a limiting reading of the PSC's flexibility to make changes to plans.

SACE is also wrong when it contends that the PSC "manipulated" Section 366.82(8) in its treatment of rewards and penalties. The Commission clearly has discretion to authorize rewards or penalties. The language of these subsections is permissive: "may authorize," and "The Commission is authorized..." The Commission is therefore not required to give a reward or penalty under this statute. Given its discretion to decide whether a reward or penalty is due, the Commission must also have the discretion to determine under what circumstances a reward or penalty may be authorized.

It is a basic rule of statutory construction that parts of a statute are not read in isolation. "It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole." GTC, Inc. v. Edgar, 967 So. 2d 781, 787 (Fla. 2007) (citing Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992)). Thus, subsection (8) must be read together with the other parts of Section 366.82, specifically subsection (7). Subsection (7) provides the Commission with flexibility to modify plans or programs, both when it is in the "public interest" and when there would be "an undue impact on the costs passed on to customers." The PSC must therefore be given flexibility to adjust the potential penalties and rewards for meeting goals, if it has the flexibility to modify plans and programs under subsection (7). To assume otherwise would impermissibly render the two subsections inconsistent.

C. Even if the Goals are Deemed to be Modified, the Commission Acted within its Legislative Authority to Modify the Goals

The Commission, after months of reviewing data requests provided to it by the Company, decided that, pursuant to its broad regulatory authority, and consistent with its discretion to implement regulatory statutes, the two DSM plans submitted by PEF would cause an undue impact to the costs of PEF's customers. SACE does not challenge this factual finding in its

protest. As explained above, PEF does not believe that the Commission's order resulted in a modification of the goals. Continuing the currently-approved programs, even though the programs were not designed to meet the 2009 goals, was within the flexibility provided in Section 366.82. However, even if the Commission is deemed to have modified the goals, it was authorized to do so pursuant to Section 366.82(6).

Section 366.82(6) provides: "The commission may change the goals for reasonable cause. The time period to review the goals, however, shall not exceed 5 years." If the Commission modified the goals in its PAA order, it clearly complied with subsection (6). Reasonable cause existed, because, as explained above, the plans required to implement the new goals would result in undue cost impact to customers. And because the PAA order was issued in 2011, less than two years after the goals were set, the Commission was well within the 5 year timeframe set by subsection (6).

II. The Commission was not Required by Section 366.82(7) to Request PEF to Submit a Modified Plan because the Commission Already had the Modified Plan it was Approving.

The PSC fully complied with the requirements of Section 366.82(7). Contrary to SACE's argument, PEF did not need to resubmit a modified plan in this instance. It is helpful to consider the entire sentence at issue: "If the commission *disapproves* a plan, it shall specify the reasons for disapproval, and the utility whose plan is disapproved shall resubmit its modified plan within 30 days." § 366.82(7) (emphasis added). Here, the PSC did not disapprove PEF's DSM plans. Rather, pursuant to its authority in the second and third sentences of Section 366.82(7), the Commission *modified* PEF's DSM Plan to approve PEF's existing DSM plan. Because the Company has been implementing programs pursuant to this existing plan, the

Commission already had all the information it needed with respect to the modified plan and, therefore, it had no need to require submittal of the same plan.

It is not "extremely telling" that the Commission previously ordered PEF to submit a modified plan. SACE Brief at p. 24. This situation is quite different from the previous time when the PSC ordered PEF to submit a modified plan. When the Commission ordered PEF to submit a modified plan before, it was on the basis that the Company's plan did not meet the goals on an annual basis. See Order No. PSC-10-0605-PAA-EG. The PSC did not have a plan in its possession that reflected annual goals to review, so it disapproved the DSM Plan and ordered the submittal of a modified plan.[5] In this PAA order, the Commission specifically found that both of PEF's DSM plans would cause undue impact to costs passed on to consumers and thus ordered that the plan be modified to the existing plan. Order No. 11-0347 at p. 7. Therefore, the Commission did not "disapprove" of the plans as that term is used in the sentence from Section 366.72(7) that requires a utility to resubmit a modified plan within 30 days.

Even if one considers the Commission's actions to amount to a disapproval of the DSM plans, PEF did not need to resubmit a modified plan. When interpreting statutory language, "if some of the words of the statute, when viewed as one part of the whole statute or statutory scheme, would lead to an unreasonable conclusion or a manifest incongruity, then the words need not be given a literal interpretation. Vrchota Corp. v. Kelly, 42 So. 3d 319, 322 (Fla. 4th DCA 2010) (citing Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)). If the requirement to resubmit a modified plan was interpreted as SACE suggests, then that would lead to the unreasonable conclusion that the Commission would have to require submission of something it already has in its possession. Consistent with the overall intent of the statute to give

[5] At the encouragement of the Commission during the Agenda Conference, PEF submitted two modified plans; one to meet the annual goals and the other to mitigate rate impact to customers.

the PSC flexibility, the Commission is authorized to modify the plan as it sees fit. In this instance, it saw fit to modify the plan so that the existing programs would be continued. If the PSC knows how it wishes to modify a plan to alleviate undue rate impact, it does not make sense to enforce a strict requirement that a new plan be submitted.

Nevertheless, if the Commission finds that PEF should have been required to re-submit its existing DSM Plan, PEF is willing to make such a filing with the Commission.

Conclusion

WHEREFORE, for the reasons set forth above, PEF respectfully requests that the Commission uphold the PAA Order as issued.

In the alternative, should the Commission grant the protest, PEF respectfully submits that the appropriate remedy is not to approve the Original Goal Scenario Plan as SACE suggests, but rather to open a new goal-setting proceeding pursuant to Section 266.82 (2) and (3).

Respectfully submitted this 7th day of November, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail this 7th day of November, 2011 to all parties of record as indicated below.

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