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# IT'S ALWAYS SUNNY IN FLORIDA: REEXAMINING THE ROLE OF ENERGY MONOPOLIES AFTER RECENT SOLAR BALLOT INITIATIVES

LAUREN GILLESPIE\*

## INTRODUCTION

In Florida, the reign of state-sponsored monopolies stalls intuitive renewable energy upgrades. Despite being the “Sunshine State,” Florida lags behind the curve in solar technology.<sup>1</sup> Some power companies take advantage of tax credits to install solar panels, but bizarre laws limit access for homeowners and small business owners. But recently, Floridians turned to their lawmakers for help. Citizen-activists proposed Amendment Four [hereinafter known as pro-solar amendment] to eliminate taxes on renewable energy devices.<sup>2</sup> After a bipartisan grassroots campaign, the Florida Constitution was amended to guarantee citizens access to solar energy free from burdensome regulations.<sup>3</sup> This pro-solar amendment was a victory for idealistic citizens, environmentalists, economic conservatives, Republicans and Democrats.<sup>4</sup>

Almost immediately after this local victory, entrenched monopolies proposed a new amendment.<sup>5</sup> This Amendment One [hereinafter known

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<sup>1</sup> Ben Zientara, *What's the matter with solar in Florida?*, SOLAR POWER ROCKS (last visited Apr. 4, 2018), <https://solarpowerrocks.com/florida/florida-solar-power-problems> [<https://perma.cc/8B6Q-S4HY>] (noting that Florida ranks 24th out of 50 states in terms of solar advancement).

<sup>2</sup> Sun Sentinel Editorial Board, *For Solar, vote yes on Amendment 4*, SUN SENTINEL (Aug. 19, 2016), <http://www.sun-sentinel.com/opinion/endorsements/fl-editorial-solar-amendment-4-vote-yes-20160819-story.html> [[https://web.archive.org/web/\\*/http://www.sun-sentinel.com/opinion/endorsements/fl-editorial-solar-amendment-4-vote-yes-20160819-story.html](https://web.archive.org/web/*/http://www.sun-sentinel.com/opinion/endorsements/fl-editorial-solar-amendment-4-vote-yes-20160819-story.html)] (“Amendment 4 was placed on the ballot by the Legislature in a rare show of bipartisan unanimity”).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> David Roberts, *Florida's outrageously deceptive solar ballot initiative, explained*, VOX (Nov. 8, 2016), <https://www.vox.com/science-and-health/2016/11/4/13485164/florida-amendment-1-explained> [<https://perma.cc/5827-HT4E>] (calling the Amendment a “utility’s scam”).

as pro-utility amendment] proposes that: “State and local governments shall retain their abilities to protect consumer rights and public health, safety and welfare, and to ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do.”<sup>6</sup>

To the lay person (and even to some experts), this pro-utility amendment seemed to support solar energy and citizens’ rights.<sup>7</sup> In reality, the entrenched energy companies proposed this malicious and deceptive amendment.<sup>8</sup> The goal of the amendment was to stop progress and maintain the energy companies’ monopolies forever. Luckily, the citizens of Florida recognized the “wolf in sheep’s clothing,”<sup>9</sup> as one Florida Supreme Court judge described Amendment One. The same majority of citizens who mobilized for the pro-solar amendment showed up in force to tear down the pro-utility amendment.<sup>10</sup> Even Florida’s Firefighters Association condemned the tricky amendment after they were duped into filming a commercial for the pro-utility amendment.<sup>11</sup> Still, it is a travesty that the big businesses were even allowed to broach this nonsensical restriction on solar energy. Furthermore, the companies did not just propose a law—they attempted to make permanent changes by amending Florida’s constitution, which is notoriously difficult to alter.<sup>12</sup> This desperate power grab reveals that renewable energy terrifies traditional power companies. It also shows how entangled these monopolies are in the fabric of state governments.

This battle of amendments is a proxy for a larger struggle—the struggle over who determines Florida’s energy future. If people have a right to energy, do they also have a right to produce energy? Do they have a right to decide how others will produce energy for them? Citizens, businesses,

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<sup>6</sup> Advisory Op. to the Att’y Gen. re Rights of Elec. Consumers Regarding Solar Energy Choice, 180 So. 3d 822, 826 (Fla. 2016).

<sup>7</sup> *Id.* at 827.

<sup>8</sup> *Id.* at 834–35.

<sup>9</sup> *Id.* at 835.

<sup>10</sup> Mary Ellen Klas, *Florida voters say no to misleading solar amendment*, MIAMI HERALD (Nov. 8, 2016), <http://www.miamiherald.com/news/politics-government/election/article113449438.html> [<https://perma.cc/4K8K-PEGT>].

<sup>11</sup> Mary Ellen Klas, *Firefighters withdraw their endorsement of Amendment 1*, MIAMI HERALD (Nov. 5, 2016), <http://www.miamiherald.com/news/politics-government/state-politics/article112764713.html> [<https://perma.cc/WWT2-46XD>].

<sup>12</sup> Patrick Quinlan, *Why Vote ‘No’ on Florida’s Constitutional Amendments? It’s the right choice*, SEARCY LAW BLOG (Sept. 14, 2012), <https://www.searcyllaw.com/why-vote-no-on-floridas-constitutional-amendments-its-the-right-choice/> [<https://perma.cc/U537-7HEG>] (explaining “[O]nce an idea is written into the Florida Constitution, then the ability to make adjustments is substantially limited and the process is cumbersome.”).

and environmental groups want to make choices about solar energy while entrenched power companies want to move at their own restrictive paces.

Historically, Americans have had little influence in how their energy is manufactured. Once energy became industrialized in the eighteenth and nineteenth centuries, production was subject only to market influences and free from personal preference.<sup>13</sup> Other costs, such as the cost to the environment, were externalized.<sup>14</sup> As jurisprudence addressed (and dismissed) possible anti-trust problems, energy companies became more and more entangled in the fabric of states. This system continued throughout American history with little variation. A notable exception occurred at the turn of the century in California.<sup>15</sup> After California's experiment with deregulation, energy companies enjoyed relatively peaceful reigns.

Florida's current energy system is rife with bad incentives that maintain the status quo. While short term legal fixes could allow for the integration of solar power in Florida despite bad incentives, an overall strategy should embrace a right to personal determination in terms of energy production to truly spur innovate renewable energy. This is, after all, what Floridians have demanded in the newly minted solar choice state constitutional amendment.

In economic parlance, bad incentives exist when a rational actor must weigh the chance of increased profits against harm to a common good.<sup>16</sup> Federal anti-trust law is designed to constrain bad incentives.<sup>17</sup> If applied to Florida, the law would preclude Florida power companies from creating monopolies and yet, monopolies exist. The Sherman Act was designed to prevent the very harm that occurs in Florida. However, federal law does not apply to states in some instances. Because federal law does not apply, states control. Some scholars argue that federal law should apply (by reawakening the dormant commerce clause),<sup>18</sup> but my Note takes a different approach.

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<sup>13</sup> Jeffery Schwartz, *The Use of the Antitrust State Action Doctrine in the Deregulated Electric Utility Industry*, 48 AM. U.L. REV. 1449 (1999).

<sup>14</sup> *Id.*

<sup>15</sup> Steven Ferrey, *Soft Paths, Hard Choices: Environmental Lessons in the Aftermath of California's Electric Deregulation Debacle*, 23 VA. ENVTL. L. J. 251, 254–55 (2004).

<sup>16</sup> See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. R. 1089 (1972).

<sup>17</sup> DEP'T OF JUSTICE & THE FTC, HORIZONTAL MERGER GUIDELINES 1 (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> [<https://perma.cc/YHW4-FN37>].

<sup>18</sup> See generally Barbara Bruckmann, *The Case for a Commerce Clause Challenge to State Antitrust Laws Banning Minimum Resale Price Maintenance*, 39 HASTINGS CONST. L.Q. 391 (2012); Michael Ruttinger, *Is There a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545 (2007).

Certain companies within states are given much more room to maneuver than companies governed strictly by federal law. The Supreme Court outlined a State Action Doctrine, which details how monopolies can exist in states despite preemptive (superior) federal law. These monopolies were allowed because energy and other utilities formed a "natural monopoly." However, as renewable energy technology advances, this justification becomes less convincing.

Like most state energy schemes, Florida's relationship falls within the State Action Doctrine. Florida continues a regulatory scheme closely linked with utility companies. The state exerts only gradual changes to regulations for improved access to solar energy and other renewable sources. Florida Public Service Commission ("FPSC") regulates energy companies. Though changes have occurred, Florida still lags behind other states in allowing innovation. This is mostly because of one court case, *PW Ventures v. Nichols*, in which the Florida Supreme Court severely limited access to a common-sense financing options for solar energy.

After defining Florida's monopoly system, I will identify some issues in Florida's application of State Action Doctrine. First, the FPSC gives energy companies far-reaching ability to restrain competition. On a related note, the FPSC also faces claims of corruption.

Still, it is important to note that the FPSC was formed for valid reasons. First, the FPSC has an economic duty to prevent duplicative efforts. Next, FPSC has a quasi-civil rights role of protecting the energy supply of all socio-economic classes. As alternative energy developed, some states rethought their relationship; specifically, California attempted to deregulate their energy sector. Their experiment provides a nice example of the benefits of the state action doctrine and contrasts to Florida's own relationship with state-sponsored energy monopolies.

Understanding these justifications, this Note will offer recommendations for fixing bad incentives within the current framework of Florida's energy sector. First, the giant utilities should become decentralized to ensure loyal service to a community. Second, Florida should join other states in our nation by allowing third-party power purchasing agreements in some form. While most critics of Florida's energy sector clamor for tax incentives, this Note will discuss some issues caused by solely relying on tax breaks to produce solar energy.

Finally, I will discuss long-term fixes for the bad incentives that are pervasive in Florida. First, give Floridians the agency to determine their energy source. Additionally, a law limiting the scope of energy monopolies would be beneficial so that emerging markets can operate freely.

These are lofty goals, but in the end, the entrenched system will reach its breaking point as renewable energy continues to disrupt the market.

## I. FEDERAL ANTI-TRUST LAW

In this section, the Note will first describe the reason why anti-trust law was enacted and describe the general legislation. Next, it will explain the gaping exception to anti-trust law: namely, the State Action Doctrine. Finally, California's experiment in deregulation shows how state-sponsored monopolies came to be favored despite the environmental and economic benefits of renewable energy.

### A. *Basic Purpose of Anti-Trust Law*

A capitalist society operates with bad incentives, such as the desire to increase profits by cornering the market.<sup>19</sup> Cornering the market would make one actor more profitable but it would harm the market and society overall.<sup>20</sup> Key to this theory is understanding that rational actors will choose to benefit themselves in the short term regardless of the negative external effects, and federal law understands this.<sup>21</sup>

To contain these market urges while still encouraging free trade, Congress passed a series of regulatory statutes.<sup>22</sup> In 1890, at the height of the Industrial Revolution, Congress passed the Sherman Anti-Trust Act<sup>23</sup> because Congress feared that too much wealth would be concentrated in the hands of too few people.<sup>24</sup> The common practice for businesses was to accumulate other business and form monopolies.<sup>25</sup> To prevent business elites from using monopolies to minimize competition, Congress mandated

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<sup>19</sup> Mark J. Perry & Robert Dell, *The Battle for Capitalism and Freedom*, HUFFINGTON POST (Sept. 30, 2012), [https://www.huffingtonpost.com/mark-j-perry-and-robert-dell/the-battle-for-capitalism\\_b\\_1711510.html](https://www.huffingtonpost.com/mark-j-perry-and-robert-dell/the-battle-for-capitalism_b_1711510.html) [<https://perma.cc/XMQ7-Y728>] ("Bad economic policy is misunderstood by the public as the product of bad actors, but the deeper story is one of normal people performing under bad incentives").

<sup>20</sup> See INVESTOPEDIA, *Corner A Market*, [http://www.investopedia.com/terms/c/cornera\\_market.asp](http://www.investopedia.com/terms/c/cornera_market.asp) [<https://perma.cc/2MD9-XXMR>] (last visited Apr. 4, 2018).

<sup>21</sup> *Id.*

<sup>22</sup> EARL W. KINTNER, AN ANTITRUST PRIMER 15 (Macmillan 2nd ed. 1973).

<sup>23</sup> Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1890).

<sup>24</sup> "Vast accumulation of wealth in the hands of corporations and individuals. . . and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." KINTNER, *supra* note 22, at 15.

<sup>25</sup> *Id.*

that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal.”<sup>26</sup> Courts interpreted “restraint of trade” to include price-fixing,<sup>27</sup> amalgamation that results in elimination of competition, and agreements not to compete in defined geographic areas.<sup>28</sup>

The Supreme Court thinks highly of the Sherman Act, opining “[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”<sup>29</sup> The Court goes on to say, “[t]hey are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>30</sup> But the Sherman Act does not govern intrastate dealings.<sup>31</sup> To preserve federalism, states rule over anti-trust issues that do not affect interstate commerce.<sup>32</sup> While federal anti-trust history guides the states, it is the prerogative of the state to follow federal example.<sup>33</sup> States can choose to allow monopolies that would be otherwise hampered by federal law.<sup>34</sup>

### B. *State Action Doctrine*

There are three main cases that define the limits of the State Action Doctrine. First, in *Parker v. Brown*, the Supreme Court developed what is known as the “Parker Doctrine.”<sup>35</sup> *Parker* and its progeny defined three instances in which a state can restrain competition: “(1) action by a state itself; (2) action by a subdivision of a state—including a unit of local government or by a state agency; and (3) conduct of private parties pursuant to the direction and supervision of the state or its subdivision.”<sup>36</sup> In their

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<sup>26</sup> Sherman Antitrust Act § 1.

<sup>27</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 7–8 (1979).

<sup>28</sup> *Atkin v. Union Processing Corp.*, 59 N.Y.2d 919, 921 (1983) (affirming *Atkin v. Union Processing Corp.*, 90 A.D.2d 332, 335–36 (N.Y. App. Div. 1982)).

<sup>29</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

<sup>30</sup> *Id.*

<sup>31</sup> Sherman Anti-Trust Act § 1. However, federal courts have found intrastate transaction to effect interstate commerce and thus applied federal anti-trust law to those mergers. *See generally* *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

<sup>32</sup> Alan Meese, *Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 IOWA L. REV. 2161, 2169 (2015).

<sup>33</sup> John J. Dvorske, *Construction and Application of Sherman Act*, 15 U.S.C.A. §§ 1 *et seq.*—*Supreme Court Cases*, 35 A.L.R. Fed. 2d 1, 11.

<sup>34</sup> *Id.* at 25.

<sup>35</sup> *See generally* *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>36</sup> Schwartz, *supra* note 13, at 1459.

decision, the Court noted the lack of specificity in federal anti-trust law by saying “the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.”<sup>37</sup>

In *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, the Court discussed the issue of how to determine whether a state intended to invoke *Parker*.<sup>38</sup> The Supreme Court developed a two-prong test for determining whether or not an anticompetitive action could be protected by state directive.<sup>39</sup> First, the court must ask if the action is part of a clearly articulated state policy.<sup>40</sup> Second, the court must ask if the state is actively supervising the implementation of the state policy.<sup>41</sup> If these two factors are met, the court will allow the restraint of trade.<sup>42</sup> In *Midcal*, the court found that California’s wine pricing system clearly violated the Sherman Act.<sup>43</sup> Nevertheless, the Court looked to the state involvement in the scheme.<sup>44</sup> California’s law adhered to an articulated policy and was heavily supervised by the state.<sup>45</sup> In the end, the Court allowed this state action, even though it was a clear restraint of trade, because of the state’s right to chose.<sup>46</sup>

Finally, *Southern Motor Carriers Rate Conference v. United States* clarified that private parties could be protected by State Action Doctrine, even if their anticompetitive behavior was not expressly sanctioned by the state.<sup>47</sup> “The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant.”<sup>48</sup> The Supreme Court had two justifications for granting power to private companies in these instances: “First, the Court concluded that it would be unjust to find that a party violated federal law for doing nothing more than obeying its state sovereign.”<sup>49</sup> This gives private parties leeway in interpreting the state directive. And second, “the Court concluded that

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<sup>37</sup> *Parker*, 317 U.S. at 351.

<sup>38</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 99 (1980).

<sup>39</sup> *Id.* at 105.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 103.

<sup>44</sup> *Cal. Retail Liquor Dealers Ass’n*, 445 U.S. at 103.

<sup>45</sup> *Id.* at 105–06.

<sup>46</sup> *Id.* at 111.

<sup>47</sup> *Southern Motor Carriers Rate Conf. v. U.S.*, 471 U.S. 48, 61 (1985).

<sup>48</sup> *Id.* at 54.

<sup>49</sup> Schwartz, *supra* note 13, at 1461.



Congress did not necessarily intend to superimpose the antitrust laws as an additional and possibly conflicting regulatory mechanism in areas of the economy already regulated by the state.”<sup>50</sup> While the Sherman Act and anti-trust theory guides the states, it is the prerogative of the state to follow these federal rules.<sup>51</sup>

## II. FLORIDA

This section will consider how anti-trust law has trickled down to Florida through the lenses of the State Action Doctrine and the California experiment that were discussed above. In applying the State Action Doctrine, this section will recognize the Florida Public Service Commission, which acts as emissary of state policy to monopolies. Though the Public Service Commission has serious flaws, it cannot be eliminated offhand.

### A. *Application of the State Action Doctrine in Florida*

Under the State Action Doctrine, Florida has established legal, state-sponsored monopolies for certain sectors, including public utilities. Again, the *Midcal* factors require (1) an articulated state policy and (2) active supervision of that policy. When applying the *Midcal* factors to Florida, the Eleventh Circuit Court of Appeals found that the state policy is articulated in Fla. Stat. § 366, which generally regulates public utilities.<sup>52</sup> Next, the court found that the FPSC fulfills the second *Midcal* factor because it actively supervises the implementation of the state’s policy.<sup>53</sup>

The two *Midcal* factors are intertwined in Florida by design. Statute 366 explains how public utilities will be regulated in the state of Florida and simultaneously creates the body to regulate them.<sup>54</sup> First, § 366.02 defines public utilities as “every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas . . . to or for the public within this state.”<sup>55</sup> Then § 366.05 also establishes a FPSC with exclusive and superior jurisdiction over “electric utilities.”<sup>56</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Southern Motor Carriers Rate Conf.*, 471 U.S. at 56.

<sup>52</sup> *Praxair, Inc. v. Florida Power & Light*, 64 F.3d 609, 611 (11th Cir. 1995).

<sup>53</sup> *Id.* at 612.

<sup>54</sup> FLA. STAT. § 366 (2012).

<sup>55</sup> *Id.* § .02.

<sup>56</sup> *Id.* § 366.05.

*B. Florida's History of Noncompetitiveness*

Since its inception, the FPSC has approved agreements that would not be allowed by the Federal Energy Regulatory Committee (the federal body that handles the application of Sherman Act and anti-trust law in the national energy sector).

The history of Florida's energy sector development is rife with examples of anti-trust violations. In *Gainesville v. Florida Power & Light*, an explicit territory based noncompetitive contract was allowed to proceed, depriving consumers of utility alternatives.<sup>57</sup> Also in *Praxair, Inc. v. Florida Power & Light*, a state-sponsored monopoly was allowed to change the service provided to citizens with no chance for recourse.

Perhaps the FPSC's most infamous decision came when the regulatory agency decided the limits of its own jurisdiction. § 366 specifically excludes Rural Power Cooperatives from the FPSC's regulatory scope, but other entities are not mentioned in the rule.<sup>58</sup> In a landmark decision called *PW Ventures Inc., v. Nichols*, the FPSC expanded the scope of their jurisdiction to include individual arrangements; that is, an exchange between two people.<sup>59</sup>

PW Ventures was a solar photovoltaic company that arranged to provide solar energy producing equipment for Pratt's industrial complex in Palm Beach County.<sup>60</sup> PW Ventures would have given the energy generated on Pratt's land to Pratt under a long-term "take or pay" contract,<sup>61</sup> which means that Pratt would have the first use of any energy generated, but must pay regardless of whether its total energy needs are met.<sup>62</sup>

However, the court found that these arrangements could "drastically change the regulatory scheme in this state".<sup>63</sup> The court characterized PW Ventures as a pirate of the industry, saying "[w]hat PW Ventures

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<sup>57</sup> *Gainesville Utilities Dept. v. Florida Power & Light Co.*, 573 F.2d 292, 300, 303 (5th Cir. 1978).

<sup>58</sup> FLA. STAT. § 366.02.

<sup>59</sup> *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283–84 (Fla. 1988).

<sup>60</sup> *Id.* at 282 n.1.

<sup>61</sup> *Id.* at 282.

<sup>62</sup> Stephen C. Hall & Morten A. Lund, *Power Purchase Agreements: Distributed Generation Projects*, [http://www.agmrc.org/media/cms/Power\\_Purchase\\_Agreements\\_Distributed\\_Generation\\_Projects\\_566FFDFD1AFF9.pdf](http://www.agmrc.org/media/cms/Power_Purchase_Agreements_Distributed_Generation_Projects_566FFDFD1AFF9.pdf) [<https://perma.cc/KHJ8-JQ8L>] (last visited Apr. 4, 2018); see NORTON ROSE FULBRIGHT, *Structure of a solar power purchase agreement* (June 2015), <http://www.nortonrosefulbright.com/knowledge/publications/134662/structure-of-a-solar-power-purchase-agreement> [<https://perma.cc/6R78-VKT9>].

<sup>63</sup> *PW Ventures, Inc.*, 533 So.2d at 283.

proposes is to go into an area served by a utility and take one of its major customers.”<sup>64</sup> Furthermore, the court speculated, other customers would be forced to pay more for their electricity because Pratt’s consumption of traditional energy would be reduced and thus revenue is lowered.<sup>65</sup>

In the end, the FPSC found that “any energy sales to an individual constituted a sale to the public, and thus would interfere with the natural monopolies in place by the electric utilities in the state.”<sup>66</sup> Later, the Florida Supreme court upheld the FPSC decision.<sup>67</sup> The decision in *PW Ventures* set Florida on a path that deviates from most other states in terms of viewing utilities.<sup>68</sup> Other states make a distinction between third-party developers (who mainly help homeowners and business owners install solar panels) and state-sponsored monopolies.<sup>69</sup> For example, the Arizona Public Utility Commission ruled that third-party developers like *PW Ventures* must “compete for business” and are not monopolies.<sup>70</sup>

The holding in *PW Ventures* severely impacted the availability of third-party purchasing agreements (“PPAs”) in Florida.<sup>71</sup> Put simply, a PPA is an agreement between solar developer and purchaser.<sup>72</sup> “The developer owns, finances, and maintains the PV system and is able to obtain tax credits for these activities.”<sup>73</sup> Typically, the developer installs the solar panels for the building owner.<sup>74</sup> PPAs make up a large percentage of solar panel installations in homes across the country because developers assume the high initial costs of installation.<sup>75</sup> However, under *PW Ventures*, the developer in this arrangement is a “utility” as defined by § 366 because he is an individual providing electricity to the public and

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (“This revenue would have to be made up by the remaining customers of the regulated utilities since the fixed costs of the regulated systems would not have been reduced”).

<sup>66</sup> S.B. 640, 2012 Legis. Bill Hist. (Fla. 2012).

<sup>67</sup> *Id.*

<sup>68</sup> Bradley Klein, *Legal Memorandum: Power Purchase Agreement (PPA) Financing for Third-Party-Owned Renewable Energy Systems in Iowa* 9, ENVTL. LAW & POL'Y CTR. (Sept. 16, 2011), <http://www.scribd.com/doc/69284226/Iowa-Ppa-Memo-9-16-11-Final> [<https://perma.cc/7WPL-MCF6>].

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Ryann White, *Three Steps to a Greener Tomorrow: Encouraging Solar Energy Development in the Sunshine State*, 31 J. LAND USE & ENVTL. L. 263, 275 (2016).

<sup>72</sup> *Id.* at 274.

<sup>73</sup> *Id.*

<sup>74</sup> Samuel Farkas, *Third Party PPAs: Unleashing America’s Solar Potential*, 28 J. LAND USE & ENVTL. L. 91, 112 (2012).

<sup>75</sup> *Id.* at 93.

he is thus subject to the same regulations as energy giants.<sup>76</sup> Thus, preventing the developer from disrupting the existing state-sponsored monopoly.

The FPSC maintains that regulation of third-party PPAs is fact-specific.<sup>77</sup> Nevertheless, it is clear that the FPSC protects the status quo and *ipso facto* favors state-sponsored energy monopolies.

### C. *Issues with FPSC*

As described above, the FPSC gives energy companies far-reaching ability to restrain competition. On appeals, Florida courts tend to give extreme deference to FPSC.<sup>78</sup> This means that courts continue practices considered egregious anti-trust violations by the Federal Energy Regulatory Committee (“FERC”). Because Florida courts grant such wide deference to the FPSC, there is no way to tell if the Commission or the courts apply a separate legal standard consistently. Indeed, judges lament the tradition of deference. “Once again we have a case where the FPSC has approved a territorial agreement between two utilities over the objections of a large number of consumers of one of the utilities,” Judge Ervin opined in a dissenting opinion.<sup>79</sup> Though the Supreme Court noted strong citizen outrage, it decided not to overturn the FPSC, saying “[t]he powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law.”<sup>80</sup>

The FPSC also faces claims of corruption<sup>81</sup> and FPSC is often referred to as a “revolving door.”<sup>82</sup> Reporters claim that the commissioners are rewarded for a pro-monopolistic decision with a cushy, well-paying job at the selfsame utility company they judged. Former Florida Public Service Commission chairwoman Nancy Argenziano explained to local news

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<sup>76</sup> FLA. STAT. § 366.04(2)(c).

<sup>77</sup> *Choctawhatchee Elec. Coop. v. Graham*, 132 So. 3d 208, 215 (Fla. 2014) (“[W]e are mindful of the highly fact-specific nature of the territorial disputes that come before the Commission.”)

<sup>78</sup> See *infra* note 82.

<sup>79</sup> *Storey v. Mayo*, 217 So. 2d 304, 308 (Fla. 1968).

<sup>80</sup> *Id.* at 307.

<sup>81</sup> Tim Dickinson, *The Koch Brother’s Dirty War on Solar Energy*, ROLLING STONE (Feb. 11, 2016), <http://www.rollingstone.com/politics/news/the-koch-brothers-dirty-war-on-solar-power-20160211> [<https://perma.cc/WL5Z-H4PW>]; Mary Ellen Klas, *Group says power companies wield too much influence in Legislature*, MIAMI HERALD (Mar. 30, 2014), <http://www.miamiherald.com/news/state/article2087902.html> [<https://perma.cc/38EE-3JBF>].

<sup>82</sup> Keith Laing, *Analysis: Truth to criticism of Florida PSC*, HERALD-TRIB. (Oct. 10, 2010), <http://www.heraldtribune.com/news/20101023/analysis-truth-to-criticism-of-florida-psc> [<https://perma.cc/96DC-ALW8>].

outlets upon resigning, “I tell you that in my weirdest nightmare, I would not have expected to come upon the corruption, the bought-and-sold nature of everything related to the operation of the PSC.”<sup>83</sup> Argenziano took the chairwoman position after her predecessor, Matt Carter, improperly communicated with utility lobbyists.<sup>84</sup> Matt Carter actually backed the pro-utility Amendment One in 2016,<sup>85</sup> giving credence to the “revolving door” accusations.

In light of these issues, it appears that the FPSC inadequately serves the state and instead serves the interest of the investor owned, state-sponsored monopolies. If determined to be the case, Florida fails to meet the State Action Doctrine expounded by the Supreme Court. The Doctrine is designed to protect consumers, and subpar performance of the FPSC undermines its statutory intent.

#### D. *Policy Justifications*

Still, there are policy justifications for some state regulations under the FPSC despite claims of ineffectiveness and corruption. First, one purpose of the FPSC is preventing duplicative efforts.<sup>86</sup> The first justification is explicitly enumerated in statutory language.<sup>87</sup> It makes sense—multiple producers of power that generate from disparate sources could lead to power lines laid one on top of each other en route to homes and businesses. In fact, most states with Public Service Commissions articulate a desire to streamline the distribution process.<sup>88</sup> In addition to economic waste, this system could potentially be an eyesore: just look at the electric wires in Thailand’s urban centers.<sup>89</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> Julie Patel, *PSC member reigns as agency begins deliberations of ethics*, SUN SENTINEL (Oct. 5, 2009), <http://www.sun-sentinel.com/business/sfl-psc-conferences-100609-story.html> [[https://web.archive.org/web/\\*/http://www.sun-sentinel.com/business/sfl-psc-conferences-100609-story.html](https://web.archive.org/web/*/http://www.sun-sentinel.com/business/sfl-psc-conferences-100609-story.html)].

<sup>85</sup> Mary Ellen Klas, *Florida Supreme Court appears divided over utility backed solar amendment*, TAMPA BAY TIMES (Mar. 7, 2016), <http://www.tampabay.com/news/politics/state/roundup/florida-supreme-court-appears-divided-over-utility-backed-solar-amendment/2268331> [<https://perma.cc/U75W-HJQN>].

<sup>86</sup> *Praxair, Inc. v. Florida Power & Light*, 64 F.3d 609, 611 (11th Cir. 1995).

<sup>87</sup> FLA. STAT. § 366.04(2)(c).

<sup>88</sup> Farkas, *supra* note 74, at 93.

<sup>89</sup> ASIAN CORRESPONDENT, *Thai government to tackle overhead wire problem after controversial Bill Gates post* (Jan. 2016), <https://asiancorrespondent.com/2016/06/thailand-wire-bill-gates/> [<https://perma.cc/VWX6-TTBU>].

Second, the FPSC is responsible for ensuring that all Floridians have power when they reach for their light switch. It is important to consider California as a powerful counterexample. After the *Southern Motor Carriers* ruling, states questioned the power given to energy companies within their states.<sup>90</sup> California believed that renewable energy could become more feasible, but power companies would have no incentive to update their infrastructure. This would negatively impact the environment because most traditional companies used coal.<sup>91</sup> The state was unsure if alternative energy could displace such an entrenched system without competition.<sup>92</sup> Furthermore, the way large companies structured their energy purchases could lock residents into poor economic deals.<sup>93</sup> By 1998, three states (California, Massachusetts, and Rhode Island) attempted to introduce competition to their energy markets.<sup>94</sup> The most important state was California, whose enormous economy is comparable to some small countries.<sup>95</sup> California attempted to deregulate their energy market by implementing a series of programs.<sup>96</sup> “Retail rates under the restructuring system were frozen until utilities recovered stranded costs or until March 2002.”<sup>97</sup> Additionally, the state imposed a 10% price cut to consumers.<sup>98</sup> This had the opposite of the intended effect: “this discouraged consumers from shifting to alternative retail suppliers even though it was allowed.”<sup>99</sup> Next, California barred “hedging” and forced companies to buy at that moment’s price.<sup>100</sup> This left power companies on the hook for the difference between wholesale and retail price.<sup>101</sup> By outlawing creative financial solutions, California forced its power companies to parity.<sup>102</sup> Finally, for the energy produced out of state, sellers took advantage of the companies’

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<sup>90</sup> Farkas, *supra* note 74, at 99.

<sup>91</sup> *Powering a Generation*, NAT’L MUSEUM OF AM. HIST., <http://americanhistory.si.edu/powering/generate/gnmain.htm> [<https://perma.cc/W8TF-RRBJ>] (last visited Apr. 4, 2018).

<sup>92</sup> Peter Navarro, *The Argument for Radical Deregulation*, HARV. BUS. REV. 112, 112 (1996); Theo Mullen, *Unseating the Electrical Utilities’ Monopoly*, N.Y. TIMES (Mar. 11, 1990), <https://www.nytimes.com/1990/03/11/business/unseating-the-electrical-utilities-monopoly.html> [<https://perma.cc/KNR3-DKM5>].

<sup>93</sup> Farkas, *supra* note 74, at 99.

<sup>94</sup> *Id.* at 95.

<sup>95</sup> Ferrey, *supra* note 15, at 253.

<sup>96</sup> *Id.* at 257.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Ferrey, *supra* note 15, at 259.

<sup>101</sup> *Id.* at 258.

<sup>102</sup> *Id.*

shortage and legal requirement to provide natural gas.<sup>103</sup> “Some of the gas supply companies declined to sell natural gas to the integrated electric and gas utility companies in California that were required by law to serve residential and other natural gas customers.”<sup>104</sup> It is clear that California’s “de-regulation” provided crippling regulations for energy companies.

Disaster struck on January 17, 2001 when the first rolling blackout hit California since World War II.<sup>105</sup> California’s Governor Davis declared a state of emergency, citing an “imminent threat of widespread and prolonged disruption of electrical power.”<sup>106</sup> Eventually, California’s de-regulation failed. Because of California’s drastic results, most states have not implemented widespread energy sector deregulation.<sup>107</sup>

These policy justifications are in alignment with Florida’s intention in designing this regulatory scheme and they are also helpful for larger human rights goals. The FPSC considers itself a vanguard of the grid system.<sup>108</sup> Their website touts the Commission’s role in providing energy to every citizen.<sup>109</sup> Indeed, implicit in its rate-fixing system is the idea that access to the market (especially for a necessary item) should not have an unattainable price tag.<sup>110</sup> This is important because access to energy may as well be a human right.<sup>111</sup> Humans need it to function in society. Especially in America, our daily lives begin with an alarm clock and end with flipping a light switch. Most of our communications and functions are made possible by electricity.

Finally, it is important to remember California’s debacle in deregulation. Because of all of these factors, it is clear that Florida cannot simply eliminate the FPSC while these justifications still exist.

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<sup>103</sup> *Id.* at 259–60.

<sup>104</sup> *Id.*

<sup>105</sup> PBS, *The California Crisis: California Timeline*, <http://www.pbs.org/wgbh/pages/frontline/shows/blackout/california/timeline.html> [https://perma.cc/S4XR-QA2Q] (last visited Apr. 4, 2018).

<sup>106</sup> Ferrey, *surpa* note 15, at 263.

<sup>107</sup> This is especially true in Florida. *Florida Panel Eyes Deregulation*, ST. AUGUSTINE RECORD (Feb. 1, 2001), [http://staugustine.com/stories/020101/sta\\_0201010031.shtml#.WKmw-mXaHu8](http://staugustine.com/stories/020101/sta_0201010031.shtml#.WKmw-mXaHu8) [https://web.archive.org/web/\*/http://staugustine.com/stories/020101/sta\_0201010031.shtml#.WKmw-mXaHu8] (explaining “the biggest obstacle to deregulation may be fears of California’s post-deregulation situation, with rolling blackouts there spooking customers nationwide”).

<sup>108</sup> FPSC, <http://www.psc.state.fl.us> [https://perma.cc/NU9A-FBU9] (last visited Apr. 4, 2018).

<sup>109</sup> *Id.*

<sup>110</sup> See generally *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>111</sup> Adrian J. Bradbrook & Judith G. Gardam, *Placing Access to Energy Services within a Human Rights Framework*, 28 HUMAN RIGHTS Q. 389, 389 (2006).

### III. RECOMMENDATIONS

This Note does not call for the complete elimination of energy regulation. As discussed in the policy section above and considering California's experience, it is clear that some regulation must stay in place. Still, the issues that plague the FPSC necessitate decentralizing the regulatory scheme. The first recommendation concerns the physical nature of solar energy. Decentralization would better harness solar power's peaking nature. The second recommendation concerns the financing of solar energy.

#### A. *Decentralization*

The current energy system thrives on its elaborate infrastructure. However, this infrastructure is at odds with the innovative strides in renewable energy. All forms of energy would ideally be consumed almost simultaneously to their production.<sup>112</sup> Solar energy specifically is a peaking energy generation.<sup>113</sup> However, energy is at peak production during peak demand,<sup>114</sup> especially in hot, humid Florida where air conditioning accounts for approximately 40% of a homeowners' annual utility bill.<sup>115</sup> Solar panels are ideal for homeowners who could use the energy as it is produced; however, the bulk of solar energy production occurs on massive fields run by entrenched power utilities.<sup>116</sup> Thus, energy is wasted in the transport, and large utilities are chained to the streamlined management of their energy production sites. Breaking up large investor owner monopolies would allow them to form "micro-grids."<sup>117</sup> Furthermore, authority could likewise be decentralized to allow for more localized

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<sup>112</sup> Javier Silvente et al., *Simultaneous energy supply and demand management in micro-grids: A comparative study of MILP formulations*, 155 APPLIED ENERGY 486 (2016).

<sup>113</sup> John Miller, *Why Expanded Alternative Energy Increases the Need for Natural Gas*, ENERGY COLLECTIVE (Jan. 29, 2013), [http://www.theenergycollective.com/jemiller\\_ep/178096/expanded-wind-and-solar-power-increase-need-natural-gas](http://www.theenergycollective.com/jemiller_ep/178096/expanded-wind-and-solar-power-increase-need-natural-gas) [https://perma.cc/T5GH-V5MA].

<sup>114</sup> *Id.*

<sup>115</sup> DEL-AIR, *Florida Air-Conditioning Costs: Tips to Lower Your Bill During the Summer Heat* (July 26, 2016), <http://www.delair.com/florida-air-conditioning-costs-tips-lower-bill-summer-heat/> [https://perma.cc/3X7D-JGAZ].

<sup>116</sup> Silvente et al., *supra* note 112, at 486.

<sup>117</sup> Anant Sudarshan, *Enthusiasm for Solar Micro-Grid World Gets a Sobering Reality Check In India*, FORBES (Oct. 13, 2016), <https://www.forbes.com/sites/ucenergy/2016/10/13/enthusiasm-for-solar-micro-grids-in-developing-world-gets-a-sobering-reality-check-in-india/#559ca4fc4505> [https://perma.cc/FWF4-GJPN].



enforcement.<sup>118</sup> Overall, decentralization would allow for homeowner self-generation and decrease energy waste.

*B. Allow Third-Party Power Purchasing Agreements*

This will not be the first or last academic paper to advocate for third-party PPAs in Florida. Prior research identifies several benefits of PPAs. First, the cost of solar energy stabilizes under long-term third-party PPAs.<sup>119</sup> “Electricity consumers have witnessed . . . an average annual increase of 4.1% on U.S. retail electricity costs from 2005 to 2010. Third-party PPAs allow customers the opportunity to negotiate a long-term contract that specifies a predetermined price for a twenty to twenty-five year duration.”<sup>120</sup> This type of stability is currently reserved for utility companies and not homeowners or business owners. Allowing PPAs would also be beneficial to developers who take the risk of installing solar panels. Furthermore, it satisfies the intent of the pro-solar amendment.

In 2011, the Florida legislature attempted to repeal *PW Ventures* by removing third-party developers from regulation as utilities.<sup>121</sup> Under this bill, a “public utility” would not include the “developer of a renewable energy generation facility . . . that is located on the premises of a host consumer or group of host consumers, including, without limitation, residential, commercial, industrial, institutional, or agricultural host customers located on the same or contiguous property, all subject to the aggregate gross power limitation.”<sup>122</sup> It further lessened regulation when such a developer “supplies electricity exclusively for sale to the host consumer or consumers for consumption on the premises only and contiguous property owned or leased by the host consumer or consumers, regardless of interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way.”<sup>123</sup> However, this bill failed.<sup>124</sup> In the years since, Floridians took to the ballot box and made their voices heard by accepting the pro-solar amendment and rejecting

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<sup>118</sup> See generally Scott Stromberg, *Has the Sun Set on Solar rights? Examining the Practicality of the Solar Rights Acts*, 50 NAT. RES. J. 211 (2010) (explaining localized enforcement of solar rights).

<sup>119</sup> Farkas, *supra* note 74, at 99.

<sup>120</sup> *Id.*

<sup>121</sup> H.R. 1349, 2011 Leg. (Fla. 2011).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Farkas, *supra* note 74, at 103.

the pro-utility amendment.<sup>125</sup> Going forward, the Florida executive branch and the courts need to interpret Amendment Four to repeal *PW Ventures* and allow PPAs.

C. *More Homeowner Tax Incentives*

Often, the arguments to allow third-party PPAs are paired with calls for tax incentives to lower the cost of home solar energy even further.<sup>126</sup> Instead, I propose that tax incentives are not the best way forward. While tax incentives are important to initially lowering cost barriers to home solar energy, they are not a sustainable, long-term solution.

Of course, citizens want to take advantage of tax credits; however, it is easier for large, investor-owned corporations to take advantage due to their large tax equity.<sup>127</sup> This is why third-party PPAs are attractive to developers.<sup>128</sup> “Developers are better situated than ordinary power consumers to reap the maximum reward for PV investment . . . individuals and entities that do not have a sufficiently large tax bill will not be able to fully maximize the benefits.”<sup>129</sup> Therefore, tax incentives could be beneficial if the government interprets the pro-solar amendment correctly because it would lower costs across the board.

Also, large public utilities, the same companies that tried to squash Florida’s home solar panel development, adopted solar panel generation and reaped the tax benefits.<sup>130</sup> In 2015, Duke Energy used solar plants to supplement their traditional methods of electricity by installing large-scale solar panel fields.<sup>131</sup> Less than one year later, Florida Power & Light,

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<sup>125</sup> “The Solar Amendment would override any existing, and prevent any future, state or local regulation to control duplication of facilities.” Lynne Holt & Mary Galligan, *Florida’s Proposed Constitutional Amendment on Local Solar Electricity Supply*, 28 *ELECTRICITY J.* 66, 72 (2015).

<sup>126</sup> See, e.g., White, *supra* note 71, at 272.

<sup>127</sup> Felix Mormann, *Beyond Tax Credits: Smarter Tax Policy for a Cleaner, More Democratic Energy Future*, 31 *YALE J. ON REG.* 303, 324 (2014).

<sup>128</sup> Farkas, *supra* note 74, at 100 (Farkas writes: “Developers are better situated than ordinary power consumers to reap the maximum reward for PV investment. Solar energy developers operate with the advantage of ‘knowing the business’ . . . Similarly, individuals and entities that do not have a sufficiently large tax bill will not be able to fully maximize the benefits. Some incentives, such as the MACRS, do not apply to homeowners and non-taxable entities. Therefore, third-party contractors are better situated to achieve a full utilization of the available benefits, which allows them to transfer the cost savings to the site-host.”).

<sup>129</sup> *Id.*

<sup>130</sup> Kristine Esperacion, *Duke Energy Florida solar installation project launches long-term effort*, *SNL RENEWABLE ENERGY WEEKLY* (Oct. 9, 2015).

<sup>131</sup> *Id.*

one of the largest public utility companies in Florida, built new energy production sites with over one million solar plants.<sup>132</sup> Florida Power & Light paired with Next Energy Inc., a solar startup, to develop these plants.<sup>133</sup> But, there is no incentive for Florida Power & Light to change how it interacts with its customers. Customers have no choice for self-generation. Next Energy Inc. is a subsidiary of Florida Power & Light because Florida's usage relationship does not allow them to be independent. Thus, tax incentives do not provide overly compelling incentives for homeowners to pay the high cost of installing solar panels. While the tax credits are essential to establishing solar panels for users with large equity, they do not advance energy sufficient or energy positive homes.<sup>134</sup> Moreover, federal tax schemes are often only effective when supplemented by state policy to allow solar technology.<sup>135</sup> Politics can influence tax programs; the same program of incentives implemented in one election cycle can be stripped four years later.<sup>136</sup> Though solar developers sell long-term contracts, they have no guarantee that tax benefit programs will last.<sup>137</sup> Thus, Florida should not rely on tax incentives to power a long-term solar investment strategy.

#### D. A Solar Right

Customers should not be bereft of choice. In this next section, this Note will discuss methods for disrupting the energy monopolies with solar technology.

As discussed above,<sup>138</sup> as solar panels become more efficient, the development of solar energy is moving towards more modular uptake.<sup>139</sup> This

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<sup>132</sup> Waquas Azeem, *FPL begins construction on three Florida solar plants*, SNL RENEWABLE ENERGY WEEKLY (Feb. 12, 2016).

<sup>133</sup> *Id.*

<sup>134</sup> Although, the recently passed pro-solar amendment should counter this problem.

<sup>135</sup> Mormann, *supra* note 127, at 317.

<sup>136</sup> Stephen Lacey, *Repealing the Investment Tax Credit Could Cut the US Solar Market in Half*, GREEN TECH MEDIA (Nov. 15, 2016), <https://www.greentechmedia.com/articles/read/repealing-the-investment-tax-credit-could-cut-americas-solar-market-in-half> [<https://perma.cc/SDA5-L25A>].

<sup>137</sup> Clare Magee, *Is the Long-Term PPA Becoming Outdated for Corporate Renewables Procurement?*, GREEN TECH MEDIA (Aug. 2, 2016), <https://www.greentechmedia.com/articles/read/corporate-renewables-procurement-must-evolve-beyond-the-long-term-ppa> [<https://perma.cc/86P3-64C8>].

<sup>138</sup> See *supra* notes 113–19.

<sup>139</sup> Modular Uptake means that energy is produced in small bursts at scattered locations, not one centralized energy plant. *Using Solar Electricity at Home*, ENERGY.GOV, <https://>

development is at odds with the grid-like system employed by Florida Power & Light and other traditional state-sponsored monopolies. Still, the entrenched state-sponsored monopolies attempt to undermine these victories. Thus, there is a demonstrated need to secure the right to solar energy with comprehensive legislation. Yet as in the battle of amendments discussed in the beginning of this Note, Florida's citizens are not looking to maintain the status quo; rather, they want to establish a new system based on the option of home solar generation. A long-term solution would guarantee a right to solar generation and the energy produced thenceforth.

Floridians should look west for innovative ways to secure their right to sunshine. Within a few years of each other, Wyoming and New Mexico both passed solar rights acts.<sup>140</sup> These laws were based on the western notion of water rights, where the first person to put the water to beneficial use is granted ownership.<sup>141</sup> While there is no such history in Florida, the idea is applicable because harnessing energy and protecting the environment are undoubtedly beneficial uses. While New Mexico's solar rights act needed to be reformed,<sup>142</sup> Wyoming's rights simply enumerate the right to access solar energy and the right to use it.<sup>143</sup> The law is enforced primarily at the local level.<sup>144</sup> The meat of this new act should focus on the right to generate one's own electricity. It should include language about the right to sell and extinguish property rights.

A solar right might add nuance to the third-party PPA developments because it would call for negotiation of the right along with the financial contract negotiations. However, this is a small price to pay in the battle to defend Florida's citizens from state-sponsored power monopolies.

Two events at the ballot box (the passage of the pro-solar amendment and the repudiation of the pro-utility amendment) prove that Florida's citizens desire rights to solar energy in some form. The Florida Court of Appeals have contemplated this issue, and it has not been rejected.<sup>145</sup> Additionally, a right to solar generation would fit nicely with the existing hodgepodge of solar protection laws. Finally, Florida could look to existing solar rights acts in other states for inspiration and lessons learned.

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energy.gov/energysaver/small-solar-electric-systems [https://perma.cc/B9UG-SLZK] (last visited Apr. 4, 2018).

<sup>140</sup> Scott Stromberg, *Has the Sun Set on Solar Rights? Examining the Practicality of the Solar Rights Acts*, 50 NAT. RES. J. 211, 216 (2010).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 217.

<sup>144</sup> *Id.* at 232.

<sup>145</sup> Tawny L. Alvarez, *Don't Take My Sunshine Away*, 28 PACE L. REV. 535, 542 (2008).

The pro-solar amendment was initially criticized for being too broad and vague.<sup>146</sup> Indeed, the amendment touches upon “rate, service and territory regulations . . . and imposition by electric utilities of special rates, fees, charges, tariffs, or terms and conditions.”<sup>147</sup> Instead of empowering home-owning consumers, the amendment sought to tear at the fabric of the state-sponsored monopolies. Still, the Florida Supreme Court recognized that, though inartfully worded, “[t]he provisions encompass[] a single plan and merely enumerate[] various elements necessary to accomplish the plan.”<sup>148</sup> The courts understood that a cohesive plan was required to truly make the amendment feasible. Furthermore, Floridians rejected the pro-utility amendment, which proves a desire to upend the regulations imposed by state-sponsored monopolies.

A right to solar self-generation may seem radical; however, the courts have not expressly rejected such a right. In *PW Ventures*, the court ruled, “[t]he legislature determined that the protection of the public interest required only limiting competition in the sale of electric service, not a prohibition against self-generation.”<sup>149</sup> At the same time they limited developer solar panels, the court also explicitly left open the possibility that such a right could be granted to citizens.

Floridians have won several small but hard fought battles for the right to solar panels and solar production.<sup>150</sup> The result of such small legal victories is a hodgepodge of protection—a shield riddled with holes.

While no statute or rule in Florida currently provides electricity consumers with the specific right “to own or lease solar equipment installed on their property to generate electricity for their own use,” several statutes operate as if such a right is forthcoming.<sup>151</sup> For instance, Fla. Stat. § 163.04 prevents homeowners’ associations and others from prohibiting the installation of “solar collectors, clotheslines, or other energy devices.”<sup>152</sup> But this same statute makes no mention of the right to own or lease solar equipment or the use of solar electricity.<sup>153</sup> Also, Fla. Admin. Code 25-6.065

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<sup>146</sup> Advisory Op. to the Att’y Gen. re Rights of Elec. Consumers Regarding Solar Energy Choice, 188 So.2d 822, 830–31 (Fla. 2016).

<sup>147</sup> Advisory Op. to the Att’y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply, 177 So.3d 235, 240 (Fla. 2015).

<sup>148</sup> *Id.* at 244.

<sup>149</sup> *PW Ventures*, 533 So.2d at 284.

<sup>150</sup> White, *supra* note 71, at 280–81.

<sup>151</sup> *Advisory Opinion*, 188 So.3d at 828.

<sup>152</sup> FLA. STAT. § 163.04.

<sup>153</sup> *Id.*

explains how citizens can receive expedited grid interconnection and net-metering, which is only applicable to citizens with energy generated at their property.<sup>154</sup> But this rule does not create a right for consumers to own or lease solar equipment.<sup>155</sup> Furthermore, the rule does not address the installation of solar equipment.<sup>156</sup> These examples prove that a right to solar energy self-generation would fit within the current legislative framework. In fact, guaranteeing such a right may even make the laws more logical.

#### CONCLUSION

For decades, renewable energy has grown and developed. It has been embraced by homeowners, businesses, and local and federal government. The benefits are clear: renewable energy is good for the environment and cheap to produce. Solar energy in particular is ideal for homeowners and small business. However, only certain groups were able to take advantage of renewable energy's lower costs.

Florida government has a close relationship with its state-sponsored monopolies. These monopolies do fall within the State Action Doctrine because Florida statute created the monopolies and a regulatory agency in the Florida Public Service Commission. One of the FPSC's most notorious cases was *PW Ventures v. Nichols*. In this case, the Florida Supreme Court affirmed a decision to limit access to financing options for solar energy.

The FPSC has faced claims of corruption and inadequacy, but the valid justifications for electricity utility mean that it cannot simply be eliminated. Some ways to reform this system while relying on its merits include decentralization and allowing third-party power purchasing agreements in some form. While most critics of Florida's energy sector clamor for tax incentives, these incentives do not solve the issue of increasing homeowner generation.

Looking forward, Florida should consider a solar rights act that guarantees citizens the right to home generation. Though this may seem like a radical proposal, other states have adopted such acts. The act would help ensure that homeowners' access to solar energy is not limited by state-sponsored monopolies.

The timing could not be better; citizen participation at the ballot box proves that Floridians are ready for a new relationship with their energy suppliers. In fact, they demand a choice in how their energy is produced.

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<sup>154</sup> FLA. ADMIN. CODE ANN. r. 25-6.065 (2018).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

