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SUPREME COURT OF FLORIDA
Case No.: SC19-328

ADVISORY OPINION TO THE ATTORNEY GENERAL RE:

"Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice"
[Initiative Petition 18-10]

REPLY BRIEF OF FLORIDA POWER & LIGHT COMPANY AND GULF POWER COMPANY IN OPPOSITION TO PROPOSED AMENDMENT

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ARGUMENT

In their initial brief, Florida Power & Light Company and Gulf Power Company ("FPL/GPC") argued that the Amendment violates the single-subject restriction by combining at least two disparate subjects. FPL/GPC also argued that the ballot summary contains materially misleading statements and ambiguities, and fails to give voters notice of other constitutional provisions that would be substantially affected. As to the single-subject restriction, the Sponsor makes broad conclusory statements, but fails to distinguish the Amendment from multiple cases cited by FPL/GPC in which this Court has stricken proposed amendments that suffered from the same flaws. With respect to the ballot summary, the Sponsor attempts to sweep away the myriad problems noted by FPL/GPC with a strained and unsustainable interpretation of the Amendment that creates more problems than it solves.

Two Disparate Subjects

FPL/GPC identified two subjects in the Amendment that violate the single-subject restriction: (1) the provision of Subsection (b) that would open the electricity market to competition; and (2) the provision of Subsection (c) that would oust "investor-owned electric utilities" from the market for generation and sale of electricity. FPL/GPC argued that combining the two subjects in a single amendment triggered the two primary concerns identified by this Court as underlying the single-

subject restriction: first, it constitutes logrolling by imposing upon voters the all-or-nothing choice of two disparate subjects; and second, its passage would have precipitous and cataclysmic impact on a critical aspect of Florida government.

In response, the Sponsor makes the conclusory statement that the two provisions are "directly and clearly related," but offers no meaningful analysis to support the claim. Instead, its defense consists of citations to this Court's recent decisions upholding proposed amendments on solar energy and medical marijuana. The material distinctions between those amendments and the current Amendment illustrate why the current Amendment should be invalidated.

The amendment reviewed in *Solar Energy I,* 177 So. 3d 235 (Fla. 2015), stated that its chief purpose was to encourage and promote the generation of solar energy and to limit and prevent regulatory and economic barriers to the production of such energy. The amendment delineated various government and industry imposed impediments to the development of solar energy, all clearly related to the chief purpose. The amendment reviewed in *Solar Energy II*, 188 So. 3d 822 (Fla. 2016), gave electricity consumers the right to own or lease solar equipment to generate their own electricity and included definitions of the terms used in the operative portion of the amendment. Both amendments retained the powers of state and local governments to protect consumer rights and the public's health, safety and welfare.

The Court held that provisions in *Solar Energy I* prohibiting government and private impediments to the generation and use of solar energy were directly related to the amendment's purpose of encouraging and promoting such use. In *Solar Energy II,* the Court noted that the amendment created a right, and authorized the government to regulate that right. The Court held that, "Combining a right with the government's authority to regulate that right represents two sides of the same coin." *Id.* at 188 So. 3d 828.

The Court reviewed a proposed amendment legalizing the use of medical marijuana in *Medical Marijuana I*, 132 So. 3d 786 (Fla. 2014), and *Medical Marijuana II*, 181 So. 3d 471 (Fla. 2015). The chief purpose of the amendment was to decriminalize the use of marijuana by persons having certain medical conditions. In addition to providing that qualifying persons would not be subject to civil or criminal sanctions, the amendment immunized certifying physicians and dispensing centers from sanctions, and provided details regarding the implementation of the law. The immunizing provisions were not only related to, but necessary, if the chief purpose of the amendment was to be realized. Like the Solar amendments, the Medical Marijuana amendment also defined limits on the right granted and provided for regulation of the right.

The provisions of the Amendment ousting current providers from the market and requiring divestiture of ownership are not qualifications to or regulation of the

right of a consumer to choose an electricity provider or to self-generate electricity. They are connected to the open competition provision only by the Sponsor's subjective opinion that they would foster competition. This can easily be contrasted with the provisions in the *Solar Energy I* amendment that prohibited impediments to use of solar power. The interference with solar usage posed by those impediments were objective and logic based, not subjective and opinion based.[1] Neither the solar energy nor medical marijuana decisions, nor any other decision of this Court, has held that two provisions as disparate as those in the case at bar met the single-subject restriction.

The Market Power Argument

As expected, the Sponsor argues that competition cannot be achieved if the current providers are permitted to remain in the market for the generation and sale of electricity. As noted in the FPL/GPC initial brief, such an assumption is not self-evident, and permitting a proponent to clear the single-subject threshold on the basis of such subjective factual assumptions would create a new and judicially unmanageable standard. The Sponsor offers a self-defeating response. The Sponsor touts a Texas statute that prohibits electric monopolies, which the Sponsor states

[1] "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." *Solar Energy I,* 177 So. 3d at 241.

created a "truly competitive" market. Based upon the Sponsor's insistence that such a competitive market would require removal of existing providers, one would assume that the Texas law included the same type of market exclusions as does the current Amendment. But, curiously, the Sponsor tells us otherwise:

> As FPL is well aware, every one of the former IOUs in Texas that owned generation prior to that state's restructuring continues to own generation and participate in the wholesale market—albeit with caps on the amount of generation that can be owned (a rule that applies to all generation owners, to prevent market power) and under a corporate structure that ensures that the generation company is kept fully at arm's length from the remaining Transmission and Distribution Utility (TDU) that continues to own and operate the poles, wires, and related infrastructure.

Sponsor Brief, p. 26. The Sponsor's concession that the "investor-owned utilities" that existed when the Texas law was enacted continue to participate in the market, and that the market still became "truly competitive," undermines the foundation of the Sponsor's premise that removal of the existing providers is necessary for competition, and therefore part of a single subject.

The Texas statute did not require existing providers to disinvest all interest in infrastructure and bar them from continued participation in the market as does the Amendment. The Texas law allows existing providers to remain engaged in all phases of the energy market, provided that they separate their business activities into separate units for generation, retail sale, and transmission and distribution (which units can be wholly owned by the original providers acting through parent

companies) and provided they adhere to a cap on generation capacity equally applicable to all participants. *See* Sections 31.002; 35.004; 39.154, 156, 157(6), Tex. Stat., which recognize the continuing right of such affiliated companies to "own" generation, transmission, and distribution equipment and facilities.

The Sponsor's reference to the Texas law not only undermines its assertion that removal and divestiture of providers is necessary, it illustrates why judicial single-subject analysis cannot be based upon a sponsor's subjective opinion that a disparate requirement is necessary to achieve an amendment's purpose. The constitutional procedure for this Court's initial review of a petition proposal does not contemplate an evidentiary hearing to determine the validity of a sponsor's factual claims. For this reason, the Court has required that a proposed amendment stand or fall based on its own language. In the cases relied upon by the Sponsor, this Court did not find a subject connection based upon non-record facts external to the amendment. The connections it found to sustain the amendments arose from the language of the amendments themselves.

The Sponsor makes the surprising and inconsistent assertion that the Amendment does not violate the single-subject restriction because it would *not* require existing providers to exit and divest. Instead, the Sponsor argues that nothing in the Amendment prohibits the Legislature from "crafting legislation" that would allow current providers to continue to participate in the market "after corporate

reorganization to comply with the new law." It makes no effort to explain what kind of corporate reorganization could possibly allow existing providers to continue to participate in the market for generation and sale of electricity, and still comply with the Amendment. The Sponsor cites reorganization of the Texas power industry as an example. Sponsor Brief, pg. 26. There is no legitimate comparison. While the Texas legislature did extensively reorganize its industry, it was not bound by an irreconcilable constitutional provision, and it had no obligation to remain consistent with the language of a ballot summary.

Even if the Amendment could be as broadly interpreted as suggested by the Sponsor, the result would be to render defective the ballot summary, which unconditionally requires the Legislature to "limit the activity of investor-owned electric utilities to the construction, operation, and repair of electrical transmission and distribution systems." This issue is more fully discussed below.

The Burden Shifting Argument

The Sponsor argues that FPL/GPC are attempting to shift the burden of proof. Opponents of proposed constitutional amendments do carry the general burden to show that the amendment is clearly and conclusively defective. However, this Court has recognized that it has a specific burden to give initiative proposals "careful scrutiny" and to require "strict compliance with the single-subject rule." *Solar Energy I*, 177 So. 3d at 242; *Fine v. Firestone,* 448 So. 2d 984, 989 (Fla. 1984). That

burden cannot be met by finding single-subject compliance based upon an attenuated connection between the chief purpose of an amendment and the Sponsor's subjective belief that an otherwise disconnected requirement will promote that purpose.

Logrolling

The Sponsor states that there is no logrolling problem because the Amendment contains "no 'unpopular' issue being swept along with the initiative to grant electricity customers the right to choose their energy provider from a competitive energy market." Sponsor Brief, p. 23. The statement misperceives the concept of logrolling within the context of the single-subject restriction. Logrolling isn't determined by testing public opinion to determine whether a provision is generally popular. The question is whether the aggregation of subjects confronts individual voters with having to "accept part of a proposal which they oppose in order to obtain a change which they support." *Fine,* 448 So. 2d at 990.

It is not difficult to visualize a voter who philosophically believes in free enterprise and a competitive market — and would therefore favor opening the market to competition — but who also values private property and the sanctity of contracts. It is equally probable that the same voter who favors greater choice among electricity providers would not favor being precluded from having the option of selecting service from his or her existing provider. The Amendment would confront such voters with the necessity of accepting a provision that violates his or her latter

conviction in order to obtain the former. That's the essence of logrolling, and it arises from core provisions of the Amendment.

BALLOT SUMMARY

Material Ambiguities

FPL/GPC raised five questions in their initial brief demonstrating that the summary contains ambiguities relating to use of the term "investor-owned utilities" of such magnitude that a voter would be unable to discern the chief purpose and material effects of the Amendment.[2] The Sponsor sidesteps the questions with a novel bit of sophistry:

> The obvious answer is that the essence of the term 'utility' in the electricity industry is monopoly. If there is no monopoly, there is no utility. Nobody selling electricity in a competitive market would be a utility.

Sponsor Brief, p. 64.

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[2] 1. Who are "customers" of investor-owned utilities if investor-owned utilities cannot sell electricity?

2. If an investor-owned utility is any private company that generates and sells electricity, wouldn't a customer who begins to generate and sell electricity thereby become an investor-owned utility and thus be prohibited from generating and selling electricity?

3. If an investor-owned utility is something other than a private company that generates and sells electricity, what is it, and how is the voter supposed to determine that from the summary?

4. Does "investor-owned utility" refer only to companies generating and selling electricity on the effective date of the Amendment, or to such companies that enter the market after the effective date?

5. If the latter, can investors in a company ousted from the market return to the market by investing in a new company?

The mere fact that the Sponsor finds it necessary to engage in such convoluted logic to explain away the apparent inconsistencies in the summary is evidence of the summary's ambiguities. There are two problems with the explanation. In the first place, it is not quite so "obvious" that the term utility is synonymous with monopoly. In Chapter 366, Florida Statutes, which provides for regulation of electric energy, "public utility" is defined, with certain exceptions not relevant here, as follows:

> "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state….

Sec. 366.02, Fla. Stat. No mention of monopoly. The statutory definition is consistent with common understanding of the term, as illustrated by Webster's online dictionary, which defines "public utility" as:

> a business organization (such as an electric company) performing a public service and subject to special governmental regulation.

https://www.merriam-webster.com/dictionary/public%20utility. Again, no mention of monopoly. The Sponsor fails to cite any authority to substantiate its statement that the term "utility" in the electricity industry is synonymous with monopoly, and the statement is baseless. In the absence of support for its definition of an electric utility as a monopoly, the Sponsor is left with no defense to the ambiguities problem. Moreover, the Sponsor's interpretation would render the language of the Amendment that limits activities of "investor-owned utilities" purposeless.

Even more importantly, the Sponsor's reasoning, if accurate, would make the ballot summary significantly deceptive. The summary tells voters that the Amendment "[l]imits investor-owned utilities to construction, operation, and repair of electrical transmission and distribution systems." That language supports only one conclusion: investor-owned utilities would be forbidden to construct or own the infrastructure to generate electricity (the power plants) or to own the infrastructure necessary to transmit or distribute electricity (the poles and wires). But the Sponsor now tells us that the companies referred to as "investor-owned utilities" really will be able to participate in all aspects of the electricity market because (wink wink) "utility" means "monopoly," and once the Amendment eliminates monopolies, the companies will no longer be "utilities" and, therefore, will not be subject to the language that limits "investor-owned utilities." Why the average voter — or any voter — is expected to glean such verbal gymnastics from the language of the summary is not explained.

If the Sponsor's characterization of the effect of the Amendment is accurate, the ballot summary is a classic example of a game of "hide the ball," which this Court has condemned. *See Roberts v. Doyle,* 43 So. 3d 654 (Fla. 2010); *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

Deceptive Reference to a Right to Sell Electricity

In their initial brief, FPL/GPC noted that the ballot summary erroneously states that the Amendment "[g]rants customers of investor-owned utilities the right to choose their electricity provider and to generate *and sell* electricity." (Emphasis added.) The rights granted by the Amendment are clear:

> (b) Effective upon the dates and subject to the conditions and exceptions set forth in subsections (c), (d), and (e), *every person or entity that receives electricity service from an investor-owned electric utility . . . has the right to choose their electricity provider*, including, but not limited to, *selecting from multiple providers in competitive wholesale and retail electricity markets*, or by *producing electricity themselves or in association with others*, and shall not be forced to purchase electricity from one provider.

(Emphasis added.) The plain language grants customers two rights: the right to choose from competing electricity providers in a competitive market, and the right to *produce* their own electricity. That's it. The plain language of the Amendment does not include a right of customers to *sell* electricity. Again, the Sponsor proposes a strained interpretation:

> If a customer has the right to choose its electricity provider from any entity other than an investor owned utility, it follows that the customer has the right to choose to buy electricity from another customer that has been granted the right to generate electricity itself or in association with others.

Sponsor Brief, p. 76.

The problem with the Sponsor's explanation is that the Amendment does not give customers the right to buy electricity "from *any entity* other than an investor-

owned utility." The actual language is that customers will have "the right to choose their electricity provider." Nothing in the Amendment states who can be an electricity provider, other than the fact that it cannot be an "investor-owned electric utility." The Amendment instructs the Legislature to adopt complete and comprehensive implementing legislation. Since the only restriction on the Legislature's power to define who can sell electricity is the restriction on "investor-owned" utilities, the Legislature would be free to restrict or prohibit the sale of electricity by some or all customers. That is directly contrary to the summary's statement that, upon passage of the Amendment, customers will have a constitutional right to sell electricity.

Deceptive Reference to New Consumer Protections

FPL/GPC noted that the summary misleadingly states that the Amendment requires the Legislature to adopt laws providing for specific consumer protections, clearly implying that such protections do not currently exist. The FPL/GPC initial brief noted that the Legislature has already authorized the Public Service Commission to protect consumers from all abuses mentioned in the Amendment, and the PSC has already adopted regulations to ensure such protections. FPL/GPC cited several cases in which the Court has disallowed amendments for the same types of misleading statements in ballot summaries. The Sponsor offers no response to this issue.

Undisclosed Effects on Article I Provisions

The FPL/GPC initial brief argued that the ballot summary fails to alert voters to the fact that the Amendment effectively amends three sections of Article I of the Florida Constitution: section 2, which guarantees the right to possess and protect property; section 9, which guarantees that no person will be deprived of property without due process of law; and section 10, which prohibits laws impairing the obligations of contracts. The Sponsor responds that the Amendment does not affect the cited provisions because the "market restructuring" under the Amendment will be a valid exercise of the police power of the Legislature, and because current law allows the PSC to impair contracts. (Sponsor Brief, p. 33)[3] Neither current law nor the police power of the Legislature will have any bearing if the Amendment passes. The language of the Amendment with respect to the ouster and disinvestment provisions recognizes no exceptions. It would take precedence over any rights granted by pre-existing, more general provisions of Article I.

[3] The Sponsor discusses the issue under the section of its brief dealing with the single-subject restriction. The FPL/GPC initial brief raised the issue in connection with the ballot summary, which is where this Court has analyzed the requirement. *See Property Tax Cap,* 2 So. 3d 968 (Fla. 2009); *Treating People Differently,* 778 So. 2d 888 (Fla. 2000).

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

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I hereby certify that a true and correct copy of the foregoing has been filed electronically with the Clerk of the Court via the e-filing Portal and served via email to the following this 21st day of June, 2019:

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