IN THE SUPREME COURT OF FLORIDA

Case Nos. : SC15-780; SC15-890

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: LIMITS OR PREVENTS BARRIERS TO LOCAL SOLAR ELECTRICITY SUPPLY

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: LIMITS OR PREVENTS BARRIERS TO LOCAL SOLAR ELECTRICITY SUPPLY (FIS)

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

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STATEMENT OF INTEREST

The Florida Electric Cooperatives Association, Inc. ("FECA") submits this brief as an interested party in response to this Court's scheduling order of May 21, 2015. FECA is a not-for-profit trade association and the service organization for fifteen electric distribution cooperatives that sell retail electricity directly to their member customers, and two generation and transmission electric cooperatives that transmit, generate, and purchase electricity for sale to their member distribution cooperatives at wholesale.[1]

FECA's member cooperatives are nonprofit corporations organized for the purpose of supplying safe and reliable electric energy to their member customers at the lowest possible costs. Florida's rural electric cooperatives currently serve approximately 2.4 million customers in 57 counties throughout Florida, and are regulated as electric utilities by the Florida Public Service Commission ("PSC").

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[1] FECA's electric distribution cooperative members include: Central Florida Electric Cooperative, Inc., Choctawhatchee Electric Cooperative, Inc., Clay Electric Cooperative, Inc., Escambia River Electric Cooperative, Inc., Florida Keys Electric Cooperative Association, Inc., Glades Electric Cooperative, Inc., Gulf Coast Electric Cooperative, Inc., Okefenoke Rural Electric Membership Corporation, Peace River Electric Cooperative, Inc., Sumter Electric Cooperative, Inc., Suwannee Valley Electric Cooperative, Inc., Talquin Electric Cooperative, Inc., Tri-County Electric Cooperative, Inc., West Florida Electric Cooperative Association, Inc., and Withlacoochee River Electric Cooperative, Inc. FECA's generation and transmission cooperative members include PowerSouth Energy Cooperative and Seminole Electric Cooperative, Inc.

The PSC ensures that the cooperatives' rates are structured so that their overall costs of providing service are fairly apportioned among the recipients of the service to avoid discriminatory cross subsidies among customer classes. Thus, FECA's member cooperatives not only have a duty to their member customers to provide low cost electric services, they are legally obligated to ensure that one customer class is not forced to unfairly subsidize the cooperative's cost of serving another customer class.

The constitutional proposal now before the Court would fundamentally alter the governmental framework and the economic model under which rural electric cooperatives and other retail electric utilities have been regulated for decades. It also would create a new class of consumers that purchase solar-generated electricity from unregulated entities but still require the regulated utility to supply back-up electricity when the solar power is insufficient. This new class of solar customers would be entitled to receive subsidies from the regulated utility's other customers that do not consume or purchase solar power from unregulated entities. For these reasons, FECA has a direct and vital interest in the outcome of these proceedings and presents this brief in opposition to the placement of this proposed constitutional amendment on the ballot.

INTRODUCTION

The initiative petition entitled "Limits Or Prevents Barriers To Local Solar Electricity Supply" (the "Solar Initiative" or "Initiative") seeks to embed in Florida's Constitution the unrestricted right to construct solar generation facilities, and produce, sell, and purchase solar-generated electricity without governmental protections or contractual limitations. On the surface, the proposal presents a politically popular proposition. Indeed, who does not want to harness the power of the sun to produce electricity?

However, the allure of an unfettered right to build solar facilities, and produce, sell, and purchase solar electricity, must be temporarily set aside when the constitutional change is proposed by a citizen ballot initiative. In that special circumstance, constitutional and statutory voter protections of full disclosure and fair notice must be given first priority. This is the only proceeding by which the Solar Initiative is tested against the threshold requirements for assuring that Florida voters really understand what the proponents are actually seeking to shoehorn into the Constitution.

STATEMENT OF THE CASE AND FACTS

Pursuant to article IV, section 10 of the Florida Constitution, and section 16.061, Florida Statutes (2014), the Florida Attorney General has asked this Court for an advisory opinion on the validity of the Solar Initiative.

The Court's advisory opinions 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, and whether the ballot title and summary comply with section 101.161(1), Florida Statutes. A copy of the Ballot Title, Summary, and the full text of the proposed amendment are attached hereto as Appendix A.

By order entered on May 21, 2015, the Court has authorized interested parties to file briefs on or before June 10, 2015, addressing the initiative petition's compliance with the requisites for its placement on a general election ballot. FECA is such an interested party, and respectfully submits that the initiative proposal does not comply with either the single-subject or the ballot summary requirements.

SUMMARY OF THE ARGUMENT

The Solar Initiative must not appear on the ballot for the November 2016 general election because the proposed amendment violates the single-subject requirement of article XI, section 3 of the Florida Constitution, and because the ballot summary violates the requirements of section 101.161(1), Florida Statutes (2014). The defects are clear and conclusive.

Compliance with the single-subject requirement is measured by whether the proposed amendment substantially alters the functions of more than one branch of government or more than one level of government. The Solar Initiative not only

substantially alters but actually prohibits the functions of the legislative and executive branches, and all levels of government, to govern the construction of solar generating facilities rated up to 2 megawatts (MW), and the production, sale, and purchase of solar electricity generated therefrom. In addition, the Initiative would severely curtail the consumer protection functions of the PSC, the Florida Attorney General, and the various other state and local consumer protection agencies. The Initiative also would limit the authority of the Florida Attorney General to investigate, and the judicial branch to issue orders and injunctions, to protect consumers of local solar electricity from deceptive and unfair trade practices.

The ballot summary also is defective because it omits material facts and otherwise misleads the voter. The proposed amendment creates a new special class of customers comprised solely of those that purchase some of their electricity from a so-called "local solar electricity supplier" ("LSES") but also requires the regulated utility to provide those customers with electricity when the solar power is insufficient. The summary, however, hides the fact that the proposal would require customers that do not purchase local solar electricity to pay higher rates to subsidize service to this new class of LSES customers. The summary also fails to disclose the fact that the Legislature and the PSC already have the power to protect one group of customers from having to unfairly subsidize others, and that the proposal would strip the Legislature and the PSC of that power.

Moreover, by describing a LSES with undefined euphemisms like "local," "non-utility," and "facility rated up to 2 MW," and referring to the sale of electricity by a LSES as limited to "customers at the same or contiguous property as the facility," the summary deceives the voters into believing that the amendment is simply about someone who owns a house or small business with a solar panel on the roof selling a small amount of solar power to a neighbor next door. In fact, a single solar generating facility capable of generating 2 MW of electricity would span over 12 acres and could serve as many as 714 customers. The summary masks the true magnitude of the Initiative and leaves voters unaware that the main purpose of the proposal is to authorize a wholly-unregulated commercial enterprise to build unlimited solar generating facilities wherever it wants and charge unsuspecting customers whatever it wants for the electricity. The summary also deceives voters into believing that the Initiative is needed to overcome government "barriers" to solar power when in fact Florida provides numerous tax and regulatory incentives for solar power and the state's express policy is "to promote, stimulate, develop, and advance the growth of the solar energy industry in this State." § 288.041(2), Fla. Stat. The deception does not end there.

Voters are given no hint that the proposal would dismantle the exclusive electric utility service areas established by Florida law to protect electric customers from uneconomic duplication of facilities and higher rates. Furthermore, the

summary fails to apprise voters that some cooperative members currently procure solar electricity from small community-based solar facilities owned by their local cooperative, and that the proposal could prohibit those rural electric cooperatives from continuing to supply their customers with solar electricity.

Any of these defects is sufficient to prevent the proposed amendment from appearing on the ballot. Cumulatively, they leave no doubt that the proposed amendment is clearly and conclusively defective and must be stricken.

ARGUMENT

I. THE SOLAR INITIATIVE VIOLATES THE SINGLE-SUBJECT REQUIREMENT OF ARTICLE XI, SECTION 3.

There are five methods for amending or revising the Florida Constitution: by joint resolution passed by the Legislature (Art. XI, § 1, Fla. Const.), by a constitution revision commission (Art. XI, § 2, Fla. Const.), by the taxation and budget reform commission (Art. XI, § 6, Fla. Const.), by constitutional convention (Art. XI, § 4, Fla. Const.), and by citizen ballot initiative (Art. XI, § 3, Fla. Const.). Of those five methods, only the citizen ballot initiative requires that a proposed amendment "embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const.

The reason the citizen initiative method is restricted to single-subject changes to the constitution is "because the initiative process does not provide the opportunity

for public hearing and debate that accompanies the other methods of proposing amendments." Advisory Op. to Att'y Gen. re Amend. to Bar Gov't from Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888, 891 (Fla. 2000). Simply put, the framers of our constitution were concerned that the electorate could be misled into impulsively changing the organic law of our state based on what is politically popular at the time. Recognizing that the initiative process gives special interest groups unbridled discretion to draft a proposed amendment without any public, legislative, or judicial input,[2] and thereafter submit the proposal to a vote of the electorate with nothing more than the required number of signatures, the framers were careful to require that "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) (quoting Fine, 448 So. 2d at 988)).

Because the single-subject requirement is a "rule of restraint" incorporated in the constitution to protect the organic law of our state from precipitous changes, Fine, 448 So. 2d at 993, the Court requires "strict compliance" with the rule, Treating People Differently, 778 So. 2d at 891 (quoting Fine, 448 So. 2d at 989).

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[2] Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984) ("It is apparent that the 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 guiding principle in evaluating whether a proposed amendment violates the single-subject requirement is whether the proposal manifests a "logical and natural oneness of purpose." In re Advisory Op. to the Att'y Gen. - Restricted Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994) (quoting Fine, 448 So. 2d at 990). The Court determines if there is a "oneness of purpose" by inquiring "whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution." Id. Where a proposed amendment "changes more than one government function, it is clearly multi-subject." Evans v. Firestone, 457 So. 2d 1351, 1354 (Fla. 1984); accord Save Our Everglades, 636 So. 2d at 1340 ("no single proposal can substantially alter or perform the functions of multiple branches" (emphases omitted)).

A. The Proposed Amendment Substantially Alters The Functions Of More Than One Branch Of Government As Well As Multiple Levels Of Government.

This Court has consistently held that initiatives which substantially alter the function of more than one branch of government or more than one level of government violate the single-subject requirement.

In Advisory Opinion to the Attorney General – Restricted Laws Related to Discrimination, the Court considered an initiative which read "[t]he state, political subdivisions of the state, municipalities, or any other governmental entity shall not enact or adopt any law" that would restrict any anti-discrimination protection to ten

specifically enumerated classifications of people. 632 So. 2d at 1019. The Court gave as one reason for rejecting this initiative:

> the subject of discrimination in the proposed amendment is an expansive generality that encompasses both civil rights and the power of all state and local governmental bodies. By including the language "any other governmental entity," the proposed amendment encroaches on municipal home rule powers and on the rulemaking authority of executive agencies and the judiciary.

Id. at 1020.

In Advisory Opinion to the Attorney General – Save Our Everglades, the Court rejected an initiative creating a trust that would seek to restore the Everglades by using funds collected as fees from sugarcane growers. 636 So. 2d at 1340-42. The Court first explained that the trustees would be performing a legislative function because the initiative implemented a public policy decision of statewide significance. Id. at 1340. The Court then reasoned that because the trustees would be authorized to "administer" the Trust in many particulars they would be exercising an executive function. Id. Finally, the Court held that since the initiative rendered a judgment and de facto liability, it was performing a judicial function. Id.

In Advisory Opinion to the Attorney General Re Tax Limitation, 644 So. 2d 486 (Fla. 1994), the Court struck from the ballot an initiative that entitled owners to full compensation when governmental action damaged the value of their vested property rights. The Court held: "This initiative not only substantially alters the functions of the executive and legislative branches of state government, it also has a

very distinct and substantial [e]ffect on each local governmental entity." Id. at 494-95.

The initiative in Advisory Opinion to the Attorney General Re Voter Approval Required for New Taxes, 699 So. 2d 1304 (Fla. 1997), specified that "[n]o new taxes may be imposed except upon approval in a vote of the electors of the state, local or other taxing authority seeking to impose the tax," id. at 1309. As one of the reasons for rejecting the initiative the Court stated that it substantially affected several levels of government. Id. at 1310-11.[3]

In Advisory Opinion to Attorney General Re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, the Court addressed four initiatives, the first three of which barred the "state" from treating persons differently based on race, color, ethnicity, or national origin in the areas of education, employment, and contracting, and a fourth which contained the same provisions, but also proscribed differential treatment based on sex. 778 So. 2d at 888-90. The initiatives defined the State as including not only the State itself, but also "any city, county, district, public college or university, or other political

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[3] In Advisory Opinion to the Attorney General Re 1.35% Property Tax Cap, 2 So. 3d 968 (Fla. 2009), the Court held that where an initiative only involved the government's right to raise taxes, the single-subject requirement was not applicable, id. at 977. While the Court in 1.35% Property Tax Cap receded from the Voter Approval Required for New Taxes case to that extent, this had no bearing on the single-subject analysis in Voter Approval which involved a proposed amendment that affected several different levels of government.

subdivision or governmental instrumentality of or within the State." Id. at 889-890. Not surprisingly, the Court held that "the proposed amendments' substantial effect on local government entities, coupled with its curtailment of the powers of the legislative and judicial branches, renders it fatally defective and violative of the single-subject requirement." Id. at 896.

These decisions all confirm that the Solar Initiative violates the single-subject requirement because it not only substantially alters but actually prohibits the functions of the legislative and executive branches, and all levels of government, to govern and regulate the construction, production, sale, and purchase of solar electricity generated by facilities rated up to 2 MW.

In Florida, electricity is considered an essential service.[4] Thus, it comes as no surprise that the production, sale, and purchase of solar-generated electricity, and the construction and operation of solar electricity generating facilities, all are governed under a multi-layered framework which includes the legislative and executive branches, their respective agencies, and various levels of local government.

Specifically, Florida's legislature has passed a compendium of laws that requires the PSC, a legislative agency,[5] to regulate the retail sale of electricity in

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[4] See, e.g., In re Advisory Op. to Gov., 509 So. 2d 292, 305 (Fla. 1987) (recognizing that electricity is an "essential" service that the government can tax).

[5] § 350.001, Fla. Stat. ("The Florida Public Service Commission has been and shall continue to be an arm of the legislative branch of government.").

order to protect consumers from poor service quality, unreasonable rates,[6] discriminatory rate structures,[7] and unsafe practices.[8] In addition, to ensure the reliability of the grid, and to protect against the high costs and inefficiencies resulting from the uneconomic duplication of facilities, the legislature has charged the PSC with ensuring that the public is provided with electricity by exclusive utility providers within defined service areas set forth in territorial agreements. See Lee Cnty. Elec. Coop. v. Marks, 501 So. 2d 585 (Fla. 1987).

In order to ensure that electrical generating facilities, including solar generating facilities, are developed and operated in a safe and environmentally responsible manner, the legislature also has passed a series of laws which place the development and operation of electrical generating facilities under the watchful regulatory authority and permitting jurisdiction of various executive branch agencies. Those executive agencies include the Florida Department of

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[6] § 366.03, Fla. Stat. ("All rates and charges made, demanded, or received by any public utility for any service ... shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.").

[7] § 366.04(2), Fla. Stat. ("[T]he commission shall have power ... [t]o prescribe a rate structure for all electric utilities.").

[8] § 366.04(6), Fla. Stat. ("The commission shall further have exclusive jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperative Law, and electric utilities owned and operated by municipalities.").

Environmental Protection ("FDEP")[9] and Florida's water management districts.[10] Solar generating facilities owned by non-utilities also are subject to health, safety, zoning, and environmental regulation by Florida's municipalities and counties.

The Solar Initiative clearly violates the single subject requirement by substantially altering the function of more than one branch of government and more than one level of government in at least three ways: (1) it substantially limits the power of the Legislature to pass laws ensuring that the construction, production and sale of solar-generated electricity are done in a way that protects the public interest; (2) it curtails the authority of legislative and executive branch agencies to implement those laws through rulemaking, enforcement, and other agency actions; and (3) it encroaches upon the home rule powers of municipalities and some counties as well as the police powers of all divisions of government.

Subsection (a) of the proposed amendment is expressly designed to promote the production of local solar generated electricity by "preventing regulatory and economic barriers . . . imposed by state or local government on those supplying such local solar electricity." It is difficult to envision how this proscription on multiple branches of state government and all levels of government could be more broad. All regulatory or economic "barriers" that "discourage" the supply of local solar

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[9] See, e.g., §§ 403.809, 403.814, Fla. Stat.
[10] See § 403.507(2)(a)2, Fla. Stat.

electricity to customers at the same or contiguous property would be prohibited; in fact, the proposal's open-ended proscription of "economic barriers" appears to preclude any type of taxes, fees, or assessments on local solar electricity suppliers or on sales to their customers. Likewise, there is no limit to the branches of state government and the divisions of local government whose powers would be circumscribed by this proscription. There is no doubt that the proposed amendment would substantially curtail the regulatory authority of legislative branch agencies like the PSC and executive branch agencies like the FDEP and the water management districts. Moreover, by broadly defining "local government" to include "any county, municipality, special district, district, authority, or any other subdivision of the state" the proposed amendment would have "a very distinct and substantial [e]ffect on each local governmental entity." Tax Limitation, 644 So. 2d at 494-95.

Subsection (b)(1) goes on to broadly prohibit all branches of state government, and all levels of government, from enacting or enforcing any laws, ordinances, or rules that would govern the "rates" or quality of "service" of a LSES or the geographical area within which the LSES could operate. This provision would severely curtail the consumer protection functions of the PSC, the Office of Public Counsel,[11] and any other state or local consumer protection agency including the

[11] See § 350.0611, Fla. Stat.

Florida Attorney General, the Florida Department of Agriculture and Consumer Services, the Broward County Consumer Protection Board, the Hillsborough County Consumer Protection Agency, the Miami-Dade County Consumer Services Department, the Orange County Consumer Fraud Unit, the Palm Beach County Consumer Affairs Division, and the Pinellas County Office of Consumer Services.

Moreover, subsection (b)(1) would prohibit the Attorney General from exercising its enforcement authority under the Florida Deceptive and Unfair Trade Practice Act, section 501.201, Florida Statutes, et. seq. ("FDUTPA"), to protect consumers who suffer damages as a result of deceptive or unfair trade practices stemming from any "rates" or "service" of a LSES. The provision also would strip the circuit courts of their authority under section 501.207 to issue appropriate orders and injunctions to enforce the provisions of FDUTPA as it relates to any "rates" or "service" of a LSES.

Subsection (b)(4) similarly circumscribes the powers of all branches of state government, and all levels of government, from enacting and enforcing health, safety, and welfare laws, ordinances and other governmental protections that "have the effect of prohibiting the supply of solar-generated electricity by a local solar electricity supplier." For example, the Florida Legislature would be prohibited from passing, and executive agencies like FDEP and the water management districts could not enforce, laws designed to protect critical wildlife habitat, wetlands, and water

resources if they would "have the effect of prohibiting" the siting of a local solar electricity generating facility within areas where such protections would apply.[12] Likewise, a local government would be prohibited from adopting or enforcing a local wind resistance ordinance designed to protect its residents from potentially dangerous wind-blown debris if a LSES claimed its solar facilities could not economically meet those standards.

These obvious encroachments on the various branches of government, and on all levels of government, constitute a clear violation of the single-subject requirement. The Solar Initiative is conclusively defective, and must not be placed on the ballot.

II. THE SOLAR INITIATIVE VIOLATES SECTION 101.161(1), FLORIDA STATUTES, INASMUCH AS THE BALLOT TITLE AND SUMMARY ARE MISLEADING AND DO NOT DISCLOSE THE TRUE MEANING AND RAMIFICATIONS OF THE PROPOSED AMENDMENT.

Section 101.161, Florida Statutes, requires that the substance of a proposed constitutional amendment be expressed in the ballot summary in clear and

[12] See, e.g., § 403.814(6)(e), (h), Fla. Stat. (prohibiting FDEP from issuing general permits for electric transmission and distribution lines that "adversely affect threatened and endangered species" or that are located within 550 feet of water body designated as an Outstanding Florida Water); § 373.414, Fla. Stat. (establishing a rigorous environmental resource permit program for activities in wetlands, which is administered by the FDEP and the water management districts).

unambiguous language in the form of an explanatory statement "of the chief purpose of the measure" so that "the electorate is advised of the true meaning, and ramifications, of an amendment." Askew v. Firestone, 421 So. 2d. 151, 155 (Fla. 1982). A ballot summary is fatally defective if it omits material facts that are essential to understanding the changes to be effected by the proposed amendment. Fla. League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992); Advisory Op. to Att'y Gen. – Ltd. Political Terms in Certain Elective Offices, 592 So. 2d 225, 228 (Fla. 1991); Wadhams v. Bd. of Cnty. Comm'rs, 567 So. 2d 414, 416-17 (Fla. 1990); Askew, 421 So. 2d at 155-56. All of these requirements are intended "so that the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot." Save Our Everglades, 636 So. 2d at 1341.

The Solar Initiative's ballot summary falls well short of these requirements.

A. The Ballot Title And Summary Fail To Warn Voters That The Proposed Amendment Would Require Non-LSES Customers To Pay Higher Rates To Subsidize Service To LSES Customers.

The title and ballot summary fail to alert voters that the proposed amendment will ultimately require cooperative customers who do not supply solar power to others or do not purchase solar electricity from a LSES to subsidize the electric rates of customers that do.

Under current law, an electric utility must be able to set its rates at a level that allows it to recover the costs of providing electric service to the public. To deprive a utility of that right to recover its cost-of-service would be an impermissible taking prohibited by the federal and Florida constitutions. Keystone Water Co., Inc. v. Bevis, 278 So. 2d 606, 609-11 (Fla. 1973); Gulf Power Co. v. Bevis, 289 So. 2d 401, 403 n.1 (Fla. 1974). Furthermore, an electric utility's rates must be structured so that its overall cost-of-service is fairly apportioned among its various classes of customers based on the unique cost characteristics of each class. See, e.g., C.F. Indus., Inc. v. Nichols, 536 So. 2d 234, 236 (Fla. 1988) (PSC is required to fix the rates of "each customer class based on the cost of providing service to the class"). This is to protect against discriminatory rates where one class of customers is required to pay more than their fair share of a utility's cost-of-service and thus subsidize service to another class.

In a broad sense, an electric utility's cost-of-service is what the utility spends to build, operate and maintain its electric grid, i.e., its generation, transmission, and distribution systems. Although most of these grid costs are relatively fixed, regulators have encouraged electric utilities not to use fixed charges to recover all of those costs since fixed charges can operate as a disincentive for energy conservation. Instead, utilities have been encouraged to recover most of their grid costs through

rates paid by customers for each kilowatt-hour (KWH) of electricity they consume from the utility.[13]

These "consumption-based rates" have been an effective way for a utility to recover the grid costs from "full requirements" customers that rely on the electric utility for all of their electricity needs and whose purchases of electricity are expected to remain relatively stable. However, consumption-based rates have not proven effective to recover fixed grid costs when it comes to customers that obtain part of their electricity requirements from alternative sources but still rely on the regulated utility's grid services when those alternative sources of electricity are not available. These "partial-requirements" customers are unique in that while they have a constant need for connectivity and grid services, the amount of electricity they purchase from the regulated utility is diminished and highly unpredictable. Because of this decline in sales without a commensurate reduction in the cost to serve, consumption-based rates often will not enable a utility to fully recover its fixed costs to serve a partial-requirements customer. To address this shortfall, this Court has recognized that special charges for partial-requirements customers may be warranted. See C.F. Indus., 536 So. 2d at 238-39 (the Court found that a special "standby" charge for industrial customers that generated some electricity as a by-

[13] Electric utility rates also include a monthly customer charge which is a fixed amount, but those charges usually only cover a very small portion of the utility's actual fixed costs.

product of their industrial operations was needed because rates for self-generating customers "which did not recover the cost-of-service would unfairly discriminate against other customers by requiring them to subsidize the standby service").

Because solar power is unavailable at night and at other times depending on cloud cover, solar power users likewise are partial-requirement customers which are dependent on a standby supply of electricity from a regulated utility when the sun is not shining. In providing this special type of standby service to solar power users, which is intermittent, electric utilities also incur unique costs that differ from the costs of serving other customers. Such costs include the cost of power supply and capacity on the transmission and distribution lines that the utility must reserve and maintain around-the-clock for use when called upon by the solar power user. In addition, since regulated utilities must be ready to serve solar power users at any given time when sunshine is insufficient, the flow of electricity over their utility system must be continuously balanced which also imposes unique costs on the utility. Moreover, LSES customers that produce or consume solar power from non-utility sources present additional safety challenges for regulated utilities. For example, regulated utilities may have to install special disconnect switches to ensure the safety of utility line workers, firemen, and other first-responders whose services are needed by the LSES customers. There is no doubt that electric utilities will be

required to incur unique costs in order to accommodate this new class of LSES customers.

However, contrary to C.F. Indus., subsection (b)(2) of the Initiative would actually prohibit an electric utility from charging that new class of LSES customers a special rate or charge to fully recover these additional costs. That subsection states:

> (2) No electric utility shall impair any customer's purchase or consumption of solar electricity from a local solar electricity supplier through any special rate, charge, tariff, classification, term or condition of service, or utility rule or regulation, that is not also imposed on other customers of the same type or class that do not consume electricity from a local solar electricity supplier.

In other words, the PSC could not authorize an electric utility to charge a LSES customer a rate that is higher than that imposed on others who do not consume "local solar electricity," even though the cost to serve the LSES customer likely will be higher than the amount the utility is permitted to charge that customer. To make matters worse, subsection (b)(3) of the Initiative would prohibit an electric utility from disconnecting LSES customers, even if the utility is losing money on those customers.

Due to the relative infancy of the industry and low usage of customer-generated solar power, the PSC, except in a few instances,[14] has not yet found it

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[14] In recognition that customers using solar power have unique load and cost characteristics, the PSC has approved the rate structures of two cooperatives that have special higher charges for member customers with solar generation. See Withlacoochee River Electric Cooperative, Inc.'s Net Metering Service Tariff,

necessary to authorize higher rates for current users of solar power. However, in view of the substantial increase in solar power usage contemplated by this Initiative, the electric utilities' responsibilities and corresponding costs to serve these new LSES customers will increase dramatically. Yet since the Initiative would prevent electric utilities from charging LSES customers a special higher rate, the only way the electric utilities can recover those additional costs would be to raise the rates of all of their electric customers. This would force non-LSES customers to subsidize service to LSES customers -— a classic example of unfair rate discrimination.

Avoiding rate discrimination is extremely important for rural electric cooperatives which truly are not-for-profit, customer-owned organizations. If a cooperative is precluded from fully recovering the cost of serving a class of customers, it cannot foist those unrecovered costs onto other stockholders that are not customers because the only owners of a cooperative are its customers. This means that setting the rates of a rural electric cooperative is a zero sum computation. If a cooperative is precluded from fully recovering the unique cost of serving a particular class of customers, then those unrecovered costs are shifted to, and must be paid for by, other cooperative customers in the form of higher rates. Such an unfair shift in costs from LSES customers to non-LSES customers is precisely what

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effective January 1, 2015, and Lee County Electric Cooperative, Inc.'s Net Metering Service Tariff, effective January 1, 2011.

the proposed amendment would require — yet the title and summary make no mention of those discriminatory subsidies, much less the potential for higher rates.

The discriminatory subsidies latent in the proposed amendment also become apparent when one considers that the proposal could also require the regulated electric utility to deliver local solar electricity over its lines so that a LSES customer can receive electricity directly from a wholly-unregulated solar supplier. Such service is commonly referred to as "retail wheeling," and is currently prohibited under Florida law because non-utility suppliers are not allowed to make retail sales of electricity. However, subsection (a) of the proposed amendment would eliminate that retail sale prohibition as it relates to a LSES and would prevent any "regulatory and economic barriers that discourage the supply of electricity generated from solar energy sources to customers who consume the electricity at the same or a contiguous property as the site of the solar electricity production." Thus, if a customer claimed that its ability to purchase local solar electricity would be "discouraged" by their regulated utility's failure to offer retail wheeling service, the utility would appear to have no choice but to provide that novel service. Yet subsection (b)(2) would prohibit the utility from charging for the retail wheeling service since it would be a unique charge that is not imposed on other customers "that do not consume electricity from a local solar supplier."

Those unrecovered retail wheeling costs could be substantial for rural electric cooperatives. Because cooperatives often serve in sparsely populated areas where there are vast undeveloped tracts of property, a solar customer requiring retail wheeling services could be located on property "contiguous" to the solar generator and still be miles away from the generator.

Thus the proposed amendment would constitutionally authorize a discriminatory rate structure that would require the customer who does not purchase local solar electricity to pay higher rates to subsidize the customer that does. Yet the ballot summary is completely silent regarding these discriminatory subsidies and their potential to cause higher rates even though those matters are material to the proposed amendment and to the voter's ability to make an informed decision about it. The failure of the ballot summary to inform voters of those crucial issues is a clear and conclusive defect.

B. The Ballot Title And Summary Fail To Warn Voters That Florida Law Presently Protects Customers From Discriminatory Electric Rates And That The Proposed Amendment Would Take That Legal Protection Away.

Florida law currently protects customers of rural electric cooperatives and other electric utilities from rate discrimination so that one classification of customers is not required to subsidize service to another class. Indeed, the PSC is charged with protecting customers from discriminatory cross-subsidization through its rate structure jurisdiction found in section 366.04(2)(b), Florida Statutes. However, as

explained in the preceding section, the proposed amendment would abolish these customer protections by constitutionally authorizing a discriminatory rate structure that requires the other customers to pay higher rates to subsidize the new class of LSES customers.[15]

This Court has made it clear that a ballot initiative cannot substantially alter existing law without giving the public fair notice of the current state of the law. See Askew, 421 So. 2d at 156 (Ballot summary was defective for failing to explain current law on lobbying ban or that the proposal weakened current law.). Yet that is precisely what this summary does. The ballot title and summary leave voters unaware that non-LSES customers will be required to subsidize this new class of LSES customers, and that the legislature and the PSC will be stripped of their current authority to prevent that discriminatory subsidy. It is indeed ironic that a ballot initiative evoking the power of sunshine would keep voters in the dark on such crucial issues.

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[15] At least in one instance, the amendment would not only authorize discriminatory rate structures, but would mandate rate discrimination by prohibiting Lee County Electric Cooperative from continuing to charge special rates to solar users that were specifically designed to prevent unfair subsidies. See, e.g., supra note 14.

C. The Ballot Title And Summary Mislead The Voter By Failing To Advise Of The Solar Initiative's Full Meaning, Chief Purpose, And Ramifications.

The title and summary of a ballot initiative must "fairly reflect[] the chief purpose of the proposed amendment." In re Advisory Op. to Att'y Gen., English—Official Language of Fla., 520 So. 2d 11, 13 (Fla. 1988). It also must advise voters of "the meaning and ramifications of the proposed amendment," Wadhams, 567 So. 2d at 418, and "give the voter fair notice of the decision he must make," Askew, 421 So. 2d at 155.

The ballot title and summary of the initiative read as follows:

> BALLOT TITLE: Limits or Prevents Barriers to Local Solar Electricity Supply
>
> BALLOT SUMMARY: Limits or prevents government and electric utility imposed barriers to supplying local solar electricity. Local Solar electricity supply is the non-utility supply of solar generated electricity from a facility rated up to 2 megawatts to customers at the same or contiguous property as the facility. Barriers include government regulation of local solar electricity suppliers' rates, services and territory, and unfavorable electric utility rates, charges, or terms of service imposed on local solar electricity customers.

The ballot title and summary, along with the text of the amendment, are cleverly crafted to mislead the voter by euphemistically describing the affected solar generating facilities with terms like "local," "non-utility," "facility rated up to 2 megawatts," and "small scale." To further downplay the magnitude of the proposal, the proponents describe the supply of local solar electricity as being limited "to customers at the same or contiguous property as the facility." This necessarily leads

the voter to believe that this Initiative is just about someone who owns a house or small business with a solar panel on the roof selling electricity on a "small-scale" to the neighbor next door. What the voters are not told is that a single local solar generating facility capable of generating 2 MW of electricity would span over 12 acres and, according to proponents, could serve approximately 714 customers,[16] which is certainly not what most voters would consider to be "small scale."

Moreover, the 2 MW "cap" is illusory and would not restrict the proliferation of large scale wholly-unregulated solar electricity suppliers throughout the state. The proposed amendment, in fact, invites a structure where a large corporation could form unlimited special purpose entities each of which could operate a 2 MW facility and supply massive amounts of solar-generated electricity. At the same time, the proposal handcuffs the legislative and executive branches, their respective agencies, and local governments from attempting to regulate the proliferation of solar-generating facilities in order to safeguard the environment and protect the public from higher electric rates.

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[16] According to Floridians For Solar Choice, Inc.'s memorandum to the Financial Impact Estimating Conference dated April 8, 2015, a 2 MW solar generating facility "has the potential to service an estimated 714 residential customers." See Fin. Impact Estimating Conf., Solar Power - Limits or Prevents Barriers to Local Solar Electricity Supply, EDR Notebook 422, http://edr.state.fl.us/Content/constitutional-amendments/2016Ballot/WorkshopNotebook_4-24-15.pdf.

While the Solar Initiative may purport to promote the supply of local solar electricity, its main purpose is to authorize a wholly unregulated commercial enterprise that can build unlimited large-scale solar generating facilities wherever it wants and to charge customers whatever it wants. Because the Solar Initiative conceals that purpose from the voters, and fails to even hint that the amendment could raise electric rates, it should not be allowed on the ballot.

In addition, the ballot title and summary are skillfully worded to mislead the voter into believing that the Solar Initiative is necessary to overcome government opposition to solar power when in fact Florida's stated policy is to promote solar energy. The use of the word "barriers" three times in the title and summary implies the existence of governmental barriers to the use of solar power when nothing is further from the truth. Section 288.041(2), Florida Statutes, explains that: "It is the policy of this State to promote, stimulate, develop, and advance the growth of the solar energy industry in this State." To advance that policy the state provides numerous tax exemptions for solar equipment[17] and for the use of electricity from solar generation.[18] In addition, section 366.81, Florida Statutes, states that "the Legislature intends that the use of solar energy . . . be encouraged," and section

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[17] E.g., § 212.08(7)(hh), Fla. Stat. (solar energy systems are exempt from the sales tax); § 193.624, Fla. Stat. (residential solar equipment is exempt from the valuation of real property for tax purposes).

[18] § 166.231, Fla. Stat. (the municipal public service tax of up to 10% applies to sales of electricity, but not the use of customer generated electricity).

366.91, Florida Statutes, expressly promotes the development of "renewable energy resources" which are defined to include solar energy. Section 366.91 also requires electric utilities to purchase electricity produced from customer-owned solar generation. To suggest that the state has erected "barriers" to solar power is disingenuous. By raising this straw man which the Initiative promises to eliminate, the title and summary "fly under false colors" and cleverly disguise the fact that the chief purpose of the proposed amendment is to authorize the large-scale sale of electric power by a new wholly-unregulated provider — the LSES. Armstrong v. Harris, 773 So. 2d 7, 22 (Fla. 2000) ("A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect."); Askew, 421 So. 2d at 156 ("A proposed amendment cannot fly under false colors; this one does. The burden of informing the public should not fall only on the press and opponents of the measure — the ballot title and summary must do this.").

The Solar Initiative is laden with other ramifications that are not disclosed in the summary. For example, voters are left completely unaware that the legislature has authorized the PSC to establish exclusive monopoly service areas for electric utilities to avoid uneconomic duplication of facilities, control costs, and keep electric rates as low as possible. More to the point, the summary hides the fact that the proposal would strip the legislature and the PSC of those regulatory powers and allow unregulated solar electricity suppliers to operate in what historically were

within the regulated utilities' exclusive service areas, take a substantial portion of their load, and dilute their revenue base. In PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988), this Court was quick to caution that authorizing unregulated alternative electricity suppliers to encroach within the exclusive service areas of a regulated electric utility could result in cream-skimming of major customers and lead to increased rates:

> The regulation of the production and sale of electricity necessarily contemplates the granting of monopolies in the public interest. Section 366.04(3), Florida Statutes (1985), directs the PSC to exercise its powers to avoid "uneconomic duplication of generation, transmission, and distribution facilities." If the proposed sale of electricity by PW Ventures is outside of PSC jurisdiction, the duplication of facilities could occur. What PW Ventures proposes is to go into an area served by a utility and take one of its major customers. Under PW Ventures' interpretation, other ventures could enter into similar contracts with other high use industrial complexes on a one-to-one basis and drastically change the regulatory scheme in this state. The effect of this practice would be that revenue that otherwise would have gone to the regulated utilities which serve the affected areas would be diverted to unregulated producers. This revenue would have to be made up by the remaining customers of the regulated utilities since the fixed costs of the regulated systems would not have been reduced.

Id. at 283 (footnote and internal citations omitted).

The ballot summary is defective because it gives voters no hint that the proposal would disassemble the exclusive utility service areas established by the PSC pursuant to sections 366.04(2)(d) and (5), Florida Statutes, and expose electric customers to uneconomic duplication of facilities and higher rates—the very risks that this Court warned of in PW Ventures. A ballot initiative cannot substantially

alter existing law without giving the public fair notice of the current state of the law. See Askew, 421 So. 2d at 156.

In addition, the summary makes no mention that cooperative members may be prohibited from procuring power from a small community-based solar facility owned by their local cooperative. Under the sweeping definition in subsection (c)(1) a "local solar electricity supplier" includes: "any person who supplies electricity generated from a solar electricity generating facility with a maximum rated capacity of no more than 2 megawatts" to any other person located on contiguous property. Yet under subsection (c)(3) an electric utility cannot be a "local solar electricity supplier." Therefore, the Initiative may mean that rural electric cooperatives are prohibited from supplying electricity from solar facilities that are 2 MW or smaller to customers on adjacent or contiguous property.

Because rural electric cooperatives have fewer customers and different cost structures than investor-owned electric utilities, they are more inclined to focus on the sub-2 MW solar market.[19] For example, over the last six years the Florida Keys Electric Cooperative ("Keys Cooperative") has operated two small community-based solar generating facilities in Monroe County: a .097 MW array of solar modules in Marathon, and a .021 MW array on Crawl Key. The Keys Cooperative

[19] To put this segment of the solar market in context, a solar facility with a rated capacity of 2 MW would cost approximately $5 million.

leases portions of its solar arrays to its members and credits the electricity generated by their portion of the solar array to the participating member's electric bill. The combined capacity of the Keys Cooperative's solar generation is significantly below the 2 MW threshold in the proposed amendment, and the solar arrays are located adjacent to US Highway 1 and the right-of-way utilized by the cooperative, which is contiguous to many of its customers in the Keys. Thus, on the surface, the Keys Cooperative would appear to qualify as a LSES. However, because subsection (c)(3) would forbid an "electric utility" from serving as a LSES, there is a real question whether the cooperative would be able to continue to fulfill its contractual obligations to its members under its existing solar leases. The summary fails to disclose that the Initiative could have the perverse effect of excluding electric utilities from the sub-2 MW solar market thus creating a barrier for those customers that prefer to obtain local solar electricity from their cooperative.

By concealing more than it reveals, the ballot summary precludes the voter from casting "an intelligent and informed ballot." Save Our Everglades, 636 So. 2d at 1341.

CONCLUSION

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

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CERTIFICATE OF FONT AND OF SERVICE

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APPENDIX A

The ballot summary provides as follows:

Limits or prevents government and electric utility imposed barriers to supplying local solar electricity. Local solar electricity supply is the non utility supply of solar generated electricity from a facility rated up to 2 megawatts to customers at the same or contiguous property as the facility. Barriers include government regulation of local solar electricity suppliers' rates, service and territory, and unfavorable electric utility rates, charges, or terms of service imposed on local solar electricity customers.

The full text of the Initiative provides as follows:

ARTICLE X, SECTION 29.—

Section 29. Purchase and sale of solar electricity. –

(a) PURPOSE AND INTENT. It shall be the policy of the state to encourage and promote local small-scale solar-generated electricity production and to enhance the availability of solar power to customers. This section is intended to accomplish this purpose by limiting and preventing regulatory and economic barriers that discourage the supply of electricity generated from solar energy sources to customers who consume the electricity at the same or a contiguous property as the site of the solar electricity production. Regulatory and economic barriers include rate, service and territory regulations imposed by state or local government on those supplying such local solar electricity, and imposition by electric utilities of special rates, fees, charges, tariffs, or terms and conditions of service on their customers consuming local solar electricity supplied by a third party that are not imposed on their other customers of the same type or class who do not consume local solar electricity.

(b) PURCHASE AND SALE OF LOCAL SMALL-SCALE SOLAR ELECTRICITY.

(1) A local solar electricity supplier, as defined in this section, shall not be subject to state or local government regulation with respect to rates, service, or territory, or be subject to any assignment, reservation, or division of service territory between or among electric utilities.

(2) No electric utility shall impair any customer's purchase or consumption of solar electricity from a local solar electricity supplier through any special rate, charge, tariff, classification, term or condition of service, or utility rule or regulation, that is not also imposed on other customers of the same type or class that do not consume electricity from a local solar electricity supplier.

(3) An electric utility shall not be relieved of its obligation under law to furnish service to any customer within its service territory on the basis that such customer also purchases electricity from a local solar electricity supplier.

(4) Notwithstanding paragraph (1), nothing in this section shall prohibit reasonable health, safety and welfare regulations, including, but not limited to, building codes, electrical codes, safety codes and pollution control regulations, which do not prohibit or have the effect of prohibiting the supply of solar-generated electricity by a local solar electricity supplier as defined in this section.

(c) DEFINITIONS. For the purposes of this section:

(1) "local solar electricity supplier" means any person who supplies electricity generated from a solar electricity generating facility with a maximum rated capacity of no more than 2 megawatts, that converts energy from the sun into thermal or electrical energy, to any other person located on the same property, or on separately owned but contiguous property, where the solar energy generating facility is located.

(2) "person" means any individual, firm, association, joint venture, partnership, estate, trust, business trust, syndicate, fiduciary, corporation, government entity, and any other group or combination.

(3) "electric utility" means every person, corporation, partnership, association, governmental entity, and their lessees, trustees, or receivers, other than a local solar electricity supplier, supplying electricity to ultimate consumers of electricity within this state.

(4) "local government" means any county, municipality, special district, district, authority, or any other subdivision of the state.

(d) ENFORCEMENT AND EFFECTIVE DATE. This amendment shall be effective on January 3, 2017.