

**BEFORE THE PUBLIC SERVICE COMMISSION**

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

**DOCKET NO. 100155-EG**

**Dated: October 24, 2011**

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

**DOCKET NO. 100160-EG**

**Dated: October 24, 2011**

**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 Sections 120.569 and 120.57, Fla. Stat., and Commission Order No. PSC-11-0469-PCO-EG, the Southern Alliance for Clean Energy (“SACE”), by and through its undersigned counsel, respectfully submits its brief and attached appendix supporting the protest of Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG.

**I. Statement of Issues and Positions**

Issue 1: Whether the Commission violated Fla. Stat. §366.82(7) by ordering a “Newly Modified DSM Plan” for FPL that matches its DSM Plan currently in place?

**SACE Position: Yes. Fla. Stat. §366.82(7) requires FEECA utilities, following the adoption of conservation goals by the Commission, to develop demand side management (DSM) plans and programs to meet those goals. However, the “newly modified DSM plan” approved by the Commission for FPL, in Order No. PSC-11-0346-PAA-EG, is nothing more than FPL’s previously approved DSM Plan, which was originally approved to meet numeric conservation goals adopted in 2004 as opposed to the currently applicable goals adopted in 2009. The statute is clear on its face that the Commission can only adopt new goals pursuant to §§366.82(2) & (3), and can only change goals only pursuant to §366.82(6). Thus, by its reliance on §366.82(7) as authority for approval and extension of FPL’s previously approved DSM plan, which will not meet currently applicable goals, the Commission has violated Fla. Stat. §366.82(7) by using the same as a de-facto goal setting provision in excess of its statutory authority.**

Issue 2: Whether the Commission violated Fla. Stat. § 366.82(7) by not requiring FPL to submit a modified plan following denial of FPL's "Modified DSM Plan" and "Alternate DSM Plan" submitted on March 25, 2011?

**SACE Position: Yes. Fla. Stat. § 366.82(7) provides that a utility whose plan is disapproved shall resubmit its modified plan within 30 days. However, in Order No. PSC-11-0346-PAA-EG, the Commission disapproved FPL's "Modified DSM Plan" and "Alternate DSM Plan," but did not require FPL to resubmit a modified DSM plan as required by Fla. Stat. § 366.82(7).**

Issue 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?

**SACE Position: Yes. Fla. Stat. §366.82(7) requires FEECA utilities, following the adoption of conservation goals by the Commission, to develop demand side management (DSM) plans and programs to meet those goals. However, the "newly modified DSM plan" approved by the Commission for PEF, in Order No. PSC-11-0347-PAA-EG, is nothing more than PEF's previously approved DSM Plan, which was originally approved to meet numeric conservation goals adopted in 2004 as opposed to the currently applicable goals adopted in 2010. The statute is clear on its face that the Commission can only adopt new goals pursuant to §§366.82(2) & (3), and can only change goals only pursuant to §366.82(6). Thus, by its reliance on §366.82(7) as authority for approval and extension of PEF's previously approved DSM plan, which will not meet currently applicable goals, the Commission has violated Fla. Stat. §366.82(7) by using the same as a de-facto goal setting provision in excess of its statutory authority.**

Issue 4: Whether the Commission violated Fla. Stat. § 366.82(7) by not requiring PEF to submit a modified plan following denial of PEF's "Original Goals Scenario DSM Plan" and "Revised Goal DSM Plan" submitted on March 25, 2011?

**SACE Position: Yes. Fla. Stat. §366.82(7) provides that a utility whose plan is disapproved shall resubmit its modified plan within 30 days. However, in Order No. PSC-11-0347-PAA-EG, the Commission disapproved PEF's "Original Goals Scenario DSM Plan" and "Revised Goals DSM Plan," but did not require PEF to resubmit a modified DSM plan as required by Fla. Stat. §366.82(7).**

## **II. Statement of the Case and Facts**

### **A. Florida Power and Light**

The Commission is required to adopt conservation goals, at least every five years, for electric utilities regulated under the Florida Energy Efficiency and Conservation Act

("FEECA").<sup>1</sup> Florida Power & Light ("FPL"), the largest investor-owned utility in the state, is a FEECA-regulated utility. On June 26, 2008, the Commission established a conservation goal setting docket, Docket No. 080407-EF, to adopt goals for FPL, and held proceedings and adopted goals on December 30, 2009 as set out in Commission Order No. PSC-09-0855-FOF-EG. Pursuant to this Order and Rule 25-17.0021(4), F.A.C., FPL was then required, within 90 days, to submit a demand-side management (DSM) plan to the Commission in order to implement the goals adopted in the conservation goal setting docket. The Commission established Docket No. 100155-EG for the filing and consideration of FPL's DSM plan.

In that docket, the Commission issued Order No. PSC-11-0079-PAA-EG, which denied FPL's initial DSM plan filing because it was insufficient to meet the Commission's annual goals for multiple customer class categories in multiple years as required by Commission Order No. PSC-09-0855-FOF-EG. The Commission, pursuant to § 366.82(7), Fla. Stat. required FPL to resubmit a DSM plan within thirty days that would comply with goals adopted in Commission Order No. PSC-09-0855-FOF-EG.<sup>2</sup> On March 25, 2011, FPL submitted two plans, a "Modified DSM Plan" that modified certain programs to fulfill the requirements of Commission Order No. PSC-09-0855-FOF-EG, and an "Alternate DSM Plan." Commission Staff, based on its finding that the Modified DSM Plan was projected to achieve all goals, and would not create an undue rate impact, recommended that the Commission approve FPL's Modified DSM Plan.<sup>3</sup> Furthermore, to the extent the Commission had any

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<sup>1</sup> §§366.81 -85, 403.519, Fla.Stat.

<sup>2</sup> It is noteworthy that the Commission, pursuant to § 366.82(7), Fla. Stat., required FPL to resubmit a modified plan after denying FPL's initial filing due to the fact that it was insufficient to meet the applicable numerical conservation goals.

<sup>3</sup> See Docket No. 100155-EG, *Staff Recommendation*, May 12, 2011.

concern about rate impacts, SACE argued in both written and oral comments that Commission should approve the FPL “Modified DSM Plan” but that costs to ratepayers could be reduced through better program selection and design, without reducing energy savings to customers.<sup>4</sup>

In Order No. PSC-11-0346-PAA-EG, issued August 16, 2011, the Commission denied FPL’s “Modified DSM Plan.”<sup>5</sup> In the same order, the Commission, erroneously relying on §366.82(7), Fla. Stat., further ordered that a “newly modified DSM Plan *consisting of programs currently in effect*” be approved.<sup>6</sup> Thus, the effect of the order is to have a DSM Plan in place, which is nothing more than FPL’s previously approved DSM plan, which was designed to implement goals adopted in the 2004 conservation goal setting proceeding.<sup>7</sup> The 2004 goals, which were adopted before the Legislature amended §366.82 in 2008 in order to require the Commission to adopt more meaningful conservation goals, are in sharp contrast to the new, more robust, conservation goals adopted by the Commission in Order No. PSC-09-0855-FOF-EG. Thus, the Commission, through its approval and extension of FPL’s existing DSM Plan, utilized improper procedure to change FPL’s goals, and thus has exceeded its statutory authority by utilizing § 366.82(7), Fla. Stat., as a de-facto goal setting provision. In order to properly adopt new goals for FPL, or change FPL’s goals, the Commission would have had to acted pursuant to § 366.82(2) & (3), Fla. Stat., or §366.82(6), Fla. Stat., and followed all corresponding procedural requirements. However,

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<sup>4</sup> See SACE Comments filed in Docket No. 100155-EG on July 15, 2010; August 3, 2010; December 23, 2010; and March 25, 2011.

<sup>5</sup> Although the Commission disapproved the Modified DSM Plan, it did not require FPL to submit a modified plan within 30 days as required by § 366.82(7), Fla. Stat.

<sup>6</sup> Commission Order No. PSC-11-0346-PAA-EG, August 16, 2011, p.5 (emphasis added).

<sup>7</sup> Commission Order No. PSC-04-0763-PAA-EG.

the Commission instead erroneously relied on §366.82(7) in excess of its statutory authority.

The Commission's approval and extension of FPL's previously approved DSM plan, which implements the goals adopted in Commission Order No. PSC-04-0763-PAA-EG, will result in considerably less energy savings to residential, commercial and industrial customers in Florida as opposed to the energy savings required in Commission Order No. PSC-09-0855-FOF-EG, issued in 2009.<sup>8</sup> Due to this fact, and moreover the Commission's violation of law, SACE, on September 6, 2011, filed a protest challenging the legal basis for Commission Order No. PSC-11-0346-PAA-EG.

## **B. Progress Energy Florida**

Progress Energy Florida, Inc. ("PEF"), the second-largest investor-owned utility in the state, is a FEECA-regulated utility. On June 26, 2008, the Commission established a conservation goal setting docket, Docket No. 080408-EF, to adopt goals for PEF, and held proceedings and adopted goals for PEF on March 31, 2010<sup>9</sup> as set out in Commission Order No. PSC-10-0198-FOF-EG. Pursuant to this Order and Rule 25-17.0021(4), F.A.C., PEF was then required, within 90 days, to submit a demand-side management (DSM) plan to the Commission in order to implement the goals adopted in the conservation goal setting docket. The Commission established Docket No. 100160-EG for the filing and consideration of PEF's DSM plan.

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<sup>8</sup> Compare the annual and cumulative GWh energy savings in Commission Order No. 04-0763-PAA-EG, p.3 to the significantly more robust annual and cumulative GWh energy savings in Commission Order No.09-0855-FOF-EG, p.17.

<sup>9</sup> The goals were originally adopted on December 30, 2009 as set out in Commission Order No. PSC-09-0855-FOF-EG, but later adjusted through Order No PSC-10-0198-FOF-EG to correct a double-counting error.

In that docket, the Commission issued Order No. PSC-10-0605-PAA-EG, which denied PEF's initial DSM plan filing because it was insufficient to meet the Commission's annual goals for multiple customer class categories in multiple years as required by Commission Order No. PSC-10-0198-FOF-EG. The Commission, pursuant to § 366.82(7), Fla. Stat. required PEF to resubmit a DSM plan within thirty days that would comply with goals adopted in Commission Order No. PSC-10-0198-FOF-EG.<sup>10</sup> PEF's submitted two plans on November 29, 2010, an "Original Goal Scenario DSM Plan," that modified certain programs to fulfill the requirements of Commission Order No. PSC-10-0198-FOF-EG, and a "Revised Goal DSM Plan." SACE provided timely, detailed comments to Commission staff in regards to these submittals, and relied upon the analysis submitted in those comments to recommend that the Commission approve the PEF "Original Goal Scenario DSM Plan, which met the newly adopted goals as required by §366.82(7), Fla. Stat." Furthermore, to the extent that the Commission had concerns about the rate impacts associated with the "Original Goal Scenario" plan, SACE commented that costs to ratepayers could be reduced through better program selection and design, without reducing energy savings to customers.<sup>11</sup>

In Order No. PSC-11-0347-PAA-EG, issued August 16, 2011, the Commission denied PEF's "Original Goal Scenario DSM Plan."<sup>12</sup> In the same order, the Commission, erroneously relying on §366.82(7), Fla. Stat., further ordered that a "newly modified DSM Plan

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<sup>10</sup> It is noteworthy that the Commission, pursuant to § 366.82(7), Fla. Stat., required PEF to resubmit a modified plan after denying PEF's initial filing due to the fact that it was insufficient to meet the applicable numerical conservation goals.

<sup>11</sup> See SACE Comments filed in Docket No. 100160-EG on July 15, 2010; August 3, 2010; December 23, 2010; March 25, 2011; and June 3, 2011.

<sup>12</sup> Although the Commission disapproved the Original Goal Scenario DSM Plan, it did not require PEF to submit a modified plan within 30 days as required by §366.82(7), Fla. Stat.

*consisting of programs currently in effect*” be approved.<sup>13</sup> The effect of the order is have a DSM Plan in place, which is nothing more than PEF’s previously approved DSM plan, which was designed to implement goals adopted in the 2004 conservation goal setting proceeding.<sup>14</sup> The 2004 goals, which were adopted before the legislature amended §366.82 in 2008 in order to require the Commission to adopt more meaningful conservation goals, are in sharp contrast to the new, more robust, conservation goals adopted by the Commission in Order No. PSC-10-0198-FOF-EG. Thus, the Commission, through its approval and extension of PEF’s existing DSM Plan, utilized improper procedure to change PEF’s goals, and thus has exceeded its statutory authority by utilizing §366.82(7), Fla. Stat., as a de-facto goal setting provision. In order to properly adopt new goals for PEF, or change PEF’s goals, the Commission would have had to acted pursuant to § 366.82(2) & (3), Fla. Stat., or §366.82(6), Fla. Stat., and followed all corresponding procedural requirements. However, the Commission instead erroneously relied on §366.82(7) in excess of its statutory authority.

The Commission’s approval and extension of PEF’s previously approved DSM plan, which implements the goals adopted in Commission Order No. PSC-04-0769-PAA-EG, will result in considerably less energy savings to residential, commercial and industrial customers in Florida as opposed to the energy savings required in Commission Order No. PSC-10-0198FOF-EG, issued in 2010.<sup>15</sup> Due to this fact, and moreover the Commission’s

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<sup>13</sup> Commission Order No. PSC-11-0347-PAA-EG, August 16, 2011, p.5 (emphasis added).

<sup>14</sup> See Commission Order No. PSC-04-0769-PAA-EG.

<sup>15</sup> Compare the annual and cumulative GWh energy savings in Commission Order No. 04-0769-PAA-EG, p.3 to the significantly more robust annual and cumulative GWh energy savings in Commission Order No.10-0198-FOF-EG, p.12.

violation of law, SACE, on September 6, 2011, filed a protest challenging the legal basis for Commission Order No. PSC-11-0347-PAA-EG.

### **III. Summary of Argument**

On August 16, 2011, the Public Service Commission (“Commission”) issued Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG in the instant dockets that denied PEF’s “Original Goals Scenario DSM Plan” and FPL’s “Modified DSM Plan” respectively and purported to create a “newly modified DSM Plan” for both utilities, which is nothing more than FPL’s DSM plan and PEF’s DSM plan currently in place. The Commission order violates §366.82(7), Fla. Stat. because it requires that FEECA utilities, following Commission adoption of conservation goals, to develop plans and programs that *meet* those goals; instead, the Commission utilized §366.82(7) as a de-facto goal setting provision. The law is clear and unambiguous that §366.82(7), Fla. Stat. requires the Commission to approve, deny or modify utility DSM plans that implement the most recently adopted goals, in the instant matters, the goals adopted for FPL in 2009 in Order No. 09-0855-FOF-EG and the goals adopted for PEF in 2010 in Order No. PSC-10-0198-FOF-EG. However, in Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG, the Commission exceeded its authority under § 366.82(7), Fla. Stat., by denying FPL’s “Modified DSM Plan” and PEF’s “Original Goal Scenario DSM Plan” and approving a “newly modified DSM plan” for both utilities that does nothing more than extend FPL’s and PEF’s previous DSM plans that were approved to meet significantly weaker goals set in the 2004 conservation goal setting proceeding as adopted in Order Nos. PSC-04-0763-PAA-EG and PSC-04-0769-PAA-EG.<sup>16</sup> In

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<sup>16</sup> PEF petitioned the Commission in 2006 for approval of two new DSM programs and revisions to six existing DSM programs. The DSM modifications were granted pursuant to Commission Order No. PSC-06-1018-TRF-EG;

so doing, the Commission changed FPL's and PEF's numeric conservation goals, and thus violated §366.82(7), Fla. Stat., because the Commission simply does not have the authority to adopt or change goals pursuant to this provision. Rather, the Commission is required to adopt goals pursuant to the provisions of §§366.82(2) & (3), Fla. Stat., and furthermore can change goals for reasonable cause pursuant to §366.82(6).

Fla. Stat. § 366.82(7) is plain on its face. There is no authority in this statutory provision that would permit the Commission to adopt or change *goals* through the modification of DSM *plans*. In sharp contrast, the limit of the Commission's authority under this subsection is to approve, deny or modify plans, and the Commission simply cannot revisit previously adopted conservation goals through §366.82(7), Fla. Stat. This is plainly evidenced by the fact that the Legislature has established a specific statutory provision requiring the Commission to adopt goals, §366.82(2), Fla. Stat., and another provision, §366.82(3), Fla. Stat., setting forth the factors that the Commission should consider when adopting goals. Moreover, §366.82(6), Fla. Stat., allows the Commission to change the goals "for reasonable cause." However, the Commission's Order at issue made no reference whatsoever to these goal setting provisions, and instead relied on §366.82(7) to effectuate an improper change in FPL's and PEF's goals. This is a clear procedural violation that is in excess of the Commission's statutory authority, because in order to adopt new goals for FPL or PEF, or to change FPL's or PEF's goals, the Commission should have acted pursuant to §§366.82(2), (3) or (6), and complied with all applicable procedural and due process

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FPL petitioned the Commission in 2006 for approval of two new DSM programs and revisions to seven existing DSM programs. The DSM modifications were granted pursuant to Commission Order No. PSC-06-0740-TRF-EI.

requirements. Ultimately, the Commission simply misapplied §366.82(7), Fla. Stat. in order to circumvent the goals setting provision(s) contained in the statute.

Stated simply, the plain language of §366.82, Fla. Stat. is unambiguous in establishing the proper procedures by which the Commission can adopt or change goals, as well as the Commission's authority to approve, deny or modify DSM plans. As a result, there is no need to resort to the legislative intent of the statute or for statutory interpretation. However, should the Commission determine that a review of the legislative intent is required to determine the meaning of the statute, the legislative history indicates that the 2008 amendments<sup>17</sup> to §366.82, Fla. Stat., required the Commission to set more meaningful conservation goals. This intent is evidenced, for instance, in the House of Representatives Staff Analysis of HB 7135.<sup>18</sup> Furthermore, the Commission's deliberations during the 2009 goals setting process are replete with references acknowledging the need for more robust goals to meet legislative intent.<sup>19</sup> Nevertheless, in the instant docket, this Commission disregarded legislative intent by approving and extending a plan that implements much weaker goals based on the so-called Rate Impact Measure (RIM) cost-effectiveness test. The Commission in 2009 moved away from the RIM test to the Total Resource Cost (TRC) cost-effectiveness test to encourage more energy efficiency implementation in Order Nos. PSC-09-0855-FOF-EG and PSC-10-0198FOF-EG.<sup>20</sup>

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<sup>17</sup> H.B. 7135 (2008), line 2396 (adding provision §366.82(3)).

<sup>18</sup> House of Representatives Staff Analysis of HB 7135, March 16, 2008. ("This bill builds on last year's legislation and includes policies developed through these discussions, including: Requiring the PSC to adopt goals to increase and promote cost-effective demand-side and supply-side efficiency and conservation programs and renewable energy systems.")

<sup>19</sup> Docket Nos. 080407, 080408, *Transcript, Agenda Conference, Item 9*, November 10, 2009, pp. 26, 86, 89 & 98.

<sup>20</sup> Docket No. 080407, 080408, Commission Order No. PSC-09-0855-FOF-EG, p. 15 ("The goals proposed by each utility rely upon the E-RIM Test. Our intention is to approve conservation goals for each utility that are more robust

Ultimately, the Commission violated §366.82(7), Fla. Stat., by utilizing the same as a de-facto goal setting provision and defied legislative intent for more robust goals by approving and extending FPL's and PEF's previously approved DSM plans that implement goals established in 2004 based on the rejected RIM test.

Similarly, should the Commission determine that statutory construction is required, the only reasonable conclusion of such an analysis is that the Commission order violates §366.82(7), Fla. Stat. by failing to construe the related goals setting provisions in the statute *in pari materia*. This failure renders §§366.82(2), (3), and (6), Fla. Stat. meaningless and furthermore produces an absurd result. The Commission establishes goals through a proceeding where it can weigh complex and extensive evidence and reach conclusions based on the evidence. The Commission must also consider a host of factors prior to establishing goals that includes the cost and benefits to the general body of ratepayers as a whole for specific energy efficiency measures. § 366.82(3), Fla. Stat. If the Commission were able to circumvent that process, as it has done in this case, it renders §§366.82 (2), (3), and (6), Fla. Stat., meaningless. Not only has it rendered these sections meaningless but has produced an absurd result whereby the Commission purports to create a “newly modified DSM plan,” which is nothing more than FPL's and PEF's previously approved DSM plans, which implement goals set in 2004 and thereby ignores the recent goal setting Order Nos. PSC-09-0855-FOF-EG and PSC-10-0198-FOF-EG.

Moreover, the Commission has manipulated the penalty provisions of §366.82(8), Fla. Stat., in an attempt to justify its misapplication of §366.82(7), Fla. Stat. The penalty

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than what each utility proposed. Therefore, we approve goals based on the unconstrained E-TRC Test for PEF, PEF, TECO, Gulf, and FPUC.”)

provision clearly states that the Commission may authorize financial penalties for “those utilities that fail to meet their *goals*.” §366.82(8), Fla. Stat. (emphasis added). Commission Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG allegedly do not change the FPL or PEF conservation *goals*, but rather modify the FPL and PEF DSM *Plan*. Yet in its orders, the Commission establishes that FPL and PEF will only be subject to financial penalty if they do not meet the “savings projections” (goals) in the “newly modified DSM plan,” which essentially implements the 2004 goals.<sup>21</sup> This ploy renders the goal setting and penalty provisions in §§366.82 (8), Fla. Stat., meaningless and produces an absurd result never intended by the Legislature.

Finally, §366.82(7), Fla. Stat. is clear on its face that if the Commission disapproves a plan, “the utility whose plan has been disapproved shall resubmit its modified plan within 30 days.” In Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG, the Commission denied FPL’s and PEF’s DSM plans yet did not require that FPL and PEF submit a modified DSM plan within the statutory 30 day time frame. Since the Commission denied FPL’s “Modified DSM Plan,” and PEF’s “Original Goal Scenario DSM Plan” FPL and PEF were required to resubmit a modified plan within 30 days, but never did so. The Commission’s failure to require FPL and PEF to resubmit a modified plan is a violation of § 366.82(7), Fla. Stat.

The Commission should vacate Commission Order No. PSC-11-0346-PAA-EG; and order the approval of the FPL “Modified DSM Plan” that meets the energy savings goals adopted in Commission Order No. PSC-09-0855-FOF-EG. In the alternative, the Commission should approve the portions of the FPL “Modified DSM Plan” which meet

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<sup>21</sup> Commission Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG, August 16, 2011, p.5

Commission approval and order FPL to resubmit a modified DSM Plan that addresses specific deficiencies identified by the Commission, including concerns about rate impacts. The Commission should also vacate Commission Order No. PSC-11-0347-PAA-EG; and order the approval of the PEF “Original Goal Scenario DSM Plan” that meets the energy savings goals adopted in Commission Order No. PSC-10-0198-FOF-EG. In the alternative, the Commission should approve the portions of the PEF “Original Goals Scenario DSM Plan” which meet Commission approval and order PEF to resubmit a modified DSM Plan that addresses specific deficiencies identified by the Commission, including concerns about rate impacts.

**IV. Argument 1: The Commission Violated §366.82(7), Fla. Stat. By Utilizing This Provision as a De-Facto Goal Setting Provision.**

**A. The statute is plain on its face: the Commission can only adopt or change goals pursuant to the goal setting provisions contained in §§366.82(2), (3), and (6), Fla. Stat.**

§366.82, Fla. Stat. is plain on its face that the Commission has the authority, and moreover is required, to establish conservation goals. “The commission shall adopt appropriate goals for increasing the efficiency of energy consumption ....” §366.82(2), Fla. Stat. Furthermore, the statute sets out specific factors the Commission must consider before setting conservation goals. §366.82(3), Fla. Stat. The Commission may also change conservation goals when reasonable cause exists pursuant to Fla. Stat. § 366.82(6), and may also, on its own motion or petition by a substantially affected person or a utility, initiate a proceeding to review and, if appropriate, modify the goals. Rule 25-17.0021(2),

F.A.C.<sup>22</sup> Thus, the statute and the Commission's rules clearly authorize the Commission, pursuant to the statute's goal setting provisions in §§366.82(2), (3), and (6), Fla. Stat., to adopt or change goals. There is no other provision in §366.82, Fla. Stat. or Commission rules that contemplates adoption of goals, or a change in goals, except through these provisions.

Likewise, the language in §366.82(7) Fla. Stat. is equally unambiguous. After the conservation goals are set, the electric utility must submit a DSM plan to implement the currently applicable goals. §366.82(7) Fla. Stat. provides, in pertinent part:

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...If the commission disapproves a *plan*, it shall specify the reasons for the disapproval, and the utility whose *plan* is disapproved shall resubmit its modified *plan* within 30 days. (emphasis added).

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Thus, following adoption of goals, and submission of plans and programs by utilities, the Commission then has the authority to approve, deny, or modify the plans for the reasons specified in the statute. However, §366.82(7) simply does not provide a basis for the Commission to adopt or change goals, as it has done in the instant matter. Rather, the

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<sup>22</sup> For instance, PEF petitioned the Commission in 2006 for approval of two new DSM programs and revisions to seven existing DSM programs. The DSM modifications were granted pursuant to Commission Order No. PSC-06-1018-TRF-EG and FPL petitioned the Commission in 2006 for approval of two new DSM programs and revisions to seven existing DSM programs. The DSM modifications were granted pursuant to Commission Order No. PSC-06-0740-TRF-EI..

Commission would have had to acted pursuant to §366.82(2), (3), or (6), and followed all procedural and due process requirements associated with these provisions.

The meanings of §§366.82(2), (3), (6) & (7), Fla. Stat. are plain on their face and require no statutory construction in order to determine legislative intent. In attempting to discern legislative intent, a court must first look at the actual language used in the statute. *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000); accord *BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003). When the statute is clear and unambiguous, it is not necessary to look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *See Lee County Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 303 (Fla. 2002). In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. *See State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004).

In the instant cases, the Commission violated the plain language of Fla. Stat. §366.82(7) by relying on this provision to change FPL's and PEF's goals. The Commission denied FPL's "Modified DSM Plan" and PEF's "Original Goal Scenario DSM Plan," which were intended to appropriately implement the goals adopted in the most recent conservation goal setting order,<sup>23</sup> and instead approved and extended FPL's and PEF's previously approved DSM plans, which were intended to implement the goals adopted in 2004. Therefore, the Commission impermissibly substituted § 366.82(7) for §§ 366.82(2), (3) and/or (6), Fla. Stat., which is a clear procedural violation and an abuse of the Commission's statutory authority.

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<sup>23</sup> Commission Order Nos. PSC-09-0855-FOF-EG and PSC-10-0198-FOF-EG.

In fact, the Commission's own staff found it difficult to justify circumvention of the statute's goal setting provisions by utilizing the Commission's authority to deny or modify plans. For instance, in supporting the Commission order for PEF, staff indicated that "[w]e find that the programs currently in effect, contained in PEF's existing Plan, are cost effective and accomplish the *intent* of the statute."<sup>24</sup> (emphasis added). However, the intent of the statute is irrelevant when the Commission is violating the *letter* of the statute, as it has done in the instant matter. Moreover, there is no need for analysis of statutory intent when the statute is clear on its face. When the statute is plain on its face, utilizing statutory construction constitutes an abrogation of legislative power. *Nicoll v. Baker*, 668 So. 2d 989, 990-91 (Fla. 1996). Ultimately, the Commission has utilized administrative contortionism to circumvent the plain meaning of the statute, and as such, has violated the law in order to improperly change FPL's and PEF's goals.

#### **B. Legislative intent never contemplated the "status quo."**

Should the Commission decide that §366.82, Fla. Stat., is not plain on its face and requires statutory interpretation, it is well-settled that beyond looking at the plain meaning of the statute, legislative intent is the polestar that guides a statutory construction analysis. *See State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001); *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998). At the July 26, 2011, Agenda Conference, the Commission made it very clear that its intent was on maintaining the "status quo"<sup>25</sup> in

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<sup>24</sup> Commission Order No. 11-0347-PAA-EG, p.7.

<sup>25</sup> Docket No. 100160-EG, *Agenda Conference Transcript, Item No. 5*, July 26, 2010, p. 82; Docket No. 100155-EG; *See Agenda Conference Transcript, Item No. 6*, July 26, 2010, p. 2-10

regards to FPL's and PEF's goals, which is in direct contravention to the legislative intent of the 2008 amendments of FEECA.

In 2008, the legislature amended §366.82, Fla. Stat. to add subsection (3) which specifically enumerates certain factors that the Commission must consider when adopting goals. The factors include:

- (a) The costs and benefits to customers participating in the measure.
- (b) The costs and benefits to the general body of ratepayers as a whole, including utility incentives and participant contributions.

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§366.82(3) Fla. Stat.

These factors were added to the statute to encourage the Commission to set more meaningful conservation goals.<sup>26</sup> This intent is evidenced in the House of Representatives Staff Analysis of HB 7135,<sup>27</sup> and the Commission's deliberations during the 2009 goals setting process, which are replete with references acknowledging the need for more robust goals to meet legislative intent.<sup>28</sup> Increased energy efficiency implementation required that the Commission move away from the so-called Rate Impact Measure (RIM) cost-effectiveness test and instead utilize the more expansive Total Resource Cost (TRC) cost-effectiveness test. The Commission decided that it would reject the RIM test that it had relied on in past conservation goal setting proceedings and embrace the TRC test in

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<sup>26</sup> H.B. 7135 (2008), line 2396.

<sup>27</sup> House of Representatives Staff Analysis of HB 7135, March 16, 2008. ("This bill builds on last year's legislation and includes policies developed through these discussions, including: Requiring the PSC to adopt goals to increase and promote cost-effective demand-side and supply-side efficiency and conservation programs and renewable energy systems.")

<sup>28</sup> Docket No. 080408-EG, *Transcript from Agenda Conference, Item 9*, November 10, 2009, pp. 26, 86, 89 & 98.

the 2009 goal setting proceedings.<sup>29</sup> Thus, the goals set in the past, such as in 2004, provide much weaker energy savings for utility customers than do the conservation goals set in 2009. Nevertheless, the Commission, in Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG, defied legislative intent by effectuating a de-facto change in FPL's and PEF's conservation goals through a clear procedural violation.

Specific concerns over costs of the FPL "Modified DSM Plan" were not raised by the Commission during its July 26, 2011 Agenda Conference.<sup>30</sup> In fact, the Commission's own staff indicated that the FPL "Modified DSM Program" would not create an undue rate impact for FPL customers.<sup>31</sup> At that same Agenda Conference, the Commission expressed concern over the cost of the PEF DSM plans. However, the legislative intent of FEECA requires that the Commission explore ways in which to make FEECA-regulated utilities' plans, like PEF's and FPL's DSM plans, the most cost-effective and most cost-efficient conservation plans. The legislative intent of FEECA states in part:

The Legislature finds and declares that it is critical to utilize the *most efficient and cost-effective* demand-side renewable energy systems and *conservation systems* in order to protect the health, prosperity, and general welfare of the state and its citizens. (emphasis added).

§366.81, Fla. Stat.

Moreover, SACE offered numerous comments, prior to the Agenda Conference, on how the PEF programs, and FPL's programs, could be made more cost-efficient. However, rather

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<sup>29</sup> The Commission approved DSM plans for all the FEECA-regulated utilities that implement goals based on the TRC test, except for PEF and Florida Power and Light. Oddly enough, the Commission chose to handle these DSM plans of FPL and PEF differently.

<sup>30</sup> Docket No. 100155-EG, *Transcript from Agenda Conference, Item No. 6*, July 26, 2010, pp. 2-10. The total transcript for the FPL DSM Plan portion of the Agenda Conference amounts to 9 pages.

<sup>31</sup> Docket No. 100155-EG, Staff Recommendation, May 12, 2011. p.4

than exercising its authority under § 366.82(7), Fla. Stat., to approve, deny or modify plans or programs to meet the more robust conservation goals adopted in Order Nos. PSC-09-0855-FOF-EG and PSC-10-0198-FOF-EG most cost-effectively and efficiently, as the Legislature intended, the Commission violated §366.82(7) in order to effectuate a de-facto goals for the state's two largest utilities. Stated differently, the Commission maintained the "status quo" goals in violation of the plain language of the statute and the legislative intent in the 2008 FEECA amendments.

**C. The Commission's violation of law produces an absurd result and renders the statute's goal-setting provisions meaningless.**

Should the Commission decide that §366.82, Fla. Stat. requires statutory interpretation beyond looking at legislative intent, it is well-settled that to ascertain the meaning of a specific statutory section, beyond looking at the plain meaning of the statute, the section should be read in the context of its surrounding sections. *See Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000) (stating that "statutes must be read together to ascertain their meaning"); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) (stating that, "[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another"). The doctrine of *in pari materia* requires that related statutes be read together to give effect to legislative intent. *See McGhee v. Volusia County*, 679 So. 2d 729, 730 (Fla. 1996).

It is important to read related subsections of statute in harmony (*in pari materia*) so as to avoid producing a patently absurd result or rendering statutory provisions meaningless. Statutory interpretations that lead to absurd results should be avoided. *City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1950); *see also Johnson v. State*, 91 So.2d

185 (Fla. 1956). A statutory provision should not be construed in such a way that it renders meaningless or absurd any other statutory provision. *See Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995) ("If possible, the courts should avoid a statutory interpretation which leads to an absurd result.")

In the instant cases, the Commission exceeded its authority under §366.82(7), Fla. Stat., by using this provision as the basis for adopting or changing *goals* through the modification of DSM *plans*. Not only is this a clear procedural error, but this interpretation turns the FEECA goal setting process on its head and renders the statute's goal setting provisions meaningless. The Commission engaged in an extensive goal setting process for FPL and PEF.<sup>32</sup> At the conclusion of the goal-setting process, the Commission issued Order No. PSC-09-0855-FOF-EG that adopted goals for FPL, and Order No. PSC-10-0198FOF-EG that adopted goals for PEF. Once the goals were adopted, FPL and PEF was required to "develop plans and programs *to meet the overall goals.*" §366.82(7), Fla. Stat. (emphasis added). FPL and PEF fulfilled that obligation by filing a "Modified DSM Plan" and an "Original Goal Scenario DSM Plan" respectively. The Commission, pursuant to §366.82(7), Fla. Stat., may modify or deny programs when in the public interest, or when the plans or programs would have an undue rate impact, but nowhere in this subsection does it provide authority for the Commission to modify plans or programs in such a way that would change goals. In fact, such an interpretation, which was adopted by the Commission in the instant dockets, would lead to an absurd result by permitting the Commission to adopt conservation goals without utilizing the appropriate goal setting process spelled out in

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<sup>32</sup> See Docket Nos. 080407-EG and 080408-EG. The dockets were opened on June 26, 2008.

§§366.82(2) & (3), or by using its authority to change goals pursuant to under §366.82(6) or Commission Rule 25-17.0021, F.A.C.

Proponents of the Commission's order may argue that an agency is entitled to great deference to interpret a statute it is charged with enforcing. *See BellSouth Telecommunications, Inc. v. Johnson*, 708 So.2d 594, 596 (Fla.1998). Such reliance is misplaced. It is important to note that such deference is only granted if the agency's interpretation of statute is not clearly unauthorized or erroneous. *P.W. Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla.1988). In the instant cases, no deference is due to the Commission as the statute is clear on its face that adopting or changing goals pursuant to §366.82(7), Fla. Stat. is unauthorized and clearly erroneous. Rather, it is clear that the Commission can only adopt or change goals pursuant to §§366.82(2), (3) or (6). Alternatively, if statutory construction were needed to determine if the Commission's interpretation of §366.82, Fla. Stat. was correct, the Commission's construction would still fail as it renders the statute's goal setting provisions meaningless and produces an absurd result.

Additionally, proponents of the Commission's order may argue that the Commission's order is appropriate given its authority to set just and reasonable rates. §366.041, Fla. Stat. Reliance on this principle is again misplaced. Another rule of statutory construction which is relevant in this inquiry is that where two statutory provisions are in conflict, the specific provision controls the general provision. *See State ex rel. Johnson v. Vizzini*, 227 So. 2d 205, 207 (Fla. 1969); *see also State v. J.M.*, 824 So. 2d 105, 112 (Fla. 2002) (noting the "long-recognized principle of statutory construction that where two statutory provisions are in conflict, the specific statute controls over the general statute"). In the

instant case, the Commission's duty in setting goals and approving DSM plans is specifically dictated in §366.82, and therefore prevails over claims of general ratemaking authority as set forth in §366.041, Fla. Stat.

**D. The Commission's manipulation of the statute's penalty provision further reinforces the fact that the Commission violated § 366.82(7), Fla. Stat., by utilizing that provision as a de-facto goal setting provision.**

In order to support its erroneous application of Fla. Stat. § 366.82(7), the Commission further misapplied the penalty provisions of §366.82(8), Fla. Stat. The penalty provision states in pertinent part that the Commission may authorize financial penalties for "those utilities that fail to meet their goals." §366.82(8), Fla. Stat. (emphasis added). §366.82(8) also allows for financial rewards should the utility exceed its goals. While this subsection is permissive in that it does not mandate penalties for non-attainment of goals, its misapplication by the Commission further reinforces the fact that the Commission violated § 366.82(7) by utilizing the same as a de-facto goal setting provision.

Commission Order Nos. PSC-11-0346-PAA-EG and PSC-11-0346-PAA-EG were carefully crafted in an attempt to demonstrate that the Commission was not changing FPL's or PEF's conservation *goals*, but rather simply modifying the FPL and PEF DSM *Plans*. Yet in its order, the Commission establishes that FPL and PEF will only be subject to financial penalty if they do not meet the "savings projections" (goals) in the "newly modified DSM plan."

As a result of our decision to modify PEF's 2010 Plan, we wish to clarify that PEF shall not be eligible for any financial reward pursuant to these statutory sections unless it exceeds the goals set forth in Order No. PSC-10-0198-FOF-EG. Conversely, PEF shall not be subject to any financial penalty *unless it fails to achieve the savings projections contained in the*

*existing DSM plan*, which is approved and extended today. (emphasis added).<sup>33</sup>

FPL's reward and penalty provision is structured identically.<sup>34</sup> In effect, this arrangement essentially constructs two sets of goals: one set of goals (the currently applicable goals adopted in Order No. PSC-10-0198FOF-EG) to serve as the basis for PEF's financial reward if exceeded; and one set of goals (the goals previously adopted in Order No. PSC-04-0769-PAA-EG) as the basis for PEF's financial penalty if not attained. This of course begs the question that, if the Commission did not intend to change the PEF goals, or FPL goals, then why are there two sets of energy savings goals that apply to FPL and PEF in determining financial penalty and reward? Furthermore, why is there no penalty for PEF for failing to attain the energy savings goals established in Order No. PSC-10-0198-FOF-EG, or for FPL for failing to attain the energy savings goals established in Order No. PSC-09-0855-FOF-EG as is clearly envisioned by the statute? The Commission's penalty / reward arrangement with FPL and PEF signals a clear intent to change the 2009 goals through denying FPL's "Modified DSM Plan" and PEF's "Original Goal Scenario DSM Plan" and substituting a "newly revised DSM plan" for FPL and PEF that was intended to meet goals established in 2004. This administrative contortionism is the only way that the Commission can carry out its procedurally impermissible de-facto goal setting without unduly punishing the utilities for being required to do nothing more than continue to implement their previously approved DSM plans.

This provision of the order renders the goal setting provisions in §§366.82(2) and (3), Fla. Stat., meaningless since the Commission has set two sets of goals as the basis for

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<sup>33</sup> Commission Order No. PSC-11-0347-PAA-EG, p.7.

<sup>34</sup> Commission Order No. PSC-11-0346-PAA-EG, p.5.

which FPL and PEF will be rewarded or penalized. FEECA contemplates only one set of goals, which are set through the goal setting provisions of §§366.82(2) and (3) Fla. Stat. FEECA further contemplates that following the adoption of goals, each utility shall develop plans and programs *to meet* the goals. §366.82(7), Fla. Stat. (emphasis added). The establishment of two sets of goals, with no penalty for attaining the currently applicable goals for which the DSM proceeding was intended to implement, creates an absurd result which was never intended by the plain language of the statute.

**V. Argument 2: The Commission Violated § 366.82(7), Fla. Stat., by not Requiring FPL or PEF to Resubmit Modified Plans Following Denial of FPL’s “Modified DSM Plan” and “Alternate DSM Plan and PEF’s “Original Goals Scenario Plan” and “Revised Goals DSM Plan.”**

If the Commission disapproves a plan, “the utility whose plan has been disapproved shall resubmit its modified plan within 30 days.” §366.82(7), Fla. Stat. The statute is plain on its face on this point. In Order No. PSC-11-0347-PAA-EG, the Commission denied PEF’s “Original Goal Scenario DSM Plan,” therefore PEF was required to resubmit a modified plan within 30 days. Similarly, in Order No. PSC-11-0346-PAA-EG, the Commission denied FPL’s “Modified DSM Plan,” therefore FPL was required to resubmit a modified plan within 30 days. However, the Commission did not require that FPL or PEF resubmit a modified DSM plan within the statutory 30 day time frame, and thus violated §366.82(7), Fla. Stat.

As referenced *supra*, it is extremely telling that when the Commission denied PEF’s original DSM plan submittal in Order No. PSC-10-0605-PAA-EG and denied FPL’s original DSM plan submittal in Order No. PSC-11-0079-PAA-EG, it required PEF and FPL to resubmit a modified plan because their proposed plans were insufficient to meet the goals as required by Order No. PSC-10-0198-FOF-EG and Order No. PSC-09-0855-FOF-EG

respectively. However, when the Commission denied PEF's "Original Goal Scenario DSM Plan" and "Revised Goal DSM Plan" and FPL's "Modified DSM Plan" and "Alternate DSM Plan" at issue in this protest, it did not require PEF or FPL to resubmit a modified plan that was intended to meet the applicable goals. Rather, it simply allowed PEF and FPL to revert to their previously approved DSM plan which does not meet the applicable goal setting orders. Ultimately, the failure of the Commission to require the refiling of a modified DSM plan that meets the applicable goals adopted in 2009 not only violates the plain language of §366.82(7), Fla. Stat, but moreover showcases the confusion of violating the law in order to effectuate a procedurally improper de-facto goal change.

## **VI. Conclusion**

The Commission violated Fla. Stat. §366.82(7) in Commission Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG by relying on this statutory provision as authority to effectuate a change in FPL's and PEF's applicable conservation goals. This is a clear procedural violation as §366.82(7) only allows the Commission to, following the adoption of goals pursuant to the goal setting provisions of the statute, approve, modify, or deny DSM plans submitted by utilities to ensure the plans meet applicable goals. The Commission simply cannot adopt or change goals pursuant to §366.82(7); rather, the statute is clear and unambiguous in that goals can only be adopted or changed pursuant to §§366.82(2), (3) and (6), Fla. Stat.

Therefore, the Commission has violated the plain language of §366.82, Fla. Stat., by attempting to set or modify goals pursuant to §366.82(7). Though the plain language of the statute is clear, should the Commission determine that statutory construction is required, the legislative history of the 2008 amendments to the statute is clear that the Legislature

intended for more robust conservation goals to be set, and that the Commission must find ways to meet the goals in the most efficient and cost-effective manner. Thus, the Commission's orders are in direct contravention to legislative intent. Moreover, a statutory construction analysis clearly reveals that the Commission orders violate §366.82(7), Fla. Stat. by failing to construe the goal setting subsections *in pari materia*, which renders §§366.82(2), (3), (6) and (8), Fla. Stat. meaningless and produces an absurd result. Finally, the Commission violated § 366.82(7), Fla. Stat., by failing to require and FPL and PEF to resubmit a modified plan following denial of PEF's "Original Goal Scenario DSM Plan" and "Revised Goal DSM Plan, " and FPL's "Modified DSM Plan" and "Alternate DSM Plan" as is required by the statute.

**Wherefore,** SACE respectfully requests that the Commission vacate Commission Order Nos. PSC-11-0346-PAA-EG and PSC-11-0347-PAA-EG; and order the approval of: (1) the FPL "Modified DSM Plan" that meets the energy savings goals in Commission Order No. PSC-09-0855-FOF-EG; or in the alternative, the Commission approve a portion of the FPL "Modified DSM Plan" which meet Commission approval and order FPL to submit a modified DSM Plan that addresses specific deficiencies identified by the Commission; and (2) the PEF "Original Goals Scenario DSM Plan" that meets the energy savings goals in Commission Order No. PSC-10-0198-FOF-EG; or in the alternative, the Commission approve a portion of the PEF "Original Goal Scenario DSM Plan" which meet Commission approval and order PEF to submit a modified DSM Plan that addresses specific deficiencies identified by the Commission.

Respectfully submitted this 24<sup>th</sup> day of October, 2011.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by US Mail and email on this 24th day of October 2011, to the following:

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