

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL: SB 1128

INTRODUCER: Senator Hutson

SUBJECT: Preemption on Restriction of Utility Services

DATE: March 8, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sharon _____	Imhof _____	RI _____	Pre-meeting _____
2.	_____	_____	CA _____	_____
3.	_____	_____	RC _____	_____

I. Summary:

SB 1128 preempts municipalities, counties, special districts, or other political subdivisions from restricting utility service choice, irrespective of fuel source. The bill prohibits these entities from enacting or enforcing any resolutions, ordinances, rules, codes, or policies that restrict a property owner, tenant, or utility service customer's choice of utility service type from a utility service provider that serves the affected property.

The bill voids any restrictions on utility service choice enacted before, on, or after the bill takes effect.

The bill retains the right of municipalities to levy taxes on public services and to receive revenue from public utilities.

The bill is effective July 1, 2021.

II. Present Situation:

Local Government Authority

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.¹ Those counties operating under a county charter have all powers of local self-government not inconsistent with general law or special law approved by the vote of the electors.² Likewise, municipalities have those governmental, corporate, and proprietary powers

¹ FLA. CONST. art. VIII, s. 1(f).

² FLA. CONST. art. VIII, s. 1(g).

that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.³

In Florida, special districts are separate governmental entities created for a special purpose that have jurisdiction to operate within a limited geographic boundary.⁴ Special districts are created by general law, special act, local ordinance, or by rule of the Governor and Cabinet.⁵ Throughout the state there are over 1,770 active special districts encompassing more than 80 specialized governmental functions.⁶

Interlocal Cooperation and the Florida Municipal Power Agency

The Florida Interlocal Cooperation Act of 1969 (Act) allows local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage.⁷ The Act provides that local governmental entities may jointly exercise their powers by entering into a contract in the form of an interlocal agreement.⁸ Under such an agreement, the local governmental units may create a separate legal or administrative entity “to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.”⁹

In 1978, the Florida Municipal Power Agency (FMPA) was created through a series of interlocal agreements under s. 163.01, F.S., to provide wholesale power supply to municipal electric utilities. FMPA is currently owned by 31 municipalities.¹⁰ Through various joint power supply projects,¹¹ the FMPA supplies all of the electrical power needs of 13 member utilities and a part of the power needs for seven other member utilities.¹² Through these projects, FMPA members maintain ownership interests in various electrical power plants throughout Florida. FMPA manages the transmission of electrical power over facilities owned by FMPA or its members.¹³

³ FLA. CONST. art. VIII, s. 2(b). *See also* s. 166.021(1), F.S.

⁴ Section 189.012(6), F.S.

⁵ *Id.*

⁶ *See* Florida Department of Economic Opportunity, *Introduction to Special Districts*, <https://floridajobs.org/community-planning-and-development/special-districts/special-district-accountability-program/florida-special-district-handbook-online/introduction-to-special-districts> (last visited Mar. 5, 2021).

⁷ Section 163.01(2), F.S.

⁸ Section 163.01(5), F.S.

⁹ Section 163.01(2), F.S.

¹⁰ Currently, FMPA serves the following municipalities: Alachua, Bartow, Blountstown, Bushnell, Chattahoochee, Clewiston, Fort Meade, Fort Pierce, Gainesville, Green Cove Springs, Havana, Homestead, Jacksonville Beach, Key West, Kissimmee, Lake Worth, Lakeland, Leesburg, Moore Haven, Mount Dora, New Smyrna Beach, Newberry, Ocala, Orlando, Quincy, St. Cloud, Starke, Vero Beach, Wauchula, Williston, and Winter Park. Florida Municipal Power Agency, *Members*, <http://fmpa.com/about/members/> (last visited Mar. 5, 2021).

¹¹ Section 361.12, F.S., authorizes any electric utility, or any organization, association, or separate legal entity whose membership consists only of electric utilities, to join with any other such entity to finance, acquire, construct, manage, operate, or own an electric power supply project for the joint generation or transmission of electrical energy, or both. Further, s. 361.13, F.S., authorizes any such entity to purchase capacity or energy, or both, in an agreed upon quantity from any project in which the purchaser has an ownership interest.

¹² *See* Florida Municipal Power Agency, *Projects*, <https://fmpa.com/power-supply-projects/> (last visited Mar. 5, 2021).

¹³ *See* Florida Municipal Power Agency, *Value of Public Power*, <https://fmpa.com/value-of-public-power/> (last visited Mar. 5, 2021).

Preemption

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. A local government enactment may be inconsistent with state law if (1) the Legislature has preempted a particular subject area or (2) the local enactment conflicts with a state statute. Where state preemption applies, it precludes a local government from exercising authority in that particular area.¹⁴

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.¹⁵ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.¹⁶ In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.¹⁷

In cases determining the validity of ordinances in violation of state preemption, the effect has been to find such ordinances null and void.¹⁸ In one case, the court stated that implied preemption “is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.”¹⁹ Preemption of a local government enactment is implied only where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and strong public policy reasons exist for finding preemption.²⁰ Implied preemption is found where the local legislation would present the danger of conflict with the state’s pervasive regulatory scheme.²¹

Florida Public Service Commission

The Florida Public Service Commission (PSC) is an arm of the legislative branch of government.²² The role of the PSC is to ensure that Florida’s consumers receive utility services, including electric, natural gas, telephone, water, and wastewater, in a safe, affordable, and reliable manner.²³ In order to do so, the PSC exercises authority over public utilities in one or more of the following areas: (1) Rate or economic regulation; (2) Market competition oversight;

¹⁴ See James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009) available at <https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/> (last visited Mar. 5, 2021).

¹⁵ See *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008).

¹⁶ *Mulligan*, 934 So. 2d at 1243.

¹⁷ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). Examples of activities “expressly preempted to the state” include: operator use of commercial mobile radio services and electronic communications devices in motor vehicles, s. 316.0075, F.S.; regulation of the use of cameras for enforcing provisions of the Florida Uniform Traffic Control Law, s. 316.0076, F.S.; and, the adoption of standards and fines related to specified subject areas under the purview of the Department of Agriculture and Consumer Services, s. 570.07, F.S.

¹⁸ See, e.g., *Nat’l Rifle Ass’n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002).

¹⁹ *Phantom of Clearwater, Inc.*, 894 So. 2d at 1019.

²⁰ *Id.*

²¹ *Sarasota Alliance for Fair Elections, Inc.*, 28 So. 3d at 886.

²² Section 350.001 F.S.

²³ See Florida Public Service Commission, *The PSC’s Role*, <http://www.psc.state.fl.us> (last visited Mar. 5, 2021).

and/or (3) Monitoring of safety, reliability, and service issues.²⁴ The PSC monitors the safety and reliability of the electric power grid²⁵ and may order the addition or repair of infrastructure as necessary.²⁶ Further, the PSC reviews applications to determine the need for certain new electrical power plants²⁷ and certain large transmission lines as part of the Department of Environmental Protection's siting process.²⁸

The PSC does not fully regulate publicly owned municipal electric utilities.²⁹ However, it does have jurisdiction over municipally owned electric systems with regard to rate structure, territorial boundaries, bulk power supply operations, and planning.³⁰ Additionally, the PSC has jurisdiction over 27 municipally owned natural gas utilities and four gas districts with regard to territorial boundaries, safety, and safety authority over all electric and natural gas systems operating in the state.³¹

A public utility includes any person or legal entity supplying electricity or gas, including natural, manufactured, or similar gaseous substance, to or for the public within the state.³² Notably, courts have ruled that the sale of electricity to even a single customer makes the provider a "public utility" subjecting them to the PSC's regulatory jurisdiction, under s. 366.02(1), F.S.³³ The PSC's jurisdiction over public utilities is exclusive and superior to all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and in cases of conflict the PSC is to prevail.³⁴

Investor-Owned Electric Utilities Companies

There are five investor-owned electric utility companies in Florida: Florida Power & Light Company, Duke Energy Florida, Tampa Electric Company, Gulf Power Company, and Florida Public Utilities Corporation.³⁵ Investor-owned electric utility rates and revenues are regulated by the Florida Public Service Commission.³⁶ Accordingly, these utilities must file periodic earnings reports, either monthly, quarterly, or semi-annually, depending upon each company's size. These more frequent company filings allow the PSC to monitor earnings levels on an ongoing basis and adjust customer rates quickly if a company appears to be overearning.³⁷

²⁴ *Id.*

²⁵ Sections 366.04(5) and (6), F.S.

²⁶ Sections 366.05(1) and (8), F.S.

²⁷ Section 403.519, F.S.

²⁸ Section 403.537, F.S.

²⁹ Florida Public Service Commission, *2020 FPSC Annual Report*, available at <http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Annualreports/2020.pdf> (last visited Mar. 5, 2021).

³⁰ *Id.*

³¹ *Id.*

³² Section 366.02(1), F.S.

³³ *Florida Public Service Com'n v. Bryson*, 569 So. 2d 1253, 1255 (Fla. 1990) (finding that even a property management company is a public utility within the PSC's regulatory jurisdiction); *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 284 (Fla. 1988) (finding that "to the public," as used in ch. 366, F.S., means "to any member of the public," rather than "to the general public").

³⁴ Section 366.04 (1), F.S.

³⁵ *Id.*

³⁶ Florida Department of Agriculture and Consumer Services, *Electric Utilities*, <https://www.fdacs.gov/Energy/Florida-Energy-Clearinghouse/Electric-Utilities> (last visited Mar. 5, 2021).

³⁷ FPSC, *2020 Annual Report*, *supra* at n. 29.

Municipally Owned Electric Utilities

A municipal electric utility is an electric utility system owned or operated by a municipality engaged in serving residential, commercial or industrial customers, usually within the boundaries of the municipality.³⁸ Municipally owned utility rates and revenues are regulated by their city commission.³⁹ As noted above, the PSC does have limited jurisdiction over municipally owned electric utilities.⁴⁰ In total there are 34 municipal electric companies in Florida.⁴¹ Most municipal electric utilities are represented by the Florida Municipal Electric Association which serves over three million Floridians.⁴²

Natural Gas Utilities

Florida's natural gas network is comprised of four interstate pipelines and two intrastate pipelines.⁴³ These pipelines supply natural gas to five investor-owned natural gas utilities, 27 municipal natural gas utilities, and four special gas districts.⁴⁴ Pursuant to ch. 366, F.S., the PSC has regulatory authority over the investor-owned natural gas utilities in all aspects of operations, including safety; authority over municipally-owned natural gas utilities that is limited to safety and territorial boundary disputes; and authority over special gas districts that is limited to safety and territorial boundary disputes.⁴⁵

Sustainable Energy

Public Utility Regulatory Policies Act (PURPA)

In 1978, the federal government enacted the Public Utility Regulatory Policies Act (PURPA),⁴⁶ which required promotion of energy efficiency and use of renewables.⁴⁷ The act required utilities to purchase power from “qualifying facilities,” which fall into two categories: qualifying small power production facilities and qualifying cogeneration facilities.⁴⁸ The PURPA directed the Federal Energy Regulatory Commission to implement the provisions, which in turn, directed the states to implement the provisions. In response, the Florida Legislature created s. 366.051, F.S., directing the utilities to purchase power from the cogenerators or small power producers and defining “full avoided costs.”

Florida Energy Efficiency and Conservation Act

Under the Florida Energy Efficiency and Conservation Act (FEECA),⁴⁹ enacted in 1980, the Legislature directed the PSC to develop and adopt programs for increasing energy efficiency and

³⁸ FDACS, *Electric Utilities*, *supra* at n. 36.

³⁹ *Id.*

⁴⁰ FPSC, *2020 Annual Report*, *supra* at n. 29.

⁴¹ FDACS, *Electric Utilities*, *supra* at n. 36.

⁴² Florida Municipal Electric Association, *About FMEA*, <https://www.publicpower.com/about-us> (last visited Mar. 5, 2021).

⁴³ Florida Department of Agriculture and Consumer Services, *Natural Gas Utilities*, <https://www.fdacs.gov/Energy/Florida-Energy-Clearinghouse/Natural-Gas-Utilities> (last visited Mar. 5, 2021).

⁴⁴ *Id.*

⁴⁵ FPSC, *2020 Annual Report*, *supra* at n. 29.

⁴⁶ 16 U.S.C. ch. 46 § 2601 et seq.

⁴⁷ Federal Energy Regulatory Commission, *PURPA Qualifying Facilities*, <https://www.ferc.gov/qf> (last visited Mar. 5, 2021).

⁴⁸ *Id.*

⁴⁹ Sections 366.80-366.85, F.S.

conservation, intending, in part, that solar energy and renewable energy sources be encouraged.⁵⁰ The Legislature's goal is to advance the conservation of expensive resources, such as petroleum fuels in order to reduce and control electric consumption.⁵¹

Renewable Energy

In 2005, the Legislature created s. 366.91, F.S., to address renewable energy. This section requires utilities to continuously offer a purchase contract to renewable energy producers for a minimum of ten years.⁵² It also includes municipal electric utilities and rural electric cooperatives whose annual sales are greater than 2,000 gigawatt hours.⁵³

In 2006, the Legislature created s. 366.92, F.S., relating to renewable energy policy, to authorize the PSC to adopt appropriate goals for increasing the use of existing, expanded, and new Florida renewable resources.

Renewable Portfolio Standards and Goals

Renewable portfolio standards (RPS) are policies, either voluntary or formal, designed to increase the use of renewable energy sources for electricity generation.⁵⁴ RPS policies that a specified percentage of the electricity sold by utilities comes from renewable resources.⁵⁵ Currently, there is not a national RPS in place.⁵⁶ However, most states have enacted their own RPS programs. Over the past year, state governments nationwide have been revising their RPS policies, requiring that a specified percentage of electricity sold come from renewable sources.⁵⁷

In 2007, Florida Governor Crist signed a series of three executive orders initiating Florida's energy policy and declaring the Florida's commitment to be a leader in establishing energy security and reducing greenhouse gases:

- Executive Order 07-126; Establishing Climate Change Leadership by Example: Immediate Actions to Reduce Greenhouse Gas Emissions from Florida State Government.⁵⁸
- Executive Order 07-127; Establishing Immediate Actions to Reduce Greenhouse Gas Emissions within Florida.⁵⁹

⁵⁰ Section 366.81, F.S.

⁵¹ *Id.*

⁵² Section 366.91, F.S.

⁵³ Section 366.91(4), F.S.

⁵⁴ U.S. Energy Information Administration, *Renewable Energy Explained: Portfolio Standards*, [https://www.eia.gov/energyexplained/renewable-sources/portfolio-standards.php#:~:text=Renewable%20portfolio%20standards%20\(RPS\)%2C,energy%20sources%20for%20electricity%20generation.&text=However%2C%20most%20states%20have%20enacted%20their%20own%20RPS%20programs](https://www.eia.gov/energyexplained/renewable-sources/portfolio-standards.php#:~:text=Renewable%20portfolio%20standards%20(RPS)%2C,energy%20sources%20for%20electricity%20generation.&text=However%2C%20most%20states%20have%20enacted%20their%20own%20RPS%20programs). (last visited Mar. 5, 2021).

⁵⁵ National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals*, <https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx> (last visited Mar. 5, 2021)

⁵⁶ USEIA, *Renewable Energy Explained: Portfolio Standards*, *supra* at n. 54.

⁵⁷ *Id.*

⁵⁸ Fla. Exec. Order No. 07-126, available at <http://www.fsec.ucf.edu/en/media/enews/2007/pdf/07-126-actions.pdf> (last visited Mar. 5, 2021).

⁵⁹ Fla. Exec. Order No. 07-127, available at <http://www.fsec.ucf.edu/en/media/enews/2007/pdf/07-127-emissions.pdf> (last visited Mar. 5, 2021).

- Executive Order 07-128; Florida Governor’s Action Team on Energy and Climate Change.⁶⁰

In Executive Order 07-127, the Governor requested the PSC initiate rulemaking to require that utilities produce at least 20 percent of their electricity from renewable sources with a strong focus on solar and wind energy. In September 2007, the PSC began holding workshops to study the issue of renewable portfolio standards.

Currently, Florida is one of only 12 states that does not have either a formal renewable energy portfolio or a voluntary renewable energy portfolio.⁶¹

III. Effect of Proposed Changes:

The bill creates s. 366.032, F.S., to preempt municipalities, counties, special districts, or other political subdivisions from restricting utility service choice, irrespective of fuel source. The bill prohibits these entities from enacting or enforcing any resolutions, ordinances, rules, codes, or policies that restrict a property owner, tenant, or utility service customer’s choice of utility service type from a utility service provider that serves the affected property.

The bill voids any restrictions on utility service choice enacted before, on, or after the bill takes effect.

The bill retains the right of municipalities to levy taxes on public services and to receive revenue from public utilities.

The bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill prohibits local governments from imposing any restriction on a utility service customer choice of utility service.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁶⁰ See Sellers, Lawrence E. & Curtin, Lawrence N., *Holland & Knight Newsletter: Florida Addresses Greenhouse Gas Issues* <https://www.hklaw.com/en/insights/publications/2007/09/florida-addresses-greenhouse-gas-issues> (last visited Mar. 5, 2021).

⁶¹ NCSL, *State Renewable Portfolio Standards and Goals*, *supra* at n. 55.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

Line 38 of the bill expressly states that the bill does not restrict a municipality's right to levy taxes pursuant to s. 166.231, F.S.

B. Private Sector Impact:

The bill may have an indeterminate effect on the private utilities sector as it eliminates any local government imposed restrictions on a utility service customer choice of utility service.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 366.032 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.