SC19-328; SC19-479 (CONSOLIDATED)

IN THE SUPREME COURT OF FLORIDA

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

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ENERGY MARKET FOR CUSTOMERS OF INVESTOR-OWNED UTILITIES; ALLOWING ENERGY CHOICE
(FINANCIAL IMPACT STATEMENT)

AMICUS CURIAE BRIEF OF THE CITY OF BELLE GLADE, VILLAGE OF INDIANTOWN, CITY OF CHIPLEY, CITY OF VERNON AND THE LAKE OKEECHOBEE REGIONAL ECONOMIC ALLIANCE OF PALM BEACH COUNTY, INC. ("LORE")

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IDENTITY & INTEREST OF *AMICUS CURIAE*

The *amicus curiae* is a group of small and rural local governments consisting of the City of Belle Glade, Village of Indiantown, the City of Chipley, and the City of Vernon (the "Small Local Governments") and the Lake Okeechobee Regional Economic Alliance of Palm Beach County, Inc. ("LORE"). The Small Local Governments and LORE are located in rural areas of the state. We represent citizens of Florida who rely on electrical power, just like the other citizens of Florida, but whose location and income make them a less desirable customer for electrical power providers whose rates are not regulated by the State, but instead are driven purely by the desire to make the most profit.

The communities represented by the Small Local Governments will be disproportionately impacted by the proposed amendment, because we are located in areas that are less developed and less population-dense, providing less incentive for an unregulated purely profit-driven electrical provider to supply power. Additionally, our smaller and less developed communities rely significantly on taxes and fees provided by existing electrical utilities, and the proposed amendment jeopardizes many of these taxes and fees. The likely results of the passage of the proposed amendment, as detailed below, give rise to our interest in this case.

LORE's mission is to further the economic and general well-being of the people of the "Glades" region in western Palm Beach County. LORE is focused on diversifying the economy of the region by recruiting new business and industries to locate in the Glades. LORE was founded in 2006 arising from meetings among county, municipal, business and civic leaders about the need for a Glades-wide representative body to foster, in a coordinated way, economic development in the region. LORE is not a governmental body, but its board includes the city managers from the region and it partners with the local governments in its efforts.

While the Small Local Governments and LORE agree that the ballot title and summary are misleading and the proposed amendment violates the single-subject rule as argued by the primary parties opposing the proposed amendment, we seek to inform the Court on issues unique to our communities.

STATEMENT OF THE CASE AND FACTS

The Attorney General has requested this Court's advisory opinion to determine the validity of an initiative petition to amend the Florida Constitution, titled "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice" (the "Ballot Initiative" or "Proposed Amendment"). This Court has jurisdiction. *See* Art. V, § 3(b)(10), Fla. Const.

This Court reviews the Ballot Initiative to determine: (1) whether it satisfies the single-subject requirement of article XI, section 3 of the Florida Constitution; and (2) whether the ballot title and summary use sufficiently "clear and unambiguous language" to satisfy section 101.161(1), Florida Statutes. *See In re Advisory Op. to the Attorney Gen. re: Save Our Everglades Trust Fund,* 636 So. 2d 1336, 1339, 1341 (Fla. 1994) (citation omitted). We agree that the Ballot Initiative violates the single subject rule and that the ballot title and summary are misleading as argued by other parties opposing the proposed Amendment. This brief presents other deficiencies in the proposed Amendment that will have negative impacts on our communities.

SUMMARY OF ARGUMENT

The "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice" (the "Proposed Amendment"), if passed, would deregulate the market for Florida electrical power generation, transmission and sale. The Proposed Amendment mandates the creation of a competitive market for power, but the communities represented by the Small Local Governments and LORE would be harmed by that competitive market, because our communities are located in areas with smaller populations and limited commercial development. The Proposed Amendment does not include a provision for a provider of last resort, potentially leaving our communities, particularly those that are more remote or those with the

lowest incomes, without any source of power. Unregulated profit-driven electrical providers would have little incentive to provide services to our communities. Those few electrical providers that provide service will have little, if any, competition, and will be able to charge substantially increased amounts to supply power to our citizens, many of whom are poorer and less able to afford the additional expense.

Further, the Proposed Amendment would cause substantial reduction in the Small Local Governments' revenues, because it would likely result in lower property taxes and municipal utility taxes, and would probably abolish franchise fees. We rely on property taxes, municipal utility taxes, and franchise fees from the existing electrical utilities to supply critical income for our governments to operate. Without these franchise fees and taxes, many of the Small Local Governments will struggle to pay for basic government functions such as police and fire services. These results will make it even more challenging to bring economic development to rural areas of the state.

Finally, the Proposed Amendment creates a constitutional right for any person to generate power. This appears to eliminate State and local police powers to regulate for the safety and public welfare of each community. Even basic safety and zoning regulations may be prohibited if the Proposed Amendment becomes part of the Florida Constitution.

ARGUMENT

I. THE PROPOSED AMENDMENT

The Proposed Amendment seeks to deregulate the Florida electrical utility market, particularly focusing on investor-owned utilities ("IOUs"). The Proposed Amendment would add the following section to Article X of the Florida Constitution:

> (a) POLICY DECLARATION. It is the policy of the State of Florida that its wholesale and retail electricity markets be fully competitive so that electricity customers are afforded meaningful choices among a wide variety of competing electricity providers.
> (b) RIGHTS OF ELECTRICITY CUSTOMERS. Effective upon the dates and subject to the conditions and exceptions set forth in subsections (c), (d), and (e), every person or entity that receives electricity service from an investor-owned electric utility (referred to in this section as "electricity customers") has the right to choose their electricity provider, including, but not limited to, selecting from multiple providers in competitive wholesale and retail electricity markets, or by producing electricity themselves or in association with others, and shall not be forced to purchase electricity from one provider. Except as specifically provided for below, nothing in this section shall be construed to limit the right of electricity customers to buy, sell, trade, or dispose of electricity.
> (c) IMPLEMENTATION. By June 1, 2023, the Legislature shall adopt complete and comprehensive legislation to implement this section in a manner fully consistent with its broad purposes and stated terms, which shall take effect no later than June 1, 2025, and which shall:

(1) implement language that entitles electricity customers to purchase competitively priced electricity, including but not limited to provisions that are designed to (i) limit the activity of investor-owned electric utilities to the construction, operation, and repair of electrical transmission and distribution systems, (ii) promote competition in the generation and retail sale of electricity through various means, including the limitation of market power, (iii) protect against unwarranted service disconnections, unauthorized changes in electric service, and deceptive or unfair practices, (iv) prohibit any granting of either monopolies or exclusive franchises for the generation and sale of electricity, and (v) establish an independent market monitor to ensure the competitiveness of the wholesale and retail electric markets.

(2) Upon enactment of any law by the Legislature pursuant to this section, all statutes, regulations, or orders which conflict with this section shall be void.

(d) EXCEPTIONS. Nothing in this section shall be construed to affect the existing rights or duties of electric cooperatives, municipally-owned electric utilities, or their customers and owners in any way, except that electric cooperatives and municipally-owned electric utilities may freely participate in the competitive wholesale electricity market and may choose, at their discretion, to participate in the competitive retail electricity market. Nothing in this section shall be construed to invalidate this State's public policies on renewable energy, energy efficiency, and environmental protection, or to limit the Legislature's ability to impose such policies on participants in competitive electricity markets. Nothing in this section shall be construed to limit or expand the existing authority of this State or any of its political subdivisions to levy and collect taxes, assessments, charges, or fees related to electricity service.

(e) EXECUTION. If the Legislature does not adopt complete and comprehensive legislation to implement this section in a manner fully consistent with its broad

> purposes and stated terms by June 1, 2023, then any Florida citizen shall have standing to seek judicial relief to compel the Legislature to comply with its constitutional duty to enact such legislation under this section.

II. THE PROPOSED AMENDMENT WILL RESULT IN HIGHER AND DISCRIMINATORY RATES AND PRACTICES FOR SMALL AND RURAL COMMUNITIES.

A. The Proposed Amendment Will Allow Electrical Providers to Charge Discriminatory Higher Rates to Small and Rural Communities.

The Proposed Amendment will have a disproportionate negative impact on small and rural communities by removing existing requirements that the IOUs provide power to all consumers in their territories without discrimination as to rates. Currently, Florida law protects consumers by ensuring that IOUs do not "make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect." § 366.03, Fla. Stat. *See also* § 366.07, Fla. Stat. (permitting the Florida Public Service Commission (the "PSC") to set fair and reasonable rates when a utility is charging "unjustly discriminatory or preferential" rates).

Under the deregulated system, the PSC will no longer have the power to mandate that rates charged are based upon costs plus the ability to earn a return that is set – and monitored – by the PSC, nor would it be able to ensure that those rates are charged to customers on a non-discriminatory basis. Instead, companies whose

only limitation is profit would enter the field. While these companies may compete to provide lower cost power to large consumers of power, such as large business and large cities, the small and rural communities will not receive the same amount of attention or competition. The likely outcome will be that small and rural communities will have, at best, a single electricity provider that can charge whatever price it chooses without competition, raising rates for the lower-income communities that live in these areas. Worse yet, with no provision for an electricity provider of last resort, some hard-to-reach areas could find themselves with no electricity provider at all. Likewise, rural areas would face increased challenges in economic development and growth as there would be a significant disincentive to extend electric service into new, as-yet-under-developed areas unless a customer or the community is willing to front the cost for the new facilities, as further addressed below.

Small and rural communities will also be prime targets for discriminatory blackouts in favor or "higher value" customers. Under existing law, IOUs are required to keep records of all interruptions in service, "make all reasonable efforts" to avoid interruptions in service, and if service must be interrupted, interrupt the service at a time that is least inconvenient for the customers. Fla. Admin. Code. r. 25-6.044. Under the Proposed Amendment, nothing prevents a profit-driven

electrical provider from diverting power away from small and rural communities to supply a larger customer with power, causing the smaller customers to have random and frequent power interruptions.

B. The Proposed Amendment Will Result in Higher Costs to the Rural and Small Communities, Which are Generally Lower Income Communities that are Least Capable of Affording the Increased Cost.

The Proposed Amendment will eliminate the existing requirements that consumers must be treated fairly and charged only a fair and reasonable rate for power. Assuming the Proposed Amendment results in lower prices through competition, these lower prices will likely be unevenly distributed, with consumers in large cities or businesses with high-power usage receiving reduced rates, while consumers in small and more isolated communities can expect higher rates, assuming any of the deregulated entities even attempt to sell power to these communities. *See* 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, 111 (1997) ("Stern & Stern") ("Although competition in electric power markets will yield lower prices for those with market power, such as high-usage industries, low-income purchasers will find that they lack any market power and will lose existing subsidies that previously assured 'lifeline' service at affordable cost."); Todd A. Snitchler, *Maintaining the*

Status Quo: Electricity Utility Deregulation Difficulties in Ohio, 49 Clev. St. L. Rev. 647, 671 (2001) ("Unfortunately, upon implementation of deregulation, in the short-term, prices for small consumers tend to increase, and only large consumers see reduced costs from the start.").

Under existing law, electrical utilities are required to furnish electricity to "each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission." § 366.03, Fla. Stat. The electrical utility may only charge "fair and reasonable rates" for the power, and may not "make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect." § 366.03, Fla. Stat. Other statutes prohibit IOUs from overcharging customers or charging customers for unnecessary expenses. *E.g.*, § 366.041(4), Fla. Stat. (prohibiting electrical utilities from collecting impact fees to recover capital costs from initiating new service unless the fees are "fair, just and reasonable."); § 366.05(1), Fla. Stat. (permitting the PSC to determine fair and reasonable rates and limiting amounts utilities may demand for deposits); § 366.07, Fla. Stat. (permitting the PSC to fix fair and reasonable rate when rates being charged are not fair and reasonable).

The Proposed Amendment will nullify these laws, allowing new electrical providers to charge as much as they wish, or deny service to whomever they choose. While competition may limit the price in urban areas or for large businesses with large power needs, in the small and rural communities represented by the Small Local Governments and LORE, it is unlikely such competition will exist, and the citizens of these communities will be forced to pay whatever amount the electrical provider chooses to charge, however high. One need only look to the results of competition in the Florida telecommunications and broadband market to see proof that applying competition to the provision of essential services ultimately has markedly different impacts on rural areas as compared to more attractive urban markets. Small and rural communities have fewer service options and slower internet speeds than those of their larger, urban neighbors.[1]

[1] As recently as December 2018, the FCC stated: "According to the Federal Communications Commission's (FCC or Commission) most recently available data, about 30% of rural Americans lack access to fixed, terrestrial high-speed Internet of at least 25 Mbps download/3 Mbps upload (25/3 Mbps), the Commission's current speed benchmark, which reflects consumer demand for high-speed broadband services. In urban areas, that number is 2%. The gap between broadband access in rural and urban areas is unacceptable. We must do better." *Further Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration*, Order FCC 18-176, released December 13, 2018, at ¶ 1. Likewise, the FCC data reflects that a significant gap remains in rural communities and Tribal America access to fixed, high-speed broadband: 30.7% of Americans in rural areas and 35.4% of Americans in Tribal lands lack access to fixed terrestrial 25 Mbps/3 Mbps broadband, as compared to only 2.1% of Americans in urban areas. *FCC 2018*

C. The Proposed Amendment Will Allow Electricity Providers to Deny Service to Consumers Represented by the Small Local Governments and LORE in Favor of More Profitable Opportunities.

Under existing law, a public utility may not refuse to provide service to customers within their territory absent certain, limited, bases, such as failure to pay bills or safety concerns. Fla. Admin. Code r. 25-6.105; § 366.03, Fla. Stat.; *Edris v. Sebring Utilities Comm'n*, 237 So. 2d 585, 587 (Fla. 2d DCA 1970) ("The general rule is that a public utility corporation cannot refuse to render the service which it is authorized by its charter (or by law) to furnish, because of some collateral matter not related to that service."); *Fla. Power & Light Co. v. State*, 144 So. 657, 657–58 (Fla. 1932) ("It is the general rule in this state . . . that a corporation which occupies streets and highways, with its mains, pipes, or wires, and is engaged in the business of furnishing gas or electricity for light, heat, fuel, or power, is under a legal duty to supply the same to any person who applies therefor and complies with its reasonable regulations.").

Broadband Deployment Report, FCC 18-10, released February 2, 2018, at ¶¶ 50, 52, 53. The FCC also found that rural areas continue to lag behind urban areas in deployment of wireless LTE service. *Id.* In rural areas, 68.6% of Americans have access to both services, as opposed to 97.9% of Americans in urban areas. *Id.*

The Proposed Amendment upends this law. It will encourage profit-driven electricity providers to provide electricity to the biggest profit centers, such as large businesses and cities, to the exclusion of the small and rural communities represented by the Small Local Governments. Stern & Stern, 4 Envtl. Law. at 127 (describing how, absent a duty to serve any consumer "electricity providers will 'cherry pick' the most financially attractive customers, such as large industrial customers, and will have little incentive to provide service to small or unaggregated customers, such as residential customers."). "Service interruptions and blackouts may become the norm for small consumers who lack market power." Stern & Stern, 4 Envtl. Law. at 128. Nothing in the Proposed Amendment would prohibit an electrical provider from selectively providing power only to certain, more profitable, members of a community, to the exclusion of others.

III. THE PROPOSED AMENDMENT WILL IMPAIR SMALL LOCAL GOVERNMENTS' AND LORES' ABILITY TO STRUCTURE ATTRACTIVE ECONOMIC DEVELOPMENT PROPOSALS AND DAMAGE GROWTH OPPORTUNITIES TO RURAL COMMUNITIES.

Should the Proposed Amendment be approved, small, rural communities and their economic development partners, such as LORE, will face increased, if not insurmountable, challenges in luring new business and industry to their areas. Energy options and pricing are critical components of any business's decision-making process when considering opening a new facility or relocating an existing

one. For industrial facilities that depend upon a reliable power supply option for their manufacturing processes, a reasonable price for that power is a primary factor in deciding the location. The Proposed Amendment will eliminate the ability of Small Local Governments and their economic development partners to attract these businesses, because they will be unable to assure these businesses a reliable, affordable source of power. Adding insult to injury, should the location being considered require the utility to build additional infrastructure so that the location has access to electricity, the potential customer could expect to also pay a premium for the infrastructure build-out, given that the facility provider would no longer be able to factor in potential revenues from the new customer as part of its cost equation. Ultimately, Small Local Governments and LORE would lose attractive business development opportunities to communities located at or near urban centers, depriving rural communities of much needed jobs and likewise depriving Small Local Governments of an increased tax base.

IV. THE PROPOSED AMENDMENT WILL DRAMATICALLY REDUCE THE INCOME OF SMALL LOCAL GOVERNMENTS, HARMING CRITICAL COMMUNITY SERVICES.

The Proposed Amendment will cause significant reductions in property and local municipal taxes, as well as franchise fees that provide critical sources of revenue for the Small Local Governments. This lost revenue would severely harm

the ability of the Small Local Governments to function, and would force local citizens to pay local taxes and fees to make up the deficit. IOUs currently pay over a billion dollars annually statewide in franchise fees, property taxes and municipal utility taxes. The loss or diminishment of these types of revenues would adversely impact the annual budgets of the Small Local Governments. However, the franchises will no longer be present if the Proposed Amendment is passed and the IOUs are no longer permitted to sell electrical power. Further, because the IOUs will be forced to divest their electrical generation properties for some, undetermined sum, to presently unknown entities, the property taxes from these properties will almost certainly decline. Stern & Stern, 4 Envtl. Law. at 105 ("Deregulation and restructuring of the industry are likely to reduce significantly those tax revenues.").

While the IOUs and others opposing the Proposed Amendment address "stranded costs" as a significant issue, the same forces that create the stranded costs will reduce property taxes available to the Small Local Governments. A significant disadvantage of the forced divestiture of assets required by the Proposed Amendment is that the IOUs will be forced to sell their assets in "fire sales" with reduced bargaining power in a limited market flooded with other power generation facilities. Peter Navarro, *A Guidebook and Research Agenda for Restructuring the Electricity Industry*, 16 Energy L.J. 347, 361 (1995). The forced sale will reduce the

value of the assets sold. *Id.* While this undervaluation creates valuation problems for the IOUs and the State, it also creates a new, lower, valuation for the properties sold, reducing property taxes available to the Small Local Governments. This will lead to millions, and likely hundreds of millions of dollars in lost property taxes to local governments across the state. For example, Florida Power & Light Company pays a significant amount in property taxes to the Village of Indiantown for its Martin Power Plant, located within the jurisdictional limits of Indiantown. The plant's taxable value would be significantly diminished if it were required to be sold in a forced sale.

The Small Local Governments would also lose significant municipal utility taxes. As the Florida League of Cities explained in its presentation at FIEC Public Workshop on February 11, 2019, the IOUs paid over $780 million in 2017 in municipal utility taxes, which supply needed revenue to the Small Local Governments, as well as other local governments.

This loss of revenue could cripple many of the Small Local Governments, causing them to struggle to supply basic services. To make up for this lost revenue, the Small Local Governments may be forced to either cut essential services or increase local taxes and fees on their citizens, who are generally lower-income.

Additionally, the Small Local Governments, as well as other local governments and municipalities, would lose hundreds of millions of dollars in franchise fees if the Proposed Amendment passes. The Proposed Amendment 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." Proposed Amendment, (c)(1). This language appears to ban entirely franchise agreements, which give rise to the franchise fees. At best it bans local governments from granting exclusive franchises. During the February 11, 2019 FIEC public workshop, the Florida League of Cities explained that the Proposed Amendment puts franchise fees at risk of being eliminated in their entirety. Losing this source of revenue would substantially harm numerous local governments, and in particular, the Small Local Governments.

V. THE PROPOSED AMENDMENT LIMITS THE SMALL LOCAL GOVERNMENTS' ABILITY TO EXERCISE THEIR POLICE POWERS TO ENSURE THE SAFETY AND WELFARE OF THEIR CITIZENS.

The Proposed Amendment creates a constitutional right for any person to produce electricity themselves, with no limitations on how that electricity is produced. This constitutional right could be construed to limit the ability of the

Small Local Governments (or any State or local government) to impose "best practice" safety and welfare regulations pursuant to their police powers.

"Pursuant to police power, local governments may enact ordinances reasonably necessary for the protection of the public health, safety, welfare, or morals of their communities." *Metro. Dade Cty. Fair Hous. & Employment Appeals Bd. v. Sunrise Vill. Mobile Home Park, Inc.*, 511 So. 2d 962, 965 (Fla. 1987). This power includes the power to impose some regulations on electrical power plants. *Gaines v. City of Orlando*, 450 So. 2d 1174, 1179 (Fla. 5th DCA 1984). However, local governments may not use their police powers in ways that infringe on constitutional guarantees. *Gates v. City of Sanford*, 566 So. 2d 47, 49 (Fla. 5th DCA 1990) ("Ordinances enacted pursuant to general police powers must not infringe constitutional guarantees by invading personal or property rights unnecessarily or unreasonably or by denying due process or equal protection of laws.").

The Proposed Amendment creates a constitutional right for any person to produce electrical power. Because the right will be embedded in the Florida Constitution, the Small Local Governments', as well as the State and other local governments', power to regulate this power generation could arguably be constrained. Facially, the Proposed Amendment vests any person with the right to build a power plant in their backyard. Restrictions imposed to protect a nearby

school, hospital or other facility would be subjected to a higher degree of judicial scrutiny as a result of this right, potentially curtailing the State and local governments' police power. The same curtailment may limit the State or local governments' power to ensure the power plant was constructed safely through building codes and regulations. Similarly, it is not clear that the PSC would have any authority to do so. *See* Fla. Admin. Code r. 25-6.039. While the existing rules could remain in place as they relate to the actual distribution and transmission infrastructure, these rules would likely not apply to independent power sources or the facilities necessary to interconnect those sources to the Florida Electrical Grid. Thus, there would potentially be a regulatory dichotomy of a transmission network heavily regulated for safety, and an independent power generation network that the State and local governments are limited in regulating.

Beyond the obvious safety issues, the Proposed Amendment would potentially eliminate the requirements that utilities coordinate in order to ensure underground facilities share joint trenches and make efforts to reduce the costs of undergrounding. Fla. Admin. Code r. 25-6.081. Thus, there will be little or no incentive to partner with Small Local Governments and LORE in ongoing redevelopment and beautification efforts that including relocating overhead facilities underground.

CONCLUSION

The Proposed Amendment will harm and disproportionately impact small and rural communities such as those represented by the Small Local Governments and LORE by raising rates, reducing revenue, and eliminating the Small Local Governments' ability to regulate for the safety and welfare of their citizens. We respectfully request that this honorable Court reject the proposed amendment.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is filed electronically with the Florida Courts E-Filing Portal and served by electronic transmission on this 18th day of April 2019, on the following:

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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the requirements of Rule 9.210(a)(2) and is written in Times New Roman 14-point font.

By: *s/ GLEN J. TORCIVIA, ESQ.*