IN THE SUPREME COURT OF FLORIDA

Case Number SC19-328

Upon Request from the Attorney General
For an Advisory Opinion As to the
Validity of An Initiative Petition

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

INITIAL BRIEF OF
Orlando Utilities Commission
Florida Municipal Electric Association, Inc.
Florida Municipal Power Agency
(Filed in Opposition to the Initiative Petition)

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INTRODUCTION

Aside from the current matter before the Court for review, it is difficult to conceive of a ballot initiative that would have more of an impact on the personal welfare and economic well-being of every resident, visitor, and enterprise in the State of Florida. Everyone in the state—residents, visitors, business owners, and consumers—is impacted by the cost and reliability of electricity, at home, at work, and in what they pay for goods and services. We need look no further than hurricanes in recent years to see the catastrophic impacts on vulnerable individuals, when electricity is not available.[1]

Today, the integrated electric utility grid in Florida is made up of generating facilities, transmission facilities (to move electricity from where it is generated to the areas where it is delivered), and distribution facilities (to distribute electricity in local areas and connect end users to the integrated electric grid). This system of electric generation and delivery is made up of facilities owned by investor owned utilities, municipal utilities, and electric cooperatives and is governed by a stable regime of statutory and regulatory provisions.

[1] Michael Nedelman, *Husband and wife among 14 dead after Florida nursing home lost A/C*, CNN.com (Oct. 9, 2017, 3:47 PM), https://www.cnn.com/2017/10/09/health/florida-irma-nursing-home-deaths-wife/index.html (detailing deaths in South Florida resulting from Hurricane Irma and related electric outages).

This integrated system is made possible by the coordinated effort of policy makers, regulators, and utility providers, at the local, state and federal levels, and works well to provide adequate, reliable, and cost-effective electric service to all in Florida who request it. In fact, under the current system of electric service, the providers are required to provide service without regard to whether the customer requesting it is financially viable or a good business risk. The current proposal attempts to dismantle all of this under the misleading banner of providing consumer choice. What the State would be left with in the place of the current integrated electric grid is unanswered, but for purposes of the Court's review that answer is not necessary to uncover the proposed initiative petition's manifold and fatal flaws.

IDENTITY AND INTERESTS OF THE PARTIES

A. ORLANDO UTILITIES COMMISSION

The Orlando Utilities Commission ("OUC") is a statutory municipal utility that was created by Chapter 9861, Laws of Florida (1923), a Special Act of the Florida Legislature (as subsequently amended from time to time, the "Act") as a part of the City of Orlando, but governed by a Board of Commissioners consisting of five members (the "OUC Board"). All members of the OUC Commission must be OUC customers, and at least one member must live outside the Orlando city limits. The Mayor of Orlando serves as an *ex officio* member of the OUC

Commission; the other four members may serve up to two four-year terms. All members of the OUC Commission serve without compensation.

The OUC Commission sets the rates and establishes the policies governing OUC's service and operations. OUC's board meetings are open to the general public and customers are permitted to participate in OUC Commission meetings in accordance with Chapter 286, Florida Statutes. OUC's generating facilities include owned interests totaling approximately 197 MW of simple cycle combustion turbine and 476 MW of combined cycle capacity fueled by natural gas, 775 MW of capacity fueled by coal, and 60 MW of nuclear generating capacity. OUC's transmission system provides service through an Open Access Transmission Tariff approved by the Federal Energy Regulatory Commission and consists of an integrated system of 31 substations interconnected through approximately 335 miles of 230 kV, 115 kV, and 69 kV transmission lines. OUC has a total of 22 interconnections with Florida Power & Light Company ("FPL"), Duke Energy Florida, LLC ("DEF"), KUA (Kissimmee Utility Authority), FMPA, Lakeland Electric, Tampa Electric Company ("TECO"), and TECO/Reedy Creek Improvement District. Additionally, through an Interlocal Agreement, OUC is responsible for planning, operating and maintaining the city of St. Cloud's four substations, 55 miles of transmission lines, and three interconnections. OUC currently serves approximately 242,000 electric customer accounts, including

approximately 211,000 electric residential customers, 25,000 electric commercial customers, 5,700 electric industrial customers, a small number of customers to whom OUC provides street and highway lighting service, and a similarly small number of other public authorities to which OUC provides service.

OUC has a territorial agreement with Duke Energy, which has been approved by the Florida Public Service Commission (the "PSC") and is subject to the PSC's continuing jurisdiction.

B. FLORIDA MUNICIPAL ELECTRIC ASSOCIATION, INC.

The Florida Municipal Electric Association, Inc. ("FMEA"), is the statewide trade association for Florida's 33 local government-owned public power utilities.[2] Founded in 1942 in response to WWII fuel shortages, for more than 75 years FMEA has been committed to supporting its public power members and the local communities they serve with reliable and low cost electric service. FMEA's member utilities provide electric service to approximately 14% of Florida's statewide electric load, which exceeds three million Floridians.

Many of FMEA's member utilities purchase some or all of their wholesale power supply from IOUs,[3] through contracts that are regulated and approved by

[2] General information concerning FMEA as well as specific data about its public power utility members can be found at its website: www.publicpower.com.

[3] *See infra* note 5.

the Federal Energy Regulatory Commission ("FERC"), including the city of Blountstown, the city of Chattahoochee, the city of Quincy, the city of Williston, and the city of Wauchula, to name a few. Many FMEA member utilities also rely on transmission service from IOUs, and have related transmission service agreements, also regulated and approved by FERC, to provide service to their retail customers. These FMEA member utilities are transmission dependent utilities ("TDUs") who do not have generation facilities connected to their local grid and, so, must purchase power from outside their system and rely on transmission service of neighboring IOUs to deliver that power to their local system. Finally, many of FMEA's member utilities have PSC-approved territorial agreements with IOUs, and several have franchise agreements with IOUs that serve portions of the area inside the member utility's city limits, if that area is not included in the member utility's service territory.

C. FLORIDA MUNICIPAL POWER AGENCY

Florida Municipal Power Agency ("FMPA") is a separate legal entity created pursuant to article VII, section 10 of the Florida Constitution, and the provisions of section 163.01, Florida Statutes, and part II, chapter 361, Florida Statutes, and exercising the powers provided by both provisions, or either, pursuant

to the interlocal agreement among its 31 member utilities.[4] FMPA owns interests and holds output entitlements (in whole or in part) in electric generation facilities across the State, and relies on the wholesale transmission systems of FPL and DEF to transmit the electric energy it generates to the member utilities it serves. Today, FMPA has five power supply projects (its St. Lucie Project, Stanton Project, Stanton II Project, Tri-City Project, and All-Requirements Power Supply Project) that supply all or a portion of the wholesale power needs of 22 public power utilities in Florida.

Additionally, in May 2018, FMPA, together with OUC, entered into new contractual arrangements with subsidiaries of NextEra Energy, Inc., the parent company of FPL ("NextEra") on behalf of eleven FMPA member utilities – which together with OUC is called the Florida Municipal Solar Project – that will cumulatively purchase approximately 223.5 MWs of energy from new solar photovoltaic generating facilities to be constructed by NextEra and planned to be online in 2020.

Each of FMPA's five existing power supply projects, and the new Florida Municipal Solar Project, require the utilization of transmission service from IOUs to transmit the power from where it is generated to the local systems of FMPA's

[4] All of FMPA's members are also members of FMEA. JEA (formerly, the Jacksonville Electric Authority) and Reedy Creek Improvement District are members of FMEA, but not FMPA.

member utilities. FMPA's power supply projects cannot function without transmission service from IOUs.

FMPA, through its St. Lucie Project, is also the joint owner of an 8.806% minority interest in the St. Lucie Unit No. 2 nuclear plant, along with OUC, which is majority owned and operated by FPL. As a part of a separate nuclear reliability exchange agreement with FPL, FMPA, and OUC also have certain rights to the output of St. Lucie Unit No. 1, in the event of outages or reduced output from St. Lucie Unit No. 2. These contractual ownership and operations agreements are regulated by the United States Nuclear Regulatory Commission (the "NRC"). FMPA also has interconnection and interchange agreements with IOUs, approved and regulated by FERC, which enable it to buy and sell power with the IOUs and effectuate the overall service that FMPA provides to its member utilities. And, FMPA enters into power sales and power purchase agreements from time to time with IOUs which are also regulated by FERC.

D. JOINT INTERESTS OF THE PARTIES

OUC, FMEA, and FMPA (collectively, the "Public Power Parties") are each significantly and determinately impacted by the initiative petition entitled "Right to

Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice" (the "Initiative").[5]

Not only does the Initiative impermissibly roll together a whole host of separate subjects (consumer choice for retail electric service, ownership of transmission and generation assets, regulation of electric utilities at wholesale (federal) and retail (state) levels, and competitive markets, to name a few), it is also fundamentally misleading. From its title to the ballot summary, it certainly aims to appeal to voters with consumer-friendly phrases like "right to choose." Ultimately, however, the Initiative tries to do too much, implicating far too many disparate subjects, lacking a logical and natural oneness of purpose, altering and performing the functions of multiple branches of government (at the state and federal levels), and failing to disclose all constitutional provisions affected by the Initiative, while misleading voters as to the true meaning and ramifications such an amendment will have on them, and on our State.

[5] Nowhere in the Initiative is the term "investor-owned utilities" defined, which is almost certain to cause voter confusion. However, for purposes of this Initial Brief, the Public Power Parties will use the term "investor owned utilities" or "IOUs" to refer to the PSC-regulated, for-profit electric utility companies that OUC, FMEA's member utilities, and FMPA have territorial, wholesale power, transmission, and other contractual arrangements with, including FPL and DEF. *Cf., e.g.*, Fla. Pub. Serv. Comm'n, *Statistics of the Florida Electric Utility Industry*, at 4 (Oct. 2018) (available at http://www.psc.state.fl.us/Files/PDF /Publications/Reports/Electricgas/Statistics/2017.pdf)

Particularly misleading is the enticement of voters who rely on public power utilities[6] for their electric power, as it states that "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." Initiative § (d).

Considering the reality of Florida's highly integrated electric grid, and the pre-existing, long-term contractual commitments among IOUs and public power utilities, even if Florida's public power utilities are excluded from an aspect of the Initiative, there is no practical way public power utilities can avoid its overall negative impact. *Contra* Initiative § (d) ("Nothing in this section shall be construed to affect the existing rights or duties of . . . municipally-owned electric utilities, or their customers and owners in any way . . . .") (hereinafter, the "*Opt-In Clause*"). Regardless of whether a public power utility elects to opt into competitive markets, the Initiative prohibits IOUs from owning electric generation and transmission facilities and outright prohibits the "granting of either monopolies or exclusive franchises for the generation and sale of electricity." Initiative § (c)(1)(iv). These two provisions alone would substantially impair the existing contractual relationships for power supply, transmission service, and generating

[6] "Public power utilities," generally, refers to the Orlando Utilities Commission, and all of the member retail utilities of the Florida Municipal Electric Association, Inc., and Florida Municipal Power Agency.

plant joint ownership for Florida's public power utilities, as well as invalidate every existing power supply agreement, interconnection agreement, territorial agreement and franchise agreement between the public power utilities and the IOUs, all to the misunderstanding of the voter.

The Initiative before this Court for review would fundamentally alter the contractual relationships that the Public Power Parties have built and relied upon for decades and destabilize the business arrangements necessary to serve the more than three million people in Florida that rely on those public power utilities. It would also dismantle the governmental framework under which Florida's public power utilities and other retail electric utilities have been regulated for years. The Public Power Parties, therefore, present this Initial Brief in opposition to the Initiative being placed on the ballot.

STATEMENT OF THE CASE AND FACTS

Advisory opinions of this Court on constitutional initiatives are limited to whether a proposed amendment complies with the single-subject requirement of article XI, section 3 of the Florida Constitution; whether the ballot title and summary comply with section 101.161(1), Florida Statutes; and whether the associated financial impact statement, prepared by the Financial Impact Estimating Conference, is in compliance with section 100.371, Florida Statutes.

On March 29, 2019, this Court entered an order authorizing interested parties to file briefs on or before April 18, 2019, addressing the Initiative's compliance with the requirements for its placement on a general election ballot. As interested parties, the Public Power Parties respectfully submit that the Initiative does not comply with either the single-subject or the ballot summary requirements, and the financial impact statement fails to satisfy its statutory requirements.

SUMMARY OF ARGUMENT

The Initiative fails to satisfy the single-subject requirement. Art. XI, § 3, Fla. Const. The Initiative purports to propose only one change, customer choice of electric providers, but in fact implicates at least two major issues for voters: (1) the offer of customer choice of electricity providers for the customers of existing IOUs, and (2) disassembly of the entire policy and regulatory framework of the electric utility industry in Florida. Impermissibly, the Initiative forces a voter in favor of one aspect of the proposal to vote on the entire Initiative in an "all or nothing manner." *Advisory Op. to Att'y Gen. re Right to Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998).

The Initiative also substantially alters the functions of multiple branches of government (at the state, federal, and local levels). STATE LEVEL—The existing legislative policy choice for established service territories among utilities, and the

statutory obligation or "duty to serve" that IOUs and public power utilities must serve customers in their territories, would be compromised or eliminated by the Initiative. In place of the existing regulatory oversite by the federal and state government, the Legislature would receive new policy instructions by constitutional mandate. The regulatory power to provide for a reliable electric grid in the event of an emergency, *see* § 366.04(5), Fla. Stat. (2018) (often cited as the PSC's "Grid Bill") grants the PSC jurisdiction over "the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes." The Initiative would compromise or eliminate the ability of the PSC to regulate service territories and grid reliability. This elimination of both the legislative prerogative and regulatory authority will eviscerate the State's ability to provide for the health, safety, and welfare of its citizens, visitors and business through the assurance of an adequate and effective grid.

FEDERAL LEVEL—The Initiative even attempts to impermissibly impose on the pre-empted and settled authority of the federal government, *see, e.g., Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453 (1972) (establishing that federal authority extends over wholesale sales of electricity within Florida because of the interconnected nature of the electric grid to utilities within and outside of the State), by establishing a new regulatory scheme to ensure the

competitiveness of the wholesale market. *See* Initiative § (c)(1)(v). *Compare* 10 C.F.R. pt. 50 (providing, pursuant to the U.S. Atomic Energy Act of 1954, as amended, for the exclusive federal licensing for the ownership and operation of nuclear generation facilities in the United States, 42 U.S.C. § 2131 (2019)).

LOCAL LEVEL—Finally, the Initiative has a distinct and substantial effect on local governmental entities in the state, including municipal-owned electric utilities like the Public Power Parties. First, the existing authority for municipalities and counties to enter into exclusive franchise agreements is eliminated. Second, the collection of franchise fees would be rendered void. And, third, the contractual framework for the Public Power Parties' power supply, transmission service, and generating plant joint ownership is substantially impacted, because all of those existing contractual relationships with IOUs would necessarily be altered.

The Initiative's title and ballot summary also affirmatively misleads voters and omits necessary and material facts in violation of section 101.161(1), Florida Statutes. The ballot summary sets up false and misleading expectations that Florida's public power utilities will be unaffected by the Initiative unless they choose to "opt into competitive markets." This misguided notion could allow the customers of public power utilities to vote under the mistaken belief that there is no impact on them as public power utility customers. The reality, though, is that the Florida Public Power Parties will be unable to avoid the Initiative's impact.

Under the guise of an "exception," Florida's public power utilities will have their operation-critical contractual arrangements impaired by the Initiative's new prohibitions on IOUs owning generation or transmission assets. Thus, the voters who are served by public power utilities might vote for or against the Initiative, in either case based on the inaccurate and false language of the ballot summary.

The ballot summary also misinforms voters by hiding the true meaning and ramifications of many of the Initiative's key provisions, one of which is to eliminate regulated monopoly services and open the Florida market to generation suppliers without consideration for the impact on consumers. The ballot summary also fails to mention that providers who may compete in this type of market may have no duty to serve, and such current protections for consumers would be eliminated. The ballot summary leaves it to voters to guess as to the "inconsistent statutes, regulation, and orders" that will be made void. And, it also fails to mention the creation of a new regulatory scheme to ensure competitive markets through an independent market monitor.

The Financial Impact Statement prepared by the Financial Impact Estimating Conference fails to meet its statutory requirements, as it creates ambiguity by narrowly referencing potential cost savings for government electricity customers, without quantification, in the larger context of describing the Initiative's impact as negative and indeterminate. Such a statement is misleading and requires correction.

ARGUMENT

I. THE INITIATIVE VIOLATES THE FLORIDA CONSTITUTION'S SINGLE SUBJECT REQUIREMENT.

The process of placing a ballot proposal before the voters to amend the state constitution allows great flexibility for special interest groups to draft and advance the proposed amendment without public, legislative, or judicial input. For this reason, the constitution's framers required "the electorate's attention be directed to a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution." *In re Advisory Op. to Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) (internal quotation marks and citation omitted); *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984) ("[T]he authors of article XI realized that the initiative method did not provide a filtering legislative process for the drafting of any specific proposed constitutional amendment or revision.").

The single subject requirement requires that the proposed amendment have a "logical and natural oneness of purpose," *Fine v Firestone*, 448 So. 2d at 990, which is ascertained by considering whether the proposed amendment "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 Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 892 (Fla. 2000). Thus, logrolling is prohibited.

A. The Initiative Violates the Prohibition on Logrolling.

The constitutionally violative practice of logrolling occurs when "several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." *Advisory Op. to Att'y Gen. re Extending Existing Sales Tax to Non-Taxed Servs.*, 953 So. 2d 471, 477 (Fla. 2007) (internal quotation marks and citation omitted); *see also Advisory Op. to Att'y Gen. re Right to Citizens to Choose Health Care Providers*, 705 So. 2d at 566 (noting that voters would have to make a choice on two distinct subjects, forcing the electorate to make an "all or nothing" decision); *Save our Everglades*, 636 So. 2d at 1339 (noting that logrolling "does not give the people an opportunity to express the approval or disapproval severally as to each major change suggested" (internal quotation marks and citation omitted)).

While the Initiative cobbles together a whole host of separate subjects impermissibly under the general guise of electricity or electric utilities, its flaw is in fundamentally combining two distinct subjects: a proposal to provide customer choice in the purchase of electricity among current customers of IOUs, and the disassembly of the entire policy and regulatory framework of the electric utility industry in the State. A voter who wants customer choice, assuming that voter is not served by a public power utility and, thus, is not being provided customer choice by the Initiative, has to vote yes or no on the destruction of the Legislature's

policy framework and the state regulatory framework, in order to cast his vote for utility choice.

In this way, the Initiative is little different from the proposed amendment in *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998), where the court struck down the proposal on the grounds of the single-subject requirement. There, a simpler proposal (1) provided for the right of citizens to choose their health care provider and (2) banned contracts that would limit health care provider choices. While cobbled together under the general guise of health care provider choice, the Court found these subjects to be distinct. *Id*. at 566. One addresses the economic freedom of consumers to make choices in a marketplace, and the other addresses the rights of individuals to contract with others.

For the instant Initiative, the distinction is even more stark. The subject of electric customer choice addresses the economic freedom of consumers to make choices in a marketplace of electric providers. The subject of the existence, or not, of the State's policy and regulatory framework of the electric utility industry in Florida addresses the province of the State to enact policy and provide for the regulation of electric utilities. The subject of unwinding of the existing, intricate web of electric service and supply contracts among the State's utilities addresses the wholesale market destabilization, stranded costs and financial losses to utilities

and their rate payers. The subject of granting customers the right to generate and sell electricity addresses the changing roles of utilities and the modifications to their systems that would be required to accommodate customer-to-customer sales. The subject of granting each Florida citizen the right to seek judicial relief compelling the legislature to implement the amendment addresses a whole new mechanism outside of the PSC process for dealing with a subject that is uniquely within the purview and expertise of the PSC.

This Court need look no further than the example that *Right of Citizens to Choose Health Care Providers* provides to recognize the clear and constitutionally prohibited logrolling.[7]

B. The Initiative Substantially Alters the Functions of Multiple Branches of Government.

The Initiative violates the single subject requirement because it substantially alters the functions of multiple branches of government. "Although a proposal may *affect* several branches of government and still pass muster, no single proposal can substantially *alter* or *perform* the functions of multiple branches . . . . ." *Save our Everglades*, 636 So. 2d at 1340 (footnote and citation omitted). '[W]here a

[7] Additionally, there is no need for the policy and regulatory choices of the State to be torn asunder to provide customer choice in the purchase of electricity For example, to limit the current Initiative more narrowly to customer choice for the customers of IOUs, the removal of (i), (iii), and (iv) from (c)(1) would accomplish that.

proposed amendment changes more than one government function, it is clearly multi-subject." *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984).

Clearly, the Initiative suffers from three fatal shortcomings as to impact on various branches of government, at the state, federal, and local levels.

First, all of the existing Legislative policy preferences (for example, that there be defined territories among utilities and an obligation of utilities to serve within their territories, §§ 366.03 and 366.04(2)(d) and (e), Fla. Stat. (2018)), are obliterated by the Initiative immediately upon the enactment of any law by the Legislature pursuant to the provisions of the Initiative. Initiative § (c)(2). Further, not only does the Initiative do violence to the Legislature's existing policy choices, but it mandates the Legislature to adopt new policy without question (performing the task of Legislative policy-making), and gives expansive standing to "any Florida citizen," Initiative § (e), to sue to enforce the Initiative's policy edicts. Likewise, the authority of the PSC to regulate electric utilities in the State of Florida, for the benefit and protection of Florida's residents, visitors, and businesses who are impacted by the reliability and cost of electric service in the state, is eliminated in the cursory language of the Initiative that "regulations or orders that conflict with this section shall be void." *Id.* Included in this swath of regulatory chaff cut to the ground is the essential role the PSC plays in providing for "an adequate and reliable source of energy for operational and emergency

purposes" § 366.04(5), Fla. Stat. (2018), pursuant to its Grid Bill jurisdiction. *E.g.*, Fla. Admin. Code R. 6.0342 (2019) (providing for utilities to prepare storm hardening plans and requiring utilities to meet certain standards to harden electric systems against hurricanes). Without question, the Legislature's function with respect to the electric utility industry in Florida is fundamentally altered.

Second, the United States government has preempted to itself and its regulatory bodies the licensing and operation of nuclear generation plants (through the NRC) and the wholesale sale of power and transmission service (through the FERC). Inexplicably, the drafters of the Initiative appear blind to this not-so-recent development[8] and provide, instead, for the divestiture of FPL's ownership in its nuclear generating facilities in Florida, Initiative § (c)(1)(i), and the establishment of an "independent market monitor to ensure the competitiveness of the wholesale and retail electric markets." Initiative § (c)(1)(5). In this sense, the Initiative seeks to wrest back from the United States government preempted authority by state constitutional fiat. Pursuant to the Supremacy Clause of Article VI of the U.S. Constitution, Art. VI, cl. 2, U.S. Const., and the well-settled case law, including *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (establishing the federal government's immunity from taxation by states pursuant to the implied supremacy

[8] The United States Atomic Energy Act was originally enacted in 1946, and the Federal Power Act was originally enacted in 1920.

of federal authority), there is no doubt this misguided attempt at establishing an independent wholesale market in Florida fails. But, just as readily, it is apparent the Initiative seeks to alter not only Florida's three governmental branches, but also reach up to the federal level too and perform a function that today lies within the province of the Congress and federal agencies (*i.e.*, the NRC and FERC).

C. The Initiative has a Distinct and Substantial Effect on Local Governmental Entities.

The present Initiative not only attempts to alter the functions of the Legislature and regulatory agencies (at the state and federal levels), it has a very distinct and substantial effect on local governmental entities. For this reason, this Court struck down the proposed amendment in *In re Advisory Op. to Att'y Gen.—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994), saying it "encroaches on municipal home rule powers and on the rulemaking authority of executive agencies and the judiciary." *Id.* at 1020.

As has already been discussed, the Initiative tramples on the home rule authority of Florida's public power utilities and municipalities, generally, as it would eliminate the ability to grant exclusive electric franchises and collect commensurate franchise fees. And, the Initiative would undo decisions made to contract with parties in the furtherance of a public power utility's proprietary, home rule powers. OUC and FMPA have chosen to co-own their portions of St.

Lucie Unit No. 2 with FPL, but the Initiative would undo that choice – as to the chosen business collaboration with FPL.

Second, the contractual framework for power supply, transmission service, and generating plant joint ownership is substantially impacted, because all of those existing contractual relationships with IOUs would necessarily be altered. When the Initiative would remove the existing IOUs as counterparties to Public Power Parties on those agreements, there is no doubt that those existing contractual arrangements are impaired.

For instance, the Initiative could impair the contracts between FMPA and NextEra for the new Florida Municipal Solar Project. To the extent that NextEra is deemed an investor-owned utility under the Initiative[9], the Initiative would prohibit it from owning solar generation facilities. FMPA must also utilize the transmission systems of FPL and DEF to deliver the project's energy to its member utilities. Thus, the Initiative would impair these arrangements by prohibiting FPL and DEF from owning transmission facilities.[10]

[9] It is not clear under the Initiative what would be considered an investor owned utility under the new regulatory regime.

[10] While the Initiative reduces investor-owned utilities to the "construction, ownership, and repair of electrical transmission . . . systems," Initiative § (c)(1)(i), it is not clear if "operation" would entitle an investor owned utility to sell transmission service on a transmission system it is prohibited from owning.

The single subject requirement is violated where there is "a very distinct and substantial affect [sic] on each local government entity." *Advisory Op. to Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 494-95 (Fla. 1994). The distinct and substantial effect, here, on Public Power Parties is evident, and they urge the Court to strike the Initiative from the ballot.

D. The Initiative Fails to Identify the Existing Provisions of the Constitution that are Substantially Affected.

Nowhere does the Initiative identify the existing provisions of the constitution that are substantially affected. "[T]he possibility that an amendment might interact with other parts of the Florida Constitution is not sufficient reason to invalidate the proposed amendment." *Treating People Differently*, 778 So. 2d at 892 (internal quotation marks and citation omitted).

> Nevertheless, it is imperative that 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 that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations.

Id. (internal quotation marks and citation omitted). The Initiative "should identify the articles or sections of the constitution substantially affected," *Fine v. Firestone*, 448 So. 2d at 989, so that "the public will be able to comprehend the contemplated changes in the constitution and to avoid leaving this Court with the responsibility of interpreting the initiative proposal to determine what sections and articles are substantially affected by the proposal." *Advisory Op. to Att'y Gen. re 1.35% Prop.*

Tax Cap, Unless Voter Approved, 2 So. 3d 968, 976 (Fla. 2009); *see also Treating People Differently*, 778 So. 2d at 899-900.

Here, the Initiative fails to inform the voter of at least three different constitutional protections that would be substantially impacted by its passage. First, the Initiative substantially affects and, indeed, impairs both the territorial agreements that establish the public power utilities' exclusive service territories, as well as the public power utilities power purchase and sales agreements, transmission service agreements (*see supra* note 10), interchange and interconnection agreements, and joint ownership agreements (for jointly owned generation facilities). However, nowhere in the Initiative are voters informed that any implementing legislation will necessarily and substantially affect article I, section 10 of the Florida Constitution, prohibiting the impairment of Contracts.

Further, this constitutional prohibition on the impairment of contracts is particularly important for FMPA because of section 163.01(15)(j), Florida Statutes (2018), which provides that the "powers, duties, or existence of [FMPA] or of its officers, employees, or agents shall not be diminished, impaired, or affected in any manner," *id.*, which will "affect materially and adversely the interests and rights of the owners of [FMPA] bonds," *id.*, with respect to any obligation or duty of FMPA as to any contract or agreement, including FMPA's joint ownership agreements with FPL for the St. Lucie Unit No. 2 nuclear plant, while bonds are outstanding.

FMPA's publicly issued bonds for its St. Lucie Project, comprised of its 8.806% joint ownership interest in St. Lucie Unit No. 2, currently extend until 2027. "The provisions of [section 163.01(15)(j)] shall constitute an irrevocable contract by the state" *id.*, with FMPA's bondholders. Therefore, not only does the Initiative run afoul of the general constitutional prohibition on the impairment of contracts in article I, section 10, but it is in directly conflict with the State's contractual pledge of section 163.01(15)(j) (in addition to the existing contractual obligations of FMPA under its joint ownership agreement with FPL).

Second, the Initiative empowers the courts to force the Legislature to engage in policymaking by legislation, however there is no mention of this dramatic deviation from the existing separation of powers provision found in article II, section 3 of the Florida Constitution. *See* Initiative § (e) (providing that judicial relief can be sought in the courts by "any Florida citizen" to *compel* the Legislature to enact "complete and comprehensive legislation" that implements the Initiative "in a manner fully consistent with its broad purposes and stated terms.").

As such, the Initiative transforms the judiciary into a policy maker, or at least the guarantor that the Legislature will engage in policymaking. And, the Initiative does so with vague and concerning language like "complete and comprehensive," *id.*, that clearly appears designed to give the policymaking "steering wheel" to the courts. So too is the determination as to whether any

legislation was in fact adopted "in a manner fully consistent with [the Initiative's] broad purposes and stated terms." *Id.* These are not "judicially manageable standards." *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996).

Finally, then, the Initiative strips from Florida's public power utilities, and all Florida municipalities, the home rule authority to grant electric franchise agreements, which provide property rights and provide for the health, safety, and welfare of local communities. *See Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237 (Fla. 2004) (describing a proper electric franchise agreement as a bargained for exchange where the granting city enjoys the benefits of securing an electric utility provider for the health, safety, and welfare of its community, and the electric utility enjoys the benefits of the use and occupation of the city's rights-of-way).

Additionally, Florida's public power utilities frequently make use of their "proprietary powers" granted by article VIII, section 2 to make choices in the selection of parties they desire to contract with for necessary services. For example, many public power utilities will issue a request for proposals when they need to arrange for new power supply and negotiate with a supplier that provides the best price and terms. The Initiative would vacate these choices (if an IOU is

the selected supplier, because it can no longer own generation assets in order to sell power supply).

Without reference to these aforementioned constitutional provisions substantially affected by the Initiative, the Court is left alone with its thoughts on how to reconcile the various provisions together in a manner that meets the constitution's single subject requirement. Public Power Parties urge the Court, though, that no mental strain is necessary. Lacking the aforementioned references to multiple constitutional provisions, the Initiative fails and must not be placed on the ballot.

II. THE TITLE AND BALLOT SUMMARY ARE MISLEADING, IN VIOLATION OF SECTION 101.161(1), FLORIDA STATUTES.

Florida law requires that "a ballot summary . . . shall be printed in clear and unambiguous language on the ballot." § 101.161(1), Fla. Stat. (2018). The purpose of this statute "is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment." *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982).

This Court's analysis of the ballot title and summary focuses on two questions: (1) whether the title and summary clearly and accurately inform the voter of the chief purpose of the proposed amendment; and (2) whether the language of the title and summary, as written, is likely to mislead the public. *See, e.g., Advisory Op. to Att'y Gen. re Florida Marriage Protection Amendment*, 926

So. 2d 1229, 1236 (Fla. 2006); *cf. Advisory Op. to Att'y Gen. re Protect People from the Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking*, 814 So. 2d 415, 419 (Fla. 2002) (because of the 75-word limit, the title and summary cannot necessarily detail every aspect of the proposed initiative).

A. The Ballot Summary Falsely Implies that Florida's Public Power Utilities are Unaffected Unless they Opt into Competitive Markets.

The ballot summary misleads voters who receive electric service from or through the Public Power Parties to believe that their public power utility will be unaffected by the proposed amendment, unless that public power utility elects to "opt into competitive markets."

The internal conflicts between § (d) and the other provisions of the Initiative, particularly § (c)(1)(i), means the *Opt-In Clause* provides no workable or effective exception to voters who would otherwise believe the Initiative would not impact Florida's public power utilities. The *Opt-In* Clause is illusory because (c)(1)(i) and (d) of the Initiative are in conflict. Today, FPL sells Wauchula wholesale power through a power sales contract from its fleet of generation assets. For example, then, the first provision would prohibit FPL from owning generation assets, while the second provides that the city of Wauchula's existing rights will not be "affected in any way." Hardly. The Initiative would clearly affect that relationship as FPL would no longer own generation capacity to sell to Wauchula. Any voter's

reliance on the *Opt-In Clause* is necessarily misplaced because public power parties' reliance cannot escape the impacts of the Initiative.

The ballot summary sets up false and misleading expectations that Florida's public power utilities will be unaffected by the Initiative unless they choose to "opt into competitive markets."

The summary also avoids the subject of how Florida Public Power Parties will unwind the existing intricate web of electric service and supply contracts with the IOUs, the destabilizing impact of such actions on the Florida wholesale electric market, retail service obligations of Florida utilities, stranded cost and financial loss allocation by divesting utilities and their rate payers.

Additionally, the Initiative's grant of rights to "customers" to "sell" electricity certainly impacts Florida's public power utilities. Initiative § (b). If any customer of a public power utility can sell electricity to others, public power utilities will necessarily have to provide for operational and business mechanisms to permit such sales. Further, the Initiative is entirely unclear on the interplay between the "right of electricity customers to . . . sell . . . electricity" and the public power entities' "discretion, to participate in the competitive retail electricity Market . . . ." *Compare* Initiative § (b) and (d). The ability of public power entity customers to generate and sell power directly to other customers – both into and

from within public power entity service territories and load – will certainly "affect the existing rights or duties of . . . municipally-owned utilities, or their customers . . . ." Initiative § (d). Public power entities plan for and acquire generation resources necessary to meet their entire load in their service territories. A mandate that public power entities allow their customers the boundless right to generate and sell electricity reduces the public power entities' retail loads and results in stranded utility costs and increased rates for other public power entity customers. This is not clear to public power entity voters based on the wording of the Initiative.

Therefore, as should be evident, when the illusory promise of the *Opt-In Provision* is elevated to the ballot summary, it necessarily makes the ballot summary misleading. Any voter of a public power utility who reads the ballot summary could be easily misled in the belief that his or her utility provider would not be impacted by the Initiative. There is no effective opt out from the impact the Initiative would have.

B. The Ballot Summary is Misleading because it Fails to Inform Voters of its True Meaning and Intent of the Initiative.

The true meaning and intent of the Initiative is hidden from the voters by the appeal to customer choice. As has already been shown, if the purpose of the Initiative, as the ballot summary would otherwise indicate, is to provide customer

choice to the customers of IOUs, much of the Initiative could have been stripped down. *See supra* note 7.

Instead, the chief purpose of the Initiative is to eliminate the regulated structure of electric service in the State of Florida, which assures service is provided to all who need it at a reasonable rate of return in designated services territories, and replace it with an open Florida market to providers of electricity with no duty to serve and leaving the majority[11] of the electric customers with no IOU guaranteeing service within their monopoly service territories. *Compare* § 366.03, Fla. Stat. (2018) (obligating IOUs to "furnish to each person applying therefore reasonably sufficient, adequate, and efficient service" as regulated by the PSC). Removing such IOU's ownership only guarantees access to new generation providers, not customer choice, and places customers at risk of not being served at all since the Initiative does not require there to be a provider of last resort.

Just like the elimination of the PSC's Grid Bill jurisdiction leaves a jurisdictional hole that strips away existing protections for customers, the elimination of designated service territories and prohibiting IOUs from the ownership of generation and transmission assets eliminates significant measures for the protection of Florida's customers. What would be guaranteed by the Initiative would be greater access by electric providers, large and small, to

[11] Approximately 76% of Florida's population is currently served by IOUs.

electricity consumers in the State, without the concurrent promise of better or improved customer service.

Further, the ballot summary misleads voters because it does not disclose the "inconsistent statutes, regulations, and orders" that must be repealed. This leaves the voter to wonder what these inconsistent provisions are. This lack of information is not superfluous to a voter's decision on the Initiative but is a material matter as to whether the voter understands the breadth and scope of the repeal of inconsistent provisions of law. *Cf. Advisory Op. to Att'y Gen.—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991) ("A ballot summary may be defective if it omits material facts necessary to make the summary not misleading."). With this repeal of inconsistent provisions, addressing an entire policy and regulatory regime for a critical infrastructure and service to everyday life—that is, electric utilities—such a repeal is material and the absence of the delineation of these inconsistent provisions misleads voters.

Particular to FMPA, § 163.01(15)(j), Florida Statutes, provides an "irrevocable contract by the state" to the holders of FMPA's outstanding bonds for its interests in the St. Lucie Unit No. 2 nuclear plant that FMPA's "joint owner agreement . . . shall not be diminished, impaired, or affected in any manner . . . ." *Id.* Certainly, the Initiative, which prohibits FPL from being a co-owner of St. Lucie Unit No. 2 with FMPA, diminishes, impairs, and certainly affects FMPA's

joint owner agreement with FPL. And, that impairment would have a negative impact on FMPA's bondholders because they rely on that joint owner agreement and this Court's validation for repayment, *State v. Florida Muni. Power Agency*, 428 So. 2d 1387 (Fla. 1983), all in direct contradiction of section 163.01(15)(j). Nowhere is section 163.01(15)(j) listed in the ballot summary. Such an omission is fundamentally misleading.

Lastly, the ballot summary also is defective for one additional material omission – the Initiative would have an entirely new "independent market monitor" regime set up to "ensure the competitiveness" of markets in the State. Initiative § (c)(1)(v). Clearly, it is material for voters to know the Initiative would put into place a new regulatory regime for competitiveness, as most of the PSC's regulatory mandates would be eliminated by such a new and narrow focus (i.e. safety, reliability, fairness in rates of return, etc.).

The misleading nature of the ballot summary demands that the Court keep the Initiative from the ballot.

III. THE FINANCIAL IMPACT STATEMENT FAILS TO MEET THE REQUIREMENTS OF SECTION 100.371(5)(a), FLORIDA STATUTES.

The financial impact statement submitted with the Initiative fails to meet the statutory requirements for a single reason: and that is, it is impossible to tell at this time what the financial impact would be of these broad, sweeping changes to

regulations, contracts and structure of the electric supply utilities in the state. However, it impermissibly holds out the possibility of lower electricity costs for governments, while at the same time, indicating that all other financial impacts are negative or indeterminate, creating ambiguity. A voter is left not knowing if costs for essential electric services will go up or down, and for whom. Given the great deal of opportunity to confuse and mislead voters, this Court should remand to the Financial Impact Estimating Conference for some realistic estimate of cost, taking into account the full impact (both direct and indirect) of the Initiative.

As this Court has noted in past decisions, it "has an independent obligation to review the [financial impact] statement to ensure that it is clear and unambiguous and in compliance with Florida law." *Advisory Op. to Att'y Gen. re Voter Control of Gambling*, 215 So. 3d 1209, 1217 (Fla. 2017). In this review, the Court's focus is narrow as to whether the financial impact statement "is clear, unambiguous, consists of no more than seventy-five words, and is limited to address the estimated increase or decrease in any revenues or costs to the state and local governments. *Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amend. of Local Gov't Comprehensive Land Use Plans*, 963 So. 2d 210, 214 (Fla. 2007).

The financial impact statement submitted with the Initiative reads as follows:

> The final design of the new market system for electricity is unknowable until the Legislature acts. There will be significant costs to state and local governments to transition to a fully operational system. *The cost of purchasing electricity by governments may be higher or lower*, depending on changes in charges for electricity resulting from the amendment. As currently administered, several government revenues would be reduced, but the legislative response to these effects is unknown.

(Emphasis added).

It is inconsistent to say that there will be "significant costs" to the state and local governments and that "governmental revenues would be reduced," (each, broadly negative considerations of higher costs and lower revenue) while also setting forth the contrary, narrow notion that governments may pay more or less for electricity as a result of the Initiative. This ambiguity arises from a narrow focus on one aspect of all the potential costs that could be borne by consumers from the Initiative—the possible, future cost of retail electric service—among the remainder of the financial impact statement's general and indeterminate considerations.[12] This ambiguity will confuse and misinform voters.

[12] Additionally, this potentially positive statement (that customers could save money) could be mistakenly taken by voters as an editorial liberty or a statement intended to sway voters that electric consumer choice for the customers of IOUs has the potential to lower costs and, thus, the Initiative is worthy of an affirmative vote. The financial impact statement does not provide a connection for how the increased or decreased costs to consumers will be contingent on many factors, that are yet costly or indeterminate, and, thus, is misleading because it fails to articulate with any precision the estimated retail costs or detriments of the Initiative on customers. *See Advisory Op. to Att'y Gen. re Referenda Required for Adoption &*

For instance, a voter may believe that there will be significant costs borne by others, but consumers will be able to pay less for electricity. In truth, though, whatever costs there are, they will ultimately be paid by the retail customers of the service provider using the services of the electric grid(s) that produces and delivers electric service to customers.

Public Power Parties acknowledge that it passes muster from the Court for the financial impact statement to be indeterminate. *See, e.g., Advisory Op. to Att'y Gen. re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1240 (Fla. 2006) ("Although the FIS does not state with particularity any increase or decrease in revenues or costs to state or local government that the proposed amendment might have, it does make it clear that the financial impact "cannot be determined, but is expected to be minor." (internal quotations omitted)); *Advisory Op. to Att'y Gen. re Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco*, 926 So. 2d 1186, 1195 (Fla. 2006) (after providing a quantitative estimate for direct impacts, the financial impact statement addressed the indetermination of indirect impacts, with the Court providing "[a]lthough the indirect financial impacts are described as indeterminate, rather than quantified, this Court has previously found no basis to reject similar

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Amend. of Local Gov't Comprehensive Land Use Plans, 992 So. 2d 190, 192-93 (Fla. 2008).

wording."); and *Voter Control of Gambling*, 215 So. 3d at 1218 (where the Court held, "[o]verall the financial impact statement is necessarily indefinite but not unclear or unambiguous," and passes muster.) (quoting *Advisory Op. to Att'y Gen. re Fla. Growth Management Initiative Giving Citizens The Right to Decide Local Growth Management Plan Changes*, 2 So. 3d 118, 124 (Fla. 2008). In the case of the Initiative, it may not be fatal that the financial impact is indefinite, but it is further unclear and, thus, misleading as to the categories of costs that would be impacted, and the persons or entities impacted by such costs. The ambiguity in the Initiative's financial impact statement is plain and requires correction.

CONCLUSION

For the foregoing reasons, the Initiative must not be authorized for placement on the ballot.

Respectfully submitted this 18th day of April 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served to the following parties this 18th day of April 2019:

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I HEREBY CERTIFIY that this brief was prepared with 14-point Times New Roman, and that this brief is therefore in compliance with the Florida Rules of Appellate Procedure.

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