SC15-2150; SC16-12

IN THE SUPREME COURT OF FLORIDA

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

ANSWER BRIEF FOR INTERESTED PARTIES PROGRESS FLORIDA, INC., ENVIRONMENT FLORIDA, INC., AND THE ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC. IN OPPOSITION TO THE INITIATIVE PETITION

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SUMMARY OF ARGUMENT

While the Sponsor's Initial Brief asserts that the proposed amendment would merely perpetuate existing powers of state and local governments to regulate the use of solar panels, the amendment seeks to embed in the Constitution the theory that leases of solar panels are miniature utilities operating within the monopoly territory of regulated utilities. It does so by excluding pay-by-the-watt leases from the definition of "lease." Thus, the ballot summary is misleading because it purports to establish a new right when in fact the purpose and effect of the amendment is to eliminate the right to obtain rooftop solar power by way of pay-by-the-watt leases.

The Supporters' initial briefs contend that the proposed amendment only establishes a constitutional framework by which the rights of solar users and nonusers are established. Instead, the proposed amendment would provide a constitutional endorsement of disputed accounting theories developed by regulated utilities. Those theories are founded on the premise that solar users are subsidized by nonusers when they consume electric power from the electric grid and when they sell power to the electric grid. Constitutional adoption of disputed accounting theories is neither preservation of existing powers, nor the establishment of a framework for determining rights. Because the proposed amendment assumes the

truth of these disputed accounting theories, without disclosing this in the summary, the amendment summary is misleading.

ARGUMENT

I. The Sponsor's Initial Brief Misinterprets *P.W. Ventures* As Prohibiting Pay-By-The-Watt Leases For Rooftop Solar Panels; By Failing To Describe Legal Ramifications Of Approval, The Ballot Summary Is Defective.

The Sponsor and allied interests assert that the proposed amendment would merely establish a framework of rights and expectations of solar and non-solar users. It would do much more than that: the intention of the utility proponents is to establish constitutional definitions and constitutional mandates. As candidly acknowledged by the brief in support of the proposed amendment filed by the investor-owned utilities, the purpose of the amendment is to imbue as a constitutional mandate the definitions and theories set out in it. Initial Brief in Support of Initiative Petition by Duke Energy Florida, Florida Power & Light Co., Gulf Power Company, and Tampa Electric Company ("Utilities' Brief") at 8.

The most formidable regulatory barrier to solar users that would be codified in the proposed amendment is in the definition of the term "lease" in section 29(c)(4). "Lease" is defined to mean agreements in "which payments do not vary in amount based on the amount of electricity produced by the equipment and used by the customer/lessee." That definition has the effect of eliminating pay-by-the-watt leases.

Ordinary households lack the financial resources to spend tens of thousands of dollars to purchase solar panels, and are naturally hesitant or unwilling to make monthly payments for solar panel leases without being certain that the panels will work consistently. Pay-by-the-watt leases cure that problem by obliging the homeowner to pay only for the electricity actually provided by the solar panels. Thus, the exclusion of pay-by-the-watt leases leaves most homeowners without a practical way of using rooftop solar.

The exclusion of the most accessible means for home owners to benefit from rooftop solar panels is an interpretation of this Court's decision in *P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988), which is argued by the Sponsor as authority in support of the solar subsidy theory. In that case, a consortium of electrical power companies proposed to build and operate a cogeneration facility within a manufacturing complex and then sell electricity to the manufacturing complex. *Id.* at 282. When the plan was presented to the Florida Public Service Commission, it ruled that because the cogenerator would sell and the manufacturing complex would buy electricity, the cogenerator would be functioning as an illegal utility operating within the monopoly territory of the local regulated utility. *Id.* at 282-83.

It is this principle extrapolated from *P.W. Ventures* – that pay-by-the-watt leases are illegal utilities – that forms the basis for the Sponsor's argument that the

definition merely preserves existing state authority over the use of solar panels. But to extend that decision to mean that every home with a rooftop solar panel could be a miniature utility illegally competing in the monopoly territory of the local regulated utility would be absurd.[1] It could increase the number of utilities in Florida from fifty-eight[2] to 8,546.[3] An interpretation that could change the number of utilities in Florida by over a factor of one hundred is untenable. *Utility Air Regulatory Group v. EPA*, 134 S.Ct 2427, 2439 (2014) (Clean Air Act term could not be interpreted to radically increase the number of regulated entities).

It would also produce absurd results. Under this theory, a homeowner's house with a pay-by-the-watt lease on a solar panel that yields just enough to power her swimming pool pump would be treated as a utility. The next-door neighbor could accomplish the same outcome by using a timer to turn his pool pump off during the day. Under the Sponsor's interpretation of *P.W. Ventures*, both houses would reduce their electric usage by the same amount but the solar

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[1] *See* § 288.0415, Fla. Stat. ("the state shall give priority to removing identified barriers to and providing incentives for increased solar energy development and use."); § 193.624, Fla. Stat. (prohibiting property tax assessment increases because of installation of solar panels); § 704.07, Fla. Stat. (procedures to establish solar easements to facilitate the use of solar power).

[2] Florida Public Service Commission, Review of the 2015 Ten-Year Site Plans of Florida's Electric Utilities ("Ten-Year Site Plan Review") at 7, *available at* www.psc.state.fl.us/files/PDF/Utilities/Electricgas/TenYearSitePlans/2015/Review.pdf.

[3] Ten-Year Site Plan Review at 26 (8,581 customer renewable energy installations minus 35 non-solar installations), *available at* www.psc.state.fl.us/files/PDF/Utilities/Electricgas/TenYearSitePlans/2015/Review.pdf.

panels on the roof of the house with the pay-by-the-watt lease would be an illegal utility.[4]

The Sponsor's Brief also cites to *P.W. Ventures* for the proposition that when a customer uses less electricity the result is reduced revenues to the utility, which "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. This theory – that customers who reduce electric usage impose costs on other customers – is the basis for the "Rate Impact Measure" test used by the Public Service Commission to evaluate the impact of increased use of solar panels and of other conservation measures that reduce electric consumption.[5] That test reveals that electric generation costs can be so high during peak periods that reductions in electric usage during those periods more than offset the lost revenues from those usage reductions. Because these lost revenues are offset by the reduced costs, there is no need to increase rates on other customers. When the Public Service Commission evaluated whether rooftop solar panels passed the Rate

[4] If she owned the solar panel outright, the proposed amendment would treat her as being subsidized by her next-door neighbor with the pool timer – even though they both use the same amount of electricity – and she would have to pay higher rates for the "backup power" needed to run her swimming pool pump at night.

[5] *See* Florida Public Service Commission Order No. PSC-14-0696-FOF-EU at 34, *available at* http://www.psc.state.fl.us/library/filings/14/06758-14/06758-14.pdf.

Impact Measure test,[6] Florida Power & Light ("FPL") reported that the solar panels in its territory produced a small net revenue increase.[7] That means that there *is no lost revenue* that needs to be made up by charging other FPL customers more. Moreover, with only a miniscule fraction of total electrical generation coming from rooftop solar panels, the proposition that their use will actually recognizably increase electric rates is implausible. Thus, the rationale of *P.W. Ventures* — that reductions in electric usage impose additional costs that must be paid by other electric customers — is inapplicable to solar panels. For these reasons, the better view of existing law is that it does not prohibit pay-by-the-watt leases of rooftop solar panels. Because the proposed amendment's summary does not reveal the treatment of those leases as becoming illegal miniature utilities, it is misleading.

II. Contrary To The Assertions Of The Sponsor And The Utilities, The Proposed Amendment Does Nothing To Protect Consumer Rights; Instead, The Purpose Of The Proposed Amendment Is To Provide A Constitutional Mandate For Accounting Theories That Discourage Solar Use.

a. Section (b) Of The Proposed Amendment Does Not Protect Consumer Rights.

[6] The Rate Impact Measure metric assigns a value of 1 to measures that result in no change in overall costs. Measures that result in an overall reduction in electrical generation costs are assigned a value greater than 1. Measures scoring one or more pass the Rate Impact Measure test.

[7] Docket No. 130199-EI, Exhibit TRK-8 at 2 (showing that residential solar has a RIM score of 1.01, which indicates a small net revenue increase), *available at* www.psc.state.fl.us/library/ filings/14/ 01475-14/01475-14.pdf.

The Sponsor of the proposed amendment contends that "[a]ll of [the amendment's] provisions are directly connected to the purpose of protecting the rights of consumers in the use of solar generating equipment." Sponsor's Brief at 11. The proposed amendment specifies that "[s]tate and local governments shall retain their abilities to protect consumer rights . . . and to ensure that consumers who do not choose to install solar are not required to subsidize the costs . . . to those who do." Rather than protecting consumer *rights*, this provision ensures "that regulatory authority to prevent subsidization has been constitutionally mandated." Utilities' Brief at 8.

Section (b) does nothing to protect consumer *rights*, because it does not convey or protect any consumer right. "Right" is defined as "[a] legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong." Black's Law Dictionary (10th ed. 2014). Section (b) does not give consumers any legally enforceable claim. If section (b) were meant to protect a consumer's right to not subsidize other consumers, it would create an enforceable right.

b. <u>The Actual Purpose Of The Proposed Amendment Is To Provide A Constitutional Mandate For The Utilities' Accounting Theories To Discourage Solar.</u>

In their initial brief, the utilities explicitly state that the proposed amendment is a "constitutional mandate" that "provides the constitutional assurance that the

costs of individual solar access will be appropriately allocated and not underwritten by non-solar consumers." Utilities' Brief at 9, 12. By constitutionalizing the utilities' subsidy theories,[8] the proposed amendment protects the utilities' right to charge discriminatory rates to ensure there is no "subsidy," just in regard to solar-users. By singling out the so-called "solar subsidy," the utilities reveal that their real purpose is to discourage the use of solar power, not to protect against rate subsidization.

If the proposed amendment was really about protecting consumer rights from subsidies, the amendment would protect consumers from ever having to "subsidize" other users. Such a hypothetical right would require people who live closer to power plants to have lower rates than those far away.[9] The utilities make their subsidy theory clear in their brief, because, assuming the amendment passes, they will then be able to use their brief before the Public Service Commission to show that the proposed amendment does indeed take "the form of a constitutional mandate" to impose discriminatory charges and rates against solar users, and solar users alone. Utilities' Brief at 9. By failing to disclose any of these mandates or that solar users are being singled out for higher rates and charges, the ballot

[8] Even applying the disputed subsidy theory, there is in fact no solar subsidy paid by FPL's non-solar customers. *See supra* at 5-6. For a discussion about whether such subsidies ever exist, *see* Initial Brief of Opponent: Florida Solar Energy Industries Association at 21-24.

[9] People who live close to a power plant make no use of the vast network of wires and transformers, but still pay the same rates as customers dozens of miles away.

summary is deceptive because it fails to "tell the voter the legal effect of the amendment." *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984) (finding ballot summary misleading when ballot summary contained subjective evaluation of impact).

CONCLUSION

For these reasons, Progress Florida, Environment Florida, and the Environmental Confederation of Southwest Florida respectfully submit that this Court should find that the proposed ballot summary is deceptive and therefore the proposed amendment should not be placed before the voters.

Respectfully submitted this 1st day of February, 2016.

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