

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Rate Increase by Florida
Power & Light Company

DOCKET NO. 20210015-EI

**TESTIMONY BY FLORIDA PETROLEUM MARKETERS ASSOCIATION, INC. IN
OPPOSITION TO PARAGRAPH 22 (i), (ii), (v), and (vi) OF THE STIPULATION AND
SETTLEMENT AGREEMENT**

1. The Florida Petroleum Marketers Association, Inc. ("FPMA") is a voluntary, non-profit trade association comprised of about 80 members who own or operate over 90 percent of the 9600-plus convenience stores in Florida, a substantial number of which are in Florida Power and Light's ("FPL") service area. FPMA routinely represents its members before Florida state agencies, including the Department of Environmental Protection, the Florida Department of Revenue, the Florida Department of Agriculture and Consumer Services, the Florida Department of Transportation, and the Florida Lottery, and has been a party to numerous rule making proceedings. FPMA also seeks to advance the interests of the convenience store industry before Congress, the Florida Legislature, the Governor and Cabinet, and the judiciary. FPMA members' convenience stores are likely properties on which electric vehicle charging stations will be installed.

2. FPMA, by letter dated November 9, 2020, submitted public comments to the Public Service Commission ("PSC") in opposition to Florida Power & Light Company's ("FPL") Petition for Approval of Optional Electric Vehicle Public Charging Pilot Tariffs, Docket No. 20200170-EI. A copy of that letter is attached hereto as Exhibit 1 and is incorporated herein. FPMA was an interested person in that docket.

RECEIVED-PSC
1 SEP 13 PM 4:04
COMMISSION
CLERK

3. The PSC issued its December 21, 2020, Order Granting Petition for Approval of Optional Vehicle Public Charging Pilot Tariffs by Florida Power and Light Company, Order No. PSC-2020-0512-TRF-EI, a copy of which is attached as Exhibit 2.

4. The Order approved three optional EV public charging pilot tariffs: 1) utility-owned Public Charging for Electric Vehicles (utility-owned fast charging stations); and 2) and 3) Electric Vehicle Charging Infrastructure Riders for General Service Demand and General Service Large Demand Tariffs (third-party public charging stations operating in the FPL service area).

5. Underlying considerations for the rate schedule included the fact that FPL had already implemented installation of 218 public fast charging stations at a cost of \$80,000 each, to be offset by the voluntary tariff. The scope of this installation would result in estimated costs of \$17,460,000.

6. In support of the Order, the PSC stated that it was implementing section 366.02(2), Florida Statutes, and that the Florida Supreme Court recognized the PSC's discretion in interpreting its statutory authority, citing to *City of Tallahassee v. Florida Public Service Com'n.*, 433 So. 2d 505 (Fla. 1983).¹ The PSC also relied on the Legislature's specific statutory provisions in section 339.287, Florida Statutes, with respect to EVs.

7. In the course of the proceedings, Advanced Energy Economy ("AEE") cautioned the PSC that FPL's proposed rate for its own public chargers is 15% lower than the average rate offered by third parties creating "a tilted playing field that challenges third-party charging infrastructure development over time." The Settlement Agreement adds to these fears by now

¹ It is important to note that the *City of Tallahassee* case predates Fla. Const. Art. V & 21 limiting agency deference. Further, the question in *City of Tallahassee* was whether the PSC could develop policy through adjudication. This begs the question of whether ss. 339.287, F.S., cited below, limits the PSC's authority.

allowing FPL to not only offer lower rates for its own chargers, but to recover infrastructure and marketing costs across its entire rate base.

8. The Order recognized that the possibility of FPL's cost recovery for the pilot program across the entire rate base was not yet at issue. The Order states “[w]e find that FPL's proposed market-based rate is reasonable in the limited context of approving pilot tariffs with the specific goal to collect cost and usage data for utility owned fast charging stations.” (Emphasis supplied.) Now, FPL seeks to expand its “pilot program” nearly ten-fold, using rates that were approved for a voluntary, limited pilot program, and to recover those costs from non-user rate payers. Apparently, the \$17 million pilot program to accumulate data is no longer sufficient and a program of \$130 million is now necessary for this alleged purpose.

9. On August 10, 2021, FPL filed with the PSC a Joint Motion for Approval of Settlement, along with an attached Stipulation and Settlement Agreement ("Settlement Agreement") in the above-referenced docket. This time, FPL does not merely seek optional tariffs for the installation of electric vehicle ("EV") charging stations. Instead, FPL seeks approval of \$30 million through 2022 for EVolution, self-described as a "pilot program" for an analysis of public EV charging infrastructure build-out plans, and \$100 million over the four-year period of 2022-2025 for the Public Fast Charging Program, which is a self-described "pilot program" for construction and installation of public EV fast charging stations. The costs are "includable in FPL's jurisdictional rate base until recovered from customers." See, Settlement Agreement, par. 22. FPMA objects to Paragraph 22(i), (ii), and (vi) of the Settlement Agreement.

10. According to Paragraph 22 (ii) of the Settlement Agreement, the Public Fast Charging Program revenue requirements "will be partially offset by revenue received under FPL's

UEV tariff approved in Docket 20200170-EI, which establishes a rate for utility-owned public EV fast charging stations."

11. The Settlement Agreement does not include any offset for funds received or which may be received by FPL under federal, state, or local EV infrastructure programs.

12. The PSC's Mission Statement is to "facilitate the efficient provision of safe and reliable utility services at fair prices." <http://www.psc.state.fl.us/AboutPSC/PSCMission>. The PSC's Goals for Economic Regulation include "[t]o the extent possible, streamline regulatory requirements to provide an open, accessible and efficient regulatory process that is fair and unbiased" and to "[p]rovide a regulatory process that results in fair and reasonable rates while offering rate based regulated utilities an opportunity to earn a fair return on their investments." Id. By approving the Settlement Agreement, the PSC will be obligated, as a matter of being "unbiased," to approve similar EV charging "pilot programs" for every regulated utility. In other words, with the Settlement Agreement, the PSC is committing at least half a billion dollars to "pilot programs" for public EV charging stations owned and operated by the utilities without any oversight. The PSC will have destroyed the non-regulated market for public EV charging. At that point, the "pilot programs" surely will swallow up the market and crush any non-regulated utility investment and innovation in the EV charging market. Paragraph 22 of the Settlement Agreement reflects a failure of the PSC's "fairness" goals for two reasons. It requires that non-EV charging rate payers subsidize the installation of charging stations that will only be used by the EV-driving public. According to the Florida Department of Agriculture, Office of Energy, 2019 Annual Report, EV's account for less than one percent of new car sales in Florida, and expected growth will only be 12.5 percent by 2028. The entire rate base should not subsidize a fraction of EV charging station users who are able to purchase EV's that are typically markedly more expensive

than internal combustion vehicles. In addition, the Settlement Agreement will distort the free market for the construction of EV infrastructure and sale of electrical power.

13. As a matter of statutory authority, or, rather the absence thereof, authority to create a pilot program funded by non-user rate payers does not appear anywhere in Chapter 350 or Chapter 366, Florida Statutes. In fact, the statutes illustrate that the PSC is putting the cart before the horse. Section 339.287, Florida Statutes--Electric vehicle charging stations; infrastructure plan development directs the Florida Department of Transportation to coordinate, develop, and recommend a master plan for current and future plans for the development of EV charging stations along the State Highway System.² The PSC, in consultation with the Office of Energy in the

² **339.287 Electric vehicle charging stations; infrastructure plan development.—**

- (1) The Legislature finds that:
 - (a) Climate change may have significant impacts to this state which will require the development of avoidance, adaptation, and mitigation strategies to address these potential impacts on future state projects, plans, and programs;
 - (b) A significant portion of the carbon dioxide emissions in this state is produced by the transportation sector;
 - (c) Electric vehicles can help reduce these emissions, thereby helping to reduce the impact of climate change on this state;
 - (d) The use of electric vehicles for nonlocal driving requires adequate, reliable charging stations to address electric vehicle battery range limitations;
 - (e) Having adequate, reliable charging stations along the State Highway System will also help with evacuations during hurricanes or other disasters;
 - (f) Ensuring the prompt installation of adequate, reliable charging stations is in the public interest; and
 - (g) A recommended plan for electric vehicle charging station infrastructure should be established to address changes in the emerging electric vehicle market and necessary charging infrastructure.
- (2)(a) The department shall coordinate, develop, and recommend a master plan for current and future plans for the development of electric vehicle charging station infrastructure along the State Highway System, as defined in s. 334.03(24). The department shall develop the recommended master plan and submit it to the Governor, the President of the Senate, and the Speaker of the House of Representatives by July 1, 2021. The plan must include recommendations for legislation and may include other recommendations as determined by the department.

(b) The department, in consultation with the Public Service Commission and the Office of Energy within the Department of Agriculture and Consumer Services, and any other public or private entities as necessary or appropriate, shall be primarily responsible for the following goals and objectives in developing the plan:

1. Identifying the types or characteristics of possible locations for electric vehicle charging station infrastructure along the State Highway System to support a supply of electric vehicle charging stations that will:

- a. Accomplish the goals and objectives of this section;
- b. Support both short-range and long-range electric vehicle travel;
- c. Encourage the expansion of electric vehicle use in this state; and
- d. Adequately serve evacuation routes in this state.

2. Identifying any barriers to the use of electric vehicles and electric vehicle charging station infrastructure both for short-range and long-range electric vehicle travel along the State Highway System.

3. Identifying an implementation strategy for expanding electric vehicle and charging station infrastructure use in this state.

4. Quantifying the loss of revenue to the State Transportation Trust Fund due to the current and projected future use of electric vehicles in this state and summarizing efforts of other states to address such revenue loss.

(c) The Public Service Commission, in consultation with the department and the Office of Energy within the Department of Agriculture and Consumer Services, and any other public or private entities as necessary or appropriate, shall be primarily responsible for the following goals and objectives in developing the plan:

1. Projecting the increase in the use of electric vehicles in this state over the next 20 years and determining how to ensure an adequate supply of reliable electric vehicle charging stations to support and encourage this growth in a manner supporting a competitive market with ample consumer choice.

2. Evaluating and comparing the types of electric vehicle charging stations available at present and which may become available in the future, including the technology and infrastructure incorporated in such stations, along with the circumstances within which each type of station and infrastructure is typically used, including fleet charging, for the purpose of identifying any advantages to developing particular types or uses of these stations.

3. Considering strategies to develop this supply of charging stations, including, but not limited to, methods of building partnerships with local governments, other state and federal entities, electric utilities, the business community, and the public in support of electric vehicle charging stations.

4. Identifying the type of regulatory structure necessary for the delivery of electricity to electric vehicles and charging station infrastructure, including competitive neutral policies and the participation of public utilities in the marketplace.

(d) The Public Service Commission, in consultation with the Office of Energy within the Department of Agriculture and Consumer Services, shall review emerging technologies in the electric and alternative vehicle market, including alternative fuel sources.

Department of Agriculture and Consumer Services, is primarily responsible for a number of goals and objectives, including determining the extent of an EV charging station network "in a manner supporting a competitive market with ample consumer choice." The PSC has not done this. Instead, prior to legislative review of the FDOT Master Plan (see paragraph 16, below), the PSC has abrogated its authority to project the scope of the EV charging network, to evaluate the types of charging stations needed, to partner with the business community, and most importantly, to develop "competitive neutral policies." By approving the "pilot programs," the PSC is exercising authority that it does not yet have, pending legislative action on the FDOT Master Plan.

14. It is now clear that the optional electric vehicle public charging pilot tariffs at issue in Docket No. 20200170-EI was FPL's effort to crack open the door. The Settlement Agreement would break the wall down. The EVolution "pilot program" seeks to gather data "ahead of mass EV adoption" to better "plan for and design possible and future EV investments." The "pilot program" aims to establish build-out impacts of "EV adoption rates, rate structures and demand models, and grid impacts of fast charging." In other words, FPL wants to use \$30 million to plot the build-out of its EV infrastructure network, funded by jurisdictional rate base, approximately two percent of which could potentially use FPL's public charging stations during the time the funds will be expended. Further, the PSC has already established a rate for utility-owned public EV fast

(e) The department, the Public Service Commission, and the Office of Energy within the Department of Agriculture and Consumer Services may agree to explore other issues deemed necessary or appropriate for purposes of the report required in paragraph (a).

(f) By December 1, 2020, the department shall file a status report with the Governor, the President of the Senate, and the Speaker of the House of Representatives containing any preliminary recommendations, including recommendations for legislation.

(Emphasis supplied).

charging stations. In addition, the Settlement Agreement provides for an additional \$20 million for New Technologies and Software and \$5 million for Education and Awareness. (See Par. 22 (v) and (vi). In total, FPL seeks \$55 million in additional funds aimed at creating its own long-term, for profit network for EV charging, all subsidies by its jurisdictional rate base, much of which will never use EV charging. Every regulated utility will follow suit, and since the PSC has approved FPL's plans, it will likely have to approve every other proposal from regulated utilities.

15. FPL seeks to have its ratepayers pay \$100 million over the 2022-2025 time period for installation of public EV fast charging stations. First, \$100 million is hardly a "pilot program." It is instead FPL's strategy to install fast charging stations that it owns and powers and to establish consumer buying patterns based on the extent of this network, to the detriment of property owners and other EV providers, all at costs borne by the jurisdictional rate base.

16. FPL states that expanded access to public fast charging will "[include] access in underserved areas and evacuation routes." However, the Settlement Agreement does not include any commitment for the installation of public fast charging in these areas. According to the Florida Department of Transportation's ("FDOT") Electric Vehicle Infrastructure Master Plan (July 2021 Draft), a copy of which is attached as Exhibit 3, providing public charging in underserved areas and along evacuation routes is a primary public policy goal. If FPL is going to spend \$100 million on fast charging stations, there should be a specific requirement to coordinate with FDOT to identify these areas and commit a specific portion of the expenditures to these areas. The Settlement Agreement also includes a voluntary tariff for a \$25 million program for residential customers desiring EV charging service (see Par. 22(iii)) and a voluntary tariff for a \$25 million program for commercial fleet customers for FPL-owned, operated and maintained EV charging on the customer's property. (See par. 22(iv)). Since these programs are more equitably paid for by

users in the rate base, monies spent by non-users in the rate base, at the very least, ought to be spent on achieving the public policy objective of increasing access to underserved areas and evacuation routes.

17. In addition to the unfair allocation of costs to the non-user rate base, FPL's strategy is eerily similar to the marketing practices by refiners in a vertically-integrated market for petroleum products. By having non-user rate base customers subsidize costs of infrastructure, such subsidized utilities can sell power cheaper than anyone else and enjoy having less costly infrastructure costs subsidize marketing costs (also including as a result of the \$5 million Education and Awareness Program funded by rate payers under the Settlement Agreement), thereby putting other potential EV charger providers at a marketing and pricing disadvantage. See, "Curbing Predatory Practices in Florida's Petroleum Marketing Industry," Huey, et al. Florida State University Law Review, Vol. 13, Issue 3 (Fall 1985), a copy of which is attached as Exhibit 4.³ Further, non-regulated utility EV charging providers, who are dependent on revenue from EV charging users, must compete against the regulated utilities who are able to spread their investment over their entire rate basis.

FPMA has no objection to the PSC's approval of the Settlement Agreement, other than Paragraph 22. For the reasons stated above, FPMA objects to approval of Paragraph 22 (i), (ii), and (vi). FPMA also believes that Paragraph 22 (v) and 22 (vi) should not be approved on the grounds that the programs are tools by which FPL will increase its unfair competitive advantage, subject to the completion and legislative review of the Florida Department of Transportation's Electric Vehicle Infrastructure Master Plan.

³ To address the competitive imbalance caused by the integration of production and distribution in the petroleum industry, the Florida Legislature enacted the Motor Fuel Marketing Practices Act, ss. 526.301, F.S., et seq., as an alternative to divorcement.

DATED, this 13th day of September, 2021.

Robert D. Fingar

Robert D. Fingar, Esq. • FBN 0578282
bob@guildaylaw.com
Ralph A. DeMeo, Esq. • FBN 0471763
ralph@guildaylaw.com

GUILDAY
LAW

Guilday Law, P.A.
1983 Centre Pointe Blvd., Suite 200
Tallahassee, Florida 32308
(850) 224-7091 Telephone
(850) 222-2593 Facsimile
Secondary Email Addresses:
Shelia@guildaylaw.com
ChristineB@guildaylaw.com
Attorneys for:
Florida Petroleum Marketers Association, Inc.

cc: Edward M. (Ned) Bowman, Jr.



**Florida Petroleum Marketers
Association, Inc.**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

November 9, 2020

Adam Teitzman, Director
Florida Public Service Commission
Office of Commission Clerk
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
[\(ateitzma@psc.state.fl.us\)](mailto:ateitzma@psc.state.fl.us)

COMMISSION
CLERK

REC'D SEP 13 PM 3:47

FLCPMD-FPSC

Re: Florida Power & Light Company's Petition for Approval of Optional Electric Vehicle Public Charging Pilot Tariffs, Docket No. 20200170-EI

Dear Mr. Teitzman,

Thank you for the opportunity for the Florida Petroleum Marketers Association (FPMA") to provide public comment to the Florida Public Service Commission (the "Commission") Docket No. 20200170-EI, regarding the Florida Power & Light Company's ("FPL") petition for approval of optional electric vehicle public charging pilot tariffs (the "Petition").

1. The Commission's Mission Statement and Goals.

In addressing the Petition, FPMA requests that the Commission consider whether such a pilot tariff would be fair and unbiased. Acting in a fair and unbiased manner is at the heart of the Commission's Mission Statement and Goals. The Commission's Mission Statement is "To facilitate the efficient provision of safe and reliable utility services at fair prices."¹ The Commission's Goals for Economic Regulation include: "To the extent possible, streamline regulatory requirements to provide an open, accessible and efficient regulatory process that is fair and unbiased" and "Provide a regulatory process that results in fair and reasonable rates while offering rate base regulated utilities an opportunity to earn a fair return on their investments." *Id.* (emphasis added). FPMA maintains that the

¹ <http://www.psc.state.fl.us/AboutPSC/PSCMission>.

Commission should resist any temptation to impose the cost needed to accommodate electric vehicle (“EV”) charging on rate payers who do not own an EV.

2. Authority to Approve “Pilot Program.”

As a threshold matter, it is unclear whether the Commission has authority to approve the requested “pilot program” in the Petition. The word “pilot” does not appear anywhere in Chapter 350, Florida Statutes (Florida Public Service Commission), Chapter 366, Florida Statutes (Public Utilities) or Title 25, Florida Administrative Code (Public Service Commission). Assuming it has statutory authority to engage in a “pilot program,” the Commission should inform the public of the specific statutory authority that would allow for imposition of rates in an unfair and biased manner and in a manner that would subsidize some EV providers to the detriment of others.

3. Legislative Mandate.

Effective July 1, 2020, the Florida legislature enacted section 339.287, Florida Statutes – Electric vehicle charging stations; infrastructure plan development. That section directs the Department of Transportation to coordinate, develop, and recommend a master plan for current and future plans for the development of electric vehicle charging station infrastructure along the State Highway System. The Commission, in consultation with the department and the Office of Energy within the Department of Agriculture and Consumer Services, is primarily responsible for the following goals and objectives in developing the plan:

- Projecting the increase in the use of electric vehicles in this state over the next 20 years and determining how to ensure an adequate supply of reliable electric vehicle charging stations to support and encourage this growth in a manner supporting a competitive market with ample consumer choice.
- Evaluating and comparing the types of electric vehicle charging stations available at present and which may become available in the future, including the technology and infrastructure incorporated in such stations, along with the circumstances within which each type of station and infrastructure is typically used, including fleet charging, for the purpose of identifying any advantages to developing particular types or uses of these stations.
- Considering strategies to develop this supply of charging stations, including, but not limited to, methods of building partnerships with local governments, other state and federal entities, electric utilities, the business community, and the public in support of electric vehicle charging stations.

- Identifying the type of regulatory structure necessary for the delivery of electricity to electric vehicles and charging station infrastructure, including competitive neutral policies and the participation of public utilities in the marketplace.

§339.287(c), Fla. Stat. (emphasis added). By December 1, 2020, the department is to file a status report with the Governor, the President of the Senate, and the Speaker of the House of Representatives with its preliminary recommendations, including recommendations for legislation. §339.287(f), Fla. Stat.

Absent from the mandate is any directive or authority to grant petitions permitting tariffs for EV charging stations by public utilities. On the contrary, the legislative mandate emphasizes the importance of “supporting a competitive market,” entering into partnerships, “competitive neutral policies,” and the participation of public utilities “in the marketplace.” The request for EV public charging tariffs is in direct opposition to these stated goals.

4. Fairness.

The Commission should not adopt rates that are unfair and biased. If a pilot program is approved, it should ensure that ratepayers are not asked to subsidize a new technology or subset of users to the detriment of others.

a. Fairness will not be achieved by negatively impacting Florida’s transportation sector and tourism industry.

Florida is the fourth-largest energy consuming state, using almost eight times as much energy as it produces.² Florida’s transportation sector accounts for 39.9% of the state’s end-use consumption, consuming 1,775.2 trillion BTUs in 2018.³ “Florida’s tourism industry is one of the largest contributors to the state’s economy, and a progressive and diversified transportation system is vital to the tourist industry.”⁴ Tourism in Florida contributes to the state having the third-highest motor fuel demand and sixth-highest jet fuel use in the United States.⁵ To remain competitive, Florida’s tourism industry, including the transportation sector, needs to have access to affordable and reliable electricity.

² <https://www.eia.gov/state/?sid=FL>

³ Id.

⁴ <https://www.fdacs.gov/ezs3download/download/90056/2572665/Media/Files/Energy-Files/2019-OOE-Annual-Report.pdf>

⁵ <https://www.eia.gov/state/?sid=FL>

b. Fairness will not be achieved by distorting the free market for retail sale of vehicle fuel.

It is patently unfair and unnecessary to distort the free market for the retail sale of vehicle fuel. Retail outlets selling liquid fuel or compressed natural gas for motor vehicles do not receive subsidies from all car owners. Likewise, all users of electricity should not have to subsidize the retail sale of EV fuel. A level playing field would serve the legislative mandate and the Commission's mission statement and goals. If utilities want to enter and compete in the retail vehicle fuel market against other sellers of vehicle fuel, they should compete fairly. Seeking to enter the market for the retail sale of vehicle fuel with zero market entry costs is not competing fairly. The private sector cannot compete with zero market entry costs. Permitting rate-based EV charging stations undercuts the competitive nature of the refueling marketplace and could lead to a monopoly harming consumers through less competition and higher costs.

c. Fairness will not be achieved by requiring a majority of non-EV owning utility customers to subsidize a small minority of EV owning customers.

According to the Florida Department of Agriculture, Office of Energy 2019 Annual Report, EV's account for less than 1 percent of new car sales in Florida and the estimated expected growth of EV sales will only be 12.5 percent by 2028.⁶ Fairness is not achieved by increasing the rate base of all utility customers to recover the costs of EV charging equipment when a majority of the customers do not use EVs. EVs are not a common, ubiquitous good used by the majority of ratepayers. The entire class of ratepayers should not be forced to subsidize infrastructure used by only a small minority of customers.

d. Fairness will not be achieved by forcing lower income customers to subsidize well-to-do EV owners.

“EV buyers are affluent deal-seekers,” according to John Krafcik, president of TrueCar.⁷ EV sticker prices are higher than comparable gas vehicles. EV purchases are strongly correlated with income levels.⁸ A recent study found that the average annual income of an EV owner is significantly higher than the owner of a gasoline powered vehicle. The average buyer of a regular Ford Focus had a household income of \$77,000 per year, as compared to an annual household income of \$199,000 for the average owner of Ford Focus EV. Buyers of the EV Fiat 500e average 45 years of age with an annual

⁶ FPSC Review of the 2019 Ten-Year Site Plans of Florida’s Electric Utilities;
<https://www.fdacs.gov/ezs3download/download/90056/2572665/Media/Files/Energy-Files/2019-OOE-Annual-Report.pdf>

⁷ <https://www.cnbc.com/2015/05/06/young-affluent-drivers-buy-these-cars.html>.

⁸ <https://www.truecar.com/blog/which-generation-is-going-green/>.

household income of \$145,000. That's twice the income level of Fiat 500 buyers.⁹ Lower income consumers and people in disadvantaged communities spend a large proportion of their annual income on energy bills. Even small increases in electricity bills could lead to energy insecurity and the inability to pay for basic necessities such as food and medications. The elderly and anyone on a fixed income would also be adversely affected. Any increase to energy bills will decrease funds available for food, medications, and other necessities. Fairness clearly would not be achieved by placing the burden of subsidizing EV drivers on lower income customers and seniors dependent on fixed incomes, the majority of whom do not use EVs.

e. Fairness will not be achieved by subsidizing EV charging when a private market is available.

Currently, EV manufacturers and others are entering into contracts with private landowners for the construction of EV charging stations and the sale of electricity. Rate payer subsidies of EV charging will result in unfair competition.

5. Environmental Concerns.

Greenhouse gas emissions associated with the raw materials and production stage of EVs are between 1.3 and 2.0 times higher than for internal combustion engine vehicles.¹⁰ While coal consumption in Florida's electric power sector has fallen, it still accounted for 12 million tons of coal consumption in 2018.¹¹

6. Conclusion.

Thank you for providing us with the opportunity to address our concerns. FPMA supports the Commission's goals of providing utility service at fair prices through an efficient, fair and unbiased regulatory process. FPMA also supports the legislature's directive to coordinate, develop, and recommend a master plan for the development of electric vehicle charging station infrastructure along the State Highway System in a manner supporting a competitive market with ample consumer choice. Unfortunately, the requests in the Petition run contrary to these stated goals and directives.

⁹ <https://www.cnbc.com/2015/05/06/young-affluent-drivers-buy-these-cars.html>.

¹⁰ Congressional Research Institute, *Environmental Effects of Battery Electric and Internal Combustion Engine Vehicles*, June 16, 2020 <https://fas.org/secp/crs/misc/R46420.pdf>.

¹¹ . <https://www.eia.gov/state/?sid=FL#tabs-1>

Adam Teitzman, Director
Florida Public Service Commission
November 9, 2020
Page 6 of 6

If you have any questions, please feel free to contact me at ned@fpma.org or by phone at (850) 877-5178.

Respectfully submitted,



Edward M. "Ned" Bowman, Jr.
Executive Director

About FPMA:

The Florida Petroleum Marketers Association, Inc. is a non-profit, nationally recognized, marketer driven, premier Association dedicated to fostering the business health and vitality of Florida's petroleum marketers, dealers, suppliers and convenience store retailers. FPMA strives to promote a growth oriented business community in the state of Florida and work to ensure that every one of our members reaps the benefits of a fairly regulated and business friendly environment.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of optional electric vehicle public charging pilot tariffs, by Florida Power & Light Company.

DOCKET NO. 20200170-EI
ORDER NO. PSC-2020-0512-TRF-EI
ISSUED: December 21, 2020

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK, Chairman
ART GRAHAM
JULIE I. BROWN
DONALD J. POLMANN
ANDREW GILES FAY

ORDER GRANTING PETITION FOR APPROVAL OF OPTIONAL
VEHICLE PUBLIC CHARGING PILOT TARIFFS
BY FLORIDA POWER & LIGHT COMPANY

BY THE COMMISSION:

Background

On June 19, 2020, Florida Power & Light Company (FPL or utility) filed a petition requesting approval of three optional electric vehicle (EV) public charging pilot tariffs. The first tariff, Utility-Owned Public Charging for Electric Vehicles (Rate Schedule UEV), would establish a charging rate for utility-owned fast charging stations. The second set of tariffs, Electric Vehicle Charging Infrastructure Riders for General Service Demand and General Service Large Demand (Rate Schedules GSD-1EV and GSLD-1EV) tariffs, would establish a tariff for third-party public charging stations operating in FPL's service area. The tariffs and associated rates would limit the demand cost associated with general service demand rates billed to the charging stations. The utility requests that the three proposed tariffs take effect in January 2021 and remain in effect for a period of five years, unless extended by order of this Commission or terminated early by FPL following notice to us. FPL's proposed tariffs are appended to this Order as Attachment A.

By Order No. PSC-2020-0398-PCO-EI, issued October 26, 2020, we suspended the 60-day file and suspend provision pursuant to Section 366.06(3), Florida Statutes (F.S.). There are sixteen interested persons in this docket.¹ Comments were filed by Advanced Energy Economy (AEE); Tesla, Inc. (Tesla); Electrify America; EVgo Services (EVgo), LLC; Drive Electric Florida; the Edison Electric Institute; Greenlots; and the Florida Petroleum Marketers

¹ The interested persons are: Walmart, Inc.; Tesla, Inc.; Southern Alliance for Clean Energy; Sierra Club; Corey Ershow and Coley Girouard; the Office of Public Counsel; Florida Solar Energy Center; EVgo; Electrify America, LLC; Drive Electric Florida; Central Florida Clean Cities Coalition; Charge Point; Edison Electric Institute; Greenlots; Advanced Energy Economy; and the Florida Petroleum Marketers Association, Inc.

EXHIBIT



ORDER NO. PSC-2020-0512-TRF-EI

DOCKET NO. 20200170-EI

PAGE 2

Association, Inc. These comments have been placed in the docket file. In addition, an email objecting to the proposed UEV rate as being too high has been placed in the docket file.²

In support of its petition for the proposed pilot tariffs, FPL lists several benefits of EVs and cites Section 339.287(1)(f), F.S., that states that “ensuring the prompt installation of adequate, reliable charging stations is in the public interest.” Furthermore, Section 339.287(2), F.S., directs the Florida Department of Transportation, in consultation with the Commission and the Florida Office of Energy, to develop a master plan for electric vehicle charging infrastructure and submit the master plan to the Governor by July 1, 2021.

FPL began voluntarily implementing in 2019 an EV infrastructure pilot called FPL EVolution. Under the EVolution pilot, as of June 2020, FPL has installed 166 Level 2 (4-6 hours to full charge) charging stations at 27 locations with plans to install more than 1,000 additional charging stations over an approximate three-year period. The additional charging stations FPL plans to install will include Level 2 and fast charging stations at locations such as public parks, malls, companies that wish to install charging stations for public and employee use, high-traffic areas along highways such as the Florida Turnpike, Interstate-95, or Interstate-75, and along evacuation routes. Specifically, FPL estimates that it will install 1,150 Level 2 chargers and 218 fast charging stations. FPL stated that the average cost to install a single Level 2 charger is approximately \$5,500 and for a fast charger approximately \$80,000; however, actual cost could vary based on location and technology.

FPL contends that the EVolution pilot will help the state expand the number of EV charging stations and allow FPL to conduct research in areas such as: (1) FPL-owned charging stations, (2) partnering with commercial customers who wish to offer EV charging services on their premises, (3) rate structures, and (4) the effects of charging stations on system load and the electric distribution system.

FPL states that the utility intends to request base rate recovery of the EVolution infrastructure as part of its next base rate proceeding. FPL anticipates the total investment in the FPL EVolution pilot to be \$30 million through the end of 2022; however, a portion of this investment will be offset by any revenues received under the proposed UEV tariff. FPL reflects the revenues, operating expenses, capital additions, and depreciation associated with the current and planned Level 2 and fast charging stations as above-the-line items on the Earnings Surveillance Reports filed with the Commission.

Under its general grant of authority³ and the flexibility afforded by the Florida Supreme Court in construing and applying these statutes,⁴ we have previously approved several EV pilot programs. In 1995, we approved an electric vehicle tariff for Tampa Electric Company.⁵ More recently, in 2017, we addressed EV charging stations owned by utilities in two rate case

² Document No. 04130-2020 in Correspondence Section of Docket file.

³ Section 366.02(2), F.S., provides that “electric utility” means any investor-owned electric utility which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

⁴ *City of Tallahassee v. Florida Pub. Serv. Com'n*, 433 So. 2d 505 (Fla. 1983)

⁵ Order No. PSC-95-0853-FOF-EG, issued July 17, 1995, in Docket No. 950517-EG, *In Re: Petition for Approval of New Experimental Electric Vehicle Tariff by Tampa Electric Company*.

settlements. In Gulf Power Company's rate case settlement, we permitted the utility to provide EV charging stations on a revenue neutral basis as a pilot program and stated that we "retain[] the ability to review and make a determination regarding the appropriate regulatory jurisdiction and regulatory treatment of EV charging stations."⁶ In Duke Energy Florida, LLC's (DEF) rate case settlement, we authorized the utility to purchase, install, own, and support Electric Vehicle Service Equipment as part of a five-year pilot program and the agreement provided that DEF may incur up to \$8 million plus reasonable operating expenses.⁷

In last year's session, the Legislature enacted Section 339.287, F.S. This statute recognizes the emerging importance of EV charging stations and the important role of utilities in this effort. We also note that several public utility commissions in other states have approved utilities' provision of EV charging to the public.⁸

We have jurisdiction over this matter pursuant to Sections 366.03, 366.04, 366.05, and 366.06, F.S.

Decision

Proposed Optional Utility-Owned Public Charging for Electric Vehicles Pilot Tariff

The proposed UEV tariff would apply to customers charging electric vehicles that purchase charging services directly from FPL at certain FPL-owned public fast charging stations. Fast charging stations provide electricity at high voltage (the UEV tariff requires power to be delivered at 50 kilowatts or greater) which results in a charging time of approximately 30 minutes. FPL stated that the determination of which charging stations would use the proposed tariff would be made on a site by site basis and based on the site host's preference. If the UEV tariff is not used, the site host would provide the charging services and pay FPL's otherwise applicable commercial rates and retain the revenues collected for providing charging services.

The user of a utility-owned fast charging station must register an account with FPL's mobile application, including payment information, prior to charging the EV. FPL currently does not have a tariff to charge customers who use charging stations the utility owns and operates under its EVolution pilot and, therefore, FPL is currently not charging drivers for charging services. Currently, the site host for each station is the customer of record and pays FPL standard rates for the electricity delivered to the site. The EV charging services are provided for free by the site host or the site host may charge a fee directly to the EV drivers.

FPL's proposed volumetric rate is \$0.30 per kilowatt-hour (kWh). FPL explained that the rate was chosen based on a comparison of various automotive fuel alternatives available to

⁶ Order No. PSC-17-0178-S-EI, issued May 16, 2017, in Docket No. 160170-EI, *In re: Petition for approval of 2016 depreciation and dismantlement studies, approval of proposed depreciation rates and annual dismantlement accruals and Plant Smith Units 1 and 2 regulatory asset amortization, by Gulf Power Company.*

⁷ Order No. PSC-2017-0451-AS-EU, issued November 20, 2019, in Docket No. 20170183-EI, *In re: Application for limited proceeding to approve 2017 second revised and restated settlement agreement, including certain rate adjustments, by Duke Energy Florida, LLC.*

⁸ Examples include Vermont, District of Columbia, California, Ohio, Nevada, and Oregon.

customers. Specifically, FPL stated that when comparing the average mileage efficiency of electric vehicles to gasoline-powered vehicles, the electricity price that equates to the same cost per mile is \$0.31 per kWh. Furthermore, public fast charging prices in Florida offered by other providers, such as Tesla, EVgo, and Electrify America, average at \$0.35 per kWh. However, FPL explained that the utility gave more consideration to the Tesla charging rate of \$0.28 per kWh, because at the time the utility did the calculation, Tesla was the only EV provider charging on a per-kWh basis. EVgo and Electrify America offered per-minute charging rates and due to varying charging speeds may present a level of uncertainty when converting to a price per kWh.⁹ FPL asserts that the proposed \$0.30 per kWh rate is reasonable compared to the equivalent cost per mile for gasoline-powered vehicles and the EV pricing options offered by non-utility providers.

The proposed \$0.30 per kWh rate is not cost-based. FPL stated that the utility currently does not have data regarding actual sales volumes and operating costs of utility-owned public charging stations and, therefore, developing cost-based rates would be conjectural at this time. To support the proposed “market-based” rates, FPL referred to a decision by the Washington Utilities and Transportation Commission, which approved a pilot tariff for fast charging rate that is comparable to rates being charged by other public charging facilities.

Greenlots, the Edison Electric Institute, and Drive Electric in written comments support FPL’s proposed UEV tariff. AEE filed comments in the docket on June 19, 2020. AEE explained that it represents a diverse set of businesses and supports the creation of beneficial EV-specific rates. However, AEE expressed concern that FPL’s proposed rate of \$0.30 per kWh is 15 percent lower than the average rate of \$0.35 per kWh offered by non-utility providers, or third parties. AEE asserts that, based on a review of their members, there is “concern that the price differential could inadvertently create a tilted playing field that challenges third-party charging infrastructure development over time.”

Tesla filed comments on June 23, 2020. In its comments, Tesla suggests that the calculation of the FPL proposed rate should not include the price Tesla charges, or in the alternative the rate should be set on FPL’s expected costs of providing charging services. As shown in Chart 1 on page 10 of FPL’s petition, FPL included a Tesla charging rate of \$0.28 per kWh in its calculation of the average charging rate of \$0.35 per kWh offered by non-utility charging stations. Tesla asserts its business model for its charging network is “unique and not necessarily replicable by other charging operators.”

Electrify America, in its comments filed on August 14, 2020, advocated a shared-responsibility model for utility investment that can encourage third-party infrastructure development while limiting ratepayer risk. Electrify America states that it operates the nation’s largest public fast charging network, including 110 chargers in Florida and several more projects currently under construction. Electrify America states that several jurisdictions have encouraged investment in public charging through the shared-responsibility model. Electrify America did not address the proposed \$0.30 per kWh rate.

⁹ FPL stated that in October 2020, Electrify America announced a \$0.43/kWh fast charging rate for Guest and Pass members and a \$0.31/kWh rate for Pass+ members.

EVgo, a competitive supplier of EV charging infrastructure, filed comments on October 5, 2020. EVgo contends that FPL's petition is premature as there has been no forum in Florida to discuss the appropriate role of utilities in owning and operating EV infrastructure. EVgo stated that, given that the role of the utility in owning and operating fast charging infrastructure has not been debated, FPL's proposed UEV tariff should be evaluated in FPL's next rate case. Finally, EVgo states that the proposed \$0.30 per kWh rate creates an uneven playing field if the utility is granted the ability to recover costs of its public charging infrastructure.

The Florida Petroleum Marketers Association, Inc. (FPMA) filed comments on November 10, 2020, objecting to FPL's petition. Specifically, the FPMA states that the Commission does not have the authority to approve pilot programs and does not have authority to permit tariffs for EV charging stations by public utilities. Furthermore, the FPMA asserts that the Commission should not adopt rates that are unfair and biased and that all ratepayers should not have to subsidize the EV infrastructure used by on a small minority of EV owners.

FPL asserts that one of the goals of its petition is to learn more about EV driver needs and gather more specific usage and cost data to allow FPL to develop cost-based rates for EV charging services. The proposed UEV tariff is not cost-based, but based on a "market-rate." Fast charging rates vary by provider, by location, and the level of charging offered. We find FPL's calculation of the proposed UEV rate to be appropriate for the limited purpose of this pilot and that traditional cost-of-service based rates can not be accurately calculated at this early stage of utility-involvement in the EV market. We find that FPL's proposed market-based rate is reasonable in the limited context of approving pilot tariffs with the specific goal to collect cost and usage data for utility-owned fast charging stations.

Section 339.287(2)(c)1, F.S., emphasizes the Legislature's intent for an adequate supply of reliable EV charging stations to support and encourage a competitive market. The proposed UEV tariff appears to be consistent with the legislative objectives of Section 339.287, F.S. Allowing FPL to participate in the EV infrastructure build-out in Florida by offering a utility-based rate as an option to EV customers during this nascent stage of EV adoption and the EV charging market development, promotes the public interest and should provide value to EV customers. We find that FPL's proposed tariff will facilitate the development of the competitive EV charging market by allowing the utility, together with other providers, to offer fast charging EV services. The increased availability of EV chargers will remove a barrier to adoption of electric vehicles in Florida.

FPL is not seeking approval of the costs associated with the EVolution pilot in the instant docket. We are not prejudging recovery of the EVolution investment and we retain full discretion to evaluate FPL's request in the next rate case for recovery of its EVolution investment and its impact on the general body of ratepayers, including the benefits, if any, to the general body of ratepayers.

FPL explained that the utility will work with the site hosts to determine which fast charging stations installed by FPL under the EVolution pilot will utilize the proposed UEV tariff. Any revenues collected pursuant to UEV tariff would be used by FPL to offset the revenue requirement associated with the EVolution facilities. For any FPL EVolution fast charging

stations that will not take service under the proposed UEV tariff, the revenue requirement would be recovered from the general body of ratepayers, if approved by us in the next rate case.

Conclusion

Based on the above, we approve FPL's proposed optional UEV pilot tariff, effective January 1, 2021. As detailed below, FPL shall file annual reports by January 30, with the first report due January 30, 2022, for the reporting period of January through December 2021, to allow us to monitor the reasonableness of the UEV rate. The tariff shall remain in effect for a period of five years, unless extended, modified, or terminated by order of this Commission or terminated early by FPL upon notice to us. Not later than September 1, 2025, FPL shall file a petition to extend, modify, or terminate the UEV pilot tariff.

Reporting Requirements

This is the first request by a Florida utility for an EV charging rate applicable to utility-owned fast charging stations. During the pilot period, FPL shall file annual reports by January 30 providing capital and operating costs, revenue requirements, revenues collected, and energy sales of its utility-owned fast charging stations. FPL shall also collect data regarding charging times to measure time of use and demand for its utility-owned fast charging stations and shall include this information in the annual report. The first annual report is due January 30, 2022, for the reporting period January through December 2021. In addition, FPL shall evaluate and provide any updates to the market rates, i.e., rates charged by non-utility EV charging providers, to maintain consistency with the market rates. The information collected by FPL will allow our staff, and interested parties, to monitor the development of the EV charging under the UEV tariff and ultimately determine a cost-based rate. If FPL and/or Commission staff determine that the UEV rate should be modified during the five-year term of the pilot program, based on the data collected by the utility, staff will open a docket for Commission consideration. The annual reports are to be filed in this docket.

Proposed GSD-1EV and GSLS-1EV Pilot Tariffs

The proposed optional pilot tariffs would apply to customers that operate public fast charging stations and would remain in effect for five years. In response to a data request from Commission staff, FPL clarified that the tariff would apply to existing and new charging stations. Since the fast charging stations are typically commercial customers, they are billed on FPL's standard commercial General Service Demand (GSD) or General Service Large Demand (GLSD) rate schedules. The GSD and GSLS rate schedules are comprised of an energy charge (based on the amount of energy, or kWh, consumed) and a dollar per kilowatt (kW) demand charge. The demand charge is billed on the highest usage, or demand, over a specified time interval (30 minutes). This peak usage determines the demand charge for the billing month.

FPL states that the current rate design poses a challenge to the economics of the public fast charging stations that experience a high demand and low levels of kWh energy sales, or utilization. At low levels of utilization, the electric bills incurred by the charging stations result in demand charges being spread over a relatively low volume of energy sales. This is referred to

as a low load factor customer. Charging stations with higher kWh sales, i.e., high load factor customers are able to spread the billed demand cost over more energy sales and are, therefore, more likely to recover their costs.

FPL asserts that the demand charge included in standard demand rate schedules creates a barrier to entry during the early years of the EV market. FPL further states that fast charging providers and potential public charging site hosts have expressed concerns over their ability to recover costs in the early years of the EV market adoption.

To address the challenges FPL identified for public fast charging stations, the utility proposed tariffs that include a demand limiter mechanism. Under the tariffs, the amount of demand billed to the customer would be the lesser of the measured demand or the limited demand as calculated by dividing the kWh sales by a fixed constant of 75 hours. Mathematically, applying the 75 hours constant to the kWh sales results in a reduction in the demand billed to a customer with a load factor of less than ten percent. Customers with a load factor above ten percent would pay the standard demand charges contained in the GSD and GSLD rate schedules and would not receive a reduction in the electric bill.

Greenlots, the Edison Electric Institute, and Drive Electric in written comments support FPL's proposed GSD-1EV and GSLD-1EV tariffs. EVgo Services supports FPL's proposal; however, EVgo suggests increasing the demand limiter of 75 hours to a limiter of 100 to 200 hours and increasing the term of the pilot program from five to ten years. Tesla, Electrify America, and AEE also stated that increasing the demand limiters would help improve fast charging stations' finances. Several interested persons referred to other states that have approved demand limiters of 100 or 200 hours, tariffs that reduce or eliminate demand charges, or no demand charges.

The proposed tariffs are not-cost based as FPL will not fully recover its demand-related, or fixed, costs from customers with low load factor fast charging stations. The demand limiter is designed to provide rate relief that will facilitate and encourage the development of EV fast charging infrastructure during this nascent stage of EV adoption and EV charging market development. We find that the proposed demand limiter pilot tariffs represent a balanced approach to encourage third-party market development at these early market stages, while limiting ratepayer risk. We find that this also aligns with the legislative intent to encourage the installation of EV infrastructure.

The proposed tariff could have an impact on the general body of ratepayers. Based on 2019 usage data of 41 fast charging stations, FPL estimated the annual lost revenues to be approximately \$157,000. However, FPL asserts that if the proposed tariffs are successful in accelerating the adoption of EV use, any additional revenues will contribute to the recovery of fixed costs, reducing the impact on the general body of ratepayers.

As discussed above, some interested persons expressed a desire for a larger reduction in the demand charges. However, a larger incentive would have the potential of shifting more costs to the general body of ratepayers. We find that FPL's proposed demand limiter balances the

interests of low load factor fast charging stations and the general body of ratepayers that could be impacted by the associated revenue loss when base rates are reset in FPL's next rate case.

Conclusion and Reporting Requirements

The proposed GSD-1EV and GSLLD-1EV tariffs are designed to mitigate the impact of demand charges on fast charging stations with low utilization levels. Fast charging stations with a load factor over ten percent will pay the traditional tariffed rates. While the discount on the demand charges could cause a potential impact on the general body of ratepayers, we find that the impact would be minor. Additionally, the proposed pilot tariffs could facilitate the growth of the EV infrastructure in Florida and additional revenues could mitigate any adverse impact on the general body of ratepayers.

Based on the above, the proposed GSD-1EV and GSLLD-1EV pilot tariffs are approved. Similarly to the reports for the UEV tariff, FPL shall file annual reports by January 30 reporting the number of fast charging stations taking service under the tariffs, the number of fast charging stations that received the benefit of mitigated demand charges, and the annual revenue loss resulting from the reduction in demand-related revenues from fast charging customers. The first annual report is due January 30, 2022, for the reporting period of January through December 2021, and the annual reports are to be filed in this docket. The GSD-1EV and GSLLD-1EV pilot tariffs shall remain in effect for a period of five years, unless extended, modified, or terminated by order of this Commission. Not later than September 1, 2025, FPL shall file a petition to extend, modify, or terminate the tariffs.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's proposed optional UEV pilot tariff is approved, effective January 1, 2021. It is further

ORDERED that FPL shall file annual reports by January 30, with the first report due January 30, 2022, for the reporting period of January through December 2021. The reports shall provide capital and operating costs, revenue requirements, revenues collected, and energy sales of its utility-owned fast charging stations, together with updated market rates, to allow us to monitor the reasonableness of the UEV rate. FPL shall also collect data regarding charging times to measure time of use and demand for its utility-owned fast charging stations and shall include this information in the annual report. It is further

ORDERED that the UEV pilot tariff shall remain in effect for a period of five years, unless extended, modified, or terminated by order of this Commission or terminated early by FPL upon notice to us. Not later than September 1, 2025, FPL shall file no later than September 1, 2025, a petition to extend, modify, or terminate the UEV pilot tariff. It is further

ORDER NO. PSC-2020-0512-TRF-EI
DOCKET NO. 20200170-EI
PAGE 9

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's proposed GSD-1EV and GSLLD-1EV pilot tariffs are approved, effective January 1, 2021. It is further

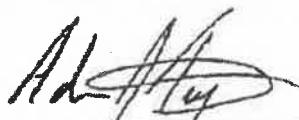
ORDERED that FPL shall file annual reports by January 30 reporting the number of fast charging stations taking service under the tariffs, the number of fast charging stations that received the benefit of mitigated demand charges, data regarding charging times to measure time of use and demand, and the annual revenue loss resulting from the reduction in demand-related revenues from fast charging customers. The first annual report is due January 30, 2022, for the reporting period of January through December 2021. It is further

ORDERED that the GSD-1EV and GSLLD-1EV pilot tariffs shall remain in effect for a period of five years, unless extended, modified, or terminated by order of this Commission. Not later than September 1, 2025, FPL shall file a petition to extend, modify, or terminate the tariffs. It is further

ORDERED that if a protest is filed within 21 days of issuance of the Order, the tariff shall remain in effect with any charges held subject to refund pending resolution of the protest. It is further

ORDERED that if no timely protest is filed, this docket shall be placed in monitoring status upon the issuance of a consummating order so that the utility can file its reports in this docket.

By ORDER of the Florida Public Service Commission this 21st day of December, 2020.



ADAM J. TRITZMAN
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

SPS

NOTICE OF FURTHER PROCEEDINGS

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The Commission's decision on this tariff is interim in nature and will become final, unless a person whose substantial interests are affected by the proposed action files a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on January 11, 2021.

In the absence of such a petition, this Order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

FLORIDA POWER & LIGHT COMPANY

Original Sheet No. 8.936

UTILITY-OWNED PUBLIC CHARGING FOR ELECTRIC VEHICLES (EVs)
(PILOT PROGRAM)

RATE SCHEDULE: UEV

AVAILABLE

Available to customers charging electric vehicles at certain FPL ("the Company") owned public EV fast charging stations ("the stations") with output power of 50kW or greater where FPL provides charging service and direct billing to the station user.

APPLICATION

The stations may be accessed by any person ("user") who resides either within or outside the Company's service territory. EV charging service will be available at the Company-owned stations installed at Company or Host locations. The stations will be accessible to the public for charging. Service under this tariff shall terminate five years from the effective date of the tariff, unless extended by order of the Florida Public Service Commission ("FPSC"), or terminated earlier by the Company upon notice to the FPSC.

LIMITATION OF SERVICE

The user must register an account with the Company's mobile application or network provider, including payment information, prior to charging the EV.

BILLING AND PAYMENT TERMS:

The current rate is set at \$0.30/kWh. Charging network fees as determined by the charging station network provider may apply at certain stations. Vehicle idling fees at a rate up to of \$0.40 per minute following a ten-minute grace period may apply at certain stations located in close proximity to highway corridors or other highly trafficked areas. The rates applicable to the specific station including the rate per kWh, taxes and charging network provider and idle fees will be visible to the users via the app and/or display. Users will be notified when the charging session is complete via the display located at the charging dispenser and through the Company's mobile application and will have the ability to obtain a detailed receipt of the charge session.

RULES AND REGULATIONS

Service under this rider is subject to orders of governmental bodies having jurisdiction and to the currently effective "General Rules and Regulations for Electric Service" on file with the Florida Public Service Commission. In case of conflict between any provisions of this schedule and said "General Rules and Regulations for Electric Service" the provisions of this rider shall apply.

Issued by: Tiffany Cohen, Director, Rates and Tariffs
Effective:

FLORIDA POWER & LIGHT COMPANY

Original Sheet No. 8.106

**ELECTRIC VEHICLE CHARGING INFRASTRUCTURE RIDER TO GENERAL SERVICE DEMAND
(OPTIONAL PILOT PROGRAM)**

RATE SCHEDULE: GSD-IEV

AVAILABLE:

In all territory served. Service under this rider shall terminate five years from the effective date of the tariff unless extended by order of the Florida Public Service Commission ("FPSC"), or terminated earlier by the Company upon notice to the FPSC.

APPLICATION:

For electric service required for the purpose of commercial or industrial public electric vehicle charging with a measured Demand in excess of 20 kW and less than 500 kW. Eligible charging installations must be accessible to the public for commercial or general use.

SERVICE:

Single or three phase, 60 hertz and at any available standard distribution voltage. All service required on premises for electric vehicle charging will be furnished through a dedicated meter.

MONTHLY RATE:

All rates and charges under Rate Schedule GSD-1 shall apply.

DEMAND:

The Demand is the kW to the nearest whole kW, as determined from the Company's thermal type meter or, at the Company's option, integrating type meter for the 30-minute period of Customer's greatest use during the month as adjusted for power factor. In no month shall the billed demand be greater than the value in kW determined by dividing the kWh sales for the billing month by 75 hours per month.

TERM OF SERVICE:

Not less than one year.

RULES AND REGULATIONS:

Service under this schedule is subject to orders of governmental bodies having jurisdiction and to the currently effective "General Rules and Regulations for Electric Service" on file with the Florida Public Service Commission. In case of conflict between any provision of this schedule and said "General Rules and Regulations for Electric Service" the provision of this schedule shall apply.

FLORIDA POWER & LIGHT COMPANY

Original Sheet No. 8.311

**ELECTRIC VEHICLE CHARGING INFRASTRUCTURE RIDER TO GENERAL SERVICE LARGE DEMAND
(OPTIONAL PILOT PROGRAM)**

RATE SCHEDULE: GSLLD-1EV

AVAILABLE:

In all territory served. Service under this rider shall terminate five years from the effective date of the tariff, unless extended by order of the Florida Public Service Commission ("FPSC"), or terminated earlier by the Company upon notice to the FPSC.

APPLICATION:

For electric service required for the purpose of commercial or industrial public electric vehicle charging with a measured demand of 500 kW and less than 2,000 kW. Eligible charging installations must be accessible to the public for commercial or general use.

SERVICE:

Single or three phase, 60 hertz and at any available standard distribution voltage. All service required on premises for electric vehicle charging will be furnished through a dedicated meter.

MONTHLY RATE:

All rates and charges under Rate Schedule GSLLD-1 shall apply.

DEMAND:

The Demand is the kW to the nearest whole kW, as determined from the Company's thermal type meter or, at the Company's option, integrating type meter for the 30-minute period of Customer's greatest use during the month as adjusted for power factor. In no month shall the billed demand be greater than the value in kW determined by dividing the kWh sales for the billing month by 75 hours per month.

TERM OF SERVICE:

Not less than one year.

RULES AND REGULATIONS:

Service under this schedule is subject to orders of governmental bodies having jurisdiction and to the currently effective "General Rules and Regulations for Electric Service" on file with the Florida Public Service Commission. In case of conflict between any provision of this schedule and said "General Rules and Regulations for Electric Service" the provision of this schedule shall apply.

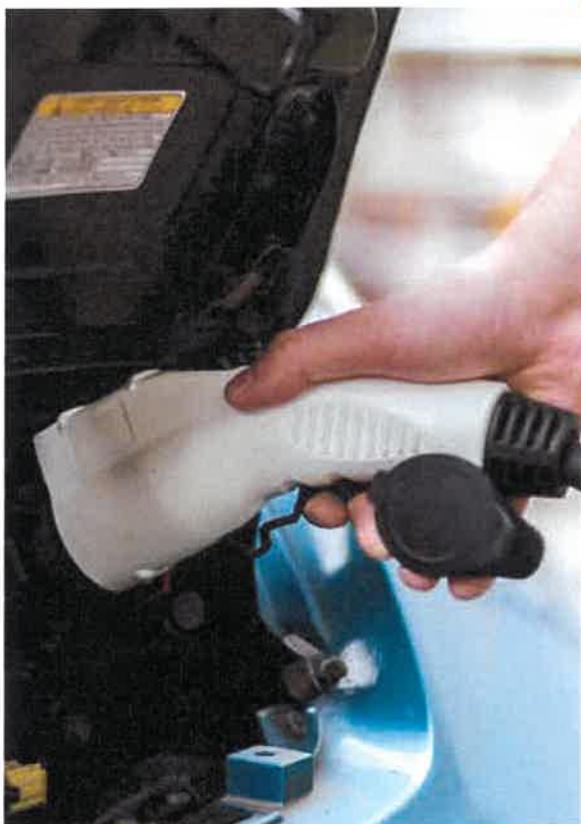
Issued by: Tiffany Cohen, Director, Rates and Tariffs
Effective:

FLORIDA POWER & LIGHT COMPANY

Sixty-First Second Revised Sheet No. 8.010
 Cancels Sixty-First Sixtieth Revised Sheet No. 8.010

INDEX OF RATE SCHEDULES		
<u>RATE SCHEDULE</u>	<u>DESCRIPTION</u>	<u>SHEET NO.</u>
BA	Billing Adjustments	8.030
SC	Storm Charge	8.040
GS-1	General Service - Non Demand (0-20 kW)	8.101
GST-1	General Service - Non Demand - Time of Use (0-20 kW)	8.103
GSD-1	General Service Demand (21-499 kW)	8.105
<u>GSD-1EV</u>	<u>Electric Vehicle Charging Infrastructure Rider Pilot</u>	<u>8.106</u>
GSDT-1	General Service Demand - Time of Use (21-499 kW)	8.107
GSL	General Service Load Management Program	8.109
NSMR	Non-Standard Meter Rider	8.120
GSCU-1	General Service Constant Usage	8.122
RS-1	Residential Service	8.201
RTR-1	Residential Time of Use Rider	8.203
CU	Common Use Facilities Rider	8.211
RLP	Residential Load Control Program	8.217
GSLD-1	General Service Large Demand (500-1999 kW)	8.310
<u>GSLD-1EV</u>	<u>Electric Vehicle Charging Infrastructure Rider Pilot</u>	<u>8.311</u>
GSLDT-1	General Service Large Demand - Time of Use (500-1999 kW)	8.320
CS-1	Curtailable Service (500-1999 kW)	8.330
CST-1	Curtailable Service -Time of Use (500-1999 kW)	8.340
GSLD-2	General Service Large Demand (2000 kW +)	8.412
GSLDT-2	General Service Large Demand - Time of Use (2000 kW +)	8.420
HLFT	High Load Factor - Time of Use	8.425
CS-2	Curtailable Service (2000 kW +)	8.432
CST-2	Curtailable Service -Time of Use (2000 kW +)	8.440
CST-3	Curtailable Service -Time of Use (69 kV or above)	8.542
CS-3	Curtailable Service (69 kV or above)	8.545
GSLD-3	General Service Large Demand (69 kV or above)	8.551
GSLDT-3	General Service Large Demand - Time of Use (69 kV or above)	8.552
OS-2	Sports Field Service	8.602
MET	Metropolitan Transit Service	8.610
CILC-1	Commercial/Industrial Load Control Program (Closed)	8.650
CDR	Commercial/Industrial Demand Reduction Rider	8.680
SL-1	Street Lighting	8.715
SL-1M	Street Lighting Metered Service	8.718
PL-1	Premium Lighting	8.720
OL-1	Outdoor Lighting	8.725
SL-2	Traffic Signal Service	8.730
SL-2M	Traffic Signal Metered Service	8.731
LT-1	LED Lighting	8.735
RL-1	Recreational Lighting	8.743
SST-1	Standby and Supplemental Service	8.750
ISST-1	Interruptible Standby and Supplemental Service	8.760
EDR	Economic Development Rider	8.800
DSMAR	Demand Side Management Adjustment Rider	8.810
TR	Transformation Rider	8.820
SDTR	Seasonal Demand - Time of Use Rider	8.830
OSP-1	Supplemental Power Services Rider Pilot	8.845
EFEDR	Existing Facility Economic Development Rider	8.900
CISR	Commercial/Industrial Service Rider	8.910
VSP	Voluntary Solar Partnership Pilot Program	8.930
STR	FPL SolarTogether Rider	8.932
<u>UEV</u>	<u>Utility-Owned Public Charging for Electric Vehicles Pilot</u>	<u>8.936</u>

Issued by: Tiffany Cohen, Director, Rates and Tariffs
 Effective:



EV INFRASTRUCTURE MASTER PLAN

July 2021



CONTENTS

EXECUTIVE SUMMARY	1
INTRODUCTION	3
Types of EVs	3
ICE vs. EV	3
EV Infrastructure	4
Existing EVSE Types and Use Cases.....	4
BENEFITS OF ELECTRIFIED MOBILITY	5
BARRIERS TO ADOPTION AND INDUSTRY TRENDS	7
EV Adoption Barriers.....	7
EVSE Adoption Barriers.....	7
Perceived Barriers	7
EV Market Trends in the United States and Abroad	8
Cumulative BEV Offerings by Vehicle Type	8
INSTALLATION CONSIDERATIONS	9
Existing Statutes Regarding EV and EVSE.....	9
EV Technology Trends Currently Being Monitored	10
Plan Over Time to Expand EVSE Network	10
EVSE Pre-Deployment Planning	12
FLEET CONSIDERATIONS AND FUTURE ADVANCEMENTS	13
Private Light-Duty Fleets	13
Private Heavy-Duty Fleets.....	13
Transit Fleets.....	14
Wireless Power Transfer (WPT)	14
UTILITY REGULATORY CONSIDERATIONS	15
Regulatory Considerations	17
Current Utility Participation.....	19
STRATEGIES TO DEVELOP CHARGING SUPPLY	23
Other States' Examples	23
EV MARKET ADOPTION	25
BEV Ownership by County.....	25
Statewide EV Market Adoption by Vehicle Type	25
Current EV Adoption.....	26
Adoption Scenarios	26

IMPACTS TO TRANSPORTATION FUNDING	27
Total Net Revenue Differential	27
2021-2040 STTF Total Net Revenue Loss (Moderate Growth Scenario).....	28
RESILIENCY AND EMERGENCY EVACUATIONS	29
EVSE Infrastructure Resiliency	29
Emergency Preparedness.....	30
Emergency Response.....	30
IDENTIFICATION OF POTENTIAL NEW EVSE LOCATIONS	31
Gap Analysis for Long-Range Travel (DCFC)	31
Gap Analysis for Short-Range Travel (Level 2)	31
Existing Publicly Accessible EVSE Locations	32
EV INFRASTRUCTURE ON THE STATE HIGHWAY SYSTEM	33
Gap Analysis Results - Potential DCFC Locations	33
Potential Community Charging (Level 2) Footprints	34
OTHER STATES' POSITION ON EV POLICIES	35
REGIONAL COLLABORATION	36
RECOMMENDATIONS	37
Process	37
Goals	37
Initiatives.....	37
Framework	38
INITIATIVE 1: ADAPT	39
INITIATIVE 2: FACILITATE	41
INITIATIVE 3: EDUCATE	43
INITIATIVE 4: COORDINATE	45
LOOKING AHEAD	47
LIST OF ABBREVIATIONS	48

EXECUTIVE SUMMARY

Electric Vehicle Infrastructure Master Plan (EVMP)

Florida Statute 339.287 titled “Electric vehicle charging stations; infrastructure plan development” requires the Florida Department of Transportation (FDOT) to coordinate, develop and recommend a Master Plan for the development of electric vehicle (EV) charging station infrastructure along the State Highway System (SHS). The FDOT, in consultation with the Florida Department of Environmental Protection (FDEP), the Florida Public Service Commission (PSC) and other state agencies, developed the EVMP with extensive public engagement.

The EVMP delivers a comprehensive course of action to efficiently and effectively provide for EV charging infrastructure to support the goals of F.S. 339.287. This document serves as a starting point for both public and private entities to become familiar with the challenges and opportunities associated with EV charging infrastructure. It also serves as a guide for future legislative, agency-level and public engagement efforts.

The EVMP supports the Florida Transportation Plan (FTP), a single overarching plan for Florida’s transportation future, by advancing the use of EVs to improve air quality, and fosters economic development by encouraging the expansion of the labor force to support EV infrastructure. The EVMP supports opportunities to lower the total cost of vehicle ownership per household and enhances transportation equity. The primary objectives of the EVMP include:

SUPPORT

short-range and long-range electric vehicle travel as well as emergency evacuation in the state

ADAPT

state highway infrastructure consistent with market demand

ENSURE

availability of adequate and reliable EV charging stations

Emerging Needs and Opportunities

Florida is the third most populated state in the nation with a current population of over 21 million and is rapidly growing with approximately 800 people moving to the state every day. Florida also hosted more than 130 million visitors in 2019 and is anticipated to host 180 million visitors by 2029. Transformational initiatives are needed in order to enhance transportation infrastructure and meet the growing demand for safely moving people and goods, while enhancing economic prosperity and preserving the quality of our environment and communities.

Many automakers have recently announced their commitment to EVs by diversifying their offerings and making pledges towards electrifying their fleets over the next few years. Automakers are driving the need for electric vehicle supply equipment (EVSE) to charge the vehicles they are offering. Private sector EV infrastructure service providers deploy in areas where utilization is high, which leaves gaps in the network. Florida has an opportunity to adapt to these emerging technologies by closing the EVSE gaps along the state’s multimodal transportation infrastructure.

These technologies also have implications for transportation funding both at the statewide and local levels. Careful consideration must be given to balance the desire to move toward electrified mobility and sustaining resources for the state’s long-term success.

FDOT's role is to adapt state transportation infrastructure to enable the future of electrified mobility.

Recommendations

The process for the development of the EVMP included coordination with state, regional and local agencies and stakeholders as well as members of the public. A total of seven stakeholder meetings were conducted in addition to two public webinars and a 30-day public comment period. The collaborative process was informed by technical analysis, which led to the development of recommendations.

The recommendations provide a framework and strategic actions that Florida should consider to help achieve the goals and objectives of the EVMP. These foundational concepts are steps toward expanding EVSE networks along multimodal transportation infrastructure and enhancing both public and private investment in EVSE.



ADAPT
Adapt transportation infrastructure
to advance electrified mobility.



FACILITATE

Facilitate the transition of next generation infrastructure through strategic investments and partnerships.



EDUCATE
Provide resources to share information and knowledge that enhance educational and outreach efforts to support the state's electrification goals.



COORDINATE

Engage other states, communities, agencies and stakeholders to coordinate best practices on EV infrastructure deployment.

Utility Regulatory Considerations

A key aspect of providing a reliable EVSE network involves participation from electric utility providers and the regulations set forth by the PSC. Two main areas of consideration include:



1. Utility interaction with third party EVSE service providers (EVSPs).



2. Utility-owned and operated EVSE.

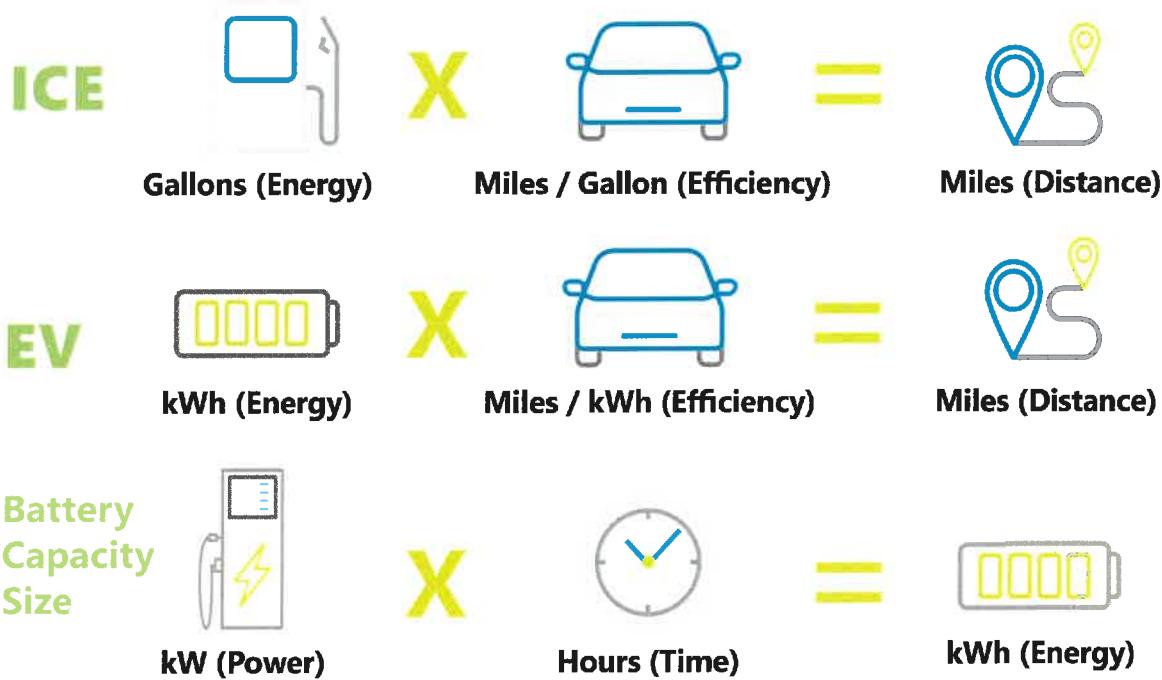
INTRODUCTION

Types of EVs

Electric vehicles are a rapidly evolving technology. They are fueled and propelled differently from Internal Combustion Engine (ICE) vehicles. This section provides an overview of EV types and associated infrastructure.



ICE vs. EV



Conversions



EV Infrastructure

EV Infrastructure is also referred to as EVSE and charging stations. There are three types of EV technologies currently available in the market for passenger vehicles.

Level 1 Charger

- Standard equipment for most electric vehicles
- Slower charging speed >eight hours - (full charge)
- Foundational technology that is aging out

Level 2 Charger

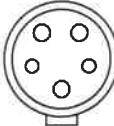
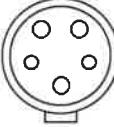
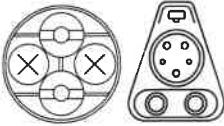
- Slower charging speed >two hours - (full charge)
- Short-range travel (commuting, intra-regional)
- Currently accounts for ~80% of all charging demand

Direct Current

Fast Charger (DCFC)

- Fast charging speed ~30 minutes - (full charge)
- Long-range travel (evacuation, inter-regional)
- Future-oriented

Existing EVSE Types and Use Cases

EVSE Type	Supply Voltage	Charger Examples	Power Level	Charge Rate (miles / hr)	Install Cost	Charging Use Cases	KEY POINTS
Level 1	120V (Toaster)		1 - 1.8 kW	3 - 7	\$	Home / Overnight	 Obsolete for commercial purposes
Level 2	208-240V (Clothes Dryer)		3.3 - 19.2 kW 7.7 kW typical	10 - 60 26	\$\$	Home-work / Destination / Community	Currently dominant for commercial purposes
DCFC	480V (Small office building)		50 kW 150 kW 350 kW	175 500 1,200	\$\$\$	Travel along State Highways	Most applicable for long-range travel and evacuations



THE RIGHT CHARGER



FOR THE RIGHT SPACE

Long-Range Travel
VS
Community Charging

BENEFITS OF ELECTRIFIED MOBILITY

Transportation electrification provides opportunities to transform mobility by providing environmentally friendly and cost effective travel options while promoting energy independence.

Transportation sector (automobiles) has been identified as one of the largest contributor of Green House Gases (GHGs).



Emissions are often disproportionately **concentrated in under-served and low-income communities within congested urban areas.**

Lack of transportation energy diversity can lead to over reliance on specific energy sources.



This makes Florida susceptible to changes (price fluctuations / availability) in the global energy market. **EVs can be fueled by any power source.**

Energy sector fuel source (for electricity generation) is primarily natural gas.



Natural gas is becoming more popular and is a cleaner fuel source compared with coal-based electricity production. At the same time, **Florida utilities are rapidly investing in solar farms, which could further reduce EV's carbon footprint.**

General lack of awareness / education.

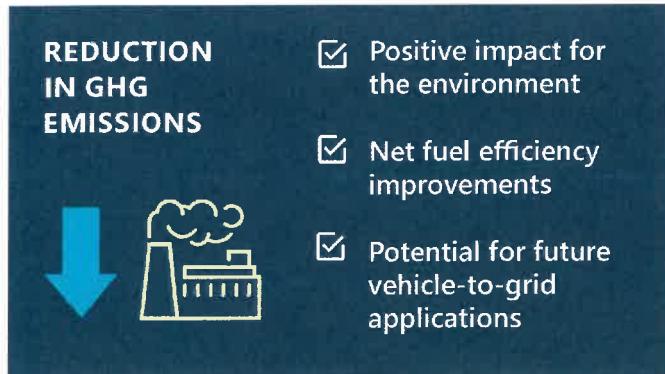


Higher price points for new EVs lead to confusion about overall total cost of ownership. Significantly **less maintenance and zero gasoline pumped** helps drive costs down over time.

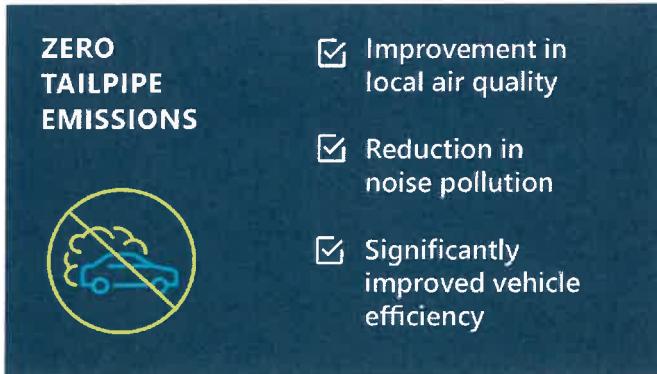


Electric mobility provides several benefits to both transportation and energy sectors.

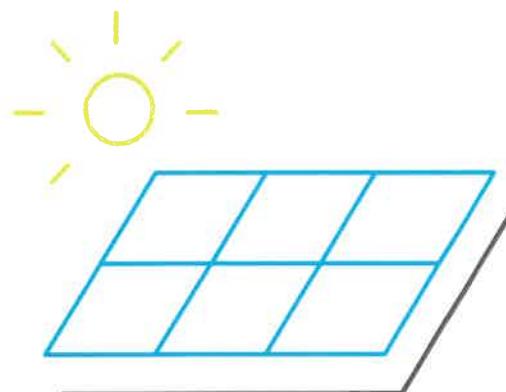
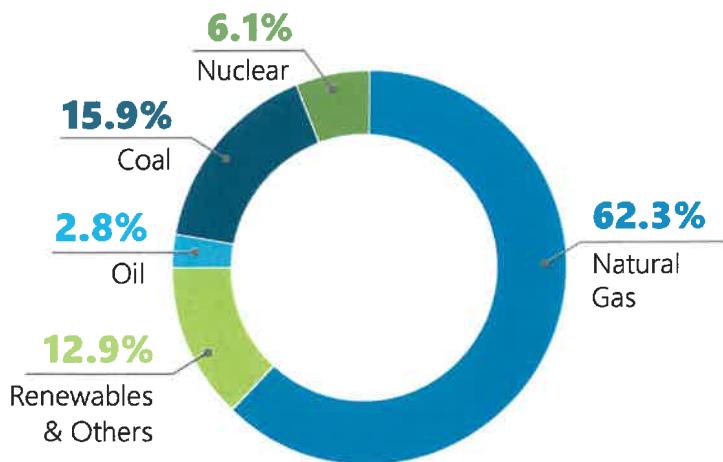
ENERGY SECTOR



TRANSPORTATION SECTOR



Florida's Energy Sources for Electricity Generation



Solar is projected to increase
600% over the next ten years.

BARRIERS TO ADOPTION AND INDUSTRY TRENDS

Emerging technologies often face barriers to market acceptance. Some barriers are easily overcome through innovation and market forces while other barriers are persistent. Some major barriers are highlighted below.

EV Adoption Barriers



EV cost parity with ICE vehicles – expected to occur short-term (2025 - 2030)

No secondary market (limited amount of used EV inventory)

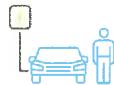


Lack of charging stations; long-distance travel; and multi-family housing



Lack of dealership knowledge / willingness to suggest EVs; lack of EVs available at Florida dealerships

EVSE Adoption Barriers



Low EV customer base



Lack of public awareness regarding EVSE locations



EVSE charging speed – function of power delivery of EVSE and how much power an EV can accept



Service providers locate EVSE where EV adoption is highest; EVSE gaps exist in low-utilization, rural and under-represented communities



Utility demand charges



Lack of site-specific back-end utility infrastructure for DCFC stations, especially in rural and critical emergency evacuation areas



Additional costs when providing back-up power at EVSE locations for emergency evacuation



Limited public funding

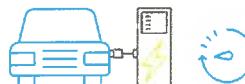
Perceived Barriers



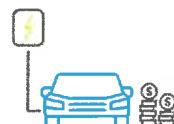
Range anxiety during longer trips



Lack of truck, SUV/crossover EV models available on the market



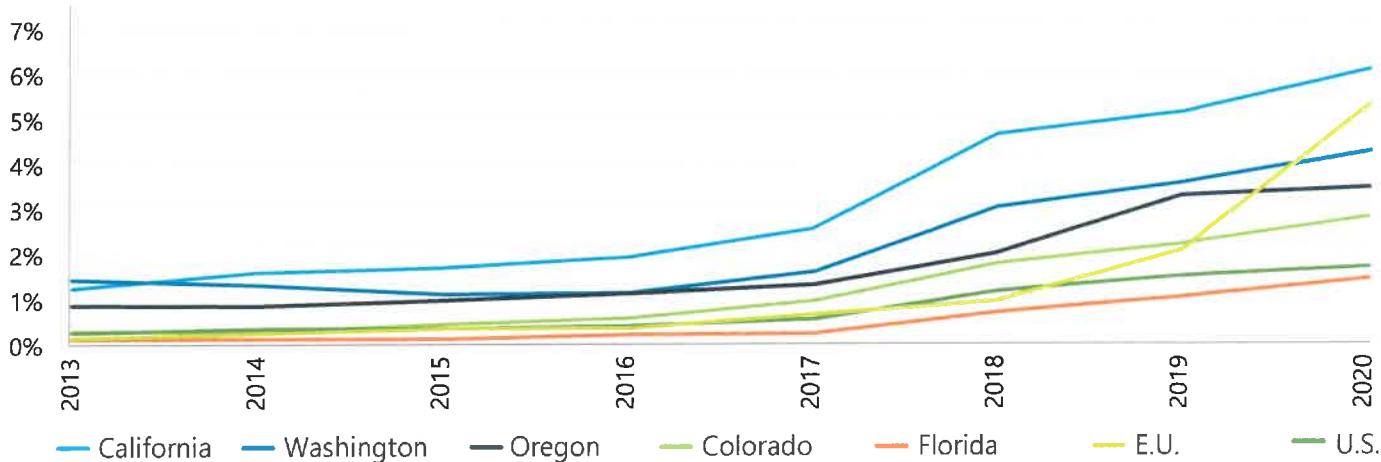
Long recharging times



Perception that gasoline is inexpensive

EV Market Trends in the United States and Abroad

The global market for EVs has been growing with significant increase in sales starting in 2017. California has the largest annual sales percentage with EVs accounting for over six percent of all vehicles sold in 2020. Several other states have reached annual EV sales percentages of three to four percent. The United States national average has increased slowly and is now just under two percent of annual vehicle sales.



Automobile Manufacturers are Going Electric

VOLVO
has pledged that
50% of its vehicle
offerings will be
EV by 2025.

GENERAL MOTORS
has pledged that
all light-duty cars
and SUVs will be
EV by 2035.

FORD
expects that
40% of global
sales will be
EV by 2030.

VOLKSWAGEN
expects that
50% of US sales
will be EV
by 2030.

Cumulative BEV Offerings by Vehicle Type

2021	2022	2023	2024	2025
20	38	44	46	50
3	10	13	15	18
1	9	11	13	13
24 MODELS	57 MODELS	68 MODELS	74 MODELS	81 MODELS

By the end of 2020, there were 17 BEV models on the market.

Cumulatively, by 2025, there will be at least 81 additional BEV models available to consumers.

INSTALLATION CONSIDERATIONS

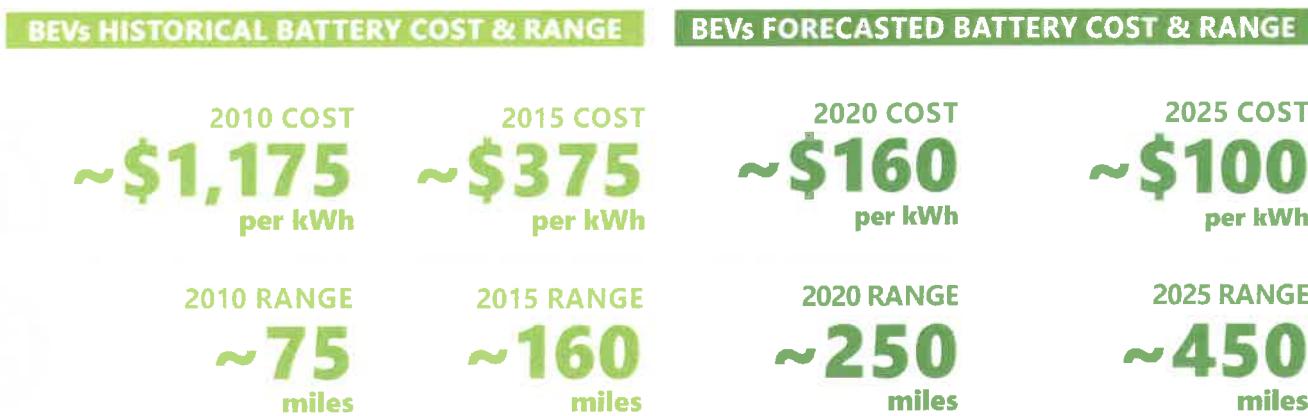
EVSE installations require coordinating with local building permit office(s) for EVSE related codes and local electricity utility provider(s) to determine load demand, especially when considering DCFCs. Existing Statutes and Rules regarding EVs and EVSE are highlighted below.

Existing Statutes Regarding EV and EVSE

EV Insurance Regulation	Insurance companies may not impose surcharges, or any additional fees based on the vehicle being electrified, unless justified and approved by the Florida Office of Insurance Regulation.	<i>Florida Statutes Title XXXVII. Insurance § 627.06535. Electric vehicles; restrictions on imposing surcharges.</i>
EVSE Financing Authorization	Local governments within Florida may offer funding for EVSE projects to private landowners.	<i>Florida Statutes Title XI. Intergovernmental Programs § 627.06535. Supplemental authority for improvements to real property.</i>
Authorization for Alternative Fuel Infrastructure Incentives	Local governments may use income from the infrastructure surtax to offer incentives to private property owners to install EVSE equipment. A local government ordinance must be in place.	<i>Florida Statutes Title XIV. Taxation and Finance § 212.055. Discretionary sales surtaxes; legislative intent; authorization and use of proceeds.</i>
EVSE Supply Equipment Utility Regulation Exemption	Electricity sold from publicly available non-utility EVSE infrastructure is not subject to regulation of rate, terms, or conditions.	<i>Florida Statutes Title XXVII. Railroads and Other Regulated Utilities § 366.94. Electric vehicle charging stations.</i>
EVSE Rules	Prohibits non-EV vehicles from using or blocking space allocated for plug-in vehicle charging. Also requires the state to provide definitions, methods of sale, labeling requirements, and price posting requirements for EVSE.	<i>Florida Statutes Title XXVII. Railroads and Other Regulated Utilities § 366.94. Electric vehicle charging stations.</i>
EVSE Policies for Condominiums	Requires a condominium association to allow a resident to install, at their own cost, EVSE infrastructure for the purpose of charging a vehicle.	<i>Florida Statutes Title XL. Real and Personal Property § 718.113. Maintenance; limitation upon improvement; display of flag; hurricane shutters and protection; display of religious decorations.</i>
Rest Areas	Florida administrative rule prohibits the physical connection of any vehicle to an electrical or water outlet at rest areas.	<i>Florida Rule 14-28.002 - Public Use of Rest Areas, Welcome Centers, Truck Comfort Stations, and Wayside Parks.</i>
Agreements Relating to the Use of and Access to the Interstate System Rights-of-Way	Effectively prohibits commercial activities relating to the sale of electricity and other commodities at interstate rest areas. If a state DOT installs EVSE at interstate rest areas, the use of the charging station must be free to the traveling public.	<i>Federal Regulation 23 U.S. Code § 111</i>

EV Technology Trends Currently Being Monitored

In order to assess infrastructure readiness, various technologies and market indicators need to be monitored.



Plan Over Time to Expand EVSE Network

Ultimately, the deployment of EVSE infrastructure in the state of Florida will occur in several phases. The optimum methodology for choosing EVSE sites and determining the number of chargers will evolve as the EV adoption rate increases.

	2020	2025	2030	2035
PHASE	EARLY PHASE		MIDDLE PHASE	
OBJECTIVE	Build Out the Network		Grow and Densify	Densify and Maintain
ACTION	Fill in the Gaps Between Locations (New Locations)		Increase Number of Chargers at Each Location	Decrease Intervals Between Stations
METRIC	40 Mile Spacing Between EVSE Locations Along the SHS		Approximately 1MW of Peak Charging Demand at Each Location (6 DCFC Stations per Location)	25 Mile Spacing Between EVSE Locations Along the SHS
	 At least 2 EVSE at each location		 At least 6 EVSE at Each Location	 6+ EVSE at each location

INSTALLATION CONSIDERATIONS

Installation of EVSE requires special considerations for how, where and why EV operators charge their vehicles. Locations along travel corridors are ideal for DCFC while Level 2 is best suited at locations with longer dwell times. Once the right charger has been identified for the location, the following are some pre-deployment considerations.

DCFC Installation Site - Long-Range Travel



Level 2 Installation Site - Community Charging



EVSE Pre-Deployment Planning

Considerations for Every Location Prior to Developing EVSE.

1. Power Supply

Early and consistent communication with the electrical utilities is critical so they can evaluate impacts to the grid, design and construct the necessary infrastructure equipment, and determine rate structure.

Utilities should understand the electrical requirements including:



PEAK LOAD
(both at start up and at future build out)

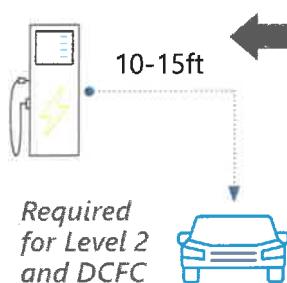
CHARGER VOLTAGE
(typically 480V for DCFC chargers)

SITE CONSTRAINTS

SCHEDULE

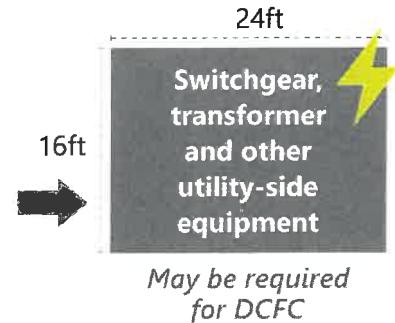
2. Space Requirements

Electrical utilities will typically require an easement for the overhead or underground power supply and for the equipment. Distribution transformers typically have three feet of space available to the sides and rear for fire safety and up to ten feet of clearance at the front for operational safety. **Larger load sites (typically greater than 1 MW) may have additional utility requirements.**



Charging stations are located near the parking stalls and must be located within approximately 10 to 15 feet of the vehicle.

The utility-side charging equipment for DCFCs will likely require a 16 feet by 24 feet enclosed area for the equipment.



ADA requirements should be taken into consideration at all sites.



Queue management considerations should be made for EVs waiting to charge.

3. Future Growth Considerations

If installations occur at a later time, **additional conduit should be installed** at the site to avoid costly demolition or downtime.

The electric utility industry should plan to accommodate **future upgrades**.

When improving existing or developing new multimodal transportation infrastructure, especially managed lanes, consider potential future technologies such as in-lane vehicle charging.

FLEET CONSIDERATIONS AND FUTURE ADVANCEMENTS

Due to economies of scale, public and private fleets (including transit agencies), are realizing cost savings by switching to EVs. Fleet managers need to evaluate where and how to charge their vehicles. The following provides considerations when making these decisions.

Private Light-Duty Fleets

Rental Cars, Delivery Vans, etc.

- Majority of vehicles will be light-duty (LD), but some may be medium-duty (MD) vehicles, charging infrastructure is the same
- Primary charging demands will be met with on-premise (i.e., depot, yard) using Level 2 chargers
- Secondary charging demands may be met using off-site publicly accessible DCFC as needed



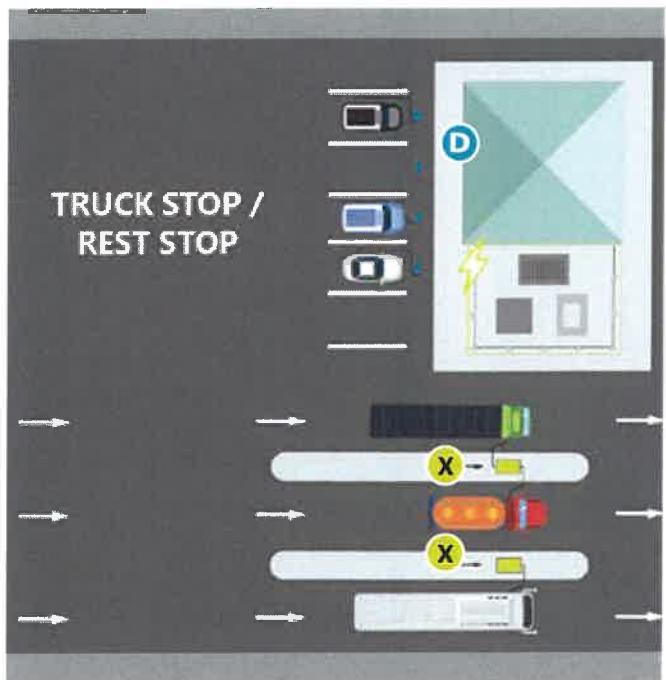
② LEVEL 2 CHARGERS ① DCFC STATIONS

ⓧ XFC CHARGERS

Private Heavy-Duty Fleets

Long-Haul Trucks, Construction Vehicles, etc.

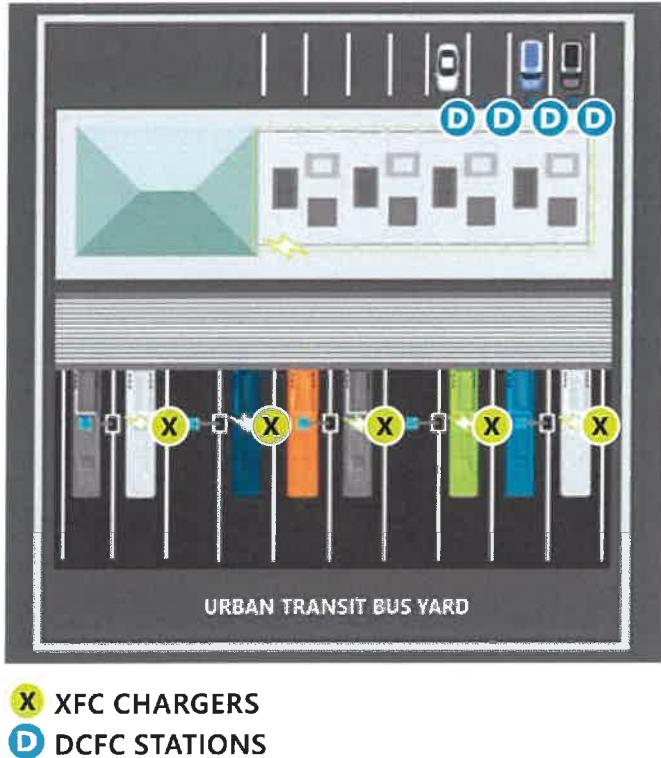
- Heavy-Duty (HD) fleet vehicles currently use HD EVSE which operates at >150kW
- HD vehicles will have their own dedicated EVSE charging network and may use Extreme Fast Charging (XFC) in the near future (1 MW+)
- LD and MD chargers will not be compatible with HD EVSE
- HD EVSE network will be primarily located along the SHS, likely at truck stops, rest areas, intermodal hubs and distribution centers



Transit Fleets

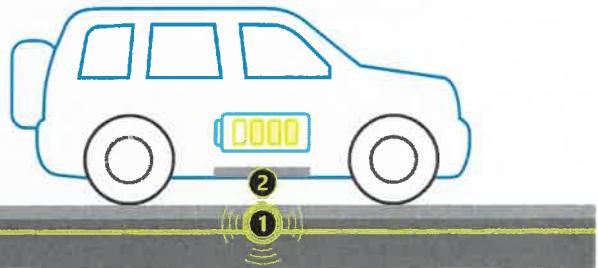
School Buses, Transit, etc.

- HD EVSE for transit bus charging typically ranges between 150kW – 350kW
- A 100 bus depot pulls around 5MW of power to support 30-35 150kW chargers
- Charging is primarily conducted within the bus depot, but en-route charging can extend daily operations
- When en-route charging is not feasible, multiple buses may be needed to cover longer routes traditionally served by one diesel bus
- Battery size and charging strategy are critical to ensure maximum en-route time
- Transit fleet fuel sources have evolved from petroleum (diesel) to natural gas and now electricity, requiring substantial investment to deliver fuel to their vehicles

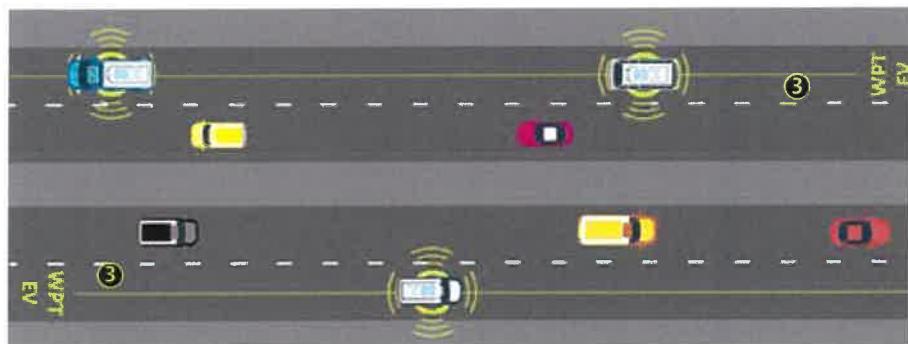


In-Road (Highway) or En-Route (Transit) Wireless Power Transfer (WPT)

WPT technology is currently in Research and Development phase, but is being closely monitored for future implementation.



Charging While Driving Could Enhance the State Highway System



LEGEND

- ① In-road wireless charging using inductive loop technology.
- ② EVs must have on-board equipment to facilitate charging.
- ③ WPT on SHS to support long-range travel and emergency evacuations.

Florida's managed lanes provide an excellent opportunity to facilitate in-lane charging.

UTILITY REGULATORY CONSIDERATIONS

Florida is a traditionally regulated state, with vertically integrated public electric utilities serving exclusive service territories under the jurisdiction of the Public Service Commission (PSC), pursuant to **Chapters 350 and 366, Florida Statutes.**

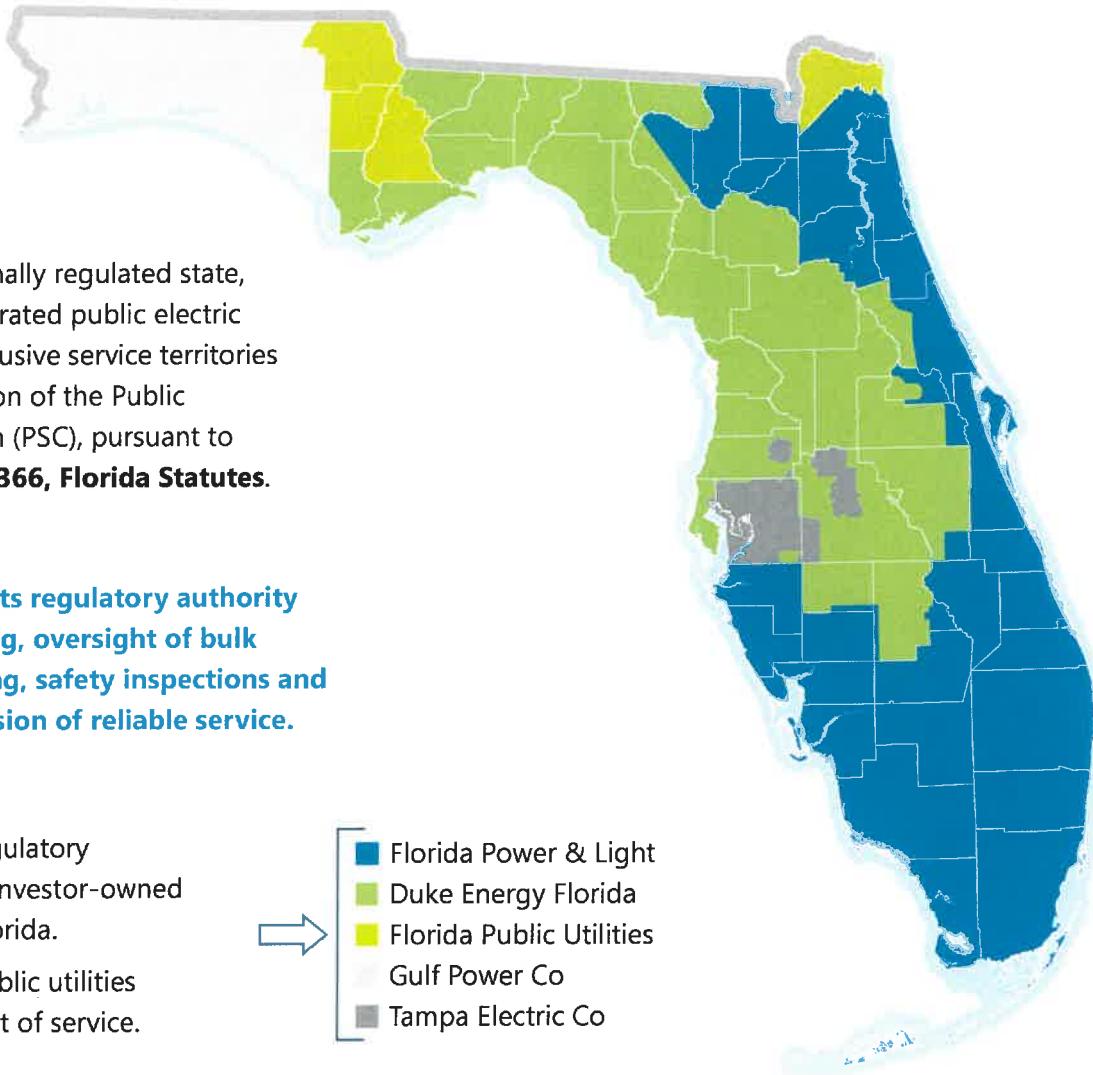
The PSC exercises its regulatory authority through rate setting, oversight of bulk power grid planning, safety inspections and ensuring the provision of reliable service.

The PSC has full regulatory authority over five investor-owned public utilities in Florida.

Rates are set for public utilities based upon the cost of service.



- Florida Power & Light
- Duke Energy Florida
- Florida Public Utilities
- Gulf Power Co
- Tampa Electric Co

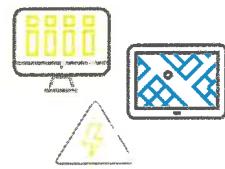


Public utilities are permitted to recover in rates the capital invested in assets used to provide electric service, along with the opportunity to earn a reasonable return on that investment, and operating costs.

**THE
PSC**



does not regulate the rates and service quality of municipal or rural cooperative electric utilities,



but does have jurisdiction regarding rate structure, safety, territorial boundaries, and bulk power supply planning.

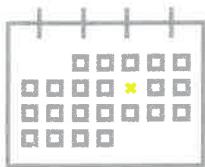
Since the current regulatory structure of electric utilities in Florida includes exclusive service territories, the sale of electricity to retail, or end-use customers by a third party is not permitted.

However, in 2012 the Florida Legislature created an exemption for electric vehicle charging. Section 366.94(4), Florida Statutes, states that "The provision of electric vehicle charging to the public by a non-utility is not the retail sale of electricity for the purposes of this chapter. The rates, terms and conditions of electric vehicle charging services by a non-utility are not subject to regulation under this chapter."

As such, the current process for the installation and provision of electric vehicle charging by a non-utility is not subject to regulation by the PSC.

On September 2, 2020 the PSC issued a request for comment identifying the type of regulatory structure necessary for the delivery of electricity to electric vehicle charging infrastructure and the participation of public utilities in the marketplace. In response, the PSC received 15 sets of comments from various stakeholders.

These contributors included the generating investor-owned utilities, three of the larger municipal utilities, several electric vehicle charging companies and stakeholders, and two environmental organizations.



On October 21, 2020 the PSC conducted a workshop to discuss the comments received.



Initial observations are that among stakeholders there is a general consensus that Florida's current regulatory structure is appropriate for the delivery of electricity to charging station infrastructure.

Participation by public utilities in the electric vehicle charging marketplace involves two areas of consideration.



1 Interaction with 3rd party EVSPs



2 Utility-owned / operated EVSE

A focus on flexibility should be maintained in order to adopt different models of utility and third-party ownership / operation based upon site-specific circumstances. In addition, prematurely and narrowly defining the role of public utilities should be discouraged given the nascence of the market and the urgent need to address gaps in charging infrastructure.

UTILITY REGULATORY CONSIDERATIONS

Regulatory Considerations

How Utilities Interact with Third-Party Charging Station Owners

Make-Ready utility installations involve both entities preparing the location for EV charging infrastructure. The utility facilitates installations or upgrades to distribution facilities including distribution lines, pad mounted transformers and the electrical meter. The third party is responsible for the panel that connects to the meter and the EV charger.

Traditional Cost of Service

Traditional cost of service regulation includes the idea that the party causing costs to be incurred should be responsible for bearing those costs, not the general body of ratepayers. With Make-Ready installations, under this approach, costs of installing the facilities connected by third-party chargers should be recovered by the utility from that third-party company.

If the charging station fails to function or the utility is otherwise unable to recover costs from the third party, the Make-Ready installation could result in stranded costs passed on to or subsidized by the general body of ratepayers. Any regulatory allowance of proposed Make-Ready projects should consider the risk of potential cross-subsidization. However, it should be noted that the Florida Legislature has encouraged utility investment in certain projects in the past by creating or allowing special cost recovery mechanisms for such investment.

Rate Structure

The rate structure applied to electric service for third-party charging stations is another consideration. For example, EV charging station companies are concerned that through the rate structure, demand charges by utilities are an impediment to DC Fast Charging infrastructure. Fast charging stations are commercial customers billed under rate schedules that include an energy charge (based on the amount of energy consumed, or kWh) and a demand charge (dollar per kW). The demand charge is based on the highest usage, or demand, over a specified time interval (15 or 30 minutes). This peak usage determines the demand charge for the billing month.

Demand charges recover the utility's fixed cost of facilities (power plant, distribution facilities) built to meet a customer's highest electricity demand, regardless of use. This challenges the economics of public fast charging stations that experience a high peak demand, but low levels of kWh energy sales, or utilization. Peak demand at an infrequently used site could be determined by the single customer of that site with the highest demand, rather than an aggregate from multiple users charging at the sites busiest time. At low levels of utilization, the bill incurred by the charging stations result in demand charges being spread over a low volume of energy sales. Stations with higher kWh sales spread the demand charge over more energy sales and are more likely to recover costs. In addition to evaluating whether demand charges are appropriate for EV charging, utilities may consider how rate structure can help manage the additional demand created by vehicle charging. Time-of-use rates, based upon the cost of producing energy during different segments of the day, can be a mechanism for encouraging EV charging during off-peak hours.

How to Address Utility Participation Directly in the Charging Service Marketplace

There are multiple participants in the charging marketplace that face private capitalization and competition for high-usage locations. Potentially, a utility with lower capital risk provided by rate base regulation could have an advantage in the marketplace. However, public policy priorities may determine that the advantages of rapid deployment and the ability of utilities to serve high-cost, low-usage locations may outweigh the competitive concerns. Absent direction from the Legislature to adopt rules, the PSC will address utility involvement in the EV charging marketplace on a case-by-case basis as utilities propose programs for approval. Through comments, stakeholders have suggested competitively neutral policies that should be considered as utilities enter the market, such as the ability of site hosts to choose the products, services, and pricing that best suit their goals for providing charging services, as well as the use of equipment and software that promotes interoperability among charging locations. Regulated utilities offering EV charging services directly to the public would need to petition the Commission for approval of an EV charging tariff. Under traditional regulation, rates are set based upon the cost of service. Current conditions of this emerging market may not offer sufficient data available to determine a cost-based rate for charging services. In the early stages of participation, utilities may rely on some form of market-based rate derived by comparing rates charged by similarly situated charging stations. With this approach, utilities run the risk of charging rates that do not recover the cost of installation, creating subsidization by other users. On the other hand, there is a similar risk of utilities recovering more than the cost of providing service.



UTILITY REGULATORY CONSIDERATIONS

Current Utility Participation

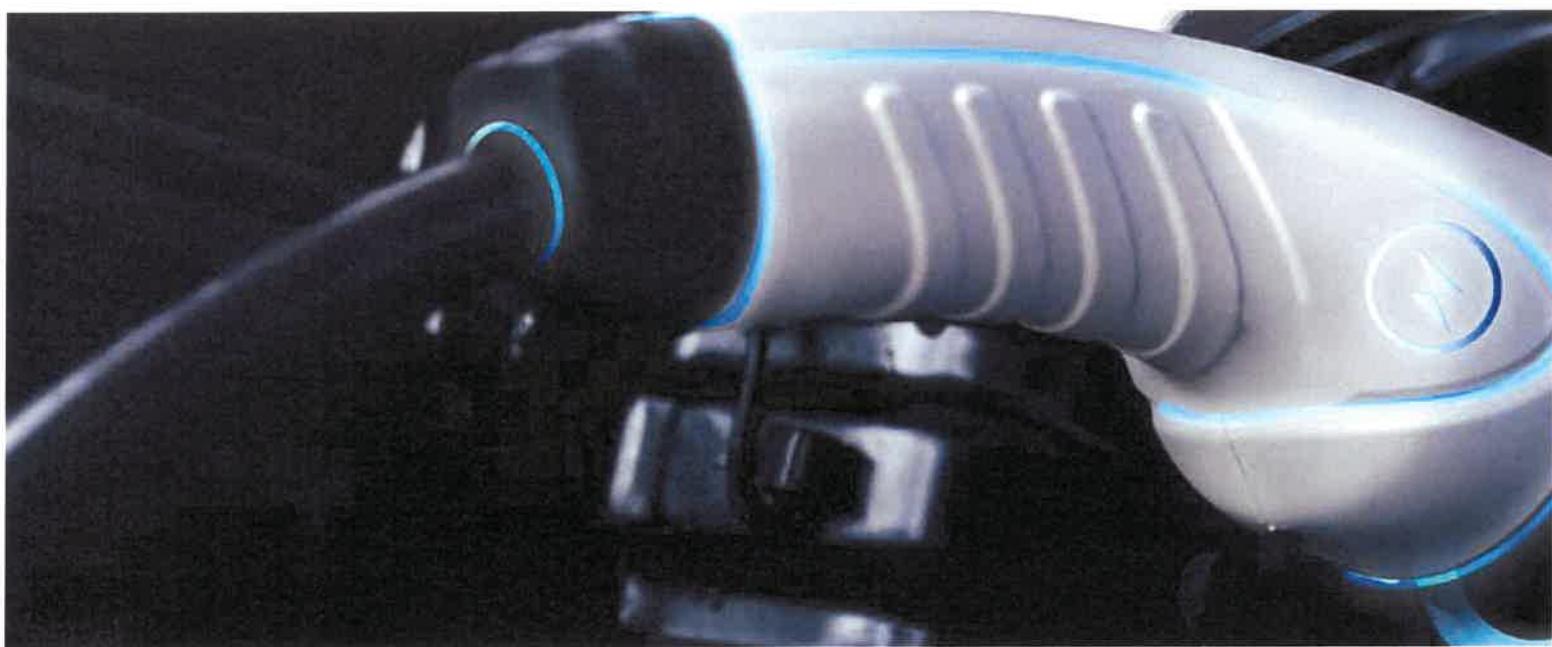
Duke Energy Florida

Duke Energy Florida (DEF) has a five-year, EVSE pilot program "Park & Plug" as part of a negotiated rate case settlement agreement. DEF was authorized by the PSC to purchase, install, own and support EVSE at DEF customer locations. DEF may incur up to \$8 million plus reasonable operating expenses, with a minimum deployment of 530 EVSE ports.

EVSE PILOT DETAILS

- At least 10 percent of EVSE ports must be installed in low-income communities.
- Deployment of Level 2 chargers and DCFC.
- Provision of equipment, installation, warranty and network connection services free of charge to the site hosts through 2022.
- Funding of consumer education up to \$400,000.
- Ownership and operation of the charging station network with access (easement).
- Site hosts responsible for the cost of electricity used by the charging station; and
- Site hosts provide stations either as an amenity to drivers or by charging a fee to the driver, enabled by a smartphone or radio-frequency identification card.

The 2017 Settlement required a separate proceeding for approval of a permanent EV charging station offering within four years of the effective date or make a filing with the PSC to explain why a permanent offering is not warranted. On January 14, 2021, DEF filed a new Settlement Agreement, which requests the approval of a permanent EV charging station offering. The parties of the 2021 Settlement agree that DEF's 2017 EV Pilot should not be continued in its current form, although DEF will continue operation and recovery of costs of the charging stations that were installed pursuant to the 2017 EV Pilot. In its place, the 2021 Settlement presents three new EV programs forecasted to cost \$62.9 million over a four-year term of 2022-2025.



NEW DUKE EV PROGRAMS

Residential EV Non-Time of Use (TOU) Credit Program

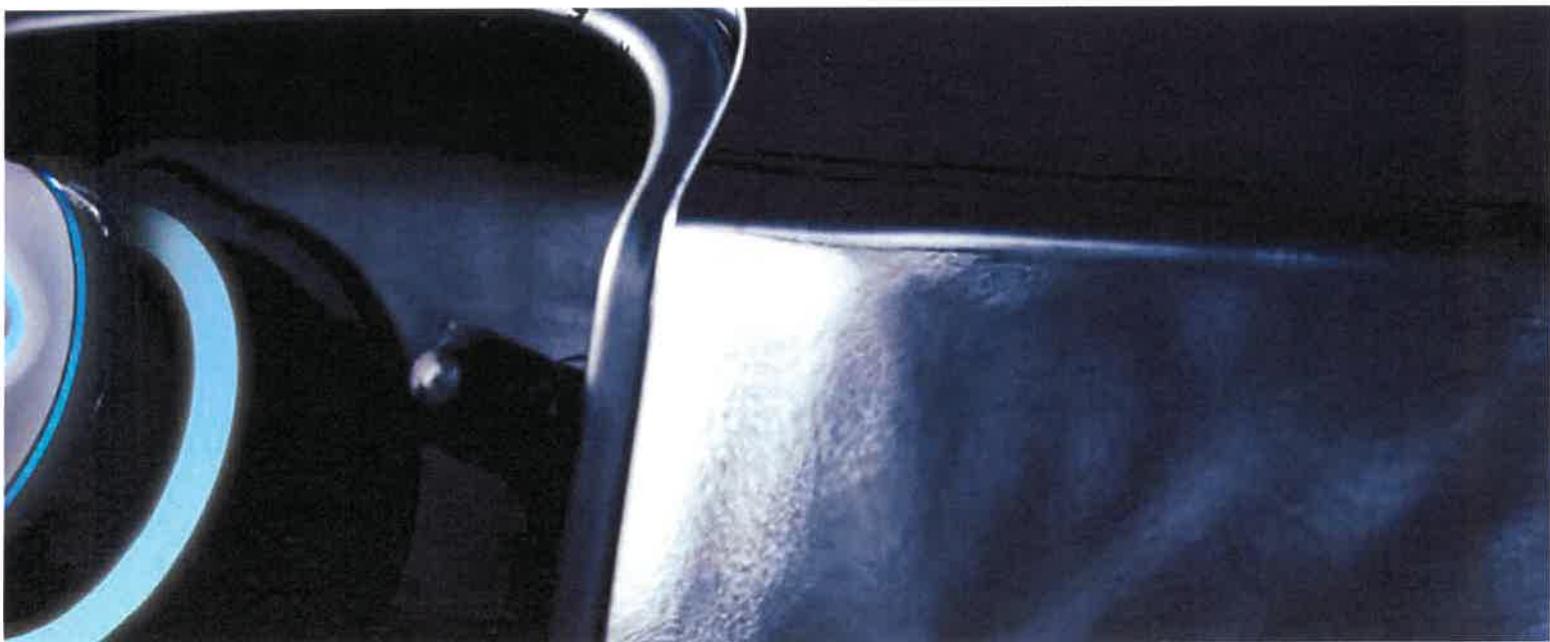
Residential customers that are not on a whole home TOU rate and who have EV charging stations located at their residence will be eligible for a \$10 per month credit as a proxy for being on a TOU rate. The credit will be paid monthly to participating residential customers who observe off-peak charging. Customers will be allowed to "opt out" and charge during on-peak hours no more than twice in one month; customers who charge on-peak more than twice in one month will not receive that month's credit.

Rebate Program for Commercial & Industrial (C&I) Customers

All C&I customers that install an eligible EV charging station are eligible for the rebate. In exchange for the rebate, the C&I customer must install all EV chargers behind a separate meter and take service on schedule GST-1, a non-demand TOU rate schedule. The rebate amount will vary depending on the type of charging station being installed. Under the terms of the 2021 Settlement, DEF will be authorized to defer the recovery of its C&I rebate costs to a regulatory asset that will be amortized over five years.

Company-Owned DC Fast Charging Stations

DEF will be allowed to offer a new tariff for a Fast Charge Fee (FCF-1) to be collected from EV drivers using company-owned DC Fast Charging stations. The FCF-1 is based on the average cost for Fast Charging provided by other operators across Florida. DEF will include the Fast Charging station investments in rate base. All associated costs related to the DC Fast Charge EV program will be included in the cost of service. The 2021 Settlement was approved by the PSC on May 4, 2021.



UTILITY REGULATORY CONSIDERATIONS

Florida Power & Light Company

In 2019, Florida Power & Light Company (FPL) began a three-year pilot program, known as EVolution, which targets the installation of 1,000 charging ports of various technologies and all market segments.

EVolution PILOT DETAILS

- Facilitates gathering information such as EV use, adoption, and power quality data.
- Provides insights into potential new rate structures.
- Aims to increase public charging stations for EVs in Florida by 50 percent.
- Conducted in partnership with interested host customers over an approximate three-year period; and
- Installations will encompass workplace, destination, public fast charging, and residential.

OPTIONAL EV CHARGING PILOT TARIFFS

Utility-Owned Public Charging for Electric Vehicles (UEV)

Establishes a charging rate for utility-owned direct current fast charging stations. The UEV tariff sets a price of \$0.30 per kWh for electricity sold to motorists at charging stations operated by FPL. FPL chose this rate based on a comparison of automotive fuel alternatives. FPL compared the average mileage efficiency of electric vehicles to gasoline-powered vehicles and, as a result, the electricity price that equates to the same cost per mile is \$0.31 per kWh. FPL also considered EV pricing options offered by non-utility providers, such as Tesla, EVgo, and Electrify America. FPL also noted that the proposed \$0.30 per kWh rate is not cost-based and that they do not have data regarding actual sales volumes and operating costs of utility-owned public charging stations and, therefore, the development of cost-based rates is conjectural at this time.

Electric Vehicle Charging Infrastructure Riders for General Service Demand (GSD-1EV) and General Service Large Demand (GSLD-1EV)

These new tariffs establish a rate for competitive market charging stations operating in FPL's service area. The GSD-1EV and GSLD-1EV tariffs help mitigate the impact of demand charges for charging stations that have low use. The GSD-1EV and GSLD-1EV rate schedules are comprised of an energy charge (based on the amount of energy, or kWh, consumed) and a dollar per kilowatt demand charge. The demand charge is billed on the highest usage, or demand, over a specified time interval (30 minutes). This peak usage determines the demand charge for the billing month. Current rate design results in scenarios where at low levels of utilization, the electric bills incurred by the charging stations result in demand charges spread over a relatively low volume of energy sales (low load factor customer). Charging stations with higher kWh sales (high load factor customers) are able to spread the billed demand cost over more energy sales and are, therefore, more likely to recover their electricity costs.

FPL proposed tariffs that include a demand limiter mechanism. Under the tariffs, the amount of demand billed to the customer would be the lesser of the measured demand or the limited demand as calculated by dividing the kWh sales by a fixed constant of 75 hours. Mathematically, applying the 75 hours constant to the kWh sales results in a reduction in the demand billed to a customer with a load factor of less than ten percent. Customers with a load factor above ten percent would pay the standard demand charges contained in the GSD-1EV and GSLD-1EV rate schedules and would not receive a reduction in the electric bill. The PSC ordered FPL to file, no later than Sept. 1, 2025, a petition to extend, modify, or terminate the tariffs, and required the utility to file annual reports with the results of the pilot program.

Tampa Electric Company

On September 25, 2020, Tampa Electric Company (TECO) filed a petition with the Commission for approval of a four-year, \$2 million EV charging pilot program.

PROPOSED PILOT DETAILS

- TECO will own, operate, and maintain approximately 200 Level 2 charging ports and four DC Fast Chargers within the company's service area.
- Will engage a turn-key vendor for installation of the charging ports, provision of networking, operation, maintenance and 24/7 customer support.
- Will fund the full cost of installation for income qualified and government site hosts.
- Charging ports will be located in five different market segments: workplaces, public/retail, multi-unit dwellings, income qualified, and government, with Site Hosts selected through an application process.
- Will contribute up to \$5,000 towards installation costs for ports in the workplace, public/retail and multi-unit dwelling segments. The cap will encourage site hosts to minimize installation costs.

During the Pilot, TECO will retain full ownership of the charging equipment and provide full operation and maintenance service. The Site Host will be charged for electricity consumed by the charging equipment at standard tariff rates. The Site Host may choose to charge drivers for charging or may provide charging at no cost to EV drivers as an amenity. If the Site Host chooses to charge EV drivers, the charge will be limited to TECO's then-current GS tariff rate, plus any telecom or administrative fees assessed by the billing vendor. Tampa Electric Company will produce a final report on the key findings of the Pilot and provide the report to the PSC no later than the third year of the Pilot. The TECO pilot was approved by the PSC on April 1, 2021.

Municipal and Cooperative Utility EV Charging Programs

There have been two Municipal and Cooperative EV utility tariffs filed with the PSC for rate structure review in 2020.

ORLANDO UTILITIES COMMISSION (OUC)

OUC has been offering commercial Level 2 and DCFC EV charging services that include ownership options. OUC offers two models to choose from:

- "Charge-It" - OUC owns, installs and maintains the station. The commercial partner obtains EV charging services from OUC for a fixed monthly fee over a contracted period of time. The fee is based on specific characteristics of the site and the equipment type.
- "Own-It," - OUC designs, procures and installs the station. The commercial partner pays for the equipment and installation that OUC provides and then takes immediate ownership of the station.

SUMTER ELECTRIC COOPERATIVE (SECO)

On January 1, 2021, SECO implemented a 50 kW or greater fast charging tariff that directly bills the user of the EV charger. The user must register an account with SECO's mobile application or network provider, including payment information, prior to charging the EV. The tariff is available to EV fast charging stations with output power of 50 kW or greater where SECO provides the charging service and direct billing to the user. The energy charge is \$0.31 per kWh for charging at levels 1-129 kW and \$0.44 per kWh for charging at levels 130kW and above.

STRATEGIES TO DEVELOP CHARGING SUPPLY

Other States' Examples

To increase EV charging station development, Florida can pursue a singular model or multiple models to enable ample opportunity for involvement from many parties. Multiple options to EVSE deployment allow the market to develop, embrace different business models and maintain flexibility. Following are examples and strategies of how they were implemented in other states.

MAKE-READY INFRASTRUCTURE: NEW YORK

The utility installs infrastructure for charging station and Electric Vehicle Service Provider (EVSP) is installed/owned by third party.

The EVSE New York Public Service Commission (NYPSC) approved a \$701 million Make-Ready infrastructure program, involving the state's six investor-owned utilities to spur the installation of chargers. The NYPSC treats all utility-owned infrastructure as capitalized plant in service with cost allocation and recovery via traditional utility rate making methods. Since the assets are not reflected in current rate plans, utilities can recover the associated revenue requirement through an existing surcharge until base rates are adjusted to include the new program's investments.

53,000

Level 2

Chargers to be
Installed

1,500

DCFCs
Installed

~\$5K

for Level 2

Chargers Rebates

~\$70K

for DCFC
Rebates

REBATES: MICHIGAN

Rebates to third parties help with the initial costs of installing chargers. The rebate costs can be capitalized and put in rate base.

The Michigan Public Service Commission (MPSC) has authorized Consumers Energy to launch a charging infrastructure pilot program that includes rebates and a time-of-use rate plan. The PowerMIDrive program includes rebates for commercial public Level 2 chargers (up to \$5,000) and for DC Fast Charging stations (up to \$70,000). Applicants must be a business customer, submit an application, install at least one commercial charger from PowerMIDrive's approved list and complete installation of the charger.

UTILITY OWN/OPERATE: NORTH CAROLINA

Fully owned and operated by the electric utility. Good for deployment in high-cost, low usage areas needing improved return on investment to support deployment by third-party charging.

The North Carolina Utilities Commission (NCUC) approved a \$25 million EV pilot program allowing Duke Energy to install and own 280 charging stations. Duke Energy can install, own and operate 160 Level 2 charging stations at public destinations, 40 public DC Fast Charging stations throughout North Carolina, and 80 Level 2 charging stations at multi-family housing.

160

Level 2 Public Chargers

80

Level 2 Multi-family Chargers

40

DCFCs

SUBSCRIPTION SERVICES: MASSACHUSETTS

Utility owns and leases EVSE to third parties at flat subscription service charge for useful life of asset.

In Massachusetts, Eversource, offers an EV Make-Ready program that provides installation and funding support for non-residential customers to install approved Level 2 or DC fast charging EVSE at businesses, multi-unit dwellings, workplaces and fleet facilities. To qualify, customers must own, lease, or operate a site where vehicles are typically parked for at least two hours.

Level 2 & DCFCs
Installed at Locations
Where Residents
Typically Park for
at least
2 HRS

UTILITY/THIRD-PARTY PARTNERSHIP: ARIZONA

Utility partnerships for third-party turnkey services or bulk purchases under an own and operate model allowing utilities to work with an operator for maximum in-service time.

Arizona's Salt River Project (SRP) is partnering with EVgo to provide five new DC Fast-Charging stations in SRP's service territory. This business model, where EVgo owns, operates, and maintains the charging equipment, allows for a consistent customer experience and aligns the network operator and the consumer.

5
New DCFCs
to be
Installed

PUBLIC-PRIVATE PARTNERSHIPS: NEW YORK

Negotiated state contracts with multiple EVSE vendors deploying infrastructure along state highways and evacuation routes.

Municipalities can work with EVSE owners to expedite deployment by streamlining permitting for installations.

REV Connect is a partnership that brings together companies and electric utilities to accelerate innovation, develop new business models and deliver value. The program engages partners through online platforms, in-person events and webinars. REV Connect is funded by the New York State Energy Research and Development Authority.

8
Partnerships
Being Developed

REGIONAL/STATE PLANNING ORGANIZATIONS: MARYLAND

Planning organizations can be developed to advance charging infrastructure regionally and statewide through planning, implementation, and completion.

Maryland has a statutorily created entity, the Maryland Zero Emission Electric Vehicle Infrastructure Council (ZEEVIC), responsible for developing recommendations for a charging infrastructure plan. ZEEVIC develops targeted policies to support fleet purchases of electric vehicles, develops charging solutions for existing and future multi-unit dwellings, and pursues other goals and objectives that promote utilization of zero emission vehicles.

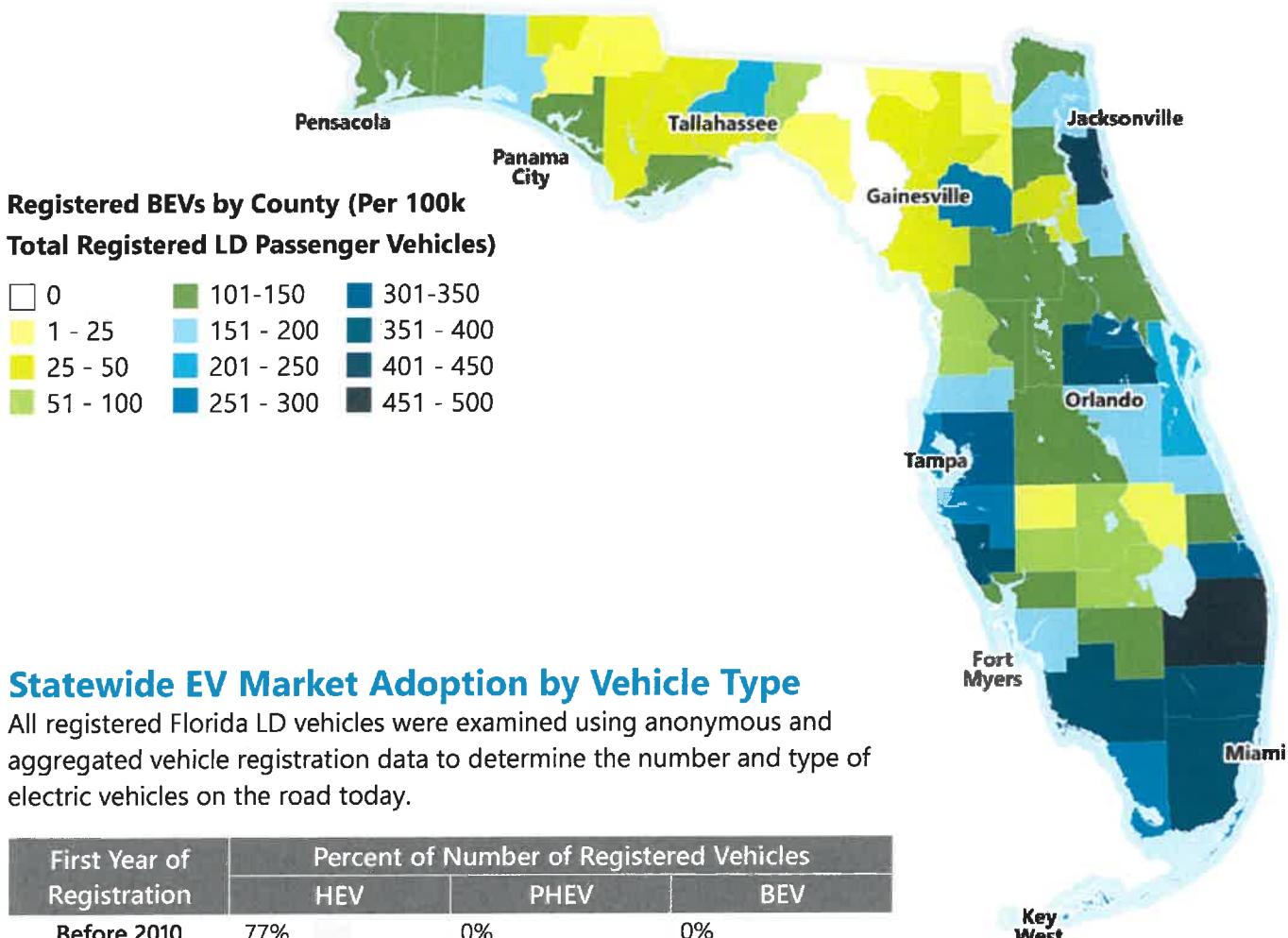
5
Partnerships are
Operational

ZEEVIC
(Maryland's)
Zero Emission
Electric Vehicle
Infrastructure
Council

EV MARKET ADOPTION

Increasing EV sales is a precursor to actual EV market adoption. In Florida, annual EV sales have remained below two percent of overall vehicle sales and are projected to grow.

BEV Ownership by County



Statewide EV Market Adoption by Vehicle Type

All registered Florida LD vehicles were examined using anonymous and aggregated vehicle registration data to determine the number and type of electric vehicles on the road today.

First Year of Registration	Percent of Number of Registered Vehicles		
	HEV	PHEV	BEV
Before 2010	.77%	0%	0%
2010	1.58%	0%	0%
2011	1.72%	.03%	.02%
2012	2.37%	.11%	.04%
2013	2.51%	.11%	.11%
2014	2.22%	.14%	.12%
2015	1.94%	.11%	.14%
2016	1.66%	.15%	.22%
2017	1.66%	.21%	.26%
2018	1.56%	.26%	.54%
2019	1.50%	.29%	.62%
2020	1.57%	.20%	.72%
All Years	1.48%	.14%	.27%

Map Source: Florida Highway Safety and Motor Vehicles (2021); Date of Production: 3/19/2021

Current EV Adoption

	All Registered LD Vehicles	Other Fuel Types	HEV	PHEV	BEV	.41%
Vehicles	16,529,219	16,218,211	244,323	22,617	44,068	all LD vehicles registered in Florida
% Total	100%	98.12%	1.48%	0.14%	0.27%	

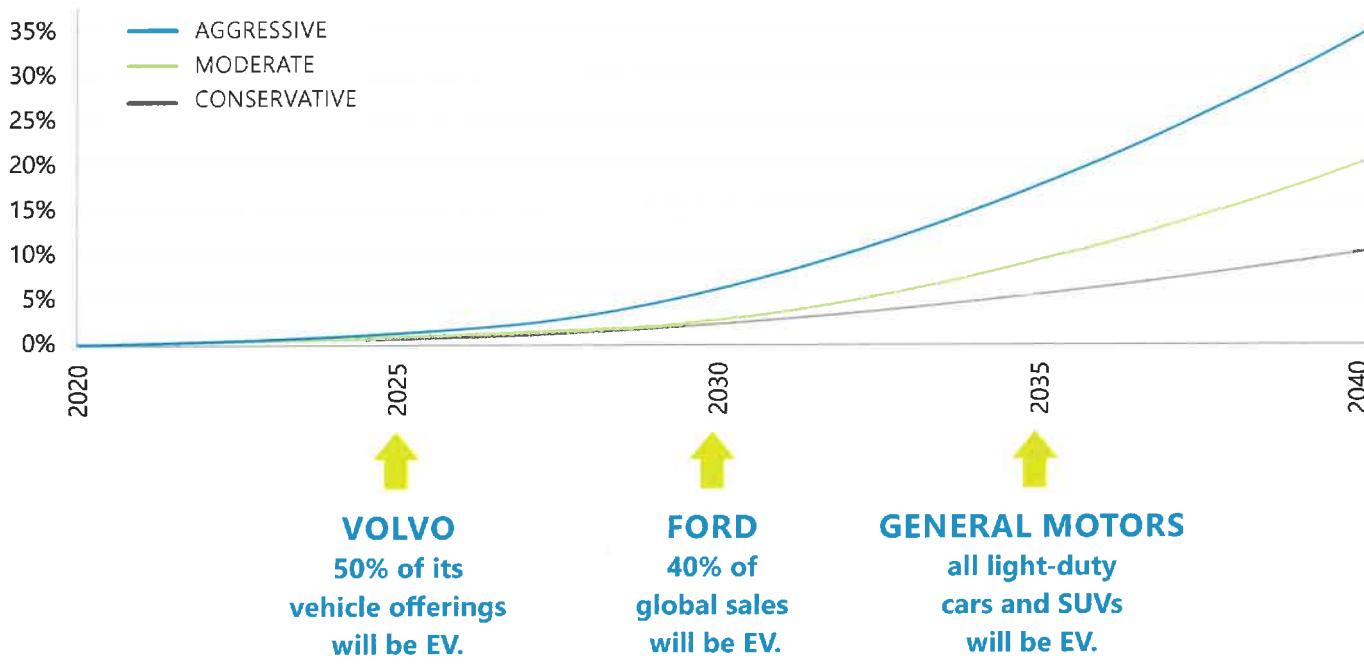
Source: FLHSMV VIN Registrations as of July 28, 2020

Adoption Scenarios

Industry trends are shifting toward offering increasingly more EVs. Three growth scenarios have been developed as indicators for understanding how aggressively transportation infrastructure needs to adapt. The EV adoption market projections, shown in the graph below, may shift and evolve with certain industry milestones.



EV Market Adoption Projections of LD Vehicles by Scenario



IMPACTS TO TRANSPORTATION FUNDING

All motor fuel consumption based revenue streams will be reduced with EV market penetration, which will have national, statewide as well as regional and local impacts. Rising market shares of EVs are expected to adversely impact revenues collected from highway fuel taxes into resources like the State Transportation Trust Fund (STTF) over the next 20 years. Local option fuel taxes will also be adversely affected, which could have implications for operations and maintenance of local roadways, as well as public transportation.

Transportation funding impacts have been forecasted based on revenue projections issued by the Revenue Estimating Conference (REC). Impacts of reduced gasoline and diesel fuel consumption on Highway Fuel Sales (HFS) Tax, the State Comprehensive Enhanced Transportation System (SCETS) Tax, and the Local Option Distribution were estimated.

Total Net Revenue Differential

Impacts to REC Projections by Scenario - Includes All Revenue Streams.

The revenue impacts could range between 5.6 percent and 20 percent by the year 2040 depending on the adoption scenario. This represents cumulative revenue impacts up to seven percent under the aggressive scenario.

2040 Net Revenue Loss Projections



20-Year Cumulative Total Projections



**IMPROVED
FUEL
EFFICIENCY**



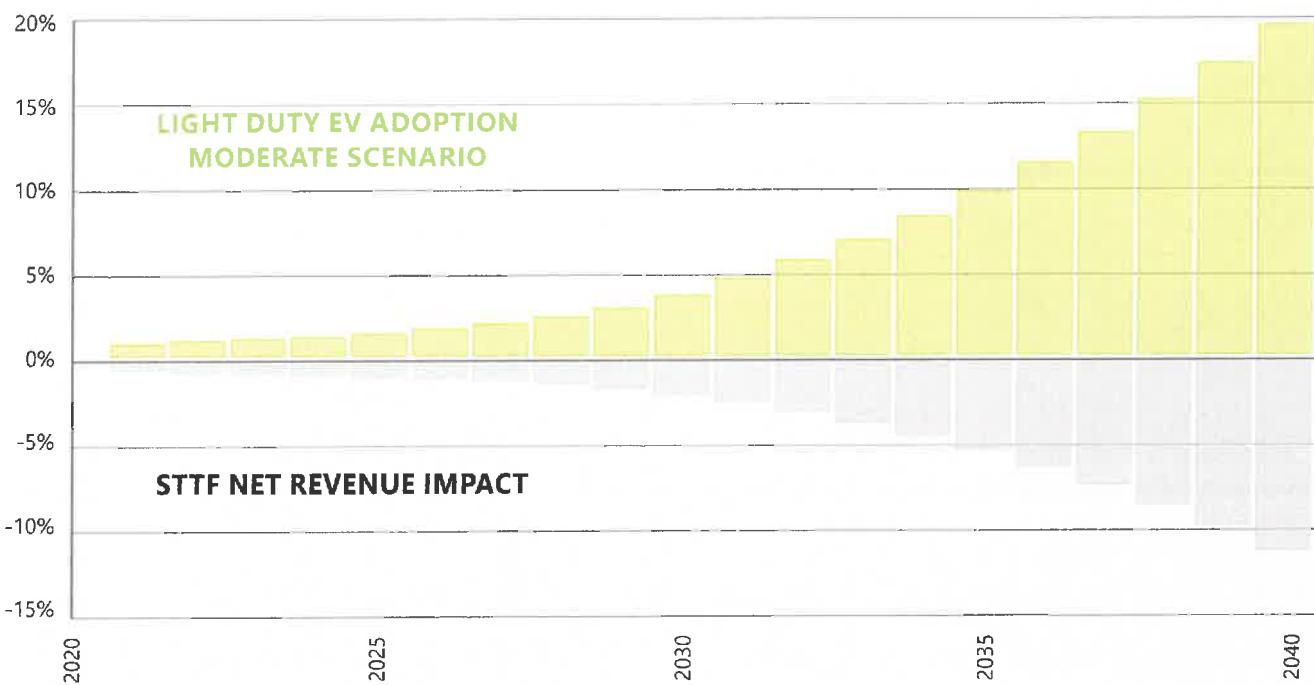
To date, hybrids and improved fuel efficiency of ICE vehicles may have had a more significant impact on overall motor fuel consumption as compared to EVs. However, as BEVs proliferate, their impacts will become prominent.

IMPACTS TO TRANSPORTATION FUNDING

2021-2040 STTF Total Net Revenue Loss (Moderate Growth Scenario)

Includes All Revenue Streams.

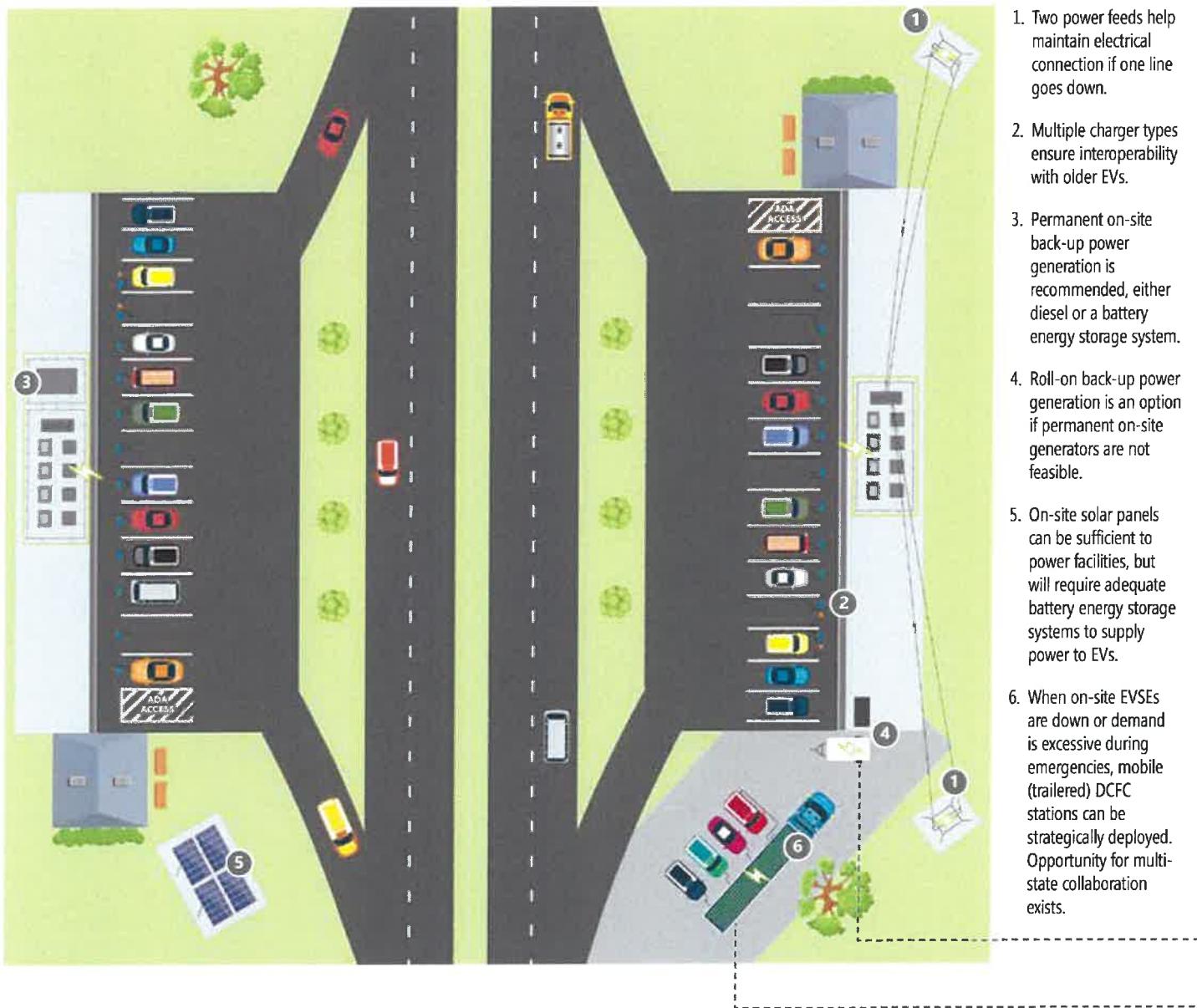
When factoring all transportation revenue streams, for every one percent increase in EV market adoption, there could be 0.5 percent reduction in STTF revenue.



RESILIENCY AND EMERGENCY EVACUATIONS

EVSE Infrastructure Resiliency

Resiliency during natural disasters is a critical requirement for EVSE infrastructure in Florida. The ability to travel after a hurricane is important for everyone including EV owners. Redundant power feeds to EVSE locations improve the resiliency of the charging network. Where redundant feeds are not available on-site, back-up power generation is another option. Emergency charging locations should also have multiple chargers and charging plugs so that a failure of a single charger does not render the charging site inoperable.



EVACUATION PREPARATION

Evacuate 10s of miles and not 100s of miles.
Fully charge your vehicle.
Use ICE vehicle, if you have the option.

Emergency Preparedness

Items put in place before the disaster occurs, including physical infrastructure and plans.

ELECTRICAL HARDWARE

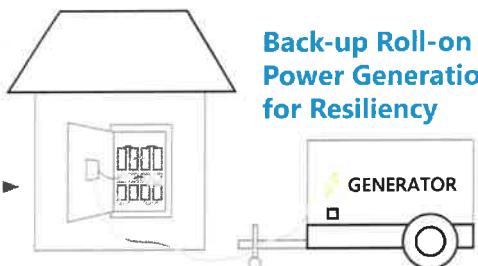
- Infrastructure installed at designated emergency EVSE locations prior to an emergency occurring
- Redundant power feeds, on-site generators, connections for mobile generators

COMMUNICATION NETWORK

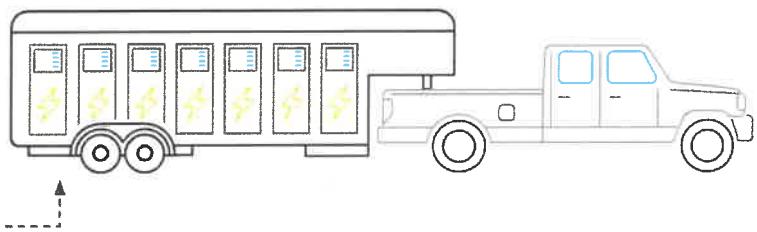
- Network connectivity and redundancy in contingency plans
- Hardwired communication lines can be backed-up by cellular networks or vice-versa
- If communication goes down but power does not, EVSE should still operate during an emergency

PAYMENT

- Communication is usually used for payments, there are multiple ways to address an outage
- Capture payment information locally and process payments later
- Florida could explore legislative framework for FEMA to reimburse electricity costs associated with EV charging during a declared emergency



Mobile EVSE for Emergency Response



F.S. 526.143 requires certain gas stations along evacuation routes to have backup power generation. Florida could amend this statute to include EVSE locations. Alternatively, locations without existing EVSE could be host sites (i.e., rest areas) for mobile DCFC EVSE stations.

IDENTIFICATION OF POTENTIAL NEW EVSE LOCATIONS

Gap Analysis for Long-Range Travel (DCFC)

A GIS computer mapping analysis was used to find gaps in the DCFC charging network along the SHS. Multiple factors were combined to find the areas around SHS roadway intersections that had high potential to fill the gaps in the DCFC EVSE network.

CONSIDERATION FACTORS:

Proximity to existing DCFC charging sites

- A. Areas within a 25-mile driving distance of an existing DCFC EVSE were considered to be adequate
- B. Locations between 25 and 50 miles were potentially suitable
- C. Areas more than 50 miles from a DCFC EVSE were rated as most in need of new charging stations.
(Since the existing DCFC stations tend to be clustered in urban areas, this factor also helped address equity concerns by finding potential EVSE locations in more rural areas)

Daily traffic at intersections along the SHS

- A. Areas near high-traffic intersections rated higher than those with moderate or low traffic levels

Proximity to SHS intersections along evacuation-critical routes

- A. Located areas with easy access for motorists on the SHS
- B. Identified areas within 1 minute, 5 minutes or 10 minutes drive from each SHS intersection
- C. Areas within a short drive-time were rated higher than areas that took longer to reach

To ensure the greatest benefit to the most EV drivers, the proposed EVSE locations were prioritized by

- A. The amount of daily road traffic on the SHS roadways
- B. Higher priority given to the most heavily traveled roads

Gap Analysis for Short-Range Travel (Level 2)

A GIS analysis was conducted to identify potential Level 2 EVSE charging sites within urban areas with consideration for low-income communities and multi-family residential buildings. Besides providing EV charging capability for EV owners unable to charge their vehicles at home, many of these sites would also provide destination charging opportunities for EV users going about routine daily activities.

CONSIDERATION FACTORS:

Within convenient walking distance of large multi-family residential buildings

- A. Highest priority for areas within a quarter mile

Median household income

- A. Greatest weight assigned to areas in the lowest 20 percent income group

Identify existing gaps in the Level 2 charging network

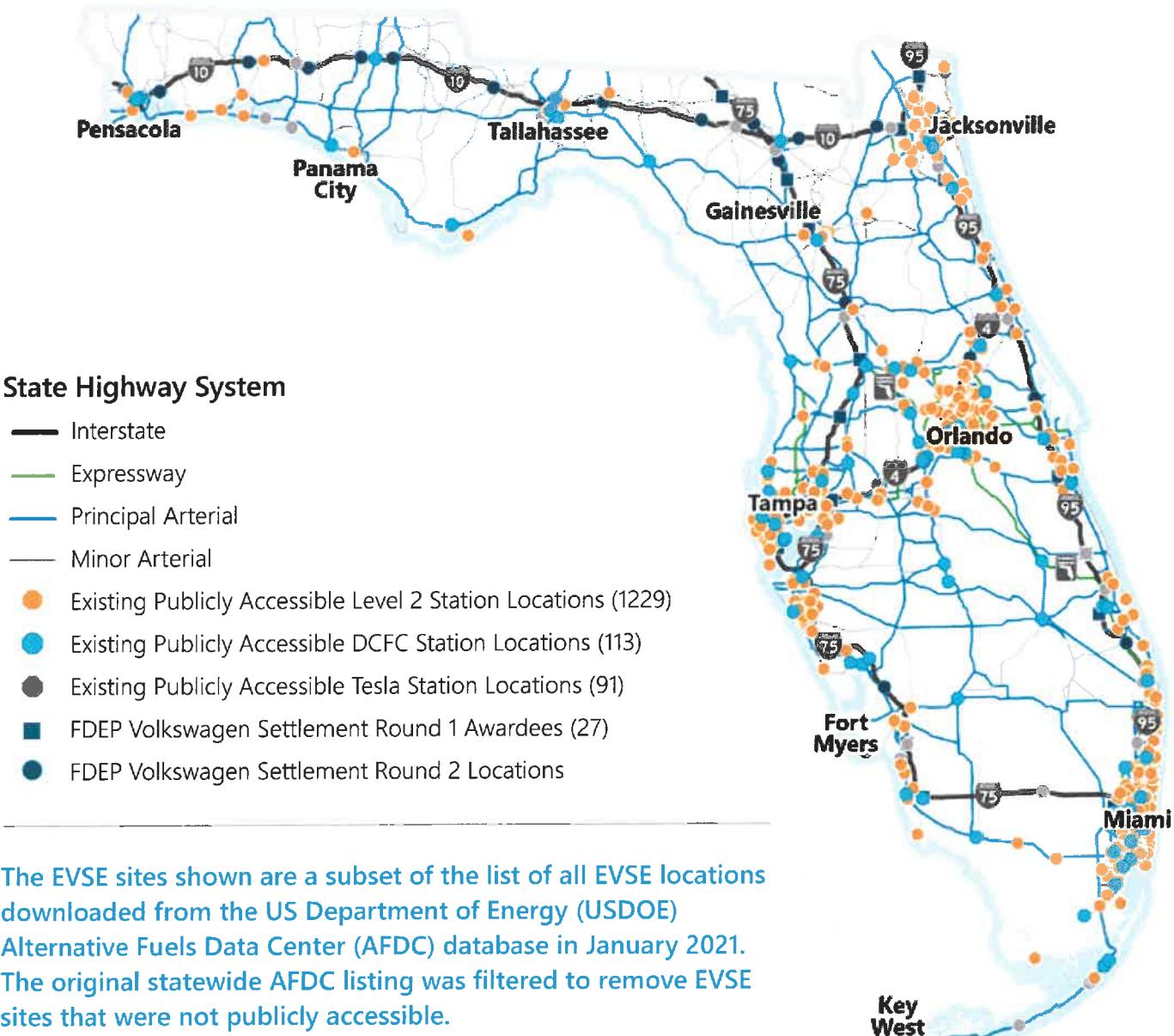
- A. Areas more than five miles from a Level 2 charger as the highest priority
- B. Areas within a half mile of an existing Level 2 EVSE were rated as low priority

Land use types at which drivers might park for extended periods of time

- A. Movie theaters, restaurants, shopping centers, parks and government offices

Existing Publicly Accessible EVSE Locations

Prior to conducting the gap analyses, the existing publicly available EVSE locations were identified. The following page provides results from these gap analyses.



Source: U.S. DOE Alternative Fuels Data Center (February 2021);
Florida Department of Transportation (February 2021)
Date of Production: 3/17/2021



3 STATEWIDE CHARGING NETWORKS



Level 2 (community/local)
DCFC (long-range)
Proprietary

Each has unique characteristics that must be accounted for.

EV INFRASTRUCTURE ON THE STATE HIGHWAY SYSTEM

Gap Analysis Results - Potential DCFC Locations

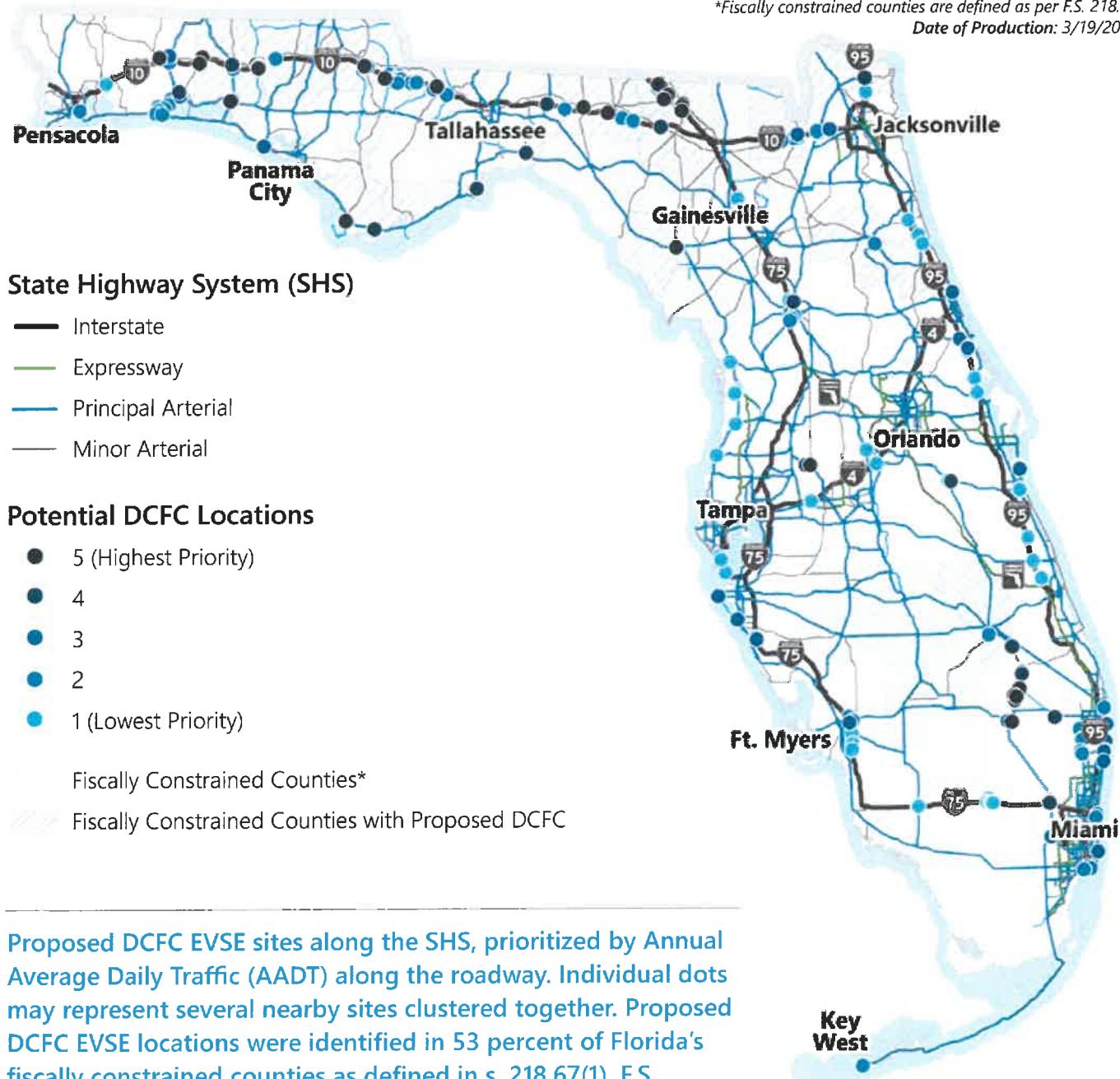
To Support Long-Range Travel

Source: U.S. DOE Alternative Fuels Data Center (February 2021);

Florida Department of Transportation (February 2021)

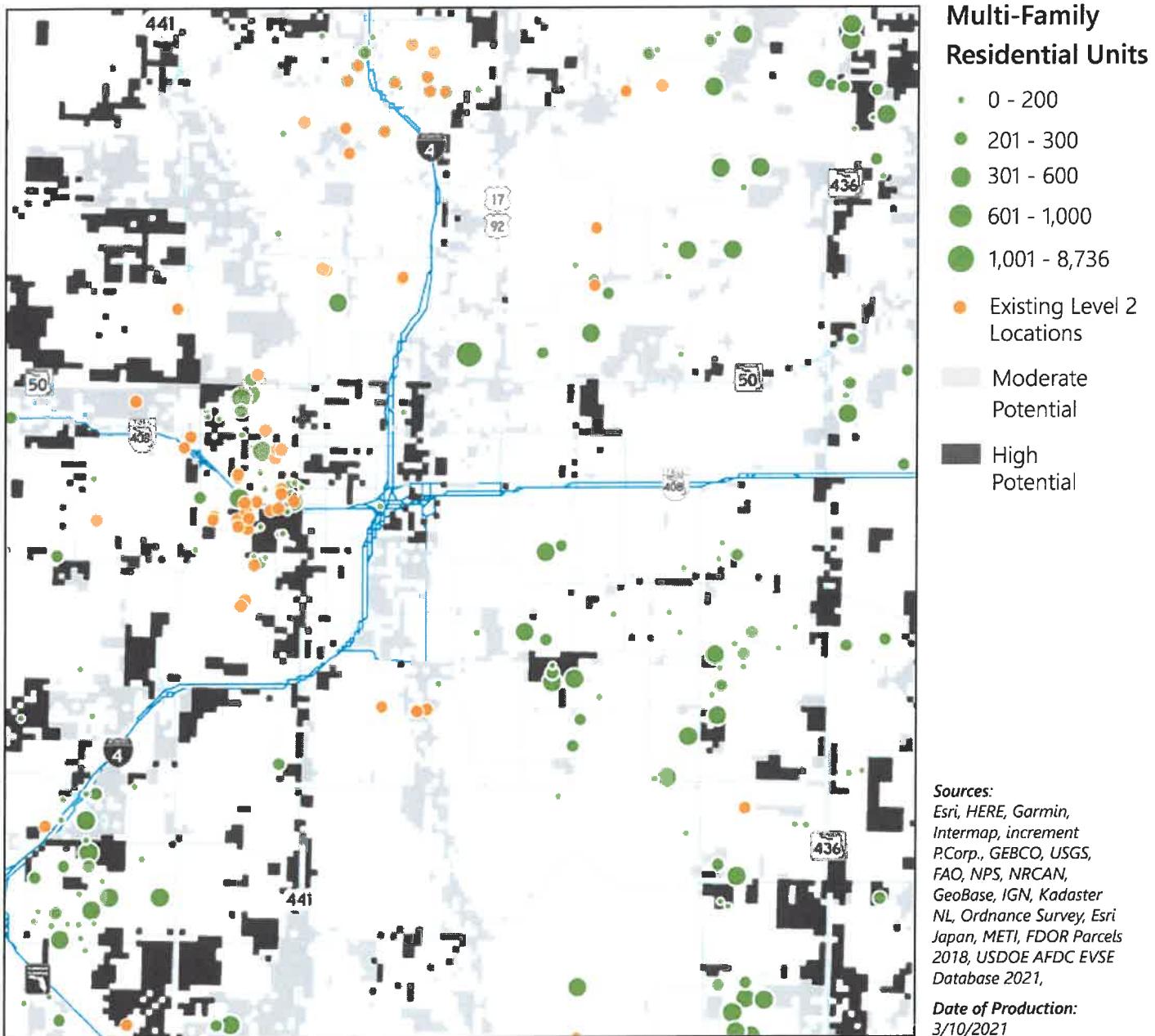
*Fiscally constrained counties are defined as per F.S. 218.67

Date of Production: 3/19/2021



Potential Community Charging (Level 2) Footprints

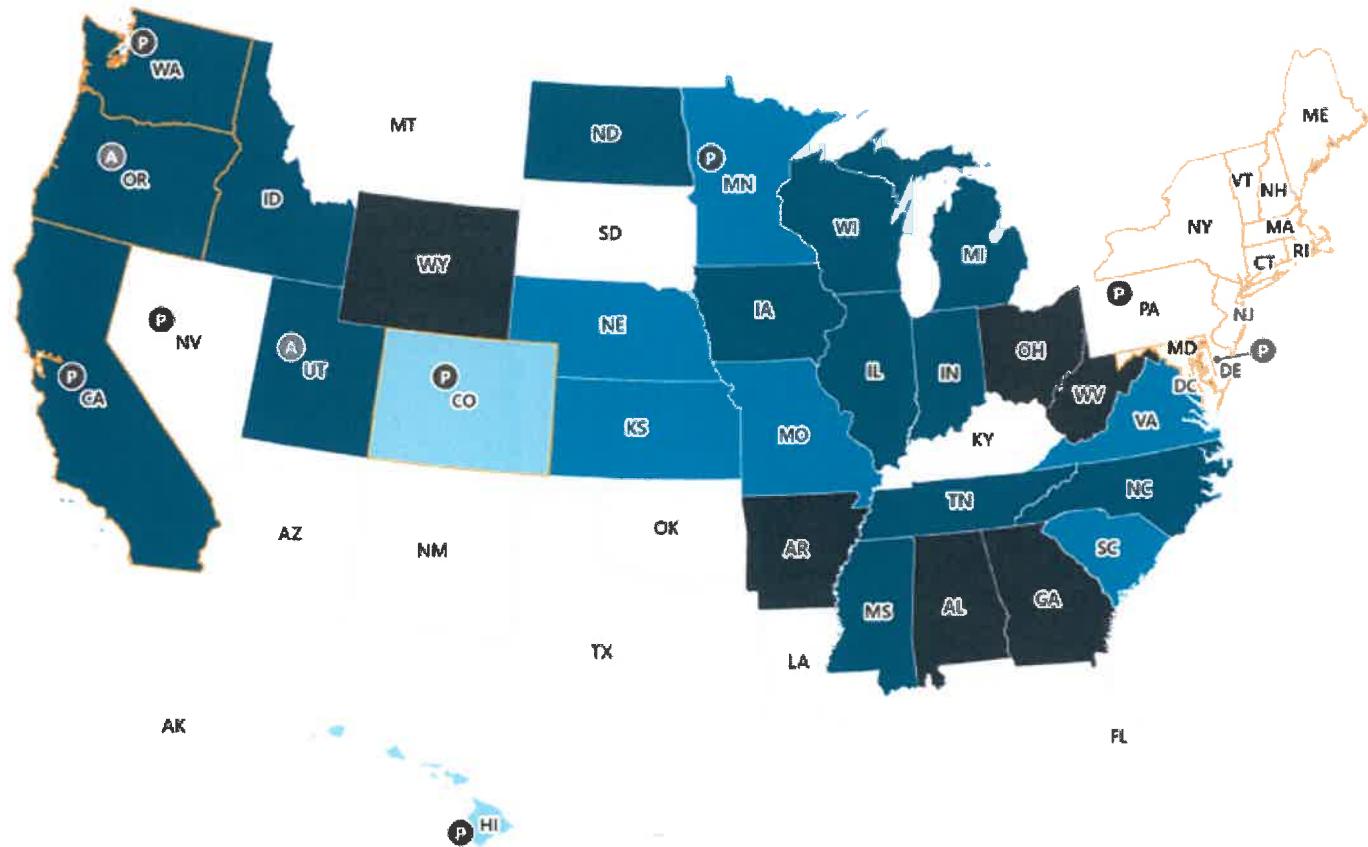
To Support Short-Range Travel (Orlando Area Example)



Potential locations to serve low-income and multi-family residential populations in the vicinity of Downtown Orlando. The areas represent land uses conducive to longer-term parking, such as restaurants, movie theaters, shopping centers, parks or government offices, where slower Level 2 charging would be more feasible.

OTHER STATES' POSITION ON EV POLICIES

Various policies, fees and programs have been enacted by states to encourage the adoption of EVs and facilitate the installation of EVSE. Other state-level efforts may exist, but the following is an overview of the most common policy actions.



REGISTRATION FEES

As of early 2021, 28 states have implemented a registration fee supplement for EVs, with a combined average fee of \$121.

Road Usage Charge (RUC)

Piloted Projects

- Active Program
- Pilot/Demo

RUC PROGRAM

Two coalitions have emerged to guide and support the development and interoperability of regional RUC systems. A number of pilots have been conducted throughout the United States to explore different approaches to collecting road user fees.

Zero Emission Vehicle (ZEV) Regulated State

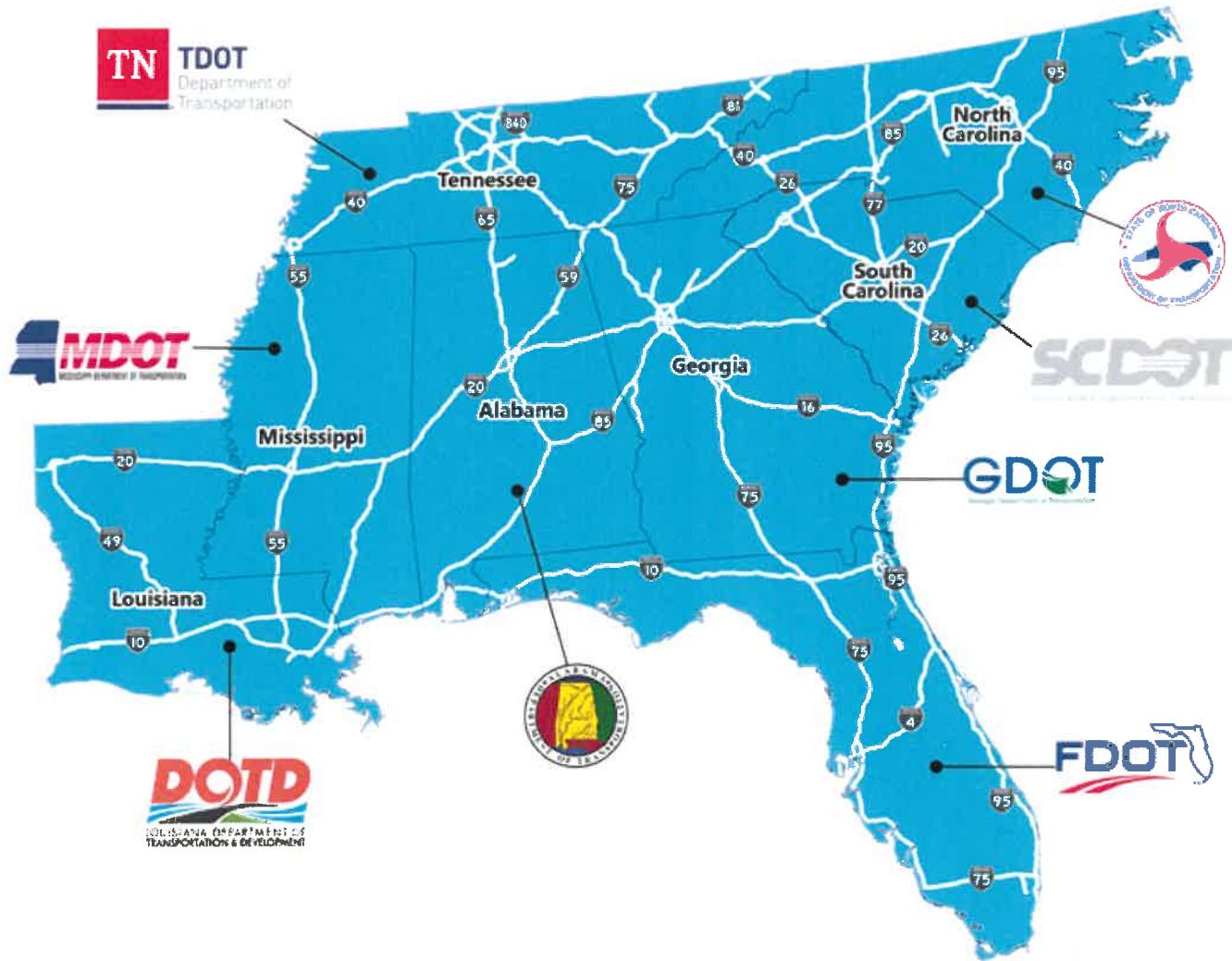
- Active Participant

REGULATED STATES

A state can adopt Section 177 of the Clean Air Act which permits a state to require automakers to sell a certain proportion of their vehicles as ZEV.

REGIONAL COLLABORATION

Florida actively participates in organizations such as the American Association of State Highway and Transportation Officials (AASHTO) and The Eastern Transportation Coalition (ETC) to advance inter-regional objectives that strive for well-connected transportation networks. These entities serve as sounding boards to share best practices and achieve common goals towards providing safe, reliable and equitable mobility options.



Regional Opportunities in the Southeast

Potential southeast regional opportunities may involve engaging existing regional organizations and partnerships. Activities and topics of discussion could include:

- Regional market forecast for LD, MD and HD EVs
- EVSE siting assessment for multi-state corridors
- Model policy, planning guidance, and EVSE-ready building codes for local agencies
- Regional evacuation considerations

RECOMMENDATIONS

INTRODUCTION

This section includes recommendations for actions and next steps towards facilitating the expansion of EVSE to support transportation mobility goals.

Process

To inform the EVMP framework, stakeholder and public engagement occurred during the development of the Plan. The collaborative process was also informed by technical analysis.

ANALYSIS
Supporting technical memoranda

7

STAKEHOLDERS
entities and organizations

200+

4

OUTREACH
hosted webinars

150+

COMMENTS
received from public comment period

Goals

The following goals were developed based on the legislation and the FTP to establish the framework of this Plan.

PROMOTE

a variety of energy sources

POSITION

Florida as a national leader in EVSE infrastructure implementation

EXPAND

EVSE access in Florida

ANTICIPATE

changes in travel choice and transportation technologies toward EV adoption

ENHANCE

Florida's overall transportation system

SUPPORT

emergency evacuation

Initiatives



ADAPT



FACILITATE



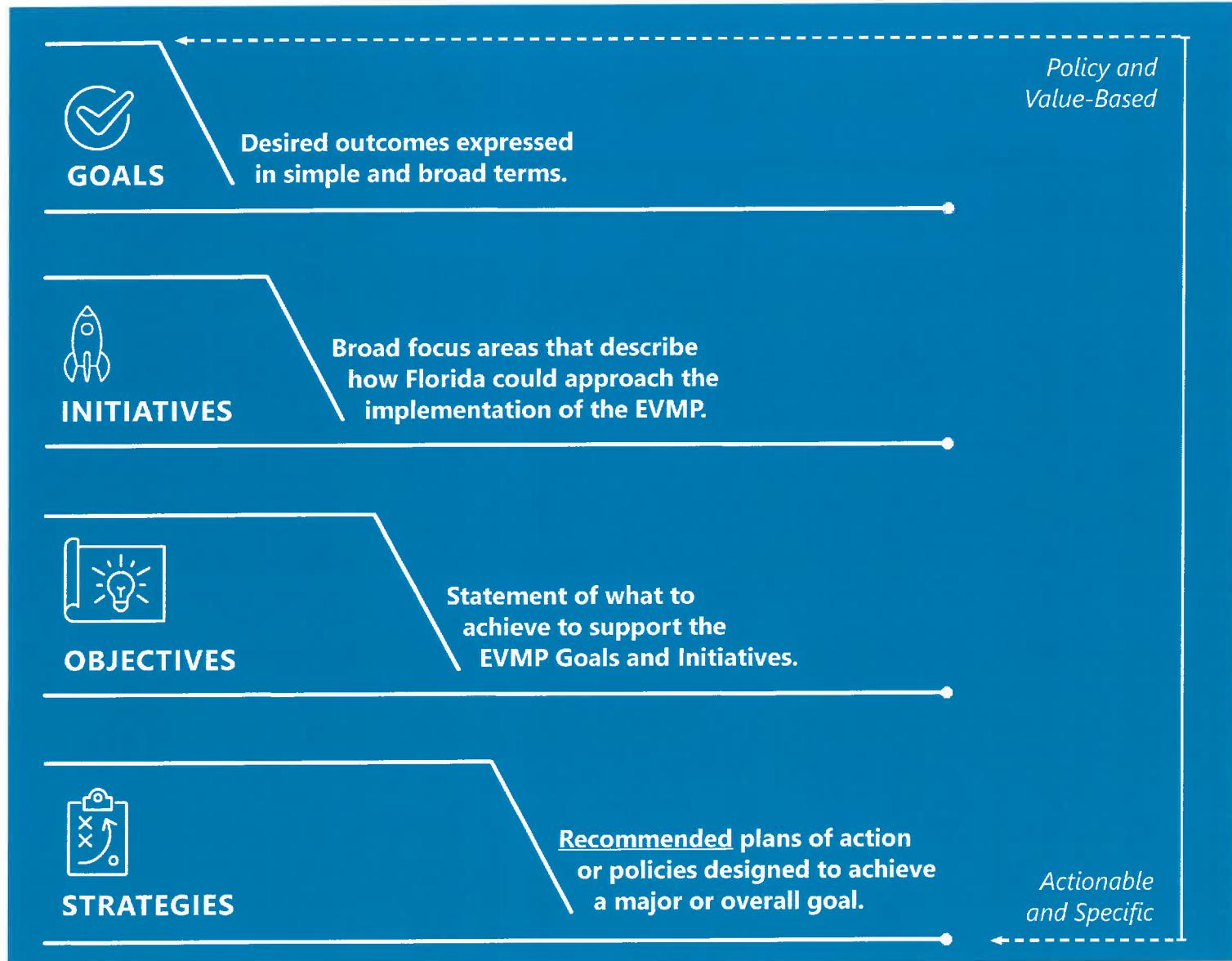
EDUCATE



COORDINATE

Framework

The framework provides an overview of recommendations that should be considered for action to support the identified goals, initiatives, objectives, and strategies.



Equity, as defined for the EVMP, prioritizes fair and equal access, and incorporates criteria for mitigating potential social or economic status barriers to electric vehicles and charging stations.



**EQUITY
IN THE EVMP**



EVMP strategies supporting Equity will be highlighted throughout the recommendations.

RECOMMENDATIONS

INITIATIVE 1: ADAPT



FDOT should take the lead to adapt existing transportation infrastructure to support the move towards electrified mobility.

1

STRATEGY OBJECTIVE

Anticipate Market and Industry Trends

- **Monitor industry trends to inform decision making:**

Understanding what is happening in the EV and EVSE market is critically important to adapting transportation infrastructure to meet changing customer needs.

2

OBJECTIVE

Adapt Transportation Policy Framework

- **Remove legal and institutional barriers for installing EVSE at rest areas and other facilities within state owned right-of-way:**

For example, 23 U.S. Code § 111 and Florida Administrative Rule 14-28.002 could be amended.

- **Identify alternative and innovative revenue sources:**

Motor fuel consumption is going to decrease while the wear and tear on our roads is going to increase. It is critically important to identify sustainable revenue sources at the state and local levels.

3

OBJECTIVE

Expand EVSE Network along Transportation Infrastructure

- **Fill immediate EVSE gaps:**

The private sector is leading the implementation. However, low return on investment creates infrastructure gaps in areas with low EVSE utilization. The state can play an important role in filling these gaps along the SHS. EVSE Infrastructure investments should be scaled with EV market adoption.

- **Develop and implement a phased approach to EVSE deployment:**

Develop an EVSE deployment plan that prioritizes immediate needs while expanding the network over time to meet future needs.

- **Include EVSE in planning and project development:**

Account for EVSE needs when existing infrastructure is enhanced or new infrastructure is developed.

- **Assess opportunities to provide sponsorships of EVSE at rest areas:**

Similar to 'safe cell phone zones' at rest areas and FDOT Road Rangers, sponsorships could offset the cost of electricity.

- **Develop and deploy a mobile charging program to support evacuations:**

Utilize existing state property to develop and deploy mobile charging stations at strategic locations along major evacuation routes.

- **Install EVSE at welcome centers:**

EVSE at welcome centers provides the state an opportunity to showcase electrified mobility advancements. If these centers used electricity powered by solar, it could tie into the "Florida Sun" brand.

4

STRATEGY OBJECTIVE

Support Municipal and Local Agencies with Implementation of the EVMP

- Increase or raise awareness and provide guidance for early adopters of EVSE:

Develop guidance and standards for the entire life-cycle of EVSE.

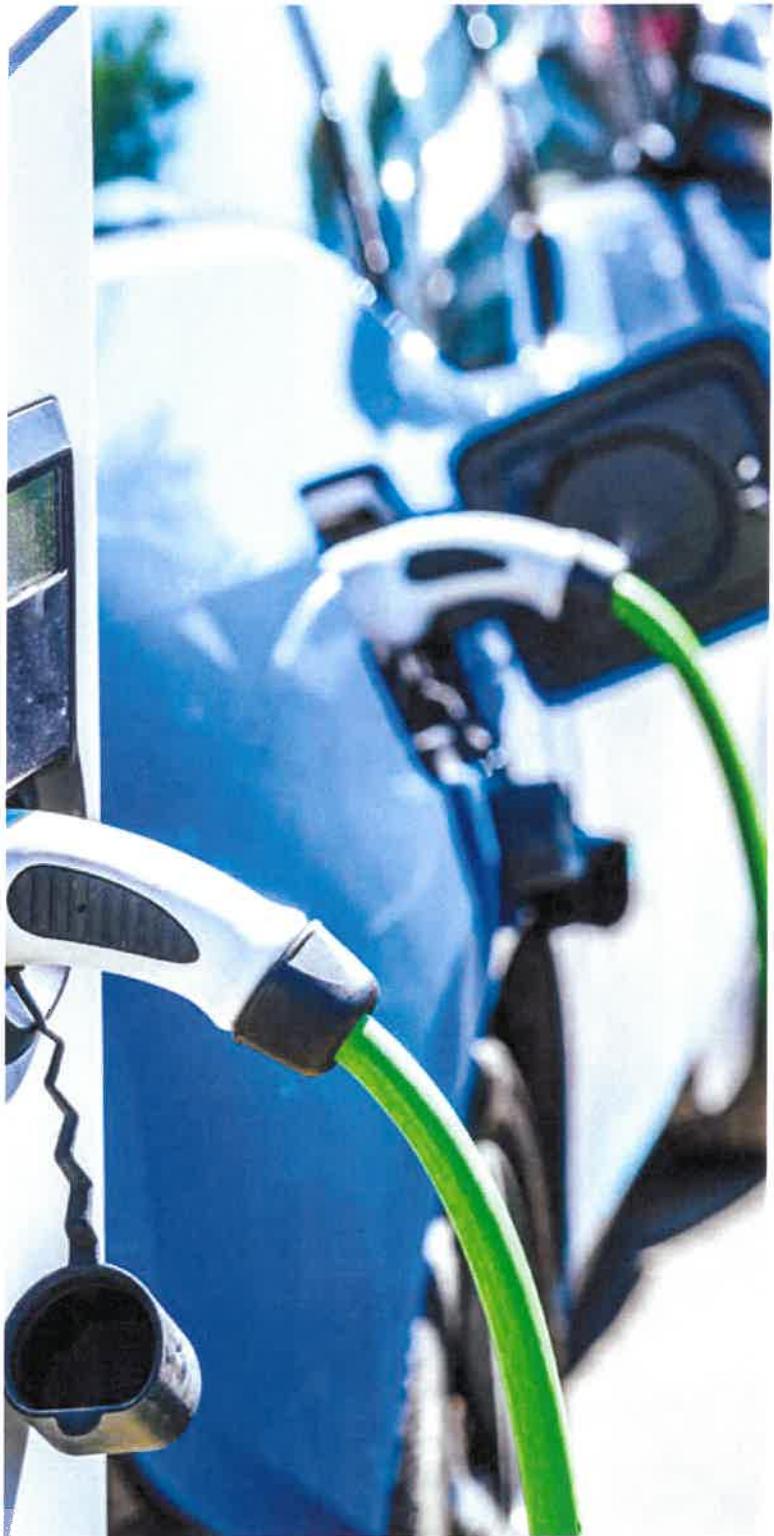
5

STRATEGY OBJECTIVE

Support Research and Testing of Next Generation EVSE like WPT and HD EVSE

- Leverage SunTrax as a test bed for industry:

FDOT invested in a large-scale, cutting edge facility (SunTrax) dedicated to the research, development and testing of emerging technologies in a safe and controlled environment. EVSE vendors can lease test sectors, develop test scenarios, access specialized equipment, and realize testing performance at the facility.



RECOMMENDATIONS

INITIATIVE 2: FACILITATE



FDOT can serve as a facilitator between public and private partners to strategically enhance EV infrastructure.

1
OBJECTIVE

Promote EVSE Infrastructure to Support Long-Range Corridor Travel and Emergency Evacuation

- **Create an EVSE competitive grant program:**

Tap the private sector to lead the implementation of DCFC charging infrastructure in key areas throughout Florida.

- **Forge strategic partnerships to expand EVSE network:**

Facilitate EVSE network expansion through public-private partnerships (P3).

- **Promote emergency EVSE accessibility:**

Require publicly accessible EVSE to be open to all users during times of emergencies and require chargers to continue functioning if communications are disabled.

- **Encourage open source data:**

Work with partners to encourage all DCFCs to adhere to latest Open Charge Point Protocol industry standards to ensure interoperability.

STRATEGIES

2
OBJECTIVE

Identify and Pursue a Variety of Funding Options with Partners to Support EVSE Implementation

- **Continuously monitor federal funding programs:**

FDOT and other Florida agencies will continuously monitor funding options available through federal programs.

A. Low and Zero Emission Public Transportation Research, Demonstration, and Deployment Funding

B. Alternative Fuel Infrastructure Tax Credit

C. Improved Energy Technology Loans

D. Congestion Mitigation and Air Quality (CMAQ) Improvement Program

E. Diesel Emissions Reduction Act (DERA) Funding

F. Advanced Transportation and Congestion Management Technologies Deployment (ATCMTD)

G. Rebuilding American Infrastructure with Sustainability and Equity (RAISE)

H. Department of Energy / Clean Cities Coalition Funding Opportunity Announcements (FOAs)

I. State Energy Program

J. Federal Lands Access Program (FLAP)

K. Voluntary Airport Low Emissions Program (VALE)

L. Department of Energy Loans Program

M. Surface Transportation Block Grant Program (STBG)

N. Surface Transportation System Funding Alternatives Grant Program (STSFA)

STRATEGIES

3

OBJECTIVE

Promote Installation of Community Charging Infrastructure

STRATEGIES



Develop an innovative and ongoing funding program:

Work with partners to develop a grant and/or loan program to expand access to EVSE in low-income and historically disadvantaged communities.

- **EVSE planning program:**

Support regions, agencies, counties, and municipalities to develop their own EVSE readiness plans.



Develop model building and zoning codes:

Draft language that local and regional governments can adopt or modify for use in establishing requirements and guiding the implementation of EVSE.



Multi-family EVSE:

Expand language restricting condominium associations from banning EVSE to include multi-family rental developments.

- **Fast-track and streamline EVSE permitting:**

Each permitting entity should allow fast-tracked permitting to EVSE infrastructure. This should also include standardizations by region to allow designers to quickly meet standards and requirements.

- **EVSE minimum functionality standards:**

Provide guidance and minimum functionality, or operational, requirements for EVSE installed in public areas or using public resources. This should include the latest in universal high functionality payment standards, allowing travelers to seamlessly plug and charge. Additionally, the potential to integrate payment with SunPass transponders could provide another payment mechanism within an existing tolling account.

- **Develop minimum EV-ready parking requirements:**

Work with state and local government partners to establish minimum EV-ready parking requirements for planning future EVSE or requirements for installing EVSE based on different land uses or building types. This needs to acknowledge the crossover between EV charging spaces and ADA required spaces.

RECOMMENDATIONS

INITIATIVE 3: EDUCATE



Public awareness and education of electric transportation infrastructure and how it supports electrified mobility is important in achieving the goals of the EVMP.

1

OBJECTIVE
STRATEGIES

Support EVSE-Focused Education and Outreach



Develop and launch a consumer-oriented education and outreach program:

A program to educate the general public on the basics of EV ownership, such as how the charging works, the potential benefits and downfalls, the cost, the incentives available, and information relevant to purchasing or owning an EV. This program could inform the public on available EV infrastructure. This should be coordinated to provide education and outreach to the broader community with active engagement efforts in low-income and historically disadvantaged communities.

- **Develop a fleet and charging site-oriented education and outreach program:**

Develop a fleet and charging-site oriented program to educate owners and operators on the cost, planning considerations, benefits, available incentives, etc. This should target the rental agencies, businesses, and property owners, and incorporate feedback on any barriers to adoption of this technology.

- **Attract, retain and train EVSE installation and maintenance professionals to support adapting our transportation infrastructure:**

Collaborate with workforce development agencies to recruit talent.



Workforce development with active engagement efforts in disadvantaged communities:

Coordinate with education providers around the state to develop the knowledge and curriculum needed to train Florida's workforce to service EV vehicles and to install, service and maintain EVSE infrastructure.

2

OBJECTIVE
STRATEGIES

Support Local Jurisdictions and Agencies

- **Practical guidance:**

Develop practical guidance for planning considerations, EVSE installation, prioritization, and any of the knowledge that community planners and engineers need to support their EV and EVSE implementation efforts.

- **Develop Long-Range Transportation Plan (LRTP) guidance:**

Develop potential guidance for the MPOs on how to best consider EVSE and equity into the development of the LRTP.

Provide resources to share information and knowledge that enhance educational and outreach efforts to support the state's electrification goals.

3

OBJECTIVE

STRATEGIES

Increase awareness of publicly available EVSE locations

- **Include charging station locations on FL511 app:**

Update Florida's traveler information app (FL511) to include publicly-available charging locations. This effort should be coordinated with charging network providers to provide up to date information and status of chargers.

- **Leverage Partner Resources:**

Promote EVSE availability through signage, web sites and social media.



RECOMMENDATIONS

INITIATIVE 4: COORDINATE



FDOT should continue coordinating with all stakeholders to ensure development of EV infrastructure supporting short-range and long-range EV travel options.

1

OBJECTIVE

Advance a Regionally and Comprehensive Approach to EV Infrastructure

- **Interstate coordination:**

Partner with other states in the Southeast to harmonize interstate corridor electrification efforts. This should include groups such as The Eastern Transportation Coalition, the American Association of State Highway and Transportation Officials, and the National Association of Regulatory Utility Commissioners in order to coordinate signage and EVSE infrastructure between southeastern states.

2

OBJECTIVE

Continuously Coordinate Stakeholders to Support EVSE Planning and Implementation Efforts



Florida EVSE stakeholder group:

Leverage existing inter-agency work groups that include federal, state, local, private, and research organizations.

These groups should include diverse representation from low-income and historically disadvantaged communities throughout the state of Florida.

3

STRATEGIES OBJECTIVE

Establish State, Regional and Local Agency Roles and Responsibilities

- **Program charter:**

Initiate a program charter that identifies the roles and responsibilities of each stakeholder involved in statewide EVSE planning and implementation.

- **Planning continuum:**

Develop structure to harmonize statewide EVSE planning and implementation with regional and local efforts.

4

STRATEGIES OBJECTIVE

Coordinate the Utility Roles and Rates to Support the Goals of this Plan

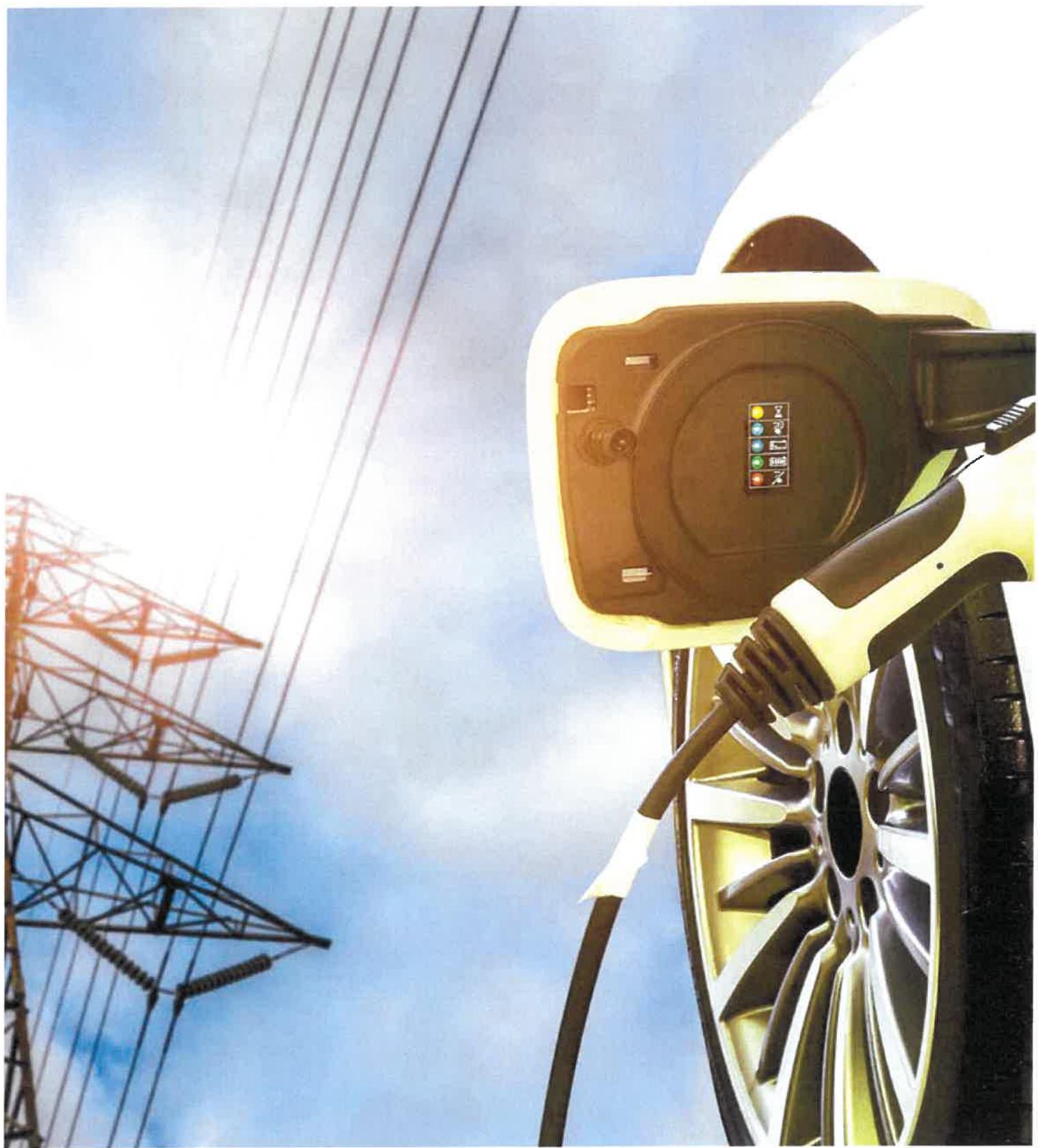
- **Grid benefits and impacts:**

Evaluate the benefits and impacts of incorporating EVSE into the electricity grid (such as vehicle-to-grid charging).

- **Coordinate with Florida utilities:**

Facilitate EV infrastructure deployment best practices.

Engage other states, communities, agencies and stakeholders to coordinate best practices on EV infrastructure deployment.



LOOKING AHEAD

The Department is committed to advancing electrified mobility in the state through the implementation of the EVMP in close coordination with state, regional, local and industry partners. The recommendations from this Plan will guide the development of integrated mobility solutions, reflecting the diverse needs of our state. EVSE is integral to the transformation of our multimodal transportation infrastructure. The innovative electrified mobility solutions will serve Florida for years to come as the Department continues to deliver one of the best transportation systems in the nation.



LIST OF ABBREVIATIONS

AADT.

Annual Average Daily Traffic

ADA.

Americans with Disabilities Act

AFDC.

Alternative Fuels Data Center

API.

Application Programming Interface

BESS.

Battery Energy Storage System

BEV.

Battery Electric Vehicle

CCS.

Combined Charging System

DCFC.

Direct Current Fast Charger

EV.

Electric Vehicle

eVMT.

Electric Vehicle Miles Traveled

EVSE.

Electric Vehicle Supply Equipment

(aka charging station and EV infrastructure)

EVSP.

Electric Vehicle Service Provider

(aka EVSE operator)

GIS.

Geographic Information System

HEV.

Hybrid Electric Vehicle

ICE.

Internal Combustion Engine

MA3T.

Market Acceptance of Advanced

Automotive Technologies Model

MPG.

Miles per gallon

NHTSA.

National Highway Traffic

Safety Administration

PEV.

Plug-In Electric Vehicle

(includes BEV and PHEV)

PHEV.

Plug-In Hybrid Electric Vehicle

REC.

Revenue Estimating Conference

SCETS.

State Comprehensive Enhanced

Transportation System

STTF.

State Transportation Trust Fund

VIN.

Vehicle Identification Number

VMT.

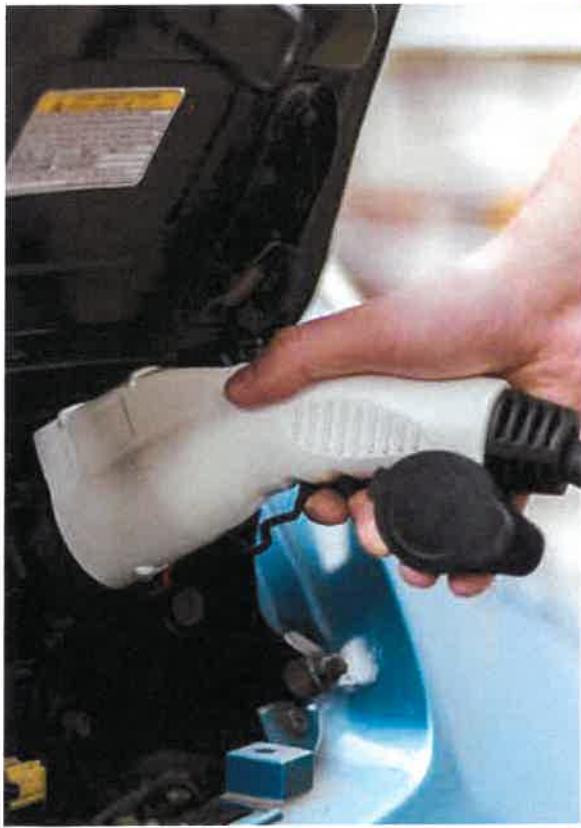
Vehicle Miles Traveled

WPT.

Wireless Power Transfer

XFC.

Extreme Fast Charging



Florida Department of Transportation

605 Suwannee Street

Tallahassee, FL 32399

FDOT.EVMP@dot.state.fl.us



Florida State University Law Review

Volume 13 | Issue 3

Article 17

Fall 1985

Curbing Predatory Practices in Florida's Petroleum Marketing Industry

J. Michael Huey

Geoffrey B. Schwartz

Douglas S. Roberts

Follow this and additional works at: <https://ir.law.fsu.edu/ir>



Recommended Citation

J. M. Huey, Geoffrey B. Schwartz & Douglas S. Roberts, *Curbing Predatory Practices in Florida's Petroleum Marketing Industry*, 13 Fla. St. U. L. Rev. 923 (1985).
<https://ir.law.fsu.edu/ir/vol13/iss3/17>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

EXHIBIT

4

tabbed

CURBING PREDATORY PRACTICES IN FLORIDA'S PETROLEUM MARKETING INDUSTRY

J. MICHAEL HUEY,* GEOFFREY B. SCHWARTZ,** and DOUGLAS S. ROBERTS***

I. INTRODUCTION

During the past decade significant changes have occurred in the marketing of motor fuel in the United States. These changes primarily resulted from the entry of major oil companies into the retail gasoline market. While major oil companies argue that this change in marketing strategy is in good faith and directly benefits the motoring public, wholesale marketers and independent retailers have cried "foul" while being displaced in the retail market by the major refiners. Indeed, the turmoil within the petroleum industry over this issue has resulted in both state and federal government involvement. The Florida Legislature first attempted to deal with this dilemma in 1974 by limiting direct retail marketing by refiners.¹ Unenforced for ten years, this law was finally declared constitutional in 1984² and became the leverage for a second legislative remedy during the 1985 Regular Session—the Motor Fuel Marketing Practices Act.³

Florida's adoption of this petroleum marketing law, on the heels of similar actions by Alabama⁴ and Georgia,⁵ underscores the significance of this issue. Whether Florida's latest action will eliminate predatory and anticompetitive marketing conduct remains to be seen. What seems certain, however, is the resolve of the respective interests in this fight—the refiners, the wholesalers, and the dealers—to engage in legislative and judicial war to protect or advance their positions.

*Akerman, Senterfitt & Eidson, Tallahassee, Florida. Florida State University, B.S., 1967, J.D., 1980.

**Akerman, Senterfitt & Eidson, Tallahassee, Florida. University of Central Florida B.A. 1971; Florida State University M.B.A., J.D., 1980.

***Candidate for the degree Juris Doctor, Florida State University College of Law.

1. *Fla. Stat. § 526.151* (1974).
2. *State ex rel. Gas Kwick, Inc. v. Connor*, 453 So. 2d 863 (*Fla. 1st DCA* 1984).
3. Ch. 85-74, 1985 Fla. Laws 429.
4. *Ala. Code* § 8-22-1 (1984).
5. *Ga. Code Ann.* § 10-1-250 (Supp. 1985).

II. THE PETROLEUM INDUSTRY MARKETING STRUCTURE—PAST AND PRESENT

The petroleum industry, although viewed differently during the oil crisis of the 1970's, has generally been perceived to be a stable industry controlled by a few corporate giants. The general public has been and continues to be unmindful of the various sectors that comprise the industry and how these sectors are controlled. Functionally, the petroleum industry is divided into four major interrelated sectors: production, refining, transportation, and wholesale-retail marketing.⁶

Production, refining, and transportation have historically been controlled by a very few large, well-known corporations such as Exxon, Chevron, Standard Oil, Mobil, Texaco, Gulf, and Phillips. In 1974, the top eight corporations controlled fifty-four percent of total U.S. crude oil production, sixty-five percent of all U.S. power oil reserves, and sixty-four percent of the U.S. crude oil and refined petroleum products transported in pipelines.⁷ This oligopolistic trend seems to be continuing as evidenced by Sohio's recent acquisition of Gulf and other potential acquisitions or takeovers.

Marketing of refined petroleum products at the wholesale and retail levels has, on the other hand, been highly competitive, involving hundreds of thousands of independent businesses.⁸ Historically, the major oil companies left the wholesaling and retailing of motor fuel to independent businessmen.⁹ Refined products were generally sold or consigned to independent wholesalers (referred to as jobbers) and other consignees, who in turn supplied independent retailers and commercial accounts, for example trucking companies and municipalities. The wholesalers and consignees purchased the refined motor fuel at a wholesale price, generally known as the terminal price, and stored it in their bulk storage facilities for subsequent sale. These wholesalers or consignees, in turn, sold most of their gasoline to retailers at a price generally known as the

6. SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 93D CONG., 1ST SESS., PRELIMINARY FEDERAL TRADE COMM'N STAFF REPORT 12 (Comm. Print 1973) [hereinafter cited as FTC STAFF REP.].

7. Comment, *State Gasoline Divorcement Statutes: Legal and Economic Implications*, 28 CATH. U.L. REV. 511, 515 (1979). Some 10,000 firms operated in this sector in 1973, but 50% of all production was controlled by eight firms. FTC STAFF REPORT at 6. See also *The Industrial Reorganization Act, 1975: Hearings on S.1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 461, 465 (1975) (submission of Exxon Co. U.S.A.).

8. FTC STAFF REP., *supra* note 6, at 6.

9. *Id.* at 21.

dealer tankwagon price, plus freight charges and applicable taxes.¹⁰ Traditionally, wholesalers were the collectors of state and motor fuel taxes.

Although wholesale and retail marketing of motor fuel was typically conducted by independent businessmen, they were far from independent of the control and influence of major producers and refiners. Each major refiner typically established its own wholesalers or consignees geographically. These consignees received franchises to sell that refiner's gasoline, oil, and other accessories. These franchisees were obligated by contract to purchase all of their gas and oil from the refiner, sell these products under the refiner's brand, and comply with operational requirements imposed by the refiner. Similarly, service station dealers supplied by these "branded" consignees or wholesalers were required to sell only the refiner's products and to comply with the refiner's operational requirements.¹¹

During the past two decades, while jobbers and consignees continued to operate under contracts which required them to purchase minimum quantities of fuel each year, the refiners have begun to supply some service station dealers directly, thus bypassing the wholesalers.¹² This dual distribution system has had an adverse impact on wholesale marketers.¹³ While many wholesalers had been assured that they would be the only distributor of a particular refiner's motor fuel products within a geographic region, their contracts, prepared by the refiners, did not expressly preserve this promise. Most wholesale marketers' economic lives were so closely tied to their refiner that they had to accept the new dual distribution system imposed by the refiners.¹⁴

10. *Gasoline Marketing Since Decontrol: Hearings Before the Subcomm. on Energy, Environment, and Safety Issues Affecting Small Business of the House Comm. on Small Business*, 97th Cong., 2d Sess. 59, 61 (1982) [hereinafter cited as *Gasoline Marketing Hearings*].

11. Comment, *supra* note 7, at 518-20.

12. J. WILLIAMS, *Gasoline: Regulation of Price and Supply*, 1, 1-2 (Callaghan Energy Law Monograph No. 4A, (1978)). See also *Gasoline Marketing Hearings*, *supra* note 10, at 266-71 (statement of Robert I. Thornhill, President-Elect, National Oil Jobbers Council). Jobbers purchase products in bulk at a terminal and either store in it their own storage facilities for later distribution or transport it directly to a retail outlet or other customers. Jobbers profit through the distribution charge and other services they provide retailers, items which constitute the jobber margin. *Id.* at 266. In 1980, jobbers handled more than 48% of the gasoline products moving to the retail market, which represented a 15% growth in such movements. This includes sales made to retail service stations owned by jobbers. *Id.* at 605.

13. Comment, *supra* note 7, at 521-22.

14. See *id.*

Fortunately, the wholesale marketer was allowed to purchase at wholesale price (posted terminal price) which was lower than the price at which the refiner sold to his directly supplied dealers (the dealer tankwagon price). Therefore, jobbers and consignees could also continue to supply dealers at prices which were relatively competitive with those given refiner-supplied dealers. Of course, the opportunity for continued growth by jobbers and consignees was severely hampered as refiners generally chose to directly supply the most favorably located, higher volume, service stations.¹⁵

While gasoline produced by major refiners (majors) typically has been marketed through the independent wholesale-retail network, this is not the case for some of the midsize and smaller refiners (mini-majors) comprising the remaining top twenty firms in the industry.¹⁶ Many of these refiners elected years ago to retail their gasoline through their own company-operated stations.¹⁷ Lacking the name recognition of the majors, the mini-majors competed by offering lower prices and fewer customer services.¹⁸ Their profits were built through volume sales rather than the higher profit margins enjoyed by the majors.¹⁹

Drastic price increases resulting from oil embargoes, greater retail competition from the mini-majors, and nationwide acceptance of self-serve gasoline have resulted in substantial changes in gasoline retailing since the 1970's. The majors have moved toward a third marketing system in which they market refined products through company-operated stations that are primarily self-serve with no automotive repair services. These directly-operated outlets have been opened in competition with jobbers supplied by the majors and dealers purchasing from these jobbers, as well as with refiner-supplied dealers.²⁰ This has occurred even though the jobbers and the refiner-supplied dealers continue to have minimum purchase requirements imposed upon them by their refiners and regardless of the fact that their refiners and suppliers are competing in the same market with them.

Wholesalers, further bypassed under this marketing strategy,

15. *Id.* at 519.

16. FTC STAFF REP., *supra* note 6, at 21-23. The top eight firms in gasoline sales are the same as the top eight in crude oil production and in refinery capacity. *Id.* at 22.

17. FTC STAFF REP., *supra* note 6, at 23.

18. *Id.*

19. Comment, *supra* note 7, at 519. Mini-majors "have established their own network of retail stations to utilize fully their refinery capacity, and they augment their refining income through high volume gasoline sales" at company-operated stations. *Id.*

20. J. WILLIAMS, *supra* note 12, at 2.

have diminished in number, except those wholesalers who have become chain retailers, owning and operating self-service stations and convenience stores. The number of dealers has also dwindled. Due to the separation of motor fuel sales from automobile service, these dealers are unable to compete with their supplier and the mini-majors, who operate with a lower overhead.²¹

According to wholesalers and retailers, existing state and federal regulation has been only partially successful in preventing abuses by refiners in the marketing of motor fuel.²² Vertical integration by refiners may not be, *per se*, harmful but it has had a deleterious effect. Refiners have evidently used production and refining profits to subsidize their marketing efforts at their directly operated outlets and at some of their directly-supplied dealers' outlets. Jobbers and dealers have been placed in a cost-price squeeze that they interpret as an attempt to drive them out of the more lucrative retail markets.²³ Among the predatory refiner practices claimed by jobbers and dealers are:

1. Below cost selling at retail by majors and mini-majors;
2. Refiners raising prices to jobbers while holding down prices to company-operated retail locations and directly-supplied dealers;
3. Refiners imposing annual minimum purchase requirements on jobbers while not imposing such requirements on company-operated stations or directly-supplied dealers;
4. Refiners imposing restrictions or allocations on the motor fuel which jobbers may purchase, while no such restrictions or allocations are imposed on the company-operated stations or on directly supplied dealers;

21. STAFF REPORT OF PA. GOV.'S ENERGY COUNCIL, GASOLINE MARKETING: TRENDS AND CHOICES (1982), reprinted in *Gasoline Marketing Hearings*, *supra* note 10, at 568-92. Independent dealer-operated stations dropped from 204,146 to 98,804 between 1972 and 1980 nationally—a 50% drop. As a percentage of the market, leasee dealer stations dropped from 37% to 24%. *Id.*

22. *Gasoline Marketing Hearings*, *supra* note 10, at 35 (testimony of Vic Rasheed, Exec. Director, Service Station Dealers of Am.). See also *id.* at 200 (testimony of Jack R. Findlay, Pres., Cal. Arco Distrib., Inc.); *id.* (testimony of Jack A. Blum, Counsel, Indep. Gasoline Marketers Council).

23. See R. CALLMAN, UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES (4th Ed. 1981) for a discussion of various types of unfair competitive practices. Included within the scope of predatory practices are sales below cost, price and supply discrimination, attempts at monopolization, and interference with a competitor's customers.

5. Increased restrictions on credit extended by refiners to jobbers and independent dealers;
6. Rack pricing by refiners which eliminates the jobbers' traditional functional margin (the difference between the price paid by jobbers for motor fuel at wholesale and the price paid by directly-supplied dealers);
7. Increased sales by refiners to commercial account customers at prices below jobber cost;
8. Volume rebates, rent reductions, and other allowances provided to refiner-supplied dealers but not provided to competing jobbers;
9. The refiner's use of superior bargaining power to force dealers to submit to terms in station leases and supply contracts which are not in the dealers' best interests, such as hours of operation, maintenance requirement, and forced conversion to self-service and convenience stores;
10. Unprecedented rent increases imposed upon dealers by refiners.²⁴

Refiners respond that their actions are not predatory or discriminatory. They argue that the current changes in petroleum marketing are the result of recent decontrol of petroleum prices and allocations, decreased consumer demand for motor fuel, and general economics.²⁵ In this situation, refiners say, the inefficient marketers will have to streamline their operations or discontinue business.

24. *Gasoline Marketing Hearings*, *supra* note 10, at 268-269 (statement of R.J. Thornhill, President-Elect, National Oil Jobbers Council). The complaints were a summary of responses from jobbers and jobber associations across the country. See *id.* at 290-412 (compiling letters from various state jobber associations listing predatory practices engaged in by refiners to the detriment of their members). The jobber margin was estimated to have declined 44% in the 18 month period beginning in January 1981. *Jobber-dealer spread off 44% in 18 mos.*, *Oil EXPRESS*, October 4, 1982, at 1, reprinted in *Gasoline Marketing Hearings*, *supra* note 10, at 283. Not all refiners were accused of all of these practices, although each major refiner was seen as engaging in one or more of the practices. *Gasoline Marketing Hearings*, *supra* note 10, at 269.

Other complained of conditions included imposition of prescribed pricing policies, marketing of refiner automotive parts; tires, batteries, and accessories (TBA); and minimum volume sales. F. ALLVINE, J. HOUSTON, & O. PHILLIPS, *THE CASE FOR LEGISLATIVE RELIEF FROM THE IMPENDING DESTRUCTION OF SMALL BUSINESS AND COMPETITION IN THE GASOLINE INDUSTRY* (1980), reprinted in *Gasoline Marketing Hearings*, *supra* note 10, at 70.

25. *Gasoline Marketing Hearings*, *supra* note 10, at 477 (testimony of Ellis W. Gunnels, Vice President of Marketing, Texaco, U.S.A.).

Majors suggest that price structures for directly-supplied dealers and for jobbers are unrelated to each other and, therefore, that the equalization of prices to these two groups is fair. They maintain that prices to jobbers and dealers are set independently of one another, based upon current market conditions.²⁶

Majors also argue that the maximum monthly or annual supply limits placed upon jobbers permit the refiner to supply all customers more efficiently and to avoid periodic shortages.²⁷ The majors defend, as a necessary competitive practice, volume rebates and sales-boosting incentives to directly-supplied and company-operated stations.²⁸ They disclaim any solicitation of independent dealers and commercial accounts but consider these accounts a totally different "class of trade" for which they maintain the right to respond to requests for direct refiner sales.²⁹

The majors further contend that recent rent increases are not exorbitant³⁰ and that contract terms are not forced on dealers.³¹ They and the mini-majors defend their operation of company-owned stations and contend that any sales at those stations made below the motor fuel cost paid by dealers are the result of higher

26. *Id.* at 483. *See also id.* at 511 (testimony of R.C. Kiddoo, Vice President of Marketing, Exxon Co., U.S.A.). "[S]ince distributor and dealer prices vary as a result of somewhat different competitive pressures, there is no fixed relationship between the two." *Id.* The major refiners point to the few jobber bankruptcies as evidence that jobbers are not preyed upon by their suppliers. *See id.* at 515-16.

27. *Id.* at 484. Refiners also point to the fact that jobbers generally are taking average monthly quantities well under their maximum allocation. Texaco reports that a typical jobber draws 82 to 87% of their maximum monthly allocation. *Id.*

28. *Id.* at 493. (Prepared statement of R. C. Kiddoo, Vice President of Marketing, Exxon Co., U.S.A.). For example, in 1982, Texaco offered an incentive rebate that worked as follows: On monthly sales up to 50% of a predetermined base period amount, a 0 cent-per-gallon discount; on monthly sales between 50% and 100% of the base period amount, 4 cent-per-gallon discount from the refiner; and on sales over 100% of the base period amount a 5½ cent-per-gallon discount, for a price equal to the price charged to a jobber. Thus, a station that sold 100% of its base period amount received an average 2 cent-per-gallon discount on products supplied by the refiner. On all sales over 100% of the base period amount, the dealer purchased products delivered from the refiner for the same price as that which the jobber paid to pick up the product at the terminal. *Id.* at 479 (testimony of Ellis Gunnells, Texaco, U.S.A.).

29. *Id.* at 518 (prepared statement of R. C. Kiddoo, Vice President of Marketing, Exxon Co., U.S.A.).

30. *Id.* at 516.

31. *Id.* at 519-20. Exxon maintains that its annual rent increases have averaged 8% per year, with a recent spurt following petroleum price decontrol to compensate for artificially low rents. Refiners also point to the federal Petroleum Marketing Practices Act, 15 U.S.C. § 2801 (1982), as providing dealers with protection from unreasonable franchise or lease terms. *Id.* at 505 (testimony of W.J. Bittles, Jr., Vice President of Sales, Shell Oil Co.).

volumes³² or market competition,³³ and not a result of subsidization of marketing operations by other segments of the firm's operations.³⁴

III. FEDERAL AND STATE RESPONSES TO PREDATORY MARKETING PRACTICES

The predatory or anticompetitive conduct allegedly occurring in petroleum marketing today is similar to conduct in other industries in the past century. A variety of measures have been taken by states and the federal government designed to curb such conduct and to insure a viable and competitive market. These measures have varied from general efforts, like antitrust and unfair sales acts which cover all products and industries, to laws designed to cure problems with specific industries or products, such as alcohol, milk, or petroleum.

A. Antitrust Laws: Effect on Predatory Practices

Beginning in the late 1800's, federal and state antitrust laws were created to curb anticompetitive practices in the free market. The federal antitrust framework is found in three statutes: (1) the Sherman Act,³⁵ with its emphasis on monopolies and combinations in restraint of trade; (2) the Clayton Act,³⁶ as amended by the Robinson-Patman Act,³⁷ emphasizing price discrimination and certain other exclusionary practices; and (3) the Federal Trade Commission Act,³⁸ which controls unfair methods of competition and unfair and deceptive business practices. Of these, the Clayton Act and the Robinson-Patman Act specifically detail proscribed practices; the other statutes are less specific, allowing the courts and the Federal Trade Commission (F.T.C.) to establish broad guidelines by which they judge the legality vel non of particular actions.

The federal policy underlying the antitrust laws reflects both economic and noneconomic goals, as can be seen from the oft-quoted statement of Mr. Justice Black in *Northern Pacific Railway Co. v. United States*:³⁹

32. *Id.* at 493.

33. *Id.* at 499.

34. *Id.* at 514.

35. 15 U.S.C. §§ 1-7 (1982).

36. *Id.* §§ 12-14, 19-22; 29 U.S.C. §§ 52-53 (1982).

37. 15 U.S.C. §§ 13-13b, 21a (1982).

38. *Id.* § 45 (1982).

39. 356 U.S. 1 (1958).

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.⁴⁰

Among antitrust scholars there is no general agreement on how to best achieve these goals.⁴¹

In addition to federal statutes, most states have enacted antitrust laws which are patterned after the Sherman Act. These statutes provide a basis for state enforcement where the federal government declines to take action or where the activity is beyond the reach of federal statutes because it involves *intrastate* rather than interstate commerce.⁴²

To accomplish its objectives, Congress has provided that enforcement actions under the Sherman Act may be brought by the Department of Justice or by private parties; actions under Section 5 of the F.T.C. Act may be brought by the F.T.C.; and actions under the Clayton Act (including Section 2 of the Robinson-Patman Act) may be brought by any of the three.⁴³ The key element of the private civil action is the availability of treble damages and attorney's fees to the successful plaintiff.⁴⁴

40. *Id.* at 4.

41. There are two schools of economic thought as to the proper antitrust approach: the "Harvard (Structuralist) School" of economic theory and the "Chicago (Neoclassical) School." The Harvard School emphasizes market structure and barriers to market entry as determinants of effective competition. Its members regard industry concentration of markets as particularly harmful to the competitive process and advocate government intervention to prevent concentration and to deconcentrate those markets already concentrated. The Chicago School, in general, opposes government intervention. Its members believe that the free market will ultimately determine the most efficient market structure, thereby benefiting consumer welfare. They believe that the absence of government intervention will promote the efficient allocation of resources, and that the most efficient firms will survive by producing the most desired goods at reasonable prices. See generally Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

42. Florida's antitrust laws were substantially revised in 1980. The Florida Antitrust Act of 1980 is patterned after the Sherman Act in prohibiting unreasonable restraints of trade and unlawful monopolies. See FLA. STAT. ch. 542 (1983).

43. See *supra* notes 35-38. It is beyond the scope of this Article to describe in detail the full panoply of available public and private remedies. Specifically, the Department of Justice can bring a criminal action or a civil action for damages and injunctive relief, while private parties may bring a civil action for damages and injunctive relief.

44. 15 U.S.C. § 15a (1982).

From their inception, federal antitrust laws have been an important check on the more pronounced anticompetitive practices in the marketing of motor fuel.⁴⁵ For example, courts have long held that predatory pricing violates the antitrust laws when used in a systematic manner to destroy competition.⁴⁶ The most prevalent form of predatory pricing manifests itself in below cost selling. The objective is not to promote healthy competitive pricing but is to impose losses on other firms, to drive them out of the market, and to allow the predator to establish monopolistic prices.⁴⁷

Although predatory pricing clearly violates the antitrust laws, how to define and prove predatory pricing is far from clear. This has been the major impediment to using the federal antitrust laws to stop below cost selling in the petroleum industry.⁴⁸ Judicial formulations of the predatory pricing concept often turn on the inherently vague test of "intent". To prevail, a plaintiff must show that the alleged predator "desires" that its pricing practices injure its competitors.⁴⁹ This is an extremely difficult burden for the plaintiff. Further, courts have been reluctant to find that a low price is a predatory price and is not the result of vigorous price competition in the market, even when the "vigorous price competition" forces competitors out of business.⁵⁰

The proof of predatory intent has been made somewhat easier by substituting an objective standard for the subjective one of "motive." To establish the intent element, the plaintiff must prove

45. Standard Oil Co. v. United States, 221 U.S. 1 (1911) (predatory pricing is a violation of § 2 of the Sherman Act, which prohibits attempts to monopolize).

46. Predatory pricing violates: (1) section 2 of the Sherman Act when there is an attempt to monopolize, see *Standard Oil*, 221 U.S. at 43; (2) § 2 of the Clayton Act when the conduct includes price discrimination, see *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); and (3) § 3 of the Robinson-Patman Act under any circumstances. The issues with regard to predatory pricing are the same under all these provisions. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 284 n.1 (1977).

47. See P. AREEDA, *ANTITRUST ANALYSIS: PROBLEMS, TEXT AND CASES* ¶¶ 214(b), 605 (2d ed. 1981).

48. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853 (5th Cir. 1981); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 111 (1977).

49. *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 722 (5th Cir. 1975) (the term "predatory intent" is troublesome; it has never been clearly defined). See also *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir. 1977) (the use of the term "predatory" to describe an antitrust violation has left much to be desired).

50. *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 816, 826 (6th Cir. 1982); *Northeastern Tel. Co. v. American Tel. & Tel.*, 651 F.2d 76, 88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Janich Bros., v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978) ("It is the very nature of competition that the vigorous efficient firms will drive out less efficient firms.").

that the defendant was selling below cost on a regular basis. By making this *prima facie* case, the plaintiff shifts the burden to the defendant to either refute the proof of "cost" or to justify its behavior as a response to competitive market pressures.⁵¹ This objective standard has not eliminated the problem of proving intent, since much confusion remains over the definition of "cost." A growing number of antitrust scholars and courts have adopted a strictly economic test to measure cost. Since it is difficult to get two economists to agree on anything, it is not surprising that courts are split on which of several cost formulations to use.⁵² Although the economists' definitions of "marginal costs," "average variable cost," and "average total cost" are susceptible to explanation and understanding in the classroom, it has been extremely difficult and ruinously expensive to quantify these costs in the courtroom. This is probably the single largest obstacle facing a plaintiff attempting to prove a predatory pricing claim under federal law.

The antitrust laws have been frequently used to halt discriminatory pricing practices in the petroleum market.⁵³ The antitrust prohibitions against certain types of price discrimination have been an important curb on the more egregious of the abusive practices in motor fuel marketing. However, their current effectiveness has been lessened by new marketing methods used by refiners and by problems of proving competitive injury. For example, under the Robinson-Patman Act there is no violation unless the discrimination involves sales to competing buyers who purchase from the same seller.⁵⁴ This does not cover two types of practices perceived

51. See *supra* notes 48-49.

52.. For a concise discussion of the literature and case law surrounding the complex notion of cost determinations, see A.B.A. ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 126-29 (2d ed. 1984). The debate among economic and legal scholars regarding the proper cost model to use is also extensively discussed in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *Malcolm*, 642 F.2d at 854 n.17.

53. See *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963); *Littlejohn v. Shell Oil Co.*, 456 F.2d 225 (5th Cir. 1972).

54. *American Oil Co. v. McMullin*, 508 F.2d 1345, 1353 (10th Cir. 1975). Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, prohibits, under certain circumstances, two forms of price discrimination: (1) primary line discrimination, where the seller charges an artificially low (predatory) price in one market in order to drive out its competitors, while subsidizing these lower prices with higher prices in other markets or profits made at other levels in the production and distribution chain; and (2) secondary line discrimination—where the seller charges different prices for comparable goods to buyers competing in the same market.

The proof problems for a plaintiff bringing a predatory pricing action under § 2 of the Sherman Act also confront a plaintiff attempting to establish a primary line violation under

to be discriminatory. First, this loophole in the Robinson-Pactman Act allows a refiner to sell to its direct dealers at the same price it sells to its jobbers. This means that the dealers who purchase from the jobber will ultimately pay a higher dealer tankwagon price for the same product purchased by the refiner's directly-supplied dealer. Of course, this gives the refiner's directly-supplied dealers a competitive advantage over the jobber's dealers. Courts have found, however, that this does not constitute actionable price discrimination because the refiner is not selling to the jobber's dealers at a price different than it is selling to its directly-supplied dealers.⁵⁵ This ignores the simple fact that both the jobber's dealers and the refiner's direct dealers are competing in the same market for the same customers with the same product.⁵⁶

Second, the existing federal price discrimination laws do not reach the situation where the refiner supplies its company-operated stations. To violate the Robinson-Patman Act, there must be two sales to competing buyers. Courts have taken a literal approach to the term "sale" and have uniformly held that intra-company transfers are not "sales" for purposes of the Robinson-Patman Act.⁵⁷ This means that a refiner is free to supply gasoline to its company-operated stations at a price lower than the price at which it supplies the same product to its jobbers or directly-supplied dealers who compete with the refiner's stations. This places the jobbers and independent dealers at a substantial competitive disadvantage.

As with violations of the Sherman Act, courts have required a plaintiff alleging price discrimination to demonstrate an injury to competition and not just injury to himself as a single competitor.⁵⁸

the Clayton Act as amended by the Robinson-Patman Act. In secondary line cases, a disadvantaged plaintiff must show a discrimination in price (a net difference in price), between two buyers of the same seller competing in the same market, of commodities of like grade and quality. In both primary line and secondary line cases, the plaintiff must prove that the effect of the discriminatory pricing may substantially injure competition. F. ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 141-206 (1962).

55. O'Byrne v. Cheker Oil Co., 727 F.2d 159, 164 (7th Cir. 1984).

56. To avoid this somewhat illogical result, courts have adopted the "indirect purchaser" doctrine. This approach focuses on the competition for the ultimate purchase of the product, and not the formal chain of distribution that can be established by the refiner in an attempt to avoid the prohibitions against discrimination. See, e.g., Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

57. Shavnoch v. Clark Oil & Refining Corp., 726 F.2d 291 (8th Cir. 1984); O'Byrne, 727 F.2d 159; Security Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962 (5th Cir. 1979), cert. denied, 444 U.S. 942 (1979).

58. Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967); see also *Statement of Commission Policy With Respect to Anticompetitive Practices in the Marketing of Gasoline*, 3 TRADE

In *Sweeney & Sons, Inc. v. Texaco, Inc.*,⁵⁹ the Third Circuit Court of Appeals affirmed a directed verdict for the defendant-refiner after the plaintiff failed to introduce evidence from which an inference could be drawn that the alleged price discrimination had a substantially adverse effect on competition, rather than just adversely affecting the plaintiff as an individual competitor.⁶⁰ The practical problem is again one of proof. Attempting to prove injury to the market or injury to competition, the litigation becomes a battle of experts, with the concomitant increase in costs.

B. Further Federal Response

The rapid emergence of state franchise protection statutes moved Congress to enact the Petroleum Marketing Practices Act (PMPA).⁶¹ The major oil companies lobbied for such legislation to avoid a variety of different state laws; retail dealers also supported this effort.⁶² The Act prohibits a franchisor from canceling or failing to renew a retail franchise without cause. The Act protects both the specific franchise and the "franchise relationship" that exists between dealer and oil company beyond the mere terms of their mutual contract.⁶³

The PMPA has been criticized for its provision preempting conflicting state franchise laws as this denies dealers the more favorable protections under various state laws.⁶⁴ However, some courts have concluded that preemption extends only to state law provisions that directly conflict with the PMPA, allowing the remainder of a state law to survive.⁶⁵ Regardless of the preemption issue, independent branded retail dealers have been given significant statutory rights that permit them to remain in the retail market, at least to the extent of not being arbitrarily dispossessed of

REG. REP. (CCH) ¶ 10,373 (FTC June 30, 1967).

59. 637 F.2d 105 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981).

60. *Id.*

61. Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (1978) (current version at 15 U.S.C. §§ 2801-2841 (1983)).

62. H. BROWN, FRANCHISING: REALITIES AND REMEDIES § 7.04(4) (1982).

63. Cause which would justify termination or nonrenewal of the franchise includes failure to comply with franchise terms that are both reasonable and of material significance; the occurrence of an event relevant to the franchise relationship that makes termination reasonable; or withdrawal from the marketing area by the refiner. Strict notice requirements for nonrenewal or termination are imposed. A dealer may sue in federal court to enjoin a violation and to recover damages suffered. 15 U.S.C. §§ 2801-41 (1982).

64. H. BROWN, *supra* note 62, § 7.04(4).

65. See, e.g., *Ted's Tire Serv., Inc. v. Chevron U.S.A., Inc.*, 470 F.Supp. 163 (D.Conn. 1979); *Bates v. Chevron U.S.A. Inc.*, 260 S.E.2d 367 (Ga. Ct. App. 1979).

their stations.

In sum, the federal antitrust laws provide both public and private remedies for the more egregious anticompetitive practices in the petroleum industry. In the area of below cost sales and in certain forms of price discrimination, however, federal law does not provide a practical remedy to the small competitor suing a major refiner. This is in part the reason that numerous states have enacted legislation to address certain forms of predatory practices. It is to these efforts that we now turn.

C. State Responses

1. General Below Cost Sales Bans

In addition to federal and state antitrust laws, many states have enacted statutes banning below cost sales which injure competition in general or harm a single competitor. Until the beginning of the twentieth century, sellers had freedom to set prices as they wished. The common law recognized no cause of action by a party injured as a result of the predatory pricing policies of a competitor.⁶⁶ However, this situation soon changed. In 1902, South Carolina became the first state to adopt a statutory ban on sales made below cost with the "intent or purpose of driving out competitors or . . . of financially-injuring competitors."⁶⁷ Some state statutes adopted after South Carolina's covered all goods offered for sale, particularly when offered by the original producer, while a few acts limited themselves to specific products or categories of products.⁶⁸ Known as unfair practices acts, these below cost sales bans were aimed at horizontal levels of price competition so that one seller could not go below his cost to make a sale to the detriment of a competitor. The effect was to create a minimum or floor price.⁶⁹

At the same time, courts began to overturn the common law view by recognizing a cause of action against a competitor who en-

66. See *Kent Stores of New Jersey v. Wilentz*, 14 F. Supp. 1, 6-8 (D.N.J. 1936) for a summary of the common law view of predatory pricing.

67. S.C. CODE ANN. § 39-3-150 (Law. Co-op. 1985). This section provides that it is unlawful for any person engaged in commerce to sell at less than cost; "such person shall be guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade," subject to a fine of up to \$5 thousand. This statute was enacted as part of South Carolina's general antitrust laws, a pattern followed by several states during the rest of that decade. See *WORKS PROGRESS ADMIN. STATE PRICE CONTROL LEGISLATION XXVII* n.4 (1940) (identifying 11 states as having enacted predatory pricing prohibitions) [hereinafter cited as WPA].

68. See R. CALLMAN, *supra* note 23, at § 702 and statutes cited therein.

69. WPA, *supra* note 67, at XLVIII.

gaged in a business "regardless of loss to himself, and for the sole purpose of driving his competitor out of business."⁷⁰ In *Dunshee v. Standard Oil Co.*,⁷¹ an oil wholesaler was subject to suit when it entered the Des Moines, Iowa retail oil market with no real intent to establish a retail business of its own, but with the intent to ruin the existing business of a retailer who purchased part of his oil needs from other suppliers. Once Standard Oil made an example of the plaintiff by destroying his business, Standard Oil ceased its retail operation and restricted itself once again to wholesale distribution. Although the court recognized that a defendant would break no law in selling its product at one-half of plaintiff's retail price, such a practice "would have a distinct bearing upon the reasonableness of its method employed in diverting trade" and on whether the defendant was "actuated by malice or spirit of wanton assault upon the business of another."⁷² Still, sales below cost were valid even if made with malice toward a competitor as long as a second legitimate motive was present, such as establishing an ongoing business for profit.⁷³

During the Depression, state legislation barring predatory pricing flourished. Due to the advent of large retail marketing chains and discount houses, the focus shifted from the production level to the upper levels of the chain of distribution.⁷⁴ At the federal level, the National Recovery Administration (NRA) fashioned hundreds of industry codes of fair competition that, among other provisions, prohibited below cost sales.⁷⁵ The demise of the NRA, however,

70. *Tuttle v. Buck*, 119 N.W. 946, 948 (Minn. 1909). The Minnesota Supreme Court affirmed a verdict for a plaintiff-barber against a banker who opened a competing barber shop with two salaried barbers. By virtue of his position, the defendant-banker was able to divert the plaintiff's regular customers to his competing barbershop. The court found the defendant's purpose "wicked, malicious, and unlawful . . . and not for the purpose of serving any legitimate interest." *Id.* at 946. However, if the defendant had been found to have both a malicious purpose to injure and a legitimate intent to make a profitable competing enterprise, then such a complaint could not have been brought against him. See *Beardsley v. Kilmer*, 140 N.E. 203 (N.Y. 1923) in which economic injuries caused by a competing newspaperman were held not actionable where defendant's intent was both revenge against the plaintiff and the establishment of a profitable ongoing business. The defendant's act of continuing in business after he forced out the plaintiff was seen as indicative of a legitimate purpose.

71. 132 N.W. 371 (Iowa 1911).

72. *Id.* at 375.

73. *Id.*

74. WPA, *supra* note 67, at XXVII.

75. See Comment, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law*, 57 YALE L.J. 391, 405-406 (1948).

brought these codes to an early end.⁷⁶ Numerous trade groups that had helped develop the NRA codes sought the adoption of state unfair practices acts modeled after the defunct codes.⁷⁷

In 1935, California became one of the first states to adopt an unfair practices statute under this effort. Its legislation created a general prohibition against below cost sales when made for the purpose of injuring and destroying competition.⁷⁸ In the following years, a number of other states adopted similar legislation requiring an intent to injure competition or to destroy competition before a below cost sale would be found unlawful.⁷⁹ Some states have done away with the "intent to injure" requirement before a violation was established, and instead found unlawful any sale made below cost that had an effect to injure competition.⁸⁰ Constitutional attacks on such laws met with limited success, with the most successful challenges coming against state laws that required no showing of an injurious intent before an unlawful below cost sale would be found.⁸¹

The statutes adopted during the 1930's and 1940's also differed in their scope and in their approach to defining costs. The California act, and others modeled after it, covered sales by producers, wholesalers, and retailers doing business within the state.⁸² Other

76. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Schechter Poultry challenged an NRA poultry industry code for the New York City area that, among other things, barred unfair methods of competition and minimum wage and hour standards. The Supreme Court found the particular code invalid under the commerce clause because the New York poultry industry did not affect interstate commerce. The National Industrial Recovery Act was held unconstitutional as an unlawful delegation of legislative power to the NRA administrator.

77. Comment, *supra* note 75, at 407-09. Chief among these proponents were associations of retail grocers and of gasoline, cigarette and confectionery distributors. *Id.*

78. 1935 CAL. STAT. 1546-1551, § 3, cited in Comment, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 CALIF. L. REV. 640, 646 (1936). California law currently provides that sales below cost are unlawful when done for the purpose of injuring competitors or of destroying competition. CAL. BUS. & PROF. CODE § 17043 (West 1964).

79. Comment, *Regulation of Business—Sales-Below-Cost Statutes—The Elements of Violation and the Defense of Meeting Competition*, 58 MICH. L. REV. 905, 909 (1960).

80. See also TENN. CODE ANN. § 47-25-203 (1984). Sales at less than cost are unlawful where either the intent or effect is to injure a competitor, to impair competition, or to divert trade from a competitor.

81. See, e.g., Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 12 A.2d 201 (Md. Ct. Spec. App. 1940) (holding invalid a 1939 Maryland act which made sales below cost unlawful if made with the intent, effect, or result of injuring competitors); State *ex rel.* English v. Ruback, 281 N.W. 607 (Neb. 1938) (finding unconstitutional a statute requiring no intent necessary to declare a below cost sale). But see McElhone v. Geror, 292 N.W. 414 (Minn. 1940).

82. See Comment, *supra* note 78, at 646. The Act defined cost of production (raw mater-

states limited their coverage to distribution and retail sales and defined cost as invoice or replacement cost. Most states passing such laws during this time period covered all commodities offered for sale.⁸³ Some states enacted laws that required a minimum markup above cost that was presumptive of the cost of doing business. Other states followed California's lead and attempted to set out the elements of the cost of doing business. These were to be added to the invoice or replacement cost in order to arrive at the true cost of the item offered for sale.⁸⁴ These statutes provided certain remedies to an injured competitor, including injunctive relief and recovery of damages, with some states awarding treble damages. Violators were also exposed to potential criminal or civil sanctions in some jurisdictions.

By 1948, thirty-one states had passed laws barring predatory pricing, most of general application.⁸⁵ During the post-Depression era of economic growth and well-being, however, interest in these statutory bans waned. It appears that few attempts were made to enforce the provisions of these laws.⁸⁶ Since 1961, several states have repealed their below cost sales prohibitions of either general applicability to all commodities or of applicability to specific products.⁸⁷

ials, labor, and overhead expenses) and cost of distribution (invoice or replacement cost and overhead expenses), suggesting both production and distribution were covered. Several states followed California in covering sales by both producers and distributors. See ARK. STAT. § 14313 (Pope 1937) (current version at ARK. STAT. ANN. § 70-301-314 (1967)); COLO. STAT. ANN. ch. 48, § 302(1) (Supp. 1946) (current version at COLO. REV. STAT. §§ 6-2-101-117 (1973 & Supp. 1984)); KY. STAT. ch. 129A, § 4748h-1 to 14 (Carroll 1936) (current version at KY. REV. STAT. §§ 365.020-070, 365.090 (1970 & Supp. 1984); MONT. REV. CODE ch. 112A, § 7590.3 (Supp. 1939) (current version at MONT. CODE ANN. §§ 30-14-210-224 (1983)); OR. COMP. LAWS §43-104 (1940) (repealed by 1975 Or. Laws ch. 225); UTAH CODE ANN. tit. 16A, ch. 4 (1943) (current version at UTAH CODE ANN. §§ 13-5-1 to 18 (1953 & Supp. 1983); WASH. REV. STAT. § 5854-21 (Remington Supp. 1940) (repealed by 1983 Wash Laws ch. 288).

83. E.g., ARK. STAT. ANN. § 70-301 (1957) (making it unlawful to sell any article or product, or service or output of service trade at less than cost). WIS. STAT. ANN. § 100.30(3) (West 1982) (sale of "any merchandise" at less than cost is unlawful) (adopted 1939).

84. Compare R.I. GEN. LAWS, § 6-13-1(a) (1970) ("[a] markup [is] to cover in part the cost of doing business, which markup . . . shall be six per cent [sic] (6%) of the total cost at the retail outlet" for retailer cost, with a 2% markup required of wholesale sales); to CALIF. BUS. PROF. CODE § 17029 (West 1964) (the cost of doing business means all costs incurred in conduct of business including, without limitation, "labor, . . . rent, interest on borrowed capital, depreciation, . . . delivery costs. . . licenses, taxes, insurance and advertising").

85. Comment, *supra* note 75, at 391.

86. E.g., Reiley, *Enforcement of Legislation Prohibiting Sales Below Cost in Washington*, 42 WASH. L.R. 817 (1967). The author termed the below-cost sales law as lying dormant for 20 years with only two reported cases reaching the Washington Supreme Court between 1939, the year of enactment, and 1964.

87. See, e.g., CONN. GEN. STAT. ANN. § 42-104-110 (West 1960), repealed by 1975 Conn.

Over the years, there have been numerous challenges to the legality of these state statutes prohibiting below cost sales. These efforts have been largely unsuccessful. Recently, the West Virginia Supreme Court of Appeals upheld the below cost sales prohibition in that state's Unfair Practices Act.⁸⁸ In *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*⁸⁹, the court rejected substantive due process and vagueness challenges, and more importantly, held that the law did not conflict with the federal antitrust law as both the state ban and the federal antitrust laws prohibit sales below cost.⁹⁰ This same result was obtained four years earlier by the Ninth Circuit Court of Appeals in the legendary case of *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*⁹¹

2. Specific Petroleum Marketing Below Cost Sales Bans

Several states have recently recognized the need for additional statutory bars to below cost sales and discriminatory pricing in petroleum marketing. In addition to Florida, five states have specific statutes barring the sale of motor fuels below cost: Alabama, Georgia, Massachusetts, New Jersey, and Utah.⁹² Below cost sales of motor fuels in the other twenty-three states that have general below cost sales bans can be remedied under those statutes.

Massachusetts makes it unlawful to sell motor fuel at retail for less than the cost to that retail dealer when it is done with the "intent to injure competitors or destroy substantially or lessen competition."⁹³ New Jersey bars the offering of rebates or other

Pub. Acts 75-31 (Reg. Sess.); NEB. REV. STAT. § 59, art. 12 (1968), *repealed* by 1972 Neb. Laws 1410; N.H. REV. STAT. ANN. § 358 (1970), *repealed* by 1977 N.H. Laws 245:1.

88. W. VA. CODE § 47-11a-1-14 (1980 & Supp. 1985).

89. 328 S.E.2d 144 (W. Va. 1985).

90. *Id.*

91. 668 F.2d 1014 (9th Cir. 1981). The Ninth Circuit in *William Inglis & Sons*, and the West Virginia court in *Hartsock*, 328 S.E.2d 144, held that there was no conflict even though the state statutes defined "cost" in a manner different from federal antitrust laws. The prevailing attitude under federal antitrust law is to focus on marginal or average variable costs; the state statutes, on the other hand, defined cost as average total costs. 668 F.2d at 1038.

92. ALA. CODE § 8-22-1. (1984) ("Motor Fuel Marketing Act"); MASS. GEN. LAWS ANN. ch. 94, § 295P (West 1984) ("Unfair Motor Fuel Practices Act"); N.J. STAT. ANN. § 56:6-22 (1964); UTAH CODE ANN. § 13-16 (Supp. 1983); GA. CODE ANN. § 10-1-250 (Supp. 1985) ("Below Cost Sales Act") (effective July 1, 1985); Ch. 85-74, 1985 Fla. Laws 429, ("Motor Fuel Marketing Practices Act").

93. MASS. GEN. LAWS. ANN. ch. 94, § 295P (West 1984). Sales made in good faith to meet the price of a competitor are allowed. A violation could result in a fine of up to \$1 thousand. Unlike other such laws, the Massachusetts provision is directed only to retail dealers; other

discounts in connection with a motor fuel sale with the intent to injure competitors or to destroy or lessen competition.⁹⁴ Such rebates have the effect of creating a sale which is below dealer cost.

The laws in Alabama, Georgia, and Utah have all been passed since 1980 and were influenced by a model bill drafted by the National Oil Jobbers Council (NOJC).⁹⁵ Below cost sales are banned except for several enumerated exceptions, including good faith attempts to meet the equally low price of a competitor. The model act also bars discrimination in the selling price charged to competitors on the same level of competition.⁹⁶ No requirement of an intent to injure competition or a competitor is necessary. A showing that a sale was made below cost creates a presumption that shifts the burden to the seller to show a justification for the sale.⁹⁷

Many of the NOJC provisions found their way into the Utah and Alabama statutes. The Alabama law provides that an effect resulting from a below-cost sale which injured competition was adequate to establish a violation in the presence of predatory intent.⁹⁸ The Utah law requires no intent or detrimental effect upon competition or a competitor before a below cost sale is unlawful because any sale below made cost is per se unlawful.⁹⁹

The recently enacted Georgia law¹⁰⁰ varies from both the Alabama and Utah laws. A reasonable cost of doing business, to be added to the seller's invoice or transfer price, is to be computed pursuant to generally accepted accounting principles plus transportation charges.¹⁰¹ The Georgia statute only requires an effect

states focus on refiners, distributors, and retailers. *Id.* §§ 295 R.S.

94. N.J. STAT. ANN. § 56:6-22 (1964). The legislature found that unfair methods of competition had emerged in motor fuel marketing which harmed the public by hampering supply. The Act does not directly bar below cost sales, but the ban on rebates and discounts has that effect. The Act further prohibits price discrimination between different buyers.

95. MODEL STATE LEGISLATION: TO PROHIBIT MOTOR FUEL SALES BELOW COST (1981) (National Oil Jobbers Council). The NOJC did not endorse the model bill but compiled it based upon provisions in existing state laws. States were urged to study the proposal and select those provisions they found warranted. This model act reflects the provision of the 1935 California law which brings producers, distributors and retailers within its scope. Cost is defined as the cost of raw materials for producers, and invoice or replacement cost, plus the cost of doing business for wholesalers and retailers. The cost of doing business is broadly defined to include, but is not limited to, labor, rent, interest, depreciation, maintenance, freight and business licenses, and taxes. *Id.* art. II §§ (1)(d)-(e).

96. *Id.* art. III, § 2. The act further provides for civil penalties.

97. *Id.* art. II, § 9.

98. ALA. CODE § 8-22-6 (1984).

99. UTAH CODE ANN. § 13-16-4 (Supp. 1983).

100. 1985 Ga. Laws 389 (codified at GA. CODE ANN. § 10-1-250 (Supp. 1985)).

101. GA. CODE ANN. § 10-1-253 (2) (Supp. 1985). This is a more flexible standard of the

that injures competition before a violation will be found but that effect must be one that acts substantially to lessen competition or tends to create a monopoly or to injure, destroy, or prevent competition.¹⁰² This appears to require a greater showing of actual or potential injury before judicial relief may be sought by an injured competitor. Yet, the Georgia law exposes the *knowing buyer* in a below cost sale to liability for damages inflicted upon an injured competitor.¹⁰³ As will be explained below, Florida's new law differs dramatically from the efforts of her sister states.

3. State Franchise Protections

Several states have responded to the plight of the independent service station dealer by attempting to equalize his bargaining position with the refiner or jobber who owns the dealer's station. Most of the independent branded retailers lease or operate their stations under a franchise from their petroleum supplier. Acting individually, these dealers are often in a weak position to bargain with the refiner or jobber over contractual terms. Thus, to enhance the dealers ability to bargain effectively, states have enacted statutes giving dealers a greater economic interest in their franchise and stronger protections against arbitrary franchise cancellations.¹⁰⁴

By 1978, a majority of states had enacted statutes that provided new protections to the franchise dealer.¹⁰⁵ Known as "good cause"

cost of doing business than the detailed list of includible costs set out in the Alabama and Utah laws.

102. *Id.* § 10-1-254(a).

103. *Id.* § 10-1-254(f). It is unlawful for any person engaged in sales of motor fuel "knowingly to induce or to receive a below cost or discriminatory price" as prohibited by this act. The Georgia law does reflect some of the other provisions of the NOJC model act in the evidentiary presumption which shifts justification to the defendant upon a showing of a below cost sale. Yet the law only allows recovery of actual damages, expressly excluding punitive damages and any class action enforcement. To that extent it makes the law a less attractive means of private enforcement.

104. See H. BROWN, *supra* note 62, § 7.04[1]. The terms of a retail petroleum franchise will often set the wholesale price paid for motor fuel by the dealer, the standards by which the station is to be operated, the hours of operation, and the sales of preferred products. Due to the strict terms, the dealer must exercise great care to avoid breaching the franchise terms. At renewal, oil company franchisors are free to dictate the terms and length of any extensions. It is to these potential abuses that such dealer protection laws are directed.

105. Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. Rev. 1089, 1132 n.100 (1981). In 15 states, such protections existed under general limitations on franchise terminations that extended to all franchises. See, e.g., DEL. CODE ANN., tit. 6, § 2251 (1975), "Security for Franchised Distributors." The failure to renew a franchise is unlawful if done without good cause or with bad faith. A franchise provision allowing termination or nonrenewal

statutes, they reflect a changing theory about the franchise relationship, moving away from a contract approach to one based on a joint venture concept.¹⁰⁶ This view finds that both the oil company and the dealer add something to the success of the enterprise; the oil company contributes its nationally-known trademark and petroleum products, and the dealer contributes his services and efforts toward realizing a profit for both.¹⁰⁷ These statutes recognize that the dealer owns the business he operates at the franchised premises. As such, he is entitled to the protection of the law before the value of his business, in the form of customer goodwill, is taken away from him without just and good cause.¹⁰⁸

4. Prohibitions on Price Discrimination

In addition to attempting to ban below cost sales, many states have also enacted statutory prohibitions on price discrimination between a seller's customers or between regions of a state. Thirty-one states have general laws barring discrimination in prices charged different purchasers at the same level of distribution.¹⁰⁹ Forty-six states have found the need for legislation dealing with price discrimination in sales of specific products or industries, such as insurance, alcoholic beverages, tobacco products, and agricultural products.¹¹⁰ Many states enacted price discrimination laws, along with below cost sales bans, as part of their unfair sales laws. Other states enacted such bans as part of their antitrust laws with price discrimination seen as a monopolistic practice.¹¹¹

Many of these price discrimination laws prohibit geographic discrimination between localities, such as selling a product at a lower price in one area than in another.¹¹² Other statutes prohibit price discrimination in the form of different prices charged to different

without justification is construed to mean that a franchisor may only terminate justly. No franchisor may charge, for leased property, an excessive rent in light of the property's use and the franchisor's interest in the property.

106. Comment, *Retail Gasoline Franchise Terminations and Nonrenewals Under Title I of the Petroleum Marketing Practices Act*, 1980 DUKE L.J. 522, 527.

107. *Id.* at 527-28.

108. H. BROWN, *supra* note 62, § 7.04[1].

109. See 1 TRADE REG. REP. (CCH) ¶ 30,201-35,585 (1982) for a listing and the full text of each state's statute.

110. See 1 TRADE REG. REP. (CCH) ¶ 3514 (1982) for a listing of states having these special laws and the products or industries included.

111. S. OPPENHEIM & G. WESTON, *UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION* 787 (3d ed. 1974).

112. 1 TRADE REG. REP. (CCH) ¶ 3510 and ¶ 3562 (1982). Florida has such a prohibition on locality discrimination. See FLA. STAT. § 540.01 (1983).

customers at the same level of distribution,¹¹³ an approach which is consistent with federal antitrust law. Most states provide that the seller entertain some intent to injure either competition in general or a single competitor. This latter standard is less restrictive than federal law, and a few states do not require a showing of intent before a violation will be found.¹¹⁴ In those states, any sale shown to be made at a price different than that charged another customer will be presumed discriminatory and unlawful. Of course, this is also a lower standard of proof than that imposed under federal law.

As in the federal price discrimination laws, state statutes give sellers several defenses. Sales of products of different grade and quality, differences in quantities purchased, or differences in the cost of transportation will justify price discrepancies in products.¹¹⁵ A different price offered in good faith to meet the price of a competitor may also be invoked as a defense. Additionally, certain sales are exempt from the ban on different prices charged to similar customers.¹¹⁶

Remedies for the violation of price discrimination statutes include injunctive relief and in some states penal sanctions.¹¹⁷ Civil damage actions may also be brought in some states by persons who can demonstrate an injury to themselves from these anticompetitive practices.¹¹⁸ Still, the laws appear to be rarely enforced or used in private actions.¹¹⁹

5. Florida's Geographic Price Discrimination Protection

Prior to the enactment of the Motor Fuel Marketing Practices Act, Florida had few laws that could be invoked to restrain predatory trade practices. Florida had not joined the large number of

113. S. OPPENHEIM & G. WESTON, *supra* note 111, at 787.

114. 1 TRADE REG. REP. (CCH) ¶ 3528 (1982).

115. *Id.* at ¶ 3538, 3540.

116. R. CALLMAN, *supra* note 23, § 7.53. Exempt sales include sales of damaged or perishable goods, court-ordered sales, clearance and liquidation sales, and sales to charitable and governmental organization. *Id.*

117. R. CALLMAN, *supra* note 23, at § 7.53.

118. S. OPPENHEIM & G. WESTON, *supra* note 111, at 788. Some states provide for treble damages to a successful plaintiff. See, e.g., CAL. BUS. & PROF. CODE § 17082 (West 1964) ("[A]ny plaintiff . . . shall be entitled to recover three times the amount of the actual damages.").

119. S. OPPENHEIM & G. WESTON, *supra* note 111, at 788. The mere prospect of a private enforcement action, with the threat of treble damages, may be sufficient to discourage such practices. In that sense, these price discrimination laws may be self-enforcing.

states which had adopted specific bans on sales at less than cost. No reported cases have been found where an action for predatory pricing was brought solely under Florida's antitrust statutes. A geographical price discrimination statute, applicable to the sales of all commodities, was enacted to prevent discrimination "between different sections, communities, or cities of this state."¹²⁰

Under the statute, the seller must engage in predatory pricing with the purpose of destroying the business of a competitor. The seller may justify different sales prices by showing a difference in transportation costs or a good faith effort to meet competition.¹²¹ Enforcement lies with the Department of Legal Affairs and the state attorneys.¹²² A violation of the law is a misdemeanor. If a corporation is found guilty of these practices, its license to conduct business in the state can immediately be revoked.¹²³ Despite its availability, this price discrimination ban has been rarely used.¹²⁴

One commentator views Florida's geographical price discrimination statute to be of dubious value in eliminating injurious practices. This is due to the fact that the law does not permit private enforcement by injured competitors, as is allowed with many other unfair practices acts.¹²⁵ Typically, it is this private enforcement mechanism, or the threat of its use by an injured competitor, that provides meaningful enforcement against such practices.

A. Florida's Divorcement Law

Florida was a co-leader with Maryland in attempting to deal with abusive refiner practices in 1974 when both states passed "retail divorcement" laws restricting refiners' ability to directly retail

120. FLA. STAT. § 540.01 (1983). The law was first enacted in 1915. See ch. 6945, 1915 Fla. Laws 326.

121. *Id.*

122. FLA. STAT. § 540.03 (1983).

123. *Id.* § 540.04 (1983).

124. In *Syfo Water Co. v. Chakoff*, 182 So. 2d 17 (Fla. 3d DCA 1965), a distributor of seltzer water, Chakoff, alleged geographical price discrimination by Syfo Water Co., a competing distributor. Testimony showed Syfo Water was selling its product at eight cents per gallon in areas where Chakoff did business and at 15 cents per gallon in other areas. The trial court enjoined both parties from such practices. On appeal, the reviewing court found no evidence that Syfo Water engaged in these practices with the intent of destroying Chakoff's business and reversed the lower court. Chakoff failed to curb his competitor's practice of selling at different prices because he was unable to establish Syfo Water Co. and its employees intended to destroy his business.

125. Kemker, *Price Discrimination Under the Robinson- Patman Act*, 14 U. FLA. L. Rev. 155, 156 n.10 (1984).

their motor fuel. Maryland's statute¹²⁶ imposes an absolute prohibition on refiners selling motor fuel at retail. Section 526.151, Florida Statutes, limits refiners' directly-owned retail operations to three percent of the total number of retail outlets selling petroleum products under the refiner's primary brand or secondary brand. While the Maryland and Florida statutes attempted to address other abusive marketing practices by refiners, the divorce-ment provisions were the substance of these laws.

Several major refiners challenged Florida's divorcement law in state court,¹²⁷ alleging it to be unconstitutional. They sought a temporary injunction prior to the law's effective date of October 1, 1974. The Second Circuit Court entered an order granting the refiners' request for a temporary injunction, and thus barred enforcement of the statute. Simultaneously, several of the mini-majors challenged the application of the new statute to their retail outlets, arguing that they did not offer a full line of automotive services and were not, therefore, "service stations" under the law.¹²⁸ On September 27, 1974, the same circuit court ruled in favor of the mini-majors and enjoined enforcement of the law against them.¹²⁹

In January 1975, the circuit court ruled the divorcement statute unconstitutional, holding it to be vague and ambiguous, an invalid exercise of the police power, discriminatory, and violative of the Equal Protection Clause.¹³⁰ The state did not appeal this ruling and thus ended, for the moment, Florida's special regulation of refiners' marketing operations and practices.

Maryland's divorcement statute experienced a similar fate at the trial court level. The same major refiners attacked Maryland's law on identical grounds as those raised in Florida. The law was held unconstitutional, but Maryland appealed the lower court's ruling. In 1977, the Maryland Court of Appeals reversed the lower court and upheld the constitutionality of the law.¹³¹ This decision was appealed to the United States Supreme Court by the majors, and the Court rendered a lengthy opinion upholding the law.¹³²

126. Md. ANN. CODE art. 56, § 157E (Supp. 1977).

127. Exxon Corp. v. Conner, No. 74-1449 (Fla. 2d Cir. Ct. 1974); Shell Oil Co. v. Conner, No. 74-1577 (Fla. 2d Cir. Ct. 1974); Phillips Petroleum Co. v. Conner, Case No. 74-1772 (Fla. 2d Cir. Ct. 1974). These cases were later consolidated.

128. Direct Oil Corp. v. Conner, No. 74-1185 (Fla. 2d Cir. Ct. 1974).

129. *Id.*

130. See *supra* note 127 (final judgment entered Jan. 23, 1975).

131. Governor of Md. v. Exxon Corp., 370 A.2d 1102 (Md. 1977), *aff'd*, 437 U.S. 117 (1978).

132. *Id.*

Divorcement was thereafter accomplished in Maryland and it continues today. Florida's service station dealers continued to pursue retail divorcement by supporting such legislation in each Florida legislative session from 1975 through 1982. During each of these years, the jobbers joined the refiners in opposing and defeating the bills.

In 1983, however, the jobbers began exploring possible legislative measures to address refiner abuses. The jobbers persuaded the House Commerce Committee to conduct an informal study of the industry, particularly the marketing sector.¹³³ Furthermore, the jobbers insisted that the state begin enforcement of its divorcement statute in light of the Supreme Court's ruling in *Exxon Corp.*¹³⁴ Doyle Conner, Commissioner of Agriculture and Consumer Services, charged with responsibility of enforcement of the law, refused to begin enforcement. Accordingly, in June 1983, the jobbers filed a petition for writ of mandamus to compel the Commissioner's performance under the statute.¹³⁵

Ironically, the petition was heard by the same circuit judge who had held the statute unconstitutional some nine years earlier. The judge remained firm, dismissing the petition for mandamus.¹³⁶ That order was appealed by the jobbers to the First District Court of Appeal. The First District reversed the lower court and declared the Florida divorce law constitutional.¹³⁷

On February 1, 1985, the Department of Agriculture and Consumer Services published its notice of intent to adopt proposed rules interpreting and implementing the divorcement statute.¹³⁸ The proposed rules were immediately attacked by the majors and mini-majors, who filed petitions to determine the invalidity of the rules.¹³⁹ On February 22, the Department of Agriculture and Consumer Services conducted a hearing to receive public comments regarding the proposed rules. The rule challenges were referred to

133. See generally Florida Petroleum Marketers Ass'n, *Petrogram* page 10, col. 1-2 (Oct. 1983) [hereinafter cited as FPMA *Petrogram*].

134. 437 U.S. at 117.

135. State *ex rel.* Gas Kwick, Inc. v. Conner, 453 So. 2d 863 (Fla. 1st DCA 1984).

136. *Id.*

137. *Id.*

138. 11 Fla. Admin. Weekly 366 (Feb. 1, 1985) (proposing Rule 5F-7.01-03)

139. The following cases were filed in the State of Florida, Division of Administrative Hearings: Autotronics Syss, Inc. v. Dep't of Agric. and Consumer Servs., No. 85-0646R (1985); Amerada Hess Corp. v. Dep't of Agric. and Consumer Servs., No. 85-0647R (1985); Kayo Oil Co. v. Dep't of Agric. and Consumer Servs., No. 85-0649R (1985); Exxon Corp. v. Department of Agric. and Consumer Servs., No. 85-0650R (1985); Ashland Oil, Inc. v. Department of Agric. and Consumer Servs., No. 85-0651R (1985).

the Division of Administrative Hearings but were never heard as the legislature convened and passed the new Florida Motor Fuel Marketing Practices Act,¹⁴⁰ repealing Florida's divorcement law.

III. FLORIDA'S MOTOR FUEL MARKETING PRACTICES ACT

A. Legislative History

The First District Court of Appeal decision declaring section 526.151, the retail gasoline divorcement statute, constitutional, kicked off a vigorous campaign by refiners to repeal the law.¹⁴¹ During the first few months following the First District's decision, the refiners had two goals: to slow implementation of the enforcement of the divorcement statute by challenging rulemaking initiated by the Department of Agriculture and Consumer Services, and to marshal legislative support for the repeal of the statute during the 1985 Regular Session.

Florida's petroleum wholesalers, who had initiated the litigation due to continuing deterioration of relations with refiners, pushed for adoption and implementation of the Department of Agriculture and Consumer Services' divorcement rules. The wholesalers also organized a legislative defense of the divorcement statute.¹⁴² As the 1985 Regular Session approached, the industry had realigned on the divorcement issue; refiners now opposed both dealers and

140. Ch. 85-74, 1985 Fla. Laws 429.

141. Exxon Corp. v Conner, No. 74-1449 (Fla. 2d Cir. Ct. 1974); Shell Oil Co. v. Conner, No. 74-1577 (Fla. 2d Cir. Ct. 1974); Phillips Petroleum Co. v. Conner, No. 74-1772 (Fla. 2d Cir. Ct. 1974).

142. Interview with Carl Adams, Exec. Dir., Fla. Petroleum Marketers Ass'n, in Tallahassee, Fla. (July 17, 1985) (hereinafter cited as Interview). It is significant to note that during the time the 1974 divorcement law was held in abeyance by the circuit court's injunction, retail petroleum dealers mounted extensive legislative campaigns from 1975 through 1982 to persuade Florida's legislature to replace section 526.151 with another retail divorcement statute. See e.g., Fla. HB 35 (1982); Fla. HB 802 (1981); Fla. HB 1310 (1980); Fla. HB 1462 (1975). Refiners, of course, opposed these legislative attempts by the dealers. Ironically, the wholesalers also adamantly opposed those legislative bills. By 1983, however, the wholesalers realized that peaceful coexistence with the refiners was a delusion. Wholesalers found they could not compete with refiners for retail markets. The virtually unlimited resources of refiners within the structure of the petroleum industry placed the future livelihood of wholesalers in jeopardy.

In the summer and fall of 1983, the House Comm. on Com. had a special subcommittee conduct hearings regarding petroleum industry problems. This was an ad hoc study committee chaired by Rep. Christian Meffert, Dem., Ocala. See *FPMA Petrogram* at 10, cols. 1-2. These hearings were held as a result of requests from the wholesale segment of the industry. The Subcommittee proposed no legislation at the end of these hearings; therefore, the legislature did not address the issue in 1984.

wholesalers.¹⁴³

Prior to the opening of the session, the refiners solicited House and Senate members to sponsor legislative bills repealing the divorce law. By early 1985, it appeared that Senator Fox,¹⁴⁴ a powerful member of the Senate Commerce Committee, and Representative Burnsed,¹⁴⁵ Chairman of the House Commerce Committee, would sponsor the refiners' repealer bills. At this juncture, legislators expressed mixed feelings about the issue. Some legislators felt the law, which had been judicially held in abeyance since 1973, should have an opportunity to function before judging it to be detrimental. Others, by far the majority, felt the law was ill-conceived in 1973 and equally repugnant in 1985.¹⁴⁶

As the legislative session became imminent, the refiners could not maintain a unified legislative repose. Several of the mini-majors, with integrated refining-to-retailing operations, decided not to risk an all or nothing position with the legislature. While outright repeal of the divorce law was their preference, they expressed a desire to negotiate with the wholesalers in an attempt to find compromise legislation, and thereby largely defuse the legislative fight.¹⁴⁷ These mini-majors—Tenneco, Hess, Marathon and others—would be required to alter their entire marketing system if the divorce law was implemented. This defection of the mini-majors stymied the primary refiner lobbying arm, the Florida Petroleum Council. Since both majors and mini-majors belong to the Council, there was no consensus position which the Council could actively promote.

On February 20, 1985, Senator Fox prefled the repealer bill in the Senate on behalf of the refiners.¹⁴⁸ Also at this time, the mini-majors approached the petroleum wholesaler's organization¹⁴⁹ in an effort to initiate discussions about compromise legislation. The wholesalers, believing that retention of the divorce law would be difficult and that other legislation might provide better relief to their segment of the industry, were willing to explore other alternatives. The two groups immediately focused on the below cost

143. Interview, *supra* note 142.

144. Dem., Miami.

145. Dem., Lakeland.

146. Interview, *supra* note 142.

147. *Id.*

148. Fla. SB 237 (1985).

149. The Florida Petroleum Marketers Association, Inc. is the trade association which represents petroleum jobbers in Florida.

sales legislation passed in 1984 by the Alabama Legislature¹⁵⁰ and the similar Georgia measure, which was under consideration by the Georgia Legislature at that time.¹⁵¹ After spirited negotiations, the two groups agreed to propose to the Florida Legislature a compromise tailored after the Alabama law. Pertinent parts of the compromise were: (a) a prohibition on sales below cost by refiners, retailers, and wholesalers; (b) a prohibition of price discrimination, including discrimination occurring in intracompany transfers at prices lower than the sales prices to independent purchasers; (c) a prohibition on refiners selling to commercial accounts at prices lower than their prices to wholesalers; and (d) repeal of the divorcement law.¹⁵²

The next step was to sell this proposal to the dealers and to block an attack by the majors and other groups on the compromise. Neither the dealers nor the majors had been part of the negotiations, and the compromise was deemed unacceptable by both groups. Even though the dealers and the majors refused to embrace the proposal, the mini-majors and the wholesalers elected to push for its adoption. The obvious method for accomplishing this objective was to have the compromise proposal substituted for Senator Fox's repealer bill. That bill was scheduled to be heard by the Senate Commerce Committee on April 11.¹⁵³ The morning of the 11th, before the Committee meeting, Senator Fox adamantly refused the suggestion that she amend her bill with the compromise proposal. In fact, during the Committee presentation, Senator Fox blasted the compromise as industry price fixing and predicted that the proposal would increase retail gasoline prices.¹⁵⁴ Similar attacks came from the majors, the dealers, the American Association of Retired Persons, the Florida League of Municipalities, the Florida School Board Association, the Florida Trucking Association, the Florida Farm Bureau, and others.¹⁵⁵ In the end, the compromise was soundly defeated and Senator Fox's repealer bill passed intact.¹⁵⁶

The wholesalers were left wondering if they could now stop out-

150. ALA. CODE § 8-22-1 (1984).

151. 1985 Ga. Laws 385 (codified at GA. CODE ANN. § 10-1-250 (Supp. 1985)).

152. Interview, *supra* note 142.

153. Fla. S., Comm. on Com., tape recording of proceedings (Apr. 11, 1985) (on file with committee).

154. *Id.*

155. *Id.*

156. *Id.*

right repeal. The mini-majors were left pondering whether they had made a tactical error in breaking rank with the majors and if repeal without compromise was now possible. Nothing seemed certain; the mini-major and wholesaler coalition appeared strained. Indeed, as is constantly the case in legislative affairs, the parties had to reevaluate their respective positions and determine whether they were stronger together, separate, or realigned with others. After some reflection, the coalition determined that it would continue its attempts to achieve a compromise; recognizing, however, that the Florida Legislature was not disposed toward acceptance of legislation substantially similar to Alabama's below cost sales law.¹⁵⁷

The mini-majors and wholesalers quickly sought the counsel of the House leadership. Representative Burnsed, who had prefiled the House repealer bill, was contacted and consideration of the House bill was delayed. This delay allowed the mini-majors and wholesalers additional time to piece together a compromise before the repealer bill was to be heard by the House Commerce Committee.¹⁵⁸ Although the parties continued to meet, they became somewhat more independent in their attempts to draft another compromise. The mini-majors backed away from several of their earlier concessions to the wholesalers. The wholesalers likewise retreated on a few points due to political realities. For example, the wholesalers recognized that the prohibition of commercial sales by refiners at prices below wholesale drew too many opponents, such as trucking interests, the Florida League of Municipalities, and other commercial end users. Both parties recognized that the prohibition of below cost sales at all levels was an overkill which had become an anti-consumer issue in the Senate.¹⁵⁹

The mini-majors attempted to include the majors in these compromise deliberations while the wholesalers met with the dealers in an attempt to include their concerns in the negotiations. The dealers wanted two issues addressed. First, they wanted additional franchise protections whereby majors, wholesalers, and other franchisors could not mandate conversion of their gas stations to convenience stores. Secondly, the dealers wanted additional franchise protection from substantial rent increases.¹⁶⁰

157. Interview, *supra* note 142.

158. *Id.*

159. *Id.*

160. *Id.* Although dealer franchises are protected under the federal Petroleum Marketing Practices Act, the Act contains no prohibitions against conversion of the premises to another form of retail gasoline facility. Standard service stations with work bays and full-

The majors were still largely uninterested in substitute legislation and wanted the divorcement law repealed without compromise. They remained adamantly opposed to any below cost sales prohibitions or other marketing restrictions being advocated by the wholesalers. The two dealer issues were deemed heresy by the majors. They maintained that they had a right to convert their service stations into convenience stores to obtain maximum profits. Furthermore, the majors would not consider any proposals restricting rent increases, contending that this was exclusively within federal jurisdiction under the Petroleum Marketing Practices Act.¹⁶¹

The wholesalers continued to push for some type of below cost sales legislation which they believed necessary to have any meaningful legislation addressing their problems in the marketplace. The wholesalers and dealers reached an accord whereby the dealers would support the wholesalers' proposals regarding marketing restrictions in exchange for the wholesalers support of the dealer's proposals on station conversions and unjustified rent increases.¹⁶² They prepared a draft bill which: (1) eliminated the below cost sales prohibition at the refining and wholesale levels and restricted only refiners at retail; (2) eliminated the restriction on refiners selling to commercial accounts at prices less than wholesale; and (3) contained a severability clause intended to reinstate divorcement if the marketing restrictions were declared unconstitutional.¹⁶³

The mini-majors, now in basic accord with the majors, countered with a price discrimination bill which the majors would accept. They, like the majors, refused to consider the demands of the dealers, by arguing that the Petroleum Marketing Practices Act preempted any state action in the area of petroleum franchises. They opposed any below cost sales provisions and suggested that the

service gasoline pumps were being converted into total self-service facilities, generally in conjunction with the convenience store or mini-convenience store concept. Dealers had traditionally engaged in gasoline sales, tire and battery sales, and auto repairs, with little training or experience in marketing food and convenience items and managing such operations. Consequently, when dealers stations were transformed into convenience stores with self-service gasoline, the dealers often failed to be successful, thereby allowing the franchisor to remove them from the locations and replace them with company personnel. *See supra* note 24 and accompanying text. The Petroleum Marketing Practices Act also addresses negotiation and renegotiation of gasoline franchises, but it does not contain any rent control provisions. 15 U.S.C. § 2801 (1983). Dealers maintain that franchisors had imposed abusive rent increases in Florida, due to their desire to directly operate the more favorable locations leased to dealers. Interview, *supra* note 142.

161. Interview, *supra* note 142.

162. *Id.*

163. *Id.*

Senate Commerce Committee's action operated as clear notice that the legislature deemed such marketing restrictions anti-consumer.¹⁶⁴

The industry representatives met in late April to exchange and discuss the pertinent provisions of their respective proposals. Representatives from the Florida Petroleum Council, the Florida Petroleum Marketers Association, and the Service Station Dealers Association, as well as representatives from individual refineries attended this meeting.¹⁶⁵ The meeting was not fruitful. The parties seemed further from agreement than ever before. A subsequent series of meetings followed where each group presented a priority list for any new compromise. The majors, for the most part, were uncompromising throughout. However, only a few issues thwarted basic agreement between the wholesalers and mini-majors. Specifically, the mini-majors refused to accept provisions of the wholesaler-dealer draft which would have restricted their award of rebates at the wholesale and retail levels. The wholesalers were adamant that the legislation had to preclude refiners from providing rebates or discounts to their directly-supplied dealers when discounts were not offered to their wholesalers in the same market area. The wholesalers also demanded a severability clause, which provided that the entire Act would become void if any of the provisions of the law were found unconstitutional. The clause further provided that failure of the Act would reinstate Florida's divorce law. This was unacceptable to the mini-majors; the dealer demands also continued to be unacceptable.¹⁶⁶

With none of the parties willing to yield, the majors and the mini-majors decided to test the sentiment of the House Commerce Committee, rather than reaching an accord with the wholesalers and dealers. Representative Burnsed was informed of the parties' failure to reach an accord. The Commerce Committee staff was instructed to draft an amendment to the repealer bill for consideration at the next Commerce Committee meeting.¹⁶⁷

On May 7, the House Commerce Committee hearing room was packed with representatives from all interested groups, as well as representatives of the press.¹⁶⁸ As expected, several of the majors

164. *Id.*

165. *Id.*

166. *Id.*

167. Memorandum to Interested Parties from Rep. Burnsed, Chairman, Fla. H.R., Comm. on Com. (May 2, 1985).

168. Fla. H.R., Comm. on Com., tape recording of proceedings (May 7, 1985) (on file

vehemently attacked the amendment rather than seeking outright repeal of the divorce law. An attempt was made to eliminate the restrictions on refiner rebates, but the Committee defeated the attempt overwhelmingly. The wholesalers and dealers supported the Committee staff draft. The mini-majors, sensing the tremendous Committee support for the staff amendment, also supported it. The Committee unanimously passed the amendment.¹⁶⁹

As a result of the House Commerce Committee vote, momentum seemed to swing in favor of the wholesalers and dealers. Even though the Senate Commerce Committee had indicated a preference for outright repeal of the divorce statute,¹⁷⁰ a repeal could only occur if both the Senate and House concurred. The House Commerce Committee action was a strong indication that the House favored legislation which would provide some relief to wholesalers and dealers in exchange for the repeal of the divorce law.

Again, the interested parties had their own biased perceptions of the status of the matter. The majors probably felt that they could persuade the Senate to pass Senator Fox's repealer bill and then persuade the House to accept that bill, or a substantially watered down substitute for the House Commerce Committee bill. The mini-majors felt they could not lose since they felt confident that legislation was certain to pass and that whatever bill did pass would include repeal of divorce. The wholesalers were obviously buoyed by the House Commerce Committee action, but now had to gain Senate acceptance of the new draft which contained some provisions that were still unacceptable to many senators.

Senator Fox called a meeting of all interested parties within a matter of days following the House Commerce Committee action.¹⁷¹ At that meeting, she indicated her willingness to support the House Commerce Committee amendment on the floor of the Senate as a substitute to her repealer bill.¹⁷² Rumors continued that the majors intended an intensive lobbying effort in the Senate to persuade senators not to accept the House Commerce Committee's product. In the meantime, on May 20, the House passed the Commerce Committee substitute by a vote of 114 to 0.¹⁷³ Three

with committee).

169. *Id.*

170. Fla. SB 237 (1985).

171. Interview, *supra* note 142.

172. *Id.*

173. Fla. H.R. JOUR. 446-47 (Reg. Sess. 1985).

days later, Senator Fox spoke in favor of the bill when she presented it on the floor of the Senate. The Senate passed the legislation by a vote of 35-0.¹⁷⁴ On June 5, the bill was signed into law by Governor Graham.¹⁷⁵ The industry battle over this legislation came to an end.

The legislative findings and intent provide:

The Legislature finds that fair and healthy competition in the marketing of motor fuel provides maximum benefits to consumers in Florida, and that certain marketing practices which impair such competition are contrary to the public interest. Predatory practices and, under certain conditions, discriminatory practices, are unfair trade practices and restraints which adversely affect motor fuel competition. It is the intent of the Legislature to encourage competition and promote the general welfare of Florida citizens by prohibiting such unfair practices.¹⁷⁶

Whether this law will actually preclude predatory, discriminatory, and unfair trade practices remains to be seen. The legislature had more than just a passing interest in this issue. This is evidenced by a provision which directs the Department of Agriculture and Consumer Services to compile an annual report of complaints of violations of this law for presentation to the Speaker of the House and the President of the Senate. Furthermore, Section 15 directs the Division of Consumer Services to study the operation of this law and its effect on gasoline prices. The Division is to then report its recommendations to the legislature no later than November 1987.¹⁷⁷

B. Summary of Florida's New Legislation

1. Below Cost Sales

The centerpiece of the new law is section four, the prohibition against refiners selling motor fuel below cost at retail.¹⁷⁸ To understand the operation of this section, it is necessary to consider the alleged abuse. As discussed above, refiners are directly operating more and more retail motor fuel outlets in Florida. Jobbers contend that it is common for refiners to sell motor fuel to their di-

174. FLA. S. JOUR. 402 (Reg. Sess. May 23, 1985) (Fla. CS for HB 690).

175. Ch. 85-74, 1985 Fla. Laws 429, 434.

176. *Id.* § 2, 1985 Fla. Laws at 429.

177. *Id.* § 15, 1985 Fla. Laws at 433.

178. *Id.* § 4, 1985 Fla. Laws at 433.

rectly-operated stations at prices below those charged to their jobbers and independent dealers. In most cases, and especially with branded motor fuel (Texaco, Mobil, Chevron, Exxon, Amoco), jobbers and independent dealers are required to purchase a minimum quantity of a refiner's motor fuel under a long-term supply contract, to accept the refiner's credit card, to sell only the refiner's fuel, to exhibit the refiner's brand, and to follow the refiner's policies.¹⁷⁹ It is difficult, if not impossible, for a jobber or independent dealer to compete for any length of time with its supplier that sells at retail in the same market at prices less than the supplier sells to the jobber or dealer. If the jobber and the independent dealer do not meet their supplier's lower retail price, they will lose sales and ultimately be forced out of the market. On the other hand, if they meet the refiner's lower price and sell below their cost, substantial losses will eventually force them out of business. Refiners obviously do not operate under the same profit and loss constraints as do wholesalers and dealers. They can subsidize "losses" at their retail outlets through profits earned in production and refining. In the past, refiners have shown substantial losses in their motor fuel marketing operations, which may be indicative of below cost selling.¹⁸⁰ Continued subsidization of their retail marketing losses through upstream production profits to the detriment of the jobbers and dealers suggests predatory conduct by the refiners.

Section four requires refiners to sell at retail, at or above their "cost."¹⁸¹ Obviously, the refiner's cost of fuel must be more than its production cost. Therefore, the new law requires refiners to compute cost beginning with the refiner's posted terminal price (wholesale price), plus taxes, inspection fees, and freight charges to its retail location.¹⁸² Additionally, the cost attributable to a refiner's labor at a particular retail outlet and a reasonable rental value for the outlet must be included in the cost of motor fuel at a particular outlet.¹⁸³ Restricting refiners from below cost sales at retail does not unduly tamper with consumer prices as the market remains totally flexible for nonrefiners to sell below cost. It is fully expected that this will happen from time to time as has been the case in the past with temporary price wars. Although refiners are prohibited from selling below cost, they are permitted to drop their

179. See *supra* note 24 and accompanying text.

180. See ALLVINE, *supra* note 24, at 63; WILLIAMS, *supra* note 12, at 70.

181. Ch. 85-74, § 4, 1985 Fla. Laws 429, 430.

182. *Id.* § 3(7), 1985 Fla. Laws at 430.

183. *Id.*

prices below cost to meet the equally low price of a competitor selling in the same market area. This means that the refiners' retail outlets are not placed at a competitive disadvantage, only that they are unable to engage in "first strike" predatory pricing.

2. Price Discrimination

Section five of the Act attempts to expand the restrictions imposed on price discrimination to preclude refiners from supplying their directly-operated retail outlets with motor fuel at prices lower than prices charged to jobbers or independent dealers competing with those outlets.¹⁸⁴ Section five removes the distinction between an intracompany transfer and a sale, and thereby requires refiners to offer their jobbers or independent dealers the same price as that charged to their directly-operated retail outlets in the same market area.¹⁸⁵

3. Discriminatory Allocation of Fuel

Discriminatory allocations of motor fuel by refiners is addressed in section six.¹⁸⁶ The legislature heard testimony that just as refiners discriminate by way of price, they also discriminate against jobbers and dealers by limiting or allocating the availability of motor fuel to them while fully supplying their own directly-operated outlets.¹⁸⁷ This type of discrimination can be more ruinous than price discrimination or below cost selling since it curtails or removes the jobber's or independent dealer's source of supply from its sole supplier. Thus, with many refiners intent on expanding their directly-operated locations and reducing their jobber or independent dealer locations, a prohibition on discriminatory allocations seems appropriate.

Section six directly addresses the above-described discriminatory practice. A refiner cannot favor its own retail outlets by way of product availability at the expense of its jobbers or independent dealers. Furthermore, a refiner cannot base future product allocations upon one jobber's or dealer's prior usage, unless the refiner

184. *Id.* § 5, 1985 Fla. Laws at 430.

185. *Id.* See § 3(3), defining "sale" to include any transfer of a motor fuel from a person or entity to itself or to an affiliate. Price discrimination under the Robinson-Patman Act requires two independent contemporaneous sales to customers competing in the same market area. Since intracompany transfers by a refiner to its own retail outlet have not been interpreted as sales, the federal law does not reach this obvious discrimination.

186. *Id.* § 6, 1985 Fla. Laws at 431.

187. See *Gasoline Marketing Hearings*, *supra* note 10, at 268.

applies that same method to all purchasers, including the refiner's own directly-operated outlets.¹⁸⁸

4. Coercive Contract Practices

Section seven addresses the relationship between refiners, jobbers, other suppliers, and independent dealers.¹⁸⁹ Due to the tremendous economic advantage refiners and other suppliers have over independent dealers, the dealers are often coerced into lowering the retail price of their motor fuel. Additionally, dealers claim they are coerced into modifying their contractual arrangements, including station leases and motor fuel supply contracts, particularly with regard to modification of the service station to a convenience retail outlet.¹⁹⁰ Conversion of the station to a convenience retail outlet is usually accompanied by substantial rent increases. The result is most often economic failure of the dealer and, ultimately, loss of the dealer's lease.

In section seven, the legislature specifically prohibits refiners and other suppliers from fixing or maintaining retail motor fuel prices at independent retail outlets and from coercing the purchasers in this regard.¹⁹¹ While such actions are already prohibited under federal law, this additional state remedy can only help stop such practices. Also, section seven imposes a good faith or reasonable business practice test on supplier-lessors when there is a modification of supply contracts with dealers or when leased premises are materially altered.

5. Rebates

Refiner rebate programs were strenuously attacked by the jobbers. They argued that refiners use these programs to favor their directly-supplied dealers and to discriminate against their jobbers and the jobbers' dealers. The most typical rebates mentioned were volume rebates and rent rebates, whereby refiners allowed their directly-supplied dealers substantial discounts which result in these dealers selling motor fuel at a lower price than their competitors.¹⁹² This practice occurs typically in market areas where refiners supplied jobbers without offering rebates. The jobbers were therefore

188. Ch. 85-74, § 6, 1985 Fla. Laws 429, 431.

189. *Id.* § 7, 1985 Fla. Laws at 431.

190. See *supra* note 24 and accompanying text.

191. Ch. 85-74, § 7, 1985 Fla. Laws 429, 431.

192. See *supra* note 24 and accompanying text.

unable to pass on a rebate to their dealers who, in turn, were unable to compete with the lower prices offered by the refiners' directly-supplied dealers.

Federal law does not prohibit this type of price discrimination because it technically occurs at two different levels of distribution.¹⁹³ However, the impact is the same as if the discrimination occurred at the same level of distribution. Section eight of the Motor Fuel Marketing Practices Act addresses this problem. It requires all sellers of motor fuel to provide equal rebates, allowances, or concessions to all purchasers purchasing for resale in the same market area. Wholesalers are required to pass on refiner rebates to their dealers.¹⁹⁴

6. Enforcement and Penalties

Section ten provides for public enforcement of the Act.¹⁹⁵ Complaint investigations are conducted by the Department of Agriculture and Consumer Services. The results of these investigations are given to the Department of Legal Affairs, which prosecutes violations. Violators may incur civil penalties of up to \$1 thousand per violation, with each day of noncompliance deemed a separate violation. There is a \$50 thousand cap on the civil penalty. Also, violators may be required to pay the state's legal fees if the court deems it appropriate.¹⁹⁶

Section eleven authorizes private legal actions for injunctive and declaratory relief as well as damages.¹⁹⁷ A court *may* treble actual damages and must award attorney's fees to a prevailing plaintiff. If the defendant prevails, a court *may* award it attorney's fees.¹⁹⁸

There is a two-year statute of limitations on prosecutions by the Department of Legal Affairs and a one-year statute of limitations on private actions, except price discrimination actions, which have a two-year limitation period.¹⁹⁹

Like the federal and state antitrust laws, there is no violation under the Act unless there is an injury to competition.²⁰⁰ Unlike the antitrust laws, however, injury to competition means injury to

193. See *supra* notes 54-56 and accompanying text.

194. Ch. 85-74, § 8, 1985 Fla. Laws 429, 431-32.

195. *Id.* § 10, 1985 Fla. Laws at 432.

196. *Id.*

197. *Id.* § 11, 1985 Fla. Laws at 432.

198. *Id.*

199. *Id.* § 12, 1985 Fla. Laws at 431.

200. *Id.* § 4(1), 1985 Fla. Laws at 430.

a single competitor.²⁰¹ Thus, the burden of proof required to show a violation and prove damages under this Act should be substantially less than the burden of proof in antitrust cases.

Pursuant to section fifteen, the Division of Consumer Services is to compile a report of all complaints alleging violations of this law and to present it to the Speaker of the House and the President of the Senate no later than January 1 of each year.²⁰² The Division is also directed to study the operation of this law, to examine in detail its effect on motor fuel prices, and to compare vertically integrated pricing with horizontal distribution pricing. This study and the recommendations of the Division are to be presented to the Speaker and the Senate President no later than November 1987.²⁰³

Finally, the Florida divorce law has been repealed, and present or potential actions thereunder are rendered unenforceable by sections thirteen and fourteen of the law.²⁰⁴

IV. ANALYSIS AND CRITICISM

Florida's Motor Fuel Marketing Practices Act should have a positive effect on both the petroleum industry and the consuming public, thereby increasing overall consumer welfare. Contrary to the views of its critics, the Act is *not* a minimum mark-up law or state sanctioned price-fixing, which could raise prices at the pump or a guarantee by the state that inefficient operators can remain in the gasoline business. Rather, the Act represents a necessary addition to existing federal and state laws prohibiting unfair trade practices. The Act's specific focus on prevalent practices in motor fuel marketing should make the law more effective than the repealed divorce law. Section eleven of the Act reveals that the legislature intended the Act to eliminate certain unfair practices in order to encourage fair and unfettered competition in the marketing of motor fuel, which in turn should maximize benefits to the consumers of Florida.²⁰⁵ Although the Act has several shortcomings as a result of the compromise process,²⁰⁶ it is consistent and harmonious with national trade regulation policy.²⁰⁷

201. *Id.* § 3, 1985 Fla. Laws at 430. "Competition" is defined as the vying for motor fuel sales between any two sellers in the same market area." *Id.*

202. *Id.* § 15(1), 1985 Fla. Laws at 433.

203. *Id.* § 15(2), 1985 Fla. Laws at 433.

204. *Id.* §§ 13-14, 1985 Fla. Laws at 433.

205. *Id.* § 2, 1985 Fla. Laws at 429.

206. See *supra* notes 146-76 and accompanying text.

207. See *supra* notes 35-40 and accompanying text.

Specifically, the Act will improve the ability of dealers and wholesalers to compete fairly in the market with the refiners. Accordingly, more vigorous competition should benefit Florida's motoring public, both in price and nonprice areas. The prohibition against certain discriminatory practices is the key to giving the dealers and wholesalers competitive parity with the refiners. For example, the Act's discriminatory pricing provision extends to refiners' transfers to their company-operated retail stations.²⁰⁸ This means that a refiner operating a retail station on one corner cannot supply its own station with gasoline at a price less than that same refiner supplies an independent dealer or jobber operating a station on the opposite corner. This eliminates one of the inherent historical problems with the dual distribution system and closes a loophole currently existing in the federal antitrust laws.

The prohibition against discriminatory rebates also eliminates a serious abuse that has remained unchecked under the antitrust laws.²⁰⁹ As explained above, many of the major refiners have operated dealer rebate programs in a manner that indirectly discriminates against other retail dealers that sell the refiners' product. Invariably, this places the retail dealer who purchases from a wholesaler at a competitive disadvantage even though the wholesaler purchases from the same refiner. In giving a substantial cash rebate to the directly-supplied dealer, the refiner proportionately lowers that dealer's net price paid for fuel. The Act eliminates this practice and requires refiners to give rebates to all *resellers* (including wholesalers) who compete in the same market.²¹⁰ The Act also requires that wholesalers pass the rebates on to their retail dealers in the market, thereby ensuring competitive parity at the retail level.²¹¹ Although refiners have threatened to eliminate dealer rebate programs and other trade credit and trade discounts to wholesalers, it is entirely too speculative at this point to determine whether this threatened action will materialize. Since all refiners do not use dealer rebate programs, those refiners who do cannot eliminate these rebates if they want to keep their dealers competitive unless they lower their dealer prices. A probable result is that the rebate programs will continue but on more equitable terms. Because of the competition between refiners who have rebate programs and those who do not, the rebate provision of the

208. Ch. 85-74, § 4(1), 1985 Fla. Laws 429, 430.

209. See *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984).

210. See *supra* notes 192-94 and accompanying text.

211. *Id.*

Act should not increase prices at the pump.

In the urban markets of the state, the prohibition against discriminatory allocations will permit dealers and wholesalers to grow with the market. This will prevent refiners with company-operated retail units from squeezing out competing dealers and wholesalers that purchase from these refiners. This, in turn, should increase competition in the urban markets between refiners on the one hand and independent dealers and wholesalers on the other.

There are many who believe that the Act's prohibition of below cost sales does not go far enough. Since the Act only limits sales made below cost by refiners operating their own units at retail, some are concerned that this will not be effective to prevent the below cost pricing prevalent in the market. This may or may not be the case, but the intent of this provision was not to prevent below cost pricing, *per se*, but only to prevent below cost pricing that is predatory in nature and not the result of vigorous competition. By limiting the prohibition against below cost sales to refiners, the legislature recognized that only this group can subsidize its losses at the retail level from upstream profits earned in the production and refining of crude oil. The Act operates as a measured response aimed at the group with the greatest financial ability to engage in predatory pricing. It also stops far short of setting minimum retail price levels, which could result in higher prices.

The Act's definition of "refiner cost" is somewhere between a marginal and average variable cost definition.²¹² This does not force refiners to keep their prices at or above average total cost, as do the Alabama and the Georgia statutes. More importantly, however, the exception which permits the refiner to sell below cost to meet competition allows the refiners to remain competitive and gives consumers the benefit of price wars. The refiner simply cannot lead the market down. One of the final problems in measuring refiner cost, however, is how to determine a reasonable rental value of the retail outlet and to apportion that value to the part of the premises attributable to the retail sale of motor fuel. This could be difficult in the instances of convenience stores that sell gasoline.

One of the major differences between the Act and the existing standards under both federal and state antitrust laws is the element of injury to competition. Florida's Act does not require a specific showing of intent to injure competition. Rather, the act of injuring competition itself provides the presumed intent to

212. See *supra* note 52.

accomplish the result.²¹³ Hence, the unfair practices delineated in the Act are unlawful only when the *effect* is to injure competition. Moreover, "competition" is defined as competition between two persons, and means that an aggrieved plaintiff can satisfy the "injury to competition" element by showing injury to himself, as a single competitor.²¹⁴ This should remove a major proof obstacle and eliminate one of the impediments to private enforcement actions that exist under federal antitrust laws.

A potential criticism of the Act is that it will promote expensive and unnecessary litigation. This admittedly undesirable effect is checked in two ways. First, the legislature provided that isolated and inadvertent incidences shall not be a violation of the Act.²¹⁵ This should keep the crybabies out of court. Further, the Act gives courts discretion to award attorney's fees to a prevailing defendant. Although the Act does not provide specific guidelines, an award should be made where there is a lack of a substantial basis for bringing the action.²¹⁶ This should have a chilling effect on frivolous actions.

Overall, the enforcement scheme is intended to promote voluntary compliance. It is doubtful that the Department of Legal Affairs will actively enforce the Act except in the most egregious circumstances. The potential risk of substantial civil fines should also prove a deterrent, but the primary enforcement tool will be private treble damage actions. This too will have a strong deterrent effect. Allowing plaintiffs to litigate potential claims in state court should lessen the expense and delay of litigating under the federal antitrust laws.

With respect to the dealer provisions, there was much sentiment on behalf of the dealer organizations and others that the provisions of the Act stop short of correcting the main evils identified by the dealers. Although there is some merit to this claim, the Act does give the dealers some relief.²¹⁷ Although the federal antitrust laws currently prevent resale price maintenance through a supplier's use of coercive tactics,²¹⁸ the Act's prohibition of this practice not only provides an alternative state remedy to the dealer, but also sends a

213. See *supra* notes 200-01 and accompanying text.

214. *Id.*

215. Ch. 85-74, § 4(1), 1985 Fla. Laws 429, 430.

216. *Id.* § 11(4), 1985 Fla. Laws at 433.

217. See *id.*, § 7, 1985 Fla. Laws at 431.

218. *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979), cert. denied, 446 U.S. 918 (1980).

clear message to refiners that such practices will not be tolerated in Florida. Further, the dealers received additional relief from unreasonable modifications of their contracts and unreasonable rent increases and from forced conversions of leased premises. This gives the dealer some leverage in negotiating its contracts with refiners and forces refiners to justify decisions affecting the manner in which the leased premises are operated.

In sum, the true impact of the Act will not immediately be known. It is too soon for public and private enforcement actions to have been concluded and, therefore, to be assessed as to their effectiveness. Public enforcement by the Department of Agriculture must await the Department's education of its field investigators about the provisions of the Act. Finally, it is too early to measure the refiner's response to several key provisions of the Act, especially those addressing below cost sales and unlawful rebates. The Act should still go a long way toward alleviating the harm occurring in the petroleum marketplace in Florida today.