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**THE SUPREME COURT OF FLORIDA**

**Case No. SC19-328**

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ADVISORY OPINION TO THE ATTORNEY GENERAL RE:

RIGHT TO COMPETITIVE ENERGY MARKET FOR CUSTOMERS OF  
INVESTOR-OWNED UTILITIES; ALLOWING ENERGY CHOICE

CONSTITUTIONAL AMENDMENT INITIATIVE PETITION 18-10

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**BRIEF OF INFINITE ENERGY, INC., NRG ENERGY, INC., VISTRA  
ENERGY CORP., NATIONAL ENERGY MARKETERS ASSOCIATION,  
AND THE ENERGY CHOICE COALITION (THE ENERGY SUPPLIERS)  
IN SUPPORT OF THE PROPOSED AMENDMENT**

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## **IDENTITY AND INTEREST OF THE ENERGY SUPPLIERS**

Infinite Energy, Inc., NRG Energy, Inc., and Vistra Energy Corp. are competitive energy suppliers that together supply electricity, natural gas, and related home and business energy services to more than three million customers across the United States and Canada. NRG Energy and Vistra Energy also operate competitive power generation facilities supplying more than 64,000 MW of electricity across the United States. Infinite Energy, Inc. is based in Gainesville, Florida, and currently supplies natural gas to thousands of commercial and industrial customers across Florida. The National Energy Marketers Association is a national, non-profit trade association representing wholesale and retail suppliers of electricity, natural gas, and related products, services, information and technologies. The Energy Choice Coalition is a non-profit organization whose members engage government leaders and regulators on the issue of electricity market design and competitive markets across the United States. These entities are collectively referred to herein as the “Energy Suppliers.”

The Energy Suppliers work to support policies that expand free markets and liberate captive ratepayers into customers by giving them individual choice in their energy supply, thereby improving competitive markets and maximizing individual freedom in the process. The Energy Choice Amendment is one such policy.

Like the investor-owned utilities, the Energy Suppliers have a financial stake in the outcome of this proceeding and in the election that may follow it, but the nature of that stake is very different. The Energy Suppliers want to compete to supply electricity to Floridians, by improving the quality of customer service for Florida's electricity customers, and expanding the variety of energy services that will allow customers to take control of their energy usage and costs. The investor-owned utilities – Florida Power & Light Company and NextEra Energy's recently purchased FPL-affiliate Gulf Power Company (FPL), along with Duke Energy Florida (Duke) and the Tampa Electric Company (TECO) – do not want to compete. They seek to preserve an antiquated 19<sup>th</sup>-century electricity system that allows each to profit nearly risk-free from their state-sanctioned monopolies, socializing their costs and risks upon their captive base of Florida ratepayers.

The Energy Suppliers believe that every electricity customer should be free, so far as practically and technologically possible, to choose electricity products they desire, and to choose whom they purchase electricity products from. Toward that end, the Energy Suppliers believe that state-sanctioned electricity monopolies should be limited to electrical transmission and distribution, where natural monopoly remains, at present, an unavoidable fact. Accordingly, we submit this brief in support of the Energy Choice Amendment.

## **STATEMENT OF THE CASE AND BACKGROUND**

This Court has made it clear that it “does not review the merits or the wisdom” of proposed amendments. *Advisory Op. to Att’y Gen. re Authorizes Miami-Dade & Broward Cty. Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So.2d 522, 523 (Fla. 2004). Nevertheless, the investor-owned utilities and the other parties that have joined them in opposing the Energy Choice Amendment have, in 19 briefs spanning approximately 1,700 pages, made a concerted effort to frame the introduction of individual choice and free market competition into Florida’s electricity system as a kind of constitutional hemoclysm. Those characterizations are incomplete, misguided, and misleading.

The Energy Suppliers have served customers in the fully competitive electricity market in Texas for nearly 20 years. In Texas, the investor-owned utilities unbundled their generation and retail functions, retaining only their natural monopoly over transmission and distribution. More than 400 Power Generation Companies and 100 Retail Electric Providers (REPs) now compete to generate power and serve electricity customers in Texas.<sup>[1]</sup> Every single customer in the investor-owned utility areas of Texas is competitively served, and more than 3

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1. *Alphabetical List of PGCs*, Pub. Util. Comm'n of Tex., [https://www.puc.texas.gov/industry/electric/directories/pgc/alpha\\_pgc.aspx](https://www.puc.texas.gov/industry/electric/directories/pgc/alpha_pgc.aspx). *Alphabetical Directory of Retail Elec. Providers*, Pub. Util. Comm'n of Tex. [https://www.puc.texas.gov/industry/electric/directories/rep/alpha\\_rep.aspx](https://www.puc.texas.gov/industry/electric/directories/rep/alpha_rep.aspx).

million Texans choose their REP every year.<sup>[2]</sup> Further, electric cooperatives and municipally-owned electric utilities co-exist with the competitive market in Texas.

We have seen that the fully competitive Texas electricity market works. The Energy Choice Amendment would direct the Florida Legislature to create a similarly competitive market in Florida. Every element of the Energy Choice Amendment is a critical component to giving the ratepayers of investor-owned utilities the right to choose their electricity provider in a fully competitive electricity market. A background discussion of how competitive electricity markets work and how they benefit customers may help make this point especially clear.

**A. The Energy Choice Amendment would result in the creation of a fully competitive electricity market in Florida.**

The purpose of the Energy Choice Amendment is clearly stated in the first sentence of the ballot summary, which says that it “grants customers of investor-owned utilities the right to choose their electricity provider and to generate and sell electricity.” Every part of the text of the Energy Choice Amendment is written in a way that meaningfully effectuates this individual right while simultaneously limiting its effect on state and local governments in other policy areas, such as taxation, renewable energy, energy efficiency, and environmental protection.

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2. *Ercot Supplemental Info. Retail Elec. Mkt. Apr. 2018 – Apr. 2019*, [http://www.ercot.com/content/wcm/key\\_documents\\_lists/89277/05012019142017-Observed\\_Selection\\_of\\_Electric\\_Providers\\_April\\_2019.pptx](http://www.ercot.com/content/wcm/key_documents_lists/89277/05012019142017-Observed_Selection_of_Electric_Providers_April_2019.pptx).

The Energy Choice Amendment would grant individual customers of Florida’s investor-owned utilities the right to choose their electricity supplier, either from competing retail providers or by producing electricity for themselves, by transforming the portion of Florida’s retail electricity market served by investor-owned utilities from a vertically-integrated monopoly framework, built on captive ratepayers, into a competitive market. It does this through its provision that “limit[s] the activity of investor-owned electric utilities to the construction, operation, and repair of electrical transmission and distribution systems.” Florida’s existing investor-owned utility model consists of a handful of vertically integrated monopolies that build generation (shifting that investment risk to ratepayers), procure fuel and produce electricity, transform and distribute it over wires, and bill their captive ratepayers for doing so at rates and terms that the ratepayer has no choice but to accept.<sup>[3]</sup> In this model, each investor-owned utility is the exclusive provider from which its captive ratepayers can purchase electricity and related services. Accordingly, captive ratepayers are limited to those rates and services

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3. Florida has four investor-owned electric utilities: Florida Power & Light Company and Gulf Power Company (FPL), Duke Energy Florida (Duke), Tampa Electric Company (TECO), and Florida Public Utilities (FPU). Fla. Pub. Serv. Comm’n, *Facts & Figures of the Fla. Util. Indus.* (May 20, 2018), <http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Factsandfigures/May%202018.pdf>. FPU is the smallest of the investor-owned utilities, and is different from the others in an important respect – it currently operates as a transmission and distribution utility, without any generation assets of its own.

that their particular investor-owned utility chooses to offer, or is required by the Florida Public Service Commission (FPSC) and state law to offer.

A natural monopoly still exists for constructing and operating the poles and wires of the electric grid – the transmission and distribution system – and so captive ratepayers in an investor-owned utility’s service area must accept this natural monopoly as the only means of delivering electricity. It would be impractical to have multiple competing transmission and distribution networks operating over the same service territory, and no one disputes this point. However, the generation of electricity and its wholesale and retail sale have never been purely natural monopolies, and were only ever bundled with the natural poles and wires monopoly as a matter of technological practicality. The development of information technology, particularly over the last 30 years, has upended that practical consideration, however, and laws that predate this technological revolution, such as those in Florida, are the only thing preventing the development of competitive markets for electricity generation and retail services.

Currently, two-thirds of Americans live in service areas where electric generation occurs in competitive wholesale markets overseen by an Independent System Operator or Regional Transmission Organization (ISO/RTO). In many of those areas, transmission and distribution utilities are either prohibited from directly owning generation, or limited in the amount of generation they may own.

In those areas, they often form affiliates that operate generation and engage in retail sales of electricity, all at arm's length. Thus, even though the investor-owned utility's parent company may have other subsidiaries engaged in competitive functions, the investor-owned utility itself cannot exercise market power.

Fully competitive wholesale markets for electricity grant several benefits. Competitive generators are naturally incentivized to build efficient, reliable, low-cost generation plants to ensure maximum profitability. They are likewise naturally discouraged from building excessive or expensive generation because, unlike monopoly utilities, they are not guaranteed a rate of return. All of the risk of profitability is shifted from the ratepayer to the competitive generator and its investors. Investor-owned utilities are, in turn, transformed into Transmission and Distribution Utilities (TDUs), which are freed from the economic and regulatory burdens of siting, managing, and repairing generation plants. This allows them to focus on their core business of building, maintaining, and improving the grid infrastructure, collecting metering information, investing in storm hardening, and performing post-storm restoration. Regulators can more effectively govern these unbundled market participants, as the siting or regulation of generation plants is fully separated from the rate setting and regulation of TDU activities.

Some form of retail competition exists in nearly all the states where a wholesale market exists. Florida is the only high-population, high-demand state

without a competitive wholesale market and one of the few that does not allow the ratepayers of investor-owned utilities any degree of choice.<sup>[4]</sup>

**B. Competitive markets have redefined many former “natural monopolies,” improving product quality, variety, and customer service.**

The opponents of the Energy Choice Amendment have frequently pointed to the unique nature of electricity markets as an argument against introducing competition into them, but other network industries – industries that, like electricity generation and sales, are dependent upon access to a single, common-carrier-type of grid or other distribution network – have seen the benefits of implementing individual customer choice and competitive markets.

Beginning in the 1980s, the Federal Energy Regulatory Commission issued a series of orders that unbundled the interstate natural gas pipelines. By the 1990’s, those pipelines became transportation-only – all sales functions were provided by independent merchants, none of which could exercise the market power that comes with owning the network.<sup>[5]</sup> For nearly 30 years, the entire interstate natural gas pipeline network has been run by transmission-only providers, similar to what the Energy Choice Amendment proposes for Florida’s electricity grid. This

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4. Of the top seven states by population and sales of electricity – California, Texas, Florida, New York, Pennsylvania, Illinois, and Ohio – Florida is the only state without an ISO/RTO wholesale market and with no retail choice whatsoever.

5. *The Hist. of Nat. Gas Reg.*, Natgas (Sept. 20, 2013), <http://naturalgas.org/regulation/history/>.

restructuring has been an unparalleled success. Reliability has improved; competitive forces have driven innovation and economic and other efficiencies, and, in turn, lower prices at all levels for all participants. The availability of new or improved services, such as the resale of excess capacity and the proliferation of storage, has encouraged more customers to meet some or all their energy needs using natural gas in lieu of costlier alternatives. Unlocking the natural gas market helped result in the United States becoming a net exporter of natural gas for 12 consecutive months, as of May 2019.<sup>[6]</sup>

Air travel in the United States was once subject to monopoly-style regulation under the Civil Aeronautics Board, which implemented strict federal control over air fares, travel routes, and market entry for new airlines for nearly 50 years. This system benefited established providers of passenger service, while keeping new entrants out of their travel routes. The 1978 Airline Deregulation Act brought this restrictive system to an end, and the results have been broadly successful:

Airfares, when adjusted for inflation, have fallen 25 percent since 1991, and are 22 percent lower than they would have been had regulation continued (Morrison and Winston 2000). Since passenger deregulation in 1978, airline prices have fallen 44.9 percent in real terms according to the Air Transport Association. Robert Crandall and Jerry Ellig (1997) estimated that when figures are adjusted for changes in quality and amenities, passengers save \$19.4 billion dollars per year from airline deregulation. These savings have

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6. Katie Dyl, *U.S. has been a net exp. of nat. gas for more than 12 consecutive months*, U.S. Energy Information Administration (May 2, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=39312>.

been passed on to 80 percent of passengers accounting for 85 percent of passenger miles.<sup>[7]</sup>

The Federal Aviation Administration still regulates safety and ensures that those engaged in flight are properly licensed. But as far as the provision of service goes, the buying and selling of air fares for passenger travel has been competitive for decades, and there are no credible sources claiming that it should be otherwise.

The dissolution of AT&T in the 1980s, the evolution of the resulting “baby bells,” and the opening of the incumbent carriers’ networks to competitive local exchange carrier and long-distance telephone services is another example of how competition has positively transformed formerly moribund network industries and delivered meaningful choice to consumers. The telecommunications technology we currently enjoy – local and long-distance carrier choice, cellular service, the internet, video streaming competing with cable, voice over internet – and the vigorous competition between and within all those industries might never have been realized if AT&T had been allowed to claim that its natural monopolies, the local and long-distance telephone wires and other unbundled network elements, were inseparable from related network elements, products and services.

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7. Fred L. Smith, Jr. & Braden Cox, *Airline Deregulation*, The Library of Economics and Liberty, [www.econlib.org/library/Enc/AirlineDeregulation.html](http://www.econlib.org/library/Enc/AirlineDeregulation.html)

**C. The Energy Choice Amendment is based on the competitive electricity market in Texas, which is the most successful model in America.**

Individual choice in competitive retail markets for electricity grants a variety of benefits to customers. Fully arm's length competitors, none of which possess market power, compete for customers, fostering price competition, spurring innovation in the marketplace, and granting once-captive ratepayers the ability to "vote with their feet" by switching away from companies that fail to meet their expectations. Market forces dictate the price of wholesale electricity and retail functions, reducing further the need for expensive, hyper-complex rate regulation, which itself often falls victim to capture by the very interests that rate regulation seeks to control. Eliminating the investor-owned utilities' market power prevents them from using their special status as state-sanctioned monopolies to distort markets and inhibit competition. It is this characteristic that makes Texas the most successful competitive electricity market in America today:

Only in Texas has retail rivalry been robust for residential consumers. While the reasons for weak competition [in other states] are debated by industry insiders, the Texas exception is telling. Texas, much more clearly than in any other state, has "quarantined the monopoly."

The phrase "quarantine the monopoly" was devised by William Baxter, an assistant attorney general for the U.S. Department of Justice and the primary architect of the 1982 settlement of the federal government's antitrust case against the AT&T monopoly. One of Baxter's principal concerns about AT&T was that the company would have incentives and opportunity to extend its monopoly into related markets to the detriment of competition. In response, he proposed limiting the harm to competition in related markets by

isolating the regulated monopoly as much as possible from these markets. This policy of quarantining the monopoly has become known as “Baxter’s Law” (and also as the Bell Doctrine).

Texas very clearly quarantined the “wires” monopoly when it restructured its retail power market. Over most of the state, the large, vertically integrated utilities were spun off into separate energy retailers, generation resources, and wires companies. Only the wires companies retained status as regulated monopolies. Texas also chose not to have incumbent default service [electricity supplied by investor-owned utilities], which other restructured states retained and which keeps the incumbent in the retail market, even if the generation cost is a pass-through.<sup>[8]</sup>

The limitation of the investor-owned utilities to electricity transmission and distribution functions, and their removal from generation and sales functions, is also justified by the results of competitive markets in other states that have taken a less comprehensive approach to competition in electricity markets. They further validate the Texas method of monopoly quarantine, which is unique among states:

The results in other states vary, but a survey of ongoing state legislative and regulatory efforts suggests unhappiness with the current half-way reforms now more than 15 years old. New York, while engaged in a multi-year regulatory push to re-imagine the future of competitive retail power in the state, has simultaneously been imposing tighter, more cumbersome controls on existing competitive retail suppliers. Illinois, too, has been talking about grander visions for a dynamic future, but retains policies like incumbent default service that stifle competitive entry. Connecticut offers customer choice, but it recently banned competitive suppliers from offering contracts with market-based variable pricing.

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8. Michael Giverson & Lynne Kiesling, *The Need for Elec. Retail Mkt. Reforms*, Energy & Environ. (May 23, 2019), <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2017/9/regulation-v40n3-4.pdf>.

As Baxter feared with the AT&T monopoly, states that left regulated electric monopolies in the retail supply business have seen these monopolies grow at the expense of competition. Quarantining the monopoly appears to be the single most effective approach to bringing about robust retail competition. It may be the *only* effective approach [emphasis from the authors].<sup>[9]</sup>

Other studies reinforce the success of Texas over other electricity market designs:

Texas is widely regarded as the most successful retail electricity market in the US. However, Texas differs from the rest of the 14 competitive states (and is more like retail markets elsewhere in the world) insofar as there is no incumbent network utility in each area with an obligation to provide a default supply service.

Also in contrast with other competitive states, the regulated distribution (wires) companies in Texas do not provide billing and other services to retailers. On the contrary, the transmission and distribution companies are effectively required to sell their services to retailers who then resell those services to customers. “Transmission and distribution companies in the Texas competitive market have very limited interaction with customers (mostly limited to receiving outage calls). Consequently, the wire companies do not create competitive barriers in Texas, unlike other US markets.”<sup>[10]</sup>

The Energy Choice Amendment attempts to introduce this effective model of full competition in electricity markets to Florida, in line with this proven approach.

The Texas model for competitive electricity, signed into law by then Governor George W. Bush in 1999, features the best of both wholesale and retail competition as implemented in other network-dependent industries, especially telecommunications and natural gas. To facilitate individual choice in competitive

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9. Id.

10. Stephen Littlechild, *The Regulation of Retail Competition in U.S. Residential Elec. Mkt.* (Feb. 28, 2018), [https://www.eprg.group.cam.ac.uk/wp-content/uploads/2018/03/S.-Littlechild\\_28-Feb-2018.pdf](https://www.eprg.group.cam.ac.uk/wp-content/uploads/2018/03/S.-Littlechild_28-Feb-2018.pdf).

markets, each investor-owned utility was required to sell its generation or divest it into arm's length generation companies, none of which can own more than 20 percent of total generation in the market. Similarly, each investor-owned utility's sales and customer service functions were divested into a stand-alone energy supplier, called a retail electric provider (REP). The remaining investor-owned utilities – now TDUs – provide regulated open-access to all generators and REPs, as overseen by the Public Utility Commission of Texas and Texas's independent electric grid operator, the Electricity Reliability Council of Texas (ERCOT). Areas served by municipal utilities or electric cooperatives were not required to enter into competitive markets, but permitted to opt in, as in the Energy Choice Amendment.

Independent generators and REPs joined the market from its inception. The Public Utility Commission of Texas still oversees the wholesale and retail electric markets, maintains performance standards, administers renewable portfolio policy requirements, sets transmission and distribution rates for the monopoly TDUs, and enforces customer protection rules. Municipalities and counties continue to collect franchise fees and other taxes, although the structure of these taxes may change depending upon the particular design of a competitive electricity market.

This is no experiment. Competitive markets have served electricity to Texans in most of the state since 2002. The market in these areas has always been robust – as of May 2019, the Texas electric market boasts the following:

- A full 89 REPs compete to provide retail service to all customers in the competitive service areas of Texas managed by ERCOT.
  - In each of the five TDU service areas, about 160 service plans are listed on the Public Utility Commission of Texas's Power to Choose website, <http://powertochoose.org>. Entering a Texas ZIP Code – such as 75001 for Dallas – shows a host of different competitive offers.
  - Other service plans and purchase agreements are available directly from REPs, and many REPs offer customized plans and offerings.
  - Some 4 REPs offer voluntary excess distributed generation purchase agreements on their websites.
- 24 REPs provide service to specific customers (typically, these REPs are entities that self-serve, such as Walmart, which supplies its own locations).
- 2 REPs operate distributed generation facilities on the premises of the industrial consumer that consumes the generation (generation supplies some or all of the customer's load; the excess is sold on the wholesale market).
- 69 self-generators own distributed generation to serve their own electricity needs (generation supplies some or all the customer's electricity load; the excess is sold to the REP that supplies the remainder of the customer's load).
- 77 customer aggregators serve customers by forming aggregated purchaser groups, negotiating on behalf of those groups, and providing other services.
- 417 power generation companies supply power to the ERCOT grid.
- More than 1,800 active market participants generate, move, buy, sell, or use wholesale electricity in ERCOT. ERCOT manages more than 650 generating units representing more than 78,000 MW of capacity and 46,500 miles of high-voltage transmission.
- 75 percent of load in the ERCOT area, amounting to some eight million individual points of electric service for 25 million consumers, is served by the competitive market. Some 99 percent of those meters are advanced smart meters which include distributed generation metering capability and

allow time-of-use pricing, same-day REP switching, demand response, and advanced energy usage analytics.<sup>[11]</sup>

- The remaining 25 percent of the ERCOT service area represents municipal and cooperative utilities that do not participate in retail competition, but do benefit from access to the competitive wholesale market.<sup>[12]</sup>

With all of these results taken together, the Federal Reserve Bank of Dallas found that “holding all else equal, having a competitive retail market in Texas caused the average residential electric bill to decline at approximately a 4.0 percent annual rate” through 2010.<sup>[13]</sup> The results of market design in Texas have only improved since that time. Rice University’s Center for Energy Studies has said that, “the ERCOT market is generally considered to be the most successful of the restructured electricity markets in North America, with more retail competition than any other market in Canada and the US.” In their 2017 study of residential electricity prices in Texas, they concluded the following:

[W]e find that residential rates in competitive and non-competitive areas of Texas have behaved in a manner that is consistent with economic theory. More specifically, residential rates in competitive areas are highly reflective

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11. Time-of-use rate plans help customers align the price of electricity with its cost at the time it is produced. This can help customers save money, and reduce overall strain on the electricity grid.

12. *Market Directories: Electric Companies Serving Texas*, Pub. Util. Comm’n. of Tex., <https://www.puc.texas.gov/industry/electric/directories/Default.aspx>; ERCOT, *Quick Facts* (Apr. 9, 2019), [http://www.ercot.com/content/wcm/lists/172484/ERCOT\\_Quick\\_Facts\\_4.9.19.pdf](http://www.ercot.com/content/wcm/lists/172484/ERCOT_Quick_Facts_4.9.19.pdf).

13. Mine Yucel & Adam Swadley, *Did Residential Elec. Rates Fall After Retail Competition?\* A Dynamic Panel Analysis Fed. Res. Bank of Dallas*, (May 2011), <https://www.dallasfed.org/assets/documents/research/papers/2011/wp1105.pdf>.

of wholesale rates, which suggests that electricity providers are minimizing costs in meeting market demands.

By contrast, residential rates in non-competitive areas do not generally reflect wholesale rates. Furthermore, we find a shrinking gap between residential rates and wholesale rates in competitive areas, which is consistent with improvements in firm and market efficiency. This also has not generally been the case in non-competitive areas.<sup>[14]</sup>

Notably, the Public Utility Commission of Texas in a report to the 2019 Texas Legislature noted that the competitive market offers residential customers significant savings of up to 30 percent compared to both the national average and their last regulated rates from 2001, adjusted for inflation. It also found that as of September 2018, Texans had a full 315 unique electricity products to choose from – another example of the innovation that results from choice and competition.<sup>[15]</sup>

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14. Peter R. Hartley, Keeneth B. Medlock III, & Olivera Jankovska, *Elec. Reform and Retail Pricing in Tex.* (June 2017), [https://www.bakerinstitute.org/media/files/files/55857030/ces-pub-txelectricity-060717\\_O6fiwZA.pdf](https://www.bakerinstitute.org/media/files/files/55857030/ces-pub-txelectricity-060717_O6fiwZA.pdf). The Rice University study also makes an important point regarding the TCAP studies referenced by the FPSC and other parties to this proceeding:

“Although the simplistic but objective finding that retail rates have on average been lower in regulated areas is an accurate observation, it ignores the path of prices over time and, thus, fails to identify the dynamic effects of the market reform in Texas. In particular [TCAP] makes no attempt to assess whether rates were lower in the areas that remained regulated before the reforms were introduced, and how those rates have changed through time.”

15. *Scope of Competition in Elec. Mkt. In Tex. - Report to the 86<sup>th</sup> Legislature, P.U.C. of Tex.* (Jan. 2019), [www.puc.texas.gov/industry/electric/reports/scope/2019/2019scope\\_elec.pdf](http://www.puc.texas.gov/industry/electric/reports/scope/2019/2019scope_elec.pdf).

These benefits have accrued to both rural and urban customers in Texas. The Small Local Governments claim that rural ratepayers of Florida’s investor-owned utilities “in small and more isolated communities can expect higher rates, assuming any of the deregulated entities even attempt to sell power to these communities.” This is a misunderstanding of how competitive markets work.<sup>[16]</sup> There will be no areas of Florida in which it is uneconomical for energy suppliers to serve. Even in the most rural areas of Texas, competition is vibrant.

To see this in action, consider Liberty County, Florida’s smallest by population, with 8,457 residents.<sup>[17]</sup> Relatively rural – but not nearly so rural as Loving County, Texas, with a population of 86.<sup>[18]</sup> The main ZIP Code for Loving County (which includes Mentone, the county seat, with a population of 19) is 79754. By plugging this ZIP Code into <http://powertochoose.org>, it can be seen that there are 157 electricity products available to these 86 people.<sup>[19]</sup> Comparing this to the wealthiest ZIP Code per-capita (77010) and the most populous ZIP Code

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16. Amicus Curiae Br. of The City of Belle Glade, Village of Indiantown, City of Chipley, City of Vernon And The Lake Okeechobee Regional Economic Alliance of Palm Beach County, Inc. (“LORE”), 9, Apr. 18, 2019.

17. *QuickFacts Liberty Cty., Fla.*, U.S. Census Bureau, <https://www.census.gov/quickfacts/libertycountyflorida>.

18. Craig Hlavatly, *The story of the least populated county in Texas and the United States*, Houston Chronicle (June 10, 2017), <https://www.chron.com/news/houston-texas/texas/article/Texas-Loving-County-least-populated-in-America-11202366.php>.

19. Offers dated May 23, 2019. This is the only ZIP Code in Loving County. *Power to Choose* - Public Utility Commission of Texas <http://powertochoose.org/>.

(77449) in the competitive ERCOT area of Texas, Loving County’s 86 residents actually have access to a slightly larger number of products (157 to 156 products) and slightly lower prices (8.5 cents / kWh to 9.4 cents / kWh).<sup>[20]</sup> Individual choice and free market competition will serve the residents of rural Florida as well as it serves the residents of rural Texas today.

Texas also provides a safety net for customers whose chosen REP is unable to provide service for whatever reason, in the form of official “Providers of Last Resort (POLR),” who operate as “a back-up electric service provider in each area of Texas open to competition.”<sup>[21]</sup> The Energy Choice Amendment permits such entities, as it would be difficult to define POLR service, which may be provided by different companies and which “is intended to be temporary and used only under rare circumstances when a REP is unable to provide service,” as an “exclusive franchise.” However, the structure of any future Florida POLR would be up to the Florida Legislature. Beyond this, there is no lack of lifeline service in Texas – all

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20. Most populous (Katy / Houston – 119,204). Texas Demographics by Cubit, *Tex. ZIP Codes by Population*, Texas-Demographics.com, [https://www.texas-demographics.com/zip\\_codes\\_by\\_population](https://www.texas-demographics.com/zip_codes_by_population); Highest income (\$648,300) Texas ZIP Code. Peter Dawson, *Houston, Tex. 77010: Local ZIP Code is among the wealthiest in U.S., report shows*, Houston Chronicle (May 7, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-zip-code-is-one-of-richest-in-U-S-13670965.php#photo-15862061>.

21. *Electricity Options – Provider of Last Resort (POLR)*, Pub. Util. Comm’n of Tex., <https://www.puc.texas.gov/consumer/electricity/Polr.aspx>.

254 counties, competitive and not, receive the same federal Low Income Home Energy Assistance Program (LIHEAP) funding that other Americans do.<sup>[22]</sup>

The investor-owned utilities in Texas have thrived as TDUs since the advent of competitive markets as well. For example, Oncor Electric Delivery operates the largest TDU in Texas, serving more than 10 million Texans across 410 cities and 120 counties.<sup>[23]</sup> Oncor posted profits of \$545 million in 2018, up 30 percent from the year before.<sup>[24]</sup> It has been so reliably successful in Texas that NextEra Energy, Inc. (NextEra), FPL's parent company, tried to purchase it for almost \$19 billion in 2017. The Public Utility Commission of Texas asked that NextEra maintain an independent board for Oncor after the purchase, but NextEra described this as “[b]urdensome and a deal-killer,” and so the purchase never happened.<sup>[25]</sup>

There are also sufficient amounts of electricity generation capacity in Texas as well. Reserve margins are additional planned electricity generating capacity

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22. Tex. Dep't. of Hous. and Cmty. Affairs, *Comprehensive Energy Assistance Program*, TDHCA.state.tx.us, <http://www.tdhca.state.tx.us/community-affairs/ceap/index.htm>.

23. *What Oncor Does – Overview*, Oncor, <https://www.oncor.com/en/Pages/What-Oncor-Does-Overview.aspx>.

24. Jon Prior, *Oncor nets half a billion in profits, refunds \$60M from tax cuts*, Dallas Business Journal (Feb. 27, 2019), <https://www.bizjournals.com/dallas/news/2019/02/27/oncor-nets-half-a-billion-in-profits-refunds-60m.html>.

25. Jeff Mosier, *PUC's demands seen as 'deal-killer' in NextEra's bid to buy Oncor*, Dallas News (Mar. 2017), <https://www.dallasnews.com/business/energy/2017/03/30/pucs-demands-seen-deal-killer-nexteras-bid-buy-oncor>.

above forecast customer demand. The FPSC says that “competitive markets in other states have experienced an erosion of capacity reserves,”<sup>[26]</sup> but reserve margins are efficient in Texas, where they are at 8.6 percent.<sup>[27]</sup> This is in line with its economically optimal reserve margin of 9.0 percent.<sup>[28]</sup> In Texas, a competitive electricity market provides economical electricity generation, and “ensures that utilities do not build and customers do not pay for unnecessary capacity.”

In Texas, limitations on the investor-owned utilities’ market power prevent them from using their special status as state-sanctioned monopolies in transmission and distribution to distort markets and inhibit competition. Texas also makes it a point to keep market power in check through clear restrictions, such as a 20 percent market share cap on generation ownership. An independent market monitor also “identifies conduct by market participants or market rules that compromise the efficiency or distort the outcomes of the markets” and “issues periodic reports providing an independent assessment of the competitive performance and operational efficiency of the market.”<sup>[29]</sup> The opponents of the Energy Choice

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26. Fla. Pub. Serv. Comm., Initial Br. 10, Apr. 18, 2019.

27. *News Release - ERCOT expects record electric use*, ERCOT (May 8, 2019), <http://www.ercot.com/news/releases/show/181248>.

28. Brattle Group, *Estimation of the Market Equilibrium and Economically Optimal Reserve Margins for the ERCOT Region* (October 12, 2018), [http://www.ercot.com/content/wcm/lists/143980/10.12.2018\\_ERCOT\\_MERM\\_Report\\_Final\\_Draft.pdf](http://www.ercot.com/content/wcm/lists/143980/10.12.2018_ERCOT_MERM_Report_Final_Draft.pdf).

29. *ERCOT*, Potomac Economics (2019), <https://www.potomaceconomics.com/markets-monitored/ercot/>.

Amendment have described the independent market monitor role it would require as a potential replacement for the FPSC. However, the language of the amendment itself suggests an attempt to follow the Texas model here as well, in which the independent market monitor ensures competitiveness by “operat[ing] under the commission's supervision and oversight” but “offer[ing] independent analysis to the commission to assist in making judgments in the public interest.”<sup>[30]</sup> The FPSC currently exercises competitive market oversight authority with regard to telecommunications companies in Florida, so it could likely perform a similar role in Florida’s restructured electricity markets. Nevertheless, the ultimate form of the FPSC and the independent market monitor is up to the Florida Legislature.

**D. Investors in Florida’s investor-owned utilities already participate in competitive energy markets through arm’s length affiliates, and the Energy Choice Amendment allows them to do the same in Florida.**

The Energy Choice Amendment does not drive the investor-owned electric utilities out of Florida – it maintains their role in the transmission and distribution monopoly that would continue to exist after its passage, and it allows them to unbundle so their investors can still compete as generators and retail suppliers through competitive affiliates shorn of the market power advantages that come with monopoly status. As shown below, Florida’s investor-owned utilities embrace competitive markets elsewhere while fighting them in Florida. For

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30. Tex. Admin. Code R. 25.365 (2018).

Florida's investor-owned utilities to support and benefit from competitive markets across the country while fighting to keep competition out of Florida is telling.

The parent companies of Florida's investor-owned utilities already participate in competitive electricity markets through affiliates. For example, FPL's parent NextEra is a major competitor in states with wholesale and retail electric markets and has continued to expand aggressively in all of the competitive markets where it operates. As of its 2018 reports to shareholders, NextEra's competitive affiliates serve 630,000 residential and 59,000 commercial customers in 14 states in the Midwest and Northeast.<sup>[31]</sup> NextEra promotes its subsidiary, Gexa Energy, an energy supplier in Texas, as "a leading provider of affordable energy services for residential and commercial customers in Texas. The company entered the Texas deregulated electricity market in 2002 and began offering services to commercial customers in California in 2013."<sup>[32]</sup> NextEra operates approximately 21,000 MW of competitive generation throughout the United States and Canada, in every ISO and RTO wholesale market.<sup>[33]</sup> FPL Energy Services, an unregulated subsidiary of FPL and a subsidiary of NextEra, also provides

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31. NextEra Energy, *Annual Report* (December 31, 2018), [http://www.investor.nexteraenergy.com/~media/Files/N/NEE-IR/reports-and-fillings/annual-reports/NextEra%20Energy\\_Annual\\_Report\\_2018.pdf](http://www.investor.nexteraenergy.com/~media/Files/N/NEE-IR/reports-and-fillings/annual-reports/NextEra%20Energy_Annual_Report_2018.pdf).

32. *Fact Sheet*, Gexa Energy, <https://www.gexaenergy.com/about-us/press-room/fact-sheet/>.

33. NextEra Energy, *Resources Portfolio* (April 30, 2019), [http://www.nexteraenergyresources.com/pdf\\_redesign/portfolio\\_by\\_region.pdf](http://www.nexteraenergyresources.com/pdf_redesign/portfolio_by_region.pdf).

competitive natural gas service to commercial and industrial customers in Florida. While the decision-makers at NextEra may still prefer FPL's state-sanctioned monopoly in their home state, with its guaranteed rates of return and captive ratepayers, they are willing and able to participate in competitive energy markets of all types, and have substantial experience in doing so.<sup>[34]</sup> Moreover, Gexa offers customers innovative products in Texas that are not available to FPL's regulated customers in Florida. Plans such as "Free 3 Day Weekends," "Free Mornings and Nights," and "Buy One Get One," are readily available to Texas customers because competition forces Gexa to be creative to meet customers' needs.<sup>[35]</sup>

Beyond NextEra, Duke's service area outside of Florida includes a large part of the competitive Midcontinent Independent System Operator market in Indiana (MISO without retail competition) and in Ohio (MISO with retail competition).<sup>[36]</sup> TECO and its natural gas division, TECO Peoples Gas, is owned by Emera, which is a member of the New England ISO through Emera Maine. TECO Peoples Gas also participates in Florida's competitive natural gas market both as the distribution utility and through its retail broker affiliate, TECO Partners.

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34. *Service Areas*, NextEra Energy Services, <https://www.nexteraenergyservices.com/for-business/business-service-areas/>.

35. *Elec. Plans*, Gexa Energy, <https://www.gexaenergy.com/for-home/electricity-plans/>.

36. Duke Energy, *Annual Report* (February 28, 2019), [https://www.duke-energy.com/annual-report/\\_/media/pdfs/our-company/investors/de-annual-reports/2018/2018-duke-energy-annual-report.pdf](https://www.duke-energy.com/annual-report/_/media/pdfs/our-company/investors/de-annual-reports/2018/2018-duke-energy-annual-report.pdf).

Nothing in the Energy Choice Amendment prevents a current FPL customer from choosing a future FPL affiliate as their energy supplier, or from selecting an electricity plan that guarantees that 100 percent of the electricity purchased on the wholesale market on behalf of the customer is generated from FPL's competitive generation affiliate using natural gas supplied by FPL Energy Services. Common ownership is not a problem for competitive markets so long as commonly-owned entities operate at arm's length and avoid preferential treatment. The key difference is that these new affiliates of the investor-owned utilities will not themselves be utilities that benefit from their state-sanctioned monopoly status, but will rather be competitive, arm's length entities that operate on the same level playing field as other energy suppliers, and without monopolistic market power.

This distinction between investor-owned utilities and arm's length affiliates is an essential element of fostering the competitiveness of energy markets for individual customers because it goes toward ensuring a level playing field for all market participants. For example, FPL Energy Services currently competes with several other businesses in Florida to provide a variety of home services and energy products. However, it benefits from several anticompetitive advantages that it enjoys through its relationship with its parent monopoly, FPL. For example:

- **Name recognition and common branding:** FPL Energy Services uses the same name and branding as FPL, a nearly hundred-year old monopoly, so it benefits from a century of recognition built up and paid for by FPL’s captive ratepayers, including those who compete with FPL Energy Services.<sup>[37]</sup>
- **Leveraging shared corporate resources:** FPL Energy Services shares the same main office, registered agent, and the same corporate officers. At least some of the corporate recruiters working on behalf of FPL Energy Services are FPL employees.<sup>[38]</sup>
- **Common use of FPL’s electricity billing system:** One of FPL Energy Services’ key selling points for its various products is that they can all be billed through a customer’s FPL bill for electricity service. This includes its annual air conditioning tune-up product, “A/C RunSmart,” its “Exterior Water Service Line Coverage from HomeServe” product, and its “Interior

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37. Vanessa Bein, *NBC2 investigates a claim that a utility company is deceiving you*, NBC2 News (April 12, 2019), <https://www.nbc-2.com/story/40298657/nbc2-investigators-claim-a-utility-companys-advertisement-is-deceiving-you>; Rachel Polansky, *NBC2 investigates claims that utility company, FPL, is deceiving customers*, YouTube (April 17, 2019), <https://www.youtube.com/watch?v=8NprY5U4qF0>.

38. NBC 2 investigation noted this as well.

Plumbing and Drainage System” product.<sup>[39][40][41]</sup> Each of these products is described as being able to be “conveniently added to your FPL bill.” FPL’s captive ratepayers pay the cost of FPL’s billing system – including those who must compete with FPL Energy Services – and so FPL Energy Services directly benefits from a ratepayer subsidy. This anticompetitive advantage exists solely because of FPL’s state-sanctioned monopoly, and none of FPL Energy Services’ competitors could ever match it as a result.

- **Use of FPL’s assets and infrastructure for marketing:** According to the Mechanical, Electrical, and Plumbing (MEP) Coalition for Fair Competition, FPL uses its electricity customer data and FPL technicians, as well as its own marketing materials, to advertise for FPL Energy Services.<sup>[42]</sup>

Sound implementation of competitive choice will eliminate issues like these, leveling the playing field for competitors while deriving value for customers.

Similar anticompetitive issues would exist in a competitive electricity market but

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39. *A/C RunSmart*, FPL Energy Services, [www.fples.com/ac-run-smart.html](http://www.fples.com/ac-run-smart.html).

40. FPL Energy Services, *2018 Water Line Responsibility Review* (October 30, 2018), <https://www.mepcoalition.org/wp-content/uploads/2018/12/Exterior-Water-Service-Line-Coverage.pdf>.

41. *Water Heater & Plumbing Protection*, FPL Energy Services, <https://www.fples.com/water-heater-plumbing-protection.html>.

42. *The Case Against FPL*, MEP Coalition for Fair Competition, <https://www.mepcoalition.org/the-case-against-fpl/>.

for the Energy Choice Amendment's language regarding market power and the limitation of the investor-owned utilities to transmission and distribution:

Electric utilities use their control over transmission – the wires that bring generated power to market – to make it difficult for independent generators to sell their power. After all, why should a company with its own electricity to sell help a rival generator by moving the competitor's power to market? Regulators have long struggled to make vertically integrated companies charge only reasonable transmission rates to firms competing with them at other levels of their business. Attempting to control pricing and access terms is a lifelong, tedious and often futile way to preserve competition.<sup>[43]</sup>

The Energy Choice Amendment permits the investor-owned utilities' affiliates to compete in electricity generation and sales, just like any other energy supplier, but it bars the investor-owned utilities themselves from participating in competitive markets beyond transmission and distribution. It does this on the state level for reasons similar to why the Federal Energy Regulatory Commission implemented wholesale electricity competition federally in the fashion that it did:

In recent decades, the Commission has undertaken an ambitious program of market-based reforms. Part of the impetus for those changes was technological evolution. Historically, electric utilities had been vertically integrated monopolies. For a particular geographic area, a single utility would control the generation of electricity, its transmission, and its distribution to consumers. Since the 1970's, however, engineering innovations have lowered the cost of generating electricity and transmitting it over long distances, enabling new entrants to challenge the regional generating monopolies of traditional utilities.

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43. Irwin Stelzer, *AT&T and the Danger of 'Vertical Integration'*, Hudson Institute (November 27, 2017), <https://www.hudson.org/research/14031-at-t-and-the-danger-of-vertical-integration>.

To take advantage of these changes, the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity. It has sought to promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power, while ensuring that the segment of the industry characterized by natural monopoly – namely, the transmission grid that conveys the generated electricity – cannot exert monopolistic influence over other areas.<sup>[44]</sup>

As Justice Scalia explained, FERC sought to promote competition by preventing utilities (chiefly investor-owned) from using the advantages of their remaining “natural monopoly” to exert influence in newly competitive markets. They could have competitive affiliates, but they could not use their monopoly power to participate in competitive markets themselves.

Without the limitations on investor-owned utilities and market power built into the Energy Choice Amendment, the investor-owned utilities would invariably bring the advantages of their state-sanctioned monopolies to bear on behalf of themselves or their competitive affiliates – just as FPL currently does with home services and energy products through its FPL Energy Services affiliate. This would inhibit the very competitive markets essential to the full realization of the Energy Choice Amendment’s central purpose – giving electricity customers the right to choose their electricity provider in a competitive market.

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44. *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 US 527 (2008).

**E. Florida’s system of state-sanctioned electricity monopolies restricts individual freedom based on long outdated economic rationale.**

No fundamental right affects more Floridians on an everyday basis than does this basic right to “acquire, possess and protect” property, as codified by Art. I, §2, Fla. Const. From this fundamental right and all of its natural implications come the economic arrangements – the competitive markets – that provide for general prosperity and make a free society governed on republican principles possible.<sup>[45]</sup>

In the last century, this fundamental right was overlooked as impractical for the provision of electricity, and the regulated, state-sanctioned monopoly emerged as the imperfect substitute. State-sanctioned monopolies provided electricity service at the exclusion of individual choice, shaped by the “unwritten compact” described by the FPSC.<sup>[46]</sup> The technical and financial advantages of “economies of scale” have always been used to justify these restrictions on individual choice:

Samuel Insull, former secretary to Thomas Edison and first president of Commonwealth Edison of Chicago, argued that as with railroads, the production, transmission and distribution of electricity was a natural monopoly. He premised his arguments on “economies of scale,” arguing that

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45. “The kind of economic organization that provides economic freedom directly, namely, competitive capitalism, also promotes political freedom because it separates economic power from political power and in this way enables the one to offset the other.” Milton Friedman, *Capitalism and Freedom: Fortieth Anniversary Edition* 9 (2002).

46. Fla. Pub. Serv. Comm., Initial Br. at 8, Apr. 18, 2019.

declining average costs allowed one firm to provide electricity less expensively than multiple competing firms.<sup>[47]</sup>

Monopoly comes with clear economic advantages for investor-owned utilities:

Although utility profits are not guaranteed, these regulatory structures eliminate two of the key risks to investors: competition and the recovery of invested capital. Cost-of-service ratemaking also fosters another goal of the early utility system: growth. Because utility profits are based on capital investment, the system directly rewards utilities for investing in and building out their systems. Indeed, the incentives produced by cost-based regulation are so strong they may encourage over-investment or inefficient investment.<sup>[48]</sup>

Through the 1960s, investor-owned utilities followed Insull's "grow-and-build" strategy. As electricity demand increased, they built new generation to satisfy it. Because the cost-per-unit of electricity declined with every new plant, electricity prices gradually declined. Low prices stimulated further electricity use, requiring new generation and seemingly driving electrification forever forward. Even today, the FPSC justifies the continued role of state-sanctioned monopolies as a substitute for individual choice and competitive markets using economies of scale:

[A]s customer growth requires an electric utility to expand its infrastructure to meet the growing need, the result is decreasing average costs to produce electricity. At some point, the established utility's average cost to supply

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47. National Energy Marketers Association, *National Guidelines for Restructuring the Electric Generation, Transmission and Distribution Industries* (January 1999), <https://www.energymarketers.com/Documents/FinalElectricityPaper.pdf>.

48. Inara Scott, *Incentive Regulation, New Bus. Models, and the Transformation of the Elec. Power Indus.*, 5 Mich. J. Env'tl. & Admin. L. 319, 329 (2016), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1049&context=mjeal>.

electricity becomes lower than any other utility or combination of utilities can achieve. This is referred to as the principle of economy of scale.<sup>[49]</sup>

This argument once held true, as “the price for electricity . . . fell steadily from 1882 to 1969,’ while access to electricity grew rapidly” at the same time.<sup>[50]</sup>

Regulators rarely questioned the expansion of investor-owned utilities in a time of double-digit demand growth, where generating capacity doubled every decade.<sup>[51]</sup>

However, “[t]his rosy picture changed after 1970, when utilities lost two of the key elements of their financial success: growth and increasing economies of scale.”<sup>[52][53][54]</sup> Electricity demand growth rates crashed to an annual average of 2.5 percent after 1975, and are projected to remain at 1 percent per year through

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49. Fla. Pub. Serv. Comm., Initial Br. at 5 (footnote text included), Apr. 18, 2019.

50. Scott, *supra*.

51. From 1945 to 1975, state regulators engaged in less than a dozen major prudence cases regarding construction costs of power plants, nationwide. Dr. Karl McDermott, *Cost of Serv. Regulation in the Investor-Owned Elec. Util. Indus.* (2012), [https://www.ourenergypolicy.org/wp-content/uploads/2012/09/COSR\\_history\\_final.pdf](https://www.ourenergypolicy.org/wp-content/uploads/2012/09/COSR_history_final.pdf).

52. Scott, *supra*.

53. The drive to consolidate investor-owned utilities has not reinvigorated their economies of scale – even where one would expect clear economies of scale in shared ownership and centralized corporate functions, they are lacking. Alan Feibelman and Michael Britt, *Are Util. Economies of Scale Real, or a Mirage?* (2012), [https://www.oliverwyman.com/content/dam/oliver-wyman/global/en/files/archive/2012/LON-UTL91501-001\\_.pdf](https://www.oliverwyman.com/content/dam/oliver-wyman/global/en/files/archive/2012/LON-UTL91501-001_.pdf).

54. As Justice Scalia highlighted in *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 US 527 (2008), technological advances also made it possible for “new entrants to challenge the regional generating monopolies of traditional utilities” for the first time in the 1970s.

2050.<sup>[55]</sup> Energy conservation and environmental protection have become public policy nationwide, further eroding the “economies of scale” that were once used to justify the monopolies granted to investor-owned utilities. For all its economic and population growth, Florida’s electricity demand growth is following this long-term trend, growing at less than 1 percent annually well into the next decade.<sup>[56]</sup>

The advantages of vertical integration – the ownership of generation, transmission and distribution, and retail sales assets by the same entity – have also largely evaporated with the loss of economies of scale in generation and supply by investor-owned utilities. Vertical integration can reduce transaction costs, “such as market uncertainty, the quantity of trading partners, and human factors.”<sup>[57]</sup>

However, the guarantees that come with vertical integration and monopoly also promote “slack and complacency.”<sup>[58]</sup> They cripple incentives for experimentation

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55. McDermott, *supra* (2.5 percent figure). U.S. Energy Info. Admin., *Annual Energy Outlook 2019, with projections to 2050* (2019), <https://www.eia.gov/outlooks/aeo/pdf/aeo2019.pdf> (1 percent figure on page 90).

56. Fla. Reliability Coordinating Council, Inc., *2018 Regional Load & Resource Plan FRCC-MS-PL-191 Version: 1* (2018), page 2, [http://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/TenYearSitePlans/2018/FRCR\\_RLRP.pdf](http://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/TenYearSitePlans/2018/FRCR_RLRP.pdf). This slow growth is projected to continue through at least 2027.

57. Douglas Gegax & Kenneth Nowotny, *Competition and the Elec. Util. Industry: An Evaluation*, 10 Yale J. on Reg. 63, 67–71 (1993); Fla. Pub. Serv. Comm., Initial Br. at 5, n.2, Apr. 18, 2019.

58. Fernando Barrera-Rey, *The Effects of Vertical Integration on Oil Company Performance*, Oxford Institute for Energy Studies (1995), <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/WPM21-TheEffectsofVerticalIntegrationonOilCompanyPerformance-FBarreraRey-1995.pdf>.

and innovation, reducing efficiency in electricity generation and supply – the most vital means of holding electricity costs down when demand growth is low.<sup>[59]</sup>

At the same time, the “grow-and-build” strategy has largely remained in place in Florida and elsewhere despite the collapse of its growth-based foundation.

This system always carried within it the risks of conflicting incentives:

[T]his structure also created embedded incentives that continue to plague the system today: the incentive to grow (even when it is not efficient), and a reliance on the regulated monopoly to protect the industry from competition and provide investors with the opportunity to earn a fair return.<sup>[60]</sup>

As the easy money of boundless growth came to an end, the latent problems of cost-based regulation began to manifest themselves in the increasingly hostile rate cases the investor-owned utilities began to face after 1975.<sup>[61]</sup>

The idea of rate regulation as a substitute for competition is a relic of a more technologically naïve era in which central planning and state regulation was celebrated as an improvement upon the limited government and free markets that long preceded it, and which have since made a vibrant comeback in many once-

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59. Lynne Kiesling, *Incumbent Vertical Market Power, Experimentation, and Institutional Design in the Deregulating Electricity Industry*, 19 *The Independent Review* (2014), [http://www.independent.org/pdf/tir/tir\\_19\\_02\\_04\\_kiesling.pdf](http://www.independent.org/pdf/tir/tir_19_02_04_kiesling.pdf).

60. Scott, *supra*.

61. McDermott, *supra*.

monopolized industries.<sup>[62]</sup> The original economic justifications for curtailing individual choice and free competition in electricity service have dissolved.

**F. Florida’s ratepayers have suffered billions of dollars in losses as a result of the state-sanctioned monopoly the investor-owned utilities enjoy.**

Despite the foregoing points, it might still be reasonable to argue in favor of this system, antithetical to every principle of limited government and free markets as it is, on a practical basis – to argue that it does not matter whether the cat is black or white, so long as it catches mice. Yet, despite the efforts of the regulators and investor-owned utilities to substitute rate regulation for competition, the ends repeatedly fail even to justify the means. Instead, the record of state-sanctioned monopoly is littered with failures that have cost Florida’s captive ratepayers billions of dollars in the last decade alone, in exchange for no benefits whatsoever:

- **Lost ratepayers \$7 billion in bad natural gas bets.** “From 2007-2016 DEF [Duke], FPL, and TECO registered cumulative hedging losses of \$6.9 billion (summed in nominal dollars). This means that had DEF, FPL, and TECO not engaged in hedging on the price of natural gas, their customers would have paid \$6.9 billion less on their electric bills from 2007 through 2016.”<sup>[63]</sup>

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62. Fla. Pub. Serv. Comm., Initial Br. at 6, Apr. 18, 2019. The FPSC references *Public Service Commission of Montana v. Blue Flame Gas Company*, 1926 D P.U.R. 314, 319, to argue that “[c]ompetition has long ceased to be potent as a regulatory factor in public utility operations.” The success of Texas as a vibrant, competitive electricity market has shown the renewed potency of free competition, which this Court has otherwise noted is “a basic postulate of our free enterprise system[.]” *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So. 2d 429, 433 (Fla. 1965).

63. Direct Testimony of Elizabeth A. Stanton On Behalf of Sierra Club, Analysis of IOUs’ Hedging Practices, Docket No. 20170057-EI, at 26, Aug. 10, 2017. <http://www.psc.state.fl.us/library/filings/2017/06925-2017/06925-2017.pdf>

- **Cost ratepayers \$2.5 billion by cutting corners to save \$15 million.** When Progress Energy (now Duke) decided to replace the steam generators in its Crystal River 3 Nuclear Power Plant, it rejected bids from companies that had handled similar projects at 34 other nuclear plants: “Company officials planned to go it alone. The do-it-yourself oversight was supposed to save about \$15 million. Progress Energy deviated from the methods used at many of the other 34 nuclear plants...A few months later, as workers cut a 25-by-27 foot hole in the wall, they discovered a crack. A later repair attempt created another crack, and a third crack eventually appeared. The estimate to repair the damage climbed above \$1 billion.

Duke Energy inherited the mess when it bought Progress Energy in 2012. The following year, the company permanently closed the unit. A reckless gamble to save \$15 million had ruined a perfectly good nuclear plant. Decommissioning the facility will cost a little less than \$900 million.”<sup>[64]</sup> Duke then built a new \$1.5 billion natural gas plant to make up for the lost generation capacity once provided by the Crystal River nuclear plant.<sup>[65]</sup>

- **Lost ratepayers \$1.5 billion on never-built nuclear plants.** “In 2008, Progress Energy projected \$17 billion for the construction of their Levy plant. This jumped to \$22 billion in 2011 and then up to \$24 billion in 2012. As the project [was] drawn out, the [investor-owned utility] continue[d] to collect preconstruction and carrying costs (including a return to company shareholders) on customers’ monthly bills. Duke Energy, who merged with Progress Energy, announced in August of 2013 that it would pull the plug on the Levy County nuclear plant. Customers would still have to pay up to \$1.5 billion.”<sup>[66]</sup>

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64. Graham Brink, *Let’s take a moment to remember the time a local util. broke Tampa Bay’s only nuclear plant*, Tampa Bay Times (Apr. 18, 2019), <https://www.tampabay.com/business/lets-take-a-moment-to-remember-the-time-a-local-utility-broke-tampa-bays-only-nuclear-plant-20190418/>.

65. Malena Carollo, *Duke Energy quietly builds a \$1.5 billion plant in Citrus County*, Tampa Bay Times (Jul. 27, 2017), <https://www.tampabay.com/news/business/energy/duke-energy-quietly-builds-a-15-billion-plant-in-citrus-county/2331718>.

66. Ben Wilcox and Dan Krassner, *Power Play: Political Influence of Florida’s Top Energy Corporations*, Integrity Florida (2014), <http://www.integrityflorida.org/wp-content/uploads/2017/11/Power-Play-Political->

- **Charged ratepayers millions for political activity.** “The widespread practice [of passing trade association dues on to ratepayers] forces ratepayers to pay for political and public relations activities with which they may not agree, and from which they do not benefit.” In FPL’s 2016 rate request, “the utility revealed that its ratepayers are on tap to pay more than \$9.5 million in Edison Electric Institute dues from 2015 to 2018.” Additional funds went to other groups, including \$80,000 to the Florida Chamber.<sup>[67]</sup>
- **Costly and opaque rate case settlement agreements.** “Utilities are gaming the settlement process. Utilities and those objecting to their requests routinely work out differences behind closed doors in settlement agreements. Utilities appear to approach the process of negotiation much like a used car dealer who marks up the initial asking price knowing that they will eventually agree to a lower amount.”<sup>[68]</sup>

Florida’s existing market structure has also failed to foster fuel diversity. The FPSC says that “fuel diversity would be less of a critical component of resource decision-making in a competitive market,” but Texas’s market comes much closer to meeting the FPSC’s own goals for a balanced fuel mix than Florida does.<sup>[69]</sup>

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[Influence-of-Floridas-Top-Energy-Corporations-FINAL-FOR-MIAMI-HERALD.pdf](#)

67. David Anderson, Matt Kasper, and David Pomerantz, *Paying for Util. Politics*, Energy and Policy Institute (2017), <https://www.energyandpolicy.org/wp-content/uploads/2017/05/Paying-for-utility-politics-ratepayers-funding-the-Edison-Electric-Institute.pdf>.

68. Alan Stonecipher, Brad Ashwell and Ben Wilcox, *Florida’s Public Service Commission*, Integrity Florida (2017), <http://files.constantcontact.com/d9f43dd5201/c0fa3602-ecfb-4031-b9a3-f69cd8b79114.pdf?ver=1506884568000>.

69. Fla. Pub. Serv. Comm., Initial Br. at 22, Apr. 18, 2019. Compare Texas and Florida data at [www.eia.gov](http://www.eia.gov). Florida uses natural gas for 70 percent of generation, coal 11, nuclear 16, and renewables 3. In the ERCOT area of Texas, natural gas is 45, coal 25, nuclear 11, and renewables 19. ERCOT, *Quick Facts* (April 9, 2019), [http://www.ercot.com/content/wcm/lists/172484/ERCOT\\_Quick\\_Facts\\_4.9.19.pdf](http://www.ercot.com/content/wcm/lists/172484/ERCOT_Quick_Facts_4.9.19.pdf).

“Concentrated power is not rendered harmless by the good intentions of those who create it.”<sup>[70]</sup> The concentrated power of Florida’s investor-owned utilities has proven costly to Florida’s ratepayers, even when costs are incurred solely due to the mistakes of the investor-owned utilities. In a competitive market, such mistakes would have been paid for by the companies responsible for making them. The Energy Choice Amendment gives the majority of Floridians a clear alternative in its chief purpose – giving the investor-owned utility customer a right to choose their electricity supplier in a genuinely competitive electricity market.

### **SUMMARY OF ARGUMENT**

The Court should approve the placement of the Energy Choice Amendment on the ballot for two reasons. First, the amendment encompasses a single subject – giving the customers of investor-owned utilities a right to choose their electricity supplier in a competitive market. Every part of the Energy Choice Amendment is written to effectuate this individual right. For example, to maximize individual choice, electricity customers can also choose to generate and sell electricity on their own or in association with others. To guarantee genuinely competitive markets, the Energy Choice Amendment provides for consumer protections and market power limitations, and limits the investor-owned utilities, as state

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70. Milton Friedman, *Capitalism and Freedom: Fortieth Anniversary Edition*, (2002), at 201.

sanctioned electricity monopolies, to transmission and distribution – the only natural monopoly function in otherwise competitive electricity markets. Competitive markets, in turn, maximize the degree of meaningful choices available. All the while, the Energy Choice Amendment does not alter the function of multiple branches of government. It respects the Legislature’s role by ensuring ample time and discretion for implementation, it carves out electric cooperatives and municipally-owned utilities, and it clarifies exceptions. The judiciary is only involved if the Legislature fails to fully implement the Energy Choice Amendment.

Second, the ballot title and summary accurately convey the chief purpose of the amendment – individual choice in a competitive electricity market. The text of the ballot title closely follows the text of the amendment, at times word-for-word. Far from misleading the voter, the Energy Choice Amendment does not conceal any hidden or “true” objectives – it leads with its chief purpose at the beginning of the summary, and works toward that purpose with every sentence thereafter.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This Court has long held that the amendment process “is the most sanctified area in which a court can exercise power.” *Pope v. Gray*, 104 So.2d 841, 842 (Fla. 1958). As a result, the Court applies a deferential standard of review to citizen initiative petitions and is reluctant to interfere with citizens’ right to self-

determination. *Advisory Op. to Att'y Gen. re Voting Restoration Amendment*, 215 So.3d 1202, 1205 (Fla. 2017). When this Court reviews a proposed amendment arising from the initiative process, its inquiry is limited to two areas: “(1) whether the amendment itself satisfies the single-subject requirement of article XI, section 3, Florida Constitution; and (2) whether the ballot title and summary satisfy the clarity requirements of section 101.161, Florida Statutes” *Advisory Op. to the Att'y Gen. re Water and Land Conservation*, 123 So.3d 47, 50 (Fla. 2015). “The Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.” *Advisory Op. to Att'y Gen. re Authorizes Miami-Dade & Broward Cty. Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So.2d 522, 523 (Fla. 2004). Accordingly, this Court is “obligated to uphold the proposal unless it is ‘clearly and conclusively defective.’” *Voting Restoration Amendment*, 215 So.3d at 1205.

## **II. THE ENERGY CHOICE AMENDMENT COMPLIES WITH THE SINGLE SUBJECT RULE**

The language of Art. XI, § 3, Fla. Const. provides that any constitutional initiative “shall embrace but one subject and matter directly connected therewith.” As the Court reiterated in *Advisory Op. to the Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So.3d 471, 477 (Fla. 2015), “In evaluating whether a proposed amendment violates the single-subject requirement, the Court

must determine whether it has a "logical and natural oneness of purpose." As importantly, this Court has said that "[a] proposal that affects several branches of government will not automatically fail; rather it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." *Advisory Op. to Att'y Gen. re Fish and Wildlife Conservation Comm'n*, 705 So.2d 1351, 1353-54 (Fla.1998). The language of the Energy Choice Amendment passes both of these tests.

**A. The Energy Choice Amendment and its Implementing Provisions Have a Logical and Natural Oneness of Purpose.**

The Energy Choice Amendment complies with the single-subject rule because its "various provisions . . . are not 'disparate subjects' and instead are directly connected to the purpose of the amendment and to each other." *Advisory Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So.3d 235, 244 (Fla. 2015). Each of its provisions is intended to effectuate the Energy Choice Amendment's "single unifying purpose" of providing the customers of investor-owned utilities with the right to choose their electricity provider in a competitive market.

The opponents of the Energy Choice Amendment have listed well over a dozen ways in which it would impact electricity markets in Florida. However, in terms of distinct subjects, the opposition briefs generally identify three different

“subjects,” as opposed to impacts – the individual right to choose an electricity provider in a competitive market, the issue of self-generation, and the limitation of the investor-owned utilities to the transmission and distribution of electricity.

The right to “generate and sell electricity” is an essential component to maximizing the broader right of “customers of investor-owned utilities” to “choose their electricity provider,” because it means that these customers have the right to choose to provide electricity for themselves or others. The choice to self-generate is ultimately little more than the choice of oneself as an “electricity provider.” It is another way of maximizing the same broader right of choice in electricity service.

The more complex issue of the limitation of the investor-owned utilities to transmission and distribution functions – a natural monopoly – is also designed to realize the Energy Choice Amendment’s purpose of providing the customers of investor-owned utilities with the right to choose their electricity provider in a competitive market. “Quarantining the monopoly” eliminates the insurmountable advantages that investor-owned utility monopolies could take advantage of in a fledgling marketplace, as the example of Texas has shown. The Energy Choice Amendment quarantines the investor-owned utilities to transmission and distribution in order to ensure maximum competitiveness in electricity generation and sales, and this is directly connected to the right of customers to choose their electricity provider. Provisions addressing market power, consumer protections,

and an independent market monitor also improve competitive electricity markets. Meaningful competition is essential to realizing meaningful choice for customers.

The Court's decision in *Advisory Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So.3d 235 (Fla. 2015) makes for a good comparison to the Energy Choice Amendment. In that case, the amendment contained several provisions on the purchase and sale of solar-generated electricity, covering rates, classifications, taxes, and fees. The Court rejected the amendment's opponents' claim that the initiative violated the single-subject rule, saying that "[a]lthough the proposed amendment contains a number of provisions – some dealing with economic barriers to supply of solar electricity and others dealing with government regulation with respect to rates, service, or territory – the logical and natural oneness of purpose of the amendment remains the same." *Id.* at 243.

There is no doubt that the Energy Choice Amendment touches on complex subject matter in trying to bring choice and competition to electricity markets defined by state-sanctioned monopoly for over a century. But complexity does not equate to logrolling, so long as its multiple elements are all part of a single, interdependent whole. The implementing provisions of the Energy Choice Amendment – its multiple elements – are all components of the same single plan, "are not 'disparate subjects,' and instead are directly connected to the purpose of the amendment and to each other." *Id.* at 244. Therefore, since the amendment has

a single, unifying oneness of purpose that each provision works toward, it meets the requirements of the Florida Constitution's single-subject rule.

**B. The Energy Choice Amendment Does Not Substantially Alter or Perform the Functions of Multiple Branches of the Government.**

The Energy Choice Amendment chiefly affects the Florida Legislature, since it is tasked with the creation of new legislation within constitutional parameters designed to effectuate the right of customers of investor-owned utilities to choose their electricity provider from a competitive market. Even here though, it gives the Legislature substantial discretion on how to implement energy choice, and leaves most specific implementation details for the Legislature to address, in order to respect its legislative power as completely as possible. For example, the Energy Choice Amendment does not attempt to change the FPSC specifically, but rather leaves its future role exclusively for the Legislature to define.

Beyond this, the Energy Choice Amendment further supplements the discretion it gives the Legislature by using carve-out provisions to clearly protect the Legislature's authority with respect to other energy-related priorities – environmental protection, energy efficiency, and renewable energy, as well as state and local taxation. Similarly, the carve-out for municipal utilities and electric cooperatives maintains the existing rights of local governments so far as possible while enabling competitive electricity markets for customers served by investor-

owned utilities. It also allows for municipal utilities and electric cooperatives to opt-in to these competitive electricity markets at their own discretion.

Finally, the impact of the initiative on the judiciary is itself limited, creating “standing to seek judicial relief” to compel the Legislature to enact legislation in the event it fails to do so. The language that addresses this issue was written in the spirit of similar language from the medical marijuana initiative. That initiative provided that if the executive branch agency at issue in that case, the Department of Health, “does not issue regulations. . . within the time limits set in this section, any Florida citizen shall have standing to seek judicial relief to compel compliance with the Department's constitutional duties.” *Advisory Op. to the Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So.3d 471, 475 (Fla. 2015). Upon its review of the implementation language at issue in another case, the Court reiterated that “the fact that [a] branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch’s function within the meaning of the single-subject rule.” *Advisory Op. to Att'y Gen. re Protect People, Especially Youth, From Addiction, Disease, & Other Health Hazards of Using Tobacco*, 926 So.2d 1186, 1192 (Fla.2006).

This Court has said that it would be “difficult to conceive of a constitutional amendment that would not affect other aspects of government to some extent.” *Advisory Op. to Att'y Gen. re Ltd. Casinos*, 644 So. 2d 71, 74 (Fla. 1994). Given

the breadth of involvement of state and local governments in electricity regulation, it is certain that the Energy Choice Amendment will have some effects on them. Nevertheless, in whatever form the Legislature ultimately chooses to implement the Energy Choice Amendment, “[a] proposed amendment having some effect on government does not necessarily result in the substantial alteration or performance of functions of government.” *Advisory Op. to Att’y Gen. re Voting Restoration Amendment*, 215 So.3d 1202, 1207 (Fla. 2017).

The major impact of the Energy Choice Amendment is on the Legislature. Other impacts – apart from the limited issue of standing in the event of legislative inaction – depend upon the form of the legislation that the Legislature eventually implements. Therefore, the Energy Choice Amendment neither substantially alters, nor performs, the functions of multiple branches of government.

### **III. THE BALLOT TITLE AND SUMMARY CLEARLY AND ACCURATELY DESCRIBE THE CHIEF PURPOSE OF THE ENERGY CHOICE AMENDMENT**

Section 101.161(1), Florida Statutes requires that proposed initiative petitions shall include a ballot title of no more than “15 words in length, by which the measure is commonly referred to or spoken of,” and a ballot summary limited to “75 words in length” which must explain “the chief purpose of the measure.” A summary, by definition, does not list and connect every detail it summarizes, and this Court has often said that the “title and summary need not explain every detail

or ramification of the proposed amendment.” *Advisory Opinion to the Att’y Gen re Limiting Cruel and Inhumane Confinement of Pigs during Pregnancy*, 815 So.2d 597, 599 (Fla. 2002). Instead, in evaluating proposed amendments against these requirements, the Court considers two elements: “(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voters of the chief purpose of the amendment; and (2) whether the language of the ballot title and summary, as written, will be affirmatively misleading to voters.” *Advisory Op. to Att’y Gen. re Voter Control of Gambling in Florida*, 215 So.3d 1209, 1215 (Fla. 2017). Here too, the language of the ballot title and summary of the Energy Choice Amendment passes both tests.

**A. The Ballot Title and Summary Fairly Inform the Voters of the Chief Purpose of the Amendment.**

The chief purpose of the Energy Choice Amendment is clear from the first sentence of its summary, which says that it “grants customers of investor-owned utilities the right to choose their electricity provider[.]” The rest of the summary then lays out how this purpose will be achieved, with much of its language tracking the text of the amendment itself. The Legislature will adopt laws providing for the establishment of competitive markets that will make choice possible, with consumer protections. These markets will be available for individual customers to participate in by June 1, 2025. After the Legislature acts to adopt laws providing

for competitive markets, any statutes, regulations, and orders which are inconsistent with the Energy Choice Amendment will be repealed. The summary then informs voters that the role of the investor-owned utilities will be limited to transmission and distribution. Finally, the summary ends by informing the voter that municipal and cooperative utilities may opt into competitive markets, demonstrating the carve-out for these utilities, but also clarifying to the voter that these utilities can choose to participate in competitive markets at some point as well, though it may be at a date other than the June 1, 2025 date guaranteed to customers of investor-owned utilities. Together, all of this makes the “chief purpose” of the Energy Choice Amendment, along with its key means of implementation, “reasonably clear” to voters, in line with the standard this Court reiterated in *Advisory Op. to Att’y Gen. re Voter Control of Gambling in Florida*, 215 So.3d 1209, 1216 (Fla. 2017). Since the ballot title and summary fairly inform the voters of the chief purpose of the amendment, they meet the first requirement of this Court’s consideration of Section 101.161(1).

**B. The Ballot Title and Summary Do Not Mislead the Voters as to the Content of the Proposed Amendment.**

The Attorney General and various other opponents of the Energy Choice Amendment have alleged that its title and summary conceal the amendment’s “true” objective – the removal of the investor-owned utilities from the Florida

electricity system altogether, and an accordant reduction in choice and competition for Florida's electricity customers. As we have seen above, this claim is false.

The Energy Choice Amendment's limitation of the investor-owned utilities to transmission and distribution is merely one of the ways by which the Energy Choice Amendment effectuates its chief purpose of "grant[ing] customers of investor-owned utilities the right to choose their electricity provider". As the experience of the fully restructured electricity market in Texas has shown, the most competitive markets, and therefore, the most meaningful choices for individual customers, depend upon properly "quarantining the monopoly." FPL already participates in Texas's fully restructured electricity market through competitive affiliates, as Duke and TECO do in other competitive markets as well. The Energy Choice Amendment permits affiliates in Florida, meaning that FPL, Duke, and TECO customers will still be able to choose these companies' competitive affiliates as their future electricity providers. The key difference is that the affiliates serving these customers will not have the anticompetitive advantages of state-sanctioned monopoly as investor-owned utilities anymore.

While the final form of a future competitive market depends on the decisions of the Florida Legislature, the Energy Choice Amendment does not restrict choice. Instead, its provisions are specifically designed to make possible, in Florida, the kind of meaningful choice that is already possible in existing competitive

electricity markets like Texas, giving customers a real voice in their electricity service, in line with the amendment's chief purpose. Therefore, the title and summary accurately cover the content of the Energy Choice Amendment, meeting the second requirement of this Court's consideration of Section 101.161(1).

### **CONCLUSION**

The Energy Choice Amendment has a logical and natural oneness of purpose, and does not substantially alter or perform the functions of multiple branches of government. Indeed, the ballot title and summary for the Energy Choice Amendment fairly inform voters of its chief purpose and thoroughly cover its content while nevertheless complying with the respective 15 and 75 word limits.

Therefore, the Energy Suppliers respectfully request that the Court approve the Energy Choice Amendment for placement on the ballot.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief was generated by computer using Microsoft Word with Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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