IN THE SUPREME COURT OF FLORIDA

Case No. SC15-2150

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: RIGHTS OF ELECTRICTY CONSUMERS REGARDING SOLAR ENERGY CHOICE

INITIAL BRIEF OF OPPONENT: FLORIDA SOLAR ENERGY INDUSTRIES ASSOCIATION

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IDENTITY AND INTEREST OF THE FLORIDA SOLAR ENERGY INDUSTRIES ASSOCIATION AND INTRODUCTION

The Florida Solar Energy Industries Association (FlaSEIA) is a Florida non-profit professional association, consisting of companies with a shared mission to advance energy policy in the State of Florida through the integration of solar energy as an economic, meaningful and sustainable part of the state's energy portfolio. FlaSEIA members include solar photovoltaic ("PV") and solar thermal contractors, installers, manufacturers, distributors, consultants, engineers, and designers. Since 1977, the organization has actively promoted the common business interests of persons engaged in business of solar energy by educating consumers, business owners and political leaders and, by supporting beneficial solar policy initiatives. FlaSEIA is especially qualified and knowledgeable to appear in a proceeding before this Court to address a proposed amendment to the Florida Constitution that purports to advance solar policy in Florida. The collective expertise of FlaSEIA is a valuable resource to inform the Court on the legal issues before the Court and essential issues of regulatory and public policy.

The proposed language of the Proposed Solar Amendment reads as follows:

BALLOT TITLE: Rights of Electricity Consumers Regarding Solar Energy Choice

BALLOT SUMMARY: This amendment establishes a right under Florida's constitution for consumers to own or lease solar equipment installed on their

property to generate electricity for their own use. State and local governments shall retain their abilities to protect consumer rights and public health, safety and welfare, and to ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do.

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add new Section 29 to Article X FULL TEXT OF THE PROPOSED CONSTITUTIONAL AMENDMENT:

Section 29 – Rights of electricity consumers regarding solar energy choice. –

(a) ESTABLISHMENT OF CONSTITUTIONAL RIGHT. Electricity consumers have the right to own or lease solar equipment installed on their property to generate electricity for their own use.

(b) RETENTION OF STATE AND LOCAL GOVERNMENTAL ABILITIES. State and local governments shall retain their abilities to protect consumer rights and public health, safety and welfare, and to ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do.

(c) DEFINITIONS. For purposes of this section, the following words and terms shall have the following meanings:

(1) "consumer" means any end user of electricity regardless of the source of that electricity.

(2) "solar equipment," "solar electrical generating equipment" and "solar" are used interchangeably and mean photovoltaic panels and any other device or system that converts sunlight into electricity.

(3) "backup power" means electricity from an electric utility, made available to solar electricity consumers for their use when their solar electricity generation is insufficient or unavailable, such as at night, during periods of low solar electricity generation or when their solar equipment otherwise is not functioning.

(4) "lease," when used in the context of a consumer paying the owner of solar electrical generating equipment for the right to use such equipment, means an agreement under which the consumer pays the equipment owner/lessor a stream of periodic payments for the use of such equipment, which payments do not vary in

amount based on the amount of electricity produced by the equipment and used by the consumer/lessee.

(5) "electric grid" means the interconnected electrical network, consisting of power plants and other generating facilities, transformers, transmission lines, distribution lines and related facilities, that makes electricity available to consumers throughout Florida.

(6) "electric utility" means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

(d) EFFECTIVE DATE. This section shall be effective immediately upon voter approval of this amendment.

The proposed amendment's ballot title and summary "hide the ball" and mislead on the true intent of the proposed amendment, and it clearly violates the constitutional requirement of being limited to a single subject. As such, it does not meet the legal threshold for ballot placement.

STATEMENT OF THE CASE AND FACTS

On November 24, 2015, Florida Attorney General requested an advisory opinion by the Court regarding the above proposed amendment (hereinafter "Proposed Amendment"). The questions presented by the request for an advisory opinion are: (i) whether the language and structure of the proposed ballot initiative violate the single subject restriction; and (ii) whether the ballot title and summary of the proposed ballot initiative provide voters fair notice of the true ultimate purpose and effect of the initiative.

STANDARD OF REVIEW

The question of whether a proposed constitutional amendment is defective is a pure question of law, subject to de novo review. *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008); *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000).

BACKGROUND

The Proposed Amendment at bar was drafted in July, 2015, by Consumers for Smart Solar (hereinafter "CSS"), a political committee. The Proposed Amendment was drafted in direct response to, and as political opposition to a separate proposed ballot initiative that preceded the Proposed Amendment, one drafted by Floridians for Solar Choice, which establishes additional consumer and market choices for solar in Florida, *See Advisory Opinion to the Att'y Gen'l re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235 (Fla. 2015). The Floridians for Solar Choice ballot initiative has passed constitutional scrutiny, by review of this Court, and is now pending final certification by the Secretary of State. *Id*. The public discourse regarding these two proposed solar amendments substantially affects one of the most vital areas of public policy in the state. Therefore, the Proposed Amendment warrants the highest degree of scrutiny to avoid voter confusion and misdirection. As the monopoly power companies are controlling actors in the energy marketplace, the Proposed Amendment should be particularly scrutinized.

CSS' arguments, materials and messaging are focused on offering an alternative to the proposal by Floridians for Solar Choice. The CSS website is replete with messaging on how the Proposed Amendment is a response to the Floridians for Solar Choice petition.[1] Press accounts confirm the genesis of the Proposed Amendment is to derail the Floridians for Solar Choice amendment.[2]

In fact, the Proposed Amendment is as alter-ego of the state's biggest power companies that view meaningful development of rooftop solar power that could be unleashed by the Floridians for Solar Choice amendment as a threat to sales and their business model. Financial reports evidence the significant bankrolling of the Proposed Amendment by the State's investor owned utilities.[3]

In October, 2015, CSS acquired public signatures sufficient to meet the threshold for consideration by the Attorney General. On November 25, 2015, the Office of the Attorney General submitted to this Court a request, pursuant to

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[1] CSS, at https://smartsolarfl.org/ (i.e. "The Tale of Two Amendments," and the "'Shady" Solar Amendment v. the 'Smart" Solar Amendment").

[2] Kallinger, *Make the smart solar choice*, Gainesville Sun, at http://www.gainesville.com/article/20151025/OPINION03/151029881

[3] As of January 4, 2016,the records of the Florida Department of State's Division of Elections indicate that direct donations to CSS from Florida Power and Light Company ($1,045,000), Duke Energy Florida ($1,005,000), Gulf Power Company ($640,000) and Tampa Electric Company ($841,000) combine to equal $3,531,000 or more than half of the total $5.9 million raised by Consumers for Smart Solar for this initiative. It is no small coincidence that these same monopoly power companies actively opposed the Floridians for Solar Choice ballot initiative.

Article IV, Section 10 of the Florida Constitution, and Section 101.161, Florida Statutes, for a written opinion on the validity of the CSS proposed ballot initiative. This Court has jurisdiction pursuant to Article V, Section 3(b)(10), Florida Constitution.

SUMMARY OF ARGUMENT

Florida law requires all proposed amendments to the Florida Constitution to be presented to voters with a clear and unambiguous explanation of the measure's chief purpose. The proposed ballot initiative at bar fails to meet this requirement, therefore fails to comply with Section 101.161, Florida Statutes.

Additionally, the text of the proposed amendment entitled "Rights of Electricity Consumers Regarding Solar Energy Choice" fails to comply with the single subject requirement of Article XI, Section 3, Florida Constitution.

The measure clearly violates the single-subject restriction. First, it purports to create a "right" to own or lease solar equipment, next, it retains the ability of state and local government to protect "consumer rights" (an undefined term), and lastly to ensure that non-solar customers do not "subsidize" (another undefined term) solar customers. It presents three disjointed issues to voters that have no reasonable unity of purpose. The CSS Proposed Amendment is also defective because the ballot title and summary fail to inform voters of the true and legitimate purpose and effect of the measure. It misleads on establishing a purported right. FlaSEIA

asserts that this right presently exists and the language in the CSS ballot initiative adds nothing new, and in-fact may restrict already existing rights. It misleads in using the term "subsidize" and fails to disclose the remedy for the so-called subsidy. Given these infirmities, the Court should respectfully not allow the proposed Amendment to be presented to voters.

ARGUMENT

I THE PROPOSED AMENDMENT IS DEFECTIVE BECAUSE THE BALLOT TITLE AND SUMMARY FAIL TO STATE IN CLEAR AND UNAMBIGUOUS LANGUAGE THE AMENDMENT'S CHIEF PURPOSE AND EFFECT.

The ballot title and summary for the proposed Solar Amendment must "advise the voter sufficiently to enable him intelligently to cast his ballot." *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) (quoting *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954)). The ballot title and summary for the Proposed Amendment, read together, do not accurately place the voter on notice the scope and effect of this initiative. *See Roberts v. Doyle*, 43 So. 3d 654, 659 (Fla. 2010). The title and summary, as written, is likely to mislead the public. *See, e.g., Advisory Op. to Att'y Gen. re Fla. Marriage Prot. Amendment, 926 So. 2d 1229, 1236 (Fla. 2006).*

A. THE USE OF THE TERMS "RIGHTS" IN THE TITLE AND "RIGHT" IN THE SUMMARY IS MISLEADING.

The title of the Proposed Amendment reads "'Rights' of Electricity Consumers Regarding Solar Energy Choice." "Rights" are defined as legal, social, or ethical principles of freedom or entitlement.[4] As such, "right" is a powerful term that connotes a freedom to engage in certain activities without government interference. For instance, in today's culture rights are often cast as inalienable rights to gun ownership, same-sex marriage rights, and property rights, to name a few - all connoting an entitled that can't be infringement by government. The title of the Proposed Amendment as well purports to create a right regarding solar energy "choice[5]" – again a powerful suggestion. Who wouldn't want a right to solar energy choice that can't be abridged by government, or the power companies? Yet, the purported "right" offered to voters is an illusion, and comes with associated undisclosed responsibilities that infringe upon the "right."

Florida's Constitution is a document of limitation by which citizens exercise restrictive authority over government dominion and power in affecting the property, the liberties, the rights and the lives of citizens, *Smathers v. Smith*, 338

[4] https://en.wikipedia.org/wiki/Rights

[5] It is important to note the term "choice" is misleading. There is no choice presented by the proponents. The term "choice" can only be interpreted as to sow confusion among voters about the identity of the Proposed Amendment and with the Floridians for Solar Choice proposed amendment. *See* www.flsolarchoice.org

So. 2d 825, 827 (Fla. 1976). It is an especially dangerous proposition in this context, to imply creation of new constitutional rights that guides or restricts government impact on the affairs of citizens, when in fact none are created.

As a threshold matter, the proposed amendment misleads because it creates the false impression that electric customers do not have the current right to own or lease solar equipment that is installed on their property to generate electricity for their own use. This is not the case. The Florida Constitution[6] and current statutes and regulations[7] afford consumers the right to own or lease solar equipment installed on their property to generate electricity for their own use. This is the type of false impression that this court has found to be misleading in ballot summaries. *See Advisory Op. to the Att'y Gen. re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466 (Fla. 1995).

In fact, not only do consumers currently have the right to own or lease solar equipment installed on their property to generate electricity for their own use, *but*

[6] Article I, Section 2 of the Florida Constitution states that "[a]ll natural persons … have inalienable rights … to acquire, possess and protect property … ."

[7] R. 25-6.065(2)(a), F.A.C. ("Customer-owned renewable generation" means an electric generating system located on a customer's premises that is primarily intended to offset part or all of the customer's electricity requirements with renewable energy. The term "*customer-owned renewable generation" does not preclude the customer of record from contracting for the purchase, lease*, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party.") (emphasis added).

consumers also have the right to provide any excess electricity back to the utility's grid through a net metering policy. Indeed, there were over 8,500 interconnected customer-owned solar systems generating power for the host property and providing excess power to grid in Florida as of December 31, 2014.[8] Net metering allows residential and commercial customers who generate their own electricity from solar power to feed any electricity that they do not use back into the grid. It is a billing mechanism that credits solar energy system owners for the electricity they add to the grid. Florida's net metering policy was established by statute in 2008 and the Florida Public Service Commission has promulgated a rule to implement the policy for the state's biggest power companies.[9]

Hence, the ballot language does not only purport to establish a "right" that already exists, but it can be interpreted to disallow current net metering policy – which is a limitation to already-existing right enjoyed by consumers. If the Proposed Amendment were to gain approval from this Court and be passed by unsuspecting voters, it would enshrine in the Constitution a limitation to customers

[8] Florida Public Service Commission, Customer Renewable Energy Systems, December 31, 2014, at http://www.psc.state.fl.us/utilities/electricgas/customerrenewable/2014/2014%20Net%20Metering%20Summary%20Spreadsheet/2014%20Net%20Metering%20Chart.pdf

[9] §366.91(5)(6), Fla. Stat.; R. 25-6.065, F.A.C.

generating power *only* for "their own use" – and eliminate the current option to provide excess power back to the grid. Current net metering policy could be deemed unconstitutional. When reviewing constitutional provisions, the Court follows principles parallel to those of statutory interpretation. First and foremost, the Court examines the actual language used in the Constitution. If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written." *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc. (FACDL),* 978 So. 2d 134, 139-40 (Fla. 2008). (internal quotation marks and citations omitted). The term for customer's "own use" is not defined in the body of the amendment. Given that the language that purports to grant the "right" to generate electricity for customer's "own use," is ambiguous, it will necessarily require future judicial interpretation. The outcome of that interpretation cannot be predicted, and as such, it also weighs against the Proposed Amendment being placed on the ballot.

Moreover, the terms "rights" in the ballot title and "right" in the ballot summary clearly misleads voters because it does not inform voters of the consequences of availing themselves of the purported "right" and "rights." The summary states in part that "[s]tate and local governments shall retain their abilities to … and to *ensure that consumers who do not choose to install solar are*

not required to subsidize the costs of backup power and electric grid access to those who do." (emphasis added).

Hence, the summary patently creates a presumption in the Florida Constitution that solar customers require a "subsidy" for the cost of back-up power and electric grid access from non-solar customers. The merits of this unsupported allegation are discussed *infra*. The voter is left not only to presume the meaning of a subsidy, but also to presume that when voters choose to install solar, gaps exists in present law to protect consumers from this dreaded occurrence.

This discourse is far removed from a discussion of a constitutional right for voters to own or lease solar equipment. It further extends the conversation beyond the mere existence of an alleged subsidy, to the question of jurisdiction of state and local governments to regulate such subsidies.

Regardless, unless a voter is an expert in utility regulation, he or she would have no knowledge that this provision contemplates imposing fees on those customers that avail themselves of the purported "rights" to use solar power to generate electricity, or otherwise make customer-sited solar power systems for those customers less financially attractive by weakening Florida's current net metering rule. Nowhere in the title (or the summary) of the Proposed Amendment are voters accurately informed that the sponsors fully intend that this language

authorize a remedy for this so-called subsidy. Likewise, nowhere in the title, the summary or the text of the Proposed Amendment do the sponsors explain the nature of remedy anticipated to correct the subsidy.

The imposition of charges by a utility on its customers that utilize solar power to remedy a purported "subsidy" is not a "right." The weakening of Florida's net metering policy will have a negative financial effect on those using solar systems that produce excess electricity because a lower credit will be afforded them from power delivered to the utility's grid. This remedy to a so-called "subsidy" is not a "right" to the consumer. The imposition of charges on customers is not a freedom or entitlement; it is a burden, a significant burden that may place the purported newly created "right" of solar consumers financially out of reach. While that would suit the power companies' agenda just fine, it is inherently misleading.

Customer-sited solar power (distributed solar power on the customer's premises) is a transcendental threat to the regulated power company paradigm as it reduces demand by customers, and hence reduces power company revenues. In fact, the electric utility industries' trade group, the Edison Electric Institute, issued a report highlighting distributed solar power as "disruptive challenge" to the

industry.[10] Power companies throughout the country have begun to address this threat to their business interests by advocating to their respective public utility commissions for the imposition of charges on their solar customers, or the gutting of existing net metering policies. Almost all states provide net metering to customers, including Florida.

The utilities have mounted a well-funded campaign to reduce or eliminate the payments.[11] Fortunately, a majority of state public utility commissions have rejected power company efforts to limit consumer solar rights. In California, for instance, power company attempts to reduce net metering payments were recently defeated. Utility companies in the state had been pushing for the credit to solar customers that provide excess power to the grid be slashed, but the California Utilities Commission ruled that they will continue to receive a retail rate credit.[12] California is a state with an order of magnitude of times more solar customer

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[10] Peter Kind, Disruptive Challenges: *Financial Implications and Strategic Responses to a Changing Retail Electric Business*, Edison Electric Institute, January 2013, at http://www.eei.org/ourissues/finance/documents/disruptivechallenges.pdf

[11] Richard Martin, *Battles Over Net Metering Cloud the Future of Rooftop Solar*, MIT Technology Review, January 5, 2016, at http://www.technologyreview.com/news/545146/battles-over-net-metering-cloud-the-future-of-rooftop-solar/

[12] Ben Willis, *Solar industry declares victory in California net metering battle*, PV Tech, December 16, 2015, at http://www.pv-tech.org/news/solar-industry-declares-victory-in-california-net-metering-battle

penetration than Florida. In Colorado, its public utility commission rejected a request by a power company to reduce the credit provided to solar customers that use net metering. More than 25,000 solar systems – orders of magnitude greater solar penetration than Florida - have been installed in the Colorado power company's system since 2006.[13] Similarly in Utah, the Utah Public Service Commission rejected a request by a power company to impose a so-called "sun tax" that would have imposed a net metering fee on solar customers.[14] The Florida power companies, who have significantly bankrolled the Proposed Amendment, are now aiming to weaken the financial benefit of solar-use in the Sunshine State as well. In fact, Florida Power and Light Company has signaled in its comments to the Florida Public Service Commission just last year, even with Florida's anemic solar penetration, that it views Florida's current net metering policy as creating a subsidy stating "without changes to the way in which solar-installing customers are charged for *access to the grid* and with their continued *reliance on backup power*, solar-installing customers will continue to be *subsidized* by other customers."[15]

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[13] Shay Castle, *PUC Ruling: No changes on net metering in Colorado*, Daily Camera, July 26, 2015, at http://www.dailycamera.com/boulder-business/ci_28708810/puc-ruling-no-changes-net-metering-colorado

[14] Ian Clover, Utah rejects net metering fee, PV magazine, September 3, 2014, at http://www.pv-tech.org/news/solar-industry-declares-victory-in-california-net-metering-battle

[15] Florida Power and Light Company, Florida Power and Lights Company's Response to Request Solar Comments, June 23, 2015, at

(emphasis added). It is *no* coincidence that the Company's comments mirror the language in the Proposed Amendment ("ensure that consumers who do not choose to install solar are not required to *subsidize* the costs of *backup power* and *electric grid access* to those who do") (emphasis added). Indeed, the state's biggest power company provided "technical and policy assistance" to CSS in the development of the Proposed Amendment.[16] FlaSEIA asserts that there is an unacceptable risk that the Proposed Amendment represents just another cog in the political opposition to the expansion of solar energy in Florida, and the opposition forces are prepared to use the Florida Constitution as a vehicle to diminish prospects that consumers can exercise their existing opportunities to use solar power.

The Proposed Solar Amendment makes absolutely no disclosure to voters on how so-called subsidies will be addressed. In fact, the term "subsidy" is not even defined in the body of the proposed amendment, nor is there any discussion of net metering. Nowhere in the title (or the summary) is the voter accurately informed that they will have a fee imposed upon them if they exercise their "solar energy

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http://www.psc.state.fl.us/utilities/electricgas/solarenergy/Florida%20Power%20and%20Light.pdf ; Tampa Electric Company also submitted comments calling for a weakening of customer net metering programs, at: http://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/SolarEnergy//Tampa%20Electric%20Company.pdf

[16] John Howell, *For Florida solar power advocates, FPL promotes a duel in the sun*, The Daily Fray, July 16, 2015, at http://thedailyfray.com/blog/florida-solar-power-fpl-promotes-duel-sun/

choice" right, or otherwise have favorable net metering policies for solar customers weakened that will directly impact their financial interest should they want to exercise the purported "right." As such, the ballot title and summary for the Proposed Amendment, read together, do not accurately place the voter on notice the scope and effect of this initiative. *See Roberts v. Doyle*, 43 So. 3d 654, 659 (Fla. 2010). Instead of disclosing the industries' desired remedy to a so-called "subsidy," the proponents chose instead to use language that misleads – using flowery rhetoric and powerful words such as "right" and "rights" without disclosing that those rights will surely come with a cost – a significant cost if the voter chooses to avail themselves of the purported right. This is a "wolf in sheep's clothing." Voters will clearly be misled on the scope and effect of this initiative.

B. THE USE OF THE TERM "SUBSIDIZE" IS MISLEADING.

The Proposed Amendment's ballot summary provides that "[s]tate and local governments shall retain their abilities to … ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do." The implication of the summary's statement is that consumers who install solar equipment require subsidies from those who do not so that the solar customers can continue to access the shared grid and have backup power, and that the establishment of a constitutional right to own or lease

solar equipment requires preservation of state and local government's ability to prevent such subsidies. Such an implication is false.[17]

In this case, the Proposed Amendment's ballot summary fails to inform the voter of the meaning and effect of the amendment. First, it fails to inform the voter of the nature of the subsidy at issue, and it presumes that one exists at all. From the utility's point of view – because it must be ready to provide a customer's full requirements whenever such service is demanded – a customer reducing its demand for utility-produced electricity by generating its own electricity from solar panels is no different from a customer that reduces its demand by installing more efficient appliances, or by living in their premises for only part of the year ("snowbirds") and thus reducing their demand for electricity. Therefore, a customer who installs solar panels and thereby reduces his or her demand for utility-produced electricity would be so-called "subsidized" in the same manner as any other customer who reduces demand by deciding to live part time out-of-state, or who chooses to install a new more efficient air conditioning system, or those by customers that retrofit to more efficient LED lighting systems, or those that adopt the practice of turning off lights and appliances that are not in use. Additionally,

[17] It is important to note that the use of the term "subsidy" or "subsidize" is a politically charged term, which will evoke an emotional response from the voter, and as such is political rhetoric which this court has historically prohibited. .

technological development, changes in the economy and even weather patterns are also among the multitude of factors that can impact electricity demand.

It's reasonable to assume that most customers prefer to reduce energy use and save money on their electric bill. It begs the question: why do proponents selectively focus on the reduction in electricity demand from solar power use, and label it a subsidy? As discusses *supra*, it's because meaningful rooftop solar development it is a transcendental threat to the power company business model.

The use of solar power is like other consumer behavior that reduces energy use and helps customer save money on bills may impact electricity demand. This is ultimately a rate issue that can be dealt with already existing authority that is in place to deal with fair, just and reasonable rates. Singling out solar power as requiring a so-called "subsidy" is highly charged political rhetoric, disingenuous at best, and patently misleading.

Florida Public Service Commission has the authority to regulate rates for the state's investor owned power companies. These companies generate approximately 75% of the electricity sales in the state of Florida and consist of Florida Power and Light Company, Duke Energy Florida, Gulf Power Company, and Tampa Electric Company – entities that have collectively poured millions of dollars in support of the Proposed Amendment – are entities that are well-versed on the process at the

Florida Public Service Commission to address rate incongruities. Section 366.06 states in relevant part:

> All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service.

§366.06(1), Fla. Stat.

Not only does the Commission possess such authority, but the power companies can request a rate adjustment, as a matter of course, by petitioning the Commission and provide proof of the necessity of such an adjustment. §366.06(1), Fla. Stat.[18]

Hence, there is a well-established process for addressing rate issues. The Florida Public Service Commission is the appropriate venue for addressing rate issues for investor-owned utilities, and the respective governing boards are the appropriate venue for addressing rate issue for municipal utilities and electric cooperatives. The Florida Constitution should not be used as a back-door vehicle for permanently enshrining rate making policy that will limit solar rights.

[18] Likewise, the Florida Public Service Commission has adopted rules for regulated power companies to submit rate schedules and to modify tariffs (rate schedules) when appropriate. See Rules 25-9.002 - .045, F.A.C.

C. CUSTOMER-SITED SOLAR POWER PROVIDES A NET BENEFIT TO ALL CUSTOMERS.

There is *no* so-called subsidy created by the use of rooftop solar power. It is important to recognize that the cost of customer-sited solar system is borne by the customer. There is no empirical evidence in Florida that any "subsidization" occurs from solar power use. In-fact, numerous reputable studies have concluded that solar users actually provide a net benefit to the power company's system – in other words, solar customers pay *more* than their fair share.[19] If a utility can plan sufficiently to meet its load requirements and still establish and structure its rates to reasonably and fairly account, for instance part-time Florida residents, then it can

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[19] *See e.g.* Crossborder Energy, *The Benefits and Costs of Solar Distributed Generation for Arizona Public Service*, p. 2, May 2013, http://www.seia.org/sites/default/files/resources/AZ-Distributed-Generation.pdf ("Our work concludes that the benefits of DG [distributed solar generation] on the APS system exceed the cost, such that new DG [distributed solar generation] resources will not impose a burden on APS's ratepayers"); Clean Power Research, *Maine Distributed Solar Valuation Study*, March 2015, at http://www.nrcm.org/wp-content/uploads/2015/03/MPUCValueofSolarReport.pdf; Frontier Group, *The Value of Rooftop solar Power for Customers and Society*, p. 4, Summer 2015, at http://environmentamerica.org/sites/environment/files/reports/EA_shiningrewards_print.pdf (A review of 11 recent analysis shows that individuals and businesses that use solar power generally deliver greater benefits to the to the grid and society than they receive through net metering); Crossborder Energy, The Benefits and Costs of Solar for Electric Ratepayers in North Carolina, October 2013, p.2, at http://c.ymcdn.com/sites/www.energync.org/resource/resmgr/Resources_Page/NCSEA_benefitssolargen.pdf (in assessing all types of distributed solar generation: "Our work concludes that the benefits of solar generation in North Carolina equal or exceed the ratepayer costs of solar resources, such that new solar resources will provide economic benefits for electric ratepayers in the state.)"

also be expected to do so for an increase in the future number of customers who install solar equipment to reduce their energy use and save money on their bill. Power companies address rate issues regularly and apply costs to different classes and types of customers.

This type selective attack on solar power is indicative of the unwelcome environment in the Sunshine State for distributed solar power. Florida is state with approximately 9 million electric customers. Of those customers, approximately a mere 8,500[20] use solar power to generate electricity. This amounts to only 0.09% of all customers availing themselves of the economic benefits of solar power. This is a very low level of solar customer penetration relative to many other states. By comparison, the state of New Jersey has over 40,000[21] customers using solar power to generate electricity – as state with half the population and less solar resource.

There are many benefits of distributed solar power for customers. Customers that use solar power can lock-in long term savings because the power generation is not dependent on fuel – hence customers pay no fuel costs and are additionally insulated from the price of power drawn from power companies that comes from

[20] Florida Public Service Commission, Customer Renewable Energy Systems, December 31, 2014, at http://www.psc.state.fl.us/utilities/electricgas/customerrenewable/2014/2014%20Net%20Metering%20Summary%20Spreadsheet/2014%20Net%20Metering%20Chart.pdf

[21] New Jersey's Clean Energy Program, *New Jersey Solar Installation Update*, at: http://www.njcleanenergy.com/renewable-energy/project-activity-reports/installation-summary-by-technology/solar-installation-projects

conventional power plants. Moreover, solar-generated electricity does not use water and emits no air pollutants, helping to keep the natural environment clean for future generations of Floridians. Customer-sited solar power additionally provides multiple benefits to a power company's system. It reduces its fuel use necessary to generate electricity; it helps offset the need for power during a portion of "summer peak" hours – when generating electricity for the power company costs the most; it reduces grid line losses because electricity does not have to travel long distances to the retail customer; and it provides a hedge against volatile fuel prices used to operate conventional power plants, while also deferring the need for additional costly new conventional power plants. All these benefits are measurable and quantifiable and exceed any costs in integrating customer-sited solar power to the grid.[22] There are, of course additional economic benefits, including job creation[23] and economic development which the state will not realize if the undisclosed policies in the Proposed Amendment are enshrined into the Constitution.

The power companies' Proposed Amendment is troubling, not only from a legal perspective – because it misleads voters, but also from a policy perspective – and its bypassing of established ratemaking procedure. It is a "wolf in sheep's

[22] Clean Power Research, LLC, *2014 Value of Solar Executive Summary*, December 2013, at http://www.austintexas.gov/edims/document.cfm?id=202758

[23] The Solar Foundation, at http://www.thesolarfoundation.org/press-release-solar-industry-creating-jobs-nearly-20-times-faster-than-overall-u-s-economy/ ("The Solar industry is creating jobs nearly 20 times faster than overall US economy")

clothing" that purports to provide a right that already exists. Moreover, the language related to the purported right can be construed to contract already existing rights of solar users. Moreover, it fails to disclose that its so-called "subsidy" will be remedied by heaping costs on to solar users or otherwise gutting a favorable net metering policy for consumers. Given that the Sunshine State's lackluster performance on distributed solar power development, enshrining policies into the Constitution that will be used to as a foundation to further weaken solar policy in Florida is detrimental to all electric consumers because it will become more difficult to realize the economic and social benefits of distributed solar power and a lost opportunity for the state in terms of jobs and economic development.

II. THE PROPOSED AMENDMENT IS DEFECTIVE BECAUSE THE BALLOT LANGUAGE DOES NOT COMPLY WITH THE SINGLE SUBJECT REQUIREMENT.

Florida's state constitution reflects a consensus on the issues and values that the electorate has declared to be of fundamental importance. The single-subject rule is a constitutional restraint placed on proposed amendments to prevent voters from being trapped in a predicament where, in an instance where disparate provisions are contained in a single amendment, electors might be forced to support an otherwise disfavored provision in order to get a favored provision

passed, *Advisory Op. re Physicians Fees*, 880 So. 2d 659, 662 (Fla. 2004)[24]; *Advisory Opinion to the Attorney Gen.-Restricts Laws Related to Discrimination*, supra, 632 So.2d at 1020, quoting *Fine v. Firestone*, 448 So.2d 984 (Fla. 1984).

Thus, to comply with the single-subject requirement, the proposed amendment must manifest a "logical and natural oneness of purpose." *Fine*, Id. at 990. To ascertain whether the necessary "oneness of purpose" exists, the Court must consider whether the proposal affects separate functions of government, and how the proposal affects other provisions of the constitution. Id.

The single-subject requirement is intended to avoid logrolling — that is, the tactic of including disparate provisions in a single amendment, "some of which electors might wish to support, in order to get an otherwise disfavored provision passed." *Advisory Op. re Physicians Fees*, 880 So. 2d 659, 662 (Fla. 2004). The Court has consistently refused to approve initiatives that contained multiple provisions that had this effect of logrolling. Typical of those cases was *Advisory Op. to the Att'y Gen'l -- Save Our Everglades Trust Fund*, 636 So. 2d 1336 (Fla. 1994). The amendment would have created a fund to restore the Everglades *and* would also have imposed a fee upon sugarcane processors as the source of revenue for the fund. The Court stated:

[24] The amendment reviewed by the Court in *Advisory Op Physicians* would have created a fund to restore the Everglades and would also have imposed a fee upon sugarcane processors as the source of revenue for the fund.

> There is no "oneness of purpose," but rather a duality of purposes. One objective – to restore the Everglades – is politically fashionable while the other – to compel the sugar industry to fund the restoration – is more problematic. Many voters sympathetic to restoring the Everglades might be antithetical to forcing the sugar industry to pay for the cleanup by itself and yet those voters would be compelled to choose all or nothing.

636 So. 2d at 1341.

This Court's decision in *Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998), is on point. As with the current Initiative, the initiative in *Health Care Providers* restricted both government regulation and private contracts. The Court held that the initiative violated the single-subject requirement, stating:

> The proposed amendment combines two distinct subjects by banning limitations on healthcare provider choices imposed by law and by prohibiting private parties from entering into contracts that would limit healthcare provider choice. The amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the healthcare provider issue in an "all or nothing" manner. Thus, the proposed amendment has a prohibited logrolling effect and fails the single-subject requirement.

Id. at 566.

In this instance, the Proposed Amendment ballot summary is comprised of the three disjoined components. First, it purports to create a right to own or lease solar equipment, next, then it retains the ability of state and local government to protect "consumer right" (an undefined term), and lastly it creates provision to

ensure that non-solar customers do not "subsidize" solar customers. We address the duality of purposes in the first and last provisions in the ballot summary. The first provision purports to create a right under Florida's constitution for consumers to own or lease solar equipment for their own use. Assuming *arguendo*, that such a new right is created, consumers will have a right to use solar equipment on their property for their own use. The third provision in the summary ensures that *consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do*. The focus of the amendment from the first provision to the third provision shifts dramatically to the *responsibilities* imposed on solar customers that avail themselves of the purported right to use solar power. As discussed *supra*, the industries' s remedy for a "subsidy" in an imposition of charge on the solar customer by the utility, or the weakening of net metering rules for customers. This serves a distinct and quite different purpose than the first provision granting the purported "right." These provisions lack a oneness of purpose. The first provision holds out the hope for a "solar right" for the voter and the third provision punishes the voter for availing themselves of that purported right. If a voter wants to avail themselves of the purported right, they would also have to obligate themselves to a presumption that their solar system is creating a subsidy for them which must be remedied – a remedy that entails a negative financial impact.

The Court has consistently refused to approve initiatives that contained multiple provisions that had this effect of logrolling. *Advisory Op. re Physicians Fees*, 880 So. 2d 659, 662 (Fla. 2004). A voter may want to avail themselves of the purported right, but may not agree that his purported right creates a so-called subsidy. Therefore, the Proposed Amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the issue in an "all or nothing" manner. *Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998). This Court has historically prohibited such Hobson's choices from making their way to the ballot. Thus, the proposed amendment has a prohibited logrolling effect and fails the single-subject requirement.

CONCLUSION

As the Proposed Amendment does not presents a single subject in compliance with Article XI, Section 3, and because the ballot title and summary are clearly misleading by failing to accurately describe the chief purpose of the proposal as required by Section 101.161, Florida Statutes, this Court should respectfully not allow the Utility Proposed Amendment to appear on the ballot.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following parties, this 11th day of January, 2016.

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I HEREBY CERTIFY that the foregoing Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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