IN THE SUPREME COURT OF THE STATE OF FLORIDA

WARNER CABLE COMMUNICATIONS, INC., et al, Defendants/Appellants,	)	Case No. 71,134
vs.	)	
CITY OF NICEVILLE, FLORIDA, a municipal corporation of the State of Florida, Plaintiff/Appellee	)	

On Appeal from the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida

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INITIAL BRIEF OF APPELLANT

James E. Moore
MOORE & MOORE P.A.
P. O. Box 746
102 Bayshore Drive
Niceville, Florida 32578
(904) 678-1121

Ralph A. Peterson
BEGGS & LANE
P. O. Box 12950
Pensacola, FL 32576

Attorneys for Warner Cable Communications, Inc.

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PRELIMINARY STATEMENT

Appellant, WARNER CABLE COMMUNICATIONS, INC., Defendant below, will be referred to herein as "Warner." Appellee, CITY OF NICEVILLE, a municipal corporation of the State of Florida, Plaintiff below, will be referred to herein as "the City." References to the Appendix will be denoted (A. [page number]). The transcript of the final hearing below constitutes the first 179 pages of the Appendix, so that the pagination of the transcript itself corresponds to that of the Appendix.

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal of a bond validation proceeding, from the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida. This Court has jurisdiction to consider this appeal pursuant to Article V, Section 3(b)(2), of the Florida Constitution (which grants jurisdiction to this Court to review cases when provided by general law), and Section 75.08, Florida Statutes (1985) (which provides for review by this Court of bond validation proceedings). See also , Fla.R.App.P. 9.030(a)(1)(B)(i).

The City filed its complaint for validation of bonds on August 26, 1987. (A. 180). The purpose of the bonds the City sought to have validated was to fund an amount not to exceed $2,000,000 for the ownership, acquisition, construction and operation of a municipally-owned cable television system. (A. 180). Under a franchise contract with the City and under the provisions of the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 et seq. ("the Cable Act"), Warner has already constructed and is operating a cable television system which is currently providing cable service to the citizens of the City of Niceville. (A. 47, 464-477). The State of Florida filed its Answer on October 1, 1986. (A. 214). Warner became an active party in the proceeding pursuant to Section 75.07, Florida Statutes (1985), by answering the complaint on October 6, 1986. (A. 211).

In its answer, Warner asserted several affirmative defenses. (A. 211-213.) Paragraph 9 of the affirmative defenses challenged the City's assertion that it had duly enacted Ordinance No. 583 and was authorized to enact Ordinance No. 583 and issue revenue bonds. Warner alleged that the City had not complied with the requirements of law, the municipal expenditures provision of the City's Charter, Section 1.02(h) of Ordinance No. 511, as a condition precedent to enacting Ordiance No. 583 and issuing revenue bonds.

(A. 211). Paragraph 10 of the affirmative defenses alleged that the City is not authorized under the Cable Communications Act to issue revenue bonds for a municipally owned cable system since the City is not authorized under the Cable Act to obtain an ownership interest and has not complied with the requirements of law under the Cable Act. (A. 212). In response to allegations in the City's complaint that no ad valorem taxes would be required to be levied for payment of the principal or the interest on the revenue bonds, Warner asserted in paragraph 11 of the affirmative defenses that the bonds should not be validated since the bond issue had not been approved by referendum vote and would actually require pledging of ad valorem taxes by the City. (A. 212). Finally, in paragraph 12 of the affirmative defenses, Warner alleged that the City acted arbitrarily and in bad faith and had abused its discretion in enacting Orinance No. 583, in seeking to issue revenue bonds to fund a municipally owned cable system, and in going forward with the project and bond issue since the City knew such action was not in compliance with the requirements of law and was not economically feasible. (A. 213).

On November 25, 1986, more than twenty days after Warner's answer and affirmative defenses were filed, the City made an oral motion to strike these affirmative defenses. (A. 425). The trial court granted the City's oral motion, and the affirmative defenses in paragraphs 9, 10, 11, and 12 were stricken as not stating legal defenses in a bond validation proceding. (A. 154, 425). Warner subsequently moved the trial court to reconsider its ruling against Warner on the affirmative defenses in paragraphs 10 and 11. However, the trial court on March 16, 1987, expressly affirmed its striking of those two affirmative defenses and ruled that it would neither consider nor address in the bond validation proceedings the issues and matters raised by those affirmative defenses, again noting that they were not legal defenses within

the scope of bond validation review. (A. 437-438). Thus, by its orders of November 25, 1986, and March 16, 1987, the trial court expressly excluded from the pleadings, as well as the validation litigation itself, issues and matters raised by the affirmative defenses in paragraphs 9, 10, 11, and 12 of Warner's answers.

The City's complaint alleged that its charter had been amended by Ordinance No. 511 (the "1983 Charter") (A. 180), but Warner denied that the 1983 Charter properly and legally amended the City's legislative Charter (the "1955 Charter"). (A. 211). Warner filed with the court a certificate from the Secretary of State to the effect that the 1983 Charter had never been filed with the Department of State. (A. 218). The City's clerk, George Ireland, later testified at hearing that the 1983 Charter was not filed until November 25, 1986. (A. 9).

Because Warner had denied the validity of the 1983 Charter, the City introduced the 1955 Charter, Chapter 31034, Laws of Florida (1955). (A. 8, 227-242). Ireland testified that the adoption procedures in both Charters were substantially the same. (A. 10). The 1983 Charter required that a proposed ordinance be read on three separate meetings and that notice be published two times commencing at least fourteen days and concluding no more than seven days prior to adoption. (A. 251). The clerk testified that the publication was done but the City did not introduce the advertisement. (A. 13). The ordinance was read on three separate occasions. (A. 13). Section 9 of the 1955 Charter specified three separate readings and required, for authentication, that the ordinance, within ten days after passage, must be posted in three public places. (A. 231). The City presented no proof that the required posting was accomplished. Section 10 of the 1955 Charter limited the effective date of an ordinance, except for specified subject, to thirty days

after passage. (A. 231). Ordinance No. 583 provided that it was effective immediately upon passage. (A. 251).

Ireland testified that he had prepared the minutes, (A. 276), of a special meeting of the City Council on August 27, 1985, and that at that meeting there was a discussion concerning the provisions of the City's 1983 Charter, Ordinance No. 511, Section 1.02(h). (A. 38). Section 1.02(h) states the requirements to be followed by the City before it takes action concerning expenditures of funds in excess of $100,000 for a single public purpose. (A. 36-38). The portion of the City's Charter referred to above states that the City shall have the power:

> To expend money for a single public purpose in a sum not to exceed $100,000 unless such expenditure in excess of $100,000 shall be contained in the budget or such fiscal year or approved by referendum vote or constitute an emergency as hereinafter defined.

Ordinance No. 511, § 1.02(h) (A. 245). Ireland testified that he recommended the entire $2,000,000 be budgeted for the cable television project, "which placed the City in a position to issue a lesser amount for the project without reopening budget hearings," and that the suggestion was moved, seconded and approved. (A. 38). There has never been a referendum vote concerning the expenditure of $2,000,000 for a cable television system (A. 38), and the adoption of the cable television bond issue ordinance has never been regarded nor treated as an "emergency" by the City. (A. 38-39).

Although Warner sought to elicit evidence concerning the validity of the budget ordinance (Ordinance No. 581) in which the expenditure of $2,000,000 for a cable television system was included, the trial court sustained an objection to introduction of such tesimony as irrelevant and immaterial, apparently based on the trial court's earlier ruling striking paragraph 9 of the affirmative defenses. (A. 46). As a result of the trial court's ruling,

Warner proffered the testimony of Ireland regarding whether Ordinance No. 581 (A. 277), was validly enacted. (A. 57). The City's 1983 Charter (Ordinance No. 511) requires that emergency ordinances contain a declaration stating that an emergency exists and a description of the emergency in clear and specific terms. Ordinance No. 511, § 3.11(a). (A. 57, 253). No such clear and specific description of an emergency is contained in Ordinance No. 581, the budget. (A. 277). Even though the 1983 Charter requires all emergency ordinances to be reconsidered at the third regular meeting following the passage of an emergency ordinance, there was no notice that the budget ordinance (Ordinance No. 581) would be reconsidered nor was the budget reconsidered at the third regular meeting following adoption of the emergency budget. (A. 59-62, 253, 405-423).

The project for which the City was seeking validation of bonds is a municipally owned and operated cable television station which would overbuild and compete with Warner's currently operating cable system in Niceville. (A. 17, 18, 47, 151, 161, 289, 464-477). The City declared in the bond ordinance that the project was "the acquisition and construction of the system as more particularly described in a financial/technical study prepared for the City of Niceville, Florida, by Cosmic Communications, Inc. dated October 2, 1985, as such study may be revised or supplemented from time to time." Ordinance No. 583 at 4, § 2. (A. 186, 17). The City introduced the financial/technical study prepared by Cosmic Communications, Inc. (the "Cosmic study"), with revisions made subsequent to October 2, 1985, as its Exhibit 7 and as its plans and specifications for the project. (A. 18-19, 23, 287-328, 404A, 404B, 404C, 404D, 404E, 404F). Exhibit 7 which the City introduced in its case in chief was in fact an incomplete copy of the Cosmic study, containing only 38 pages. (A. 121-123, 287-328, 404A-404F). Thus, when the City rested its case

and Warner moved for a directed verdict/dismissal, the trial court only had 38 pages of the Cosmic study before it. (A. 109-116).

Along with the Cosmic study, the City's plans and specification on file were a preliminary feasibility report performed by M & T Cable, Inc. of June, 1985 (the "M & T report") (A. 20, 23, 269-275), the Fray report (on financing the project) (A. 22, 23, 445-451, 452-458), a tower site layout, a preliminary system design, a pole attachment permit application, and a Federal Aviation Administration (FAA) tower permit. (A. 23). The M & T report and the Fray report were introduced into evidence, however, the other documents delineated above were not introduced nor admitted into evidence. (A. 20, 22, 23). [1]

The M & T report was not actually a plan or specification for the project since it was prepared before the Cosmic study, which Ordinance No. 583 designated as the project plan and description; the M &T report neither purports to supplement the Cosmic study nor does its cable system proposals even closely relate to any of the Cosmic study's plans; and the City and Cosmic regarded this study only as a preliminary feasibility study and not plans and specifications. (A. 20, 269, 306). Likewise, the Fray report does not actually constitute a plan or specifications for the project, since it only discusses the financing scheme available to the City for funding the project. (A. 22, 445-451). Thus, the only actual plans and specifications for the project before the trial court for determining public purpose was

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1. The City also introduced a memorandum report by Councilmember Gary Brown, Exhibit 9 (A. 441-444), which is merely a summary of some findings prepared before the Cosmic study and which the City has not included as part of its plans and specifications for the project. (A. 21, 23).

Cosmic study, and indeed, this is the only plan Fray reviewed for devising his financing plan. (A. 80).

The City presented only one city official, Ireland, as a witness to testify about the City's project for a municipally owned cable television system overbuild since Ireland was "just as qualified as...any other city official" to testify about the planned project. (A. 17). Ireland explained that along with the usual entertainment programming services provided by cable television systems, the City intended to have a government access channel and conceivably an education channel. (A. 25). Ireland believed that the City's system would provide security capability for fire alarms and burglar alarms, a service the City presently provides by using telephone lines. (A-26). He also indicated that the City's project might provide bi-directional capability for medical alert, fire, and security-type services. (A. 26). Ireland opined that along with giving the City an opportunity to synchronize its five traffic signal lights (A. 26-27, 97), the cable system may be used in the future to also shine shoes. (A. 27).

However, having testified to the purported inclusion of these features and services which were ancillary to the traditional cable system news and entertainment services provided by private enterprise, Ireland, pleading a lack of knowledge as to what the Cosmic study actually provided, was unable to show in the Cosmic study any specifications, plans or provisions which proved the actual inclusion of the ancillary services as part of the City's system. Significantly, Ireland could not even show that the actual, direct use of the City's system was to provide anything but the same services provided by private companies. (A. 52-53). Ireland demurred that it was beyond his knowledge and "expertise" as to what, if any, equipment, plans, or expenditures were included for these ancillary services in the Cosmic study.

(A. 52-53, 54-55).

Ireland's lack of knowledge and inability to point to anything in the City's actual plans for the project which could show where these ancillary services were specified and included was echoed in the testimony of each and every one of the City's witnesses. The police chief, Ed Holloway, had absolutely no knowledge whether there had been any costs or expenditures actually allocated by the City in its cable television plan for providing equipment and systems for fire alarms, medical alert alarms, intrusion alarms, or traffic monitoring systems. (A. 99, 100). All Holloway could state is that he had been told that the City's cable television system might have the capability to provide some ancillary services, but he was not aware of whether the City's plans actually provided for such services and whether they would be constructed. (A. 100-101).

Likewise, Mike Wright, the City's fire chief, testified that he had been told that the City's cable system would provide fire alarms (A.105); however, he too had no knowledge whether the fire alarm system had actually been included in the City's plans and expenditures for the municipal cable television overbuild.(A.106-107). While Wright stated that he thought the City's cable television system would permit his department to receive educational services (seminars, lectures, etc.) via satellite [2] (A.105-106), there are no provisions in the Cosmic study and City's plans for

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2. Indeed, in proffered testimony of the City's cable consultant Thomas K. Miller, the author of the Cosmic study, it was disclosed that such educational satellite services were not part of the City's plan. (A. 136).

such a system.

William Fray, the City's financial advisor, did review the Cosmic study, but not in detail, while he was structuring the City's financing plan for the bond issue. (A. 80, 82) However, he, like the City's other witnessess, knew nothing about what services, equipment, and expenditures were actually being planned by the City. (A. 81-82). Fray explained that as to the costs of the constuction and operation of the City's project, he relied solely on statements and representations as to the amounts from the City's cable consultant, Thomas K. Miller of Cosmic Communications, Inc. (A. 81-82, 91). Although Fray, like Ireland, deferred questions and explanations to Miller as to the actual plans for ancillary services (the purported "public purpose" services), the City never called Miller as a witness in their case and never inquired of Miller about the actual direct use of the project when he was called by Warner. (A. 140).[3]

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3. Warner called Miller, the City's cable consultant, as a witness to demonstrate that the actual, direct use of the City's cable system overbuild as he had planned it was not for providing the ancillary services claimed by Ireland and the City, but was for merely providing a competing system to provide the entertainment and news services already being provided by Warner. The trial court refused to permit Warner to so inquire, and Warner proffered the testimony in the trial judge's absence. (A. 126-137). Miller's proffered testimony corroborates that the actual, direct use of the City's system is not for providing the ancillary services but is to provide non-public purpose services which are provided by private enterprise. See also Argument I infra.

After the City rested its case, Warner moved for a directed verdict/dismissal of the City's action for the City's failure to demonstrate by any testimony or evidence that the actual, direct use of the City's system was anything other than for providing traditional entertainment and news services already being provided by Warner's existing service under the Cable Act. Warner contended that the City failed to prove any paramount public purpose which would be served by the City's system. (A. 109-111, 117). The trial court denied Warner's motion. (A. 117).

Only one witness that appeared before the trial court was qualified as an expert in the area of cable television -- Edward Rutter. (A. 158-161). Rutter explained that he had reviewed the City's cable television studies, including the Cosmic study (A. 161), and testified as follows regarding existence of non-entertainment channels and services provided for therein:

> A In my opinion the system, as proposed and allowed for in the proposal was basically an entertainment service providing the same types of entertainment, information and such that was already in place in kind with the existing system. It talked about providing some other ancillary services or incidental services, but there was no provision in the documents, in that report, to provide those services.
>
> Q What kind of ancillary services are you talking about?
>
> A A traffic monitoring, fire intrusion, security alarm services, medical alert, water and sewer lift monitoring. . . .
>
> ***
>
> Q Now as for the governmental aspects of the plan or at least in the records that you reviewed concerning monitoring systems, traffic monitor systems and those things that we've talked about, in reviewing the plans and specifications did you find any provisions for that in the actual plans?
>
> A I saw no provisions for staffing nor the funds to acquire the facilities in order to accomplish that.
>
> Q Does the plan, though, include a bi-directional system?
>
> A The plan discusses a bi-directional system,

second year of the franchise?

A It said it did. It didn't show it in the pro formas.

(A. 165, 167) (Emphasis supplied).

Rutter testified that an "overbuild" situation in the cable industry exists where one operator presently services a community and a second or third operator choose to provide similar service to the same area. (A. 161-162). The trial court refused to let Rutter testify as to whether the City's proposed cable television system would result in an "overbuild" in relation to Warner's existing system. (A. 162-163). Rutter was allowed to testify, however, that the proposed system laid out in the Cosmic study was "primarily an entertainment service" and that in Rutter's opinion the project would not serve a public purpose. (A. 164).

Warner attempted to offer further testimony by Rutter, concerning the issue of public purpose, (A. 167-168), however, the trial court erroneously disallowed such testimony as irrelevant. (A. 168). Warner proffered the testimony, and Rutter opined that the basis for his opinion that the proposed cable television system would not serve a public purpose was as follows:

> A The basis is historically what has occurred in the cable television industry and the majority of times is where two operators enter the same market, one eventually -- the two systems eventually evolve into one. The reason that is is for several reasons. Cost of operating of the two companies is increased and is greater than the cost of one company. Hence, while rates sometimes initially go down, over the long run they can't remain down and will result in higher rates than normal. Two, because of the inefficiencies and diseconomies in the use of -- allocations of manpower and natural resources, there tends to be a lackening and decretion in the level of services that are provided. Historically, service doesn't improve, rates don't go down, costs go up. What happens is eventually one of the operators will either acquire the other or go out of business.
>
> Q What about matters concerning what in the industry is referred to as PEG, the public, educational and governmental access channels?
>
> A What happens to a lot of these perceived public

benefits is that they become less efficient, because in order to accomplish the goal that one company has, you need to have cooperation of the two companies to interconnect the services because one company is going to have half or a portion of the subscribers and the other company's going to have a portion, and neither of them are able to avail themselves of the public service information service that's being put about by the other unless here is an interconnecion which costs more money and becomes more difficult to administer.

Q And under the circumstances with the City of Niceville and Warner, how does that pertain to that particular circumstance as to these difficulties with PEG?

* * *

A Well, you know, any time you get two operators you're going to have a similar situation. If, for instance, one wanted to broadcast a charity fundraiser on one system and they didn't interconnect with the other, then it would be half as effective in theory because it would only reach one-half of the subscribers, so the same thing could happen in Niceville that has happened in other areas.

Q And you have knowledge that this has occurred in other areas?

A Yes.

Q Now, concerning security systems and other types of monitoring systems that would go to subscribers, would this interconnection difficulty in an overbuild situation also exist?

A It only exists in the extent that if only one system is offering security, then only subscribers to that system could get security and the other parts of the community could not, and in the sense of traffic monitoring and water and sewer, it wouldn't be a problem because it's not a subscriber-oriented service. What it would do is it would give an indication that the other competing operator would have to build practically the whole community and duplicate the existing system so he's able to reach those areas.

(A. 169-171).

The court issued its final judgment on August 5, 1987 (A. 219-226), specifically holding that the bond validation ordinance complied with the procedural requirements of the City's Charter, and that the project to be financed constituted a valid public purpose under Florida law. (A. 220). The trial court also made rulings on the merits of the issues raised by Warner's affirmative defenses, the same affirmative defenses which had been stricken by

the trial court which also precluded Warner from being heard on those issues. (A. 220-223). Warner timely filed its Notice of Appeal on September 3, 1987 (A. 440), and this appeal ensued.

SUMMARY OF THE ARGUMENT

In order for public revenue bonds to be validated, the funded project must serve a paramount public purpose. In the proceeding below, the City failed to prove in its case in chief that its municipally owned and operated cable television system overbuild would serve anything but paramount private purposes which are already being served by Warner, the cable operator currently providing cable services to the citizens of Niceville. While the City's witnesses and evidence showed only a mere possibility of the project providing some ancillary and incidental services which purport to serve a public purpose, the City's actual plans for the project unequivocally established that the actual, direct use of the project was to serve paramount private purposes. Because the City failed to meet its burden of proof, the trial court erred in denying Warner's motion for directed verdict/dismissal at trial. Furthermore, Warner introduced uncontraverted evidence that the municipal cable system overbuild served no public purpose and was actually a duplication of services for private purposes. Thus, the trial court also erred in deciding that the City's project served a public purpose.

On an untimely oral motion of the City, the Warner's affirmative defenses were stricken by the trial court, declaring them not to be legal defenses and not at issue in a bond validation proceeding. The trial court, in its pretrial orders and at trial, expressly precluded Warner from being heard on the defenses. The trial court then entered final judgment against Warner on

the merits of the stricken defenses. As a result, Warner has been denied fundamental due process, and this action should be reversed and remanded.

Warner's affirmative defenses were materially related to this controversy and constituted legal defenses under state and federal law as to the issues of whether the City had the authority to own and operate a municipal cable system overbuild, whether the municipal overbuild serves a public purpose, and whether the City had met all requirements and had taken all required steps under law before issuance of bonds can be validated. The City's project is unauthorized under the Cable Act since the City's overbuild is inconsistent with the national regulatory scheme established by Congress, is unauthrized by preemption through the Cable Act, and violates the ownership requirements of the Cable Act. Therefore, the trial court erred in striking the affirmative defenses.

The trial court erred in validating the revenue bonds because the bond ordinance was not properly enacted under Florida law and the City's own charters. All notice requirements for passage of ordinances were not complied with. Additionally, the City's charter uncategorically requires that expenditures for a single public purpose in excess of $100,000 in any fiscal year be contained in that year's budget, approved by referendum vote, or constitute an emergency. The bond validation ordinance calls for such an expenditure, but the expenditure was not approved by referendum vote nor did it constitute an emergency. And although the entire $2,000,000 to be raised by the bonds was included in the budget for a single fiscal year, the budget did not comply with the City Charter's provisions either and is invalid. Thus, there was no inclusion of the expenditure in a budget within the purview of the law, and the expenditure is unlawful.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING WARNER'S MOTION TO DISMISS AT TRIAL AND IN CONCLUDING THAT THE CITY'S CABLE TELEVISION SYSTEM OVERBUILD SERVES A PUBLIC PURPOSE WHEN THE CITY FAILED TO MEET ITS BURDEN OF PROOF BEFORE IT RESTED AND WHEN THE EVIDENCE SHOWED THAT THE DIRECT, ACTUAL USE OF THE PROJECT WOULD ONLY SERVE PARAMOUNT PRIVATE PURPOSES AND AT BEST MAY PROVIDE ONLY SOME POSSIBLE BUT MERELY INCIDENTAL PUBLIC PURPOSE.

The City is unauthorized to own and operate a cable television system under Chapter 166, Florida Statutes (The Florida Municipal Home Rule Powers Act) and Article VII, Section 2(b) of the Florida Constitution, because operation and ownership of a cable television system does not serve a substantial public or municipal purpose. The record clearly demonstrates that the evidence fails to support the trial court's conclusion that the proposed cable system will serve a public purpose, and therefore, the trial court's decision must be reversed and the bonds invalidated. See Wohl v. State, 480 So.2d 639 (Fla. 1985).

Article VII, Section 2, of the Florida Constitution provides, inter alia:

> SECTION 2. Municipalities. --
> ***
> (b) Powers. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

Chapter 166, Florida Statutes, provides, inter alia :

> 166.021 Powers. --
> (a) As provided in s. 2(b) , Art. VIII of the State Constitution, municipalities shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expresly prohibited by law.

"Public purpose" and "municipal purpose" are terms which have been found to be synonymous and have been used interchangeably by the courts considering the question of paramount public purpose. See Orange County Industrial Develop. Auth. v. State, 427 So.2d 174 (1983)("Orange County"); Brandes v. City of Deerfield Beach, 186 So.2d 6,12 (Fla. 1966); State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951). Section 166.02(2), Florida Statutes, states that "municipal purpose" is ". . . any activity or power which may be exercised by the state or its political subdivisions." Municipal purpose comprehends "all activities essential to the health, morals, protection and welfare of the municipality." City of Jacksonville, 50 So.2d at 535 (Emphasis supplied); see also Wald v. Sarasota County Healh Facilities Authority, 360 So.22d 763, 770 (Fla. 1978) (Providing adequate health care facilities serves a paramount public purpose since that function clearly fosters the health, safety and welfare of the citizens of the State).

If the funded project only incidentally serves a private interest or purpose while at the same time actually serving a paramount and substantial public purpose, the bonds can be validated. Orange County, 427 So.2d at 179. Significantly, however, the converse does not support validation. "Incidental benefits accruing to the public from the establishment of some private enterprise is [sic] not sufficient to make the establishment of such enterprise a public purpose." Id . Bonds cannot be validated when the proposed project actually serves a "paramount private purpose." See id. (Emphasis supplied).

Under circumstances similar to the present case, the Florida Supreme court in Orange County, 427 So.2d at 179, found that a proposed governmental project for a television broadcasting station would not serve a paramount

public purpose and refused to validate a bond issue for the proposed television station. In that case, the government had made a broad, general "public purpose finding" that the television broadcasting system advanced the welfare of the people, similar to the finding by the City in the present action. This Court in Orange County found that such a broad, general finding does not support a legal finding of public purpose. Id.

This Court in Orange County recognized that there was some public benefit in the form of "improved local news coverage which might produce a more informed citizenry," some increase in employment, some economic prosperity to the community, and "an alleged advancement of the general welfare of the people." Id. Nonetheless, the Court held that these were incidental benefits which were accruing from the establishment of a private enterprise, and therefore, the project was actually serving a paramount private purpose. Id. In reaching that conclusion, the Court held that:

> A broad, general public purpose, though, will not constitutionally sustain a project that in terms of direct, actual use , is purely private enterprise.

Id. (Emphasis added).

Thus, the focus of the review of the City's cable television project is its "direct, actual use." Id. When the record is examined, it is clear that the City failed to prove that its overbuild of Warner's system has a direct, actual use which would serve public purposes.

The evidence showed that the actual purpose of the proposed project is merely to provide cable television subscribers an entertainment alternative besides Warner. The evidence presented by the City for the proposed construction, ownership, and operation of its own cable television system fails to define any essential or necessary governmental services to be served by the City's system. At best, the City's plans merely mention programming

services that are only potentially "capable" of being provided. At the hearing, the City began with the proposition that its proposed cable system would offer its residents services, via a "bi-directional capability," that were not presently available. However, every witness was unable to locate such a provision when asked whether the detailed Cosmic study outlining the proposed cable television system contained any actual provision for operating and paying for these services. Thus, the only "new" services to be offered the residents of the City might be improved local news coverge, which might produce a more informed citizenry, possibly some additional entertainment channels, and an alleged advancement of the citizens' general welfare. The evidence in this case shows, however, that the alleged justifications -- especially a purported general welfare benefit -- are illusory.

The City's claim of public purpose is actually no different than the contentions rejected in Orange County , 427 So.2d at 179. The City has made a broad, general statement that the municipally-owned cable television system will "enhance the general welfare of the inhabitants of the Issuer." Ordinance No. 583 at 6. (A. 188). But the record shows this statement to be unfounded. The evidence produced by the City shows that there maybe some features of the cable television system which could potentially serve some incidental public purposes; however, the City has presented no plans for, has not planned for, and has not actually included in its proposed system any expenditures for those services, equipment, and property which the City claims constitute the "public purpose" portions of its system.

Indeed, when the City's cable television system in the Cosmic study (A. 287-404F) is scrutinized, it becomes clearly evident that in terms of "direct , actual use," the project is a purely private enterprise, duplicating entertainment, governmental and educational programming services already

offered by Warner. Indeed, there are no actual plans, nor inclusion of expenditures in the plans, for providing truly substantial or essential "public purpose" features. A public purpose must be distinguished from a private or nongovernmental purpose, it must be intended to embrace some of the functions of the governmental agency, and mere incidental advantage to the public resulting from a public aid in the promotion of private industry is not a public purpose. Brandes, 186 So.2d at 12. The "public purposes" asserted by the City to the trial court, such as improved local news service and general economic welfare, have been squarely rejected as merely incidental when the project, in terms of direct, actual use, is a private enterprise. Orange County, 427 So.2d at 179.

The City's municipal overbuild of Warner's cable system obviously is not a situation where there exists no television broadcasting station and the construction of a television system could be deemed an expansion and improvement of an already existing radio station as was the case in City of Jacksonville, 50 So.2d 532. Neither is this a case where the geographical and economic situations leave a community without access to a full range of programming as in Cable-Vision, Inc. v. Freeman . 324 So.2d 149 (Fla. 1975). Rather, this action is more akin to the situation where the purported need for the funded project arises only after the completion of the project, in which case, bonds for funding the project cannot be validated. Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975). The Supreme Court in State v. City of Miami, 379 So.2d 651, 653 (Fla. 1980), succinctly summarized the Bayol, Inc. case as follows:

> In Baycol, revenue bonds were sought to be issued to finance a public parking facility. The air rights above the facility were to be leased to a private developer for the construction of a shopping center. Finding that the need for the parking facility would only arise after

> completion of the shopping center, this Court refused to validate the bonds.

The City's request for the validation of bonds to construct and operate a City-owned cable system and overbuild Warner's system is, like the situation in Baycol, the "cart leading the horse." In this instance, the municipal purpose will arise only after the City's cable system becomes operational and causes Warner to cease operations (A. 169-171), thereby creating a void and a new need for cable services which could support a municipal purpose finding. Under the holding in Baycol, a finding of public purpose in this instance is impermissible and erroneous.

Here, the simple fact is that the City intends to use its tax exemption status and advantageous funding and taxing capabilities to provide cable television services in such a fashion as to effectively cause Warner's continued operation in Niceville to become so financially infeasible that Warner will be required to cease operations. At that time, and only at that time -- when the City will be the only cable television system serving Niceville -- will a purportedly necessary public purpose have been created. In fact, as Ed Rutter, the cable television expert testified, historically when a cable television system is constructed to serve the same area as an existing system, this results in increased rates to the customers and one system normally sells out to the other, causing disruption of service to the customers. (A. 169-171). The City's attempt to create a public purpose by being the only provider of cable television services and attempting to do so in a manner which may cause a financial detriment to the residents of Niceville is a result which is prohibited by Baycol, Inc., 315 So.2d 451, and cannot support the validation of the bonds.

In the instant proceeding, the City failed to prove any need whatsoever

for the cable television system it proposed, and contrary to its legislative finding of a broad general public purpose, its own proof showed only a duplication of services already being furnished to City residents by Warner. Under these circumstances, Warner's proffered testimony that the project would consitute an "overbuild" of the existing system clearly was relevant to the proper scope of judicial inquiry and the establishment of the requisite public purpose. Thus, the proffered testimony should have been admitted. It is settled that the City has no power to issue bonds without a public purpose; thus any testimony relevant to that issue is proper and should have been heard below. Jacksonville Shipyards, Inc. v. Jacksonville Elec. Auth., 419 So.2d 1092 (Fla. 1982).

While the trial court concluded that under Florida law municipalities may compete with private businesses without violating either the Constitution or the ultra vires concept of their powers, see, e.g. , City of Winter Park v. Montesi, 488 So.2d 1242 (Fla 5th DCA 1984), it failed to recognize that a municipal corporation is allowed to go into business only on the theory that the public welfare will be served-- and then only if it will be more than just incidentally served. Loeb v. City of Jacksonville, 134 So. 205,208 (Fla. 1931); Orange County , 427 So.2d at 179. Here the only evidence the City produced unequivocably showed no such advancement of service to the public welfare as was present in the Montesi case (b e.g. the promotion of information about the city and increasing tourism).

Where services are thought to be essential to modern life, e.g., electricty and sewer and water service, a municipality's duplication of such services offered by the private sector is allowed, despite the "natural monopoly" created by the necessity of a large capital outlay to render such service. The rationale is that the essential nature of the service offsets

the waste caused by competition with an existing system providing the same service. Indeed, this is the entire basis for the system of public utilties as we know it. But in the instant case, the "essential" nature of the service is missing, while the wasteful duplication of a system already in place remains. Therefore, due to the nonessential nature of its service, cable television has neither been declared by the legislature nor deemed by the courts to be a public utility. See Teleprompter Corp. v. Hawkins, 384 So.2d 648 (Fla. 1980); Devon-Aire Villas Homeowners Ass'n, No. 4, Inc. v. Americable Assocs., Ltd., 490 So.2d 60, 63-64 (Fla. 3d DCA 1985); see also, Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Assocs., Ltd., 493 So.2d 417 (Fla. 1986). Thus, the City had a heavy burden from the beginning to demonstrate the need and essentiality of the proposed project.

In the instant case, however, the City's burden is insurmountable given that the proposed project would merely duplicate services already provided to Niceville residents by Warner. Competing cable systems are markedly different from other competing businesses; given the "natural monopoly" character of cable television, only one cable system will ultimately survive in Niceville.[4] Municipal ownership of a cable system cannot possibly serve the public welfare by merely offering duplication of programming or services already available, yet that is precisely what the City of Niceville proposed. Moreover, the confluence of several factors effectively estops the City from asserting that the project serves a public purpose and from proceeding with its municipal overbuild.

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4. Warner's proffered expert testimony to this effect was erroneously rejected by the trial court. (A. 167-168).

In awarding a cable television franchise to Warner, the City has conceded that the provision of cable television service is a private enterprise, best provided pursuant to a contractual relationship carefully spelling out the rights and obligations of Warner, in its capacity as the provider of cable service, and of the City, in its capacity as regulator and contract administrator. (A. 464-477). Indeed, this is the approach to cable television service which has been adopted by the vast majority of municipalities nationwide, and is consistent with the national policy for cable television established by Congress pursuant to the Cable Act.

Given this long history of recognition by the City that the provision of cable television is a private enterprise, coupled with Warner's detrimental reliance on this approach in performing its contractual obligations, the City is estopped from now claiming that cable television service should be provided by the City as a "public purpose." At paragraph 10 of its final judgment, the trial court cites several cases for the proposition that "it is proper and legal for a municipality to engage in private business even though it may compete with other privately owned businesses providing similar services." In none of the cases cited, however, did the municipality propose to compete with a business it had induced to provide services to community residents pursuant to a contractual relationship between the City and the private company. Simply put, a municipality which has contracted for the provision of services to the community by an independent party cannot thereafter claim that it serves a "public purpose" for the City to provide duplicative services itself.

Estoppel principles are appropriately invoked against a municipality where a party demonstrates the likelihood of unjust consequences, see City of Hialeah Gardens v. Dade County , 348 So. 2d 1174 (Fla. 3d DCA 1977); Florida East Coast Railway Company v. City of Miami , 186 So. 2d 533 (Fla. 3d

DCA 1966). Here, the likelihood of unjust consequence is clear. Even a cursory reading of Warner's franchise contract, Ordinance No. 438, reveals numerous examples of the unjust consequences which would flow from allowing the City to serve as both regulator and competitor:

1) Pursuant to Sec. 2 of Ordinance No. 438, requests by Warner to erect additional poles would have to be approved by Warner's municipal competitor (A. 464-465);

2) Pursuant to Sec. 4, Warner would be required to advise its municipal competitor monthly of any complaint received from a subscriber, thereby giving the competitor a list of likely customers to steal (A. 466);

3) Pursuant to Sec. 4, Warner could be required to disclose to its municipal competitor the status of Warner's system operation and all future plans for construction and services, thereby allowing the City to develop competitive strategies through access to this proprietary information (A. 466);

4) Pursuant to Sec. 5A, Warner must obtain the consent to use its competitor's poles, which the City would have an incentive to withhold or delay for its own competive advantage (A. 466-467).

5) Pursuant to Sec. 5B, Warner must obtain its municipal competitor's approval to construct underground facilities on any City property, which is subject to the same potential for abuse indicated above (A. 467);

6) Pursuant to Sec. 6C, Warner would be required to give its competitor free service at all public buildings (A. 467-468);

7) Pursuant to Sec. 6D, Warner would be subject to rate regulation by its municipal competitor insofar as rate regulation may otherwise be permitted by federal law (A. 468);

8) Pursuant to Sec. 6D, Warner's subscribers might be subject to the imposition of a utility tax legislated by its municipal competitor, which would increase Warner's rates and undercut the comparative value of Warner's cable service (A. 469);

9) Pursuant to Sec. 10, Warner's technical standards would be evaluated by a consultant selected in part by its municipal competitor and whose conclusions might result in the revocation of Warner's franchise (A. 471-473).

It is obvious from these and other provisions of Ordinance No. 438 that Warner and the City never intended for the City to be allowed to subsequently

compete with Warner. The unjust consequences which would flow from allowing the City to both regulate and compete with Warner in a commercial enterprise are manifest. Having contracted for Warner to provide cable service to Niceville as a private enterprise, the City is now estopped from claiming that the provision of identical, competitive service by the City serves a "public purpose."

II. THE TRIAL COURT ERRED AND DENIED WARNER FUNDAMENTAL DUE PROCESS OF LAW WHEN IT GRANTED THE CITY'S UNTIMELY MOTION TO STRIKE WARNER'S AFFIRMATIVE DEFENSES, WHEN IT PRECLUDED INTRODUCTION OF EVIDENCE PERTAINING TO THE ISSUES RAISED IN THE STRICKEN AFFIRMATIVE DEFENSES, WHEN IT DECLARED THAT IT WOULD NOT CONSIDER NOR ADDRESS THE ISSUES RAISED BY THE AFFIRMATIVE DEFENSES, AND WHEN IT SUBSEQUENTLY ENTERED FINAL JUDGMENT AFTER THE VALIDATION HEARING AGAINST WARNER ON THE ISSUES ORIGINALLY RAISED BY THE STRICKEN AFFIRMATIVE DEFENSES.

On November 25, 1986, the City made an unnoticed, oral motion to strike the affirmative defenses raised by Warner in its answer filed on October 6, 1986. (A. 427, 437). The City's motion was untimely since it was presented more than 20 days after service of Warner's answer. Fla.R.Civ.P. 1.140(f). Because the motion was untimely, the City waived any objection as to whether Warner's affirmative defenses stated a legal defense in the bond validation proceedings. See id. Therefore, the trial court erred in hearing, considering, and deciding the City's motion, and the trial court should be directed to reinstate the affirmative defenses and, on remand, take testimony and evidence on the defenses raised.

In its order on Warner's motion for reconsideration and clarification, the trial court avoided ruling on the Rule 1.140(f) waiver issue by deciding

sua sponte that the affirmative defenses should be stricken. (A. 437-438). Relying on Rule 1.200, Florida Rules of Civil Procedure, the trial court stated that it had the authority to "limit and simplify issues." (A. 437-438). In so striking Warner's affirmative defenses as legally insufficient, the trial court acted contrary to the law of Florida which prohibits a trial court from striking, on its own initiative, affirmative defenses for the reason that they are legally insufficient, since a motion attacking legal sufficiency can only be presented by a party. Bay Colony Office Building Joint Venture v. Wachovia Mortgage Company, 342 So.2d 1005, 1006 (Fla. 4th DCA 1977). Thus, the trial court erred and its decision to strike the affirmative defenses must be reversed.[5]

While the trial court erred procedurally in even considering and then granting the City's motion to strike the affirmative defenses, the trial court subsequently committed additional and more egregious error which has resulted in denying Warner fundamental due process of law. The trial court made findings of fact and conclusions of law in its final judgment on the merits of Warner's affirmative defenses, even though the trial court had stricken those affirmative defenses and prevented Warner from litigating and presenting evidence on those issues. Such action by the trial court is a denial of

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5. The court in Bay Colony did recognize, nevertheless, that a court can strike defenses if they are immaterial or "so entirely without any possible relation to the controversy as to warrant their being stricken." Id. at 1006. As discussed below, the affirmative defenses raised by Warner were not only legal defenses, but were material and very much related to this proceeding.

Warner's fundmental due process rights. Cortina v. Cortina, 98 So.2d 334, 336-37 (Fla. 1957); Stack v. Okaloosa County, 347 So.2d 145, 146 (Fla. 1st DCA 1977); Brady v. Jones, 491 So.2d 1272, 1273 (Fla. 2d DCA 1986).

After having stricken Warner's affirmative defenses, the trial court specifically declared that it would not consider nor address matters raised in paragraphs 10 and 11 of the affirmative defenses concerning the City's authority under the Cable Act to own and operate a cable system, the City's noncompliance and inability to comply with Section 613 of the Cable Act (47 U.S.C. § 533), and the pledging of ad valorem taxes. (A. 438). Futhermore, during the bond validation hearing, the trial court refused to permit introduction by Warner of any testimony or evidence relating to whether the City had met the requirements of law for enacting Ordinance No. 583, for authorizing expenditures for the cable system, and for issuance of revenue bonds under the City's charter as raised by the stricken affirmative defense in paragraph 9 of Warner's answer. (A. 46, 53, 58-62). [6] Inexplicably, the trial court permitted the City to present testimony on the ad valorem taxation issue, (A. 69-79), and even made inquiries itself on that issue, (A. 79-80), but it subsequently prohibited Warner from presenting any evidence on that same issue. (A. 118-120). Moreover, at any point during the bond validation hearing where in the trial court's opinion it appeared that Warner was presenting evidence related to whether the City's actions were an abuse of discretion, were arbitrary, or were accomplished in bad faith, (issues raised in paragraph 12 of the affirmative defenses) the trial court disallowed the

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6. Indeed, when Warner proffered testimony concerning this issue the trial judge physically left the courtroom. (A. 58).

evidence. (A. 48, 53, 100, 125-128,140, 149, 162-163, 167-168).

Having excised these defenses from the pleadings, having declared them not at issue in the proceeding, and having prevented Warner from being heard on these defenses, the trial court inexplicably entered final judgment on the merits of these defenses against Warner. In paragraph 5 of the final judgment (A. 220), the trial court declared that the City's finding of public purpose in enacting Ordinance No. 583 was "neither arbitrary, capricious, nor contrary to law," matters which the trial court precluded the parties from litigating by striking paragraph 12 of Warner's affirmative defenses. (A. 425). The trial court ruled in paragraph 6 of the judgment (A. 220-21) that the City had acted properly under Section 1.02(h) of Ordinance No. 511, the issue raised by paragraph 9 of Warner's stricken affirmative defenses. (A. 425).

The trial court also decided in paragraph 7 of the judgment that the Cable Act did not preclude the City of Niceville from issuing the revenue bonds. (A. 221). Incredibly, the trial court made this finding after it expressly precluded any opportunity for the parties to be heard on the issue by striking paragraph 10 of the affirmative defenses and instructing the parties that it would neither consider nor address the issue. (A. 437-438). Likewise, after striking paragraph 11 of the affirmative defenses and expressly declaring that the issue of pledging ad valorem taxes would not be litigated (A. 437-438), the trial court declared in paragraph 8 of the judgment that Warner and the State of Florida had failed to make any showing that the bonds would result in a pledge of the public credit. (A. 221). The trial court, in essence, has faulted the defendants for failing to introduce evidence after they were directed by that same court not to litigate and prove their positions on the issue. The trial court allowed the City to introduce evidence on this issue, but not the other parties. (A. 69-80, 118-120).

The trial court also made specific findings and ruled on those matters raised by paragraph 12 of Warner's affirmative defenses which were previously stricken as not going to the issue of whether the City's cable system served a public purpose. In paragraph 3 of the final judgment, the trial court ruled that the City's cable system was necessary and essential, although the City presented no evidence to support such a finding. (A. 219). The trial court then inconsistently stated in paragraph 9 of the judgment that the "need and necessity of the project" was beyond the scope of its review. Again, after precluding the parties from litigating the issues of bad faith, abuse of discretion, and arbitrary and capricious conduct, the trial court in paragraphs 9 and 10 of the judgment inexplicably ruled on the merits against Warner on these issues because no evidence was presented. (A. 221).

Finally, the trial court found in paragraph 16 of the judgment that the revenues pledged would be "sufficient to pay all of the principal and interest on the Bonds and to make all other payments provided for in the Ordinance [No. 583]." (A. 223). The trial court permitted the City to present evidence in support of this finding through the testimony of Bill Fray, the City's financial advisor. (A. 72-74). On cross-examination, Fray conceded, however, that the basis for his opinion was the opinion of the City's cable television consultant, Thomas K. Miller, that the City's cable system was economically feasible. (A. 80-81, 82, 91). Fray explained that if the project was not economically feasible, then his opinion would likely differ as to whether the pledged revenues would be sufficient to service the bonds. (A. 89).

The City pleaded in its complaint the sufficiency of the pledged revenues to service the bonds (A. 181) and opened the door at hearing through Fray's testimony to have the issue litigated. (A. 72-74). Indeed, the trial court clearly determined that the matter was material when it permitted the City to

introduce evidence on the issue and then when it made a specific finding on the question in its final judgment. The presentation of evidence on and review by the court of the sufficiency of the expected revenues and economic feasbility is authorized by Florida law. State v. City of Jacksonville, 50 So.2d at 534, 538 (The Court examined testimony and evidence received on the feasibilty of the project to determine whether the trial court's finding of sufficiency of revenues to meet the financial obligation was correct); Gate City Garage v. City of Jacksonville, 66 So.2d 653, 663 (Fla. 1953) (The trial court heard and considered evidence on the feasibility of the plan for which bonds were to be issued and on the sufficiency of revenues; the Supreme Court affirmed the trial court's finding after reviewing the evidence). Nonetheless, when Warner attempted to present evidence on the issue of sufficiency of pledged revenues, the trial court did not permit Warner to introduce any evidence to rebut the City's contention that the pledged revenues were sufficient. (A. 153-155). Warner was precluded from presenting facts which would have demonstrated that the City's project was not economically feasible and thus provide a factual predicate for a hypothetical question to Fray as to the sufficiency of the pledged revenues. (A. 153-155). The trial court again inexplicably disallowed Warner to be heard on this issue, but then ruled on the merits of the issue in the final judgment.

In view of the foregoing, it is abundantly clear that the trial court's findings of fact and conclusions of law in paragraphs 3, 5 through 9, and 16 must be voided and reversed since Warner has been denied its fundamental due process rights. Cortina, 98 So.2d at 336-37; Stack, 347 So.2d at 146; Brady, 491 So.2d at 1273. Futhermore, remand to the trial court is appropriate for the taking of further testimony and evidence on the issues raised by Warner's affirmative defenses since they are both legal defenses and

materially related to the controversy. See, Bay Colony ,342 So.2d at 1006.

III. THE TRIAL COURT ERRED IN STRIKING WARNER'S AFFIRMATIVE DEFENSES SINCE THE DEFENSES RAISED WERE LEGAL UNDER STATE AND FEDERAL LAW.

By its inclusion of rulings on the merits of issues raised by Warner's affirmative defenses in its judgment, the trial court has now accepted that these issues are material and were legal defenses, although it previously precluded Warner from litigating those issues. The law of Florida is clear that the defenses raised were legally sufficient, because they were properly raised in the pleadings, the defenses were properly within the scope of review in the bond validation proceedings, and Warner should have been allowed to be heard on them.

It is beyond cavil that the City was required to prove that the authorization of the revenue bonds obligation complies with the requirements of law, including a showing that the adoption of the bond ordinance (Ordinance No. 583) was procedurally correct and that the City "has taken all the required steps for the issuance of the bonds in compliance with the applicable provisions of law." Wohl v. State, 480 So.2d 639, 641, 642, (Fla. 1985); § 75.03, Fla. Stat. Noncompliance with the requriements of law in adopting a bond ordinance and for issuance of bonds prevents the bonds from being validated. See id.; Taylor v. Lee County, 498 So.2d 424, 425 (Fla. 1986). Paragraphs 9, 10, and 11 of Warner's affirmative defenses properly raised defenses to the questions of whether the bond ordinance had been adopted in accordance with applicable provisions of the law and whether there was compliance by the City with the requirements of law for issuance of the bonds.

In paragraph 9, Warner specifically alleged the City's noncompliance with its own charter, Ordinance No. 511, in enacting the bond ordinance and for issuance of the bonds. (A. 212). Clearly, Warner's allegations went to the heart of the question of the City's compliance with the requirements of law. See § 75.03, Fla. Stat.; Wohl ,480 So.2d at 641-42. The City's failure to meet these legal requirements is addressed in Argument IV infra .

Paragraph 10 of the stricken affirmative defenses also raises a claim that the City has failed to comply with the provisons of law encompassed in the Cable Act and accordingly has not and cannot have taken all required steps for issuance of the bonds. The Cable Act provides particular requirements and standards which a municipality must meet before it is authorized under the law to engage in the enterprise for which the revenue bonds are being sought to be validated in this case. Warner contends in this affirmative defense that the City has not complied with these legal requirements of federal law and also cannot comply without violating the Florida Constitution.

The City's ordinance authorizing the issuance of municipal bonds for the construction of a municipally owned cable television system must be invalidated since the City of Niceville is without authority to engage in the enterprise for which the bonds are being issued. A municipality's decision to overbuild an existing cable operator whom the municipality regulates is patently inconsistent with the national regulatory scheme established by Congress in the Cable Act and is therefore preempted.

A careful reading of the Cable Act as a whole shows that while Congress did not attempt to preclude all municipal ownership of cable television systems, neither did it intend to sanction municipal ownership in situations where such ownership could be used to frustrate the objectives of Congress. Indeed, to allow municipalities to overbuild the cable systems they regulate

would upset the delicate balance in the franchisor/franchisee relationship which Congress established by statute. In adopting the Cable Act, Congress sought to establish a national policy concerning cable communications; establish orderly franchise procedures and standards which would encourage the development of cable; establish clear guidelines and limitations on the exercise of federal, state and local authority with regard to cable regulation; promote a climate where cable systems were encouraged to provide the widest possible diversity of information sources to the public; establish protections against unfair denial of franchise renewals and minimize unnecessary regulation which would impose economic burdens on the development of cable. 47 U.S.C. § 521. The legislative history underlying the Cable Act shows that the statute was adopted to remedy deteriorating and often acrimonious relationships between cable operators and local regulatory authorities and provide stability and balance in the franchise process:

> A significant purpose of H.R. 4103 is to address the problems which have arisen in the franchise process, and to provide and to delineate within Federal legislation the authority of Federal, state and local government to regulate cable systems. The regulation seeks to provide stability and certainty to the process of granting and renewing cable franchises.... The Committee recognizes that the franchise process in every city has very significant national implications for the full development of cable telecommunications and for the delivery of the widest diversity of information sources. In view of this national impact, it is appropriate and necessary for Congress to adopt cable legislation.

H.R. Rep. 98-934, 98th Cong., 2d sess. (1984) ("House Committee Report") at 22.

In order to provide for this stability, Congress set limits on the amount of franchise fees which a municipality could impose on a cable operator; substantially limited the ability of franchising authorities to use rate

regulation as a means of obtaining franchise concessions; and established safeguards to insure that cable operators would not be denied franchise renewal unfairly. See 47 U.S.C. §§ 542, 543, 546. Furthermore, the Cable Act requires franchising authorities to modify franchise obligations in certain situations where changed circumstances warrant. Clearly, a franchising authority which itself competes with a cable operator cannot be expected to impartially deal with the cable operator on issues involving franchise fees, rates and services, franchise renewal and franchise modification. Accordingly, the bond ordinance must be deemed preempted since Niceville's ability to comply with both federal regulations and its own requirements would be "a physical impossibility." Florida Lime & Avacado Growers, Inc. v. Paul, 373 U.S. 132, 143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Similarly, to allow a municipality to overbuild the cable operator which it regulates is a policy which would stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and thus has been preempted by the Cable Act. Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed.2d 581 (1941). See also Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767, 773, 675 S.Ct.1026, 91 L.Ed.2d 1234 (1947).

In addition to the blatant inconsistency between a municipal overbuild and the overriding general federal policy established in the Cable Act designed to provide balance and fairness in the contractual relationship between cities and private cable television operators, Congress also recognized that there exist certain situations in which municipal ownership could conflict with specific national policies embodied in the Cable Act. For example, Section 627 of the Cable Act, 47 U.S.C. § 547, limits the situations under which the franchising authority can acquire a cable system as a result

of non-renewal or revocation of a franchise for cause, and establishes conditions under which such acquisition can occur.

Under the Cable Act, once a municipality has awarded a franchise to a private operator, it is precluded from acquiring municipal ownership of a cable system except upon revocation for cause or upon a failure of the franchised operator to meet the renewal standards. Id. at § 547. In the case at hand, the City has no basis for revocation of Warner's franchise for cause and is too impatient to wait for the natural expiration of the franchise contract when it would be required to pay fair market value for Warner's system. Not satisfied with either alternative, the City has sought to circumvent the Cable Act through a municipal overbuild.

Recognizing that municipalities could use franchise revocation or denial of renewal as an unfair tool to force the sale of a cable system at a price substantially below its value, the Cable Act provides that any such sale resulting from the denial of a franchise renewal must be at fair market value as a going concern, and in the case of a revocation for cause, at an equitable price. Id. An overbuild of Warner's cable system by the City of Niceville would directly conflict with the stated policy since such an overbuild would invariably have a negative impact on the value of Warner's cable system. Accordingly, the City as a competitor would be able to accomplish a forced sale of Warner's system at a below-market-value price; something which it could not accomplish in its proper role as a regulator under the Cable Act.

It is a well-established principle of law that "[t]he critical question in any preemption analysis is always whether Congress intended that federal regulations supersede state law." City of New York v. FCC, 814 F.2d 720, 724 (D.C. Cir. 1987), citing Louisiana Public Service Commission v. FCC, ___ U.S. ___, 106 S.Ct. 1890, 1899, 90 L.Ed.2d 564 (1986). See also, Fidelity

Federal Savings and Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Congress' intent to preempt an area may be evident in explicit statutory language or may be inferred from the statute's structure and purpose. Jones v. Rath Packing Co., 430 U.S. at 525, 97 S.Ct. at 1309.

In the present situation, Congress has clearly stated that the Cable Act preempts inconsistent state and local regulation. Section 636 of the Cable Act provides in relevant part:

> (c) Except as provided in section 637 [dealing with public, educational and governmental access], any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.

47 U.S.C. § 556(c). Accordingly, Congress' intent to preempt inconsistent state and local regulation of cable television cannot be seriously questioned in light of this explicit statutory language.

On the basis of evidence available to the trial court, it is evident that the bond ordinance, by allowing the City to construct a municipally owned cable system to compete with Warner, is inconsistent with the Cable Act and is therefore preempted.

The affirmative defense in paragraph 10 also asserts that even if the City was not preempted and prohibited by the Cable Act from overbuilding Warner, the City has not complied with, and cannot constitutionally comply with the fundamental legal requirement of initially acquiring the right to hold an ownership interest in a cable television system. If the City, as a franchising authority, cannot own the cable television system, then the bonds to fund the project clearly cannot be validated.

Warner is asserting in this affirmative defense that the City has not met the legal requirements under Section 533 of Title 47, United States Code, (Section 613 of the Cable Act), which sets forth the conditions which must be met to enable the City, as a franchising authority, to hold an ownership interest in a cable television system. Warner also contends that even if the City attempted or has attempted to comply with the requirements of Section 533, it cannot meet the requirements without violating the prohibition under the Florida Constitution against delegation of legislative authority. Since the City cannot acquire the right to hold an ownership interest in the cable television system, the bond obligations cannot be validated.

Section 533 provides:

> **(e) Holding of ownership interests or exercise of editorial control by States or franchising authorities.**
>
> (1) Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system.
>
> (2) Any State or franchising authority shall not exercise any editorial control regarding the content of any cable service on a cable system in which such governmental entity holds ownership interest (other than programming on any channel designated for educational or governmental use), unless such control is exercised through an entity separate from the franchising authority.

47 U.S.C. § 533(e). Thus, if editorial control is not or cannot be exercised through an entity separate from the City, then the City is prohibited from holding an ownership interest in any cable television system. See id.

Before it was precluded from doing so by the trial court, Warner intended to introduce evidence that the City has already exercised editorial control regarding programming and has entered into program affiliation agreements without such control being exercised by a separate entity. Additionally, evidence would have been presented that no action was taken until recently in

order to establish a separate entity for editorial and programming control when the City recently enacted Ordinance No. 609 (A. 434-436), which purportedly establishes an entity called the Niceville Cable Communications Commision as an attempt to comply with Section 533.

Warner further submits that Ordinance No. 609 is invalid as an unconstitutional delegation of the City's legislative authority. Ordinance No. 609 fails to impose sufficient objective guidelines and standards and permits the City's new commission to exercise unrestricted discretion. Without definite and valid limitations on the commission's discretion and on its provision of rules and regulations, the City has unconstitutionally delegated its authority, and any appointment of unelected persons to the commission under Ordinance No. 609 is constitutionally impermissible and invalid. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978); City of Miami Beach v. Forte Towers, 305 So.2d 764 (Fla. 1974); City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972); Early Mobile Homes, Inc. v. City of Port Orange, 299 So.2d 56 (Fla. 1st DCA 1974).

Even if the City was able to correct the constitutional defects in Ordinance No. 609, those corrections by definition could only cause editorial control of programming to be vested in the City, and thereby the City would violate Section 533. As a result, the City could not obtain the right to hold an ownership interest in the cable television system. See 47 U.S.C. § 533. Thus, the City cannot under any circumstances (short of a constitutional amendment) comply with the legal requirements for ownership of a cable television system, and therefore, the bonds cannot be validated.

As the discussion above clearly demonstrates, the City's noncompliance with the various legal requirements of the Cable Act is a legal defense which should not have been stricken and which should have been considered by the

trial court.

The affirmative defense in paragraph 11 unequivocably raised a legal defense, and the trial court should not have precluded Warner and the State from presenting evidence and being heard on this issue. This affirmative defense raises the question of whether the revenue bonds actually contemplate a pledge of the credit of the state or political subdivision, i.e. whether the bond issue is being secured by a promise of financing and security whose practical effect is to pledge the ad valorem taxing power of the City and to obligate ad valorem tax revenues. This issue clearly is one of whether the City has complied with the requirements of law since voter approval by referendum is required before ad valorem tax revenues may be obligated. Art. VII, §§ 11, 12. Fla. Const.; see also Orange County, 427 So.2d at 178; County of Volusia v. State, 417 So.2d 968 (Fla. 1982). Since the bond issue was not submitted to a referendum vote of the electorate (A. 38), evidence and legal argument on this legal defense should have been heard and decided by the trial court.

Warner alleged in paragraph 12 of the affirmative defenses that the City's enacting Ordinance No. 583 and issuance of the bonds constitutes an abuse of discretion, is arbitrary, and was done in bad faith. Warner has alleged a legal defense which the trial court should not have stricken and which the trial court should have heard and decided. In a bond validation proceeding, the courts are to determine whether the issuing body has "exercised that authority [to issue revenue bonds] in accordance with the spirit and intent of the law." McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252, 253 (Fla. 1980). Once the court determines that the issuing body has the authority or power to issue the bonds, it must determine whether the issuing body "exercised that power in accordance with law." DeSha v.

City of Waldo, 444 So.2d 16, 18 (Fla. 1984), citing Town of Medley v. State, 162 So.2d 257, 259 (Fla. 1964). However, a municipality is limited in the exercise of its power by the requirement that its action be taken in good faith; where good faith is lacking, there is no power to act. State ex rel. Ellis v. Tampa Water Works Company, 47 So. 358 (Fla. 1908). In Ellis the Supreme Court also held that where there exists a reasonable doubt concerning the actions of a municipality, that doubt should be resolved against the municipality. Id. ; see also City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972).

A court is permitted to inquire and receive evidence of bad faith or fraud in a bond validation proceeding if there are allegations of fraud or bad faith. See State v. Board of Public Instruction, 129 Fla. 235, 239, 131 Fla. 272, 276, 176 So. 96 (1937). If an abuse of discretion is alleged and is shown, the court can interfere and reject the initial decision as to public purpose. See City of Jacksonville, 50 So.2d at 534; State v. Florida State Turnpike Authority 134 So.2d 12, 19 (Fla. 1961). When a party has pleaded abuse of discretion or fraud, the court should allow the party to introduce evidence and require that party to make a showing of an abuse of discretion or fraud. See Penn v. Pensacola-Escambia Governmental Center Authority, 311 So.2d 97,102 (Fla. 1975)(Defendants alleged in their responive pleadings abuse of discretion and fraud, but failed to make the requisite showing of those defenses in the validation proceedings). Additionally, parties challenging validation of bonds are also permitted to prove during the proceedings that the determination of public purpose is unfounded, arbitrary, or clearly erroneous. See State v. Miami Beach Redevelopment Agency, 392 So.2d 875, 886 (Fla 1980). The City has argued and the trial court persistently ruled beforehand and during the hearing that these legal defenses raised by Warner

were collateral matters outside the scope of the court's review. As a result, the trial court refused Warner the opportunity to show abuse of discretion, bad faith, arbitrariness, and violation of the City's legal duty and power. (A. 48, 53, 100, 125-128, 140, 149, 162-163, 167-168). However, in its judgment on the merits, the trial court ruled that there had been no showing of bad faith, arbitrariness, capriciousness, and violation of legal duty and power. (A. 220-221). In support of its ruling, the trial court cited the decisions in DeSha and Town of Medley ,apparently referring to the general rule stated by the Court in DeSha ,quoting Town of Medley ,162 So.2d at 258-59:

> We have consistently ruled that questions of business policy and judgment incident to the issuance of revenue issues are beyond the scope of judicial interference and are the responsiblity and perogative of the governing body of the governmental unit in the absense of fraud or violation of duty . State v. City of Daytona Beach, 1934, 118 Fla. 29, 153 So. 300; State v. Florida State Turnpike Authority, Fla. 1961, 134, Sol.2d 12, and State v. Dade County, Fla. 1962, 142 So.2d 79.

444 So.2d at 18-19 (Emphasis supplied). While the above-quoted statement may be the general rule, it also provides the exception that inquiry should be made to determine if there has been any fraud or violation of legal duty (i.e. abuse of discretion, bad faith, or unfounded, arbitrary, or clearly erroneous findings). Id.

A review of the cases cited by the Supreme Court in Town of Medley discloses that the trial courts have permitted introduction of evidence, including evidence of the feasibility of the funded projects, in order to determine whether there has been any bad faith, violation of legal duty, abuse of discretion, arbitrariness, or erroneous findings. In State v. City of Daytona Beach, 158 So. 300, 305 (Fla. 1934), the Court indicated that had there been a showing of a charge of negligence, fraud, or violations of legal

duty, it would have considered questions of business policy. In Florida State Turnpike Authority, 134 So.2d at 19-20, the trial court heard evidence concerning the feasibility of the proposed project and the sufficiency of anticipated revenues. While the court found no showing of any abuse of discretion, the evidence still had to be presented in order for that determination to be made. See id. In State v. Dade County, 142 So.2d 79, 89-90 (Fla. 1962), the court also permitted testimony and evidence from other parties as to the feasibiliy of the project and the sufficieny of revenues. This evidence was also examined by the court in order to assist it in deciding whether the bond issue required or in practical effect pledged ad valorem taxes. Id.

Thus, Warner should have been allowed to present evidence of the City's abuse of discretion and its acting arbitrarily and in bad faith. Warner should have been permitted to demonstrate how the City ignored the law and its own legal requirements under its charters in adopting Ordinance No. 583 and in adopting budgets which purportedly authorized issuance of bonds. Evidence should have been allowed demonstrating how the City attempted to bypass notice requirements and proper consideration of ordinances concerning the cable system and the bond issue. These procedural defects occurred in the face of an astonishing ignorance on the part of the city officials concerning the details of the cable proposal. Indeed, the arbitrary and capricious blind reliance which the City placed on a facially flawed consultant's report itself evidences bad faith. Clearly, the City moved to enact and implement the ordinance on an ill-informed basis. Moreover, the information available to the City clearly revealed that the proposed municipal overbuild would, at best, merely offer services generally duplicative of these already being supplied by Warner. Yet city officials ignored these facts, as well as the

fact that the probable result of the operation of two cable systems would be the provision to city residents of inferior service at a higher cost. (A. 167-168).

Warner should have been permitted to present evidence of the City's bad faith and abuse of discretion through the City's unfounded legislative findings of necessity and essentiality of a municipally owned cable system and its unsubstantiated public purpose finding. Indeed, the trial court should have permitted Warner to demonstrate that the City's project was not only not economically sound but that the City knows it is not feasible and has apparently withheld that information from its citizens as well as its financial advisor so he could testify that the revenues from the project appear to be sufficient to cover the financial obligations.

Moreover, by enacting Ordinance No. 583 and seeking issuance of bonds for a municipal overbuild, the City has acted in bad faith in its dealings with Warner. The City and Warner have a history of dealing stretching back for more than a decade and encompassing two successive contractual terms. During this period, and as a result of the City's grant of a cable franchise contract to Warner, Warner has made substantial investments of time and money to provide cable service to Niceville residents. Now, however, the City proposes to operate its own cable system to compete with the system it invited Warner to operate pursuant to a franchise contract, Ordinance No. 438. (A. 464-477). Such municipal operation would materially alter the provisions of the City's franchise contract with Warner. In effect, the City seeks to unilaterally change the contract between itself and Warner and to substantially undermine and impair this contractual relationship. In every contract, there is an implied duty of good faith and fair dealing. See e.g., Sag Harbour Marine, Inc. v. Fickett, 484 So.2d 1250, 1254 (Fla. 1st DCA 1985). The City's actions

outlined above in derogation of its contractual relationship with Warner are a clear breach of this duty, and thus the City has acted in bad faith in adopting Ordinance No. 583.

The patent inconsistency between the provision of cable service by Warner in Niceville pursuant to a contract with the City and the City's efforts to undermine that contractual relationship through a municipal overbuild is self-evident. Under Ordinance No. 438, the City is expected to act as an impartial regulatory body to oversee Warner's performance under the contract. Clearly, as a direct competitor to Warner, the City can hardly be expected to administer the franchise contract fairly. Indeed, as addressed in greater detail above, in adopting the Cable Act, Congress sought to establish a uniform national policy to balance the relationship between cable operators and local regulatory authorities.

As yet another example of the City's bad faith in attempting to undermine the Warner franchise contract through a municipal overbuild, Section 15 of Ordinance No. 438, the Warner franchise contract, (A. 476), provides that the City has the right to purchase the assets of Warner's cable system at fair market value under certain circumstances. The existence of the City's cable system would seriously reduce the market value of Warner's system, thus raising the possibility for the City to purchase the system's assets for less than their present worth and thereby denying Warner the benefits of its original contract with the City.

Thus, the trial court clearly erred in striking paragraph 12 of Warner's affirmative defenses, and thereby precluding Warner from proving the City's abuse of discretion, bad faith, arbitrary and capricious conduct, and breach of its legal duties. This matter should be remanded to allow Warner to demonstrate that the City improperly adopted Ordinance No. 583, made unfounded

findings of necessity and public purpose, and authorized issuance of revenue bonds for a cable system in breach of its duty of good faith and fair dealing, in derogation of its own procedural requirements, without obtaining adequate information, in violation of its legal duty and power, and in the face of evidence that both city residents and Warner would be adversely affected.

IV. THE TRIAL COURT ERRED IN HOLDING THAT THE BOND VALIDATION ORDINANCE WAS PROMULGATED IN COMPLIANCE WITH THE LAW.

In paragraph 4 of the final judgment the trial court specifically found that bond Ordinance No. 583 was duly adopted, meeting all procedural requirements of both the 1955 and 1983 City Charters. (A. 220). During the final hearing attempts by Warner to introduce evidence of procedural defects during the adoption of the bond ordinance were ruled by the trial court to be immaterial and irrelevant. (A. 37-46). Warner proffered testimony to substantiate that the bond ordinance had not been adopted procedurally correct. (A. 58-62). The trial court erred in denying the proffered testimony and in limiting Warner in its proffer of nonconformance with charter provisions.

In addition to constitutional limitations such as the public purpose requirement already discussed, the power of a political subdivision to incur bond indebtedness is governed by the fundamental principle that such obligation cannot be incurred without express or implied authority from the legislature. State ex rel. Harrington v. Pompano, 136 Fla. 730, 188 So. 610 (1938). Municipal bonds will not be validated without a showing that all legislative requiremnts have been complied with in the manner prescibed by the legislature. Merrill v. City of St. Petersburg, 91 Fla. 858, 109 So. 315

(1926). If a plaintiff has not complied with the requirements of law in adopting its bond ordinance, the bonds cannot be validated. Wohl, 480 So.2d at 640-41; Taylor, 498 So.2d 425. In determining whether the law has been complied with, the requirements of a city's charter may be considered. See Wohl, 480 So.2d at 640-41.

The City's complaint specifically alleged the bond ordinance (Ordinance No. 583)(A. 180), was adopted pursuant to its 1983 Charter (Ordinance No. 511), but the City failed to show that it complied with requirements imposed by the ordinances, nor did it even rebut Warner's proof of noncompliance. As more specifically described in the statement of the case and of the facts, Section 1.02(h) of the 1983 Charter limits the power of the City by requiring that expenditures in excess of $100,000 be contained in the budget for such fiscal year, be approved by referendum or constitutue an emergency. Nevertheless, the city clerk's direct testimony was that no referendum was held approving such an expenditure and that no emergency regarding the proposed cable television system had been declared. (A. 38-39).

In fact, the City Council voted to include in a single fiscal year budget the expenditure of the entire $2,000,000 to be raised by the sale of the bonds, as reflected in the notes of its minutes of August 27, 1985. (A. 276). The entire bond amount was in fact placed in the 1985-86 fiscal year budget (Ordinance No. 581). (A. 286).

However, the budget itself was not in compliance with the 1983 Charter. The budget was passed as an "emergency" ordinance, but does not comply with the Charter's requirements for emergency ordinances. Section 3.11 of the 1983 Charter requires not only that such ordinances state that an emergency exists, but also that such ordinances describe the emergency in "clear and specific terms." The budget merely stated:

> Section 3: This Ordinance is declared an emergency measure and shall take effect immediately upon its passage and approval of the Mayor pursuant to law. (A. 277).

An ordinance of a municipal corporation is not enforceable until every provision of the city's charter necessary to give it legal existence has been strictly complied with. Nelson v. State ex rel. Axman, 83 So.2d 696 (Fla. 1955). As previously noted, this is true of bond ordinances as well. Merrill, 109 So. 315; Wohl, 480 So.2d 639; Taylor, 498 So.2d 425. However, the trial court inexplicably refused to allow introduction of the city clerk's proffered testimony regarding the validity of the budget on which, in turn, the validity of the bond ordinance necessarily rested.

The proffered testimony of the city clerk showed that the City complied with only a part of what the 1983 Charter required in order for the bond ordinance to be validly enacted. This testimony was relevant to whether the ordinance was promulgated in compliance with law, and its exclusion was error. The City chose to budget the entire bond amount in a single fiscal year so it would not have to get approval for further expenditures. Yet the City did not give the public any notice of the nature of the purported "emergency" under which the budget was enacted. When a governing body's charter requires such a statement in an emergency ordinance, it must be included therein. State v. Metropolitan Dade County Water & Sewer Bd., 347 So.2d 699 (Fla. 3d DCA 1977). The mere declaration of (or even actual existence of) an emergency does not create in itself any authority regarding, or remove statutory limitations on, the right of a public corporation to incur bonded indebtedness. State v. City of Daytona Beach, 118 Fla. 29, 158 So. 300 (1934).

The City responds that because funds in excess of $100,000 have not yet been expended in any fiscal year, the budget was validly enacted, and thus the bond ordinance also complies with law. Yet this analysis of the way the

"budget" requirement of the City should work makes no sense, or at best entirely vitiates the reason behind the requirement. If the City's analysis of the ordinance is correct, then the City can continually budget huge amounts to be expended in any given year and then "parcel out" the actual expenditure in amounts just under $100,000 per year until the amount initially budgeted for expenditure in one year is finally spent. Such an analysis renders the budget requirement meaningless, and courts should not construe legislation in a manner that will produce an absurd result. See Curry v. Lehman, 55 Fla. 847, 47 So. 18 (1908); Simmons v. State, 160 Fla. 626, 36 So.2d 207 (1948). Most telling of the City's flawed contention is the fact that under the Cosmic study, the amount to be actually expended in the first year of the project is $1,505,733.81, well in excess of the Charter's $100,000 requirement for the expenditure to be placed in the budget. (A. 299).

The City's passage of the budget containing the entire bond amount as an emergency ordinance was invalid for another separate and independent reason. Section 3.22(d) of the 1983 Charter requires that emergency ordinances be reviewed on the third regular meeting after their passage, to determine whether the emergency still exists, and specifically provides for the repeal of these ordinances by the Council. This important procedural right belonging to the citizens and residents of the City, including Warner, was not complied with by the City. The City's analysis of the budget and emergency provisions of the Charter would allow the City to budget an expenditure in excess of $100,000 in a given fiscal year and pass the budget as an emergency measure, without informing the public regarding the nature of the purported "emergency" and denying the mandated public right to review. If this analysis and procedure is permitted, then subsequent expenditures partake of the "fruit of the poisonous tree" and should also be invalid, even though the City does not

actually spend in excess of $100,000 in the first year.

In the alternative, should the 1955 City Chapter, (A. 227-242), apply because the 1983 Charter was not filed with the Department of State as required by Section 166.031, Florida Statutes (1983), the City still failed to prove its compliance with the earlier Charter. No proof was ever adduced that either the bond ordinance itself (Ordinance No. 583) or the budget incorporating expenditure of bond funds (Ordinance No. 581) was posted in three public places within ten days of their enactment, as required by Section 11 of the 1955 Charter. (A. 231).

The 1955 Charter also contained a "specific-designation-of-emergency" requirement, Section 10, which was not met with respect to the budget (Ordinance No. 581). (A. 231). Thus, under either charter the bond validation process did not comply with law.

Because the bond ordinance called for an expenditure of more than $100,000 in the project's first year of operation, the City was required to hold a referendum approving the expenditure, declare it an emergency, or include it in an annual budget. The City chose the latter, but in passing the budget as an emergency ordinance, it violated the Charter's requirements that the nature of the purported "emergency" be made known and that the public be notified that the budget's passage was subject to review. Alternatively, the City did not comply with the requirements of the 1955 Charter that ordinances be posted in three public places and that emergency ordinances specify the emergency. This illegal passage of the budget voided the budget ordinance and accordingly invalidated the bond ordinance considered below, and must not be countenanced by this Court.

CONCLUSION

Based on the foregoing, Warner respectfully requests the Court to reverse the trial court's finding that the City's cable television system serves a public purpose and that the City has complied with all the requirements of law for issuance of the revenue bonds to fund that project. Therefore, the Court is requested to invalidate the bond issue. In the alternative, Warner requests the Court to void and reverse the trial court's judgment and the rulings on Warner's affirmative defenses and remand this matter for further hearing.

Respectfully submitted,

JAMES E. MOORE, JR.
MOORE & MOORE, P.A.
Post Office Box 746
Niceville, Florida 32578
(904) 678-1121

RALPH A. PETERSON
BEGGS & LANE
Post Office Box 12950
Pensacola, Florida 32576-2950
(904) 432-2451

ATTORNEYS FOR APPELLANT

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Drew S. Pinkerton, Esquire, Assistant State Attorney, Okaloosa County Courthouse Annex, Shalimar, FL 32579, Gillis E. Powell, Sr., Esq., of Powell, Powell & Powell, P. O. Box 277, Niceville, FL 32578, and Don J. Caton, Esquire and William D. Wells, Esquire, Esquire, Office of the City Attorney, Pensacola City Hall, Pensacola, FL, by HAND DELIVERY this 23rd day of September, 1987.

James E. Moore
MOORE & MOORE P.A.
P. O. Box 746
102 Bayshore Drive
Niceville, Florida 32578
(904) 678-1121