IN THE SUPREME COURT OF FLORIDA

Case Numbers SC19-328 and SC19-479
(Consolidated)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: RIGHT TO COMPETITIVE ENERGY MARKET FOR CUSTOMERS OF INVESTOR-OWNED UTILITIES; ALLOWING ENERGY CHOICE

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: RIGHT TO COMPETITIVE ENERGY MARKET FOR CUSTOMERS OF INVESTOR-OWNED UTILITIES; ALLOWING ENERGY CHOICE (FIS)

INITIAL BRIEF OF INTERESTED PARTIES FLORIDA LEAGUE OF CITIES, INC., FLORIDA ASSOCIATION OF COUNTIES, INC., FLORIDA SHERIFFS ASSOCIATION, AND FLORIDA POLICE BENEVOLENT ASSOCIATION

IN OPPOSITION TO THE PROPOSED AMENDMENT

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STATEMENT OF INTEREST

The Florida League of Cities, Inc. (the "League") is a voluntary organization whose membership consists of over 400 municipalities and other units of government, which render municipal services in Florida. Under its charter, the League's purpose is to work for the general improvement of municipal government and its efficient administration, and to represent its members before various legislative, executive, and judicial branches of government on issues pertaining to the general and fiscal welfare of its members. The League is the united voice for Florida's municipal governments and exists to serve the needs of Florida's cities and promote local self-government and home rule. The proposed amendment will negatively affect the interests of municipalities throughout Florida. It will drastically reduce revenues, diminish home rule power, and impair existing contracts.

The Florida Association of Counties (the "Association") is a non-partisan, not-for-profit, voluntary organization of Florida's 67 counties, which was organized to protect, promote, and improve the mutual interests of all Florida counties. The Association's mission is to help counties effectively serve and represent Floridians by strengthening and preserving county home rule through advocacy, education, and collaboration. The proposed amendment will negatively

affect the interests of counties throughout Florida. It will drastically reduce revenues, diminish home rule power, and impair existing contracts.

The Florida Sheriffs Association ("Sheriffs Association") is a self-sustaining, not-for-profit 501(c)3 corporation made up of the 67 Sheriffs of Florida, which exists to foster the effectiveness of the Office of Sheriff through leadership, education and training, innovative practices, and legislative initiatives.

The Florida Police Benevolent Association, Inc. (the Florida "PBA") is an employee organization comprised of over 28,000 law enforcement officers, correctional officers, and direct-support personnel. The Florida PBA serves as the certified bargaining agent for employees of over 130 public employers including the state, county, and municipal governments throughout Florida. The proposed amendment's reduction to local government revenues will negatively impact numerous local and state law enforcement agencies and their ability to protect the citizens of Florida.

The constitutional proposal before the Court would completely dismantle Florida's current regulated energy market and fundamentally alter the governmental framework and economic model under which Florida has operated for decades. If passed, the proposal would have severe economic and legal repercussions, which would drastically affect the ability of municipalities and counties to collect revenue, honor contractual obligations and receive contractual

benefits, and regulate what entities provide electricity within their boundaries. The fiscal impacts of the proposal will be far-reaching and will negatively impact services cities and counties provide, including law enforcement services. City and county home rule powers, contracts, and charters will be impaired and frustrated. The proposal will subject cities and counties to extensive litigation and implementation costs. For these reasons, the League, the Association, the Sheriffs Association, and the Florida PBA have direct and vital interests in the outcome of these proceedings and present this brief in opposition to the placement of the proposed constitutional amendment on the ballot.

STATEMENT OF THE CASE AND FACTS

The Florida Attorney General has asked this Court to issue an advisory opinion on the validity of the Energy Choice Amendment pursuant to Article IV, section 10 of the Florida Constitution, and section 16.061, Florida Statutes. By order entered March 29, 2019, the Court has authorized interested parties to file opposition briefs by April 18, 2019. The League, the Association, the Sheriffs Association, and the Florida PBA are interested parties and respectfully submit the initiative proposal does not comply with the single-subject rule or the ballot title and summary requirements. For the Court's convenient reference, the ballot title and summary as well as the full text of the amendment are at pgs. 3-4 of the Appendix.

SUMMARY OF ARGUMENT

The ballot summary for the "Energy Choice" amendment is deceptively and fatally simplistic. It gives no indication of the far-reaching implications and cataclysmic sea change the amendment would trigger. Rather, a review of the summary leaves the voter with the naïve impression he/she will simply wake up to multiple energy providers and lower costs. The summary provides no warning Florida's current electric utility market will be completely dismantled and replaced with an entirely new regulatory scheme, which has proven costly and unsuccessful in nearly every state which has tried it.

The ballot summary violates the single-subject rule on multiple fronts. First, it consists of impermissible log-rolling by combining (a) the right to choose an electricity provider with (b) the right to generate and sell electricity. A voter may favor one of these provisions but not the other. Second, it substantially alters the functions of multiple branches of government and fundamentally affects existing constitutional provisions without referencing the same. The summary does not apprise the voter of the true scope and ramifications of this proposal.

The summary and title also mislead the voter and omit material facts. The summary makes no mention that investor-owned utilities ("IOUs") will be ***forcibly divested*** of their assets, and customers will no longer be able to purchase power from the IOUs. The amendment fails to make any mention of the substantial

financial impacts which will necessarily inure to the state, cities, and counties to implement this new market. The summary gives the false impression municipalities and local governments will be insulated from the amendment's effects because they can "opt out." However, in reality, municipalities and counties will be drastically affected – in terms of operation, home rule, costs, and lost revenues.

The summary fails to define key terms and does not contain or explain the most basic material provisions – such as who will own generation, transmission, and distribution facilities after they are forcibly taken from the IOUs. Voters will not be able to intelligently cast their ballots or adequately weigh pros and cons. In fact, from the white-washed summary, voters have no clue there are even cons to weigh.

ARGUMENT

I. The Energy Choice Initiative Violates the Single-Subject Requirement of Article XI, Section 3.

Because the citizen initiative process does not provide the opportunity for public hearing and debate, it is subject to "strict" compliance with the single subject rule. Art. XI, § 3, Fla. Const.; *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984). The single subject provision in the Constitution is a "rule of restraint" designed to insulate Florida's organic law from precipitous and cataclysmic change. *Advisory Op. to Att'y Gen. re – Save our Everglades*, 636 So. 2d 1336,

1339 (Fla. 1994). Only the citizen initiative process contains this restrictive language, because it does not have a filtering legislative process. *Id*. The legislative, revision commission, and constitutional convention processes all afford an opportunity for public hearing and debate, not only on the proposal itself, but also in the drafting. *Id*.

Indeed, prior to this citizens' initiative, attempts to approve the Energy Choice proposal failed legislatively and through the revision commission during its 2017-2018 convention. At bottom, after public hearings and debate, this proposal dies a quick death, and is almost universally opposed after the true consequences are disclosed.[1]

The single subject rule prevents an amendment from engaging in either of two practices: (a) logrolling or (b) substantially altering or performing the functions of multiple branches of state government. *Advisory Op. to Att'y Gen. re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose*, 880 So. 2d 630, 633 (Fla. 2004). The proposed Energy Choice initiative runs afoul of both.

A. The Initiative Constitutes Impermissible Logrolling

A primary purpose for the single subject rule is to prevent logrolling – a

[1] *See* extensive documents and presentations filed against proposed amendment in the Financial Impact Estimating Conference ("FIEC"), found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/EnergyChoiceAdditionalInformation.cfm.

practice by which an amendment is proposed which contains unrelated provisions, only some of which electors might wish to support. The rule guards against voters having to accept part of a proposal they oppose in order to obtain a change they support. *Id.; Fine*, 448 So. 2d at 993. Here, the proposed initiative asks the voter to approve two separate provisions: (1) the right to choose their electric provider and (2) the right to generate and sell electricity. A voter could favor one of these provisions but not the other. This is especially true considering the ballot summary goes on to mandate the legislature adopt laws providing for competitive markets and limits IOUs to construction, operation, and repair of electrical transmission and distribution systems. A voter may wish to approve a right to generate and sell his/her own electricity but disapprove of the creation of a competitive market and the limitations on IOUs.

In *Fairness Initiative*, this Court found the proposed amendment contained three disparate subjects: a scheme for the Legislature to review existing exemptions, the creation of a sales tax on services that currently does not exist, and limitations on the Legislature's ability to create exemptions. *Fairness Initiative*, 880 So. 2d at 634-35. The Court found while all of these goals arguably related to sales tax, any one of them might be the permissible subject of a constitutional amendment, and left the voter with an all-or-nothing choice. *Id.* Similarly, in *Save our Everglades*, this Court found one objective of the proposal at issue was to

restore the Everglades, which may have been politically popular. However, the second objective, which required the sugar industry to fund the restoration, may not have been so well received. *Save our Everglades*, 636 So. 2d at 1340. Likewise, here, voters may approve of competition or energy choice, but would not approve of the forced divesture or taking of IOU assets or the corresponding and undisclosed costs associated with the same.

B. The Initiative Results in Precipitous and Cataclysmic Change

Because of the lack of debate and careful consideration that accompanies citizen initiatives, Section 3 protects against multiple "precipitous" and "cataclysmic" changes in the constitution and to Florida's organic law by strictly limiting the proposal to a single subject. *Advisory Op. to Att'y Gen. re Fish and Wildlife Conservation Commission*, 705 So. 2d 1351, 1353 (Fla. 1998). To ascertain whether the requisite oneness of purpose exists, the Court must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution. *Advisory Op. to Att'y Gen. re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 891-92 (Fla. 2000). A proposal that affects several branches of government will not automatically fail; rather, it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single subject test. *Id*. This test is functional, not locational, and

where a proposal changes more than one government function, it is clearly multi-subject. *Id.* at 895 (citing *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984) (invalidating amendment that performed both legislative and judicial functions)). Enfolding disparate subjects within the cloak of a broad generality does not satisfy the single subject rule. *Evans*, 457 So. 2d at 1353.

In *Advisory Opinion re Tax Limitation*, this Court invalidated a petition that not only altered the functions of the legislative and executive branches, but had a distinct and substantial effect on local governmental entities. *Advisory Op. to Att'y Gen. re Tax Limitation*, *Approval of New Taxes, Property Rights, and Revenue Limits*, 644 So. 2d 486, 494-95 (Fla. 1994); *see also Advisory Op. to Att'y Gen. re General-Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) (invalidating amendment which encroached on the home rule powers of local government); *Treating People Differently*, 778 So. 2d at 896 (invaliding amendment based on single subject rule where the amendment had a substantial effect on local government entities as well as the legislative and judicial branches).

It is difficult to imagine an initiative proposal that would effect more precipitous and cataclysmic change than the Energy Choice initiative before this Court. The proposal substantially affects every branch of the government – legislative, judicial, and executive – and permeates and alters the most important aspects of local government and home rule power.

(i) Legislative Effects

The proposed amendment sets forth Florida's new "public policy declaration" on energy, which is a fundamentally legislative action.[2] *Save our Everglades*, 636 So. 2d at 1340 (finding the proposed amendment performed a legislative function by announcing a public policy decision of statewide significance). The amendment requires the Legislature to adopt complete and comprehensive legislation to implement the proposal, dismantle Florida's current regulated systems, and create a competitive landscape. It prohibits and abolishes exclusive franchises for the generation and sale of electricity, which are largely created by legislative acts of local governments. The amendment voids all statutes, regulations, or orders that conflict with the amendment, which negates countless state statutes and regulations, court orders, executive orders, administrative orders, and local government charters and ordinances.

Finally, without mention, the proposed amendment largely dismantles the Florida Public Service Commission ("FPSC") and significantly alters its functions, powers, and purpose.

(ii) Judicial Effects

The proposed amendment creates standing and a new cause of action for any Florida citizen to seek judicial relief to compel the Legislature to comply with its

[2] *See* Proposed Amendment (a).

constitutional duty to enact implementing legislation for the amendment. As has happened in every state where electric deregulation has occurred, extensive litigation will ensue as a result of the new landscape. In addition to the new cause of action created by the amendment, the proposal will trigger litigation related to compensation for the taking of private property for the forced divestiture of property from the IOUs, stranded cost litigation under the Federal Energy Regulatory Commission ("FERC"), contract litigation between local governments and IOUs related to franchise agreements and bulk power purchasing agreements, litigation as to what entities may own electric facilities, and what fees may be levied on new providers.[3]

(iii) Executive Effects

As noted above, the proposed amendment guts the FPSC, which would no longer oversee and set electric rates. Rather, the Legislature is tasked with creating an "independent market monitor" to ensure the competitiveness of the wholesale and retail electric markets – a rather expansive grant of executive and legislative power. S*ave our Everglades*, 636 So. 2d at 1340 (noting creation of trustees to

[3] The FIEC recognized substantial litigation is probable on a variety of fronts: *See* FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyTransmittalLetters.pdf, pgs. 1, 16-17, 19.

administer the Everglades trust was executive in nature and impinged on other existing executive entities).

(iv) Local Government Effects

The impact this proposal will have on cities and counties cannot be overstated. Cities and counties have historically been empowered to control who provides electric service within their territories by virtue of home rule, Fla. Stat. §§ 125.01, 166.011, et seq., and 180.14, numerous special act charters, and the common law prerogative to serve. This initiative will strip cities and counties of their right to control who serves, diminish home rule power, impair and frustrate numerous contracts, and drastically reduce revenues.

Currently, approximately 350 cities and 15 counties are parties to electric franchise agreements.[4] Franchise agreements are entered pursuant to legislative ordinances, and they are also contracts. By all accounts and as set forth in great detail in the presentations and documents presented to FIEC, franchise agreements will be largely abolished should this amendment pass, which will result in the loss

[4] Florida League of Cities & Ass'n of Counties Statement to FIEC, FIEC Notebook 3, Tab 10, C_9, pdf pgs. 351-358 found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook3_FINAL.pdf;

State Reports for FIEC, FIEC Notebook 1, Tab 3, C1-C4, pdf pgs. 31-58 found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook1_FINAL.pdf.

of over $700 million in city and county annual revenue. Additionally, cities and counties will be faced with significant revenue losses from a diminution in public service tax revenues levied on the purchase of electricity within their territories and in ad valorem tax revenues. The extent of the fiscal impacts on local governmental entities is detailed more specifically below in Section II, A, (ii).

Cities and counties which own, or partially own, electric generation or distribution systems will be further impacted. Some of these governmental entities co-own such assets with IOUs and will be forced to buy out the IOUs or sell their ownership interest should they not be able to purchase the assets.[5] Additionally, most cities and counties that sell electricity to their residents are parties to bulk power contracts with IOUs and will have to find new power sources.

(v) Constitutional Effects

It is imperative an initiative identify the provisions of the constitution substantially affected by the proposed amendment in order for the public to fully comprehend the contemplated changes and to ensure the initiatives' effect on other unnamed provisions is not left unresolved and open to various interpretations. *Fine*, 448 So. 2d at 989; *Tax Limitation*, 644 So. 2d at 490 (Fla. 1994).

[5] For example, JEA and IOU Florida Power & Light ("FPL") jointly own the 846-MW Robert W. Scherer Unit 4 coal-fired generating unit. *See* Impact of Amendment on JEA, FIEC Notebook 3, Tab 10, C_3, pdf pgs. 315-321 found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook3_FINAL.pdf

In addition to creating an entirely new "positive" constitutional right to energy choice, this amendment will substantially affect several existing provisions of Florida's Constitution including home rule power, the takings clause, the contracts clause, and the recently approved Solar Energy Amendment. Yet, the summary is completely and impermissibly silent as to any effects on these provisions.

The home rule power of municipalities is set forth in Article VIII, Section 2(b), Fla. Const., and in Section 166.021, Fla. Stat. and for counties in Article VIII, Section 1(f), (g), Fla. Const., and in Section 125.01, Fla. Stat. The Energy Choice amendment limits local government's ability to protect the public's investment in rights of way and in the regulation of reliable electric utility service. Perhaps most importantly, it negates the power of cities and counties to dictate who sells energy within their boundaries and destroys 365 city and county franchise agreements for the sale of electricity. Franchise and utility fees imposed by cities and counties are considered proprietary fees, which are different from taxes that require general law authorization. Consequently, these franchise and utility fees – which will be decimated by the proposed amendment – are a fundamental and crucial source of revenues for local governments. Municipalities and charter counties also levy by ordinance public service taxes on the purchase of electricity within their territories

under Sections 166.231-.235, Fla. Stat. Similar to franchise and utility fees, these fees will be largely curtailed by the passage of the proposed amendment.

Municipal and county franchise agreements are both legislative acts and valid contracts, which will be destroyed upon the passage of this amendment in contravention to Fla. Const. Art. I, §X. Additionally, for cities and counties that purchase and sell electricity to their citizens, their bulk power agreements with the IOUs will be destroyed.

Because the proposal requires the forced taking of generation assets – and potentially transmission and distribution assets – from IOUs, it triggers Article X, § 6 of the Florida Constitution, which provides property may not be taken without full compensation.

The amendment also conflicts with the recently passed Solar Amendment and the state's overall renewable energy and energy efficiency policy, which is tied to the current regulatory scheme for monopoly electric utility service. "Legislative, regulatory, and likely judicial resources will be required to unwind these policies from the current regulatory scheme and determine how they can be applied to the restructured industry envisioned by the amendment without running afoul of the amendment's conflicting requirements."[6]

[6] See pg. 19, FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergy_Report.pdf

As discussed more fully below, the amendment is utterly vague and unspecific, and improperly leaves Florida's legislative branch, executive branch, judicial branch, and local governmental entities to deal with the outfall. "Because key terms and relationships are undefined by the amendment and in current law – and since the interests of the incumbent IOUs are at stake – significant litigation and legal expenses are probable, regardless of the final legislative design of the new system." [7]

II. The Energy Choice Ballot Title and Summary Do Not Comply with Fla. Stat. § 101.161.

A. The Ballot Title and Summary Do Not Provide Fair Notice to Voters as to the Chief Purpose of the Amendment or the Extent of its Sweeping Ramifications.

The ballot title and summary provide no indication of the sea change the amendment would effectuate – nor that Florida would be joining the ever-decreasing minority of states which have attempted this boondoggle. The ballot summary is flawed for what it intentionally fails to tell the electorate. The citizens are being asked to cast a highly uninformed vote. As noted by the FIEC, the proposed amendment will require "transition to a restricted electricity market that

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[7] See pg. 16, FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergy_Report.pdf

profoundly differs from the vertically integrated structure in place today."[8] Voters are promised energy choice, but with no indication there are ***any*** potential costs or risks. Floridians are not apprised this amendment's true purpose is to minimize or expel IOUs, which provide the vast majority of electricity in this state.

Ballot summaries must give voters sufficient notice of what they are asked to decide to enable them to "intelligently" cast their ballots. Fla. Stat. § 101.161(1); *Smith v. American Airlines*, 606 So. 2d 618, 620-21 (Fla. 1992) (finding the ballot summary was not written clearly enough for even the more educated voters to understand its significance and chief purpose). Voters must be able to comprehend the "sweep" of each proposal. *Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982). The problem can often lie not with what the summary says, but, rather, what the summary fails to say. *Id*. The voters must be apprised of the true meaning and "ramifications" of an amendment and as to its "important consequences." *Id.; Fairness Initiative*, 880 So. 2d 630, 636 (Fla. 2004); *Advisory Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1999) (striking a ballot summary that failed to inform the public the Secretary of State would be granted discretionary constitutional powers which the Secretary does not currently have). The Court should strike a ballot summary if it does not explain to the reader

[8] See pg. 1, FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergy_Report.pdf.

or sufficiently inform the public of important aspects of the proposed amendment or if it is devoid of any mention of important consequences. *Id. citing Fish & Wildlife Conservation Comm'n*, 705 So. 2d at 1355; *Tax Limitation*, 644 So. 2d at 495.

(i) The Summary and Title Give No Inkling of the Radical Overhaul the Amendment Entails.

Should this amendment pass, Florida's current electricity market will be completely dismantled, and a new system will be put in place, with entirely new market players and new regulators. Florida will join an ever-decreasing minority of states that have chosen to deregulate the generation side of electricity production. Currently, four IOUs (Florida Power & Light, Duke Energy, Tampa Electric Co., and Florida Public Utilities Corp.) account for approximately 78.8% of the statewide gigawatt-hours. The remainder is provided by municipal, rural electric cooperative, or federally owned utilities.[9] The IOUs are vertically integrated meaning they own generation, transmission, and distribution assets, and sell electricity to end-users. The IOUs are subject to full regulation by the FPSC in terms of rates, reliability, and safety. Should this amendment pass, the IOUs will be forced to give up ownership of all generation facilities, and in all likelihood,

[9] See pg. 5, FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergy_Report.pdf (citing Florida Public Service Commission Statistics).

will not be selling electricity to customers. Florida's electricity market will no longer be a regulated monopoly, but rather, a deregulated market.

From the mid-1990s to 2002, the U.S. experienced a wave of electric market restructuring and deregulation, which ended with Texas deregulating in 2002. Currently, only fifteen jurisdictions have restructured markets, and eight states have suspended or repealed formerly enacted deregulation.[10] The ballot summary and amendment text make no mention that most states have chosen against deregulation, and many that tried, regretted it, and reversed course.

The summary and title do not explain the amendment will effectively expel the IOUs from Florida, which own over 75% of the electricity capacity used by Floridians, and this void will be filled by unknown providers, which will not be subject to FPSC regulations. There is no explanation in the ballot, title, or the amendment as to how reliability and guaranteed service, which are currently mandated by the FPSC, will be ensured. The summary and title give no indication the state legislature, executive branch, agencies, and local governmental entities will have to expend enormous amounts of time, resources, and money to comply and implement the amendment. Even setting aside the lost revenue to state and local governments from taxes and fees which will result from the amendment, the

[10] Charles River Associates Report to FIEC, FIEC Notebook 2, Tab 8_26 pdf pgs. 694-696, found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook2_FINAL.pdf.

costs to implement this initiative are distressing by all accounts.

First, because the amendment will force the divestiture of generating assets of the IOUs, the state will be liable for compensating the IOUs and for paying their "stranded costs," which have always been paid post electric deregulation. Estimated stranded costs for just the generation assets are at least $10-12.3 billion.[11] Estimated costs to create the mandated "competitive wholesale market" are no less than $100-500 million.[12] Litigation costs are likely to be in the hundreds of millions of dollars. The required independent system operator ("ISO") will result in on-going annual costs that approach between $170 million and $228 million.[13]

As set forth in multiple presentations to the FIEC, Florida voters are not being warned of the higher residential rates, higher consumer fraud violations, and consumer complaints which have frequently followed deregulation in other states.

(ii) The Summary and Title Do Not Provide Any Fair Notice the Amendment will Affect – Let Alone Cripple – Local Government Revenues.

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[11] Competitive Energy Market for Customers of Investor-Owned Utilities to FIEC, FIEC Notebook 2, Tab 8_31, pdf pgs. 772-775 found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook2_FINAL.pdf.

[12] *Id.*

[13] *Id.*

According to separate analyses performed by many different groups which presented to the FIEC, this amendment would have a severe adverse financial impact, in terms of revenues and increased costs, to both state and local governments. The FIEC agreed this amendment would entail significant costs to state and local governments for transition and implementation, government's purchase of electricity, stranded costs, litigation costs, costs to pay for the forced divesture of assets, and consumer protection costs.[14]

a. Complete Loss or Drastic Reduction to Electric Franchise Fees

Should this proposal pass, cities and counties will lose one of their most essential sources of revenues – franchise fees.[15] Electric franchise fees paid to cities range between $550 to $600 million per year, and the amount paid to counties is approximately $150 million per year.[16]

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[14] See pgs. 1-2, 12-20, FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergy_Report.pdf.

[15] Florida League of Cities & Ass'n of Counties Statement to FIEC, FIEC Notebook 3, Tab 10, C_9, pdf pgs. 351-358 found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook3_FINAL.pdf.

[16] State Reports for FIEC, FIEC Notebook 1, Tab 3, C1-C4, pdf pgs. 31-58 found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook1_FINAL.pdf.

Electric service franchises are typically approved by ordinance, which results in a binding contract. Currently, there are approximately 365 municipal and county electric franchise agreements. Legal authorization enabling local governments to require electric franchises is diverse, including statutory home rule, §§ 125.01, et seq., 166.011 et seq., § 180.14, Fla. Stat., numerous special act charters, and the common law prerogative to serve. As a part of the 1951 act, which initially created state regulation of the electric rates of IOUs, the Florida Legislature carefully and deliberately preserved cities' and counties' right to franchise electric service. *See* § 11, Chapter 26545, Laws of Florida (1951), codified as § 366.11, Fla. Stat., and often referred to as the "Dowda Bill."

While electric service franchises are not completely uniform, most contain certain basic provisions, including:

- City/County grant of authority to operate and provide electric service using City/County rights of way (either non-exclusive or exclusive) in return for payment of 6% of gross billings from electric sales within territorial limits
- City/County grant of the right to install and maintain electric distribution facilities in City/County rights of way for a defined term ranging from 20 to 30 years
- City/County commitment not to compete
- Grounds for forfeiture by either party
- IOU commitment to relocate utilities under certain circumstances
- "Favored Nations" provision that enables either party to "reopen" the franchise if either party executes another franchise with differing terms
- Termination rights to IOU if electricity is deregulated (the "Retail Wheeling Clause")[17]

[17] Florida League of Cities & Ass'n of Counties Statement to FIEC, FIEC

In addition, approximately 50 such franchises include an option for the city or county to purchase the distribution facilities exercisable if the franchise expires without being renewed or extended. These "purchase options" are valuable property rights that exist in favor of certain cities and counties, and will be at risk should this proposal pass.[18]

City and county franchise revenues will drop precipitously under the initiative for several reasons. First, new retail providers using incumbent utilities' distribution facilities will pay nothing. Nothing presented to the FIEC suggests under the initiative, retail electric providers using the incumbent utility's distribution lines would enter into franchise agreements or otherwise obligate themselves to pay franchise fees or their equivalent. Sales of electricity by new retail electricity providers facilitated by the proposed amendment will displace sales by utilities. These new sales will not be subject to the franchise fees.

Second, as incumbent utility sales decrease, existing franchise fee revenues will decrease, because the fees are based upon a percentage of the incumbent utility's sales. If IOUs no longer bill customers for generation, transmission, or

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Notebook 3, Tab 10, C_9, pdf pgs. 351-358 found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook3_FINAL.pdf.

[18] *Id.*

distribution costs, the revenue from these fees will be significantly reduced or even eliminated. Reasons one and two arise by virtue of attrition of franchise fee revenue caused by displaced retail sales.

Third, the franchises contain provisions that allow avoidance of franchise fee payments if new retail providers enter the market. Even if the attrition of franchise fee revenue caused by displaced retail sales fails to materialize, most of the current electric franchises contain a variety of provisions that permit incumbent utilities to reopen, renegotiate, and in many instances, terminate, the franchise if the state were to impose "retail wheeling" or deregulation.

Finally, the initiative contains a prohibition against "granting of either monopolies or exclusive franchises for the generation and sale of electricity." This language will prohibit the renewal of existing franchises, which contain exclusive service rights. In all likelihood, this initiative will erase all franchise fees as the existing franchises expire. Cities and counties will be forced to seek new taxes or other revenue sources to replace this lost revenue from franchise fees or reduce services provided to residents – none of which is made known to the voter from the ballot summary.

b. Loss of Public Service Tax Revenue

For decades, Florida has authorized the collection of a public service tax by municipalities and charter counties. The tax is levied upon, among other things,

the purchase of electricity within city and county territorial limits. Because franchise fees may be included in the base for electric sales, public service tax levies will be reduced based upon the projected reduction in franchise fees. More importantly, decisions rendered on tax exemptions for gross receipts taxes based on utility service sales indicate, to the extent retail electric service providers make the sale out of city or county territorial boundaries, the public service tax might not apply, thus reducing further the revenues from the public service tax. The displacement of IOU sales may reduce revenues from other taxes and fees as well, depending upon whether the applicability provisions for each tax and fee are ultimately construed to apply to sales by out of state (or out of city/county) retail marketers. Currently, IOUs pay approximately $780 million to cities in public service taxes on electricity and approximately $259 million to counties. [19]

c. Loss of Ad Valorem Tax Revenues

According to the Florida Chamber of Commerce, Florida's IOUs currently pay in excess of $1 billion in ad valorem taxes. Among others, cities and counties assess ad valorem taxes on IOU real and tangible business properties within their respective territories. These assessments are almost uniformly based upon net book value.

[19] State Reports for FIEC, FIEC Notebook 1, Tab 3, C1-C4, pdf pgs. 31-58 found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook1_FINAL.pdf).

The initiative requires the forced divestiture of generating assets – and perhaps distribution and transmission facilities. The assets will be instantly devalued, because the income generated from the assets will no longer be supported by today's state-assured guaranteed rate of return and because the assets will have to be sold by an arbitrary date certain. This phenomenon has been documented in the forced sale of water and wastewater utilities. More importantly, this phenomenon has been documented in many of the other states that have deregulated the retail electricity market.

Since the 1990s, virtually every state that deregulated its retail electric utility market incurred substantial "stranded costs." Specifically recognized by Florida case law,[20] stranded costs are the difference between the value of generating and related assets (ie, wholesale power agreements, fuel contracts) in a competitive energy market to be formed in Florida versus the value of investment in these plants and related assets by IOUs. Stranded costs must be compensated because they represent a loss of asset value caused by deregulation. FERC has over 1,000 pages of rules that define stranded costs. IOUs are routinely awarded the recovery of "stranded costs" to compensate for these losses. These stranded costs will ultimately be borne by the state and, of course, by the retail customer.

[20] For example, *see Florida Power & Light Co. v. City of South Daytona*, 93 So. 3d 1234 (Fla. 5th DCA 2012).

This forced "fire sale" of generating assets by the IOUs will have another "unintended consequence." Forced divestiture of utility property at prices substantially below book value will significantly decrease the ad valorem property tax base for purposes of ad valorem taxation. This will cause a resultant decrease in ad valorem tax revenue to cities and counties. Local governments will be forced to implement new taxes or other revenue sources to replace this lost revenue.

d. Losses from Replacement of Wholesale Providers

Some cities purchase bulk power supplies from the large Florida IOUs. If these providers have to divest their generation facilities, at the very least, cities will have to contract with other entities, even if these entities successfully purchase the divested generation assets. It is likely purchased power rates will increase for several reasons (including paying off stranded costs). The bulk power increases will also directly reduce the 34 municipal electric systems' revenues, thus reducing transfer fees and transfer payments (ie, payment in lieu of taxes) by municipal electric utilities to general funds.

e. Additional Costs to Local Governments

Given the potential impacts this initiative will have upon the municipal and county franchising authority, franchise rights, public service tax uncertainty, reductions in ad valorem tax base, and substantial changes in the wholesale power market, virtually every city and county in Florida will be required to incur

substantial legal, financial consulting, and/or utility management costs, fees, and expenses in order to protect local government investments and restore or replace revenue sources. The financial impact of both lost revenues and increased costs to existing cities and counties will certainly be in the billions of dollars.

None of the above costs are disclosed to voters in the ballot summary, and without this knowledge, voters cannot be expected to cast an intelligent, informed vote. The voter cannot weigh the proposal's pros and cons, because the voter is not even advised there are any associated downsides or costs to the amendment. *Askew*, 421 So. 2d at 156 (courts are required to remove matters from the ballot where the summary does not inform the voters of the true effect of the proposal); *Volusia Citizens' Alliance v. Volusia Home Builders Ass'n, Inc.*, 887 So. 2d 430, 431-32 (Fla. 5th DCA 2004) (summary stricken for excluding material elements of the amendment, and thus, not providing fair notice of the amendment's content); *see also Amendment to Bar Government,* 778 So. 2d at 899 ("drafters of proposed amendments cannot circumvent the requirements of Section 101.161 by cursorily contending the summary need not be exhaustive"). Ballot summaries and amendments cannot survive if they contain overbroad and unstated effects and fail to disclose the impact the amendment could have on other aspects of law or government. *Id.* at 900.

The summary also fails to include any references to other informative materials upon which the electorate could inform itself. *Matheson v. Miami Dade County,* 187 So. 3d 221, 226 (Fla. 3d DCA 2015) (while summary did not contain all the details and impacts, the ballot question referenced other materials, which contained all the details); *Let Miami Beach Decide v. City of Miami Beach*, 120 So. 3d 1282, 1284 (Fla 3d DCA 2013) (because the lease approval question failed to give voters necessary information and failed to even refer voters to records that would provide such information, it was stricken).

(iii) The Ballot Title and Summary Do Not Define Key Terms and are Unclear and Confusing.

Voters must be provided with the material terms of the amendment sufficient to allow them to cast an intelligent ballot. *Let Miami Beach Decide*, 120 So. 3d at 1291 (finding a lease approval question on the ballot failed because it did not disclose all of the material terms of the contract). Ballot summaries that do not adequately define terms, use inconsistent terminology, or fail to mention constitutional provisions that are affected, do not adequately describe the general operation of the amendment and must be invalidated. *Treating People Differently*, 778 So. 2d at 899-900; *see also Advisory Op. to Att'y Gen. re People's Property Rights*, 699 So. 2d 1304, 1308-09 (Fla. 1997) (finding a ballot summary misleading due to undefined terms and noting the public would not readily understand the distinction between an exemption and immunity from taxation);

Smith, 606 So. 2d at 620 (criticizing summary for failure to define "ad valorem" or to explain the term applied to real and personal property such that even more educated voters would not understand the amendment). The Court essentially previews the ballot summary to determine if the chief purpose of the amendment is explained with sufficient clarity. *General-Restricts Laws*, 632 So. 2d at 1021 (noting while the court is wary of interfering with the public's right to vote on an initiative, it is equally cautious of approving the validity of a ballot summary that is not clearly understandable). Moreover, if the ballot summary language is overly vague, it must fail as misleading and unclear. *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Provider*, 705 So. 2d 563, 566 (Fla. 1998) (calling out the divergence in terminology between "citizens" and "natural persons").

As clearly reflected in the presentations and documents submitted to the FIEC, leading industry experts and their attorneys cannot agree what this amendment actually means or mandates. For example, the amendment's proponent argues the initiative will allow IOUs to retain ownership of their transmission and distribution assets, while opponents argue the plain language of the initiative prohibits the same ("by its omission of the term 'ownership' the proposed amendment leaves open the issue of whether the state's current IOUs must divest their transmission and distribution assets, almost certainly leading to

extensive proceedings and/or litigation before the Regulatory Agency").[21] Likewise the proponent argues IOUs, potentially through their parent or affiliate companies, may be able to participate in retail sales to end users, while opponents argue this will be a legal and practical impossibility ("since the term 'investor-owned utilities' is not defined, it is not clear if other non-incumbent entities could participate if they had a corporate structure that is 'investor owned'; this lack of clarity would almost certainly lead to extensive proceedings and/or litigation before the Regulatory Agency"). [22]

This widespread confusion among entities who specialize in this industry, understand deregulation, and are familiar with industry terms, is troubling. If industry experts and the FIEC cannot make light of the proposal – how are ordinary voters supposed to intelligently cast their votes? The ballot title and summary leave undefined key terms such as "investor-owned utilities," "cooperative utilities," "wholesale markets," and "retail markets for electricity

[21] See pgs. 10 and 17, FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyTransmittalLetters.pdf ("There was no consensus among the presenters as to whether the IOUs could continue to own these [transmission and distribution] systems").

[22] See pg. 17, FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyTransmittalLetters.pdf.

generation." These terms are nuanced, and absent a fundamental understanding of the same, voters are being asked to cast their ballot in the dark.

As noted by the FIEC, the amendment proponents have essentially thrown out a half-baked, ill-defined concept and directed the legislative, executive, and judicial branches to figure it out. ("The specifics of the restructured system are left to the Legislature…each of these issues have sub-issues that also need to be addressed;" "Because key terms and relationships are left undefined by the amendment and current law – and since the interests of incumbent businesses are at stake – significant litigation and legal expenses are probable;" "the proposed amendment requires a competitive retail electricity market with multiple providers, but provides no details about how this would work."). [23] The proposed amendment itself – much less the summary – does not explain who or what entities would replace the IOUs as the new electricity generators in Florida nor does it explain how the IOUs will be compensated for the forcible taking of their property.

B. The Ballot Title and Summary Are Misleading

A ballot title and summary cannot "fly under false colors" or "hide the ball" as to the amendment's true effect. *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla.

[23] See pgs. 1, 10, 16-17, FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyTransmittalLetters.pdf.

2000). A ballot summary is defective if it omits material facts necessary to make the summary not misleading. *Term Limits Pledge*, 718 So. 2d at 803.

As discussed above, the ballot summary is misleading for concealing more than it reveals. The summary makes no mention of the staggering costs for implementation, the devastating impacts to state and local revenues, or the effective elimination of IOUs. The ballot summary – and the amendment itself – do not provide any material details regarding how this initiative will be implemented and structured, which will inarguably foster costly litigation.

In addition to what the summary fails to say, it also contains affirmatively misleading language, which attempts to "hide the ball" on the amendment's true effects. For example, rather than clearly explaining to the voter that the generation assets of all Florida IOUs will be forcibly taken from the IOUs, the summary attempts to gloss over this forced divesture by stating only: "Limits investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems." This wordsmithing is a blatant attempt to downplay or hide the fact assets will be forcibly taken from their owners, which voters may oppose as a matter of fundamental principal, a matter of fiscal concern, or both.

The last line of the summary: "Municipal and cooperative utilities may opt into competitive markets" gives the misleading impression local governments will not be negatively impacted by the amendment, which, as set forth in detail above,

is patently false. The amendment would strip cities and counties of their home rule power to choose who serves within their territories, would negate hundreds of franchise agreements and power supply contracts, and would substantially reduce revenues and services.

Finally, by using phrases such as "right to choose their electricity provider," "right to competitive energy," and "allowing energy choice" the summary and title suggest to voters a competitive market will be created with ease, IOUs will still be among their available choices for electric providers, and prices will go down due to competition. Ballot summaries cannot contain language that justifies or suggests adoption of the amendment. Nor can ballot summaries contain editorial comment or political rhetoric. *Volusia Home Builders Ass'n. Inc.,* 887 So. 2d at 431 (disallowing the proposed amendment's placement on the ballot because the opening sentence suggested the amendment would benefit the county's natural resources).[24] The ballot summary can only be descriptive of the amendment's

[24] Indeed, another Florida court struck a 2016 local charter initiative seeking to force divesture of a municipal electric utility based upon the use of the same type of impermissible political rhetoric in the ballot summary. *See City of Bushnell, Florida vs. Sumter Electric Cooperative, In. and Citizens For Cooperative Power, Case No.: 2016-CA-56 (Fla. 5th Cir. Ct. 2016), Order Denying Defendant Citizens for Cooperative Power's Motion for Summary Judgment and Granting Plaintiff's Cross Motion for Final Summary Judgment*. Said Order is attached as pgs. 5-12 in the Appendix.

contents, and political rhetoric will not be allowed. *Id.* The ballot summary should not argue for an amendment or justify why it is appropriate or desired.

Voters are not given any indication how expensive and difficult creating this market will be. Nor are they apprised the IOUs, which serve the majority of voters today, will no longer be an option. Perhaps worse, the voters will have no idea this deregulation has been largely unsuccessful in other states, and rather than lower rates, deregulation often causes rates to rise – along with consumer fraud.[25] Florida's IOUs rates are well-below both national averages and the average rates charged in states that have restructured their electricity markets.[26] As summarized by the FIEC, at best, academic and case studies of other deregulated states are "inconclusive" with respect to price change, and the customer will likely have to

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[25] *See* pgs. 1, 10, 12, 17, FIEC Complete Financial Statement found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyTransmittalLetters.pdf;

see also Concentric Energy Advisors Presentation to FEIC, FEIC Notebook 1, Tab E-6_4, pdf pgs. 783, 800-801 found at: http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook1_FINAL.pdf;

see also Fiscal Impact of a Proposed Constitutional Amendment by Fishkind & Associates to FEIC, Notebook 2, Tab 27, pdf pgs. 721-739 found at http://www.edr.state.fl.us/Content/constitutional-amendments/2020Ballot/RightToEnergyNotebook2_FINAL.pdf.

[26] *Id.*

bear significant upfront costs to transition to a new market.[27]

In sum, the special-interest lobby behind this proposal has carefully crafted an innocuous, utopian-sounding summary that paints a deceptively rosy picture – when considered in a vacuum. Citizens typically favor choice, and perhaps even competition, but here, the voters are not being advised of the sweeping ramifications this proposal would trigger.

CONCLUSION

For the foregoing reasons, the Energy Choice Amendment should not be placed on the ballot.

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[27] *Id.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 18th day of April, 2019, that a true and correct copy of the foregoing has been filed through the Florida E-Filing Portal, and sent by email to:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that the font used in this brief is Times New Roman 14-point, in compliance with Rule 9.210, Florida Rules of Appellate Procedure.

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