IN THE SUPREME COURT OF FLORIDA

Case Nos. : SC19-328; SC19-479

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

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

REPLY BRIEF OF
The Florida Electric Cooperatives Association, Inc.
(Filed in Opposition to the Initiative Petition)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

CONSTITUTIONAL PROVISIONS

STATUTES

ADMINISTRATIVE ORDERS

SUMMARY OF ARGUMENT

The Answer Brief of Citizens for Energy Choices (the "Sponsor") largely ignores the fundamental flaws in the Initiative's[1] ballot summary. In fact, the Sponsor ducks the Florida Electric Cooperatives Association, Inc.'s ("FECA") central argument that the summary falsely implies cooperatives and their consumer-members will be unaffected by the Initiative unless they affirmatively elect to opt into the newly created competitive markets. The Sponsor's failure to address this argument illustrates a simple fact—the ballot summary is indefensible in the way it dupes voters who rely on the cooperatives for their electric power.

Regardless of whether the cooperatives opt into the new competitive markets, there can be no doubt the Initiative will eliminate their existing wholesale power supply agreements with investor-owned utilities ("IOUs") and void their existing Public Service Commission ("PSC") approved territorial boundary agreements with IOUs. But the voter knows nothing of these dramatic impacts. The summary is more an effort to garner votes than to inform the voter.

The Sponsor fails to justify the ballot summary's other misleading aspects, including the summary's abject failure to (1) even mention the evisceration of the Florida Constitution's Separation of Powers protections; (2) identify the existing

[1] The proposed ballot initiative is formally entitled, "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice" ("Initiative").

statutes, regulations, and orders that the Initiative will void; and (3) inform voters about the creation of the independent market monitor to enforce the new competitive markets.

The Sponsor also has no good answer to the Initiative's violations of the single-subject requirement, as the Initiative substantially affects or performs multiple functions of government and puts voters in the unfair position of having to accept changes which they may oppose to obtain a change they support. The Court should reject the Initiative and deny it a place on the ballot.

ARGUMENT

I. THE BALLOT SUMMARY MISLEADS VOTERS ABOUT THE IMPACT ON COOPERATIVES AND THEIR CONSUMER-MEMBERS.

A. The Ballot Summary Tells Voters that Cooperatives will be Unaffected, but the Initiative Destroys the Cooperatives' Existing Wholesale Power Supply Contracts with IOUs.

Regardless of whether a cooperative opts into the newly created competitive markets, the Initiative will have an immediate and substantial impact on cooperatives' wholesale power supply agreements with IOUs. *See* Initial Brief, pp. 8-11. Many of Florida's electric cooperatives have long-term wholesale power supply agreements with IOUs that run well beyond the amendment's effective date of 2025. *See, e.g., id.* at 9-10 & nn. 4-6. Should the Initiative become part of the Florida Constitution, however, beginning in 2025, IOUs will no longer be able to generate and sell electricity. *See* Initiative § (c)(1)(i). The Initiative thus will

prohibit the IOUs from performing their obligations under their wholesale power supply agreements with electric cooperatives.

The ballot summary, however, misleads voters into believing the cooperatives and their consumer-members will be unaffected by the proposed amendment, unless the cooperatives elect to "opt into competitive markets." The ballot summary not only fails to inform the voters about the impacts on the cooperatives and their consumer-members, but also falsely assures voters the cooperatives will be unaffected.

The Sponsor brushes off the destruction of the cooperatives' wholesale power supply contracts as nothing more than a "secondary impact[]" of the Initiative. Answer Brief, p. 68. But the elimination of the cooperatives' power supply contracts is hardly a "secondary impact," as the cooperatives are intensely reliant on wholesale power to provide electricity to their consumer-members. And even if the loss of a cooperative's wholesale power supply were a "secondary impact," no case law authorizes a ballot summary to affirmatively mislead the voters about the "secondary impacts" of a constitutional amendment.

The Sponsor also suggests the cooperatives are unaffected because they "would be free to purchase electricity from any competitive provider, including from reconstituted non-monopoly affiliates of the current IOUs." *Id.* This is both speculative and irrelevant. The summary's defects do not turn on whether the

cooperatives might be able to replace their wholesale power supply agreements by negotiating new contracts with new providers under new terms and conditions—though that is a legitimate concern of the cooperatives. Rather, the summary is defective because the voters are not informed about the elimination of the cooperatives' existing agreements in the first place. And the summary is not rehabilitated simply because a cooperative in the future may be able to enter into a wholesale power supply agreement with a not-yet-created entity that could somehow be related to that cooperative's current wholesale electricity supplier.

Moreover, contrary to the Sponsor's assertions, *see id.*, there is nothing the Legislature can do to address these concerns. The plain words of the Initiative strip the IOUs of the right to generate or sell electricity. And, of course, the Legislature cannot override a constitutional directive.

Furthermore, the Initiative will not just impair, but will destroy the cooperatives' wholesale power supply agreements in violation of the Florida Constitution's protection against the impairment of contracts in article I, section 10. The Sponsor argues this impairment is simply an exercise of the State's police power, citing case law for the proposition that the State has the authority to impair public utilities' contracts in the interest of public welfare. *See* Answer Brief, pp. 32-34. This misses the mark for at least three reasons. First, the Sponsor's authorities relate to the state's police power to modify a contract by setting the

retail rates that a regulated public utility can charge for water and sewer services. *See id.* (citing *H. Miller & Sons, Inc. v. Hawkins*, 373 So. 2d 913, 914 (Fla. 1979), and *City of Plantation v. Utils. Operating Co.*, 156 So. 2d 842, 844 (Fla. 1963)). Here, the cooperatives are not public utilities. *See* § 366.02(1), Fla. Stat. (exempting the cooperatives from the definition of "public utilities" under chapter 366). Thus, any regulatory powers reserved by the state under Section 366.07, Florida Statutes, are not applicable to the cooperatives.

In fact, the state is *expressly forbidden* from regulating the rates, terms, and conditions of the cooperatives' wholesale power supply agreements with public utilities:

> No provision of this chapter shall apply in any manner, . . . *to the sale of electricity*, manufactured gas, or natural gas *at wholesale by any public utility to, and the purchase by, any* municipality or *cooperative under and pursuant to any contracts now in effect or which may be entered into in the future*, when such municipality or cooperative is engaged in the sale and distribution of electricity or manufactured or natural gas, or to the rates provided for in such contracts.

Id. § 366.11(1) (emphasis added).

Second, the Sponsor contends that contracts with public utilities are made subject to the authority of the state, and therefore, can be modified with impunity without violating the impairment of contracts protections in article I, section 10 of the Florida Constitution. *See* Answer Brief, p. 33. But this overlooks *United Gas Pipe Line Co. v. Bevis*, 336 So. 2d 560, 564 (Fla. 1976), in which this Court held

that a legislative enactment purporting to regulate the wholesale gas market did in fact unconstitutionally impair wholesale natural gas contracts.

Third, and most importantly, FECA is not arguing that the Initiative should be barred from the ballot because it impairs the cooperatives' existing wholesale power supply agreements. Rather, the Initiative is defective because the voters are not informed the Initiative would abridge the impairment of contracts protections in article I, section 10 of the Florida Constitution, and are instead affirmatively misled that the cooperatives and their consumer-members will be held harmless. *See 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, 898 (Fla. 2000) ("[T]he ballot summaries are defective for not identifying the initiative petitions' effect on these existing constitutional provisions."). The risk that the summary will fool voters is underscored in the supporting brief from the "Energy Suppliers," who repeatedly give false assurances that the cooperatives are "carved out" from the effects of the amendment when, in fact, they are not. *See* Energy Suppliers Brief, pp. 39, 44, 48. [2]

[2] The Court also should disregard the Energy Suppliers' policy-based arguments, which span nearly 40 pages and advocate the alleged merits of the Initiative and the Texas electrical system. *See Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) ("[T]he wisdom of a proposed amendment is not a matter for our review . . . ."). Regardless, Florida is not Texas. The proponents still must follow Florida law and do not get a FastPass+ to the ballot simply because they believe in the Initiative's merits.

B. The Ballot Summary Tells Voters that Cooperatives will be Unaffected, but the Initiative Eliminates the Cooperatives' Existing Territorial Agreements with IOUs.

The Sponsor completely failed to address FECA's argument that the ballot summary is misleading because voters are not told the Initiative will eliminate the cooperatives' existing territorial agreements with IOUs. Thus, any argument to the contrary is now waived. *See, e.g., 13 Parcels LLC v. Laquer*, 104 So. 3d 377, 381 n.4 (Fla. 3d DCA 2012) (holding that appellee could not raise an issue for the first time at oral argument and had waived the issue by failing to include it within the appellate record or address it in the answer brief or raise it before the trial court); *see also Simmons v. State*, 934 So. 2d 1100, 1117 n.14 (Fla. 2006) (holding that any arguments not expressly included in defendant's brief are waived for purposes of appeal).

In any event, it is plain the Initiative will not just impair but completely void the cooperatives' existing territorial agreements with IOUs. The exclusive service areas of most cooperatives are currently established by their territorial agreements with IOUs, which the PSC must approve. *See* Initial Brief, pp. 11-13. The Initiative will destroy these territorial agreements by: (1) "prohibit[ing] *any* granting of either monopolies or exclusive franchises for the generation and sale of electricity," Initiative § (c)(1)(iv) (emphasis added); and (2) requiring that once the Legislature enacts "any law" pursuant to the Initiative, "all . . . orders which

conflict with this section shall be void," *id.* § (c)(2). By its express terms, the Initiative will prohibit the establishment of new exclusive franchise service areas and will void the PSC orders approving the cooperatives' existing territorial agreements.[3]

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[3] For example, since 2000 the PSC has issued orders approving at least eight territorial agreements between cooperatives and IOUs, which the Initiative would void. *See, e.g., In re: Joint pet. for approval of amendment to territorial agreement in Hardee, Highlands, Polk, & Osceola Ctys, by Peace River Elec. Coop. & Duke Energy Fla., LLC*, Order No. PSC-2019-0048-PAA-EU, 2019 WL 398653 (Fla. P.S.C. Jan. 28, 2019), *consummated by* Order No. PSC-2019-0066-CO-EU, 2019 WL 936625 (Fla. P.S.C. Feb. 22, 2019); *In re: Joint pet. to approve territorial agreement in Columbia, Lafayette, Suwannee, & Hamilton Cntys. by Suwannee Valley Elec. Coop. & Duke Energy Fla., LLC*, Order No. PSC-17-0039-PAA-EU, 2017 WL 466475 (Fla. P.S.C. Jan. 31, 2017), *consummated by* Order No. PSC-17-0063-CO-EU, 2017 WL 818252 (Fla. P.S.C. Feb. 27, 2017); *In re: Joint pet. for approval of territorial agreement in Alachua, Marion, Columbia, Levy, & Volusia Cntys. by Clay Elec. Coop., Inc. & Duke Energy Fla, LLC*, Order No. PSC-16-0113-PAA-EU, 2016 WL 1105633 (Fla. P.S.C. Mar. 18, 2016), *consummated by* Order No. PSC-16-0145-CO-EU, 2016 WL 1546856 (Fla. P.S.C. Apr. 12, 2016); *In re: Joint pet. for approval of amendment to territorial agreement in Manatee Cnty., by Fla. Power & Light Co. & Peace River Elec. Coop., Inc.*, Order No. PSC-16-0042-PAA-EU, 2016 WL 454507 (Fla. P.S.C. Jan. 25, 2016), *consummated by* Order No. PSC-16-0085-CO-EU, 2016 WL 722883 (Fla. P.S.C. Feb. 22, 2016); *In re: Joint pet. for approval of territorial agreement in Franklin & Liberty Cntys. by Talquin Elec. Coop., Inc. & Duke Energy Fla., Inc.*, Order No. PSC-14-0470-PAA-EU, 2014 WL 4352520 (Fla. P.S.C. Aug. 29, 2014), *consummated by* Order No. PSC-14-0512-CO-EU, 2014 WL 4793951 (Fla. P.S.C. Sept. 24, 2014); *In re: Joint pet. for approval of territorial agreement between Tampa Elec. Co. & Peace River Elec. Coop., Inc.*, Order No. PSC-12-0660-PAA-EU, 2012 WL 6625268 (Fla. P.S.C. Dec. 17, 2012), *consummated by* Order No. PSC-13-0020-CO-EU, 2013 WL 174845 (Fla. P.S.C. Jan. 11, 2013); *In re: Joint pet. to approve territorial agreement in Highlands Cnty. between Glades Elec. Coop., Inc. & Progress Energy Fla., Inc.*, Order No. PSC-07-0282-PAA-EU, 2007 WL 1029463 (Fla. P.S.C. Apr. 2, 2007), *consummated by* Order No. PSC-07-0364-CO-EU, 2007 WL 1341449 (Fla. P.S.C. Apr. 27, 2007); *In re: Joint pet. for*

But again, FECA is not arguing the Initiative should be barred from the ballot because it impairs the cooperatives' territorial agreements with IOUs. Rather, the Initiative is defective because the summary falsely assures voters that cooperatives will be affected only if they elect to opt into the new competitive markets, when in reality the Initiative will void the cooperatives' territorial agreements regardless of their actions. *See Treating People Differently Based on Race*, 778 So. 2d at 898.

II. THE SPONSOR FAILS TO REFUTE OTHER WAYS IN WHICH THE BALLOT SUMMARY MISLEADS THE VOTERS.

The Sponsor also fails to adequately refute the other ways in which the ballot summary misleads the voters and deprives them of fair notice as to the "'true meaning, and ramifications,'" of the proposed amendment. *Treating People Differently*, 778 So. 2d at 892 (quoting *Askew*, 421 So. 2d at 156).

A. The Ballot Summary Fails to Inform Voters that It Substantially Affects other Constitutional Provisions.

The ballot summary keeps voters in the dark as to the Initiative's substantial effects on other provisions of the Florida Constitution. *See Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984). This Court has long recognized ballot summaries are misleading when they fail to inform voters that the proposed amendment affects

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approval of territorial agreement concerning serv. to two locations in Jackson Cty., by Fla. Pub. Utils. Co. & W. Fla. Elec. Coop. Ass'n, Order No. PSC-04-0991-PAA-EU, 2004 WL 2359120 (Fla. P.S.C. Oct. 11, 2004), *consummated by* Order No. PSC-04-1099-CO-EU, 2004 WL 2656874 (Fla. P.S.C. Nov. 5, 2004).

other constitutional provisions. *See, e.g., Advisory Op. to Att'y. Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009); *Treating People Differently*, 778 So. 2d at 899-900; *Advisory Op. to Att'y. Gen. re Tax Limitation*, 644 So. 2d 486, 490 n.1 (Fla. 1994).

As previously discussed, voters are not informed that the Initiative will substantially affect article I, section 10 of the Florida Constitution, prohibiting the impairment of contracts. *See* Initial Brief, pp. 10-11, 14-15. But the Initiative also substantially affects the existing Separation of Powers protections in article II, section 3 of the Florida Constitution by empowering the judiciary to force the Legislature to perform core legislative functions. *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").

This directive transforms the judiciary into a policy maker, and forces the Court to wade into constitutional controversies over the vaguest of terms like "complete" and "comprehensive," and to make determinations about whether legislation was enacted "in a manner fully consistent with [the Initiative's] broad purposes and stated terms." Initiative § (e); *see also* Initial Brief, pp. 14-17.

B. The Ballot Summary Fails to Advise Voters of the Statutes, Regulations, and Orders that the Initiative Automatically Voids.

The ballot summary does not come close to adequately informing the voter as to "the myriad of laws, rules, and regulations that may be affected by the repeal of" all statutes, regulations, or orders that conflict with Section (c) of the Initiative. *In re Advisory Op. to Att'y Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994) (holding that it was misleading to state "all laws inconsistent with this amendment" would be repealed without even mentioning any of the laws, rules, and regulations "that may be affected").

The Sponsor argues it cannot be expected to "identify every existing law that will be affected by the amendment." Answer Brief, p. 66. True enough, but FECA is not arguing the ballot summary is required to identify every possible impact the Initiative may have on existing laws. When the Initiative expressly repeals existing statutes, regulations, and orders that conflict with the Initiative's terms, the ballot summary has the obligation to provide the voters with *some* indication of the existing laws that will be repealed. *See Restricts Laws Related to Discrimination*, 632 So. 2d at 1021.

Furthermore, the Sponsor's assertion it cannot identify the existing laws that will be repealed "because any changes to existing laws depend entirely on what the Legislature determines in implementing the Amendment" is a total misfire. Answer Brief, p. 66. It is Section (c) itself, not the Legislature, that automatically

voids "all statutes, regulations, or orders which conflict which *this* section." Initiative § (c)(2) (emphasis added). The existing laws that are voided are those that conflict with the mandates of Section (c), and are not dependent on the parameters of any future legislation.[4]

The ballot summary opaquely states the proposed amendment "repeals inconsistent statutes, regulations, and orders" without informing the voters of the subjects of those existing laws. *See* Initial Brief, pp. 17-18 & n.7. Not even the most sophisticated voter can discern what impact such repeals might have on Florida's electrical grid.

C. The Ballot Summary Fails to Inform Voters About the Independent Market Monitor.

The ballot summary leaves voters unaware that the Initiative requires the Legislature to "establish an independent market monitor to *ensure* the competitiveness of the wholesale and retail electric markets." Initiative § (c)(1)(v) (emphasis added).

The Sponsor defends the ballot summary's silence by arguing the Initiative leaves it to the Legislature to determine the powers of the independent market monitor. *See* Answer Brief, p. 49. But this argument falls flat, as the Initiative explicitly requires the Legislature give the independent market monitor the power

[4] As previously discussed in footnote 3, *supra*, the Initiative would void the PSC-issued orders approving the cooperatives' territorial agreements with IOUs.

to *ensure* that the new competitive market system is sufficiently competitive. *See* Initiative § (c)(1)(v). Furthermore, whether the amendment is self-executing or whether the Legislature must pass legislation has no place in the Court's determination that the ballot summary is misleading.

The ballot summary makes no mention of the creation of an independent market monitor and leaves the voter to believe the Initiative will result in less regulation, not more. This omission fails to provide the voter with the material facts necessary to cast an intelligent, informed ballot. *See Advisory Op. to Att'y Gen. re Casino Auth., Taxation, & Regulation,* 656 So. 2d 466, 468-69 (Fla. 1995).

III. THE SPONSOR GLOSSES OVER THE INITIATIVE'S VIOLATIONS OF THE SINGLE-SUBJECT REQUIREMENT.

FECA discusses in its Initial Brief at length how the Initiative substantially alters and performs the functions of multiple branches of government. *See* Initial Brief, pp. 22-24. The Sponsor claims the Initiative does not perform a judicial function, citing the approved amendment language in *Advisory Op. to the Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786 (Fla. 2014), and *Advisory Op. to the Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471 (Fla. 2015). *See* Answer Brief, p. 47. But these cases involved constitutional provisions that authorized citizen suits if *state executive agencies* failed to promulgate rules implementing a constitutional amendment. Here, the Initiative is exercising an expressly judicial power—and

altering the traditional Separation of Powers protections—by forcing the courts to weigh in on the discretionary policymaking function of the Legislature and to make legislative value judgments where no "judicially manageable standards" exist. *See, e.g.*, *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 143-44 (Fla. 2019) (Canady, J. concurring); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996).

The Sponsor also argues the independent market monitor will not perform an executive function because it will be a legislative agency, like the PSC. *See* Answer Brief, pp. 49-50. But it is immaterial whether the independent market monitor will be categorized as an executive or legislative agency—the fact that the entity has enforcement powers necessarily means it will exert executive powers. *See, e.g.*, *In re Advisory Op. to Att'y. Gen.—Save Our Everglades*, 636 So. 2d 1336, 1340 (Fla. 1994) (holding that a ballot initiative necessitated the use of executive powers through a trust established to enforce Everglades restoration).

Finally, FECA's Initial Brief describes in detail how the Initiative is clearly the product of logrolling. *See* Initial Brief, pp. 24-27; *see also Advisory Op. to Att'y. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998); *see also Tax Limitation*, 644 So. 2d at 490; *Save Our Everglades*, 636 So. 2d at 1341.

CONCLUSION

For the foregoing reasons, the Initiative should be denied placement on the ballot.

Respectfully submitted this 20th day of June, 2019.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, and complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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