SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION, Appellant, vs. SEMINOLE COUNTY and CITY OF LAKE MARY, Appellees.	)	CASE NO. 76,743

AMICUS BRIEF OF FLORIDA LEAGUE OF CITIES, INC. IN SUPPORT OF APPELLEE CITY OF LAKE MARY

Harry Morrison, Jr.
General Counsel
Florida League of Cities, Inc.
Post Office Box 1757
Tallahassee, Florida 32302
Florida Bar No. 339695

Kraig A. Conn
Assistant General Counsel
Florida League of Cities, Inc.
Post Office Box 1757
Tallahassee, Florida 32302
Florida Bar No. 0793264

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
INTRODUCTION	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
Introduction	4
Point One	5
A Municipality May Pass An Ordinance That Requires An Electric Utility To Place Its Transmission Lines Underground Because The Ordinance Serves A Municipal Purpose And The Ordinance Is Not Prohibited By Law.	
A.	10
Appellees' Ordinances Serve A Municipal Purpose.	
B.	11
Appellees Ordinances Are Not Prohibited By Law.	
1.	11
Appellees' Authority Has Not Been Preempted By State Law.	
2.	15
Appellees' Ordinances Do Not Conflict With State Law.	

Point Two 17

Appellees' Ordinances Do Not Breach Their Franchises With Appellant And Do Not Unconstitutionally Impair Appellant's Rights Under The Franchises.

CONCLUSION 18

CERTIFICATE OF SERVICE 20

TABLE OF CITATIONS

Page

Cases

Anderson v. Fuller, 51 Fla. 380, 41 So. 684 (1906) 18

Atlantic CLR Co. v. Boyd, 102 So.2d 709 (Fla. 1958) 14

Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989). . . . 12

Belcher Oil Company v. Dade County,
271 So.2d 118 (Fla. 1972) 10

Capital City Light and Fuel Co. v. Tallahassee,
42 Fla. 462, 28 So. 810 (1900), Affd 186 U.S. 401,
46 L.Ed. 1219, 22 S.Ct. 866 17

Brooks v. Anastasia Mosquito Control Dist.,
148 So.2d 64 (Fla. 1st DCA 1963) 14

Carson v. Miller, 370 So.2d 10 (Fla. 1979) 14

City Gas Co. v. Peoples Gas System, Inc., 182 So.2d
429 (Fla. 1965) 13

City of Boca Raton v. Gidman, 440 So.2d 1277
(Fla. 1983) 11

City of Clearwater v. Caldwell, 75 So.2d 765
(Fla. 1954) 5, 6

City of Jacksonville v. Reynolds, Smith & Hills,
424 So.2d 63 (Fla. 1st DCA 1982) 14

City of Lake Wales v. Lamar Advertising,
414 So.2d 1030 (Fla. 1982) 11

City of Miami v. Bus Benches Co., 174 So.2d 49
(Fla. 3rd DCA 1965) 17

City of Miami v. South Miami Coach Lines, 59 So.2d 52
(Fla. 1952) 17

City of Miami Beach v. Frankel, 363 So.2d 555
(Fla. 1978) 9

City of Miami Beach v. Rocio Corp., 404 So.2d 1066
(Fla. 3rd DCA 1981) 10, 14, 16

City of Miramar v. Bain, 429 So.2d 40 (Fla. 4th DCA 1983). . 14

City of Port Orange v. Leechase Corp., 430 So.2d 534 (Fla. 5th DCA 1983) 14

City of Tampa v. Birdsong Motors, 261 So.2d 1 (Fla. 1972) 10

City of Venice v. Valente, 429 So.2d 1241 (Fla. 2nd DCA 1983) 14

City of Winter Park v. Montesi, 448 So.2d 1242 (Fla. 5th DCA 1984) 11

Edwards v. State, 422 So.2d 84 (Fla. 2nd DCA 1982) 16

Englewood Water Dist. v. Tate, 334 So.2d 626 (Fla. 2nd DCA 1976) 13

Florida Power & Light Co. v. City of Miami, 72 So.2d 270 (Fla. 1954) 11

Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799 (Fla. 1984) 18

Haines v. Certain Lands, 130 Fla. 379, 178 So. 143 (1937) 5

Harnett v. Austin, 93 So.2d 86 (Fla. 1956) 17

Heriot v. City of Pensacola, 108 Fla. 480, 146 So. 654 (1933) 6

Laborers International Union of North America, Local 478 v. Burroughs, 541 So.2d 1160 (Fla. 1989) 16

Lake Worth Utilities Authority v. City of Lake Worth, 468 So.2d 215 (Fla. 1985) 9, 15

Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977). . 18

Pensacola Gas Co. v. Provisional Municipality of Pensacola, 33 Fla. 322, 14 So. 826 (1894) 17

Peoples Gas System, Inc. v. Lynch, 254 So.2d 371 (Fla. 3rd DCA 1971), cert. denied 267 So.2d 81 19

Pinellas County v. General Telephone Co., 229 So.2d 9 (Fla. 2nd DCA 1969) 17

Plant City v. Mayo, 337 So.2d 966 (Fla. 1976) 19

Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989) 13

Rolling Oaks Homeowners Association v. Dade County, 492 So.2d 686 (Fla. 3rd DCA 1986) 11

State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951). . . 9, 11

State v. City of Pensacola, 397 So.2d 922 (Fla. 1981). . . . 14

State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978) 8, 9

State v. Division of Bond Finance, 495 So.2d 183 (Fla. 1986) 10

State ex rel. Buford v. Pinellas County Power Co., 87 Fla. 253, 100 So.2d 504 (1924) 17

Storey v. Mayo, 217 So.2d 304 (Fla. 1968), cert. denied 395 U.S. 909, 23 L.Ed.2d 222, 89 S.Ct. 1751 (1969) 13

Thayer v. State, 335 So.2d 815 (Fla. 1976) 14

Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984) 12

Tyson v. Lanier, 156 So.2d 833 (Fla. 1963) 13

Florida Statutes

Sec. 24.122(3), Fla. Stat. 15
Sec. 166.021, Fla. Stat. 6
Sec. 166.021(1), Fla. Stat. 6, 9, 13, 14
Sec. 166.021(2), Fla. Stat. 9, 11
Sec. 166.021(3), Fla. Stat. 8
Sec. 166.021(3)(b), Fla. Stat. 10, 13, 14
Sec. 166.021(3)(c), Fla. Stat. 10, 13, 14
Sec. 166.021(4), Fla. Stat. 6
Sec. 166.042(1), Fla. Stat. 8
Sec. 166.042(4), Fla. Stat. 7
Sec. 166.043(1), Fla. Stat. 15
Ch. 167, Fla. Stat. (repealed) 8
Ch. 168, Fla. Stat. (repealed) 8
Ch. 169, Fla. Stat. (repealed) 8
Ch. 172, Fla. Stat. (repealed) 8
Ch. 174, Fla. Stat. (repealed) 8
Ch. 176, Fla. Stat. (repealed) 8
Ch. 178, Fla. Stat. (repealed) 8
Ch. 181, Fla. Stat. (repealed) 8
Ch. 183, Fla. Stat. (repealed) 8
Ch. 184, Fla. Stat. (repealed) 8
Ch. 366, Fla. Stat. 12, 16

Sec. 366.04(1), Fla. Stat. 12
Sec. 366.04(6), Fla. Stat. 15
Sec. 366.04(7), Fla. Stat. 13
Sec. 366.041, Fla. Stat. 18
Sec. 373.2295(10), Fla. Stat. 15
Sec. 553.98(3), Fla. Stat. 15

Florida Constitutional Provisions

Article I, Section 10, Fla. Const. (1968) 3, 17, 18
Article VIII, Section 2(b), Fla. Const. (1968) 6, 8
Article VIII, Section 8, Fla. Const. (1885) (repealed) 5

Other Authorities

Chapter 73-129, Laws of Florida 6, 8

Senate Joint Resolution 5-2X, (1968) 6

Florida Statutes Annotated, Preface 6

12 Fla.Jur.2d, Counties and Municipal Corporations,
Section 78. 5

Rhyne, The Law of Local Governmental Operations,
Sec. 1.1 (1980) 10

Black's Law Dictionary, 5th Edition (1979) 14

Louis C. Deal, "Post-Mortem - Home Rule", Florida Municipal
Record, November, 1980 6

Thomas Mattox, His Majesty's Historiographer,
Firma Burgi: or an Historical Essay Concerning the
Cities, Towns and Boroughs of England, taken
from record (1726). 4

INTRODUCTION

Amicus, FLORIDA LEAGUE OF CITIES, INC., adopts the Introduction as it appears in the Answer Brief of Appellee, City of Lake Mary.

STATEMENT OF CASE

Amicus, FLORIDA LEAGUE OF CITIES, INC., adopts the Statement of Case as it appears in the Answer Brief of Appellee, City of Lake Mary.

STATEMENT OF THE FACTS

Amicus, FLORIDA LEAGUE OF CITIES, INC., adopts the Statement of the Facts as it appears in the Answer Brief of Appellee, City of Lake Mary.

SUMMARY OF ARGUMENT

The issue sub judice is whether a municipality in Florida may pass legislation that requires an electric utility to place its transmission lines underground.

Florida law permits a municipality to pass such an ordinance if the ordinance serves a municipal purpose and the ordinance is not otherwise prohibited by law.

Amicus submits Appellee's ordinance serves a municipal purpose and is not otherwise prohibited by law.

Appellees' ordinances delve into a subject that clearly may be addressed by the state legislature and is clearly designed to address the health, safety and welfare of Appellees' respective citizens. Appellees' ordinances thus serve a "municipal purpose."

Appellees' ordinances are not prohibited by law because Appellees' authority to enact such ordinances has not been preempted by state law, the ordinances do not conflict with state law, and the ordinances do not unconstitutionally impair Appellant's rights under its franchises with Appellees.

In order to preempt Appellees' home rule authority to exercise its police power to regulate the conduct of third parties operating within Appellees' territorial boundaries, the legislature must expressly preempt Appellees' authority. The legislature has not to date exercised its prerogative to expressly preempt Appellees' home rule authority to enact ordinances that require an electric utility to underground its transmission lines.

Under Florida law, a conflict exists when an ordinance and a statute cannot "co-exist." The test of whether an ordinance and statute cannot "co-exist" is whether the person must violate the statute in order to comply with the ordinance. Appellees' ordinances do not conflict with state law because Appellant will not violate state law by complying with Appellees' ordinances.

While Appellees have the authority to grant Appellant a franchise to use its streets, Appellees have no authority to contract away their police powers. Appellees' enactment of legislation requiring Appellant to place its transmission lines underground are a reasonable exercise of Appellees' police powers. Appellees' enactment of such ordinances does not breach Appellant's franchise simply because the franchise cannot be construed to unequivocally excuse Appellants from police power ordinances adopted by Appellees. As such a right was not and could not be granted to Appellant in the first place, Appellees' ordinances do not impair any contractual rights protected under Art. I, Sec. 10, Fla. Const.

ARGUMENT

INTRODUCTION

"Whoso desireth to discourse in a proper manner concerning the incorporated towns and communities must take in a great variety of matter and should be allowed a great deal of time and preparation .... The subject is extensive and difficult." Thomas Mattox, His Majesty's Historiographer, Firma Burgi: or an Historical Essay Concerning the Cities, Towns, and Boroughs of England, taken from record. (William Boyer, London, 1726); Rhyne, The Law of Local Governmental Operations, Sec. 1.1 (1980).

Things haven't changed much since Mr. Thomas uttered these remarks in 1726: lawyers continue to be lawyers, and thus take relatively simple legal concepts and turn them into complex legal notions.

Amicus respectfully submits such is the case with the issue presently pending before the Court.

The issue sub judice is whether a municipality in Florida may pass legislation that requires an electric utility to place its transmission lines underground.

This issue is not nearly as complicated as Appellant would have this Court believe. This is no "$30 billion" question; rather, this is a question of whether a small municipality may respond to the needs and desires of its citizens. This Court need not delve into the manner in which this question has been addressed in other jurisdictions; this question simply involves the

application of Florida law and Florida law alone.

Amicus respectfully submits a Florida municipality may enact legislation that requires an electric utility to place its transmission lines underground. Amicus submits its position rests on the sound application of established constitutional, statutory and legal principles.

Point One

A Municipality May Pass An Ordinance That Requires An Electric Utility To Place Its Transmission Lines Underground Because The Ordinance Serves A Municipal Purpose And The Ordinance Is Not Prohibited By Law.

Under Art. VIII, Sec. 8, Fla. Const. (1885) (repealed), the authority of a municipality to manage the affairs of its citizens was severely restricted. Art. VIII, Sec. 8, Fla. Const. (1885), provided:

> The Legislature shall have power to establish, ... municipalities ..., to prescribe their jurisdictions and powers, and to alter or amend the same at any time....

Historically, Florida's municipalities were viewed as a creature of the state legislature, established for the more convenient administration of local government. 12 Fla.Jur.2d, Counties and Municipal Corporations, Sec. 78. Florida's courts thus expressed the view that municipalities could possess and exercise only those powers expressly granted by the legislature, those powers necessarily or fairly implied in or incident to the powers expressly granted, and those powers essential to the declared purposes of the municipality. Haines City v. Certain Lands, 130 Fla. 379, 178 So. 143 (1937); City of Clearwater v. Caldwell, 75 So.2d 765 (Fla. 1954). If reasonable doubt existed as to whether

a municipality could exercise a certain power, the doubt would, as a matter of law, be resolved against the municipality. Heriot v. City of Pensacola, 108 Fla. 480, 146 So. 654 (1933); Caldwell, supra.

The Legislature, in special session convened on June 24, 1968, adopted three Joint Resolutions which together proposed a general revision of Florida's 1885 Constitution. The proposals were submitted to and ratified by the voters on November 5, 1968. See Preface, Florida Statutes Annotated.

Art. VIII, Sec. 2(b), Fla. Const. (1968), included in SJR 5-2X (1968) and commonly referred to as Florida's Municipal Home Rule Amendment, in part provides:

> (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.

The legislative analysis of SJR 5-2X stated that "municipalities would be given additional powers to perform services unless specifically prohibited by law" and that the Home Rule Amendment "gives municipalities residual powers except as provided by law." See Louis C. Deal, "Post-Mortem - Home Rule", Florida Municipal Record, November, 1980.

In 1973, Florida's legislature enacted the Municipal Home Rule Powers Act (the Act). Ch. 73-129, Laws of Florida. Sec. 166.021(1), Fla. Stat., states:

> (1) 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 expressly prohibited by law. (Emphasis supplied).

The Act further states the provisions of Sec. 166.021, Fla. Stat., shall be construed so as to secure for municipalities the broad exercise of home rule powers granted by the Constitution. Sec. 166.021(4), Fla. Stat.

The Act likewise declares it is the intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not "expressly" prohibited by the Constitution, general or special law, or county charter, and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those "expressly" prohibited. Id. Additionally, the Act repealed all existing special acts, including charter provisions, pertaining exclusively to the power or jurisdiction of a particular municipality, save certain enumerated exceptions. Id. [1]

To insure it was understood the state legislature was out of

---

[1] Exceptions to this general repeal, and thus limitations on the exercise of municipal home rule power, are charter provisions:

a. which affect the exercise of extraterritorial powers or which affect an area which includes lands within and without a municipality;

b. which affect the creation or existence of a municipality, the terms of elected officers and the manner of their election, or the distribution of powers among elected officers; or

c. which affect matters relating to appointive boards, any change in the form of government, or any rights of municipal employees.

Changes to any of these charter provisions require approval by referendum of the electors. Sec. 166.042(4), Fla. Stat.

the business of municipal affairs, it repealed the majority of general laws that had authorized the exercise of municipal power prior to the Act. Sec. 166.042(1), Fla. Stat., provides:

> (1) It is the legislative intent that the repeal by chapter 73-129, Laws of Florida, of chapters 167, 168, 169, 172, 174, 176, 178, 181, 183 and 184 of Florida Statutes shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers. It is, further, the legislative intent to recognize residual constitutional home rule powers in municipal government, and the Legislature finds that this can best be accomplished by the removal of legislative direction from the statutes. It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above, but shall hereinafter exercise those powers at their own discretion, subject only to the terms and conditions they choose to prescribe.

In adopting the Act, the Legislature, in sum, recognized Art. VIII, Sec. 2(b), Fla. Const., generally granted to the legislative body of each municipality the power to enact legislation concerning any subject matter upon which the state legislature may act. Sec. 166.021(3), Fla. Stat.

Subsequently, in State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978), this Court held the only constitutional limitation placed on the authority of municipalities to conduct municipal government, perform municipal functions, and render municipal services, is that such power be exercised for a valid "municipal purpose" and municipalities are not dependent upon further authorization; legislative statutes are relevant only to determine limitations on the exercise of such authority.

Appellant initially urges Appellees have no authority to adopt an ordinance requiring an electric utility to place its

transmission lines underground because there is no statute "expressly" conferring such authority on Appellees. Amicus respectfully submits Appellees need not look to statutes for the express statutory authority for such an ordinance; rather, such authority is derived from Appellees' inherent power to meet municipal needs, Lake Worth Utilities v. City of Lake Worth, 468 So.2d 215 (Fla. 1985). State statutes are relevant only to determine the limitations on Appellee's authority. City of Sunrise, supra.

While Florida's constitution and legislature have granted municipalities broad home rule powers, their powers are not unlimited. Generally speaking, municipalities may exercise any power for "municipal purposes", "except when prohibited by law."

Sec. 166.021(2), Fla. Stat., defines "municipal purpose" to mean any activity or power which may be exercised by the state or its political subdivisions. This court has defined "municipal purpose" as all activities essential to the health, morals, protection, and welfare of the municipality. State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951).

Municipalities may be "prohibited by law" from exercising their home rule authority in a particular area under a variety of legal theories. Generally speaking, municipal home rule authority may be restricted by general or special law. Sec. 166.021(1), Fla. Stat.; City of Miami Beach v. Frankel, 363 So.2d 555 (Fla. 1978); Lake Worth Utilities, supra. The exercise of a municipality's home rule authority may likewise be restricted by Florida's

Constitution. Sec. 166.021(3)(b) and (c), Fla. Stat.; City of Tampa v. Birdsong Motors, 261 So.2d 1 (Fla. 1972); Belcher Oil Company v. Dade County, 271 So.2d 118 (Fla. 1972). Additionally, municipal ordinances are inferior to state law and must fail when a conflict arises. City of Miami Beach v. Rocio Corp., 404 So.2d 1066 (Fla. 3rd DCA 1981). Likewise, a municipality's power to regulate in a particular area may be preempted by general law. Sec. 166.021(3)(c), Fla. Stat.; Rocio Corp., supra.

It is to the above firmly established legal principles this Court must turn to decide whether a municipality may pass legislation that requires an electric utility to place its transmission lines underground. An affirmative answer to this question turns on an affirmative answer to the question of whether the legislation serves a "municipal purpose" and a negative answer to the question of whether there are any ascertainable constitutional or statutory inhibitions or restraints on the municipality's authority.

A.

Appellees' Ordinances Serve A Municipal Purpose.

The Court's initial question is whether an ordinance requiring an electric utility to underground its transmission lines serves a municipal purpose.

Legislative declarations of a public purpose are presumed valid and are to be considered correct unless patently erroneous. State v. Division of Bond Finance, 495 So.2d 183 (Fla. 1986). The courts simply will not dwell on the wisdom of legislative

enactments. Florida Power and Light Co. v. City of Miami, 72 So.2d 270 (Fla. 1954).

Even a cursory review reveals a number of presumptively valid municipal purposes served by such an ordinance: underground utilities may be viewed as more aesthetically pleasing than overhead utility lines; underground utilities may tend to minimize accidental electrocutions and vehicular accidents involving transmission lines; and underground transmission lines may tend to minimize outages due to storm damage and damages generally due to storms.

Appellees' ordinances delve into a subject that clearly may be addressed by the state legislature, Sec. 166.021(2), Fla. Stat., and is clearly designed to address the health, safety and welfare of Appellees' respective citizens, City of Jacksonville, supra. In sum, Appellees' ordinances clearly satisfy a "municipal purpose." City of Lake Wales v. Lamar Advertising, 414 So.2d 1030 (Fla. 1982); City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983); City of Winter Park v. Montesi, 448 So.2d 1242 (Fla. 5th DCA 1984); and Rolling Oaks Homeowners Association v. Dade County 492 So.2d 686 (Fla. 3rd DCA 1986).

B.

Appellees' Ordinances Are Not Prohibited By Law.

1.

Appellees' Authority Has Not Been Preempted By State Law.

Appellant alleges Appellees' ordinances must fall because Appellees' authority to enact the ordinances has been preempted to

the Public Service Commission (PSC) by Ch. 366, Fla. Stat.

Appellants cite Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984), and Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), for the proposition Ch. 366, Fla. Stat., preempts Appellees' authority to exercise its police power to require electric utilities to place transmission lines underground.

Cannella, supra, involved an ordinance defining the internal procedure in which the municipality would release records to the public. In other words, Cannella, supra, governed the extent to which a municipality could adopt ordinances defining the application of state law to the municipality's internal operating procedures. Barragan, supra, involved the extent to which a municipality could adopt an ordinance that offset its employees' pension benefits by workers' compensation benefits received by employees. Again, Barragan, supra, governed the extent to which a municipality could define the application of statutes to the municipality's internal operating procedures. The issue sub judice has nothing to do with the application of state law to a municipality's internal operation procedures; rather, the issue presently before the Court governs the authority of the municipality to exercise its police power to regulate the conduct of third parties operating within the municipality's territorial boundaries.

Appellants contend the legislature's acts of granting the PSC the "jurisdiction to regulate and supervise each public utility with respect to its rates and service ....", Sec. 366.04(1), Fla.

Stat., and of directing the PSC to study and possibly require the installation of underground transmission lines, Sec, 366.04(7), Fla. Stat., combined with the Courts' findings the legislature has granted the PSC extensive regulatory powers over public utilities, Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989); Storey v. Mayo, 217 So.2d 304 (Fla. 1968), cert. denied, 395 U.S. 909, 23 L.Ed.2d 222, 89 S.Ct. 1751 (1969); and City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965), dictate this Court hold the PSC has "exclusive" jurisdiction over Appellants and Appellees thus are preempted from passing legislation that requires Appellants to place their transmission lines underground.

Amicus respectfully submits any such preemption must be "express" and not "implied" or "inferred."

Sec. 166.021(1), Fla. Stat., provides a municipality may exercise any power for a municipal purpose "except when expressly prohibited by law." Sec. 166.021(3)(b) and (c), Fla. Stat., in part provide a municipality's legislative body has the power to enact legislation concerning any subject matter upon which the state legislature may act except "any subject expressly prohibited by the constitution", or except "any subject expressly preempted by the constitution or by general law."

The judiciary's primary role in reviewing statutes is to determine the intent of the legislature, Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); and if the intent of the legislature is clear and unmistakable from the language used, it is the court's duty to give effect to that intent. Englewood Water Dist. v. Tate, 334 So.2d

626 (Fla. 2nd DCA 1976). The legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in a statute. Thayer v. State, 335 So.2d 815 (Fla. 1976). Words of common usage should be construed in their plain and ordinary sense because it must be assumed the legislature knew the plain and ordinary meaning of the words used in the statute. Carson v. Miller, 370 So.2d 10 (Fla. 1979); Brooks v. Anastasia Mosquito Control Dist., 148 So.2d 64 (Fla. 1st DCA 1963). The courts are obliged to give meaning to all words chosen by the legislature in enacting a statute and may not construe a statute in a manner that effectively strikes or deletes words from the statute. Atlantic CLR Co. v. Boyd, 102 So.2d 709 (Fla. 1958).

Black's Law Dictionary, 5th Edition (1979), defines "express" to mean:

> Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctively and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The words is usually contrasted with "implied."

Florida's courts have time and time again given a plain meaning to the word "expressly" as used in Sec. 166.021(1) and (3)(b) and (c), Fla. Stat. State v. City of Pensacola, 397 So.2d 922 (Fla. 1981); City of Jacksonville v. Reynolds, Smith & Hills, 424 So.2d 63 (Fla. 1st DCA 1982); City of Venice v. Valente, 429 So.2d 1241 (Fla. 2nd DCA 1983); Rocio Corp., supra; City of Miramar v. Bain, 429 So.2d 40 (Fla. 4th DCA 1983); City of Port Orange v. Leechase Corp., 430 So.2d 534 (Fla. 5th DCA 1983).

The legislature clearly understands how to grant the PSC the "exclusive" jurisdiction to regulate and supervise each public utility with respect to its rates and service; see, for example, Sec. 366.04(6), Fla. Stat., granting the PSC the "exclusive" jurisdiction to prescribe and enforce safety standards for the transmission and distribution facilities of all electric utilities. It is likewise clear the legislature knows and understands how to "preempt" a particular area of regulation; see, for example, Sec. 373.2295(10), Fla. Stat., preempting to the state any regulation of the interdistrict transfer and use of groundwater; Sec. 24.122(3), Fla. Stat., preempting to the state the regulation of the lottery; and Sec. 553.98(3), Fla. Stat., preempting to the state the regulation of environmental radiation occurring as the result of radon. The Legislature likewise understands how to "prohibit" a local government from regulating in a particular area; see, for example, Sec. 166.043(1), Fla. Stat., prohibiting a municipality from adopting ordinances imposing price controls.

It is well within the authority of the legislature to prohibit a municipality from adopting an ordinance that requires an electric utility to place its transmission lines underground, Lake Worth Utilities, supra; the plain fact is the legislature has to date not exercised its prerogative to enact such a prohibition.

2.

Appellees' Ordinances Do Not Conflict With State Law.

Appellant contends Appellees' ordinances requiring it to

underground its transmission lines must fall because the ordinances conflict with Ch. 366, Fla. Stat.

The concept of conflict may be distinguished from the concept of preemption in that the latter effectively precludes all municipal regulation in a given area while the former permits municipal regulation, but only to the extent that it supplements state law. Edwards v. State, 422 So.2d 84 (Fla. 2nd DCA 1982); Rocio Corp., supra.

Amicus concedes an ordinance must fall if it conflicts with a statute. Rocio, supra. Under Florida law, a conflict exists when the ordinance and the statute cannot "co-exist." Laborers International Union of North America, Local 478 v. Burroughs, 541 So.2d 1160 (Fla. 1989). The test of whether an ordinance and statute cannot "co-exist" is whether the person must violate the statute in order to comply with the ordinance. Id.

Appellant has not brought to the Court's attention one instance in which it would violate state law by complying with Appellees' ordinances. If, for example, Appellees passed ordinances prescribing less stringent safety standards for magnetic fields around electric transmission lines than those prescribed by the PSC, then a conflict would obviously exist and Appellees' ordinances would obviously fall. However, Appellant's act of complying with Appellees' ordinances requiring it to underground its transmission lines simply will not cause Appellant to violate state law. A conflict thus does not exist.

Point Two

Appellees' Ordinances Do Not Breach Their Franchises With Appellant And Do Not Unconstitutionally Impair Appellant's Rights Under The Franchises.

Appellant alleges Appellees' enactment of legislation requiring Appellant to place its transmission lines underground breaches its franchises with Appellees and violates Art. I, Sec. 10, Fla. Const., in that it unconstitutionally impairs Appellant's rights under the franchises.

A franchise is generally viewed to be a contract, City of Miami v. South Miami Coach Lines, 59 So.2d 52 (Fla. 1952), and is subject to Art. I, Sec. 10, Fla. Const. City of Miami v. Bus Benches Co., 174 So.2d 49 (Fla. 3rd DCA 1965); Pinellas County v. General Telephone Co., 229 So.2d 9 (Fla. 2nd DCA 1969).

However, property owned by a local government, and thus its power to franchise, is held by it in trust for the public. Pensacola Gas Co. v. Provisional Municipality of Pensacola, 33 Fla. 322, 14 So. 826 (1894). Rights granted Appellant under its franchise with Appellees must therefore be strictly construed against Appellant, and no rights pass to Appellant unless unequivocally granted under the terms of the franchise. Capital City Light and Fuel Co. v. Tallahassee, 42 Fla. 462, 28 So. 810 (1900), Affd 186 U.S. 401, 46 L.Ed 1219, 22 S.Ct. 866.

While Appellees have the authority to grant Appellant a franchise to use its streets, State ex rel. Buford v. Pinellas County Power Co., 87 Fla. 243, 100 So. 504 (1924), the rights granted Appellant under the franchise are subordinate to the rights

of the public. Anderson v. Fuller, 51 Fla. 380, 41 So. 684 (1906). As municipalities have no authority to contract away their police powers, Harnett v. Austin, 93 So.2d 86 (Fla. 1956), Appellant may not proffer rights it allegedly received under a franchise to shield it from police power ordinances adopted by Appellees and enforced to protect the public's health, safety and convenience. Anderson, supra.

Appellees' enactment of legislation requiring Appellant to place its transmission lines underground does not breach Appellant's franchise with Appellees simply because the franchise cannot be construed to unequivocally excuse Appellants from reasonable police power ordinances adopted by Appellees. As such a right was not and could not be granted to Appellant in the first place, Appellees' ordinance does not impair any contractual rights protected under Art. I, Sec. 10, Fla. Const.

Conclusion

Appellants imply it will some how have to absorb the costs associated with Appellees' ordinances; however, the law is clear an electric utility's rate base must include the utility's reasonably incurred expenses and a reasonable rate of return for the utility. Sec. 366.041, Fla. Stat.; Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799 (Fla. 1984); Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977). Appellants likewise imply the effect of Appellees' ordinances is to provide Appellees' citizens "free electric service" or some other "preferential treatment"; however, Amicus submits it is well within the PSC's rate-making

authority to address Appellant's concerns. Plant City v. Mayo, 337 So.2d 966 (Fla. 1976). In fact, it may well be within Appellants' authority to unilaterally address its own concerns. Peoples Gas System, Inc. v. Lynch, 254 So.2d 371 (Fla. 3rd DCA 1971), cert. denied 267 So.2d 81.

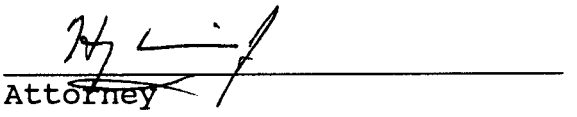
Based upon the authority cited herein, Amicus respectfully requests this Honorable Court to uphold the lower court ruling and hold a municipality may enact legislation that requires an electric utility to place its transmission lines underground.

Harry Morrison, Jr.
General Counsel
Florida League of Cities, Inc.
P.O. Box 1757
Tallahassee, Florida 32302
Florida Bar No. 339695

Kraig A. Conn
Assistant General Counsel
Florida League of Cities, Inc.
P.O. Box 1757
Tallahassee, Florida 32302
Florida Bar No. 0793264

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven true copies of the foregoing have been hand delivered to Sid J. White, Clerk, Florida Supreme Court, Tallahassee, Florida, and a true copy of the foregoing has been furnished by the U.S. mail on this 11th day of December, 1990, to: DAVISSON F. DUNLAP, JR., P.O. Box 13527, Tallahassee, Florida 32317-3527; NED N. JULIAN, JR., P.O. Box 1330, Sanford, Florida 32772; LONNIE N. GROOT, Seminole County Services Building, 1101 East First Street, Sanford, Florida 32771; ALAN C. SUNDBERG, SYLVIA WALBOLT, ROBERT PASS and F. TOWNSEND HAWKES, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.O. Box 3239, Tampa, Florida 33601; ALBERT H. STEPHENS and PAMELA I. SMITH, Office of the General Counsel, Florida Power Corporation, P.O. Box 14042, St. Petersburg, Florida 33733-4042; TERESA E. LILES, G. EDISON HOLLAND, JR. and JEFFREY A. STONE, Beggs & Lane, P.O. Box 12950, Pensacola, Florida 32576; JEAN G. HOWARD, P.O. Box 029100, Miami, Florida 33102; RICHARD BELLAK, 101 E. Gaines Street, Tallahassee, Florida 32399-0861; and JAMES D. BEASLEY and LEE L. WILLIS, Ausley, McMullen, McGehee, et al., P.O. Box 391, Tallahassee, Florida 32302.



Attorney