

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Commission Review of Numeric
Conservation Goals (Florida Power & Light
Company)

Docket No: 20240012-EG

Filed: September 12, 2024

**POST-HEARING BRIEF OF
FLORIDA POWER & LIGHT COMPANY**

I. INTRODUCTION

Florida Power & Light Company (“FPL” or the “Company”) hereby files with the Florida Public Service Commission (“Commission”) its Post-Hearing Brief in the above-referenced docket pursuant to Rules 28-106.215 and 28-106.307, Florida Administrative Code, and the Commission’s Orders Establishing Procedure, Order Nos. PSC-2024-0022-PCO-EG and PSC-2024-0159-PCO-EG (collectively, “OEP”), and Prehearing Order, Order No. PSC-2024-0293-PHO-EG. The purpose of this proceeding is to adopt Demand-Side Management (“DSM”) Goals, *i.e.*, numeric conservation goals, for the period of 2025-2034 pursuant to and in compliance with the current requirements of the Florida Energy Efficiency and Conservation Act (“FEECA”), Sections 366.80, *et seq.*, Florida Statutes, and the Commission’s DSM Goals Rules set forth in Chapter 25-17, Florida Administrative Code.

FPL’s proposal in this docket includes continuing some existing successful DSM programs, enhancing others, and offering innovative new programs, including increased offerings for residential low-income customers, a new heating ventilation and air conditioning (“HVAC”) option for its existing Residential On Call[®] load management program, and a new low-income renter pilot. Based on the testimony, exhibits, and discovery in this docket, FPL, Florida Rising, Environmental Confederation of Southwest Florida, and League of United Latin American Citizens (collectively, “FEL”), the Southern Alliance for Clean Energy, Inc. (“SACE”), and Walmart Inc. (“Walmart”) (collectively, referred to as the “Stipulating Parties”) worked

collaboratively to develop and enter a set of amended stipulations (“Stipulations”) filed with the Commission on August 5, 2024, that fully resolve all issues in this docket.¹ FPL’s DSM Goals, as modified by the Stipulations, offer even more opportunities and new innovative options for FPL’s customers to realize savings over the next decade, including a 50% increase in low-income customers assisted.

FPL’s proposed DSM Goals, as modified by the stipulations, are in full compliance with FEECA and the Commission’s DSM Goals Rules and, if approved and implemented, will continue to provide meaningful energy savings options to all customers, including owners, renters, and low-income customers, while ensuring that we keep customer bills as low as possible. For these reasons, the Commission should approve and adopt FPL’s proposed DSM Goals, as modified by the Stipulations, for the ten-year period of 2025-2034.

Although the Stipulating Parties entered into unopposed Stipulations that fully resolve all issues in this docket, the Commission directed, at Commission Staff’s request, that the Parties brief Issue 10 in the Prehearing Order regarding FPL’s proposed HVAC On-Bill option for its existing Residential On Call[®] load management program. Consistent with that direction, FPL herein limits this brief to address Issue 10 only. For the reasons explained below, the Commission should find that the proposed HVAC On-Bill option is an appropriate regulated DSM activity that will both increase the availability of more energy efficient equipment and expand FPL’s existing successful load control program consistent with the purpose and policy of FEECA and, therefore, should be included in FPL’s DSM Goals.

¹ The only other Parties to this docket were Florida Department of Agriculture & Consumer Services (“FDACS”) and Florida Industrial Power Users Group (“FIPUG”). FDACS took no position or objection to the Stipulations, and FIPUG joined the Stipulations as to Issue 8a (Tr. vol. 1, p. 17) but otherwise took no position or objection to the remaining Stipulations.

II. STANDARD OF REVIEW

Through FEECA, the Florida Legislature has emphasized the importance of utilizing 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.” *See* Section 366.81, Fla. Stat. Cost-effectiveness is a prevailing purpose and consideration throughout FEECA. Within this framework, the Commission is directed by the Florida Legislature to adopt “appropriate goals.” *See* Section 366.82(2), Fla. Stat.

In developing the DSM Goals, the Commission shall evaluate the full technical potential of available DSM measures and shall consider:

- (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.
- (c) The need for incentives to promote both customer-owned and utility-owned energy efficiency and demand-side renewable energy systems.
- (d) The costs imposed by state and federal regulations on the emission of greenhouse gases.

Section 366.82(3), Fla. Stat. In short, the Commission must consider these statutory factors in determining whether to adopt, modify, or reject proposed DSM Goals.

Consistent with FEECA, the Commission has adopted DSM Goals Rules that require each utility to propose cost-effective Summer and Winter peak demand (megawatt or “MW”) and annual energy (gigawatt-hour or “GWh”) Goals that are reasonably achievable in the residential and commercial/industrial classes, as well as to consider the effects of free riders and state building code and federal appliance efficiency standards (“Codes and Standards”). *See* Fla. Admin. Code R. 25-17.0021(3). The utility’s proposed DSM Goals are to be developed under two scenarios: one scenario that includes goals based on potential demand-side management programs that pass

the Participant and Rate Impact Measure (“RIM”) tests, and one scenario that includes goals based on demand-side management programs that pass the Participant and Total Resource Cost (“TRC”) tests. *Id.* Additionally, each DSM Goals proposal must include overall estimated annual program costs over a ten-year period. *Id.*

In this proceeding, the Stipulating Parties have presented unopposed Stipulations that fully resolve all of the Parties’ issues in this docket, including Issues 1 through 14 of the Prehearing Order. These Stipulations are essentially a settlement of all issues in the case. The nature of the stipulations reflecting a “settlement” on all issues in this proceeding was confirmed by FEL’s counsel at the final hearing. (Tr. vol. 1, p. 20.) When reviewing a settlement, the Commission does two things: (i) it makes factual findings based on the evidence presented by the parties; and (ii) it decides whether the settlement, in light of those findings of fact, is in the public interest. *Floridians Against Increased Rates, Inc. v. Clark*, 371 So. 3d 905, 910 (Fla. 2023) (citing Section 120.569(2)(l)-(m), Fla. Stat.). As a matter of policy, the Commission should continue to incentivize the customer-beneficial compromises and efficiencies achieved through settlements, including the one before the Commission in this docket. *See* Section 120.57(4), Fla. Stat. (recognizing that settlements are a viable way to resolve disputes among parties); *see, e.g., In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.*, Docket No. 100437-EI, Order No. PSC-12-0115-PCO-EI (FPSC March 14, 2012) (noting the Commission has a long-standing and strong policy in favor of resolving disputes through settlement or stipulation).

Despite the fact that the Stipulations by the Stipulating Parties fully resolve all issues in this docket, Staff nonetheless appears to oppose the stipulated position on Issue 10 of the Prehearing Order and asked that the Parties be directed to brief this issue. Since no other Party

opposed the approval of the Stipulations in total, including Issue 10, only FPL is left to file a post-hearing brief. Although Staff is not a Party to and did not submit any testimony in this proceeding, it appears that Staff does not agree with the stipulated position on Issue 10. While Staff's disagreement with an issue in a proposed settlement does not change the aforementioned standard of review, approval of Issue 10 is nonetheless supported by competent, substantial evidence in the record.

III. SUMMARY OF ARGUMENT

FEECA is statutorily required to be liberally construed in order to meet the complex problems of reducing electric consumption and peak demand. Further, FEECA is not to be construed to preclude new innovative or experimental programs. FPL's proposed HVAC On-Bill option is a new and innovative expansion of FPL's existing Residential On Call[®] load-management program that fits precisely within the spirit and purpose of FEECA.

Toward the conclusion of the Commission's discussion concerning the recent amendments to the DSM Goals Rule 25-17.0021, Florida Administrative Code, Commissioner (then Chairman) Fay emphasized the call for creativity from the utilities in their upcoming DSM filings.² FPL's proposed HVAC On-Bill option meets that call. The HVAC On-Bill option is a new voluntary service agreement that provides customers a vehicle to secure a new HVAC unit when they might otherwise opt to operate and repair older, less efficient HVAC equipment due to the high upfront cost of new equipment. The HVAC On-Bill option includes one integrated offering of an efficient HVAC system combined with specific load management equipment that allows FPL to control the HVAC unit during periods of peak demand and in exchange the customer receives a monthly bill

² See Rule Hearing Tr., pp. 76-77, Docket No. 20200181, May 2, 2023, available at: <https://www.floridapsc.com/pscfiles/library/filings/2023/03247-2023/03247-2023.pdf>.

credit. The load control feature of the HVAC On-Bill option will contribute to reducing peak demand similar to FPL's existing Residential On Call[®] program, and the enhanced efficiency of the new HVAC unit will reduce energy consumption and result in energy savings for the participating customers. The HVAC On-Bill option passes both the Participant and RIM tests scenario and, therefore, benefits all customers, including non-participants.

No Parties submitted any testimony or exhibits opposing the HVAC On-Bill option. Further, the only Parties other than FPL to submit testimony and exhibits in this proceeding have stipulated to the HVAC On-Bill option and its inclusion in FPL's proposed DSM Goals. Although Staff is not a Party and did not submit any testimony or exhibits in this proceeding, it appears that Staff nonetheless intends to oppose the undisputed HVAC On-Bill option by trying to incorporate the limitation in Section 366.05(2), Florida Statutes, on a utility's ability to sell appliances and equipment as a regulated activity.

Because the HVAC On-Bill option satisfies the requirements of FEECA, there is no need to look beyond FEECA. Moreover, the record demonstrates that the HVAC On-Bill option is not a "sale" of an appliance. Indeed, the undisputed and only evidence of record demonstrates that FPL will fully retain ownership and title to the HVAC equipment throughout the entire service agreement term, and title would only pass to the customer, at their election, after the HVAC agreement expires or is terminated. Accordingly, the HVAC On-Bill option is not a "sale" as defined by Florida Law and, therefore, Section 366.05(2), Florida Statutes, is inapplicable to the HVAC On-Bill option.

For these reasons, as further explained below and in FPL's testimony and discovery responses, the HVAC On-Bill option provides an innovative option for customers to secure a new, more efficient HVAC unit and lower energy bills. The program is an appropriate, cost-effective

DSM measure under FEECA that expands the existing On Call[®] load-management program to allow greater customer access to new energy-saving HVAC equipment and, therefore, should be included in FPL's proposed DSM Goals. As an approved DSM measure, the HVAC On-Bill option will be a regulated activity within the jurisdiction of the Commission.

IV. ARGUMENT

Issue 10: Is FPL's proposed HVAC On-Bill option for its existing Residential On-Call program with its associated HVAC Services Agreement (proposed Tariff sheets 9.858 through 9.866) a regulated activity within the jurisdiction of the Commission? If not, should the savings associated with FPL's HVAC On-Bill option and HVAC Services Agreement be removed from its conservation goals?

***FPL Position:** Yes. FPL's proposed HVAC On-Bill option expands the existing On Call[®] load-management program and passes the RIM cost-effectiveness test. This program provides greater customer access to new energy-saving HVAC equipment for a fixed monthly charge, and provides FPL with the ability to control that HVAC unit in peak demand situations. (*FPL witness Floyd*)*

Stipulated Position: The [Stipulating] Parties stipulate and agree that the record supports a Commission finding that FPL's proposed HVAC On-Bill option expands the existing On Call[®] load-management program to allow greater customer access to new energy-saving HVAC equipment in a way that also passes the RIM cost-effectiveness test, and should be included in FPL's proposed DSM Goals. (*Amended Stipulation, Para. 6, Issue 10*)

Based on Staff's discovery to FPL, its addition of Issue 10 as an issue in this docket, and its request at the August 8, 2024 hearing that the Parties brief Issue 10, it appears that Staff intends to recommend that FPL's HVAC On-Bill option is not a regulated activity under the Commission's jurisdiction and should be rejected as a DSM program that would count toward FPL's DSM Goals. While Staff's written discovery and deposition of FPL witness Floyd indicate its opposition to the HVAC On-Bill option, Staff did not file testimony or take a position in its Prehearing Statement formally confirming its opposition to the program. Likewise, Staff did not file, support, or oppose any positions or recommend any adjustments to the Stipulations, including Issue 10. This leaves

FPL in a somewhat difficult position. Unlike a proceeding in which parties are required to formally take positions by the time of the prehearing conference, FPL must try to anticipate and preemptively address a Staff recommendation and Staff arguments opposing the HVAC On-Bill option that will be issued after FPL's files its post-hearing brief. FPL submits that this set of circumstances raises due process concerns.

Further, it certainly could be argued that approval of a specific program, such as the HVAC On-Bill option, more appropriately rests in the DSM Plan approval phase of the DSM proceedings. *See Fla. Admin. Code R. 25-17.0021(4)* (the individual programs to meet the approved DSM Goals, such as the HVAC On-Bill option, are to be reviewed and approved by the Commission as part of the DSM Plan filed within 90 days of the final order establishing the DSM Goals). However, with the HVAC On-Bill option having been placed at issue here in the DSM Goals stage of the proceeding, and having been thoroughly litigated by Staff, FPL agrees that the HVAC On-Bill option issues should not be relitigated in the DSM Plan stage of the DSM proceedings and that the Commission should resolve and approve the program in this proceeding.

Therefore, and without waiver of any arguments or rights, FPL will attempt to address Staff's perceived concerns with the stipulated Issue 10 and explain why FPL's proposed HVAC On-Bill option DSM program is a regulated activity within the jurisdiction of the Commission that should be counted towards meeting FPL's proposed DSM Goals.

A. The HVAC On-Bill Option is a Regulated DSM Activity

In the stated purpose and policy of FEECA, the Florida Legislature found and declared that cost-effective DSM programs are critical to "protect the health, prosperity, and general welfare of the state and its citizens" and that "[r]eduction in, and control of, the growth rates of electric consumption and of weather-sensitive peak demand are of particular importance." Section 366.81, Fla. Stat. To satisfy these legislative objectives, the Florida Legislature "direct[ed] the

[C]ommission to develop and adopt overall goals and authorize[ed] the [C]ommission to require each utility to develop plans and implement programs for increasing energy efficiency and conservation and demand-side renewable energy systems within its service area.” *Id.* Further, the Legislature declared that the intent of FEECA should “not be construed to preclude experimental rates, rate structures, or programs.” *Id.* Finally, the Legislature declared that the provisions of FEECA “are to be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption and reducing the growth rates of weather-sensitive peak demand; increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use; encouraging further development of demand-side renewable energy systems; and conserving expensive resources, particularly petroleum fuels.” *Id.*

Thus, under FEECA, the Commission has broad discretion and authority to develop and approve programs that will contribute to the complex problems of reducing electric consumption and peak demand. As a consequence, DSM measures and programs that satisfy the requirements of FEECA are, and logically must be, regulated utility activities. This means that if the Commission finds a DSM measure or program is appropriate under FEECA, it becomes a regulated activity under the Commission’s jurisdiction upon its approval.

Consistent with FEECA and Rules 25-17.001, 25-17.0021, and 25-17.008, Florida Administrative Code, FPL has proposed DSM Goals for reasonably achievable demand savings and annual energy savings for the next ten years. As required by Rule 25-17.0021(3), FPL’s proposed DSM Goals are based upon FPL’s most recent planning process, applied both the Participant and RIM tests scenario and the Participant and TRC tests scenario, and considered the effects of free riders and Codes and Standards.

FPL followed a rigorous, six-step analytical process similar to the process it has used in past DSM Goal-setting proceedings to develop its proposed DSM Goals. (Tr. vol. 1, p. 138.) After careful analysis, FPL recommended goals for the period 2025-2034 that reflect continuation of its existing DSM programs with several enhancements, including a new addition to FPL's existing Residential On Call[®] load-management program to provide an on-bill upgrade option for HVAC systems, referred to as the HVAC On-Bill option. (Tr. vol 1, p. 96.)

Currently, On Call[®] provides bill credits to participating customers for allowing FPL to control customer-owned HVAC, water heating, and pool pump appliances. (Tr. vol 1, pp. 120-21.) FPL has continually modernized the program to ensure it maintains a role in the overall DSM portfolio. As FPL considered alternatives to keep the program cost-effective and increase participation throughout the 2025-2034 DSM goals period, the Company looked for innovative new cost-effective ways to engage customers in the program. (CEL Ex. 149.³) The HVAC On-Bill option is a new voluntary tariff option that provides a way to increase participation in the On Call[®] program and adds more efficient HVAC units and, thereby, increases energy efficiency. (Tr. vol. 1, p. 121.) Notably, the HVAC On-Bill option passes both the Participant and RIM tests scenario and, therefore, is cost-effective and benefits all customers, including non-participants. (Tr. vol. 1, pp. 111-122.)

The HVAC On-Bill option would provide interested customers an opportunity to acquire a new, and likely more energy-efficient, HVAC unit for a fixed monthly charge. Pursuant to a service agreement, FPL would own and maintain the HVAC unit, and the monthly service charge paid by the participant would cover the capital cost of the HVAC equipment plus maintenance and repairs of the unit for the multi-year duration of the tariffed agreement. In exchange for the right

³ FPL Response to Staff's 1st Set of Interrogatories, No. 20.

to control the unit during peak periods (load management), the participating customers will receive a load control credit similar to the credit provided for the existing On Call[®] program. Further, assuming the unit being replaced by the customer is less efficient than the current minimum standard, the customer would further benefit from the efficiency savings of the unit towards their energy consumption and monthly bill.⁴ (Tr. vol. 1, p. 121.)

FPL's HVAC On-Bill option fits precisely within the spirit and purpose of FEECA, which is statutorily required to be liberally construed in order to meet the complex problems of reducing electric consumption and peak demand. Section 366.81, Fla. Stat. The load control feature of the HVAC On-Bill option will clearly contribute to reducing peak demand similar to FPL's existing Residential On Call[®] program.⁵ Further, the enhanced efficiency of the new HVAC unit will reduce energy consumption and result in energy savings for the participating customers similar to FPL's existing Residential HVAC program.⁶ To be clear, however, the load control functionality and the new HVAC unit are inextricably intertwined as a single service offering that will be provided as a DSM load management service that will enable FPL to reduce peak demand and incentivize customer participation through bill credits. (CEL Ex. 151.⁷)

Load control measures and programs, such as the HVAC On-Bill option, are specifically authorized for Commission approval. Section 366.82(7), Florida Statutes, states in pertinent part,

⁴ The customer would also receive an upfront rebate from FPL's Residential HVAC program if selecting a qualifying high-efficiency unit. (Tr. vol. 1, p. 121.)

⁵ Combined, FPL's HVAC On-Bill option and existing Residential On Call[®] programs will result in peak demand savings of 127 Summer MW and 137 Winter MW over the 2025-2034 DSM Goals planning period. (CEL Ex. 5, pp. 28-29.)

⁶ The HVAC On-Bill option provides customers a vehicle to secure a new HVAC unit when they might otherwise opt to operate and repair older, less efficient HVAC equipment due to the high upfront cost of new equipment. By providing this option to replace older, less efficient HVAC equipment with new more energy efficient equipment that meets or exceeds current HVAC equipment efficiency standards, the program accomplishes the objective of reducing the growth rate of electric consumption. (CEL Ex. 151 (FPL Response to Staff's 3rd Set of Interrogatories Nos. 75, 76).)

⁷ FPL Response to Staff's 3rd Set of Interrogatories No. 68.

“[u]tility programs may include variations in rate design, load control, cogeneration, residential energy conservation subsidy, or any other measure within the jurisdiction of the commission which the commission finds likely to be effective; this provision shall not be construed to preclude these measures in any plan or program.”

Further, FEECA allows the Commission to approve investments in both the utility’s generation, transmission, and distribution system as well as efficiencies within the utility’s customer base, and it allows utilities to use their funds for purchasing conservation (demand reducing) facilities. Section 366.82(2), Fla. Stat. As noted above, FPL’s proposed HVAC On-Bill option includes one integrated offering of an efficient HVAC system combined with specific load management equipment that, together as a single service offering, will result in greater energy efficiency and the ability for FPL to reduce peak demand through load control technology integrated with the HVAC unit. FPL’s HVAC On-Bill option proposal is an investment that aligns the utility’s interest in building out a robust electric system with customers’ interest in being able to affordably access a new HVAC unit, reduce energy consumption, and lower electric bills. (CEL Ex. 151.⁸) This clearly represents an efficiency investment with impact across FPL’s generation, transmission, and distribution and customer base. (CEL Ex. 151.⁹)

Moreover, the HVAC On-Bill option specifically involves the generation of electricity, as both the load control and avoided cost benefits from this program are factored into FPL’s integrated resource plan. When FPL calculates its 20% minimum reserve margin for generation resource planning, it factors into its analysis all available DSM whereby FPL can interrupt its customers through load control, which would include both the HVAC On-Bill option and the

⁸ FPL Response to Staff’s 3rd Set of Interrogatories No. 68.

⁹ FPL Response to Staff’s 3rd Set of Interrogatories No. 71.

Residential On Call[®] program. For these residential load control programs, FPL factors into its generation resource plan a kW reduction per customer, which translates into an overall MW reduction for FPL's system. In other words, because FPL can interrupt electric service for its customers through the HVAC On-Bill option and other load control programs, it can build less generation and provide savings to its entire customer base. In addition, the HVAC units that FPL will deploy for the HVAC On-Bill option will be compliant with current energy-efficiency Codes and Standards, which will likely result in an efficiency benefit for FPL's entire generation system. In sum, the benefits of the HVAC On-Bill option will directly impact FPL's generation planning and the costs of owning, maintaining, and operating its generation and entire electric system. (CEL Ex. 151.¹⁰)

Notably, the HVAC On-Bill option is not a service that is available from the retail competitive HVAC market. Although there are many retailers and installers of HVAC equipment throughout Florida, none of these entities can offer a service that is combined with the load management functionality included in FPL's HVAC On-Bill option. (CEL Ex. 151; CEL Ex. 228, pp 30-31.¹¹) FPL's HVAC On-Bill option is a unique energy-efficiency and demand-reduction service that simply is not available from the competitive market.

FPL is making an efficient HVAC unit with load control available to its customers as a DSM program and helping the customers afford this type of DSM measure by addressing a potential high up-front cost for the equipment. This goal of making the measure more affordable for the customer is consistent with FEECA, which allows utilities and the Commission to have discretion and not be precluded from offering new effective programs and encourages utilities to

¹⁰ FPL Response to Staff's 3rd Set of Interrogatories No. 71.

¹¹ FPL Response to Staff's 3rd Set of Interrogatories No. 72; Floyd Dep. 30:4-25 and 31:1-10, July 12, 2024.

help customers afford DSM measures, as evidenced by the fact utilities can provide loans. *See* Section 366.82(7), Fla. Stat.¹² Although the HVAC On-Bill option is not a loan, it nonetheless meets a substantially similar goal by eliminating high upfront costs. (CEL Ex. 228, pp. 12 and 117.¹³)

The program is designed for the participants to pay all of the equipment and expenses of the program, while the general body of customers benefits from the avoided capacity savings related to FPL retaining control of the HVAC equipment. (Tr. vol 1, p. 121; CEL Ex. 151.¹⁴) Projected program costs are broken out within three main categories: (1) capital cost (HVAC and load control equipment and installation, information technology and billing system architecture); (2) operations and maintenance expense (ongoing maintenance and labor, information technology support, customer service and billing support); and (3) load management credit (reduction in the total cost to be collected in exchange for the right to control the HVAC units during peak periods). (CEL Ex. 149.¹⁵) Similar to other DSM programs, all the costs associated with the HVAC On-Bill option, including the load control credits and costs for the equipment and service, will be recovered through the Energy Conservation Cost Recovery (“ECCR”) clause. However, because the participants pay 100% of the equipment and service expenses, the revenues collected from the HVAC On-Bill participants will flow through the ECCR clause to fully offset the program expense, minus the load control credits,¹⁶ by the end of the service agreement. (Tr. vol 1, pp. 121-

¹² The Commission has previously approved loan programs as a part of utility DSM goals and plans. *See, e.g., Re City of Tallahassee*, Docket Nos. 930559-EG and 950448-EG, PAA Order No. PSC-96-0716-FOF-EG (FPSC May 28, 1996) (approving utility loan programs as a part of DSM plan).

¹³ Floyd Dep. 12:1-20 and 117:23-25.

¹⁴ FPL Response to Staff’s 3rd Set of Interrogatories No. 63.

¹⁵ FPL Response to Staff’s 1st Set of Interrogatories No. 23.

¹⁶ Similar to the existing On Call[®] program, the load control credits paid to participants in the HVAC On-Bill option are paid by all customers, including the participant, through the ECCR.

122; CEL Ex. 151.¹⁷) Thus, the HVAC On-Bill option is intended to hold the general body of customers harmless by the end of the service agreement, while still realizing the benefits from both improved efficiency and load control functionality.

To ensure that the general body of customers is held harmless from the non-load control costs incurred on behalf of participants in the HVAC On-Bill option, the service agreement will include appropriate protections to avoid the potential for any of these costs to be shifted from the participant to the general body of customers. Similar to any other part of FPL's bill, charges for the HVAC On-Bill option services that are unpaid as of the due date are subject to the late payment charge as set forth in FPL's tariff, and failure to pay any undisputed amount owed may result in termination of the participant's electric or HVAC service consistent with the terms of FPL's tariff until the participant has paid the outstanding balance in full. Further, should the participant close their utility account prior to the end of the HVAC On-Bill service agreement,¹⁸ the customer has two options under the terms of the service agreement: (1) immediately pay all outstanding and remaining payment obligations; or (2) if selling the property where the HVAC equipment is located, and subject to approval of both the property buyer and FPL, the customer may transfer the service contract to the buyer. In the event that former HVAC On-Bill customers fail to satisfy this obligation, FPL will seek appropriate remedies to enforce the contract as available and permitted by law. (CEL Ex. 149.¹⁹)

The use of HVAC equipment to regulate a home's temperature is the largest source of energy consumption for many FPL residential customers. The HVAC On-Bill option allows

¹⁷ FPL Response to Staff's 3rd Set of Interrogatories No. 64.

¹⁸ FPL intends to offer participating customers the option of a 10, 12, or 15-year term for the service agreement dependent on the life of the HVAC equipment's warranty. (CEL Ex. 151 (FPL Response to Staff's 3rd Set of Interrogatories. No. 62).)

¹⁹ FPL Response to Staff's 1st Set of Interrogatories No. 16.

greater customer access to new energy-saving HVAC equipment, focuses on the highest priorities of weather-sensitive peak demand, and benefits the general body of ratepayers from the avoided capacity savings related to FPL retaining control of the HVAC equipment. (CEL Ex. 151.²⁰) Importantly, since this program passes the RIM cost-effectiveness test, the general body of customers is assured the overall benefits of the program exceed costs, net of program revenues, over the term of the HVAC On-Bill service agreement. (Tr. vol 1, pp. 121-122.)

Notably, no Parties submitted any testimony or exhibits opposing the HVAC On-Bill option. Further, the only Parties other than FPL to submit testimony and exhibits in this proceeding have stipulated to the HVAC On-Bill option and its inclusion in FPL's proposed DSM Goals. As explained above, it is undisputed that FPL's HVAC On-Bill option is a cost-effective DSM measure that will contribute to the complex problems of reducing electric consumption and peak demand consistent with the purpose and policy of FEECA.

For all the reasons explained above, the HVAC On-Bill option is an appropriate, cost-effective DSM measure under FEECA that expands the existing On Call[®] load-management program to allow greater customer access to new energy-saving HVAC equipment and, therefore, should be included in FPL's proposed DSM Goals. As an approved DSM measure, the HVAC On-Bill option will, upon approval under FEECA, be a regulated activity within the jurisdiction of the Commission.

B. The HVAC On-Bill Option is Not a Sale of an Appliance

Although Staff did not submit any testimony or exhibits in this proceeding, Staff served FPL with discovery suggesting that the HVAC On-Bill option may be a sale of an appliance that

²⁰ FPL Response to Staff's 3rd Set of Interrogatories No. 67.

cannot be included in the ECCR rate under Section 366.05(2), Florida Statutes. (CEL Ex. 151.²¹) Staff's apparent position is unsupported by the record, incorrect as a matter of law, and misplaced for several reasons.

Section 366.05(2), Florida Statutes, provides as follows:

(2) Every public utility, as defined in s. 366.02, which in addition to the production, transmission, delivery or furnishing of heat, light, or power also sells appliances or other merchandise shall keep separate and individual accounts for the sale and profit deriving from such sales. No profit or loss shall be taken into consideration by the commission from the sale of such items in arriving at any rate to be charged for service by any public utility.

Thus, under Section 366.05(2), a public utility that sells appliances may not include the profit or loss from the sale in rates. Staff's reliance on Section 366.05(2) is misplaced.

As explained above in Section IV.A of this brief, FPL's unopposed HVAC On-Bill option fits precisely within the spirit and purpose of FEECA, is cost-effective and beneficial to all customers, and will result in greater energy efficiency and reduce peak demand. Under the statutory factors in Section 366.82(3), Florida Statutes, that the Commission must consider in determining whether to adopt proposed DSM Goals, the HVAC On-Bill option clearly is an appropriate DSM measure under FEECA and should be approved. Because the HVAC On-Bill option satisfies the requirements of FEECA, there is no need to look beyond FEECA and somehow try to make the provisions in Section 366.05(2) part of FEECA or for the two statutory provisions to be in conflict.²²

Even assuming, *arguendo*, that the limitation on the sale of appliances in Section 366.05(2) is applicable to a DSM measure under FEECA, the HVAC On-Bill option is not a "sale" and there

²¹ Staff's 3rd Set of Interrogatories No. 67.

²² "When the statutory language is clear or unambiguous, this Court need not look behind the statute's plain language." *English v. State*, 191 So. 3d 448 (Fla. 2016). Provisions of an act are to be read as consistent with one another rather than in conflict. *State v. Putnam County Dev. Auth.*, 249 So. 2d 6 (Fla. 1971).

are no profits or losses recovered from the general body of customers by the end of the agreement period. For these reasons, as further explained below, the limitation in Section 366.05(2) is not applicable to the HVAC On-Bill option.

The HVAC On-Bill option is an appropriate and cost-effective DSM measure under FEECA and, therefore, is a regulated activity. Because it is a regulated activity, it is subject to the exclusive jurisdiction of this Commission and not subject to regulation under the Florida Uniform Commercial Code – Sales, Chapter 672, Florida Statutes (the “UCC”). Although the UCC is not directly applicable to the HVAC On-Bill option, it nonetheless is instructive for purposes of determining whether an unregulated activity is a “sale.” Under the UCC, a “‘sale’ consists in the passing of title from the seller to the buyer for a price.” Section 672.106, Fla. Stat. The UCC further provides that “[u]nless otherwise explicitly agreed title passes to the buyer *at the time and place* at which the seller completes her or his performance with reference to the *physical delivery of the goods.*” Section 672.401(2), Fla. Stat. (emphasis added).

For the HVAC On-Bill option, the HVAC system and load control equipment will be physically delivered to the participant and installed upon execution of the HVAC On-Bill Services agreement. Importantly, however, the agreement expressly provides that FPL and the participating customer agree that FPL will retain title and ownership of the HVAC unit until the end of the agreement and/or the customer satisfies all obligations for the services provided by FPL under the tariff agreement:

12. Title and Risk of Loss.

(a) Title. The Customer agrees that Equipment installed at the Residential Property is and will remain the sole property of Company unless and until such time as the Customer satisfies its obligations under the Agreement through the end of its term or exercises any purchase option set forth in the Agreement and pays such applicable purchase price to Company. Company reserves the right to modify or upgrade Equipment as Company deems

necessary, in its sole discretion, for the continued supply of the Service. Any modifications, upgrades, alterations, additions to the Equipment, or replacement of the Equipment shall become part of the Equipment and shall be subject to the ownership provisions of this Section 12(a). The Parties agree that the Equipment is personal property of Company and not a fixture to the Residential Property and shall retain the legal status of personal property as defined under the applicable provisions of the Uniform Commercial Code. With respect to the Equipment, and to preserve the Company's title to, and rights in the Equipment, Company may file one or more precautionary UCC financing statements or fixture filings, as applicable, in such jurisdictions as Company deems appropriate. Furthermore, the Parties agree that Company has the right to record notice of its ownership rights in the Equipment in the public records of the county of the Residential Property.

(CEL Ex. 156.²³) Thus, the undisputed evidence of record establishes that title to the HVAC equipment does not pass to the participant at the time of delivery and, instead, FPL maintains both title and ownership of the HVAC equipment while it provides the services until the agreement is terminated. Under the explicit terms of the agreement, the HVAC On-Bill option is not a "sale" for purposes of the UCC.²⁴

The participant will have the option to take ownership of the HVAC unit at the end of the contract term assuming they have successfully met all outstanding obligations under the services agreement. (CEL Ex. 151.²⁵) Meaning, any transfer of ownership would only occur after the services agreement has expired. However, the potential future transfer of ownership *after* the agreement has expired does not change the unrefuted fact that no title passes from FPL to the participant during the term of the agreement, as required to qualify as a "sale" under the UCC.

²³ FPL Response to Staff 1st Request for Production of Documents No. 1, Bates No. 003752.

²⁴ The HVAC On-Bill option is also not a contract for the "future sale of goods" under Section 672.106 of the UCC, because the HVAC equipment identified in the agreement is existing and installed upon execution of the HVAC agreement. *See* Section 672.105, Fla. Stat. (defining "future goods" as "[g]oods which are not both existing and identified").

²⁵ FPL Response to Staff's 3rd Set of Interrogatories No. 67.

Further, during the entire agreement period, ultimate control of the HVAC unit will reside with FPL due to the load control functionality of the HVAC On-Bill option. (CEL Ex. 151.²⁶) As such, the HVAC On-Bill agreement is considered a service contract under U.S. Generally Accepted Accounting Principles (“GAAP”). (CEL Ex. 154.²⁷) As a service contract, FPL will use and maintain the asset to deliver service to the customer while retaining control of that asset. In turn, the customer is expected to make payment for the services provided by FPL. (CEL Ex. 151.²⁸)

The option for the customer to take title to the HVAC equipment upon the expiration, assignment, or early termination of the HVAC On-Bill agreement is a future option and would not retroactively transform the service agreement into a sale agreement. This customer option to take title to the equipment is not operative until the expiration, assignment, or early termination of the agreement and, therefore, does not change the nature of the agreement during the term of the agreement. (CEL Ex. 156.²⁹) Furthermore, the economics of the transfer does not impose any additional consideration from the customer in exchange for the transfer of title. Rather, the provisions that give the customer the option to obtain title are designed only to require that FPL receive the service fees due under the agreement, less any avoided costs (*i.e.*, the termination fee for the service agreement). Thus, the option available to the customer after the agreement has expired or has been terminated or assigned would be a transfer of title of the HVAC equipment with no transfer fee, outside of the customer’s obligation to pay the required termination fee under the service agreement.

²⁶ FPL Response to Staff’s 3rd Set of Interrogatories No. 68.

²⁷ FPL Response to Staff’s 6th Set of Interrogatories No. 116 (providing detailed explanation why the HVAC On-Bill option is a service agreement under GAAP).

²⁸ FPL Response to Staff Staff’s 3rd Set of Interrogatories No. 68.

²⁹ FPL Response to Staff 1st Request for Production of Documents No. 1, Bates Nos. 003753-003755.

Even the notion that a “sale” occurs upon the customer satisfying the terms of the service agreement, while incorrect, would not trigger Section 366.05(2). Because there will be no further payments made by the customer upon satisfaction of the terms of the agreement, there will be no profit or loss recovered from the general body of customers by the end of the agreement period when ownership of the HVAC equipment actually transfers to the participant under the express terms of the agreement. As explained above, one hundred percent of the total costs, minus load control credits, will be recovered from the participants even if a participant exercises the early termination clause of the agreement. Since the revenue requirements are designed to pass through one hundred percent of the costs to the participants and in turn make the general body of ratepayers whole, there is no profit or loss to recognize when ownership transfers to the participant since all costs will be recovered from the participant during the term of agreement. (CEL Ex. 151³⁰ and CEL Ex. 228, pp. 79-80.³¹)

Once the term of the agreement has ended, FPL is no longer obligated to provide service, and if the participant has met all outstanding obligations whereby the total cost of FPL providing service has been recovered, then FPL has no further need for the HVAC unit under the agreement. As such, upon the participant exercising the option to take title to the HVAC equipment at the end of the agreement, FPL will transfer the title of the equipment to the participant at no additional cost to the participant and with no profit or loss being recovered in rates charged to the general body of customers. (CEL Ex. 154.³²)

³⁰ FPL Response to Staff’s 3rd Set of Interrogatories No. 67.

³¹ Floyd Dep. 79:6-25 and 80:1-10.

³² FPL Response to Staff’s 6th Set of Interrogatories No. 104. Under the HVAC On-Bill agreement, the participant is required to provide FPL with written notice of their election in order to initiate a transfer of title. FPL will provide a written acknowledgement of that election. FPL will then determine whether all obligations under the service agreement have been fulfilled by the participant. Assuming these conditions have been met, FPL will file and provide a release of the UCC Fixture Filing to the participant. (CEL Ex. 154 (FPL Response to Staff’s 6th Set of Interrogatories No. 106).)

FPL also notes that it is not uncommon for Florida utilities to provide equipment and appliances to customers as part of the utility's regulated service offerings. For example, Florida City Gas has an equipment financing tariff that allows the utility to provide gas conversion, compression, or renewable natural gas equipment to be owned by the customer with the costs, including overall cost of capital, being recovered in customer's monthly rates.³³ Florida City Gas also has a tariff rate schedule that allows the utility to provide various types of equipment and appliances for the purpose of conditioning and upgrading biogas to renewable natural gas and fully recovering the total installed costs through monthly service charges.³⁴ Notably, unlike FPL's proposed HVAC On-Bill option that expressly provides that FPL retains title and ownership of the equipment until after the agreement has expired or been terminated, these Commission-approved equipment financing tariffs clearly contemplate a transfer of title to the customer, but the Commission has nonetheless approved these arrangements as regulated tariff service offerings that are recovered in the monthly rates paid by customers.

Also illustrative is the fact that the HVAC On-Bill option is substantially similar to the construct approved by the Commission for FPL's existing Optional Supplemental Power Services ("OSPS") tariff offering, where residential customers have the option of receiving an FPL-owned backup generator in exchange for making monthly payments designed to fully recover the costs incurred. Similar to the HVAC On-Bill option, a residential backup generator is likewise a piece of equipment that is installed on a pad and connected behind the meter to a customer's home

³³ See Rule 19 on Tariff Sheet 26 of the Florida City Gas FSPC Natural Gas Tariff, Volume No. 11, available at: <https://www.floridacitygas.com/wp-content/uploads/FCG%20Master%20Copy%202024%20-%20v03122024.pdf>.

³⁴ The equipment and appliances that may be provided under this Florida City Gas tariff rate schedule include, but are not limited to: "blowers, chillers, condensate removal equipment, compressors, heat exchangers, driers, digesters, gas constituent removal equipment, quality monitoring equipment, storage vessels, controls, piping, metering, propane injection, and any other related appurtenances including any redundancy necessary to provide reliable RNG Service." See Renewable Natural Gas Service (RNGS) rate schedule on Tariff Sheet 74.1-74.3 of the Florida City Gas FSPC Natural Gas Tariff, Volume No. 11, available at: <https://www.floridacitygas.com/wp-content/uploads/FCG%20Master%20Copy%202024%20-%20v03122024.pdf>.

electrical system. The HVAC On-Bill services agreement was modeled on the Commission-approved OSPS residential tariff agreement, which also provides the customer with the option to take title to the equipment upon the expiration, assignment of, or early termination of the agreement.³⁵

Based on the foregoing, the only evidence of record in this proceeding is that FPL will fully retain ownership and title to the HVAC equipment throughout the entire agreement term, and title would only pass to the customer, at their election, after the HVAC agreement expires or is assigned or terminated. Accordingly, the HVAC On-Bill option is not a “sale” as defined by the UCC and, therefore, Section 366.05(2), Florida Statutes, is inapplicable to the HVAC On-Bill option.

III. CONCLUSION

The HVAC On-Bill option is a new voluntary service agreement that provides a way to increase participation in the On Call[®] load management DSM program and adds more efficient HVAC units and, thereby, increases energy efficiency on FPL’s system. Importantly, since this program passes the RIM cost-effectiveness test, the general body of customers is assured the overall benefits of the program exceed costs, net of program revenues, over the term of the HVAC on-bill service agreement. For all the reasons explained above, the HVAC On-Bill option is an appropriate, cost-effective DSM measure under FEECA that expands the existing On Call[®] load-management program to allow greater customer access to new energy-saving HVAC equipment and, therefore, should be included in FPL’s proposed DSM Goals.³⁶

³⁵ See FPL Tariff Sheet Nos. 9.811-9.819, Residential Optional Supplemental Power Services Agreement, available at: <https://www.fpl.com/rates/pdf/electric-tariff-section9.pdf>.

³⁶ While FPL is mindful that the Commission typically does not allow parties to participate post-hearing at the agenda conference, due to the unusual nature of this proceeding (see due process concerns expressed on pages 7-8 of this Brief), FPL counsel will attend the agenda conference and will be available in the event there are any questions from Commissioners.

To the extent that the Commission concludes based on the substantial evidence of the record that FPL's HVAC On-Bill option does not fit within the spirit and purpose of FEECA, which is statutorily required to be liberally construed in order to meet the complex problems of reducing electric consumption and peak demand, or otherwise is a "sale" under Section 366.05(2), Florida Statutes, the Commission should appropriately reduce FPL's stipulated DSM Goals to remove the savings associated with the HVAC On-Bill option.

Respectfully submitted this 12th day of September 2024,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail to the following parties of record this 12th day of September 2024:

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