
IN THE SUPREME COURT OF FLORIDA

Case Numbers SC15-780 and SC15-890

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

INITIAL BRIEF OF INTERESTED PARTY
ORLANDO UTILITIES COMMISSION

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STATEMENT OF INTEREST

The Orlando Utilities Commission (OUC) was created by Chapter 9861, Laws of Florida (1923), a Special Act of the Florida Legislature (as subsequently amended from time to time, the "Act") as a part of the government of the City of Orlando, but governed by a Board of Commissioners consisting of five members (the "OUC Board"), including the Mayor of Orlando.

OUC, as a municipal utility provider, serves retail electric customers within the City of Orlando and parts of Orange and Osceola Counties. These retail services include several types of energy efficiency programs,¹ programs that promote solar installations on retail customer's homes and businesses,² as well as one of the state's first community solar photovoltaic array open to subscription to retail customers. The community solar farms allow those OUC customers who may not be financially capable of installing their own panels or whose facilities may

¹ Examples of efficiency programs are rebates provided on various efficiency measures customer may take, such as HVAC upgrades; installation of heat pump water heater; home insulation and similar programs; and energy audits (in person or online.)

² Examples of solar programs are: net metering with full credit for solar production at retail rate; solar production incentive for photovoltaic, paid at 5 cents per kwh of solar produced (in addition to net metering credit); solar hot water heater program where OUC pays 3 cents for each kwh produced through solar thermal system; and, solar financing, whereby OUC buys down the interest rate for loans obtained by customers through the Orlando Federal Credit Union for solar PV systems.

not be suited for the installation of a solar array, to subscribe blocks of to electricity from solar arrays for a fixed rate to help offset their electric usage.

OUC must, like other utilities, be prepared to provide energy services to existing and new customers in a cost effective way while recovering its costs of doing so. In addition to community solar farms, OUC has made significant strides in offering solar programs and other sustainability programs to its customers. The proposed solar ballot initiative to amend Section 29, Article X of the Florida Constitution and titled "Limits or Prevents Barriers to Local Solar Electricity Supply"(the "Solar Initiative"), as currently drafted, is a broad brush attempt to put into effect a single constitutional amendment to promote localized development of solar photovoltaic generating facilities. In fact, however, it would result in a series of changes at multiple levels of government. The Solar Initiative ignores the current system of federal, state and local regulation under which traditional electric utilities are operated, leaves consumers without recourse against the new solar utility providers and puts in question the role of local utilities in the deployment of small scale solar generation in Florida.

STANDARD OF REVIEW

Proposed amendments to the Florida Constitution by voter initiative are required to "embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. ("Single-Subject Requirement"). Since the sponsor of a proposed Constitutional amendment may advance such an amendment by simply getting enough signatures, voters have to be protected against "multiple precipitous changes in our state constitution". *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla 1984). This Court has held that any amendment by initiative must comply with the following elements of the Single-Subject Requirement: (1) the amendment may not substantially affect multiple functions or levels of government; (2) the amendment must identify all articles and sections of the constitution that are substantially affected; and (3) the amendment may not deal with separate subjects in a manner that results in logrolling. The current Initiative fails to adequately address all three requirements.

In addition to the Single-Subject Requirement, the ballot title and summary must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Advisory Op. to Att'y Gen. Re: Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (citing *Advisory Opinion to the*

Attorney Gen. re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 (Fla.1998)); §101.161 (1), Fla. Stat.(2013).

BACKGROUND

As a municipal utility provider, OUC's operations are subject to regulation at many levels. First and foremost, the OUC Board sets the rates and charges for the utility services, determines the services that OUC will offer to the public, and sets the terms and conditions upon which such services are to be offered. Also at the local level, OUC is governed by certain local permitting, land use and health and safety regulations. At the state level, when OUC proposes to build an electric generating facility of a certain size and type, OUC is subject to the Florida Electrical Power Plant Siting Act, §403.501-403.518, Fla. Stat.(2013). OUC is also subject to the State Environmental Protection Agency regulations. At the federal level, the Federal Power Act ("FPA") grants the Federal Energy Regulatory Commission ("FERC") certain jurisdiction over OUC's transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. 16 U.S.C. §824b. The FPA also gives FERC broad authority to regulate public utilities. A "public utility" is defined as "...any person who owns or operates facilities subject to the

jurisdiction of the Commission . . .” 16 U.S.C. §824(e). In addition, 16 U.S.C. §824b(a)(1) gives the FERC approval authority over the disposition of certain transmission assets by a public utility where the value of such assets is at or above \$10,000,000 in value³. While municipal utilities are largely exempt from regulation by FERC under the FPA, such exemption does not pertain to, among other things, standards for the reliable operation of the Bulk Power System. 18 CFR 39.2(a); 18 CFR 40. The Solar Initiative impacts state and local government authority by immunizing local solar electricity suppliers from regulation and limiting the oversight afforded to each such government entity. This immunity to local solar electricity suppliers puts in question how OUC, as a municipal utility, would be required to govern itself and its operations to the extent that such operations affect local solar electricity suppliers. Not only would the proposed Solar Initiative impact OUC’s operating policies and procedures, but would also cause confusion as to whether OUC itself would be deemed a local solar electricity supplier under the Solar Initiative for offering its current solar programs and which of

³16 U.S.C. §824b(a)(1) provides that “(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so - (A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of

the current policies, rules and regulations of OUC, local government, state government and federal authorities would be enforceable.

SUMMARY OF ARGUMENT

The Solar Initiative, as drafted, violates the Single-Subject Requirement and the requirements of §101.161 (1), Fla. Stat. (2013) to provide fair notice of the content of the proposed amendment. The Solar Initiative puts in place with a seemingly simple constitutional change, the legislative framework to allow the creation of a new class of retail solar generating utility ("local solar electricity supplier[s]"), alter the effect of enough existing laws to make this new utility immune to the authority of state and local government and removes the current regulatory powers of the state and local governmental to manage the complexities of the retail electric utility industry. At the same time, the Solar Initiative language holds the traditional utilities to their obligations to serve without relief from the duty to comply with the existing regulatory structure of the federal, state and local authorities. This multi-level impact on current government powers leaves no doubt that the Solar Initiative violates

the Commission, or any part thereof of a value in excess of \$10,000,000; ..."

Single-Subject Requirement and would put in question OUC's ability to effectively carry out its business operations.

In addition to violating the Single-Subject Requirement, the Court must also remove the Solar Initiative from the ballot if there are substantive omissions from the ballot summary or substantive inconsistencies between the ballot summary and the operative text of the Solar Initiative. The ballot summary and title of the Solar Initiative do not disclose the impacts the proposed amendment has on public health and safety, consumer protection and the local utility's role in deploying small scale solar generation.

ARGUMENT

I. THE SOLAR INITIATIVE VIOLATES THE SINGLE-SUBJECT REQUIREMENT BY SUBSTANTIALLY IMPACTING STATE AND LOCAL GOVERNMENTAL FUNCTIONS.

This Court has held that a proposed constitutional amendment that substantially affects multiple functions or levels of government violates the Single-Subject Requirement. *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984) (stating that, "In *Fine*, we found multiplicity of subject matter because the proposed amendment would have affected several legislative functions.") (emphasis by court). The Single-Subject Requirement will apply not only where it substantially alters the functions of the

executive and legislative branches of state government, but where there is distinct and substantial effect on each local government entity. See *Advisory Op. re Tax Limitation*, 644 So. 2d 486, 494-495 (1994) (*citing* impacts on the ability to enact zoning laws, to require development plans, to have comprehensive plans for a community, to have uniform ingress and egress along major thoroughfares, to protect the public from diseased animals or diseased plants, to control and manage water rights, and to control or manage storm-water drainage and flood waters). The Solar Initiative substantially affects multiple functions of state and local government to the extent that local solar electricity providers are immune to regulation or the powers and actions of each governmental entity are inconsistent with restrictions in the Solar Initiative.

Other Briefs filed in this case will no doubt thoroughly address the impacts of the Solar Initiative on the legislative and executive functions of the state Section 366.80-366.85, Fla. Stat. (2013) ("FEECA") and to regulate electrical grid reliability, rates, service and service territories generally under Ch. 366, Fla. Stat.(2013). The Solar Initiative likewise impacts many local government and local utility functions as they relate to interacting with local solar electricity suppliers and their customers.

A. Immunity from Regulation

Subsection (b)(1) of the Solar Initiative provides that "A local solar electricity supplier, as defined in this section, shall not be subject to state or local government regulation with respect to rates, service, or territory, or be subject to any assignment, reservation, or division of service territory between or among electric utilities." Subsection (b)(4) of the Solar Initiative provides that "Notwithstanding paragraph (1), nothing in this section shall prohibit reasonable health, safety and welfare regulations, including, but not limited to, building codes, electrical codes, safety codes and pollution control regulations, *which do not prohibit or have the effect of prohibiting the supply of solar-generated electricity by a local solar electricity supplier as defined in this section.*" (emphasis added). The provisions Subsections (b)(1) and (b)(4) of the Solar Initiative, taken together, make local solar electricity providers immune from State and Local regulation and strip both the state and local government of any regulatory authority to enact requirements to protect local customers and citizens from the activities of local solar electricity providers. These subsections also effectively take away any recourse a citizen may otherwise have to an authoritative body to address the practices of the local solar electricity supplier.

This immunity to regulation directly impacts the statutory authority provided to local utility governing boards and the home rule authority of local governments relative to local solar electricity suppliers and their customers to establish (a) rates, charges, tariffs, classifications, terms and conditions of service for electric utilities , (b) energy efficiency standards and programs, (c) safe operating practices and conditions of service for utilities serving the local solar electricity suppliers and their customers, (d) health and safety codes and standards for utility equipment and activities, and (e) zoning and land use regulations.

The governing boards of local utilities must ensure that its operations are run in a safe manner and provide reliable service at a reasonable rate. This requires that each such local board establish safe and efficient operating procedures; establish rates and charges which assure that the operating costs of the utility are recovered in a consistent manner from all utility user classes; recover costs of providing services in a manner that does not unfairly burden one user class for the benefit of another; provide terms and conditions for business interactions with all customers as well as other electric generators which are fair and consistent; and, establish safety protocols and requirements that protect the public and utility workers. In

addition, state government and local utility governing boards have been making a concerted effort to establish standards of operation that promote efficiency and energy conservation which will not apply to local solar electricity suppliers or their customers.

The immunity from regulation on rates or services granted to local solar electricity suppliers in Subsection (b)(1) of the Solar Initiative allows such solar utilities to set up and operate in any manner deemed appropriate without regard to the cost or operational impacts on the surrounding utilities who, under Subsection (b)(3) of the Solar Initiative, must maintain the infrastructure and facilities necessary to serve the customers of the local solar electricity supplier. This immunity from regulation impacts state and local authorities' ability to provide for conditions of service that assure overall grid reliability; to assure that electric generating facilities utilities are protected; to assure consumers are protected; to set reasonable cost recovery; and to maintain a means to require such local solar electricity suppliers to remedy unsafe and problematic facilities. This immunity also relieves the local solar electricity suppliers and their customers from any measures required by the state or local utility for energy efficiency and conservation standards for their facilities as

required of OUC under the FEECA Statutes, Sections 366.80-366.85, Fla. Stat. (2013).

The provisions Subsections (b)(1) and (b)(4) of the Solar Initiative, taken together, also strip both the state and local government of necessary regulatory authority to act on behalf of local customers and citizens impacted by the activities of local solar electricity providers by making local solar electric suppliers immune to such regulation. With no state or local oversight, the Solar Initiative impacts state and local police powers to address any wrong doing or damage done by local solar electricity providers if they are permitted to operate free of regulations and oversight.

Finally, local government entities are charged with the duty to assure land use development within their boundaries is done in accordance with approved land use plans and don't impair existing land rights. The Solar Initiative makes local solar electricity suppliers immune to such regulations.

B. Restriction on Regulatory Authority

Subsection (b)(2) of the Solar Initiative provides that: "No electric utility shall impair any customer's purchase or consumption of solar electricity from a local solar electricity supplier through any special rate, charge, tariff, classification, term or condition of service, or utility rule or

regulation, that is not also imposed on other customers of the same type or class that do not consume electricity from a local solar electricity supplier." This provision is the corollary to Subsection (b)(1) of the Solar Initiative. Whereas Subsection (b)(1) makes the local solar electric utility immune to regulation, this provision strips the local utility governing boards of the authority to allocate costs of providing service fairly among the different user classes if (a) doing so would require a fee that is unique to the customers of local solar electricity suppliers and (b) doing so would "impair" a customer's ability to purchase solar energy from a local solar electricity. The term "impair" is not defined in the Solar Initiative. Since the solar arrays of local solar electricity suppliers may require a technical accommodation by the local utility that impacts its existing infrastructure or operating conditions (depending upon the technology, size and location), a cost properly assigned to this user group could be appropriate and fair but deemed to "impair" the purchase of electricity from the local solar electricity suppliers. Neither the state nor the local utility governing board will have the authority needed to set these rates and charges and as a result, the remainder of the utility customers would bear the burden of any such costs.

II. THE BALLOT TITLE AND SUMMARY VIOLATE
SECTION 101.161 OF THE FLORIDA STATUTES

Section 101.161, Florida Statutes (1981), provides for submission to popular vote of constitutional amendments and other public measures. The wording of the substance of the amendment and the ballot title must be included in the joint resolution and must be prepared by the amendment's sponsor and approved by the secretary of state. *Askew v. Firestone*, 421 So. 2d 151, 153 (Fla. 1982). The substance of the amendment or other public measure shall be an explanatory statement "... of the chief purpose of the measure. *Id.* The ballot title and summary for the Solar Initiative fails to adequately address and inform the public of the intent and impact of this proposed amendment. The ballot title and summary must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Advisory Op. to Att'y Gen. Re: Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998); § 101.161 (1), Fla. Stat. (2013).

Section 101.161 also requires that the substance of a proposed amendment be in "clear and unambiguous language." *Askew* at 153. The ballot title and summary for the Solar Initiative fails to adequately inform the public of the full impact of this

proposed amendment. The Solar Initiative provides the following as the ballot title and summary:

Limits or prevents government and electric utility imposed barriers to supplying local solar electricity. Local solar electricity supply is the non-utility supply of solar generated electricity from a facility rated up to 2 megawatts to customers at the same or contiguous property as the facility. 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.

The proposed ballot title and summary omits or inaccurately summarizes relevant information from the text that would be required to adequately inform a voter of the impact of the Solar Initiative.

A. Omitted Impacts to Public Health and Safety and Land Rights

The Solar Initiative Section (b)(4) provides in part that: "Notwithstanding paragraph (1), nothing in this section shall prohibit reasonable health, safety and welfare regulations, including, but not limited to, building codes, electrical codes, safety codes and pollution control regulations, *which do not*

prohibit or have the effect of prohibiting the supply of solar-generated electricity by a local solar electricity supplier as defined in this section.” (emphasis added). The qualifier in this provision takes away the power of the local and state government and local utilities to put in place codes, standards and requirements if they affect rates, service or territory and have the effect of prohibiting local Solar electricity suppliers from selling solar-generated energy.

Most land owners take title to their property in reliance upon the existing land use plans, zoning, and covenants. Any changes to these are vetted through the local government under very controlled processes that inform and include the public. Local government entities are charged with the duty of making sure land use development within their boundaries takes place in accordance with approved land use plans and does not impair existing land rights. The Solar Initiative makes local solar electricity suppliers immune to such regulations and the ballot summary and title fails to inform the voter that the property rights of any individuals located near or adjacent to local Solar electricity suppliers will not have the same protection.

C. Omitted Impacts to Consumer Protection

The ballot summary and title fail to inform the voter that the Solar Initiative takes away any recourse a citizen may have

to local or state authorities to address problems or disputes between the local solar electricity supplier and its customers. A logical assumption of a citizen served by any local utility is that either the state or the local utility board or municipal government would have the authority to address property disputes, contract disputes, duty to serve, unconscionable rates, questionable business practices, property damage, poor service, nuisances or other problems that may occur as a result of a local solar electricity supplier locating its facilities in an unregulated manner. As discussed above, however, the provisions of Subsections (b)(1) and (b)(4) of the Solar Initiative work together to strip both the state and local government of any regulatory authority to act on behalf of local customers and citizens impacted by the activities of local solar electricity suppliers by making local solar electric suppliers immune to such regulation. This would seem to be a material omission from the ballot summary and title.

D. Omitted Impacts on Existing Local Solar Programs

The ballot summary and title fail to inform the voter that the Solar Initiative re-defines the longstanding definition of "electric utility" under Florida Law and as a result, creates questions as to what the full impact of the Solar Initiative will be on local utilities. Subsection 366.02(2), Florida Statutes

(2013) defines an electric utility as "...any municipal electric utility, investor-owned electric utility or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state." It is well established based on this definition and current law what powers and authority an electric utility has to carry out its operations, how it is governed and its duty to serve its customers.

Subsection (c)(1) of the Solar Initiative defines a "local solar electricity supplier" as: "any person who supplies electricity generated from a solar electricity generating facility with a maximum rated capacity of no more than 2 megawatts" to any other person located on contiguous property. Subsection (c)(3) of the Solar Initiative defines electric utility as "... every person, corporation, partnership, association, governmental entity, and their lessees, trustees, or receivers, *other than a local solar electricity supplier*, supplying electricity to ultimate consumers of electricity within this state". (emphasis added). Subsection (c)(3) also provides that an electric utility cannot be a "local solar electricity supplier". These definitions in the Solar Initiative create confusion as to whether a local utility such as OUC can or will become a local solar electricity supplier under the Solar

Initiative, and if so, will become immune from regulation by local and state governmental entities while acting in that capacity.

OUC, like many other local utilities, has existing community solar photovoltaic generation facilities ("Solar Farms"), some under 2 megawatts, which are available to its customers who cannot afford solar generation or can't install solar panels on their own residences or businesses. OUC is in the process of making significant investment in additional Solar Farms and arrays. However, because subsection (c)(3) of the Solar Initiative makes it unclear if OUC is an "electric utility" or a local solar electricity supplier or both and what role it may play in the introduction of small scale solar generation in the State of Florida. The summary fails to disclose that the Initiative could limit or eliminate the role of local electric utilities from the small scale solar services market.

CONCLUSION

The Solar Initiative impacts multiple levels of government and multiple government functions and therefore violates the Single-Subject Requirement. In addition, the title and ballot summary of the Solar Initiative have substantive omissions and

inconsistencies between the summary and text which will mislead the voter. These omissions and inconsistencies cause the Solar Initiative to violate the requirements for accurate and fair disclosure under section 101.161 of the Florida Statutes. The Court must as a matter of law strike the Initiative from the ballot.

Respectfully submitted this 10th day of June, 2015.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon the following by United States Mail on this 10th day of June, 2015.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief was prepared with 12-point Courier New font, a non-proportional font, and that this brief is therefore in compliance with the Florida Rules of Appellate Procedure.



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