IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,743

FLORIDA POWER CORPORATION,	)
	)
Appellant,	)
	)
v.	)
	)
SEMINOLE COUNTY and CITY OF LAKE MARY,	)
	)
	)
Appellees.	)
	)

AMICUS CURIAE BRIEF OF FLORIDA POWER & LIGHT COMPANY

ON ORDER ACCEPTING JURISDICTION TO REVIEW A FINAL JUDGMENT OF THE CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA, CERTIFIED BY THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT, AS PASSING UPON A QUESTION OF GREAT PUBLIC IMPORTANCE REQUIRING IMMEDIATE RESOLUTION

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EXPLANATION OF REFERENCES

References to the record on appeal will be indicated as "R. ___." Pages from the transcript of the trial court proceedings on July 26 and 27, 1990, will be referred to as "Tr. ___." Pages from the transcript of the trial court proceedings on August 6, 1990, consisting of closing arguments, will be referred to as "Cl. ___." Trial exhibits will be referred to as "Pl. Ex. ___." Defendants' trial exhibits will be referred to as "Def. Ex. ___."

INTRODUCTION

The amicus curiae, Florida Power & Light Company ("FPL"), supports the appellant, Florida Power Corporation ("FPC"), and urges the Court to reverse the erroneous final judgment of the trial court and declare invalid and unconstitutional the subject ordinances of appellees, Seminole County ("the County"), and City of Lake Mary ("the City"). Accompanying this brief is a motion for leave to file same pursuant to Rule 9.370, Florida Rules of Appellate Procedure.

INTEREST OF AMICUS CURIAE

The amicus curiae and its ratepayers will suffer catastrophic consequences unless the final judgment on appeal is reversed. Like the appellant, FPL is an investor owned public utility regulated by the FPSC pursuant to Chapter 366, Florida Statutes. FPL provides electric service to nearly half of the population of Florida, including inhabitants of thirty-five (35) Florida counties and over 160 municipalities. In fulfilling its statutory obligation to provide reasonably sufficient, adequate and efficient electric service without undue preference to any person or locality, FPL employs overhead construction as its standard throughout the state and has over 36,000 miles of overhead distribution facilities. It has over 5,000 miles of overhead transmission lines. As a matter of necessity, FPL utilizes many state, county and municipal road rights-of-way for its facilities.

Local governments have attempted to regulate FPL utility installations on public right-of-way and obtain preferential treatment, including conversion of FPL's facilities from overhead to underground, without paying for the resulting cost. FPL has successfully resisted and defended against such attempts on the grounds that they constitute unlawful interference with the exclusive and superior jurisdiction of the FPSC and contravene the anti-preference provisions of Section 366.03, Florida Statutes (1989).

If the final judgment at issue in this appeal is affirmed, local governments in FPL's vast service area are sure to enact ordinances similar to the ordinances of appellees. If such ordinances are declared valid by this Court, the cost of providing electric service to nearly half the population of Florida will increase drastically. It is estimated that the conversion to underground of FPL's overhead distribution facilities alone would cost eighteen (18) billion dollars, at a minimum. If transmission lines are included -- which is possible since the ordinances in question pertain to "utilities" and "utility lines" -- the increased costs would be substantially higher.

If this occurs, and the local governments requiring such costs do not have to pay for them, FPL and millions of Floridians will incur billions of dollars in costs without any increase in the availability of electric service to the general public. Further, the public would suffer this injury due to parochial interests of local governments seeking to receive something for nothing, and without any input whatsoever by the state agency empowered by the legislature with the exclusive and superior jurisdiction to regulate such matters uniformly for the protection of the public welfare on a statewide basis.

STATEMENT OF THE CASE AND THE FACTS

Appellant, FPC, is an investor owned public electric utility regulated by the FPSC pursuant to Chapter 366, Florida Statutes. FPC utilizes public right-of-way along Lake Mary Boulevard for the purpose of supplying electric power pursuant to a franchise agreement with the City, for which the City is paid a fee. (Pl. Ex. 4). FPC also utilizes County road right-of-way for its facilities pursuant to right-of-way utilization permits issued by the County. (Def. Ex. 2).

Located within the Lake Mary Boulevard right-of-way is an FPC overhead distribution line, which is the standard form of service provided by FPC in meeting its statutory duty to provide "reasonably sufficient, adequate, and efficient service." § 366.03, Fla. Stat. (1989).

In 1989, the City and County passed ordinances creating the Lake Mary Boulevard Designated Gateway Corridor -- referred to as "the beautification ordinance" -- for purposes of enhancing the aesthetic appearance and functional capacity of the roadway. (Pl. Ex. 1; Pl. Ex. 5; Tr. 118-20, 124-26, 133-34, 221-22; Cl. 59-60).

The City ordinance contained a provision requiring that all utility lines located in the corridor which were required to be relocated due to the widening of Lake Mary Boulevard, and all utility lines installed in the corridor after the date of the ordinance, had to be constructed underground.

(Pl. Ex. 5, Section 1). This ordinance further provided that the cost of said construction must be borne by the utilities and shall not be charged against the City. (Id. at Section 3).

The County ordinance contained a provision requiring that "all new or relocated utility lines within the designated corridor shall be constructed and installed" underground, unless the County determines it is "unreasonable and impracticable" to do so. (Pl. Ex. 1, Section 5.38.9). The County also passed another ordinance requiring the installation of underground lines "as a condition on the issuance of a right-of-way utilization permit." (Pl. Ex. 3). Neither County ordinance provides who must bear the cost of undergrounding, but the County has refused to pay for it.

The City and County admit that the planned improvements to Lake Mary Boulevard can be accommodated by relocating FPC's overhead distribution line to new right-of-way acquired within the corridor and that there was "no physical, engineering or road construction impediment to . . . keeping the power lines overhead as they have always been." (Tr. 220.) Nevertheless, they demanded that FPC convert its overhead distribution facilities to underground facilities pursuant to the ordinances in question and refused to pay the cost differential between relocation of the overhead line and conversion of said line to an underground system. This cost is a staggering $1,250,000. (Tr. 56).

FPC filed a complaint in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida, seeking a declaratory judgment declaring the ordinances unconstitutional and invalid, and an injunction enjoining their enforcement. The City and County counterclaimed, seeking a declaratory judgment declaring the validity of the ordinances and an injunction requiring FPC to underground its line.

In the trial court proceedings, FPC maintained that the ordinances unlawfully regulate matters preempted to the FPSC by the Florida Legislature, that they conflict with the exclusive, statewide jurisdiction of the FPSC over public utility regulation, that they contravene the anti-preference provisions in Section 366.03, Florida Statutes (1989), that the City and County lacked authority to require undergrounding, and that the ordinances breach and unconstitutionally impair FPC's franchise agreement with the City.

The City and County argued that the legislature has not preempted this area of utility regulation to the FPSC, that their ordinances do not conflict with FPSC jurisdiction, that they have the authority to require undergrounding as a form of relocation under Section 337.403(1), Florida Statutes (1989), and that the ordinances do not breach the franchise agreement since FPC took that agreement subject to the statutory law which they claim authorizes them to require undergrounding of FPC's lines at no cost to them.

The trial court rejected FPC's claims, holding that Section 337.403(1) authorizes the undergrounding required by the ordinances, that the ordinances do not conflict with the authority of the FPSC but are "part of the police power granted to local governments by the legislature," and that the cost of removal or relocation must be borne by FPC and not the taxpayers. (R. 566-67). The trial court entered a final judgment which ordered FPC to underground its line as directed by the City and County or remove it from the right-of-way. (R. 567-68).

SUMMARY OF ARGUMENT

The provision of electrical service to all Florida citizens is obviously a matter of great public importance. As a result, the Florida Legislature enacted Chapter 366, Florida Statutes in the "exercise of the police power of the state for the protection of the public welfare." § 366.01, Fla. Stat. (1989). Chapter 366 grants the FPSC broad jurisdiction and powers to regulate the rates and service of public electric utilities throughout the State of Florida. § 366.04(1), Fla. Stat. (1989). As explicitly stated by the legislature, this jurisdiction is exclusive and superior to that of counties and municipalities. Id.

In 1989, the Florida Legislature amended Section 366.04, which sets forth the jurisdiction of the FPSC, by adding subsection seven. This statute granted the FPSC exclusive jurisdiction to determine the cost-effectiveness of requiring the installation of underground electric transmission and distribution facilities in three situations: "for all new construction, . . . for the conversion of overhead . . . facilities to underground facilities when such facilities are replaced or relocated," and for the conversion of existing overhead facilities (not being replaced or relocated). § 366.04(7)(a) and (b), Fla. Stat. (1989). If the FPSC determines undergrounding is cost-effective in either of the first two situations based on criteria provided in the statute, the FPSC is mandated by the legislature to require

such undergrounding "where feasible." § 366.04(7)(a), Fla. Stat. (1989).

As directed by the legislature, the FPSC has studied the cost-effectiveness of requiring underground facilities based on the criteria set forth in Section 366.04(7)(a), and on June 28, 1990, issued an "Order on the Investigation Into Underground Wiring." (Pl. Ex. 8). This order stated there were too many unresolved and undeveloped issues and not enough evidence to reach a "pivotal" decision on undergrounding by the July 1, 1990 deadline imposed in Section 366.04(7). (Id. at p. 16). However, in response to the expressed desires of municipal utilities to make their own determinations on undergrounding, the FPSC firmly concluded that its jurisdiction was "exclusive, not supplemental or complementary." (Id.)

Appellees' ordinances clearly interfere and conflict with the FPSC's exclusive jurisdiction over rates, service and undergrounding. They decide the very issues currently being addressed by the FPSC pursuant to Section 366.04(7)(a) by requiring undergrounding for new construction, or when existing overhead facilities are relocated, at no cost to appellees.

Appellees admit the exclusivity of the FPSC's jurisdiction over rates, admit they cannot tell utilities how to install their lines and further admit their ordinances dictate the nature of service provided by utilities, yet deny

the ordinances interfere with FPSC jurisdiction. This denial ignores the plain language of Chapter 366, the interrelationship between rates and service, the undeniable adverse impact of the ordinances on FPSC regulation of those matters and appellees' own admissions.

The ordinances also contravene the anti-preference provisions in Section 366.03, Florida Statutes, in that they require utilities to provide underground service for free, which mandates an advantage for appellees that other persons and localities do not enjoy.

Appellees' reliance on Section 366.11(2), Florida Statutes, is misplaced. That provision does not grant appellees authority, nor lessen the FPSC's exclusive jurisdiction, to regulate rates, service or undergrounding requirements for public electric utilities.

The same is true for appellees' reliance on Section 337.403(1), Florida Statutes. That provision requires utilities to remove or relocate their lines, poles and other structures only if they are unreasonably interfering with a public road in the manner described in the statute. Appellees did not establish that it was necessary for FPC to install its existing overhead line underground in order to accomodate their construction plans. In fact, they admitted their plans could be carried out by moving the overhead line to a different location within the road right-of-way.

Even assuming arguendo that appellees did make the required showing of unreasonable interference under this statute, it still does not authorize appellees to require the conversion of FPC's line from overhead to underground. The legislature has made a distinction between the relocation of utilities under 337.403(1) and the conversion of overhead facilities to underground facilities under 366.04(7). Appellees' argument renders this distinction meaningless. It would also allow the absurd possibility that local governments could block an FPSC order to install underground facilities under Section 366.04(7) by enacting an ordinance prohibiting such installation. Clearly, this would interfere and conflict with the legislature's mandate in Section 366.04(7).

This Court must reverse the final judgment and hold the subject ordinances unconstitutional and invalid. If this does not occur, local governments throughout Florida are sure to begin regulating public utilities' rates, service and undergrounding requirements as appellees have done or in some other way. This would destroy the FPSC's exclusive jurisdiction and powers to regulate public utilities uniformly for the welfare of all Florida citizens, who would suffer greatly from the astronomical and unnecessary costs that would accompany such unauthorized regulation. This cannot and must not be allowed.

ARGUMENT

I.

The FPSC's Jurisdiction and Powers to Regulate Public Electric Utilities are Exclusive and Preemptive

The Florida Legislature enacted Chapter 366, Florida Statutes in the "exercise of the police power of the state for the protection of the public welfare" and stated that the provisions of that chapter "shall be liberally construed for the accomplishment of that purpose." § 366.01, Fla. Stat. (1989).

In furtherance of such statewide power and purpose, the legislature granted the FPSC "jurisdiction to regulate and supervise each public utility with respect to its rates and service . . . ." § 366.04(1), Fla. Stat. (1989). The legislature explicitly provided that it was preempting any and all other regulation of public electric utilities in the State of Florida, including any regulation by counties and municipalities: "The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail." § 366.04(1), Fla. Stat. (1989).[1/]

1/ All emphases to quotations are added unless otherwise noted.

The FPSC has broad powers in the exercise of its exclusive and superior jurisdiction, including:

> [the] power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; . . . and to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter.

§ 366.05, Fla. Stat. (1989).

In addition to being broad, the FPSC's jurisdiction and powers govern areas that are interrelated, requiring the FPSC to mandate changes in one area of regulation in order to regulate other areas. For example, in fixing just and reasonable rates, the FPSC considers "the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public . . . ." § 366.041(1), Fla. Stat. (1989); see also § 366.06(1), Fla. Stat. (1989). If the Commission finds that the practices of a public utility affecting its rates are unjust, unreasonable or unjustly discriminatory, or that the service rendered by the utility is inadequate, the Commission must hold a public hearing and thereafter "determine just and reasonable rates . . . for such service and promulgate rules and regulations affecting equipment, facilities and service to be

thereafter installed, furnished and used." § 366.06(2), Fla. Stat. (1989); see also § 366.07, Fla. Stat. (1989).

Another example pertains to the Commission's jurisdiction to plan, develop and maintain a coordinated statewide energy grid of generation, transmission and distribution facilities. §§ 366.04(2)(c) and 366.04(5), Fla. Stat. (1989). If the Commission determines there is probable cause to believe the grids are inadequate, it has the power to require installation or repair of necessary facilities and to apportion the costs thereof. § 366.05(8), Fla. Stat. (1989). Thus, the various areas of FPSC regulation are inextricably interrelated, and the FPSC's exclusive jurisdiction over all areas must be left unfettered by local regulation if it is to perform its function of statewide regulation for the welfare of the general public throughout the state.

II.

The Florida Legislature Has Granted the FPSC Exclusive Jurisdiction to Determine the Very Issues Decided by Appellees' Ordinances

Part of the Commission's exclusive jurisdiction under Chapter 366 is to determine whether undergrounding of transmission and distribution facilities is cost-effective and should be required for installation of new construction, conversion of existing overhead facilities upon their replacement or relocation, and/or conversion of existing

overhead facilities (not being replaced or relocated). § 366.04(7), Fla. Stat. (1989). If the FPSC finds that undergrounding is cost-effective based on criteria set forth in the statute the FPSC must require electric utilities, where feasible, to install underground facilities. § 366.04(7)(a), Fla. Stat. (1989).

The FPSC conducted the study required by Section 366.04(7) and issued its "Order on the Investigation Into Underground Wiring" on June 28, 1990. (Pl. Ex. 8) The order stated there were many unresolved and undeveloped issues, and concluded there was insufficient evidence "upon which a pivotal decision regarding underground wiring can be made." (Id. at p. 16). It also stated the FPSC was requesting further direction from the legislature on certain policies which affect the determination of cost-effectiveness required by Section 366.04(7). (Id.). One conclusion firmly reached by the FPSC in this order, however, was that the legislature granted "exclusive, not supplemental or complementary, jurisdiction to the Commission concerning the determination of the cost-effectiveness of undergrounding." (Id.).

III.

Appellees' Ordinances are Unconstitutional and Invalid Because They Are Preempted by the Exclusive Jurisdiction of the FPSC and Because They Are Inconsistent With and Prohibited by General State Law

The broad and exclusive jurisdiction and powers of the FPSC set forth above demonstrate that the Florida Legislature

has specifically preempted the regulation of public electric utilities' rates and service to the FPSC, including the issues of whether to require undergrounding of new facilities or of existing overhead facilities upon their relocation. The City and County ordinances conflict and interfere with this exclusive jurisdiction of the FPSC by requiring a form of service -- undergrounding -- which only the FPSC can require if it makes the statutorily mandated determinations of cost-effectiveness and feasibility based on the criteria provided by the legislature. Therefore, appellees' ordinances are unconstitutional and invalid under Article VIII, Sections 1(g) and 2(b), Florida Constitution, Sections 125.01(1) and (1)(w) and 166.021(1), (3)(c) and (4), Florida Statutes (1989), and the additional authorities set forth in Sections A, B and C of Point Two in FPC's initial brief in this appeal.

IV.

Appellees' Ordinances Contravene Section 366.03 by Requiring a Preference to Their Localities

FPC and every other public utility has a statutory duty to furnish "reasonably sufficient, adequate, and efficient service upon terms as required by the [FPSC]" without making or giving "any undue or unreasonable preference or advantage to any person or locality, or subject[ing] the same to any undue or unreasonable prejudice or disadvantage in any respect." § 366.03, Fla. Stat. (1989).

Appellees' ordinances contravene this statute by requiring FPC to provide free underground service to their localities, which is more advantageous than the terms required by the FPSC for such service to other localities. Therefore, the ordinances are invalid and unconstitutional under the authorities set forth in Section III above and the additional authorities set forth in Section D of Part Two in FPC's initial brief in this appeal.

V.

Appellees' Arguments Are Factually and Legally Flawed

The arguments advanced by appellees and relied upon by the trial court are factually and legally flawed. They also contain admissions and contradictions which demonstrate the incorrectness of the final judgment on appeal.

A. Preemption

1. Appellees' Ordinances Invade the FPSC's Exclusive Jurisdiction Over Rates

Appellees admit that the FPSC's jurisdiction is exclusive and preemptive as to rates. (Tr. 41-42). However, they maintain that their ordinances do not invade this area of exclusive FPSC jurisdiction because nothing prevents the FPSC from determining how the cost of compliance with the ordinances will be borne by FPC and its ratepayers. (Id. at 42-44; Cl. 65). This argument is absurd. It simply cannot be denied that the ordinances invade, impair, and are

inconsistent with the FPSC's jurisdiction over rates. They require undergrounding of lines at tremendous expense which, contrary to existing FPSC policy, can only be borne by utilities and their ratepayers, not by the person requesting such service.

As set forth above, the FPSC's jurisdiction and powers over rates and service are inextricably intertwined. The FPSC must, and does, have jurisdiction to control the sufficiency, adequacy and efficiency of service facilities as part of its rate-setting jurisdiction. If this were not true, local governments could require outrageously expensive forms of service which go far beyond the statutory requirement and FPSC rules and regulations, and the FPSC would be powerless to do anything but continue to raise rates to pay for the costs of such service. Obviously, this is not a correct interpretation of the law. If it was, however, which is what appellees would have this Court believe, it could not be denied that it would have a strangling effect on the FPSC's jurisdiction over rates.

In fact, appellees have admitted as much. In the trial court, appellees sought to allay the court's concern that it was being asked to decide "a question of what is reasonable in terms of undergrounding and what a reasonable cost might be", thus linking the reasonableness of the service and its cost. (Tr. 43). Significantly, appellees asserted that this

was "a question for the [FPSC]." (Id.). They went on to state:

> that a power company does not have the right to implement and use exorbitant, costly facilities when they are trying to accomplish some purpose. In other words, they can't go out and put in an expensive underground system and then go and expect the [FPSC] to put that into their rate base. They have to be prudent when they make that kind of capital expenditure . . . .

(Id. at 43-44).

This statement recognizes that the FPSC's jurisdiction over rates amounts to more than simply increasing them whenever capital expenditures are made. It admits that the Commission has the jurisdiction to decide whether the expenditure is prudent as part of its rate-making function under the regulatory scheme created by the legislature and the Commission. It also recognizes that appellees are requiring a costly, unnecessary expenditure, which underscores why the issue of undergrounding is and must be within the FPSC's exclusive jurisdiction over rates and service. Most if not all local governments will require undergrounding regardless of whether it is cost-effective and feasible if they do not have to be concerned with paying for it.

2. There Is Explicit Statutory Authority Preempting Appellees' Ordinances

Appellees argue there is no specific statutory authority preempting their ordinances. (Tr. 40). This is not true. As set forth above, Section 366.04(1) specifically provides

that the jurisdiction of the Commission is exclusive and superior to municipalities and counties, and it is clear that the ordinances invade such exclusive jurisdiction in the area of rates, service and undergrounding.

Appellees also argue that Section 366.04(7) does not specifically preempt local government authority over zoning and use of roadways. (Cl. 54; Appellees' Response to Suggestion for Direct Certification to the Supreme Court, p. 3). This argument misinterprets the legal requirement for preemption, the language of Section 366.04(7) and the context in which it exists. "Preemption need not be explicit so long as it is clear that the legislature clearly preempted local regulation of the subject." Barragan v. City of Miami, 545 So.2d 252, 254 (Fla. 1989). In this case, it is not necessary that Section 366.04(7) specify each and every aspect of local government authority which is preempted by its provision for FPSC jurisdiction over undergrounding. It is enough that this provision confers jurisdiction on the Commission to determine the cost-effectiveness and feasibility of the very act required by appellees' ordinances, which jurisdiction is exclusive and superior to that of appellees under Section 366.04(1).

3. Section 366.11(2) Does Not Exempt Appellees From the FPSC's Exclusive Jurisdiction Over Rates, Service and Undergrounding

Appellees argue that Section 366.04(7) does not preempt their ordinances because Section 366.11(2), Florida Statutes

(1989), provides that "Nothing herein shall restrict the police power of municipalities over their streets, highways, and public places or the power to maintain or require the maintenance thereof . . . ." (Cl. 54; Appellees' Response to Suggestion for Direct Certification to the Supreme Court, pp. 3-4). This argument is fallacious.

Appellees admit that Section 366.11(2) does not eliminate the FPSC's exclusive jurisdiction to set rates. This is no less true for its exclusive jurisdiction over service and undergrounding. It is inconceivable that the legislature would explicitly grant the FPSC exclusive jurisdiction over such matters and then eliminate the superiority of that jurisdiction within municipal road right-of-way without equally explicit language.

The legislature clearly contemplated public utility use of municipal roads. Included in the municipal police power rights protected in Section 366.11(2) is the right to receive revenue from public utilities pursuant to franchise agreements. This is the type of right protected by Section 366.11(2), not rights belonging solely to the FPSC under Chapter 366.

The legislature further contemplated FPSC regulation of public utility facilities located in municipal roadways. In fact, one of the factors which the FPSC must consider in weighing the cost-effectiveness of undergrounding is "vehicular accidents involving distribution and transmission

facilities", which obviously pertains to facilities located in and along public roadways. § 366.04(7)(a), Fla. Stat. (1989). If the FPSC determines undergrounding is cost-effective based on this and other factors, the FPSC is mandated to require "electric utilities" (which includes municipal utilities under Section 366.02(2), Florida Statutes (1989)) to install undergrounding where feasible.[2/] Id.

Thus, the legislature clearly intended the FPSC's jurisdiction over undergrounding to be superior to municipal police power over roadways. Otherwise, municipalities could pass ordinances prohibiting underground service after being required to install same by the FPSC pursuant to the legislature's mandate in Section 366.04(7)(a).

4. Appellees Grossly Mischaracterized the Intent and Import of Certain Language Contained in an FPSC Order and Letter to the Florida Legislature

Appellees attempted to convince the trial court and Fifth District Court of Appeal that the FPSC has admitted that its jurisdiction over undergrounding is not preemptive. To support this argument, appellees grossly mischaracterized the very language of the FPSC's "Order on the Investigation Into Underground Wiring" which specifically concluded that the FPSC's jurisdiction over undergrounding was exclusive rather

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[2/] In its "Order on the Investigation Into Underground Wiring", the FPSC relied on this provision as evidence of the legislature's intent to grant the FPSC exclusive jurisdiction over undergrounding. (Pl. Ex. 8 at p. 16).

than supplemental or complementary as appellees argue. (Cl. 49-50; Appellees' Response to Suggestion for Direct Certification to the Supreme Court, pp. 4-5; Pl. Ex. 8 at 16).

Appellees also relied on a letter from the FPSC Chairman asking the legislature to provide "further policy direction" of its intent to preempt local codes and zoning requirements in the area of undergrounding. (Pl. Ex. 8 at pp. 20-21). Given the efforts of appellees, the importance of this issue and the cost incurred by the FPSC in defending its jurisdiction, it is entirely reasonable for the FPSC to ask the legislature for further direction so as to eliminate the uncertainty that appears to exist in the minds of some local government officials. This request reinforces the FPSC's long-standing position that its undergrounding jurisdiction is exclusive.

B. Section 337.403(1), Florida Statutes (1989)

In addition to their argument that the ordinances in question are not preempted by or in conflict with the jurisdiction of the FPSC, appellees rely on Section 337.403 (1), Florida Statutes (1989) as authority for their ordinances. (Tr. 48). This statute provides:

> **337.403 Relocation of utility; expenses. --**
>
> (1) Any utility heretofore or hereafter placed upon, under, over, or along any public road that is found by the authority to be unreasonably interfering in any way with the convenient, safe,

> or continuous use, or the maintenance, improvement, extension, or expansion, of such public road shall, upon 30 days' written notice to the utility or its agent by the authority, be removed or relocated by such utility at its own expense. . . .

Appellees' reliance on this statute is misplaced. It simply authorizes local governmental entities to request that electric transmission lines, pole lines, poles and other structures be removed from a public roadway or relocated therein by a utility at its own expense if they are "unreasonably interfering" with the roadway in the manner described in Section 337.403(1). This provision does not lessen the exclusivity and superiority of FPSC jurisdiction over rates, service and undergrounding.

The relocation of a utility pursuant to this provision refers only to a change in location of the existing structures and does not authorize local governments to mandate that existing overhead service be converted to underground service or any other form of service different than that which exists at the time of the request. This is made clear by subsection (3) of Section 337.403, which, referring to subsection (1), provides that: "Whenever an order of the authority requires such removal or change in the location of any utility from the right-of-way of a public road . . . ."

This interpretation is also evidenced by the legislature's distinction between "conversion" and "relocation" in Section 366.04(7)(a):

> (7)(a) By July 1, 1990, the commission shall make a determination as to the cost-effectiveness of requiring the installation of underground electric utility distribution and transmission facilities for all new construction, and for the conversion of overhead distribution and transmission facilities to underground distribution and transmission facilities when such facilities are replaced or relocated.

By using the term "conversion" to describe the undergrounding of overhead facilities when such facilities are "relocated," the legislature has made a clear distinction between these words. This distinction must be given effect since a statute must be construed "to give a meaning to every word and phrase in it." Vocelle v. Knight Brothers Paper Company, Inc., 118 So.2d 664, 667 (Fla. 1st DCA 1960); State ex rel. City of Casselberry v. Mager, 356 So.2d 267, 269 n.5 (Fla. 1978) ("statute should be interpreted to give effect to every clause in it"); Cilento v. State, 377 So.2d 663, 666 (Fla. 1979)("a statute should be construed so as to give effect to each and all of its provisions"). Since the legislature has specifically used the word "conversion" to mean a change from overhead service to underground service, that same definition should not be read into the different word "relocation." To do so would fail to give meaning to the difference in terminology chosen by the legislature, and thwart the legislative intent. See also Terrinoni v.

Westward Ho!, 418 So.2d 1143, 1146 (Fla. 1st DCA 1982)("Statutory language is not to be assumed superfluous").

Appellees admit they do not have "the authority to tell [FPC] how they are going to install their distribution lines" (Cl. 47 and 48), yet that is precisely what their ordinances do. They attempt to dance around this admission with the following argument:

> We do have the clear ability to tell them where to put it. Underground is a location. That is all we are saying, is that you've got to put it in a location. And that location is along the line of Lake Mary Boulevard. And it's below the surface of the Earth. That is what we are telling them to do. We are not trying to describe the nature of the physical structure of their lines anymore than the [FPSC] has the authority to do that.

(Cl. 48).

This argument is preposterous. There are major differences between relocating overhead lines to a different location and converting them to a materially different and drastically more expensive form of service such as undergrounding. This is recognized by the legislature and the FPSC. In fact, this was recognized by appellees when they argued to the trial court that Sections 337.401 and 337.403 specifically authorized them "to prescribe the nature of the service [and] where it will be located." (Tr. 40-41). Thus, appellees admit that their ordinances dictate the nature of the service provided by FPC, which is clearly a matter within the exclusive jurisdiction of the FPSC and which even appellees admit they cannot do.

Appellees' reliance on Section 337.403 is further flawed in that they failed to make any showing that undergrounding of FPC's overhead distribution line is necessary in order to resolve any unreasonable interference "with the convenient, safe, continuous use, or the maintenance, improvement, extension, or expansion" of Lake Mary Boulevard. See § 337.403(1), Fla. Stat. (1989). In fact, all the evidence was to the contrary. Appellees admitted that "the road can be designed with overhead utilities by relocating them within the right-of-way we have purchased" and that there was "no physical, engineering or road construction impediment to curing this congestion problem as quickly as possible by simply keeping the power lines overhead as they have always been." (Tr. 220). Appellees also admitted it did not matter to them from an engineering viewpoint whether FPC continued to use the road right-of-way or removed its facilities to some other right-of-way. (Id. at 209).[3/] Therefore, there is no factual predicate for appellees to require undergrounding of FPC's existing overhead distribution lines pursuant to Section 337.403.[4/]

[3/] In fact, appellees admitted that requiring removal of FPC's facilities might violate FPC's franchise agreement with the City. (Cl. 51).

[4/] This conclusion is further supported by the right-of-way utilization permit granted to FPC by the County, which provides: "In the event of widening, repair or reconstruction of such road or highway, upon reasonable notice, permitee shall move its facility to clear such construction . . . ." (Tr. 203). Here again, appellees admitted it is unnecessary to convert the existing overhead distribution line to an underground system in order to clear the planned construction.

It is clear that the reason appellees are requiring the undergrounding of FPC's overhead line is their concern with its appearance. (Tr. 118, 119-120, 124-125, 221-22; Cl. 59-60). Aesthetic concerns, however, are not among those listed in Section 337.403 as grounds for removal or relocation of a utility. Although appellees also stated safety concerns as a reason for the road widening, they were directed to traffic accidents related to congestion on Lake Mary Boulevard, not to the proximity of overhead structures along the road. (Tr. 45, 119-120, 133-34, 221-22).

The only other reason offered by appellees for the required undergrounding was that they intended to create a "canopy effect" to lower the temperature on the roadway through the planting of trees, which would require consistent maintenance to provide clearance from overhead lines. (Tr. 125-26, 143, 221-22). No evidence was presented, however, that appellees would bear the responsibility of such maintenance. In addition, appellees stated that their goal was to "have the appearance of Lake Mary enhanced and maintained consistent with the way it's been historically." (Cl. 59-60). Once again, undergrounding FPC's lines is completely unnecessary to this goal since these lines have existed along Lake Mary Boulevard in an overhead capacity since they were installed approximately twenty-seven years ago.

CONCLUSION

The final judgment of the trial court should be reversed, and this Court should declare appellees' ordinances unconstitutional and invalid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ned M. Julian, Jr., Esquire, Stenstrom, McIntosh, Julian, Colbert, Whigham & Simmons, P.A., P.O. Box 1330, Sanford, Florida 32772-1330; Lonnie N. Groot, Assistant County Attorney, Seminole County, Seminole County Services Bldg., 1101 East First Street, Sanford, Florida 32771; Davisson F. Dunlap, Jr., Esquire, 300 E. Park Avenue, Tallahassee, Florida 32301, and Robert W. Pass, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., One Harbour Place, P.O. Box 3239, Tampa, Florida 33601, this 16th day of November, 1990.

Ron A. Adams