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PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Via E-Mail

Memorandum

Date: January 9, 2020

To: Mike Bjorklund
Michelle Hershel

From: George Meros
Tara R. Price
D. Bruce May, Jr.

Re: Analysis of Florida Supreme Court Opinion on Energy Ballot Initiative

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We are pleased to provide you with this brief analysis of the Florida Supreme Court's opinion in *Advisory Opinion to the Attorney General Re: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice*, No. SC19-328 (Fla. Jan. 9, 2020).

In the unanimous per curiam[1] opinion, the Florida Supreme Court struck down the ballot initiative because the ballot summary failed to "satisfy the clarity requirements of section 101.161, Florida Statutes." The opinion addresses one major flaw—that the ballot summary "affirmatively misleads voters to believe the Initiative grants a right to sell electricity." Op. at p. 5. The Court found problematic that "[t]he ballot summary tells voters that the proposed amendment grants a personal right to 'sell electricity,' when in fact the amendment does no such thing." Op. at p. 6. The Court continued: "[A]t no point does the Initiative grant a freestanding constitutional right to sell electricity." Op. at p. 7. Importantly, the Court held: "The question is not whether a person has the right to sell electricity if the Initiative is adopted, but whether, as the ballot summary claims, the Initiative grants that right. It does not, and the ballot summary is therefore affirmatively misleading." Op. at p. 7.

[1] "Per curiam" is a Latin phrase meaning, "by the court." A per curiam opinion is signed by at least a majority of the Court and does not list the individual judge responsible for authoring the opinion. In this case, the opinion was unanimous, with all five Justices who currently reside on the bench concurring, including Chief Justice Canady and Justices Polston, Labarga, Lawson, and Muniz.

As you are aware, part of our concern was how the Court might structure the opinion. The Court began its analysis by recognizing that "the parties have raised a number of issues for th[e] Court's consideration." Op. at p. 5. The Court could have written a lengthy opinion, addressing each of those issues and ruling on whether each issue presented independent grounds on which to strike the proposed constitutional amendment from the ballot. Notably, however, the Court did not pass on the merits of the numerous issues raised by the opponents. To begin, this represents a wise exercise of judicial restraint and incremental judging. Perhaps more importantly, this leaves the proponents of the ballot initiative without a road map for how to proceed in the future, as they are now unclear as to how the Court would have ruled on each of the other issues raised by the cooperatives and other opponents of the ballot initiative.

Pursuant to Florida Rule of Appellate Procedure 9.330, the proponents have the ability to file a motion for rehearing within 15 days of the Court's order, which here would be Friday, January 24, 2020. In our experience, motions for rehearing are rarely granted, particularly in cases where there is no dissenting opinion. As the Court's opinion was unanimous and relatively brief, we expect that any motion for rehearing would likely be denied.

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It was our pleasure to serve as counsel for you in this case, and we hope this information is helpful. Please let us know if you have any questions or if you need additional information.

DBM/trp