SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs. CASE NO. 76,743

SEMINOLE COUNTY and CITY OF LAKE MARY,

Appellees.
_____/

REPLY 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." The Florida Public Service Commission will be referred to as "the PSC."

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 are to appellant's initial brief and are designated "App. ___."

Because FPC must respond in only 15 pages to 120 pages of argument in the County's and City's briefs and the amicus brief of the Florida League of Cities, it obviously cannot address each of the myriad of arguments raised in those briefs. Its failure to do so should not be viewed to be an acquiescence in the correctness of those arguments.

All emphasis in quoted material is supplied unless otherwise noted.

ARGUMENT

Introduction

The straightforward issue in this case, as certified by the Fifth District Court, is "[w]hether a local government may require a public utility to install underground power lines and pass on the costs associated therewith to the ratepayers." (App. F). Despite the efforts of the County and City to obfuscate the certified issue, it is clear that the crux of this case is their requirement that FPC convert these overhead facilities to underground at no cost to themselves, which in turn means that the persons who would necessarily pay for those enormous extra costs would be the utility ratepayers, through higher electric bills.[1/] But, the rates that utility customers are to pay for their electric service are matters wholly within the exclusive regulatory powers of the PSC, and Florida law does not allow local governments to independently mandate such dramatic rate increases upon the utility ratepayers of this State.

I.

These Local Ordinances Are Preempted By And Conflict With The Statewide Regulatory Scheme For Public Utilities In Chapter 366.

The County and its amicus misleadingly suggest that the only issue before the Court is whether localities may pass ordinances requiring underground lines. That ignores the critical part of the issue at hand -- which is whether a local ordinance requiring public utilities to convert to more costly underground lines in that particular locality can mandate that the extra costs of

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[1/] Due process requires that FPC be permitted to recover prudently and legally incurred costs of doing business from the ratepayers. Gulf Power Co. v. Bevis, 289 So.2d 401 (Fla. 1974).

doing so be imposed on the utility ratepayers.[2/] The issue of payment of the increased costs for underground lines can neither logically nor statutorily be separated from the decision to require those underground facilities. If the County and City had been willing to pay for the added costs from undergrounding, FPC was fully willing to carry out this undergrounding, and this case would not be before this Court. (Pl. Ex. 13, 25, 27, 29; Def. Ex. 7 at 25-28).

In short, the issue framed by the County is a pure red herring. It is the requirement that the undergrounding be installed at no cost to the local governments that directly and impermissibly interferes with the PSC's exclusive regulatory powers over the rates, services, and facilities of the public utilities in this State.

Ignoring the PSC's warnings as to the adverse impact that local governments' efforts to mandate undergrounding at no cost to themselves would create for the State's electric utility system and the ratepayers who support that system, the County and City assert that, under their "home-rule" powers, they can act as "mini-PSCs" along with all other local governments. As such, <u>every</u> local government would have the authority to make both the decision to require conversion of a public utility's overhead facilities to underground facilities <u>and</u> to impose the additional millions of dollars in costs for that conversion on the utility's

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[2/] The City acknowledges that the real issue is whether localities can require undergrounding "at no expense to local government." City Brief at 10. However, the County incorrectly asserts that the trial court did not find that the extra costs could not be passed on to local governments. To the contrary, the trial court's order plainly shows that the court specifically held that those extra costs <u>must</u> fall upon the utility, "not upon the taxpayers." (App. A at 2-3).

ratepayers. To the contrary, Section 366.04(1), Florida Statutes, expressly grants exclusive regulatory powers to the PSC in order to assure uniform, statewide regulation of utility service, rates, and facilities.

The County and City argue that their local powers to require undergrounding of utilities at no cost to themselves are not preempted by the all-encompassing statutory scheme of Chapter 366, because there is no express preemption of local government powers in that statute. But that argument ignores the fact that this Court has, under similar circumstances, found preemption of local regulations even though the state statutory scheme contained no explicit statement of preemption.

In Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), for example, this Court found preemption of local regulation by the Workers' Compensation laws based on the pervasive legislative scheme, even though no explicit statement of preemption existed in that statute. The Court declared that, notwithstanding home rule powers granted to local governments, preemption could be inferred from comprehensive legislative treatment of a subject:

> Section 166.021(3)(c), Florida Statutes (1987), which is part of the municipal home rule powers act, limits cities from legislating on any subject expressly preempted to state government by general law. The preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject.

Barragan, 545 So.2d at 254 (citations omitted).

Similarly, based on Chapter 366's expressly broad and exclusive jurisdictional grant to the PSC of plenary regulatory powers over public utilities, there can simply be no doubt that local regulations over public utilities and their facilities which directly affect their rates are preempted. Indeed, Section 366.04

is itself a more than ample legislative expression of the statewide preemption of such local regulations, especially when coupled with the pervasive scheme of public utility regulation provided throughout Chapter 366. That provision states that:

> The jurisdiction conferred upon the commission shall be exclusive and superior to that of all . . . municipalities . . . or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

§ 366.04(1), Fla. Stat.

If this were not enough to establish preemption, as it surely is under Barragan, included in this same statutory provision -- which is entitled **"Jurisdiction of Commission"** -- is subparagraph (7)(a) which grants the PSC the direct authority to order conversion of overhead facilities to underground as a part of their relocation if the PSC determines that the statutory criteria for cost-effectiveness are satisfied. Thus, the Legislature explicitly recognized that the decision to require conversion to underground facilities is inextricably tied to the increased costs resulting from that decision, and it delegated that entire matter to the PSC. As such, the PSC's exclusive and superior jurisdiction ineluctably preempts local regulations which seek to require public utilities to convert to underground facilities at ratepayer expense.

The City struggles to distinguish the cases cited by FPC from other states involving similar utility regulatory schemes and similar statutes giving local governments the right to require relocation of utility lines as a part of road widening projects. The supreme courts in those states have squarely held that pervasive, statewide public utility regulation necessarily

precludes local efforts to require conversion to underground facilities at the expense of ratepayers.

Ignoring the carefully reasoned basis set forth by those courts for their decisions, the City argues that the cases cited by FPCs involved undergrounding of transmission lines, not distribution lines.[3/] Manifestly, this purported "distinction," based solely on the amount of voltage an electric line carries, is wholly irrelevant to the legal issue resolved in those cases, and there is certainly nothing in the stated rationale for those decisions that suggests there would have been a different decision by the court if the lines to be undergrounded were distribution rather than transmission. Indeed, since distribution lines are far more extensive than transmission lines, the impermissible adverse effect upon the statewide regulatory powers of the utility commission -- which is the foundation for those decisions -- is even greater with respect to distribution lines than transmission lines.

Moreover, the "distinction" urged by the City runs directly contrary to the statutory grant of jurisdiction to the PSC to determine the entire undergrounding issue "for the conversion of overhead distribution and transmission facilities to underground distribution and transmission facilities." § 366.04(7)(a), Fla. Stat. As shown on the face of that statute, the Florida Legislature has unquestionably included both types of power lines within the PSC's jurisdiction concerning conversion of those lines to underground.

3/ The City apparently overlooked a California decision cited by FPC which prohibited local requirements to underground distribution lines. See Town of Woodside v. Pacific Gas & Electric Co., 83 P.U.C. Decisions 419 (Cal. Pub. Ut. Comm'n 1978) (App. D).

Significantly, the cases upon which the County and City rely all involve direct constitutional or statutory grants of powers to localities to regulate utilities and the undergrounding of their facilities. They therefore provide no support for the trial court's decision in this case since there is no such constitutional or statutory provision in Florida.

For example, in Arizona Public Service Co. v. Town of Paradise Valley, 125 Ariz. 447, 610 P.2d 449 (1980), the sole issue was "whether the legislature may constitutionally delegate to cities and towns the authority to direct . . . undergrounding." Id. at 450. The state constitution there specifically allowed localities to be authorized to supervise public utilities, and the legislature had directly empowered local governments to regulate utility facilities. Similarly, in Benzinger v. Union Light, Heat & Power Co., 293 Ky. 747, 170 S.W.2d 38 (1943), the state constitution explicitly granted localities the power to control underground utility facilities. Finally, in Central Maine Power Co. v. Waterville Urban Renewal Authority, 281 A.2d 233 (Me. 1971), the power to require underground transmission and distribution lines had been statutorily delegated to an urban renewal authority, and the court specifically limited its holding to urban renewal authorities. Id. at 241.

Unlike those jurisdictions, the Florida Legislature has statutorily delegated exclusive authority over utilities, their facilities, their rates, and their service to the PSC, and Section 366.04(7)(a) specifically grants the PSC jurisdiction over the conversion of such overhead facilities to underground. As the City candidly concedes, if the PSC decided to order undergrounding of utilities pursuant to this statutory provision, a locality

could not "override" the PSC's decision. (City Brief at 28). The PSC has instead determined that it will not order undergrounding, as that has not been proven to be "cost-effective" within the Legislature's statutory definition. See Order on the Investigation Into Underground Wiring, No. 23126 (FPSC June 28, 1990) (Pl. Ex. 8). The point is, the question of undergrounding vel non and the imposition of the costs thereof has been delegated by the Legislature to the PSC, and its decision -- whatever that might be -- cannot be overridden by local ordinances.

The County and City suggest that the PSC is itself uncertain whether its statutory powers have preempted such local government ordinances, noting that the PSC's chairman sought further legislative guidance on the issue. But that request in no way detracts from the PSC's unequivocal position in its Order that its jurisdiction pursuant to Section 366.04(7), dealing with the undergrounding issue, is "exclusive," (Pl. Ex. 8 at 16), or from its unequivocal position in its amicus brief in this case to that same effect. Critically, there has been no legislative indication that the PSC's stated position of its exclusive jurisdiction was inconsistent with the Legislature's intent in enacting Section 366.04(7).

Similarly, the County's and City's assertion that the PSC's rules permit their undergrounding mandate is completely without merit.[4/] The County and City point to PSC Rule 25-6.061(3),

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[4/] The City alternatively urges that all PSC rules dealing with undergrounding are invalid as being outside of the PSC's jurisdiction. That is patently not the case, and this Court's holding in Storey v. Mayo, 217 So.2d 304, 307 (Fla. 1968), cert. denied, 395 U.S. 909 (1969), that the PSC's authority over utilities is "omnipotent," coupled with the comprehensive powers expressly granted under Chapter 366, is dispositive of that contention. Moreover, the very fact that the City's position in

(continued...)

Florida Administrative Code, contending that this rule shows that the PSC believes that localities have the authority to require undergrounding at ratepayer expense. But, when the entire language of the rule is read, it is clear that it specifically provides that utilities cannot be required to bear the increased costs of undergrounding:

> (3) If a utility is required by governmental or other valid authority to install underground distribution, and abandon overhead distribution, the utility shall not be required to bear any of the cost of making the necessary changes on the customer's premises . . . .

Rule 25-6.061(3), Fla. Admin. Code.

The County and the City also point to PSC Rule 25-6.074 (dealing with residential undergrounding) as authority for ordering this undergrounding. However, related rules specifically require that the developer of such a project pay for the extra costs of underground installation. See Rule 25-6.078, Fla. Admin. Code. Thus, there is nothing in any PSC rule to indicate that the extra costs for undergrounding may be required to be passed on to a utility's ratepayers at the insistence of local governments.

In an attempt to bolster their effort to do precisely that, the County and City devote a considerable portion of their briefs to an argument that their underlying zoning decisions were reasonable and were not disputed by FPC. It is quite true that FPC did not contend that these local governments acted unreasonably in widening this road or in creating this

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4/ (...continued)
this case requires it to assert the invalidity of all Commission undergrounding rules is yet a further indication of the fundamental conflict between the Commission's jurisdiction and the City's position.

transportation corridor with underground lines for aesthetic purposes.[5/] However, despite the County's assertion to the contrary, FPC did object -- vigorously -- to any effort to enact ordinances which required the extra costs of underground utilities to be passed on to FPC's ratepayers. (Pl. Ex. 13, 25, 27).

Moreover, FPC specifically questioned the reasonableness of a locality determining that FPC's ratepayers should pay an additional $1.25 million for underground lines which deliver exactly the same electric service to ratepayers. This issue of cost-effectiveness has been specifically dealt with by the Legislature and by the PSC. Indeed, by enacting Section 366.04(7), the Legislature squarely recognized the unseverable nexus between the decision to underground and the extra costs arising from such a decision, and it expressly delegated this entire matter to the PSC. By its very nature, this determination is one that is quintessential to the PSC's statewide regulatory powers, and it should not be made on a local, piecemeal basis.

There can simply be no question that automatically adding such enormous costs to the bills of FPC's ratepayers would substantially impact FPC's statutory duty to provide its customers with "efficient service" at fair and "reasonable" rates as determined by the PSC. See §366.03, Fla. Stat. The County and City callously assert that, since FPC's stockholders will not absorb those costs, FPC should not care that its ratepayers will. However, as these added costs will admittedly not enhance the

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[5/] Aesthetic purposes were the essential purpose for requiring underground lines. Amicus, League of Cities, speculates that there is a significant safety enhancement from underground lines, but this is not supported by this record or by the PSC Order on Underground Wiring. (Pl. Ex. 8).

actual electric service received by FPC's customers, FPC must be concerned that its ratepayers would receive less efficient service, i.e., the same electric service at significantly greater costs, all without PSC authorization as required by Chapter 366 and contrary to the PSC's determination that undergrounding has not been shown to be "cost-effective" service.

Even more importantly, FPC's ability to provide "efficient" service at "reasonable" rates would be jeopardized by the massive costs its ratepayers would be forced to pay as other local governments throughout the State imposed the same undergrounding requirements to benefit their localities. The effect of the trial court's decision cannot be viewed in a vacuum, as the County and the City would have this Court do. If these local governments can mandate free undergrounding for their localities, so can every other local government, and the resulting impact upon the utility's ratepayers and their electric bills would be mind-boggling.

These concerns over the devastating effects that statewide undergrounding requirements of local governments would have on Florida's utility system are summarily dismissed by the County and City. Yet, the very appearance of the Florida League of Cities as amicus in support of the County's and City's position demonstrates that FPC's concerns were justified. The League of Cities is obviously interested in much more than this one road project in Seminole County, and it plainly hopes to establish the right of every locality to order conversion to underground lines without charge to the local government. The appearance of the League of Cities confirms that this case cannot fairly be considered in

isolation, but rather must be viewed with reference to its impact on the overall, statewide utility system and the PSC's regulation of these utilities, their service and rates.

Finally, in support of their position that they can order undergrounding as a condition of FPC's continued use of the public rights-of-way, the County and City assert absolute dominion over those rights-of-way, regardless of the impact their decision will have on the ratepaying utility customers. However, neither the County nor City address the statutory requirement under Section 334.03(25)(b), Florida Statutes, that "replacement rights-of-way for relocation of . . . utility facilities" must be included in every transportation corridor, such as the Lake Mary Boulevard Gateway Corridor.[6/] This statute alone demonstrates that local governments are not empowered to mandate that a utility abandon its existing use of a public right-of-way.

This is even more the case when that utility has an existing franchise for using the public thoroughfares "as they now exist or may hereafter be constructed . . .," a contractual right for which it has continuously paid very substantial fees. Moreover, contrary to the County's and City's statements that FPC has a choice to either use the right-of-way or condemn a new utility corridor, the undisputed evidence established that FPC has no other feasible choice in this instance but to continue using this right-of-way, and therefore has no other practical choice under

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6/ The County weakly suggests that the Lake Mary Boulevard corridor is not really a transportation corridor. However, the County later in its Brief concedes that this gateway corridor is a "transportation corridor." County Brief at 26. Furthermore, the definition of a transportation corridor in Section 334.03(25) clearly includes the Lake Mary Boulevard Gateway Corridor.

the ordinances but to underground the lines at its ratepayers' expense. (Tr. 82-84; 98-99).[7/]

The County and City continue to rely on the road construction statute, Section 337.403, Florida Statutes, asserting that, in their "opinion," the relocation of overhead lines on the widened right-of-way would not be "convenient." (City Brief at 22). But the critical point that they ignore is that relocation of the lines overhead in the widened right-of-way would admittedly not interfere with the widening of the road. (Tr. 220). Since the lines could be relocated overhead without any physical interference whatever with the widened road, Section 337.403 does not authorize the County's and City's action in requiring conversion to underground lines as an adjunct of this road widening.

Nor does FPC's position that its ratepayers should not be forced by local governments to pay for their beautification

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7/ The County spends much time on a variety of wholly irrelevant issues, including right-of-way utilization permits it previously issued to FPC. These permits are simply immaterial to this case as FPC does not rely on them to establish a utility's general privilege to use public rights-of-way to reach its customers. Moreover, the County clearly has no authority to license use of rights-of-way within a municipality's boundaries, as Section 125.42(1), Florida Statutes, provides that the County's licensing authority over rights-of-way is expressly excluded from municipalities. Since all undergrounding in this case is within the City, the County permits have no application.

Similarly, the County's claim of FPC's failure to exhaust administrative remedies is specious, since the ordinance on which it relies provides an administrative appeal only from a denial of a request for a county right-of-way utilization permit. See Pl. Ex. 10 at Ch. 11. FPC has neither requested nor been denied such a permit. Significantly, exhaustion of remedies played no part whatsoever in the trial court's decision. And, as the extensive briefs that were filed below established, that argument is meritless; among other things, since FPC's challenge is one of facial unconstitutionality of these ordinances, there is no exhaustion requirement. See City of Miami Beach v. Perell, 52 So.2d 906 (Fla. 1951).

project destroy the zoning goals underlying this local project, as the County and City urge. All that is necessary is that the locality which requires a significant and costly aesthetic enhancement to a utility facility not undertake to insulate itself from also paying for its choice if the PSC determines that it is the proper party to pay for that choice. FPC has always been willing to help accomplish the zoning goals of beautifying this local road by installing underground lines -- it is simply not willing to do so at the expense of its ratepayers.

The desire of these local governments to enhance the beauty of this transportation corridor is completely understandable. But the inescapable fact remains that there is no such thing as a "free lunch," and those who seek utility undergrounding must be willing to concomitantly bear its costs if that is the regulatory decision of the state agency having responsibility for setting utility rates. The insistence of these local governments that they can refuse to pay for the costs of undergrounding they require in their particular localities -- regardless of the policies and directions of the PSC -- directly interferes with and is preempted by the carefully crafted statutory scheme established by the State of Florida for the uniform, statewide regulation of public utilities within this State. As such, these local ordinances are unconstitutional.

II.

These Ordinances Breach And Impair FPC's Franchise Agreement.

The County and City urge that FPC's franchise with the City can be breached and impaired so long as this is accomplished in the name of the police power.[8/] This position renders any franchise with a local government meaningless, and writes the contracts clause of the Constitution out of existence. In actual fact, it is settled that even the County and City are bound by the contracts clause of the Constitution, and they cannot substantially impair an existing contract in the absence of an overriding public necessity. See Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979); Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975). The County and City do not even attempt to argue that there is an overriding public objective which requires that local governments not pay for conversions to underground utilities which they mandate for their own benefit.

Conclusion

A cohesive, centrally regulated public utility system cannot coexist with decisions of local governments to pass along to utility ratepayers the extra cost for conversion to underground lines mandated by local governments. The PSC would be stripped of all realistic authority to control utility rates since these massive expenditures would be mandated by local governments which

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8/ The County incorrectly states that FPC stipulated at trial that its franchise had not been violated by these ordinances. This is not the case. FPC only stipulated that the franchise was not breached by FPC as "all of the payments [had] been timely and correctly made and so forth." (Tr. 58). Notably, the City itself has not even attempted to raise this meritless position.

would not agree to be responsible for them. Such a system is simply unworkable and contrary to the public interest which the PSC is empowered to protect. Accordingly, this Court should hold that these local ordinances are unconstitutional and hence unenforceable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to NED M. JULIAN, JR., ESQ., Stenstrom, McIntosh, Julian, Colbert, Whigham & Simmons, P.A., Post Office Box 1330, Sanford, FL 32772-1330, and to LONNIE N. GROOT, Assistant County Attorney, Seminole County, Seminole County Services Bldg., 1101 East First Street, Sanford, FL 32771, by Hand Delivery to DAVISSON F. DUNLAP, JR., 300 E. Park Avenue, Tallahassee, FL 32301, and to HARRY MORRISON, JR. and KRAIG A. CONN, General Counsel, Florida League of Cities, Inc., Post Office Box 1757, Tallahassee, Florida 32302, and by U.S. Mail to all other counsel of record on this the 21st day of December, 1990.

_____
Attorney