
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**

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RE: LIMITS OR PREVENTS BARRIERS TO LOCAL SOLAR
ELECTRICITY SUPPLY (FIS)**

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

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INTRODUCTION

The Florida Electric Cooperatives Association, Inc. (“FECA”) submitted an initial brief opposing the Solar Initiative on June 10, 2015, and hereby responds to the arguments raised in the initial brief of Floridians For Solar Choice, Inc., the sponsor of the Initiative (“Sponsor”).

SUMMARY OF ARGUMENT

The Single Subject Requirement

The Sponsor essentially argues that the Solar Initiative does not violate the single subject requirement because it only affects the Legislature and the Florida Public Service Commission (“PSC”), and has no substantial effects on other branches or levels of state or local government. Sponsor’s argument ignores the fact that the amendment would do more than radically alter the way that the Legislature and the PSC govern the provision of electricity in this state, it would substantially curtail the functions of the executive branch and its agencies, and all levels state and local government. Sponsor’s failure to acknowledge the Initiative’s substantial effect on the functions of state and local government is especially troubling since subsection (b)(4) would expressly usurp the authority of all levels of state and local government to require local solar generating facilities to comply with zoning, environmental, and any other health, safety or welfare regulations. The obvious encroachments on the various branches of government, and on all

levels of state and local government, constitute a clear violation of the single-subject requirement.

The Ballot Title and Summary

The ballot title and summary are fundamentally misleading because they create the false impression that there are current intractable barriers to the use of solar power when Florida's actual policy is to "promote, stimulate, develop, and advance the growth of the solar energy industry", section 288.041(2), Florida Statutes, and to encourage "the use of solar energy", section 366.81, Florida Statutes.

The Sponsor claims that the ballot title and summary are sufficient because they accurately recap the literal text of the amendment. Assuming Sponsor's claims are correct, which they are not, the summary is still fatally flawed because it fails to alert the voter to the proposed amendment's serious ramifications. In other words, the problem lies not with what the summary says, but rather with what it fails to say. See Askew v. Firestone, 421 So. 2d 151, 155-56 (Fla. 1982). Voters are given no indication that the amendment would override "any" state or local health, safety or welfare regulation if, in the sole judgment of the local solar electricity supplier ("LSES"), regulatory compliance would be prohibitive for financial reasons or any other reason. Nor are voters informed that existing law authorizes the PSC to protect customers of private for-profit utilities from poor

service, unreasonable rates, and unsafe practices, and that this Initiative would take those protections away from LSES customers. Moreover, the summary fails to warn voters that the amendment would ultimately require customers that do not consume solar power from a LSES to pay higher rates to subsidize service to customers that do. Surely voters are entitled to be advised of these ramifications in the ballot summary before they cast their vote. By concealing more than it reveals the summary precludes the voter from casting “an intelligent and informed ballot.” Advisory Opinion to the Att’y Gen. - Save Our Everglades, 636 So. 2d 1336, 1341 (Fla. 1994).

ARGUMENT

I. THE PROPOSED AMENDMENT SUBSTANTIALLY ALTERS THE FUNCTIONS OF MORE THAN ONE BRANCH OF GOVERNMENT AS WELL AS MORE THAN ONE LEVEL OF GOVERNMENT.

The Sponsor concedes that the proposed amendment would limit the regulatory authority of the Legislature, but then summarily concludes that it does not violate the single subject requirement because it “has no substantial effect on the function of any other branch or level of government, including local governments.” [Sponsor In. Br. 17.] Even a cursory study of the amendment reveals that its impact extends well beyond the legislative branch and substantially curtails the functions of the executive as well as the legislative branches and all levels state and local government. For example:

- Subsection (a) confirms that the purpose of the amendment is to promote the production of local solar electricity by “preventing regulatory and economic barriers . . . imposed by state or local government”;
- Subsection (b)(1) provides that a “local solar electricity supplier . . . 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.”
- Subsection (c)(4) broadly defines “local government” to include “any county, municipality, special district, authority, or any other subdivision of the state.”

Later in its brief, the Sponsor is forced to admit that the amendment prohibits local governments from regulating the rates and service quality of a LSES, but then dismisses that prohibition as “nominal” by claiming that the regulation of electricity suppliers is already beyond the control of local governments and is within the exclusive domain of the PSC. [Sponsor In. Br. 17, 21.] The Sponsor is mistaken as to the current scope of the PSC’s jurisdiction and misinforms the Court that all local governments have no role in setting rates when in fact the Initiative would expressly interfere with the ratemaking authority of all 34 of Florida’s municipally-owned electric utilities. While the PSC has exclusive regulatory jurisdiction over the rates and services of investor-owned electric utilities like Florida Power & Light and Gulf Power, the agency’s exclusive jurisdiction over investor-owned utilities does not extend to municipally-owned electric utilities whose rates and services are primarily regulated by local

government utility boards. City of Tallahassee v. Mann, 411 So. 2d 162, 163 (Fla. 1982) (the Court expressly acknowledged that the PSC does not have jurisdiction over a municipal electric utility's rates).¹ Thus, the regulatory proscriptions in the proposed amendment would limit the regulatory functions of those local governmental entities just as severely as they limit the functions of the PSC.

In an effort to shore up its claim that the Solar Initiative does not substantially affect local governments, the Sponsor makes multiple references to Advisory Opinion to the Att’y Gen. re Limited Casinos, 644 So. 2d 71 (Fla. 1994). However, that case actually highlights a critical defect in the Solar Initiative. The proposed amendment in Limited Casinos authorized a limited number of casinos in certain specified counties. The opponents in that case argued that the proposal violated the single-subject requirement because it performed functions of local governments and the executive branch in the areas of zoning, planning, land use and environmental regulation. While the Court ultimately approved the proposal, it did so only after carefully determining that:

¹ The actual tasks of determining the amount of revenues required to operate the municipal utility and “the dollar amount charged for a particular service or an established amount of consumption” are not within the PSC’s jurisdiction, rather they are within the purview of the municipal utility’s governing board. 411 So. 2d 163-64. The PSC’s jurisdiction over rates of municipally-owned utilities is limited to “rate structure” (i.e., ensuring that the rates are designed to fairly allocate the utility’s cost of service among the various classes of customers so that one customer class is not required to bear more than their fair share). Id.

Nothing in the petition usurps, interferes with, or affects, the powers and authority of the executive branch of government or of local governments to integrate casinos into existing governmental policies for planning, zoning, land use, or environmental considerations. There is no directive in the petition for an override of local or state environmental, land use, or regulatory policies.

Id. at 74 (emphasis added).

Unlike the initiative in Limited Casinos, subsection (b)(4) of the Solar Initiative includes a provision that would expressly override state or local environmental, zoning and any other health, safety or welfare regulations if compliance therewith would “prohibit or have the effect of prohibiting the supply of solar-generated electricity by a local solar electricity supplier.” This provision would render unenforceable any state or local health, safety or welfare regulation if, in the sole judgment of the LSES, complying with the regulation would be prohibitive for financial reasons or any other reason. The likelihood that a LSES would claim that regulatory compliance is cost prohibitive is foreshadowed in the Sponsor’s brief, which warns that an LSES could well determine that regulatory compliance would make the supply of electricity by a local solar electricity supplier “uneconomical.” [Sponsor In. Br. 26.]

Try as it might, the Sponsor cannot escape the fact that the proposed amendment radically alters the multi-branch, multi-level governmental framework under which the provision of electric service has been regulated for decades. The Solar Initiative does far more than just limit the discretion of the Legislature and

the PSC to regulate local solar electricity providers. It actually prohibits the legislative and executive branches, and all levels of state and local government, from governing and regulating the construction, production, sale, and purchase of solar electricity generated by facilities rated up to 2 megawatts (“MW”).² It also creates a new class of wholly unregulated mini-utilities that are free to build unlimited large-scale solar generating facilities wherever they want and to charge customers whatever they want, while at the same time eliminating long-standing state and local consumer protection safeguards. How can the Sponsor reasonably argue that the amendment is not a “cataclysmic” change in the way electricity is provided in this state? In any case, the standard this Court has consistently employed in determining compliance with the single-subject rule is whether the amendment substantially alters the function of more than one branch of government or more than one level of government. In this case, the answer is unmistakably in the affirmative.

The opponents have identified no fewer than twelve separate functions of state and local government that the Solar Initiative would not only alter but severely restrict:

² As explained in our earlier brief, the summary’s reference to “2 megawatts” misleadingly downplays the magnitude of the proposal, and would not prevent a large for-profit corporation from forming multiple special purpose entities each of which could operate a 2 MW facility and supply massive amounts of solar-generated electricity. [FECA In. Br. 28.]

- The legislative function of enacting laws to protect consumers from poor electric service quality, unreasonable electric rates, discriminatory electric rate structures, and unsafe practices of electric service providers;
- The legislative function of enacting laws to protect the reliability of the state's electric grid;
- The legislative function of enacting laws to ensure that electrical generating facilities, including solar facilities, are developed and operated in a safe and environmentally responsible manner;
- The legislative function of the PSC to set rates of private, for-profit electric utilities;
- The quasi-judicial function of the PSC to conduct hearings to resolve disputes over rates, quality of service, and service territories;
- The executive function of the Florida Department of Environmental Protection ("FDEP") to regulate the state's land and water resources through rulemaking, enforcement, dispute resolution and other executive agency actions;
- The executive function of Florida's water management districts to regulate the state's critical water resources through rulemaking, enforcement, dispute resolution and other executive agency actions;
- The executive function of the Florida Attorney General to enforce Florida's Deceptive and Unfair Trade Practices Act to protect consumers who suffer damages as a result of deceptive or unfair practices by local solar electricity suppliers;
- The executive function of the Florida Department of Agriculture and Consumer Affairs to accurately assess the state's energy resources to plan for and ensure a coordinated state energy program;
- The executive and quasi-judicial functions of state, county and local consumer protection agencies;
- The legislative, executive and quasi-judicial functions of municipal utility boards, including rate setting and quality of service control; and,

- The legislative, executive and quasi-judicial functions of local government building and zoning boards.

The Sponsor cannot hide from the fact that all of these multiple governmental functions would be substantially altered if the Solar Initiative were approved.

II. THE BALLOT TITLE AND SUMMARY ARE DEFECTIVE.

This Court has made it clear that the accuracy of a ballot title and summary “is of paramount importance” because voters will not have the actual text of the proposed amendment with them when they cast their ballot. Armstrong v. Harris, 773 So. 2d 7, 12-13 (Fla. 2000); Advisory Opinion to Att’y Gen. re Nonpartisan Comm’n To Apportion Legislative and Congressional Districts, 926 So. 2d 1218, 1227 (Fla. 2006) (“Voters deciding whether to approve a proposed amendment to our constitution never see the text of the proposed amendment. They vote based only on the ballot title and the summary. Therefore, an accurate, objective and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process for amending our constitution.”)

A. The Title and Summary are Misleading.

The Sponsor concedes that to pass muster the Solar Initiative’s title and summary must be written in clear and unambiguous language 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 ballot.” [Sponsor In. Br. 24.] The Initiative’s summary falls woefully short of meeting that standard.

The summary is a classic example of misdirection. Yet, rather than attempt to offer a credible explanation of why it fairly describes the Initiative, the Sponsor’s brief seeks to justify that misdirection.

The summary seeks to entice the voter by promising to eliminate barriers to solar power – a promise that the voter would be expected to approve. However, there are no intractable barriers to eliminate. Instead of erecting barriers, Florida law extensively encourages the use of solar power. [FECA In. Br. 29-30.] As this Court stated in Armstrong: “A ballot title and summary cannot either ‘fly under false colors’ or ‘hide the ball’ as to the amendment’s true effect.” 773 So. 2d at 22. This Court should not allow the clever wording of the ballot title and summary to seriously mislead the voter in this manner.

The Solar Initiative has essentially the same defect as the one which was stricken by the Court in Advisory Opinion to the Att’y Gen. re: Casino Authorization, Taxation and Regulation, 656 So. 2d 466 (Fla. 1995). The summary in that case began with the statement which read “This amendment prohibits casinos unless approved by the voters of any county or the Tourist Development Council district who may authorize casinos. . . .” Id. at 467. The Court held that this created “the false impression” that casinos are presently

allowed in Florida and “fail[ed] to inform the voter that most types of casino gaming are currently prohibited by statute.” Id. at 469. Likewise, the Solar Initiative’s summary creates the false impression that there are current intractable barriers to the use of solar power when that is not the case.

The summary also describes “barriers” as including “unfavorable electric utility rates, charges, or terms of service imposed on local solar electricity customers.” (Emphasis supplied.) The term “unfavorable” is not defined in the summary, does not appear in the text of the proposed amendment, and is inherently ambiguous. What is “unfavorable” to one voter may be “favorable” to another, just as what is “fair” to one voter may be “unfair” to another. See Advisory Opinion of the Att’y Gen. re Peoples Property Rights, 699 So. 2d 1304, 1309 (Fla. 1997) (ballot summary stricken because the term “in fairness” depends on subjective understanding of each voter) (receded from on other grounds by Advisory Opinion to Att’y Gen. re 1.35% Property Tax Cap, Unless Voter Approved, 2 So. 3d 968, 972 (Fla. 2009)). The absence of a definition or definitive explanation of “unfavorable” is equally misleading as to what is being voted on. A voter reading just the summary could reasonably assume that the amendment was designed to protect solar customers from having to pay an unfair rate when in fact it would exempt solar customers from having to pay their fair share of the utility’s cost of

service. The summary is defective because it induces voters to approve the Initiative under misleading pretenses.

B. The Title and Summary Fail to Advise the Voter of the Initiative’s Full Meaning, Chief Purpose, and Ramifications.

As explained in our earlier brief, the ballot title and summary omitted to tell voters of the meaning and ramifications of a number of key provisions in the proposed amendment. [FECA In. Br. 18-25.] One obvious omission is that voters are given no indication that the amendment contains a provision that would override any state or local health, safety, or welfare regulation if, in the sole judgment of the LSES, the regulation would “have the effect of prohibiting the supply of solar-generated electricity”. The fact that an LSES can avoid such regulations that are designed to protect the public due to cost of compliance or other factors is crucial information the voter needs to have before casting a ballot. The summary’s failure to even mention this override provision renders the Initiative fatally defective.

The summary is also defective because it gives no hint to voters that the proposed amendment would substantially circumscribe the PSC and its consumer protection responsibilities. Historically, the PSC has been charged with the responsibility of overseeing the delivery of electric power by private for-profit electric utilities, and protecting customers from poor service quality, unreasonable rates, discriminatory rate structures and unsafe practices. The PSC also has safety,

territorial, and rate structure jurisdiction over rural electric cooperatives and municipally-owned electric utilities. The Sponsor’s brief readily acknowledges that one of the key objectives of the Initiative is to remove commercial sales of “local solar electricity” from the regulatory jurisdiction of the PSC. [Sponsor In. Br. 21 & 26.] Yet, there is no mention of the PSC or the protections it provides in the title or summary or even in the proposed amendment itself. Nor is there any mention that the amendment would take those consumer protections away from LSES customers. The problem lies not with what the summary says, but, rather with what it does not say. See Askew v. Firestone, 421 So. 2d 151, 155-56 (Fla. 1982).

The title and summary also fail to warn voters that the proposal would ultimately require customers that do not consume solar power from a LSES to pay higher rates to subsidize service to customers that do receive electricity from a LSES. The required subsidy is found in subsection (b)(2) which provides:

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.

The Sponsor argues that the provision is designed to insulate this new breed of solar customer from discriminatory rates. [Sponsor In. Br. 11-12.] But that is not what subsection (b)(2) says. The amendment actually subjects non-solar customers to rate discrimination. Subsection (b)(2) prohibits an electric utility from

charging the new class of LSES customers “any” special rate or charge even though the utility’s cost to serve this new class of solar customers likely will be higher than the amount the utility is currently permitted to charge the customer. Because the amendment would prohibit electric utilities from charging “any” special rate to the LSES customers that is higher than what they charge other customers, the only way the utility would be able to recoup those unrecovered costs would be to raise the rates on all customers, including those who do not purchase electricity from the local solar electricity providers. This would result in a classic case of unfair rate discrimination.

The summary fails to warn the voters of this looming potential for rate increases or that non-solar customers would suffer rate discrimination. Surely, the voters are entitled to be advised of these ramifications in the ballot summary before they cast their vote.

CONCLUSION

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

Respectfully submitted this 30th day of June, 2015.

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