

IN THE SUPREME COURT OF FLORIDA

Case No. SC15-780; SC15-890

ADVISORY OPINION TO THE ATTORNEY GENERAL RE:
LIMITS OR PREVENTS BARRIERS TO
LOCAL SOLAR ELECTRICITY SUPPLY

ADVISORY OPINION TO THE ATTORNEY GENERAL RE:
LIMITS OR PREVENTS BARRIERS TO
LOCAL SOLAR ELECTRICITY SUPPLY (FIS)

**BRIEF OF OPPONENT
FLORIDA CHAPTER OF THE NATIONAL CONGRESS
OF BLACK WOMEN, INC.**

M. Stephen Turner, P.A.
Florida Bar No. 095691
sturner@broadandcassel.com
BROAD AND CASSEL
215 South Monroe Street, Suite 400 (32301)
P.O. Drawer 11300
Tallahassee FL 32302
Tel 850-681-6810; Fax 850-681-9782
*Counsel for Opponent, Florida Chapter of
the National Congress of Black Women, Inc.*

June 10, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS	i
IDENTITY OF THIS OPPONENT	1
INTEREST OF THIS OPPONENT	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
CONCLUSION	10
CERTIFICATE OF SERVICE.....	11
CERTIFICATE OF COMPLIANCE	11

TABLE OF CITATIONS

Cases

<i>Advisory Op. to the Atty. Gen. Re Amendment to Bar Gov't from Treating People Differently Based on Race in Public Education,</i> 778 So. 2d 888 (Fla. 2000)	6
<i>Advisory Op. to the Atty. Gen. re People's Property Rights,</i> 699 So. 2d 1304 (Fla. 1997)	7
<i>Armstrong v. Harris,</i> 773 So. 2d 7 (Fla. 2000)	8
<i>Askew v. Firestone,</i> 421 So. 2d 151 (Fla. 1982)	8, 9
<i>Evans v. Firestone,</i> 457 So. 2d 1351 (Fla. 1984)	8
<i>In Re Advisory Op. to Atty. Gen. Re Additional Homestead Tax Exemption,</i> 880 So. 2d 646 (Fla. 2004)	7, 8
<i>Smathers v. Smith,</i> 338 So. 2d 825 (Fla. 1976)	9
<i>Volusia Citizens Alliance v. Volusia Home Builders Ass'n, Inc.,</i> 887 So. 2d 430 (Fla. 2004)	10
<i>Wadhams v. Bd. County Com'rs of Sarasota County,</i> 567 So. 2d 414 (Fla. 1990)	9

Constitution

Section 29 to Article X of the Florida Constitution	3, 4, 5, 6
Section 5 to Article XI of the Florida Constitution	8

Statutes

Fla. Stat. § 101.161	8, 10
----------------------------	-------

Identity of this Opponent

This Opponent is the Florida Chapter of the National Congress of Black Women, Inc. (NCBW), founded in 1984 by the Honorable Shirley Chisholm and the Honorable C. Delores Tucker. NCBW's purpose as stated through its by-laws is to encourage participation of Black women and their families in the development of public policy that impacts them through political education and involvement. Complete background information is available at <http://nationalcongressbw.org/>.

Interest of this Opponent

NCBW opposes the Solar Ballot Initiative because the proposed amendment, if approved, will have a recurring detrimental financial impact on Black women, their families and communities in particular, as well as generally upon members of the public dependent upon electric utility service. Persons who cannot afford solar energy or whose property is not part of or contiguous to the property of a local solar energy supplier will suffer utility rate increases required to subsidize the use or intermittent use of the utility grid by solar energy suppliers and users. The proposed amendment's blanket protection for local solar energy suppliers and their customers will inevitably result in increased monthly utility rates and charges to utility customers dependent exclusively on utility generated electricity.

This is especially troublesome because such persons, although adversely affected by the proposed amendment, were not represented in the drafting process.

The Solar Ballot Initiative is proposed without the normal vetting of the legislative process or input from affected factions that might normally shape such laws. This is inconsistent with the mission of NCBW to involve and empower Black women and their families in the political process and development of public policy that impacts their lives.

Summary of Argument

The inconsistencies of the ballot summary with the text of the proposed amendment, and the failure of the ballot summary to fully and accurately explain the purpose and effect and ramifications of the proposed amendment, cause an unfair and misleading presentation to the voters. The need for accuracy and clarity is all the greater considering the disparate impact of the proposed amendment on minority and low income citizenry.

The ballot summary fails to disclose how the solar initiative will truly operate. Voters are not told that existing rules and charges will be nullified, and that solar suppliers and their customers will be immunized from any regulation or charges while they continue to use and have access to the utility grid and infrastructure. Nor are voters told that the utility operating and maintenance costs will have to be borne exclusively by the public that is not supplied solar energy. Modest and low income family members may not be inclined to vote for the

initiative if they knew they would be called upon to subsidize those who are supplied solar energy.

The Court should find the ballot summary non-compliant with the requirements of law and disapprove placement of the proposed amendment on the ballot.

ARGUMENT

This Opponent adopts the arguments presented by other opponents but underscores and amplifies the argument that the ballot summary does not accurately inform the voters of the proposed amendment.

The text of the proposed amendment, Section 29 to Article X of the Florida Constitution, provides in subsection (a) that it promotes the production and availability of local small scale solar-generated electricity by "limiting and preventing regulatory and economic barriers that discourage the supply . . . to customers who consume the electricity at the same or a contiguous property as the site of the solar electricity production." Barriers are stated to include rate or service regulations imposed by government on those supplying local solar energy, and "imposition by electric utilities of special rates, fees, charges, tariffs, or terms and conditions of service on their customers consuming local solar electricity supplied by a third party that are not imposed on their other customers of the same type or class who do not consume local solar electricity."

The proposed amendment thus precludes any regulation on or charge to a supplier of local solar electricity, leaving that supplier free to use the electrical grid to transmit solar generated energy to its customers on its site or contiguous property. For example, a shopping center owner could generate local solar energy for its tenants and for tenants of neighboring office complexes without regulation or charge for grid use transmission.

In addition, the proposed amendment precludes electric utilities from making any charge to customers of solar energy suppliers that the utility does not make to their non-solar customers. This means that solar energy customers can only be charged for the electricity they receive from the electric utility. They cannot be charged for the solar energy transmitted over the grid by the solar energy supplier, or for standby grid use to supply them with utility energy intermittently when the solar energy supplier cannot. There can be no difference in charges for the reduced amount of utility electricity provided by the utility to supplement the customer's solar supplied energy. The effect is the utility infrastructure is used by, or reserved for use by, solar energy customers, but operating and infrastructure utility costs cannot be fairly apportioned to these users, and thus must be passed to those who cannot take advantage of solar energy.

The proposed Amendment text plainly prohibits and nullifies the so-called "barriers" to supply and sale of local solar energy. Subsection (b)(1) directs

that a local solar supplier should not be subject to regulation with respect to rates, service or territory. Subsection (b)(2) provides that no electric utility can make any special rate, charge, term, condition of service, or rule not imposed on customers of the same type or class that do not consume electricity from a local solar electricity supplier. Yet Subsection (b)(3) provides that an electric utility is not relieved of its obligation under law to furnish service to any customer on the basis that such customer also purchases electricity from a local solar energy supplier.

The ballot summary for the proposed amendment text states:

"Limits or prevents government and electric utility imposed barriers to supplying local solar electricity. * * * Barriers include government regulation of local solar electricity suppliers' rates, service and territory, and unfavorable electric utility rates, charges, or terms of service imposed on local solar electricity customers."

Contrary to the ballot summary explanation, the proposed amendment does not just encourage and promote local solar generated electricity, or limit future regulation. Rather, the proposed amendment nullifies existing rules and charges for grid use that serve to fairly apportion the cost of production and infrastructure, and prohibits future rules and charges. The main purpose and effect of the proposed amendment is to eliminate charges for solar energy passed over the electric grid and for solar customers to receive electric energy intermittently to supplement supplied solar energy. This is not disclosed.

Instead, the ballot summary describes that "unfavorable" rates, charges or terms of service imposed on local solar energy customers are barriers to the supply of local solar energy. The term "unfavorable" as used in the ballot summary is itself misleading, inaccurate and ambiguous.

The proposed amendment requires electric utilities to continue to provide service to local solar energy customers (subsection (b)(3)), but prohibits any special rate or charge or condition of service not imposed on similar customers that do not consume local solar electricity (subsection (b)(2)). The word "unfavorable" in the ballot summary apparently alludes to the text prohibition against any charges for use of the electric grid to receive solar energy or for standby use to receive utility energy when solar energy is insufficient. But the term "unfavorable" does not clearly mean or signify "discriminatory" to reflect the actual idea advanced in the text. When a ballot summary uses an undefined term (here "unfavorable") that is not even used in the amendment or consistent with what the amendment prohibits, the ballot summary is invalid. *See Advisory Op. to the Atty. Gen. Re Amendment to Bar Gov't from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 899-900 (Fla. 2000) (ballot summary must be invalidated when it fails to define terms adequately or to use consistent terminology).

The undefined term "unfavorable" is ambiguous. Voters might perceive any charge imposed by an electric utility on a solar energy customer as "unfavorable." Or voters might perceive "unfavorable" to mean "unfair." Voters could believe that the proposed amendment allows "fair" utility charges to local solar energy customers, whereas the amendment text would actually preclude any charge (unless a non-solar energy customer is charged the same which is not possible). The absence of a definition or definitive explanation of "unfavorable" is misleading as to what is being voted on. *See Advisory Op. to the Atty. Gen. re People's Property Rights*, 699 So. 2d 1304, 1309 (Fla. 1997) (term "in fairness" – like "unfavorable" – depends on subjective understanding of each voter to interpret meaning). *See also, In Re Advisory Op. to Atty. Gen. Re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004) (absence of more complete definition of "exemption" was misleading because voting public could not readily understand the difference between exemption and immunity from taxation, and that the amount of money to be paid in taxes is not necessarily affected by the exemption).

It is also inaccurate to characterize prohibited utility use or standby use rates or charges as "unfavorable." They are needed to fairly pay for system costs and should be assessed or allocated consistent with benefit conferred.

The word "unfavorable" also invites an emotional response from the voter that does not reflect the true legal effect of the proposed amendment (*i.e.*, to prohibit any charge for the solar energy customer not made to any other customer despite the differing circumstance of usage of the grid). This distorts the legal effect of the proposed amendment and is misleading. *Id.*, 880 So. 2d at 653.

The failure to make clear the true purpose of the proposed amendment exacerbates the ambiguity and misleading nature of the ballot summary. The proposed amendment is not about protecting a person's ability to install solar energy equipment to reduce their own utility electric charges (as currently allowed by law). The proposed amendment is about selling solar energy to customers, and protecting that business from the fair cost of doing business. The public is going to be confused in that essential regard because the ballot summary does not provide adequate explanation and is misleading.

The Constitution Art. XI, § 5 and F.S. § 101.161 require that the ballot summary be presented fairly and sufficiently advise the voter to enable an intelligent vote. *Askew v. Firestone*, 421 So. 2d 151, 154-55 (Fla. 1982). Because voters do not have the actual text of a proposed amendment before them when they enter the voting booth, the accuracy requirement is of paramount importance in the ballot summary. *See Armstrong v. Harris*, 773 So. 2d 7, 13 (Fla. 2000). The ballot summary should tell the voter the legal effect of the proposed amendment, *Evans v.*

Firestone, 457 So. 2d 1351, 1355 (Fla. 1984), and inform of the true meaning, effect, and ramifications of the proposed amendment. *Askew v. Firestone*, 421 So. 2d at 156. *See also, Wadhams v. Bd. County Com'rs of Sarasota County*, 567 So. 2d 414, 417-18 (Fla. 1990). The public must be able "to comprehend the sweep" of the proposal from a fair notification that it is neither more nor less extensive than it appears to be. *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976).

In sum, the ballot summary is simply not accurate or fully informative. The ballot summary speaks only to limiting or preventing, whereas the text requires both and goes further to nullify and prohibit. The true purpose of the proposed amendment, to nullify and prohibit any utility charge against a local solar energy supplier or its customers for use of or access to the utility grid, is not made clear by the ballot summary. The voter is not informed, or is misinformed as to a material element or purpose of the proposed amendment to prohibit any otherwise fair charge for solar energy customer's use or standby use of the utility grid. *See Wadhams*, 567 So. 2d at 417-18 (ballot summary defective for what it does not say regarding effect on existing requirements). Voter confusion is compounded because the ballot summary references "unfavorable" charges, presumably meaning "unfair" to solar customers, whereas the text of the amendment in necessary effect precludes all such charges. In reality, utility customers not purchasing solar energy are the ones that will suffer unfair charges.

When the ballot summary is not accurately descriptive of the proposed amendment, or amounts to political rhetoric, or excludes material elements of the proposed amendment, fair notice of the content of the text is not given and the ballot summary does not comport with law. *See Volusia Citizens Alliance v. Volusia Home Builders Ass'n, Inc.*, 887 So. 2d 430, 431 (Fla. 2004).

Conclusion

For the reasons stated above, the ballot summary fails to comply with the legal requirements of section 101.161, Florida Statutes, and as such the amendment should be stricken from the ballot.

Respectfully submitted this 10th day of June, 2015.

s/ M. Stephen Turner

M. Stephen Turner, P.A.

Florida Bar No. 095691

sturner@broadandcassel.com

pwilliams@broadandcassel.com

mubieta@broadandcassel.com

BROAD AND CASSEL

215 South Monroe Street, Suite 400 (32301)

P.O. Drawer 11300

Tallahassee FL 32302

Tel 850-681-6810; Fax 850-681-9782

***Counsel for Opponent, Florida Chapter of
the National Congress of Black Women, Inc.***

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served electronically via E-service through the Court's E-Filing Portal System on Counsel listed on the attached Service List, this 10th day of June, 2015.

s/ M. Stephen Turner

Attorney

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14 – point font.

s/ M. Stephen Turner

Attorney

SERVICE LIST

Gregory T. Stewart
William C. Garner
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
gstewart@ngnlaw.com
bgarner@ngn-tally.com
legal-admin@ngnlaw.com

Hon. Pamela Jo Bondi
Attorney General
Alfred Legran Saunders
Assistant Attorney General
Allen C. Winsor
Solicitor General
State of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1060
oag.civil.eserve@myfloridalegal.com
lagran.saunders@myfloridalegal.com
allen.winsor@myfloridalegal.com

Timothy M. Cerio
Counsel to Governor Rick Scott
Executive Office of the Governor
400 S Monroe Street
Tallahassee, Florida 32399-6536
tim.cerio@eog.myflorida.com

Stephen H. Grimes
D. Bruce May, Jr.
Holland & Knight LLP
P.O. Drawer 810
Tallahassee, Florida 32302
stephen.grimes@hklaw.com
bruce.may@hklaw.com
Counsel for the Florida Electric
Cooperatives Association, Inc.

Adam S. Tanenbaum
General Counsel
Florida Department of State
500 S Bronough St., Suite 100
Tallahassee, Florida 32399-6504
adam.tanenbaum@dos.myflorida.com

George T. Levesque, Esq.
General Counsel
Office of the Senate President
404 S. Monroe Street
Tallahassee, Florida 32399-1100
levesque.george@flsenate.gov

Matthew J. Carson
General Counsel
Office of the House Speaker
422 The Capitol
Tallahassee, Florida 32399-6507
matthew.carson@myfloridahouse.gov

Tory Perfetti, Chairperson
Floridians for Solar Choice, Inc.
120 East Oakland Park Blvd., Suite 105
Ft. Lauderdale, Florida 33334
george@cavros-law.com

William B. Willingham
Michelle L. Hershel
2916 Apalachee Parkway
Tallahassee, Florida 32301
fecabill@embarqmail.com
mhershel@feca.com
Counsel for the Florida Electric
Cooperatives Association, Inc.