SC19-328, SC19-479 (consolidated)

In the Supreme Court of Florida

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)

ATTORNEY GENERAL'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

On January 30, 2019, the Secretary of State submitted an initiative petition presenting a proposed constitutional amendment for placement on a future general election ballot. If approved by the electorate, 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.

The ballot title for the proposed amendment is:

"Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice."

The ballot summary for the proposed amendment states:

> 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.

Upon referral from the Secretary of State, the Attorney General initiated this action by submitting a petition for an advisory opinion on March 1, 2019, in accordance with Article IV, Section 10 of the Florida Constitution. This Court has jurisdiction under Article V, Section 3(b)(10) of the Florida Constitution.

SUMMARY OF ARGUMENT

The proposed amendment should not be placed on the ballot because its ballot title and summary are legally deficient. They would fail to sufficiently inform the public of the proposed amendment's true purpose and would affirmatively mislead the public as to the proposed amendment's true effect.

I. The ballot title and summary do not sufficiently inform the public of the amendment's true purpose: to force investor-owned utilities out of the electricity-generating market and to create a new market that would be less competitive than the status quo insofar as the new market would exclude those substantial market participants. Nor do they inform the public that 75% of electricity customers in Florida will lose their current electricity provider and will have to choose a new one.

Without a clear explanation of those critical impacts on the current energy market, voters cannot understand the proposed amendment's true effect. Thus, because voters will not be able to understand the true meaning and ramifications of the proposed amendment by reading the ballot title and summary, the proposed amendment should not be allowed on the ballot.

II. The ballot title and summary are also affirmatively misleading. They explain what activities investor-owned utilities *may* perform, not the substantial activities that they currently perform but would be *prohibited* from performing. They also omit the significant overhaul of investor-owned utilities' businesses—the divestiture of electricity-generating components—that the proposed amendment would require. Voters will be misled into believing that the amendment's passage would result in a competitive marketplace for energy when the opposite is true. Voters would be told that they would have the right to choose their energy provider, yet 75% of energy customers would not be allowed to choose their current electricity generating provider—without being informed of that fact in the ballot title or summary. And voters would not be told that the proposed "competitive" market would in fact be a market closed to the most substantial current market participants.

Even if there were room for reasonable debate on the issue, the ballot title and summary do not inform voters that the proposed overhaul *might* result, in certain critical respects, in a less-competitive marketplace or a market in which some

customers have fewer options from which to choose. Instead, the ballot title and summary give the misleading impression that the proposed amendment would unqualifiedly promote competition in the energy market and invariably enhance the right of customers to choose their electricity provider.

ARGUMENT

"The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy." *In re Advisory Op. to Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004). Because voters "never see the actual text of the proposed amendment" and "vote based only on the ballot title and the summary," the accuracy of the title and summary are paramount. *Id.* In fact, "an accurate, objective, and neutral summary of the proposed amendment is the sine qua non of the citizen-driven process of amending our constitution. Without it, the constitution becomes not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas." *Id.* at 653-54.

Section 101.161(1), Florida Statutes, codifies the standard for reviewing ballot titles and summaries of proposed constitutional amendments. Any measure "submitted to the vote of the people" must include a ballot title "not exceeding 15 words in length, by which the measure is commonly referred to or spoken of," and a ballot summary, "not exceeding 75 words in length," explaining "the chief purpose

of the measure." § 101.161(1), Fla. Stat. (2017). "Implicit in this provision is the requirement that the proposed amendment be accurately represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000).

The purpose of the ballot title and summary is "to provide fair notice of the content of the proposed amendment." *Advisory Op. to the Att'y Gen.-Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996). To satisfy section 101.161, Florida Statutes, the title and summary must "state in clear and unambiguous language the chief purpose of the measure," *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982), so that the proposed amendment does not "fly under false colors" or "hide the ball" as to its legal or practical effect, *Armstrong*, 773 So. 2d at 16 (internal quotation marks omitted).

In assessing a proposed amendment's ballot title and summary, this Court asks two questions: "First, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public.'" *Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694, 701 (Fla. 2010) (quoting *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008)). Here, the ballot title and summary fail to meet either prong.

I. THE BALLOT TITLE AND SUMMARY DO NOT FAIRLY INFORM THE VOTER OF THE CHIEF PURPOSE OF THE PROPOSED AMENDMENT.

To determine whether a ballot summary states the "chief purpose" of a proposed amendment, this Court "look[s] to objective criteria, like the amendment['s] main effect." *Detzner v. League of Women Voters of Fla.*, 256 So. 3d 803, 809 (Fla. 2018). When "a ballot summary [does] not explain to the reader or sufficiently inform the public of important aspects of the proposed amendment," this Court must strike it. *Advisory Op. to Atty. Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (quotation marks omitted). Here, the ballot summary does not explain or sufficiently inform the public about several key aspects of the proposed amendment, including the proposed amendment's "chief purpose."

Under current law, investor-owned utilities may generate and sell electricity. *See* § 366.02(2), Fla. Stat. (defining "electric utility" to include investor-owned utilities). The proposed amendment's sponsor contends that the chief purpose of the proposed amendment is to create competitive markets for wholesale and retail generation and sale of electricity. *See* Policy Declaration. The ballot summary echoes the position of the sponsor.

The sponsor's articulation, however, does not end the inquiry. The proposed amendment's text reveals that the "main effect" of the proposed amendment is something vastly different. Currently, investor-owned utilities serve 75% of electricity customers in Florida. *Statistics of the Florida Electric Utility Industry*,

Florida Public Service Commission, Table 33 (Dec. 31, 2017). The proposed amendment would oust investor-owned utilities from the electricity-generation business, forcing them to divest their electricity-generating assets. The proposed amendment's true "chief purpose," then, is not to open the electricity-generation market to entities other than investor-owned utilities, creating a competitive market. Instead, it would create a new market for electricity generation excluding investor-owned utilities, the current largest market participants. Indeed, the first requirement in the proposed amendment's implementation provision is that the Legislature enact legislation that is "designed to (i) limit the activity of investor-owned electric utilities to the construction, operation, and repair of electrical transmission and distribution systems." Amendment Text, § (c)(1)(i).

The problem therefore "lies not with what the summary says, but, rather, with what it does not say." *Askew*, 421 So. 2d at 156. The ballot summary does not fairly inform voters that investor-owned utilities—serving 75% of electricity customers—must divest their electricity-generating assets or that investor-owned utilities would be barred from participating in the new electricity-generation market. Nor does it fairly inform voters that electricity generation is a substantial component of investor-owned utilities' businesses: Of the investor-owned utilities, all but one generates electricity, and those electricity-generating utilities serve 99.6% of customers served by investor-owned utilities. *Statistics of the Florida Electric Utility Industry*, Florida

Public Service Commission, Table 33 (Dec. 31, 2017). Instead, the ballot summary provides only that the proposed amendment would "[l]imi[t] investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems." Without explaining that electricity generation constitutes a significant segment of investor-owned utilities' businesses that would have to be divested, the ballot summary does not explain that excluding investor-owned utilities from the electricity-generating market would significantly alter the nature of their businesses and vastly shrink the electricity-generating market itself. Without "this clear explanation, the voters will be unaware of the valuable" benefit—actual competition—"which [will] be lost if the amendment is adopted." *Fla. Dep't of State v. Fla. State Conference of NAACP Branches*, 43 So. 3d 662, 669 (Fla. 2010).

Detzner v. League of Women Voters of Fla., 256 So. 3d 803, 809 (Fla. 2018), which this Court decided last year, is analogous. There, although the ballot summary informed voters that under the proposed amendment, "district school boards will no longer have the authority to operate, control, and supervise public schools that they do not establish," the ballot summary was nonetheless defective because it "fail[ed] to explain who or what, other than district school boards, currently has the authority to establish public schools, . . . and who or what will have the authority to establish future public schools if voters approve the revision." *Id.* Left unsaid in the defective

ballot summary was both the current state of affairs and the consequences of passing the proposed amendment.

So too here. The ballot summary does not disclose the significance of electricity generation to investor-owned utilities. Nor does it disclose that investor-owned utilities would have to divest those significant assets if the proposed amendment passed or that they would be barred from the electricity-generating market. And it does not disclose that three-fourths of consumers would be required to choose a new electricity provider. Because voters are informed only that the proposed amendment is supposed to increase competition, they "will simply not be able to understand the true meaning and ramifications of the revision," which is that the proposed amendment, in at least some critical respects, would result in less rather than more competition. *Detzner*, 256 So. 3d at 810; *see Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 620 (Fla. 1992) (explaining that "[t]he summary must give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots").[1]

[1] It is no answer to say that the ballot summary tracks the text of the proposed amendment. *See Armstrong*, 773 So. 2d at 15 (concluding that ballot summary was defective even though it "faithfully tracked the text of the proposed amendment").

II. THE BALLOT TITLE AND SUMMARY MISLEAD THE PUBLIC AS TO THE PROPOSED AMENDMENT'S LEGAL EFFECT.

"A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." *Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694, 701 (Fla. 2010). In light of the proposed amendment's true "chief purpose" and legal effect, the ballot title and summary here—which focus on meaningful consumer choice and the creation of purportedly competitive markets—are affirmatively misleading.

1. The ballot title and summary do not inform voters that investor-owned utilities would be prohibited from owning, constructing, operating, or repairing electricity-generating assets, something they currently do. Instead, the ballot title fails to mention this prohibition at all, while the ballot summary only obliquely refers to the activities that investor-owned utilities *may* perform, rather than to those activities they would be *prohibited* from performing. *See* Ballot Summary ("Limits investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems.").

The ballot summary provides that the proposed amendment "[g]rants customers of investor-owned utilities the right to choose their electricity provider." The term "customer" includes a customer of an "investor-owned utility," and such customers make up three-fourths of Florida voters. Based on the ballot summary, voters who are currently "customers of investor-owned utilities" might reasonably

assume that they may choose to retain their current investor-owned utility since they have "the right to choose their electricity provider." But many voters will not have the right to make that choice. Similarly, while the ballot summary claims that the amendment would establish "competitive wholesale and retail markets for electricity generation and supply," the proposed amendment text requires that implementing legislation exclude investor-owned utilities from participating in the "competitive" market for electricity generation.

Given the substantial nature of this change to investor-owned utilities and to consumer choice, the ballot summary's mention of what activities investor-owned utilities may conduct, rather than disclosure of what activities investor-owned utilities currently are conducting but would be prohibited from conducting in the future, is fundamentally misleading.

Moreover, the ballot title and summary are not "written clearly enough for even the more educated voters to understand [the proposed amendment's] chief purpose." *Smith*, 606 So. 2d at 621. The Court has repeatedly removed proposed amendments because the ballot title and summary fail to explain the subject matter to the voters, omit the current state of affairs, or leave out the consequences of the proposed amendment. *See Detzner*, 256 So. 3d at 809 (removing proposed amendment for failing to explain who or what, other than the school boards, had or would have authority to establish public schools); *Advisory Op. to the Att'y Gen. re:*

Fish & Wildlife Conservation Comm'n, 705 So. 2d 1351, 1355 (Fla. 1998) (removing proposed amendment from ballot where ballot title and summary failed to "explain to the reader" that by vesting power in one governmental unit, it was removing that power from the governmental unit that currently had that power); *Smith*, 606 So. 2d at 621 (removing proposed amendment because of ballot summary that "not only assume[d] an extensive understanding of [the subject matter], but also require[d] the voter to infer a meaning which is nowhere evident on the face of the summary itself").

To understand that the proposed amendment here would require investor-owned utilities to divest their considerable power-generating assets, members of the public would have to know the following facts which are not disclosed in the ballot summary: (1) that a substantial part of investor-owned utilities' business is electricity generation and sale; (2) that "electrical transmission and distribution systems" do not include electricity generation systems; (3) that the "[l]imit" on investor-owned utilities' activities is instead an anticompetitive requirement that they divest substantial assets; and (4) that the public may be required to compensate the investor-owned utilities for those assets. As electricity generation, supply, and distribution is a highly regulated and complex industry, the average voter is likely unaware of these critical facts. Failing to disclose them in the ballot title and

summary thus affirmatively misleads voters as to the wholesale change that the proposed amendment would bring to the energy market.

2. The ballot summary also misleadingly informs voters that, if passed, the proposed amendment would "[g]rant customers . . . the right to choose their electricity provider"; would require the Legislature to create "competitive wholesale and retail markets for electricity generation and supply"; and would allow "[m]unicipal and cooperative utilities [to] opt into competitive markets." But if passed, the proposed amendment would do none of the above; as a result, it should not be placed on the ballot. *Advisory Op. to Atty. Gen.*, 642 So. 2d 724, 727 (Fla. 1994) (rejecting amendment because it "will not deliver to the voters of Florida what it says it will").

First, the proposed amendment would not grant consumers "the right to choose their electricity provider." After all, consumers would not be allowed to choose to keep their pre-amendment electricity provider if, like three-fourths of Floridians, that provider is an investor-owned utility. In order not to mislead voters, the ballot summary would have to communicate that the proposed amendment would grant consumers the right to choose their electricity provider, so long as their choice is not an investor-owned utility, like the one that currently provides them with electricity. Instead, however, the ballot summary tracks the similarly misleading policy declaration. That declaration misleadingly states that Florida's "wholesale

and retail electricity markets [should] be fully competitive," and that consumers should have "meaningful choices" among providers. But as explained below, a "fully competitive" electricity generation market would not prohibit investor-owned utilities from being market participants, and consumers lack a "meaningful choic[e]" of providers if they are not permitted to choose their current investor-owned utility provider if they wish.

This Court's ruling in *Advisory Opinion to the Attorney General re: Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998) is instructive. There, the Court removed a proposed amendment because it would "creat[e] an illusory right to choose a health care provider when in fact it would severely limit an individual's ability to enter into a health care contract." *Id.* at 566. Here, the proposed amendment's creation of "meaningful choices among a wide variety of competing electricity providers" is similarly illusory, as it would limit an individual's ability to contract with an investor-owned utility for electricity generation. The ballot title and summary do not merely fail to disclose that fact; they affirmatively mislead the voter into believing that their choice would be "meaningful" and "competitive."

Second, the proposed amendment would not require the Legislature to create "competitive wholesale and retail markets for electricity generation and supply." In fact, it would prohibit the Legislature from creating such a competitive market: The

proposed amendment provides that investor-owned utilities—current market participants serving 75% of the market—are not permitted entry into the electricity-generation market. A core feature of a competitive market is the absence of barriers to entry that would prevent a company from participating in the market. *E.g.*, *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991) (characterizing a market as "highly competitive" where "[n]o significant barriers exist[ed] to entry into the market"). For example, in setting rates, the Federal Energy Regulatory Commission "may rely on market-based rates" but only "[w]here there is a competitive market." *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998). In light of this requirement, FERC approves applications to sell electricity at market-based rates "only if," among other things, the seller "cannot erect . . . barriers to entry by potential competitors." *Id.* By contrast, if a seller can erect barriers to entry by a potential competitor, the market is not sufficiently competitive to allow the seller to use market-based rates. *Id.* The ballot summary thus misleads voters into concluding that the proposed amendment would create a competitive market for electricity generation because the resulting market would erect a significant barrier to entry—a barrier only imposed on the most significant current market participants.

Even if there were room for reasonable debate on the issue, the ballot summary and title do not inform voters that the proposed overhaul *might* result, at

least in certain critical respects, in a less competitive marketplace or a market in which consumers have less choice than they do now. Instead, the ballot title expressly and unqualifiedly asserts that the proposed amendment would create the "Right to [a] Competitive Energy Market for Customers of Investor-Owned Utilities" by "[a]llowing consumer choice"; and the ballot summary likewise expressly and unqualifiedly asserts that the proposed amendment "[g]rants customers of investor-owned utilities the right to choose their electricity provider." The amendment's text goes even further, declaring that "[i]t is the policy of the State of Florida that its wholesale and retail electricity markets be *fully* competitive," even though the amendment would bar many existing market participants from providing electricity to current customers of investor-owned utilities.

In sum, the proposed amendment would not deliver to the voters of Florida what the ballot title and summary promise—a competitive market for energy generation that would allow meaningful consumer choice. Read as a whole, the ballot title and summary convey the misleading message that electricity generation and supply would be open to all—rather than explaining that electricity generation and supply would instead be open to all except the most significant current market participants. The ballot title and summary also fail to explain to voters the substantial costs of requiring by law that investor-owned utilities divest their ownership of

generation facilities. As a result, the proposed amendment should not be placed on the ballot.

CONCLUSION

For the foregoing reasons, the proposed amendment should not be placed on the ballot.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished by electronic service through the Florida Courts E-Filing Portal on this 18th day of April, 2019, to the following:

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