SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs. CASE No. 76,743

SEMINOLE COUNTY and CITY OF LAKE MARY,

Appellees.
_____/

INITIAL BRIEF OF APPELLANT FLORIDA POWER CORPORATION

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PRELIMINARY STATEMENT

Appellant, Florida Power Corporation, will be referred to in this brief as "FPC." Appellees, Seminole County and the City of Lake Mary, will be referred to respectively as "the County" and "the City."

References to the record on appeal will be indicated as "R. ___". Exhibits used at the evidentiary hearing below will be referred to as "Pl. Exh. ___" and "Def. Exh. ___," and pages from the transcript are referred to as "Tr. ____." All references to the Appendix to this brief are designated "A. ___."

All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE

Florida Power Corporation appeals from a Final Judgment granting Seminole County and City of Lake Mary a permanent, mandatory injunction upholding and enforcing their local zoning ordinances requiring FPC to underground, at its own cost, its overhead lines along Lake Mary Boulevard when that road is widened.

FPC challenged the facial constitutionality of these ordinances requiring free undergrounding. (R. 78-128). In turn, the County and City counterclaimed for declaratory judgment and injunctive relief. (R. 148-55; 173-216). On August 7, 1990, the trial court denied FPC's request for a temporary injunction and instead granted the County's and City's request for a temporary, mandatory injunction requiring FPC to comply with the ordinances. (R. 556-60). FPC was ordered either to remove its overhead facilities from the County and City rights-of-way or to begin plans to underground its lines within ninety (90) days of the order.

On September 5, 1990, after the parties agreed to submit the matter for final disposition on the record developed at the temporary injunction hearing, the trial court entered a Final Judgment, which was substantially similar to its prior order except that it granted a permanent, mandatory injunction requiring either the removal or the undergrounding of FPC's

utility lines by November 5, 1990.[1/] (R. 565-68; App. A). No bond was required by the Court to protect FPC in the event of a reversal of that mandatory injunction. FPC promptly filed its appeal.

On October 9, 1990, the Fifth District Court of Appeal bypassed its review and directly certified the case to this Court, finding "that a local government's efforts to require installation of underground utility lines at ratepayer expense is an issue of great public importance." (App. F). See Art. V, § 3(b)(5), Fla. Const.; Fla. R. App. P. 9.125. On November 5, 1990, this Court accepted jurisdiction.

STATEMENT OF THE FACTS

FPC supplies electric service in more than thirty (30) counties and over one hundred (100) municipalities in Florida. FPC has over 15,000 miles of overhead distribution lines within its service territory. The Florida Public Service Commission [PSC] regulates FPC pursuant to Chapter 366, Florida Statutes.

FPC has been providing electric service to the County and City since approximately 1953. In 1973, FPC and the City entered into a Franchise Agreement which grants to FPC the unqualified use of public rights-of-way within the City for the purpose of supplying electric power, in return for fees paid by FPC to the

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[1/] The trial court's order specifically provided that this deadline could be extended by the parties, and that has been done.

City.[2/] (Pl. Ex. 4). FPC's power lines have been located overhead along County and City rights-of-way at all times since their original installation. Overhead service is the standard form of distribution, and it provides "reasonably adequate" service as required by Section 366.03, Florida Statutes. (Tr. 84).

Nevertheless, on February 14, 1989, the County amended its Land Development Code by enacting Ordinance No. 89-3 (Pl. Ex. 3), which authorized the County to require the installation of underground lines "as a condition on the issuance of a right-of-way utilization permit." On March 14, 1989, the County adopted an ordinance (No. 89-5; Pl. Ex. 1), which further amended its Land Development Code by creating the Lake Mary Boulevard Designated Gateway Corridor. See §337.273, Fla. Stat. (1989). The ordinance creating this transportation corridor directly required that "all new or relocated" utility lines be installed underground. Within a few days, the City enacted a virtually identical ordinance. See City Ordinance No. 421 (Pl. Ex. 5).

On January 11, 1990, the City ordered the undergrounding of all relocated utilities in the corridor. The City directed FPC to convert its overhead electric lines to underground installation along Lake Mary Boulevard and further directed that the cost of all 21,000 feet of undergrounding along the roadway

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[2/] The County is also bound by this Franchise Agreement because City ordinances control over County ordinances within the municipal boundaries and because the City retains proprietary control over rights-of-way within its corporate boundaries.

be borne fully by FPC. See City Emergency Ordinance No. 487 (Pl. Ex. 6), superseded on February 1, 1990, by City Ordinance No. 490 (Pl. Ex. 7).

FPC protested the enactment of these ordinances, which required FPC to both relocate and convert its existing overhead utility system along this portion of Lake Mary Boulevard to a materially different and vastly more expensive underground utility system. There was no dispute that the proposed road widening could be physically accommodated with a relocation of the overhead lines to the new right-of-way. (Tr. 220). On the other hand, installation of an underground system would require use of a completely new system of underground cables, conduits, transformers and other equipment. (Tr. 72; Def. Ex. 9 at 46-50, 57, 63, 71).

The cost differential between relocating the overhead lines within the new right-of-way and converting to an underground system would be approximately $1.25 million. (Tr. 56). That differential, calculated in accordance with the rules of the PSC for residential undergrounding of electric lines (Pl. Ex. 23), would compensate FPC only for the difference in the direct cost of the conversion to undergrounding over the cost of relocating the overhead system, with no "return" to FPC.

None of the ordinances provided for payment of the cost of such a conversion by those requiring it. The City's ordinances affirmatively state that FPC must bear the entire undergrounding cost. The County's ordinances are silent as to who will pay for

the extra costs, but the County has unequivocally declared that it will not pay them. (Pl. Ex. 12, 21, 27).

These ordinances were adopted over the objections of FPC, following its discussions with the County and City concerning who would pay for the cost of this undergrounding. (Pl. Ex. 13, 25, 27). The County and City were advised by FPC that it was fully prepared to carry out the undergrounding, provided that the County and/or City, the entities requiring the undergrounding, would compensate FPC for the excess cost. (Id.; Pl. Ex. 29; Def. Ex. 7 at 25-28). Alternatively, FPC was willing to relocate its lines overhead within the new right-of-way, at its own expense. FPC was not willing to convert to underground facilities at its expense, however, and it expressly put the County and City on notice of its legal position and its intent to seek a judicial determination of the issue if it could not be resolved among the parties. (Id; Tr. 138, 141).

When the parties were unable to reach any agreement as to who should pay for the increased cost of installing an underground system along this road corridor, FPC filed suit for declaratory and injunctive relief, prompting counterclaims by the County and City. At trial, FPC asserted, among other things, that the PSC's exclusive, statewide jurisdiction over utility regulation preempted this local utility regulation. The PSC has not authorized FPC, either by tariff or rule, to provide free underground service to any person or locality. (Pl. Ex. 33). Rather, the general policy of the PSC has been, for at least a

decade, to impose the excess cost of undergrounding on the "cost causer." FPC also relied on its contractual rights under its existing Franchise Agreement, asserting that they could not be retroactively impaired by these ordinances.

The trial court rejected, without explanation, FPC's numerous constitutional challenges, and held that Section 337.403(1), Florida Statutes (1989), which permits a local government to require a utility to remove or relocate its lines when necessary for the expansion of a road, also authorizes the requirement of conversion to underground lines at the utility's expense. The trial court specifically directed FPC to bear the entire cost of undergrounding if it continues to use the rights-of-way, and ordered that none of those costs could be placed on the County's and City's taxpayers. (Final Judgment at 3; R. 567; App. A). There is no feasible way for FPC to carry out its statutory obligation to provide electric service to its customers in Seminole County without locating its electric lines within those rights-of-way, and thus it has no alternative under that injunction but to install these lines underground. (Tr. 82-84, 99).

SUMMARY OF ARGUMENT

This case involves the question of whether the County and City may lawfully require FPC to incur substantial costs to convert its existing overhead distribution system along Lake Mary Boulevard to an underground system. It is critical to recognize, however, that the issue of free undergrounding for local governments goes far beyond this one road and this one utility and instead seriously affects all ratepayers and electric utilities in the State. Indeed, the potentially devastating effects of local governments' attempts to impose the costs of underground lines on utilities and their ratepayers would create chaos for the public utilities of this State.

It has taken the State's electric utilities approximately one hundred years to construct the electric distribution system that now exists in Florida, the vast majority of which is constructed overhead. Converting the existing overhead system to underground may be an aesthetically appealing objective to local governments, but the cost of such conversion throughout the State would approach thirty billion dollars ($30,000,000,000.00). That amount far exceeds the existing aggregate rate bases of the investor-owned electric utilities in the State, and yet would not make a single kilowatt of additional electricity available for consumption in the State.

The statewide issue of whether existing overhead lines should be converted to underground and, if so, who should pay for the billions of dollars of added costs, plainly should not be

determined on a piecemeal basis at a local level. Rather, there is an overriding public need for consistent regulation on this critical issue throughout the State. To conclude that the Florida Legislature intended for local governments to have the unbridled authority to cause electric utilities to incur such enormous increases in their rate bases -- based on the political decisions of individual localities -- flies in the face of the basic concept of statewide utility regulation.

Significantly, other state supreme courts have recognized this fundamental point and have squarely held that local governments cannot mandate such undergrounding because jurisdiction rests instead in the statewide regulatory agency. Contrary to the reasoned decisions of those courts, the trial court's order allows each local government within this State to directly regulate underground service and rates of electric utilities on a local level and thereby supplant the PSC's exclusive jurisdiction to uniformly regulate utilities' service and facilities on a statewide basis.

Moreover, the trial court's order confers greater powers on local governments than have been provided to them by the Florida Legislature. Local governments ultimately have only those powers that have been granted to them by the Legislature. Yet the Legislature has never granted local governments the power to require a public utility such as FPC to install a new, underground system for their benefit but at no charge to them.

The County and City assert -- and the trial court found -- such authority pursuant to Section 337.403(1) Florida Statutes. But that statute does nothing more than empower counties and cities to require a utility to remove or relocate existing electric facilities in connection with road construction. It does not grant the additional and greater authority to require that the utility convert its distribution system to one that is materially different -- that is, to convert its existing overhead system to an underground system. Rather, this statute simply implements the historic practice of directing utilities to move existing electric facilities to another location that physically accommodates the widened road.

The Legislature plainly knows how to grant the power to require the conversion of overhead facilities to underground facilities when they are being "removed or relocated" because it explicitly granted that very power to the PSC. In Section 366.04(7)(a), Florida Statutes (1989), the Legislature directed the PSC to address the precise issue of determining the feasibility, on a uniform, statewide basis, of requiring "the conversion" of electric facilities to underground "when such facilities are replaced or relocated." The County's and City's requirement that FPC convert the existing overhead system to an underground system must yield to that specific legislative mandate for centralized PSC regulation of utility undergrounding.

Indeed, the County's and City's effort to legislate a materially different and free form of electric service also

conflicts with the utility "antipreference" law, Section 366.03, Florida Statutes. That provision expressly prohibits FPC from providing preferential service to any "person or locality." Because a utility normally provides service by overhead distribution lines, enhanced underground facilities would be preferential to a locality if not paid for by the locality. The ordinances mandating this specific type of utility facilities for this particular locality impermissibly conflict with this statute.

Finally, these ordinances impair FPC's Franchise Agreement with the City, which is, by law, equally binding on the County. That Franchise Agreement grants to FPC an unconditional right to use all "public thoroughfares" within the City "as they now exist or may hereafter be constructed . . . or extended," and it was both breached and unconstitutionally impaired by the ordinances requiring free undergrounding.

For all these reasons, it is clear that the County and City cannot require FPC to convert its overhead facilities to underground facilities without charge. The trial court's mandatory injunction directing FPC to do so should be reversed, and the local ordinances requiring free undergrounding should be held invalid and unenforceable.

ARGUMENT

Introduction

Before turning to specific legal arguments, it is important to consider the critical principle at stake in this appeal. Simply put, the County's and City's claims are in fundamental collision with the principle of centralized, statewide regulation of the rates and service of public utilities that has long formed a part of the basic law of this and other states.

If this County and this City hold, as they claim, the power to dictate that a public utility will provide a form of electric service (underground) which is far more expensive than the indisputably adequate form of service historically provided statewide (overhead), then the counties and cities of this State cumulatively hold the power to alter entirely the form of electric service provided statewide, without regard for what the PSC would direct as a matter of prudent, cost-effective utility regulation. Moreover, if the County and City possess, as they assert, the power to dictate who may not be charged for the costs of conversion from overhead to underground facilities, then the counties and cities of this State cumulatively hold the power to dramatically affect the options the PSC may exercise in setting utility rates.

The cost of converting overhead to underground distribution can be as much as $1 million per mile. FPC alone has more than 15 thousand miles of such overhead lines in place in its 32

county and 100 city service area. The aggregate cost of converting all of those lines to underground would exceed $2.5 billion, an amount approximating FPC's total rate base. The cost of converting all the overhead lines of all the investor-owned public utilities would approach $30 billion, more than the combined rate bases of all the public utilities in this State. (Tr. 85)

The exercise of that power by local governments would result in rate increases of an enormous magnitude, over which the PSC would have virtually no control. Indeed, the PSC would be reduced to simply allowing the gigantic costs mandated by counties and cities to be passed on to utility ratepayers, and the PSC would have lost any meaningful authority to regulate this vital aspect of electric utility service. Instead, local governments would sit as hundreds of mini-PSCs dictating -- based on their own special interests and without consideration of the prudence of such actions from a regulatory or utility standpoint -- the amount of capital expenditures to be undertaken by utilities, when those expenditures would be incurred, and, to a large degree, who would bear the onus of the exorbitant rates occasioned by those expenditures.

The chaos that would result for public utilities and their ratepayers is manifest. See, e.g., Potomac Elec. Power Co. v. Montgomery County, 80 Md. App. 107, 560 A.2d 50, 54 (1989), aff'd, 319 Md. 511, 573 A.2d 821 (1990) ("To permit counties to regulate utilities and supersede the rulings of the PSC would be

to allow chaos to reign throughout the State."). Recognizing this undeniable fact and the concomitant need for utility regulation on a uniform, statewide basis, unfettered by the parochial interests of individual localities, courts -- including the highest courts of four states -- have again and again rejected the local government's attempt to mandate underground facilities at the utility's own cost.

The Pennsylvania Supreme Court spoke directly to this concern in Duquesne Light Co. v. Upper St. Clair Tp., 377 Pa. 323, 105 A.2d 287, 293 (1954). As that Court emphasized:

> Local authorities not only are ill-equipped to comprehend the needs of the public beyond their jurisdiction, but, and equally important, those authorities, if they had the power to regulate, necessarily would exercise that power with an eye toward the local situation and not with the best interests of the public at large as the point of reference.

Accord Willits v. Pennsylvania Pub. Util. Comm'n, 183 Pa. Super. 62, 128 A.2d 105 (1956) (town's attempt to require undergrounding of electric lines was invalid as issue rests with Public Utility Commission).

The need for uniform, statewide treatment of electric service likewise convinced the Missouri Supreme Court that a city's ordinance requiring underground lines was preempted by Missouri's laws establishing a Public Service Commission to oversee utilities. In Union Elec. Co. v. City of Crestwood, 499 S.W.2d 480 (Mo. 1973), the utility had entered a franchise with the city, which later sought unilaterally to impose the

underground line requirement. The Missouri Supreme Court concluded that the ordinance was invalid since it impermissibly invaded an area regulated on a statewide basis by the Missouri Public Service Commission:

> If [the City] had the right by its ordinance to specify how [the utility] should design and install its transmission lines or to require it to spend this substantially greater sum in constructing said lines, then other municipalities would have like authority . . . . If 100 such municipalities each had the right to impose its own requirements with respect to installation of transmission facilities, a hodgepodge of methods of construction could result and costs and resulting capital requirements could mushroom. As a result, the supervision and control by the Public Service Commission with respect to the company, its facilities, its method of operation, its service, its indebtedness, its investment, and its rates which the General Assembly obviously contemplated would be nullified.

Id. at 483. The New Hampshire Supreme Court has held to precisely the same effect. Public Serv. Co. v. Town of Hampton, 120 N.H. 68, 411 A.2d 164 (1980) (legislature had preempted town's ability to require underground location of electric lines as Public Utilities Commission had been given comprehensive authority to regulate this area).

The Wyoming Supreme Court recently addressed this issue and likewise resolved the issue in favor of the public utility. In Vandehei Developers v. Public Serv. Comm'n of Wyoming, 790 P.2d 1282 (Wyo. 1990), the county argued, just as the local governments do here, that it could "condition" the utility's use of the county's right-of-way on the requirement that the line be placed underground. The Wyoming Supreme Court disagreed, holding

that, while the Legislature had provided that the permission of the county was required to use the right-of-way, the statute "does not . . . grant the [county] the authority to regulate public utilities," id. at 1286, and that the PSC has "exclusive power to regulate and supervise every public utility within the state," and that no such regulatory power has been "preserve[d] . . . for municipalities." Id. at 1285, 1286.

The Court then held that:

> 'If each county were to pronounce its own regulation and control over electric wires . . . , the conveyors of power . . . could become so twisted and knotted as to affect adversely the welfare of the entire state. It is for that reason that the Legislature has vested in the Public Utility Commission exclusive authority over the complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities facilities.'

Id. at 1286, quoting Chester County v. Philadelphia Elec. Co., 420 Pa. 422, 218 A.2d 331, 333 (1966). The Court accordingly concluded that:

> 'The power of the municipality to enact a zoning ordinance must yield to the superior force of the state statutes which impose upon the public utility company the duty of rendering safe and adequate service.'

Id., quoting Niagara Mohawk Power Corp. v. City of Fulton, 8 A.D.2d 523, 188 N.Y.S.2d 717, 721-22 (1959).

In short, each of these courts held in accordance with precisely the position urged by FPC in this case. The reasoning of those courts is sound and, as shown below, it is equally compelling under Florida law.

Point One

There Is No Authority Under Florida Law For Local Ordinances Mandating Free Utility Undergrounding On Public Rights-Of-Way.

No statute of this State expressly confers on local governments the authority to order public utilities to convert their usual, and indisputably adequate, form of existing overhead facilities to the far more expensive form of underground facilities. To suggest, as the County and City do, that the Legislature impliedly conferred such authority under the guise of a routine road maintenance statute that nowhere mentions conversion to underground facilities is flatly contrary to the Legislature's mandate of centralized, statewide regulation of utilities. Indeed, it is inconceivable that the Legislature conferred such expansive and far-reaching power on local governments by indirection. That power should be deemed to have been conferred only in the presence of the most clear and compelling statutory language evidencing such an intent -- which simply does not exist here.

The trial court read Section 337.403, Florida Statutes, as empowering the County and City to require FPC to remove its lines from public rights-of-way altogether, and it concluded that they could accordingly place any condition they wished on FPC's continued use of those rights-of-way. This reasoning was fatally flawed and directly contrary to the statutory and decisional law of the State of Florida.

As a public utility, FPC is obligated by Florida law to provide reliable electric service to its customers at "fair and reasonable" rates. See § 366.03, Fla. Stat. A local government cannot prevent a public utility from carrying out its public charge by prohibiting its use of a public right-of-way. See City of Jacksonville v. Ortega Util. Co., 531 So.2d 370 (Fla. 1st DCA 1988). Rather, utilities have a settled right to use public rights-of-way, subject to reasonable rules and regulations, but not subject to absolute exclusion from public rights-of-way.

Indeed, pursuant to Section 361.01, Florida Statutes, a public utility has the express right to enter upon public lands for purposes of its utility business.[3/] This statutory provision even authorizes a utility to condemn public lands without compensating the public body. Nothing could more clearly demonstrate the Legislature's recognition of a utility's overriding right to use public rights-of-way in order to provide this essential service to its customers.

In short, contrary to the trial court's conclusion, the County and City do not have the right to require FPC to

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3/ Section 361.01, Florida Statutes, provides:

> **Eminent domain** - The president and directors of any corporation organized for the purpose of constructing, maintaining or operating public works, or their properly authorized agents, may enter upon any lands, public or private, necessary to the business contemplated in the charter, and may appropriate the same . . . upon making due compensation according to law to private owners.

completely remove its facilities from the widened road's right-of-way, and the court's reasoning that they could therefore place whatever conditions they wanted on that use is manifestly wrong. Certainly, the statutory provision relied upon by the trial court does not empower the County and City to deny, based on an extraordinary demand for free local undergrounding, the right of a utility to use public rights-of-way in order to supply electricity to its customers.

A.

Section 337.403 Does Not Grant Local Governments the Power to Require Conversion of Overhead Utility Facilities to Underground Facilities.

The trial court concluded that the County and the City are authorized by Section 337.403(1), Florida Statutes, to require the undergrounding of these utility lines and to require FPC to bear that cost. As can be seen from the face of this statute, however, it does not grant localities the broad power to mandate the type of system to be used by a utility or to determine who should pay for such a system. Instead, it merely provides for the removal or relocation of utility facilities when necessary to accommodate road expansion or maintenance.

Section 337.403(1), Florida Statutes, provides:

> 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 except as provided in paragraphs (a) and (b).

The County and the City have not simply directed FPC to "remove or relocate" its utility facilities to accommodate the road widening. Rather, they have directed FPC to install, at its own expense, a completely new and different utility system. That is not authorized by this statute.

Section 337.403 means just what it says -- "removed or relocated" -- and it does not take the additional step of authorizing local governments to require "the conversion" of an existing overhead system to a completely different underground system. By its plain language, it does nothing more than effectuate a simple and necessary function: it prevents a utility from blocking a road expansion by refusing to move its lines. The words "removed or relocated" do not suggest the extraordinary requirement of conversion of an overhead electric system to an underground system as a condition of use of the right-of-way, and they should not be read in an unnatural way to allow those greater rights.

That Section 337.403 does not grant local governments the power to require undergrounding when utility facilities are "removed or relocated" is made crystal clear by the fact that the Legislature has expressly granted this power to the PSC as a part of its regulatory powers over utilities. In 1989, the Florida Legislature enacted Section 366.04(7)(a), Florida Statutes, which provides in pertinent part that:

> 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.
>
> . . . .
>
> Upon a finding by the commission that the installation of underground distribution and transmission facilities is cost-effective, the commission shall require electric utilities, where feasible, to install such facilities.

This law squarely vests the PSC with authority to require conversion of distribution lines to underground where "feasible," if the Commission finds that to be "cost-effective." In sum, this decision is to be made by the PSC, on a statewide basis, based on its cost-effectiveness.

Indeed, the very language used in this new law confirms that the Legislature did not regard the local powers granted under Chapter 337 to require "relocation or removal" of utility facilities to also authorize a requirement of conversion to an underground system. In mandating the PSC's evaluation of the "cost-effectiveness" of undergrounding in connection with "relocated" utility systems, Section 366.04(7)(a) specifically refers to such undergrounding as a "conversion" of electric service. By using a different word in Section 366.04(7)(a) -- "conversion" -- to describe undergrounding of lines in connection with "relocated" facilities, the Legislature demonstrated that it knows how to grant that power when it intends to do so.

It would have been a simple matter for the Legislature to have provided in Chapter 337 that local governments could require utilities to convert to an underground system in connection with road expansion. It did not do so.[4/] To the contrary, the Legislature has directed the PSC, as a part of its regulatory duties under Chapter 366, to evaluate whether utilities should be required to make such a "conversion" upon the relocation of their distribution facilities. The discretion given to the PSC by the Legislature to determine, on a statewide basis, whether "conversion" to underground is "cost-effective" when a utility's facilities are "replaced or relocated" would obviously be rendered meaningless if it could simply be overridden by local ordinances.

It is fundamental that these statutes should be read, to the extent possible, to be consistent. Laird v. State Dept. of Transp., 465 So.2d 486 (Fla. 1984). If Section 337.403 is read according to its plain meaning, which is to empower local governments to require utilities to move their facilities to the extent necessary to accommodate road expansion or maintenance, then the two statutory schemes dovetail and there is no usurpation of or conflict with the PSC's jurisdiction.[5/] If,

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[4/] Nor would the Florida Legislature make such a dramatic regulatory change in the guise of a benign and unremarkable provision of a road construction statute, without expressly stating it was doing so.

[5/] As discussed more fully in Point Two below, Chapter 366 grants exclusive jurisdiction to the PSC over FPC's facilities, services, and rates. Thus, if Chapter 337 were construed to grant local governments the expansive power claimed here, there

on the other hand, these provisions are not to be read together in a consistent fashion, Section 366.04(7)(a) must then be given effect over Section 337.403, since that specific grant of power to the PSC was enacted later. See State v. City of Boca Raton, 172 So.2d 230, 232-33 (Fla. 1965).

Furthermore, Section 337.403 must also be read in conjunction with other parts of the Florida Transportation Code, which make it clear that utilities which must move facilities to the widened rights-of-way in transportation corridors are to be restored to their same relative position as before the road expansion. Section 334.03(25), Florida Statutes (1989), specifically requires that all transportation corridors, like the Lake Mary Boulevard Corridor, must contain "replacement rights-of-way for relocation of . . . utility facilities." Thus, the Legislature clearly contemplated that utilities must be provided with "replacement rights-of-way" when -- as here -- a transportation corridor makes the relocation of utility poles and lines necessary. Since overhead lines could admittedly be constructed within the replacement right-of-way along Lake Mary Boulevard, (Tr. 220), there is no statutory basis for ordering free undergrounding as a adjunct of this road project.

FPC has always been willing to relocate its overhead facilities within the widened right-of-way, at its own expense, as has been traditionally required in Florida, see Anderson v.

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would be an inherent conflict with the PSC's broad regulatory powers over the public utilities in this State.

Fuller, 51 Fla. 380, 41 So. 684 (1906), and it is uncontroverted that this would physically accommodate the new road. Indeed, it was conceded below 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 possibly by simply keeping the power lines overhead as they have always been."[6/] (Tr. 220).

The only issue, then, is whether the County and City can nevertheless exclude FPC from the widened right-of-way if the utility does not agree to provide free undergrounding of its lines. The answer is clear: Florida law does not give local governments the power to so exclude public utilities from public rights-of-way and thereby prevent them from providing the service they are mandated by law to provide.

B.

Other States Have Refused
To Allow Local Governments
To Require Undergrounding.

The high courts of several states have rejected a local government's attempt to force undergrounding through zoning ordinances or by denying the utility a permit to use public rights-of-way. Notably, the laws in each of those states authorized the local government to control its public rights-of-

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[6/] Moreover, although safety concerns led to the decision to widen the road in the first instance, those safety concerns arose from traffic congestion, not from the fact there were overhead utility lines. (Tr. 45, 119-120, 133-134, 220-222).

way and to require utilities to move their facilities at their own expense when necessary for public convenience, such as widening roads. Nevertheless, each of these courts unequivocally rejected the local government's attempt to impose an undergrounding requirement on public utilities.

The most recent case to so hold is Vandehei Developers v. Public Service Comm'n of Wyoming, 790 P.2d 1282 (Wyo. 1990). As in this case, the county there refused to allow the utility to use the county rights-of-way unless its lines were placed underground. The Wyoming PSC ruled that the lines should be built in the county rights-of-way and that "placing the line underground would expose [the utility] to an extraordinary amount of expense when compared to putting the line overhead." Id. at 1284. On appeal to the Wyoming Supreme Court, the county argued that it could condition the utility's use of the county's rights-of-way on the requirement that the lines be placed underground, citing a Wyoming statute which provided:

> [U]tilit[ies] may set their fixtures and facilities along, across or under any of the public roads, streets and waters . . . in such manner as not to inconvenience the public in their use. . . . [The utility] must first obtain permission from the . . . board of county commissioners in the county where the construction is contemplated before entering upon any . . . county road. . . .

Id. at 1285-86, quoting Wyo. Stat. § 1-26-813 (1977).

The Wyoming Supreme Court rejected the county's claim, declaring that, although this statute granted the county authority over its rights-of-way, the statute did "not . . .

grant the [county] the authority to regulate public utilities." Id. at 1286. To avoid a conflict with the broad statutory powers of the PSC to regulate utilities, the Court construed the road construction statute as not empowering the county to require undergrounding of utility facilities as a condition of use of public rights-of-way.

The Missouri Supreme Court has similarly barred a city's effort to impose undergrounding on a utility. Union Elec. Co. v. City of Crestwood, 499 S.W.2d 480 (Mo. 1973). The Court rejected a city's reliance on a state road construction statute which provided that a local government could require a utility to move its electric lines from public rights-of-way at the utility's expense, when that was made necessary by widening a public road. Id. at 484.[7/] Likewise, even though New Hampshire law generally requires utility companies to remove or relocate lines in public rights-of-way at the utilities' expense when required by public need,[8/] the New Hampshire Supreme Court held that a town's effort to require underground transmission lines was impermissible. Public Serv. Comm'n v. Town of Hampton, 120 N.H. 68, 411 A.2d 164 (1980).

An Ohio court has also reached the same conclusion. In Cincinnati & Suburban Bell Tel. Co. v. City of Cincinnati, 7 Ohio Misc. 159, 215 N.E.2d 631 (Ohio Prob. 1964), the City denied the

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[7/] See Mo. Ann. Stat. §§ 229.350-.360, 393.010 (Vernon 1989).

[8/] See Opinion Of The Justices, 101 N.H. 527, 132 A.2d 613 (1957).

telephone company a permit to relocate its poles along a widened right-of-way unless it placed its lines underground. The Ohio court held that the City's effort to force free undergrounding exceeded its local powers since telephone companies had a recognized right to use public rights-of-way, subject to moving their facilities if necessary for public convenience. The court concluded that free undergrounding was not inherent in this public convenience limitation on the utility's use of public rights-of-way.

Thus, even though each of these states authorized a locality to control its rights-of-way and to require relocation of utility lines at the utility's expense when publicly necessary, that did not justify a locality's requirement that the utility convert its overhead lines to underground lines. The reasoning of these decisions is equally compelling here.

Point Two

These Ordinances Are Preempted By And Conflict With Chapter 366, And They Are Therefore Unconstitutional.

Through these ordinances, the County and the City have mandated that FPC provide a particular type of electric service to them (underground service on a public road) at a particular rate (free). Article VIII, Sections 1 and 2, Florida Constitution, subordinates powers of counties and cities to state powers and laws. Because regulation of the entire area of electric service, facilities, and rates of a public utility has been delegated to the exclusive jurisdiction of the PSC, these

ordinances are beyond the County and City's legal authority and are, therefore, unconstitutional.

A.

The PSC's Jurisdiction Over Public Utilities is Exclusive.

The Legislature has conferred broad jurisdiction on the PSC. See Chapter 366, Fla. Stat. In particular, the PSC is granted "jurisdiction to regulate and supervise each public utility with respect to its rates and service . . . ." § 366.04(1), Fla. Stat. This jurisdiction is "exclusive and superior to that of all . . . municipalities . . . or counties." Id; see Public Serv. Comm'n v. Fuller, 551 So.2d 1210 (Fla. 1989).

Florida courts have long recognized that Chapter 366 grants the PSC "very extensive" regulatory powers over public utilities. City Gas Co. v. Peoples Gas Sys. Inc., 182 So.2d 429, 435 (Fla. 1965). As this Court stated in Storey v. Mayo, 217 So.2d 304, 307 (Fla. 1968), cert. denied, 395 U.S. 909 89 S.Ct. 1751 (1969):

> The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law.

The issues of the type of facilities and service to be provided by an electric utility and the rate for that service are squarely within those "very extensive" and "omnipotent" regulatory powers. It is likewise uncontrovertible that this jurisdiction is exclusive and superior to that of local governments. See §366.04(1), Fla. Stat.

B.

Jurisdiction Over Underground Service and Rates Has Been Directly Conferred Upon The PSC.

As discussed above, the trial court's decision, if affirmed, would inevitably encourage other localities to take advantage of free underground service, causing massive increased costs to Florida's utilities and their ratepayers, without the centralized control of the PSC and without any increased benefit in electric service to the ratepayers. Since the Florida Legislature has placed utility regulation solely in the hands of PSC, the trial court's decision cannot stand.

Even the most cursory reading of Chapter 366 demonstrates that the PSC's expansive jurisdiction over utilities includes regulation of the terms upon which underground service will be provided. The PSC has, in the exercise of its broad jurisdiction, established the terms and conditions upon which underground service shall be provided in new residential developments or multi-occupancy buildings, and, in particular, how the increased costs of this extraordinary electric service will be borne. The existing PSC rules relating to undergrounding address what has, to date, been the typical situation in which the undergrounding issue arises, namely, requests for undergrounding by residential subdivision developers. (Tr. 68). These rules provide that the increased costs for underground installation are to be passed on to the entity which requests

this service from the utility -- i.e., the developer. See Rule 25-6.078, Fla. Admin. Code.

Here, of course, the entities demanding underground service are the County and the City, but they refuse to pay the extra cost of the service they demand. However, the PSC has not required utilities to provide underground electric service without charge, nor has it approved free undergrounding for local governments in connection with their road expansion. (Tr. 98). Under Florida law, a public utility is only required to provide electric service in accordance with the rate for such service approved by the PSC. See § 366.04(1). Given this regulatory scheme, the County and City cannot force FPC to provide them free underground service along public roads by the simple expedient of enacting their own self-serving ordinances.

The fact of the matter is, these ordinances impermissibly require FPC to give these localities an undue preference -- free undergrounding. That directly contravenes Section 366.03, which prohibits a public utility from giving any unreasonable advantage to "any person or locality . . . ." As this provision demonstrates, utility service is to be provided to all localities at a uniform rate. See Bromer v. Florida Power & Light Co., 45 So.2d 658, 660 (Fla. 1949); Demeter Land Co. v. Florida Public Service Comm'n, 99 Fla. 954, 128 So. 402, 407 (1930). The County's and City's ordinances run directly contrary to this provision by requiring FPC to provide them with extraordinary electric facilities without payment by them for the excess cost

of such facilities. Hence, those ordinances are unenforceable since the "power attempted to be exercised . . . may affect the operation of a state statute . . . ." Rinzler v. Carson, 262 So.2d 661, 668 (Fla. 1972).

Moreover, quite apart from the explicit proscription of Florida's anti-preference statute, this Court has unequivocally held that no one has an "'organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself.'" Lee County Elec. Coop. v. Marks, 501 So.2d 585, 587 (Fla. 1987), quoting Storey v. Mayo. As the Court stated, "[l]arger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the PSC." Id. Recognizing this broader obligation of the PSC, this Court affirmed the PSC's order in PW Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988), where the proposed service would have "diverted" revenue from a regulated utility and "[t]his revenue would have to be made up by the remaining customers of the regulated utilities . . . ."

Consistent with this over-arching obligation of the PSC to determine what type of service utilities will be required to provide and the cost that will be charged for that service, the PSC has, as noted above, been specifically directed by the Legislature to determine, on a statewide basis, whether the "conversion" to underground electric lines during their replacement or relocation is cost-effective. See § 366.04(7)(a). The Legislature directed the PSC that, "[u]pon a finding by the

commission that the installation of underground distribution and transmission facilities is cost-effective, the commission shall require electric utilities, where feasible, to install such facilities." Id.

Pursuant to this legislative directive, the PSC conducted that study and then issued its "Order on the Investigation Into Underground Wiring", No. 23126 (FPSC June 28, 1990) (Pl. Ex. 8). In that Order, the PSC emphasized that "the Legislature contemplated exclusive, not supplemental or complementary, jurisdiction to the Commission concerning the determination of the cost-effectiveness of undergrounding." (Pl. Ex. 8 at 16).[9/] Disregarding that explicit declaration by the PSC, the County and the City have repeatedly relied on isolated language from the PSC Order, which they grossly distort by quoting it wholly out of context.

The single sentence that the County and City seize upon reads as follows:

> There is no expressed or implied exemption or preemption for utilities with existing undergrounding policy or criteria arguably more

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[9/] The County and City have relied heavily on a letter request, accompanying the PSC order, by the PSC Chairman to the Legislature for further direction as to PSC preemption of local zoning requirements. Given the actions of the County and City in this case, it is not surprising that the PSC would seek further guidance from the Legislature. But that does not alter the legal effect of the existing statutory scheme, which plainly grants broad and exclusive regulatory powers over utility service, including underground service, to the PSC. Significantly, the PSC has sought to appear as Amicus in support of FPC's position that the PSC's jurisdiction preempts local efforts to order free undergrounding.

> responsive to the needs of its membership or ratepayers.

Order at 16. When that sentence is read in the context of the preceding discussion in the Order, it is clear that the PSC was holding that even utilities which are generally not regulated by the PSC (municipal and cooperative) and which may have their own underground policies are, nevertheless, included within the PSC's jurisdiction by Section 366.04(7)(a) for purposes of setting undergrounding policies. Thus, the Order finds that there is no exemption for these special types of utilities from the PSC's broad, statutory grant of jurisdiction over undergrounding -- exactly the opposite of what the County and the City have asserted.

The PSC then addressed the question of whether it should require utilities to install their facilities underground when they were moved as part of road work. It concluded that there was no "competent substantial evidence upon which a pivotal decision regarding undergrounding [could] be made." Id. at 16. While a rulemaking docket was opened as to new residential subdivisions only, id. at 17, there was no further rulemaking ordered to determine cost-effectiveness of conversion to underground lines in other cases, such as that involved in the instant case. In sum, the PSC did not find that undergrounding these types of facilities was cost-effective, and it did not order public utilities to convert their lines to underground as part of their removal or relocation.

In the face of this express legislative directive to the PSC and the PSC's conclusion that there was not sufficient evidence before it to require undergrounding as a part of the removal or relocation of existing overhead facilities, these ordinances nevertheless attempt to legislate locally on this identical issue by ordering undergrounding of these facilities. By doing so, these ordinances facially usurp the PSC's power over the issue of whether utility lines should be required to be installed underground.

The County and the City contended below that their ordinances do not infringe on the PSC's exclusive jurisdiction, because they have not undertaken to dictate to the PSC how FPC may recoup the underground costs through its rates.[10/] Their argument is not only wrong, it misses the point. Regardless of their impact on the PSC's rate-making powers, it is absolutely clear that these ordinances affect the facilities and service of

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10/ The City has also cited Section 366.11, Florida Statutes, in a misguided effort to avoid application of the PSC's exclusive jurisdiction over undergrounding utility lines. Subparagraph (2) of that statute provides that, "[n]othing herein shall restrict the police power of municipalities over their streets. . . ." Certainly, that provision cannot be read to negate the PSC's broad, exclusive regulatory powers over the type of utility service to be provided to particular customers or the rate at which various types of utility service will be provided. Nor can it be read to negate the Legislature's explicit directive to the PSC to determine whether conversion to underground as a part of road maintenance was cost-effective. The Legislature plainly did not contemplate that municipalities could require such conversion even if the PSC determined that it was not "cost-effective" for utilities. In any event, as the latest and most specific pronouncement of the Legislature on the issue, that provision undeniably controls over any inconsistent provision in Section 366.11.

the utility, both of which are indisputably under the exclusive jurisdiction of the PSC. Moreover, these ordinances directly interfere with the ability of the PSC to carry out its statutory obligation to determine whether utilities will be required to convert to underground facilities when their facilities are "relocated" along public roads. Even though the PSC has specifically declined to impose this obligation on utilities because it could not determine whether this would be cost-effective, these ordinances require that undergrounding be done in this particular locality now, whether cost-effective or not.

Furthermore, the County and City are simply wrong when they urge that they are not interfering with the PSC's ratemaking powers. Indeed, the trial court specifically ruled that the utility was required to pay for all the costs of undergrounding, and that these costs could not be imposed on local "taxpayers." Not only does that impermissibly invade the PSC's power to set rates in the first instance, as a matter of public policy local governments should not be permitted to disguise as an increased utility rate the increased costs that their governmental decision to beautify a local roadway has caused. This subterfuge is neither fair to the utility nor its ratepayers.

This precise concern led the Maryland Public Service Commission to impose the excess cost of undergrounding lines on the local government requiring this enhancement. See Re Baltimore Gas & Elec. Co., 80 Md. PSC 112 (May 9, 1989) (App. B). The Maryland PSC considered each alternative source for paying

for the excess costs of undergrounding and then followed its previous policy of refusing to impose those extra costs on ratepayers:

> The Commission [finds] it inequitable to charge all of BG & E's ratepayers, because they did not cause the cost to be incurred and because they do not share in the benefits as much as Annapolitans do. It also reject[s] surcharging BG & E's Annapolis customers, because the City, not those customers, caused the cost to be incurred.

Id. at 116. Recognizing the equity of requiring the "cost-causer" to pay for the excess cost of undergrounding, the Maryland PSC held that the local government must pay the extra costs. See also Re Boston Edison Co., 79 PUR NS 1 (Mass. Dept. Public Utility Apr. 20, 1949) (undergrounding costs substantially greater than overhead costs; PSC ordered overhead construction, because unfair to ask all ratepayers to share costs of local undergrounding, which enhances local aesthetics) (App. C); Town of Woodside v. Pacific Gas & Elec. Co., 83 PUC Decisions 419 (Cal. Pub. Ut. Comm'n 1978) (town's zoning ordinance requiring undergrounding of distribution lines is preempted by Commission's exclusive jurisdiction over electric facilities) (App. D).

This same point has been made in a constitutional context. In Rochester Tel. Corp. v. Village of Fairport, 84 A.D.2d 455, 446 N.Y.S.2d 823 (N.Y.A.D. 1982), the village required a utility to place its lines underground at the utility's expense. Finding that aesthetic reasons motivated this requirement, the court determined that the village rather than the utility should bear the expense of the underground lines since the village benefitted

from the enhanced facility. Otherwise, requiring the utility to bear the expense would violate basic principles of due process.

In truth and fact, as the PSC has long recognized, it simply makes no sense to impose the excess cost for undergrounding on the ratepayer. Yet, by dictating that they will not absorb the excess cost of the underground system that they have mandated, the County and City have sought to override the PSC's general policy of imposing such costs on the "cost-causer" and to eliminate that ratemaking choice here, thereby directly interfering with the power of the PSC to establish undergrounding charges unfettered by the act of any inferior body. But that is an impermissible infringement on the PSC's exclusive ratemaking jurisdiction and therefore cannot stand.

C.

A Local Government May Not Pass An Ordinance In A Field Preempted To A State Agency.

It is settled that the Legislature may subordinate local governments to regulatory agencies, resulting in the supersession of local government regulation. See Cross Keys Waterways v. Askew, 351 So.2d 1062, 1065-67 (Fla. 1st DCA 1977), aff'd, 372 So.2d 913 (Fla. 1978); Manatee County v. Estech Gen. Chem. Corp., 402 So.2d 1251, 1255 (Fla. 2d DCA 1981), rev. denied, 412 So.2d 468, 470 (Fla. 1982). Once the Legislature determines and declares that jurisdiction over a certain subject matter should be dealt with on a statewide basis, a locality's legislation in that same field is concomitantly preempted. Davis v. Gronemeyer,

251 So.2d 1 (Fla. 1971); Broward County v. Plantation Imports, Inc., 419 So.2d 1145 (Fla. 4th DCA 1982).

Chapter 366 is a comprehensive effort by the Legislature to delegate regulation of all aspects of electric utility service and facilities to the PSC on a statewide basis, including regulation of underground service and the determination of whether it is "cost-effective" and "feasible" for a utility to convert overhead facilities to underground when they are relocated. Since this pervasive regulatory power has been lodged in the PSC, the County and the City cannot dictate by local ordinance that such underground facilities be provided to them at no cost.

The seminal case governing standards for determining state preemption of local ordinances is Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984), in which this Court found state preemption regarding public records based on the comprehensive nature of Chapter 119, Florida Statutes. As the Court declared:

> Under [the preemption] doctrine a subject is preempted by a senior legislative body from the action by a junior legislative body if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme . . . .

Id. at 1077. Critically, this Court found that state preemption existed even though there was no explicit language within the public records act declaring preemption. The standard which emerged from this Court's decision recognized that, even as to municipal ordinances, "preemption need not be explicit so long as

it is clear that the legislature has clearly preempted local regulation of the subject." Barragan v. City of Miami, 545 So.2d 252, 254 (Fla. 1989).

The comprehensive, statewide utility regulatory scheme established by the Florida Legislature presents a classic instance of implied preemption of this local utility regulation. The grave potential for chaos if each local government passed its own ordinance requiring the conversion to underground electric facilities along the public roads in that locality is undeniable. Recognizing this potential, the Florida Legislature has established a statewide regulatory body and granted it the exclusive jurisdiction to make the rules governing electric service and rates, including those for the installation of underground service along public roads.

The PSC's regulatory determinations take into account not just narrow, parochial local interests but the broader interests it was directed to protect. To allow the imposition of the requirement of local undergrounding at no cost to the locality will inevitably lead to a chaotic patchwork of local regulations ruled by the interests of each local government, thereby destroying the very purpose of the comprehensive, statewide regulatory scheme established by Chapter 366. As shown earlier in this brief, this very concern has led courts in other jurisdictions to hold that local governments cannot mandate underground service. The efforts of the County and City to place

their local interests above Florida's uniform, statewide utility system should likewise be rejected by this Court.

Point Three

The Ordinances Impermissibly Impair FPC's Franchise Agreement.

On November 12, 1973, the City entered a Franchise Agreement with FPC by enacting City Ordinance No. 4. Under that agreement, FPC has the unconditional right, for a period of thirty (30) years, to use streets, thoroughfares, and easements for electric utilities "as they now exist or may hereafter be constructed . . . or extended" for the maintenance of "all electric facilities required by [FPC] for the purpose of supplying electricity" to the City's residents. (Pl. Ex. 4). In return for the use of those rights-of-way, FPC pays the City six percent (6%) of FPC's revenues derived from electricity sales within the City. (Tr. 56). The County and City ordinances requiring FPC to install its lines underground both breach and unconstitutionally impair the unconditional grant of authority under that Franchise Agreement to use these rights-of-way.

A.

The City's Ordinance Breaches The Franchise Agreement By Unilaterally and Materially Conditioning FPC's Use of the Rights-of-Way.

This Court has held that a franchise agreement with a governmental entity is a property right, and is not subject to revocation:

> A franchise has been defined as a special privilege conferred by the government upon individuals which does not belong to the citizens of the county as a common right, and when a franchise is accepted, it becomes a contract irrevocable unless the right to [re]voke is expressly reserved and is entitled to the same protection under constitutional guaranties as other property.

Winter v. Mack, 142 Fla. 1, 194 So. 225, 229 (1940). See also City of Miami v. South Miami Coach Lines, 59 So.2d 52, 55 (Fla. 1952) (franchise for definite period is a contract between city and franchise holder). Once a city decides to grant a franchise, the rights granted under it can be specifically enforced. See Jarrell v. Orlando Transit Co., 123 Fla. 776, 167 So. 664, 668 (1936).

In fact, not only is a municipality bound by its contracts, just as any individual, the contracting party "is entitled to the constitutional protection against impairment of it if the municipality attempts to unilaterally change its obligations under a valid agreement." City of Miami v. Bus Benches Co., 174 So.2d 49, 52-53 (Fla. 3d DCA 1965); see also Killearn Properties, Inc. v. City of Tallahassee, 366 So.2d 172 (Fla. 1st DCA) (city could not receive benefits of utility income under contract and then disavow its obligations under that agreement), cert. denied, 378 So.2d 343 (Fla. 1979). Thus, a formal, written franchise agreement, under which the franchise holder must continuously pay fees (as does FPC to the City), is more than a mere license to use public rights-of-way; it is a contract which gives rise to

constitutionally protected property interests which may not be unilaterally abrogated by the City.

The City of Lake Mary cannot receive the benefits of its franchise agreement with FPC, in the form of franchise fees based on electricity sales, and then disavow its obligation to allow FPC to use its rights-of-way to reach FPC's customers.[11/] If the expedient of invoking any public purpose could be used to avoid a city's contractual obligations, a franchise agreement would be meaningless, since virtually all actions by a city could be justified as a public purpose taken pursuant to the police power. The terms of the franchise and the rights granted thereunder must be enforced, and the County and City cannot be permitted to breach the agreement by these new ordinances.

B.

The Ordinances Unconstitutionally Impair FPC's Existing Contract Rights.

These ordinances also violate Article I, Section 10, Florida Constitution, which prohibits any law from impairing existing contractual rights. See Smith v. Dep't of Ins., 507 So.2d 1080, 1094-95 (Fla. 1987). In this State, "virtually no degree of contract impairment has been tolerated . . . ." Park Benziger & Co. v. Southern Wine & Spirits, Inc., 391 So.2d 681, 683 (Fla. 1980).

[11/] Moreover, under Article I, Section 1.4 of the Seminole County Home Rule Charter, the County must likewise honor the Franchise Agreement. Article I, Section 1.4 of the Charter provides: "Municipal ordinances shall prevail over County ordinances to the extent of any conflict." (Pl. Ex. 2). See also Art. VIII, §1, Fla. Const.

In a remarkably similar case, the Second District held that a local government's attempt to impose the cost of moving utility facilities on the utility would unconstitutionally impair an existing franchise. In Pinellas County v. General Tel. Co., 229 So.2d 9 (Fla. 2d DCA 1969), the court held that any effort by the county to impose on the utility the costs of relocating utility facilities from a right-of-way, including attempts under Sections 338.17-.21, Florida Statutes (later renumbered Sections 337.401-.404, Florida Statutes), would impair an existing franchise agreement in violation of Article I, Section 10 of the Florida Constitution. The court's reasoning in that case is even more compelling here where the City and the County seek to impose substantial, additional costs for converting an existing overhead system to an underground system. See also Wisconsin Pub. Serv. Corp. v. Marathon County, 75 Wis.2d 442, 249 N.W.2d 543 (1977) (due process requires county to compensate utility for costs of undergrounding lines necessary for a new airport, as franchise grants property rights which are protectable).

The Florida Attorney General reached the same conclusion in considering a similar constitutional challenge, issuing an opinion that the City of St. Petersburg Beach could not unilaterally alter or modify by ordinance an existing electric utility franchise agreement with FPC. Op. Att'y. Gen. 078-43 (March 9, 1978) (App. E). Much like the Lake Mary franchise in this case, the City granted FPC a 30-year franchise to operate electric facilities in that city in return for six percent (6%)

of the revenue derived from local electric sales. Finding that the franchise was a valid and enforceable agreement, the Attorney General opined that the franchise could not be altered by a later ordinance to lessen the rights of FPC unless this power had been reserved in the franchise itself. Id. at 95-96.

The Attorney General first noted that the contracts clause, Article I, Section 10, Florida Constitution, is generally applicable to agreements with municipalities. See Anders v. Nicholson, 111 Fla. 849, 150 So. 639 (1933). The Attorney General then noted that the strictures of the contracts clause apply to a city ordinance since an ordinance has the effect of law. See Tampa Northern R. Co. v. City of Tampa, 91 Fla. 241, 107 So. 364 (1926). Therefore, a party to such a contract, which was in the nature of a lease, is entitled to constitutional protection against impairment by the passage of a later municipal ordinance. See City of Miami v. Bus Benches Co., 174 So.2d 49 (Fla. 3d DCA 1965). Finding no provision in the franchise which reserved a right to the City to amend or modify the agreement, the Attorney General concluded that any ordinance which attempted to modify the franchise agreement violated the contracts clause.

These controlling authorities dictate the same conclusion here. The Franchise Agreement between the City and FPC contains no reservation by the City allowing unilateral modification of the terms of the franchise.[12/] Manifestly, the attempt by the

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12/ Since the City cannot impair its existing contract with FPC, the County cannot require free undergrounding on this road. Section 125.42, Florida Statutes (1989), makes clear that the

County and the City to impose a new condition requiring undergrounding of these electric lines at FPC's expense works a substantial impairment of FPC's unconditional rights under its existing franchise. The ordinances accordingly violate the contracts clause in Article I, Section 10, Florida Constitution, and are unconstitutional.

Conclusion

Florida's uniform and centralized system of state utility regulation cannot coexist with the trial court's ruling in this case, which permits localities to impose huge cost increases on utilities and their ratepayers by ordering free undergrounding on an ad hoc basis. If, as one would expect, every county and city takes advantage of these free service enhancements, the overall increase in the utility rates in this State will be staggering. Perhaps more importantly, these increases will occur without PSC approval or control. The statewide regulatory system established by the Legislature would be replaced by a host of varying

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County has no authority over the rights-of-way within the incorporated limits of the City, as the County can only grant licenses to utilities to use rights-of-way outside of municipalities. Furthermore, Section 337.29(3), Florida Statutes (1989), grants to municipalities the proprietary control over rights-of-way within their corporate limits even for roads transferred to other authorities, e.g., counties. Section 335.04(2), Florida Statutes, consistently provides that county responsibility for operation and maintenance of county roads within incorporated areas does not extend to the right-of-way. The City's franchise, therefore, governs the rights-of-way within its municipal boundaries, and all of the mandated undergrounding in this case is within the City's boundaries. See also note 11 infra.

requirements by local governments -- a result that simply cannot be allowed.

Furthermore, these ordinances directly and impermissibly impair the franchise rights granted to FPC. The unconditional right that was granted to FPC to use these rights-of-way cannot be subsequently and unilaterally withdrawn by the City. The contracts clause of the Constitution manifestly proscribes any such impairment of FPC's franchise rights.

For these reasons, the decision of the trial court should be reversed, and this Court should declare the County's and City's ordinances requiring free undergrounding by FPC to be invalid and unconstitutional.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to NED M. JULIAN, JR., ESQ., Stenstrom, McIntosh, Julian, Colbert, Whigham & Simmons, P.A., Post Office Box 1330, Sanford, FL., 32772-1330, LONNIE N. GROOT, Assistant County Attorney, Seminole County, Seminole County Services Bldg., 1101 East First Street, Sanford, FL., 32771, and DAVISSON F. DUNLAP, JR., 300 E. Park Avenue, Tallahassee, FL., 32301, on this the 16th day of November, 1990.

Attorney