

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-328

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

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BRIEF OF THE CITY OF FORT LAUDERDALE, THE CITY OF  
HOLLYWOOD, THE CITY OF POMPANO BEACH AND  
THE TOWN OF DAVIE AS *AMICUS CURIAE*

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RECEIVED, 04/18/2019 12:33:39 PM, Clerk, Supreme Court

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	3
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	5
SUMMARY OF THE ARGUMENT .....	6
ARGUMENT .....	7
I.    The Proposed Amendment. ....	7
II.   The Proposed Amendment May Result in Significant Loss of Revenue for the Municipal Governments.....	8
III.  The Proposed Amendment Violates the Single Subject Requirement of Article XI, Section 3 of the Florida Constitution.....	11
A.   The Proposed Amendment Logrolls Multiple Issues Into a Single Amendment.....	12
B.   The Proposed Amendment Substantially Alters the Functions of Multiple Branches of Government.....	14
CONCLUSION .....	18
CERTIFICATE OF SERVICE .....	19
CERTIFICATE OF COMPLIANCE.....	19

## TABLE OF AUTHORITIES

### Cases

<i>Advisory Opinion To Atty. Gen. re Indep. Nonpartisa Comm'n to Apportion Legislative &amp; Cong. Districts Which Replaces Apportionment by Legislature</i> , 926 So. 2d 1218 (Fla. 2006).....	14, 15
<i>Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers</i> , 705 So. 2d 563 (Fla. 1998) .....	13
<i>Advisory Opinion to Atty. Gen. re Rights of Elec. Consumers regarding Solar Energy Choice</i> , 188 So. 3d 822 (Fla. 2016) .....	11, 12
<i>In re Advisory Opinion to the Atty. Gen.-Save Our Everglades</i> , 636 So. 2d 1336 (Fla. 1994) .....	12, 13, 15
<i>Chiles v. Pub. Serv. Comm'n Nominating Council</i> , 573 So. 2d 829 (Fla. 1991) .....	17
<i>Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.</i> , 262 So. 3d 127 (Fla. 2019) .....	16
<i>In the Matter of: Us W., Inc. &amp; Cont'l Cablevision, Inc.</i> , 11 F.C.C. Rcd. 13260 (1996) .....	10

### Florida Constitution & Statutes

Sections 501.201-213, Florida Statutes (2018).....	17
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### Law Review and Journal Articles

Michael Evan Stern & Margaret M. Mlynczak Stern, <i>A Critical Overview of the Economic and Environmental Consequences of the Deregulation of the U.S. Electric Power Industry</i> , 4 <i>Envtl. Law.</i> 79 (1997).....	11
Peter Navarro, <i>A Guidebook and Research Agenda for Restructuring the Electricity Industry</i> , 16 <i>Energy L.J.</i> 347 (1995).....	10

**Government Reports**

*Report of the Florida Financial Impact Estimating Conference, Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice, Serial Number 18-10, released March 15, 2019.....9*

## **IDENTITY & INTEREST OF *AMICUS CURIAE***

The *amicus curiae*, CITY OF FORT LAUDERDALE, CITY OF HOLLYWOOD, CITY OF POMPANO BEACH, and TOWN OF DAVIE, are municipal governments (hereinafter collectively the “Municipal Governments”) that represent approximately 550,000 citizens of Florida. Both the Municipal Governments and their citizens are consumers of electricity provided by investor-owned utilities (the “IOUs”), and rely upon consistent and dependable service for their activities every day. Maintaining reliable electrical service is critical for the economic well-being of the Municipal Governments and the citizens they represent.

The Municipal Governments also collect taxes and fees from the IOUs in order to provide essential services to their citizens. The Municipal Governments have franchise agreements with the IOUs that allow the IOUs to use the Municipal Governments’ right-of-ways in exchange for franchise fees. The substantial and valuable property of the IOUs is also subject to property tax by the Municipal Governments. If those taxes and fees are reduced or eliminated, the Municipal Governments will face significant budget shortfalls to the detriment of their citizens.

## **SUMMARY OF ARGUMENT**

The “Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice” (“Proposed Amendment”), if passed, would deregulate the market for Florida electrical power generation, transmission and sale.

The Proposed Amendment may create significant financial harm to the Municipal Governments. The Proposed Amendment will ban the franchise agreements the Municipal Governments have long given the IOUs in exchange for payment of franchise fees. Property taxes the IOUs pay will also decline dramatically because the Proposed Amendment forces the IOUs, in a short time and with little to no bargaining power, to divest themselves of properties with billions of dollars in value. When these properties are sold in potential “fire sales,” the property values will likely drop significantly, resulting in much lower property tax revenues to the Municipal Governments. The combined loss of franchise fees and taxes throughout the state is estimated to be in the hundreds of millions of dollars annually. This will force the Municipal Governments to either cut or decrease essential services or increase other taxes.

The Proposed Amendment violates the single-subject requirement in Article XI, section 3 of the Florida Constitution by logrolling multiple issues into a single proposal. The Proposed Amendment includes at least four distinct issues, forcing

each voter to choose between voting for one issue he or she supports, but also one or more issues he or she opposes, or else voting against the issue he or she supports.

The Proposed Amendment also substantially affects multiple branches of government. It creates new causes of action that will require the judiciary to essentially make legislative decisions without a manageable standard needed to avoid judicial intrusion into the legislative power. It affects the legislative branch by mandating new and continuing legislative action, invalidating current law and eliminating the Public Service Commission. And, by requiring the creation of “an independent market monitor to ensure competitiveness of the wholesale and retail electric markets,” the Proposed Amendment substantially affects the executive branch. Because the Proposed Amendment violates the single-subject requirement, this Court should deny its placement on the ballot.

## **ARGUMENT**

### **I. THE PROPOSED AMENDMENT**

The Proposed Amendment would deregulate the Florida electrical utility market, creating a “fully competitive” market and restricting the rights of IOUs.

As described in the ballot summary, the Proposed Amendment:

Grants customers of investor-owned utilities the right to choose their electricity provider and to generate and sell electricity. Requires the Legislature to adopt laws providing for competitive wholesale and retail markets

for electricity generation and supply, and consumer protections, by June 1, 2025, and repeals inconsistent statutes, regulations, and orders. Limits investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems. Municipal and cooperative utilities may opt into competitive markets.

## **II. THE PROPOSED AMENDMENT MAY RESULT IN SIGNIFICANT LOSS OF REVENUE FOR THE MUNICIPAL GOVERNMENTS**

The Proposed Amendment may significantly reduce the Municipal Governments' revenue by eliminating or reducing franchise fees and reducing property values. As expressed in the Financial Impact Statement, there will be "significant costs to state and local governments to transition to a fully operational system," and that "several government revenues would be reduced."

The Municipal Governments believe these financial repercussions will be substantial. There will be significant reductions in franchise fees, property taxes, and municipal taxes which are critical revenue sources for the Municipal Governments.

The Municipal Governments enter franchise agreements with the IOUs. In exchange for the IOUs obtaining the use of the Municipal Governments' right-of-ways to conduct their utility business, the IOUs pay a franchise fee.<sup>1</sup> By banning

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<sup>1</sup> "A franchise fee is fair rent for the use of [the local government]'s rights-of-way and consideration of the local government's agreement not to provide competing utility services during the term of the franchise agreement." *Report of the Florida Financial Impact Estimating Conference, Right to Competitive Energy Market for*

such franchise agreements, the Proposed Amendment will dramatically reduce, if not eliminate, this revenue source.

This loss is mentioned in the *Report of the Florida Financial Impact Estimating Conference, Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice*, Serial Number 18-10, released March 15, 2019 (“FIS Report”) by the Florida Financial Impact Estimating Conference (“FIEC”). That report recognizes that, for franchise fees, “existing collections would be significantly reduced” if the Proposed Amendment is passed. FIS Report, p. 2. This is a substantial understatement because the Proposed Amendment will seemingly eliminate the existing franchise agreements between the Municipal Governments and the IOUs. Proposed Amendment, (c)(1) expressly requires the Legislature to “(1) implement language that entitles electricity customers to purchase competitively priced electricity, including but not limited to provisions that are designed to . . . (iv) prohibit any granting of either monopolies or exclusive franchises for the generation and sale of electricity.” It is unclear what, if any, method the Legislature would put in place to replace these agreements and the revenue they generate for the Municipal Governments.

In the fiscal year 2016-2017, municipal governments across the State received \$721.4 million in franchise fee revenues. FIS Report, pp. 14-15. During

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*Customers of Investor-Owned Utilities; Allowing Energy Choice*, Serial Number 18-10, released March 15, 2019, p. 14.

that period, the Municipal Governments received approximately \$40.1 million in franchise fee revenues, and approximately \$50.7 million in utility tax revenues. Even if some new form of the franchise fee is created by the Legislature in response to the Proposed Amendment, any franchise fee collected is likely to be significantly reduced. The Municipal Governments, as well as potentially hundreds of other local governments, will lose millions of dollars in revenue annually.

The Proposed Amendment will likely also significantly reduce the Municipal Governments' property tax revenues by reducing the fair market value of the IOUs generation properties. The FIEC reported that the IOUs "showed nearly \$2.2 billion in real property just value and nearly \$42.8 billion in tangible personal property just value across the state" in 2018. FIS Report, p 14. The Proposed Amendment will require the IOUs to divest their electrical generation properties for some, undetermined sum, to presently unknown entities, potentially forcing fire sale of assets. Peter Navarro, *A Guidebook and Research Agenda for Restructuring the Electricity Industry*, 16 Energy L.J. 347, 361 (1995) ("Navarro"); *In the Matter of: Us W., Inc. & Cont'l Cablevision, Inc.*, 11 F.C.C. Rcd. 13260 (1996) (recognizing that, in attempting to adjust to a deregulated telecommunications industry, divesting assets by a short, hard, deadline could result in "a 'fire sale' of those systems at less than full value."). That forced sale will significantly reduce the fair market value of the assets sold. Navarro, 16 Energy

L.J. at 361. The lower property valuations will reduce the taxes remitted to the Municipal Governments by millions of dollars every year. In fact, the Florida League of Cities estimates that local governments will lose up to \$178 million annually in property taxes if the Proposed Amendment passes.

In sum, if the Proposed Amendment becomes law, the Municipal Governments, as well as potentially hundreds of other local governments, will likely lose millions of dollars in revenue every year. Michael Evan Stern & Margaret M. Mlynczak Stern, *A Critical Overview of the Economic and Environmental Consequences of the Deregulation of the U.S. Electric Power Industry*, 4 *Envtl. Law.* 79, 105 (1997) (“Deregulation and restructuring of the industry are likely to reduce significantly those tax revenues.”). The Municipal Governments rely on franchise fees and property taxes to provide essential services to their communities. To make up for the dramatic reductions in income, the Municipal Governments will be forced to either reduce essential services or increase other taxes and fees.

### **III. THE PROPOSED AMENDMENT VIOLATES THE SINGLE SUBJECT REQUIREMENT OF ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION**

“Article XI, section 3 of the Florida Constitution establishes the general requirement that a proposed citizen initiative amendment ‘shall embrace but one subject and matter directly connected therewith.’” *Advisory Opinion to Atty. Gen.*

*re Rights of Elec. Consumers regarding Solar Energy Choice*, 188 So. 3d 822, 827 (Fla. 2016) (quoting Fla. Const., Art. XI, § 3). This rule applies to citizens’ initiative petitions “because the citizen initiative process does not afford the same opportunity for public hearing and debate that accompanies other constitutional proposal and drafting processes.” *Id.* “The single-subject rule prevents an amendment from (1) engaging in ‘logrolling’ or (2) ‘substantially altering or performing the functions of multiple aspects of government.’” *Id.* (quoting *Advisory Op. to Atty. Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.*, 769 So. 2d 367, 369 (Fla. 2000)).

The Proposed Amendment violates this single subject requirement both by logrolling multiple issues into a single amendment, and by substantially altering the functions of multiple branches of government.

**A. The Proposed Amendment Logrolls Multiple Issues Into a Single Amendment.**

The Proposed Amendment violates the single subject requirement by logrolling several issues together in a single proposal. Logrolling is “a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue.” *In re Advisory Opinion to the Attorney Gen.-Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994). In *Save Our Everglades*, this Court found that a proposed

amendment “embodie[d] precisely the sort of logrolling that the single-subject rule was designed to foreclose.” *Id.* at 1341. That proposal included two separate issues:

One objective—to restore the Everglades—is politically fashionable, while the other—to compel the sugar industry to fund the restoration—is more problematic. Many voters sympathetic to restoring the Everglades might be antithetical to forcing the sugar industry to pay for the cleanup by itself, and yet those voters would be compelled to choose all or nothing. The danger is that our organic law might be amended to compel the sugar industry to pay for the cleanup singlehandedly even though a majority of voters do not think this wise or fair.

*Id.* This Court rejected the proposal, finding that voters could not be compelled to make that choice. *Id.*

In *Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers*, this Court rejected another proposed amendment as violating the prohibition on logrolling two distinct subjects by “banning limitations on health care provider choices imposed by law and by prohibiting parties from entering into contracts that would limit health care provider choice.” 705 So. 2d 563, 566 (Fla. 1998). A citizen who supported a ban on limiting health care provider choices by law, but also supported the freedom of parties to enter into contracts that would limit health care provider choice, would be forced into an “all or nothing” choice in voting for the proposed amendment. *Id.* This was precisely the type of logrolling prohibited by the single-subject requirement. *Id.*

Similarly, the Proposed Amendment violates the single-subject requirement by logrolling several separate issues. The Proposed Amendment: (1) prohibits the IOUs from selling electricity directly to customers, (2) requires the creation of a competitive wholesale and retail electricity market, (3) creates a right for any person to generate and sell their own electricity, and (4) prohibits exclusive franchises or monopolies for the sale of electricity. A citizen may support the right to generate his or her own electricity, but may not support the elimination of exclusive franchise or monopolies for the sale of electricity. Alternatively, a citizen may support a competitive market for electricity but want to have the choice of continuing to purchase electricity from his or her current IOU. However, the Proposed Amendment forces the citizen to make an “all or nothing” choice, selecting all of the disparate issues covered by the Proposed Amendment, or none of them.

**B. The Proposed Amendment Substantially Alters the Functions of Multiple Branches of Government.**

The Proposed Amendment substantially affects multiple functions or levels of government, violating the single-subject requirement. In assessing the second aspect of the single-subject requirement, the Court ““must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution.”” *Advisory Opinion To Atty. Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Districts Which Replaces*

*Apportionment by Legislature*, 926 So. 2d 1218, 1226 (Fla. 2006) (quoting *In re Advisory Op. to the Atty. Gen.—Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994)). While a proposal may affect multiple branches of government, it may not substantially alter or perform the functions of multiple branches of government. *Id.*

For example, in *Save Our Everglades*, the proposal would have altered legislative functions by creating a trust to oversee the Everglades restoration, funding the trust, requiring the trustees to determine how to operate the trust, and levying fees or taxes on raw sugar. 636 So. 2d at 1340. In addition, the proposal would have required the trustees to administer the trust, expending funds for the Everglades restoration efforts and constructing and operating various facilities, exercising executive power. *Id.* Finally, the proposal performed a judicial function by finding that the sugar cane industry was at fault for the Everglades pollution and penalizing the industry through a fee to cover the restoration efforts. *Id.* By performing functions from all three branches of government, essentially creating a fourth branch of government, the proposal violated the single subject requirement. *Id.*

Similarly, the Proposed Amendment performs functions from all three branches of government. It performs judicial functions by creating a new cause of action for any Florida citizen “to compel the Legislature to comply with its

constitutional duty to enact such legislation under this section.” Proposed Amendment, (e). This would require the judicial branch to determine whether the Legislature’s decisions in implementing the broad, vague, and “comprehensive” legislation adequately satisfied the Proposed Amendment’s goals. The requirement that the judicial branch assess the constitutionality of the entire (newly created) competitive energy market based on the general goals and purposes of the Proposed Amendment is an unmanageable standard that would require the judiciary to intrude on the powers of the Legislature. *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 141 (Fla. 2019) (rejecting a challenge to the entire state K-12 educational system pursuant to a Florida Constitutional provision making the K-12 educational system a “paramount duty” because there was not a “manageable standard by which to avoid judicial intrusion into the powers of the Legislature.”).

The Proposed Amendment performs legislative functions by requiring the Legislature to “adopt complete and comprehensive legislation to implement this section in a manner fully consistent with its broad purposes and stated terms.” Proposed Amendment (c). The Proposed Amendment further exercises legislative functions to repeal laws by making “all statutes, regulations, or orders which conflict with this section” void the moment the Legislature enacts any law pursuant to the Proposed Amendment. Proposed Amendment, (c)(2). Additionally, by

requiring the creation of a wholesale and retail electricity market that is fully competitive, the Proposed Amendment replaces many, if not all, of the functions of the Public Service Commission, in particular its ratemaking function, which this Court has characterized as a legislative function. *Chiles v. Pub. Serv. Comm'n Nominating Council*, 573 So. 2d 829, 832 (Fla. 1991) (“We previously expressed the view, which we now reaffirm, that public utility rate-making by the Public Service Commission is a legislative function.”).

Finally, the Proposed Amendment performs executive functions by requiring the creation of “an independent market monitor to ensure competitiveness of the wholesale and retail electric markets.” Proposed Amendment, (c)(1)(v). The Proposed Amendment further requires legislation that would effectively require the exercise of executive authority to monitor the market to “protect against unwarranted service disconnections, unauthorized changes in electric service and deceptive and unfair practices.” Proposed Amendment, (c)(1). *See generally* §§ 501.201-213, Fla. Stat. (authorizing the Department of Legal Affairs, an executive agency under the Attorney General, to investigate and bring claims for engaging in deceptive and unfair practices).

By substantially altering the functions of all three branches of government, the Proposed Amendment violates the single-subject requirement.

## CONCLUSION

The Proposed Amendment may significantly harm the Municipal Governments and their citizens by substantially reducing the Municipal Governments' franchise fees and property tax revenues paid by IOUs. Further, the Proposed Amendment violates the single-subject requirement of the Florida Constitution by improperly logrolling multiple subjects and by substantially affecting the functions or levels of all three branches of state government.

Respectfully submitted,

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