THE SUPREME COURT OF FLORIDA

TOWN OF BELLEAIR,
a Florida municipal corporation,

Petitioner, Case No.: SC02-2149

vs.

FLORIDA POWER CORPORATION, DCA Case Nos.: 2D01-5717
a Florida corporation L.T. Case No.: 00-6487-
CI-20

Respondent.
_________________________________/

Answer Brief of Respondent Florida Power Corporation

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PRELIMINARY STATEMENT

In this Answer Brief, references to Florida Power Corporation are designated "FPC," and references to the Town of Belleair are designated "the Town" or "Belleair." References to the Florida Public Service Commission are designated "PSC."

Because the decision below was rendered in an appeal from a nonfinal order granting an injunction, the record before this Court includes a four-volume appendix filed by FPC at the Second District. All cites to the record (derived from FPC's appendix at the Second District) will be in the form: "(R[appendix number], [tab number], [specific identifying reference, if applicable])." All cites to FPC's appendix filed with this Court will be in the form: "(A[tab number] [page number])."

All emphasis in quoted material is supplied by counsel unless otherwise stated.

STATEMENT OF THE CASE AND FACTS

This review arises from an action brought by the Town of Belleair in September 2000 to obtain a mandatory injunction requiring Florida Power Corporation to continue to make contract payments for an indefinite term after the contract expired. The parties were then operating under a 30-year franchise agreement due to expire on December 1, 2001. (R1, 1, Ex. A); (A5 10). The franchise agreement granted to FPC a "franchise" for an electric system within the Town of Belleair for a 30-year term in consideration for a franchise fee of 6 percent of revenues (including payment of other charges).[1] (R1, 1, Ex. A); (A5 9).

The agreement provided that "At and after the expiration of this franchise," Belleair would have the option to purchase FPC's electric system inside the Town limits. (R1, 1, Ex. A); (A5 9). Because Belleair had no contract right to buy the system prior to the expiration of the agreement, the contract had to expire before Belleair could undertake to acquire the system. The Town has now initiated steps to do so. The

[1] The agreement required FPC to pay "an amount which added to the amount of all taxes, licenses, and other impositions . . . will equal 6% of [FPC's] revenues from the sale of electrical energy to residential and commercial customers within the corporate limits of [Belleair][.]" (R1, 1, Ex. A); (A5 9). For ease of reference, however, the parties have referred to this fee as a "6-percent-of-revenues fee." In accordance with the PSC's rule, the fee is passed through to the electrical customers within the Town. <u>See</u> Fla. Admin. Code § 25-6.100(7).

agreement made no provision that FPC should continue to make contract payments to Belleair after the contract expired. Rather, the agreement specifically provided that FPC would pay to Belleair the 6 percent-of-revenues charge for the contractually limited "period of 30 years," expiring December 1, 2001. (R1, 1, Ex. A); (A5 9).

At the time the parties entered into the franchise agreement, state law required that all such franchise agreements include a provision granting the local government an option to purchase the utility's system at the end of the contract term. <u>See</u> § 167.22, Fla. Stat. (1969); (R2, 14, pp. 5-6). This requirement was repealed in 1973. <u>See</u> Ch. 73-129, Laws of Fla.; (R2, 14, p. 5). Because the parties had entered into their agreement in 1971, the agreement included a purchase option. (R1, 1, Ex. A); (A5 9). As the expiration date drew near, however, FPC advised Belleair that it believed the purchase option was no longer enforceable given the repeal of the statutory basis for that provision. (R1, 1, Ex. C); (R2, 18, p. 2); (A5 14-16).

In its complaint, Belleair requested that the trial court require FPC to submit to arbitration to place a value on the system so that the Town could purchase the system <u>after</u> the franchise expired. (R1, 1, p. 6); (A5 6). At the same time, however, Belleair asked the trial court to enter an order

compelling FPC to continue to make contract payments as though the contract would not expire. (R1, 1, p. 8); (A5 8).

Before the trial court, Belleair stipulated that FPC had no choice but to continue to serve customers inside the Town limits, with or without a franchise. Belleair's counsel stated, "Florida Power is now under the control of the Public Service Commission, and if at the end of this franchise agreement on December 2nd, they tried to walk away from servicing those customers in the Town of Belleair without doing anything more, the Public Service Commission would strangle them." (R2, 16, p. 66). Even if FPC wished to withdraw, Belleair's counsel stipulated "they can't do that." (R2, 16, p. 83). The "PSC won't let them do that." (Id.). The evidence was also undisputed that FPC could not continue to serve its customers in Belleair without traversing public rights-of-way. (R1, 12, p. 2, ¶3).

FPC offered to enter into a new franchise agreement with Belleair, with a 6 percent franchise fee, but FPC declined to agree to a purchase option now that the statute requiring such a provision had been repealed. (R1, 13, pp. 111-12). Belleair responded by commencing this litigation.

Further, FPC stipulated in the trial court that it stood ready, after the franchise agreement expired, to pay Belleair the Town's reasonable costs of regulating FPC's use of the

public rights-of-way as long as FPC continued to use those rights-of-way. (R2, 17, p. 23). But Belleair has never attempted to charge FPC a reasonable regulatory charge, insisting, rather, on full payment of a 6 percent-of-revenues fee.

In the trial court, Belleair offered no proof that the 6 percent fee equaled the Town’s costs of regulating FPC’s use of public rights-of-way and admitted that it was unable to identify that cost. (R1, 13, pp. 25-26, 28-31, 81-82). Belleair acknowledged that thousands of entities, including numerous utilities, used the Town’s public rights-of-way, but the Town offered no proof of how much it cost to regulate any utility’s use of those rights-of-way. (R1, 13, pp. 22-23, 30-31).

Belleair further conceded that the franchise fees paid by FPC were not earmarked for regulation or maintenance of the rights-of-way but were used as a source of general revenues, like tax dollars. (R1, 13, pp. 40-41, 73-74). At the time of the hearing before the trial court, Belleair had two million dollars in excess revenues and did not need the franchise fees to meet identified expenses. (R1, 13, pp. 57, 64, 71-75).

In addition, Belleair had ample ability to replace general revenues derived from the franchise charge through lawful means. For example, state law authorized cities to

charge a utility tax equal to 10 percent of revenues, which Belleair had not then levied. (R1, 13, pp. 72-73). And the Town was operating at a 4.76 millage rate for ad valorem taxes, well below the authorized 10 mills. (R1, 13, p. 69). In fact, the Town had adopted a standby plan to tap these alternative sources of revenues if the trial court denied Belleair’s request for an injunction. (R1, 13, pp. 75-77).

On November 29, 2000, the trial court entered a temporary injunction enforcing Belleair’s request for relief, compelling arbitration (a matter not under review) and requiring FPC to continue to make the payments required by the franchise agreement even after its expiration date. The injunction required that FPC make these payments indefinitely. Specifically, the trial court ordered that FPC must continue to make contract payments until such time, if ever, as FPC no longer used public rights-of-way in Belleair or until such time as the court determined otherwise after a final hearing. (R2, 18, p. 4). The court reasoned that this relief was justified in part to ensure good faith bargaining by FPC. (R2, 18, p. 3).

The Second District Court of Appeal reversed the trial court’s order requiring continuing payment of franchise fees. See Florida Power Corporation v. Town of Belleair, 830 So. 2d

852 (Fla. 2d DCA 2002). The Second District held that the trial court could not order such injunctive relief unless Belleair met the standards for granting equitable relief, namely, by demonstrating that an injunction was necessary to protect a clear legal right and that an injunction was necessary to prevent Belleair from incurring irreparable harm. The court held that the trial court's order did not pass muster under these standards because Belleair had not established that it had a clear legal right to continue to receive payments under a contract after the contract had expired. The court held that courts may not permissibly extend contracts by judicial fiat.

Belleair sought review in this Court.

On September 19, 2002, a divided panel of the Fifth District Court of Appeal reached a contrary result in Florida Power Corporation v. City of Winter Park, 827 So. 2d 322 (Fla. 5th DCA 2002). After briefing and argument in the Winter Park case, this Court ordered briefing in this review.

SUMMARY OF ARGUMENT

The Second District correctly held that the trial court lacked authority to change or extend the now-expired franchise agreement between Bellaire and FPC. When the term of that agreement expired, both parties had every incentive to negotiate a new agreement. For its part, FPC faced the risk that Belleair might purchase its system. At the same time, Belleair faced the termination of franchise payments. The trial court's injunction fundamentally rewrote the parties' contract and favored the bargaining position of Belleair.

As a result of the injunction, Belleair was able to rely upon the expiration of the agreement to invoke its option to purchase FPC's system, but Belleair also received the assurance of continuing post-contract franchise payments indefinitely. This eliminated any incentive on the part of the Town to negotiate a new franchise agreement. It is not the role of the courts, however, to rewrite contracts or to favor one party's bargaining position over another's. Accordingly, the Second District appropriately set aside the trial court's injunction.

Further, this Court in Alachua County v. State, 737 So. 2d 1065 (Fla. 1999), held that the unilateral imposition of a fee to raise general revenues for local government amounts to the unconstitutional imposition of a tax. It makes no

difference that the charge was imposed in this case by the trial court at Belleair's behest. Courts have even less power to tax than local governments. They cannot attempt to create non-existent rights out of whole cloth in the name of providing a remedy. Even more fundamental, courts may not aid local governments to do indirectly what they cannot do directly. That is what happened in this case.

Finally, Belleair has not established any basis to circumvent or to distinguish Alachua County. Belleair's attempts to do so amount effectively to an invitation to eviscerate the holding of that case. But that case was only recently decided, and it has been relied upon by local governments and utilities alike in conducting their affairs. It has been consistently followed and applied by Florida appellate courts, with the exception of the split decision in the Winter Park case. The Alachua County decision is well-grounded in a long line of constitutional authority, and it has demonstrably not chilled the negotiation and execution of new franchise agreements. Local governments and utilities have entered into many such agreements since the date of that decision.

The Legislature must be presumed to know about the Alachua County decision; yet, it has taken no steps to countermand the outcome of the case. If local governments

perceive a problem with the decision, the proper recourse is to take their case to the Legislature, not to the courts.

ARGUMENT

Introduction

The question whether a percent-of-revenues "fee" constitutes an unconstitutional tax under this Court's decision in Alachua County constitutes a pure question of law. The standard of review for a pure question of law is de novo. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

I. The Second District Correctly Held that Injunctive Relief Does Not Lie to Compel FPC to Pay Fees Due Under a Franchise Agreement After that Agreement Has Expired

A. Belleair Failed to Establish a "Clear Legal Right"

It is well settled that a court may not issue a temporary injunction unless the requesting party has met its burden of establishing, inter alia, that the requesting party has a clear legal right to the relief granted and that the requester will suffer irreparable harm unless the status quo is maintained. See, e.g., Provident Management Corp. v. City of Treasure Island, 796 So. 2d 481, 485 n.9 (Fla. 2001). A temporary, mandatory injunction is an extraordinary and drastic remedy and should be granted sparingly. See, e.g., Florida East Coast Ry. Co. v. Taylor, 47 So. 345, 345-46 (Fla. 1908); Johnson v. Killian, 27 So. 2d 345, 346 (Fla. 1947).

In this case, the Second District correctly held that Belleair had failed to establish that it had a clear legal right to a temporary injunction to maintain the status quo.

To the contrary, Belleair failed to establish that it had any legal right at all to continue to receive payments due under a contract after the contract expired. As the Second District recognized, a "trial court cannot, by injunction, extend the terms of a contract after its expiration." Town of Belleair, 830 So. 2d at 854 (citing Sanz v. R.T. Aerospace Corp., 650 So. 2d 1057, 1059 (Fla. 3d DCA 1995)). This principle is well established. See, e.g., Giehler v. Ward, 77 So. 2d 452, 453 (Fla. 1955); see also Squires v. McCarey, 515 So. 2d 316, 317 (Fla. 5th DCA 1987). Remedies exist to effectuate recognized rights; they cannot create legal rights that do not exist. This is amply demonstrated in the circumstances of this case. By means of the judicial remedy it requested, Belleair was attempting to obtain an advantage that was not supported by, and actually ran contrary to, the language of its contract.

As demonstrated by the express terms of the parties' franchise agreement, the parties unmistakably contemplated that there might come a time when the franchise agreement would expire. Specifically, the parties included a purchase option that could not come into play by its express terms except "At and after the expiration of this franchise." (R1, 1, Ex. A); (A5 9). In fact, Belleair is seeking to take advantage of this very clause at this time, invoking its option to purchase the system because the franchise agreement

has expired. Yet, Belleair wants to get paid as though the franchise agreement were still in effect.

The problem with Belleair's position is that the franchise agreement makes no provision that FPC must continue to remit payments due under the contract after expiration. That being the case, Belleair may not rely upon the expiration of the franchise agreement when it suits the Town's purposes, but essentially deny the termination of the agreement in order to continue to receive benefits thereunder. See, e.g., Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979) ("a party may not . . . 'blow hot and cold at the same time' or 'have his cake and eat it too'"); Blumberg v. USAA Casualty Ins. Co., 790 So. 2d 1061, 1067 (Fla. 2001) ("the courthouse should not be viewed as an all-you-can-eat buffet, in which litigants can pick and choose" which outcomes they want).

As the grantor of the franchise, Belleair certainly could have sought thirty years ago to negotiate a requirement that FPC continue to make payments even after expiration of that term. But Belleair did not in fact seek or obtain a contract right to compel continuing payments "At and after the expiration" of the franchise. Although Belleair may now regret the contract that it entered into, a court may not relieve a party from what the party later perceives to be an

improvident bargain. See, e.g., Home Development Co. of St. Petersburg v. Bursani, 178 So. 2d 113, 117 (Fla. 1965); Quinerly v. Dundee Corp., 31 So. 2d 533, 534 (Fla. 1947). That is exactly what the trial court did in this case, and the Second District appropriately reversed.

Further, there is no basis to assume that the parties intended what they did not state. An obligation to continue payment of franchise fees after expiration of the agreement would be fundamentally at odds with the agreement that the parties did in fact reach. The whole value of a franchise from the utility's point of view was that it afforded stability, providing the utility with assurance that the local government would not seek to purchase the system for the decades-long period of the agreement. By contrast, a day-to-day "franchise" would be no franchise at all. It would provide no assurance that the utility would be free from interference by local government or that the amount of its local franchise charges would not change from day-to-day, or week-to-week.

There is no proof in this record that FPC would have ever agreed to pay 6 percent of the revenues it derived from sales in Belleair for a short-term arrangement — after expiration of its long-term agreement — subject to revocation at any time. The only record evidence of the parties' intent is that FPC

agreed to pay 6 percent of revenues in consideration for a 30-year franchise. (R1, 1, Ex. A); (A5 9-10). "At and after the expiration" of that agreement, Belleair would be free to initiate efforts to take over the system, and FPC would have no further obligation to pay Belleair to refrain from making such efforts. That was the deal the parties struck. (R1, 1, Ex. A); (A5 9-10).

Perhaps even more fundamental, the parties entered into their agreement at a time when the Town was legislatively prohibited from granting a franchise for more than 30 years. See § 167.22, Fla. Stat. (1969). To extend the term of the agreement by implication would be to extend the contract beyond the limit permitted by law.

Thus, it is clear that Belleair had no contractual entitlement to the money it requested. It is equally plain that Belleair had no authority to impose or request the fee absent FPC's contractual agreement to pay it. This is true because, absent contractual consent to pay the fee, the fee amounts to an unconstitutional tax.

This Court struck down a charge just like this one in Alachua County. The Court held that a charge imposed against a utility's will may not be justified as a constitutionally appropriate "franchise fee." The Court explained that franchise fees are the product of a "bargained-for agreement."

737 So. 2d at 1068. By contrast, "'a tax is a forced charge or imposition," and "it operates whether we like it or not and in no sense depends on the will or contract of the one on whom it is imposed.'" Id. (quoting State ex rel. Gulfstream Park Racing Ass'n v. Florida State Racing Comm'n, 70 So. 2d 375, 379 (Fla. 1953)). In this case, Belleair called upon the trial court to impose upon FPC against its will a continuing obligation to make the same payments to Belleair to which it previously consented in exchange for a 30-year franchise. Belleair thus sought to convert a consensual contractual arrangement into an unconstitutional tax.

Moreover, it makes no difference that Belleair attempted to enlist the aid of the judiciary to impose this unconstitutional charge. A court has even less authority to tax than a local government. Unless the local government comes to the court with a constitutionally cognizable right to enforce, the court has no jurisdiction to impose a remedy, and it certainly has no proper authority to aid a local government in doing indirectly what it cannot constitutionally do directly. See State v. Atlantic Coast Line R. Co., 47 So. 969, 982 (Fla. 1908) ("Whatever the law forbids to be directly done is also forbidden to be indirectly done."); see also Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (when action would be illegal if authorized or undertaken by legislative body,

courts may not authorize or order same action in the form of a judicial remedy); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986) (same).

Nonetheless, Belleair seeks to justify the trial court's order by advancing six arguments: (1) the trial court's temporary injunction preserved the status quo; (2) FPC had no right to use public rights-of-way after the franchise expired; (3) FPC and Belleair have an implied contract for such payments; (4) FPC must make payment to Belleair to avoid unjust enrichment, (5) FPC may not accept the benefits of a transaction and then take an inconsistent position to avoid its obligations; and (6) FPC is a holdover tenant who must pay rent. We refute each of these contentions in turn.

1. The Trial Court's Order Altered the Legal Relationship Between the Parties

Belleair contends that the trial court's temporary injunction requiring the continuing payment of fees due under the expired franchise agreement merely preserved the status quo given that Belleair sought an injunction before the franchise agreement expired. The Town as much as admits that if it had requested the same injunction after the franchise agreement had expired, this would run contrary to established authority prohibiting judicial tampering with contract terms. See, e.g., Beach Resort Hotel Corp. v. Wieder, 79 So. 2d 659,

663 (Fla. 1955) ("It is well settled that courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain."); North American Van Lines v. Collyer, 616 So. 2d 177, 179 (Fla. 5th DCA 1993) (courts may not rewrite contracts or alter the terms to benefit one of the parties).

Belleair's distinction lacks merit. If Belleair had requested an order requiring that FPC continue to make disputed payments during the term of an existing contract through the remainder of the unexpired term, then Belleair could fairly argue that it was calling upon the trial court to maintain the status quo. In such a case, the injunction would essentially compel specific performance of an existing contract. This is the fact pattern of authority on which the Fifth District relied in the Winter Park case. See 827 So. 2d at 325 (citing Precision Tune Auto Care v. Radcliff, 731 So. 2d 744 (Fla. 4th DCA 1999)). But that is not the order Belleair sought or obtained. (Nor was it the relief sought or obtained in the Winter Park litigation.)

Rather, Belleair requested an order requiring that FPC continue to make payments after the contract expired. The "status quo" at the time Belleair filed its action was that

the parties were operating under a contract with a limited term, due to expire on December 1, 2001. The court's temporary injunction did not preserve that legal relationship. It profoundly altered it. The trial court's order effectively substituted the parties' agreed-upon franchise for one of an indefinite term, to which neither party had agreed.

In fact, the trial court's order accomplished exactly what the court purported to forestall – it put the power of the court behind the bargaining position of one of the two parties engaged in negotiating a new agreement. The <u>true</u> status quo put the parties in an <u>equal</u> bargaining position. They both had something the other wanted. FPC wanted the stability of a long-term franchise agreement and was willing to pay for it. Belleair obviously wanted FPC's franchise fees. Each party had an incentive to come to the table to reach an agreement.

Significantly, this parity of bargaining strength grew directly out of the parties' prior contractual relationship. The pre-existing agreement had a definite term. The expiration of that term held great significance to both sides. Expiration of the contract triggered Belleair's option to buy FPC's system, which gave Belleair leverage over FPC. At the same time, expiration of the franchise entitled FPC to cease making contractual payments to Belleair, creating an interest

on the part of the Town to come to the bargaining table.

As a result of the trial court's injunction, Belleair got to have it both ways. The Town got to rely upon the expiration of the franchise to initiate steps to purchase FPC's system, but the Town <u>also</u> received all the economic benefits of the now-expired agreement. As a result of the trial court's injunction, Belleair had every advantage in negotiations and no incentive to make any concessions whatsoever. In this posture, why should it make any contract concessions? Belleair stood to receive all the benefits of a continuing franchise agreement even while making preparations to buy FPC's system inside the Town limits. As the dissenting opinion in <u>Winter Park</u> put it, "How can this be fair?" 827 So. 2d at 326 n.1 (Sawaya, J., dissenting).

And for how long would this court-engineered "status quo" continue to prevail? Apparently as long as Belleair declined to negotiate a new franchise agreement or delayed in buying out FPC's system. Although Belleair gravely cites Justice Overton's admonition in dissent that the Court's decision in <u>Alachua County</u> might doom utility interest in entering into future franchise agreements, the trial court's injunction in this case was what rang the death knell for bargained-for franchise agreements. No local government would ever have to bind itself again from interfering with utility business

inside its territorial boundaries as long as it could get a court order compelling continuing payment of so-called "franchise" fees even while it is taking steps to supplant the utility's continuing operations on the basis that the franchise had expired. This was far more than preserving the "status quo." The Second District understood this, and appropriately set aside the trial court's erroneous injunction. See Town of Belleair, 830 So. 2d at 854.

2. Does Have the Right to Use Public Rights-of-Way Even Absent a Franchise

Next, Belleair contends that FPC should be made to pay for use of the public rights-of-way after expiration of the franchise agreement because FPC has no right to use those rights-of-way without a franchise. Belleair overlooks the legislative scheme in Florida governing utility use of public rights-of-way and this Court's decision in Alachua County. FPC is a public utility that has a statutory duty to serve its customers wherever they may be located. See § 366.03, Fla. Stat. (2002). Unless and until excused by the Florida Public Service Commission from its obligations, FPC is statutorily required to continue to serve its customers in the Town of Belleair. Further, FPC has a statutory mandate to provide

electric power to its customers at a reasonable cost. See id. FPC must make use of public rights-of-way to serve its customers, and, in any event, FPC could not possibly deliver electricity to its customers in a cost effective manner without traversing public rights-of-way. (R1, 12).

Accordingly, the Florida Legislature has expressly provided that a public utility "may enter upon any lands, public or private, necessary to [its] business . . . and may appropriate the same . . . upon making due compensation according to law to private landowners" only. See § 361.01, Fla. Stat. (2002). The Legislature has not provided for payment by utilities to public landowners for use of public rights-of-way. The reason is that local governments do not hold public rights-of-way in a proprietary capacity; they hold such rights-of-way in trust for the public. Roney Inv. Co. v. City of Miami Beach, 174 So. 2d 26, 29 (Fla. 1937); Loeffler v. Roe, 69 So. 2d 331, 339 (Fla. 1954); Sun Oil Co. v. Gerstein, 206 So. 2d 439, 441 (Fla. 3d DCA 1968). It is only fitting, therefore, that public utilities should be able to use those rights-of-way to serve the very public for whom they are maintained.

Of course, local governments have certain regulatory powers over public rights-of-way. Specifically, the Legislature has provided that local governments have the

authority to impose reasonable regulations on utility use of public rights-of-way, including the power to oversee the permitting of new facilities. See § 337.401, Fla. Stat. (2002). But the Legislature has not empowered local governments to control public rights-of-way like feudal fiefdoms, exacting tolls for continuing use.

Mindful of this legislative framework, this Court in Alachua County struck down an attempt by Alachua County to condition continuing use of public rights-of-way upon payment of a 3 percent-of-revenues charge exacted by the County. The Court's holding in that case made clear that the utilities opposing the charge (including FPC) did in fact have the right to use public rights-of-way without payment of any fee (not tied to the cost of regulation). 737 So. 2d at 1068. Likewise, this Court held in Florida Power Corporation v. Seminole County, 579 So. 2d 105, 108 (Fla. 1991), that local governments are precluded by the overarching reach of state legislation from compelling public utilities to incur the cost of under-grounding distribution facilities in public rights-of-way. And, in City of Oviedo v. Alafaya Utlities, Inc., 704 So. 2d 206, 207 (Fla. 5th DCA 1998), the court held that local governments may not compel a utility to enter into a franchise agreement as a condition to using public rights-of-way.

In Florida, therefore, it is abundantly clear that public

utilities do in fact enjoy the right to use public rights-of-way for the purpose of serving the public for whom those rights-of-way are held in trust. By the same token, neither local governments nor the courts may presume to revoke the statutory duties and rights of such utilities upon expiration of a franchise agreement.

Franchise agreements nonetheless hold value for public utilities. For this reason, public utilities have been willing, and remain willing, to negotiate and enter into true franchise agreements, even though they have the right to operate in public rights-of-way without them. The value in such agreements lies in the fact that, absent such agreements, municipalities like Belleair might seek to serve citizens who reside within their limits by setting up municipal electric utilities and precipitating a territorial dispute with an incumbent public utility. The PSC would have to resolve the dispute, and the outcome is uncertain. See § 366.04(2)(e), Fla. Stat. (2002) (conferring jurisdiction upon the Florida Public Service Commission "[t]o resolve . . . any territorial dispute involving service areas between and among . . . municipal electric utilities, and other electric utilities"); see also § 366.04(1), Fla. Stat. (2002) ("jurisdiction conferred upon the commission shall be exclusive and superior to that of all . . . municipalities, towns, villages, or

counties”).

For this reason, the concern expressed by Justice Overton in dissent in Alachua County has not in fact come to pass. As evidenced by the record and the amici briefs in the Winter Park appeal, utilities have entered into many franchise agreements after that decision was handed down. The key point is that these are voluntary agreements, and they cannot be legally coerced by a court on the ground that, absent a franchise agreement, a public utility must be evicted from public rights-of-way.

Belleair’s reliance on City of San Diego v. Southern California Telephone Corp. 266 P.2d 14 (Cal. 1954), is therefore misplaced. That case concerned a utility franchise established prior to 1905, when California state law was changed to provide, as in Florida, that utilities have the right to use public rights-of-way without local franchise agreements. See id. at 19. With respect to territory for which telephone utilities held franchises prior to the enactment of the new law, the court held that a pre-existing statute applied, requiring that a utility pay local governments a 2 percent-of-revenues franchise fee under local franchise agreements. Otherwise, the utilities could not remain on the rights-of-way after a franchise expired.

As we have explained, the current statutory scheme in

Florida is different from the turn-of-the century regime in California. In Alachua County, this Court expressly rejected the "outdated view that arose over a century ago before the development of modern infrastructures" that local governments are landlords over public rights-of-way. 737 So. 2d at 1068 n.1. The Court held that conditioning use of public rights-of-way upon coerced payment of rent was precluded by "the vast statutes and regulatory schemes currently in place that affect both the location and cost of providing utilities." Id.[2]

3. FPC Does Not Have an Implied Contract with Belleair

Belleair next contends that FPC must be required to continue to pay a 6 percent-of-revenues franchise fee because, in effect, the expired contract between them continues to exist. This argument is based on a misunderstanding of the essential consideration for the franchise agreement, which is no longer extant.

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[2] Cities may not profit from the use of streets. See City and County of Denver v. Qwest Corp., 18 P.3d 748, 761 (Col. 2001) ("municipalities hold public rights-of-way in a governmental capacity"); American Telephone and Telegraph, Co. v. Village of Arlington Heights, 620 N.E.2d 1040, 1044 (Ill. 1993) (cities "do not possess proprietary powers over the public streets" but only "regulatory powers"); City of New York v. Bee Line, Inc., 284 N.Y.S. 452, 456 (N.Y. App. Div. 1935) (city does not have proprietary interest in streets); City of Des Moines v. Iowa Telephone Co., 162 N.W. 323, 327 (Iowa 1917) (city holds streets in trust for the public and "is not entitled to compensation for the use of its streets"); City of Zanesville v. Zanesville Telephone and Telegraph Co., 59 N.E. 781, 784 (Ohio 1901) (city may be compensated only to restore street to condition before utility constructed facility).

As we have explained, utilities have the right to use public rights-of-way with or without a franchise agreement. The true value of a local franchise agreement to a utility is the long-term assurance it affords that the utility can continue to operate and invest in its system in a particular locale without facing attempts by the city to supplant or takeover the public utility's system. As the expiration date of the parties' prior 30-year franchise drew near, however, Belleair initiated steps to buy out FPC's system, and it continues to mount an effort to do so. This demonstrates concretely that FPC no longer retains the kind of stability that it bought and paid for during the term of the agreement. It could not be clearer that this consideration no longer exists. At the present time, FPC is incurring disruption and expense to retain its business in Belleair, as the Town continues to threaten to take over its system. FPC should not have to pay Belleair as though FPC were enjoying the same right to be left alone that it previously enjoyed.

4. FPC is Not Being Unjustly Enriched

Belleair's contention that, absent an injunction, FPC will be unjustly enriched is equally devoid of merit. To begin with, as Belleair points out, the disputed franchise fee is a "pass through" charge paid by FPC's customers under the rules and regulations of the PSC. By declining to collect

that charge from its customers and remit it to Belleair, FPC enjoys no financial enrichment whatsoever. Rather, FPC has prevented its customers from subsidizing a cost that FPC previously had agreed to pay to obtain long-term operating stability for the benefit of the company and its customers.

For this reason, Belleair's reliance on City of Las Cruces v. El Paso Electric Co., 1997 W.L. 1089567 (D.N.M. 1999) is completely mistaken. The court in that case ordered a utility to pay a franchise fee to the City of Las Cruces after its franchise agreement expired because the utility continued to collect that charge from its customers without remitting it to the City. By pocketing the fee, the utility obtained a financial windfall. By contrast, FPC has not collected any fee from its customers in the name of funding a non-existent franchise charge. Therefore it has not been unjustly enriched.

Further, Belleair's argument overlooks the system of mutual benefits and burdens established by the Legislature to govern the relationship between the parties. As we have described, the Legislature has provided that public utilities may occupy public lands for the purpose of serving the public. At the same time, however, the Legislature has authorized municipalities to impose a 10 percent-of-revenues tax on public utilities, see § 166.231(1)(a), Fla. Stat. (2002), and

the Florida Constitution empowers local governments to impose an ad valorem tax on utility real and personal property. See art. VII, §§ 1(a), 9(a), Fla. Const.

As a result of these constitutionally authorized charges, local governments derive substantial benefits as the quid pro quo for the operation of public utility systems within their borders. What Belleair is attempting to do in this case is to obtain an additional unauthorized 6 percent-of-revenues charge without providing the contractual consideration and assurance afforded by a long-term franchise agreement. As this Court held in Alachua County, however, that is a tax, and local governments may not constitutionally impose such a tax.

5. FPC Has Not Improperly Changed Its Position, Having Accepted the Benefits of a Franchise

Belleair next contends that FPC has accepted the benefits of a franchise and now takes an inconsistent legal position. FPC has done nothing of the sort. As we have discussed, FPC no longer enjoys the essential consideration afforded by its expired franchise – long-term assurance that it can operate and invest in its system in Belleair, free from governmental interference. Although FPC continues to use public rights-of-way, it has the right to do so, even absent a franchise. Far from changing its legal position, FPC has consistently argued, as a party in Alachua County, as a party in the pending Winter

Park proceeding, and as a party to the present dispute, that local governments cannot constitutionally impose a unilateral franchise charge on a public utility. Franchise fees must be consensual, and this one is not.

Belleair mistakenly relies upon DeShong v. Seaboard Coast Line R.R. Co., 737 F.2d 1520 (11th Cir. 1984), and Kaneb Services, Inc. v. Federal Savings and Loan Ins. Co., 650 F.2d 78 (5th Cir. Unit A July 1981). These cases stand for the unremarkable proposition that a party may be estopped from asserting mutually exclusive legal positions. Those cases have no application here, where FPC has maintained a uniform position throughout several separate legal proceedings.

6. FPC Is Not a Holdover Tenant

Finally, Belleair argues that FPC is a holdover tenant and must be liable for continuing payment of rent like any other tenant. This contention fundamentally misconstrues the nature of a franchise agreement. A franchise agreement is not a lease on real property. Again, FPC does not need a lease to use public rights-of-way. Rather, a franchise agreement is an arrangement whereby the public utility provides electric service and the local government does not. Under a franchise agreement, the local government does not charge rent for real property. It receives remuneration for ceding (or selling) its own franchise – its prerogative to establish a municipal

utility and to serve its own citizens – to the public utility.

In fact, a local government may not permissibly charge "rent" for public rights-of-way. This point was conclusively established by this Court's decision in Alachua County. In that case, Alachua County, a charter county, sought to impose a 3 percent-of-revenues charge on public utilities for use of public rights-of-way. The county attempted to justify this charge by calling it a "franchise fee" or "rent" and by arguing that it had the constitutional power to impose either over the objection of the affected utilities. This Court rejected the county's position.

This Court held that the charge was not a "franchise" fee because franchise fees are paid by consent – they are the product of a "bargained-for agreement." 737 So. 2d at 1066, 1068. In Alachua County, as here, the local government was not charging the fee by consent. Rather, it was seeking to impose the fee on the utilities over their objection.

Further, as we have discussed, the Court likewise rejected the argument that Alachua County could charge "rent" for use of public rights-of-way, observing that this was an "outdated view" inconsistent with the "development of modern infrastructures" and "the vast statutes and regulatory schemes currently in place that affect both the location and cost of providing utilities." Id. at 1068 & n.1. The Court

explicitly held that a local government was constitutionally limited to charging only a "reasonable fee to cover the cost of regulation" and that such a charge could not "exceed[] the cost of regulation." Id. at 1068.

Belleair has never attempted to calculate its cost of regulating FPC's use of public rights-of-way and has made no attempt to show that a 6 percent-of-revenues charge even reasonably approximates that cost. Indeed, on its face a percentage-of-revenues charge cannot constitute a reasonable regulatory charge as a matter of law because a percentage-of-revenues charge is not tied to the cost of regulating anything. It is tied, rather, to revenues, which is a function of sales, which are a function of consumer demand, not costs.

For this very reason, in Bozeman v. City of Brooksville, 82 So. 2d 729 (1955), this Court struck down as facially unconstitutional a percentage-of-sales licensing charge that the city sought to justify as a reasonable regulatory charge. The Court held that, because the charge was calculated as a percentage of gross sales, "the ordinance shows on its face that the fees exacted have no reasonable relation to the cost of issuing the license or any expenses which may reasonably be expected to be incurred in enforcing the ordinance." Id. at 730. The Court held that the charge constituted an illegal

tax.

Faithful to these teachings, the First District, affirming Judge Terry Lewis's decision, struck down a percentage-of-revenues charge imposed by Leon County on a utility as an unconstitutional tax. See Leon County v. Talquin Electric Cooperative, Inc., 795 So. 2d 1142 (Fla. 1st DCA 2001). Judge Lewis reasoned that the question "[w]hether the fee is an illegal tax is a question which must be determined from the face of the Ordinance itself, not whether at some point in time the fee authorized might coincidentally be equal to the value of property occupied by a utility company." Leon County v. Talquin Electric Cooperative, Inc., Case No. 99-5149, Order at 4 (Fla. 2d Cir. Ct. order filed Apr. 28, 2000); (A4 4). Judge Lewis further observed that Alachua County made legislative findings that the 3 percent-of-revenues charge in the Alachua County case was "reasonable compensation for the use of the rights-of-way" and was "related to the fair rental value of such use, as well as the cost of regulating the rights-of-way," but "the method by which the fee was calculated – 3% of gross revenue – bore no relationship to the actual use of the right-of-way." Id. The same is true of the charge at issue in this case and, like the charge disapproved in Alachua County and Talquin, the charge in this case was constitutionally prohibited.

In sum, Belleair had no clear legal right warranting the issuance of injunctive relief. To the contrary, Belleair had no right at all to the continuing receipt of 6 percent of FPC's gross revenues. Accordingly, the Second District properly reversed the trial court's order and injunction.

B. Belleair Failed to Establish Irreparable Harm

Although the Second District did not rest its decision on this ground, the decision may be approved for the further reason that Belleair failed to establish irreparable harm – an essential prerequisite to injunctive relief. See, e.g., State Farm v. Levine, 837 So. 2d 363, 365 (Fla. 2002) (decision may be affirmed on alternative grounds supported by the record); Carraway v. Armour, 156 So. 2d 494, 497 (Fla. 1063) (same).

What is at issue in this case is the payment of money. Belleair sought to impose a 6 percent-of-revenues charge on FPC, and FPC did not want to pay it. If Belleair believed that it was entitled to that money, Belleair's recourse was to establish this entitlement at trial, and its remedy would be payment of all amounts withheld. This is a classic case where the party requesting injunctive relief had a perfectly adequate remedy at law. There are myriad cases holding that a party may not obtain injunctive relief when the requesting party may be made whole by the payment of money damages. See, e.g., Page v. Niagara Chem. Div., 68 So. 2d 382, 384 (Fla.

1953); Barclays American Mortg. Corp. v. Holmes, 595 So. 2d 104, 105 (Fla. 5th DCA 1992) ("{I]rreparable harm does not exist where potential loss is compensable by money damages."); First Nat. Bank v. Ferris, 156 So. 2d 421, 423 (Fla. 2d DCA 1963) ("injury must be of a peculiar nature, so that compensation in money cannot atone for it").

In the trial court, Belleair put on no proof whatsoever that would establish the critical element of irreparable harm. In fact, the undisputed evidence established that Belleair did not have any pressing need for the franchise fees and could readily replace them with other means at the Town's disposal to raise general revenues, including the imposition of a statutorily authorized 10 percent-of-revenues utility tax. See p. 5, supra. Nonetheless, the trial court reasoned that the requirement of irreparable harm was satisfied because this case concerned an interest in property. (R2, 18, pp. 2-3). This justification has no proper application to this case, however, because Belleair was concededly not seeking to oust FPC from the public rights-of-way. In fact, Belleair freely conceded that FPC was required by the Florida Public Service Commission to remain in Belleair to serve its customers who worked and lived there. See p. 4, supra.

Belleair's sole stated interest in seeking injunctive relief was to ensure that it would continue to receive the

money generated by the contractual franchise fee obligation. And it is that contractual obligation that the trial court impermissibly extended even after the expiration of the agreement. For this reason alone, the Second District correctly reversed the trial court's order.

II. This Court's Decision in Alachua County Is Not Distinguishable from This Case

As we have shown, this Court in Alachua County struck down a charge indistinguishable from the charge imposed in this case as an unconstitutional tax. Accordingly, Alachua County requires approval of the Second District's decision in this case. Nonetheless, Belleair attempts to distinguish this Court's decision Alachua County on five grounds: (1) the local government did not have a prior franchise agreement with the utilities in Alachua County, (2) FPC continues to enjoy all the rights and benefits of the prior franchise agreement without paying for them, (3) municipalities have greater powers than counties, (4) the charge in this case was not imposed by the local government but was imposed by a court, and (5) this Court did not consider the respective rights and duties of parties to an expired franchise agreement. We address these in turn.

1. No Prior Franchise Agreement

The fact that no prior franchise agreement existed in Alachua County is a distinction without a difference. The fact that the agreement in this case expired places the parties in exactly the same legal relationship as parties having no contract. With respect to the imposition of charges upon the utility, what this means is that the element of consent is missing in both cases, and the local government must find authority to impose a charge from some source other than the law of contracts – and none exists.

2. FPC Does Not Continue to Enjoy the Same Rights and Benefits

Belleair contends that this case is different from Alachua County because FPC continues to enjoy rights and benefits of the expired franchise agreement in this case and therefore may be compelled to pay for them. The premise of this argument is flawed. As we have discussed, the essential consideration to FPC of the expired franchise agreement evanesced with the agreement itself. The crux of the agreement was that it gave FPC long-term assurance that it could continue to serve in Belleair free from any effort by Belleair to assert its own prerogative to exercise its state-given franchise. With the expiration of the franchise, all bets were off. Belleair has aggressively moved forward with attempts to takeover the system, and FPC is left with the duty

to serve (and incur capital costs to do so), while not receiving the grant of a franchise.

3. Municipalities Do Not Have Greater Powers than Counties

Belleair is wrong in asserting that municipalities have greater powers than counties. Alachua County was a charter county at the time of the Alachua County decision. 737 So. 2d at 1067. This Court has held that charter counties have the same powers as municipalities. See State ex rel. Volusia County v. Dickinson, 269 So. 2d 9, 10-11 (Fla. 1972); Palm Beach County v. Bellsouth Telecommunications, Inc., 819 So. 2d 876, 878 (Fla. 4th DCA 2002). Although the Constitution does not speak of the proprietary powers of charter counties but does mention the proprietary powers of municipalities, compare art. VIII, § 1(g), Fla. Const. with art. VIII, § 2(b), Fla. Const., this does not mean that charter counties lack proprietary authority in appropriate circumstances. In fact, the statutes in Florida are legion with references to the authority of counties to own and hold property. See, e.g., §§ 125.031, 125.3401, 125.35, 125.355, 125.37, 125.38, Fla. Stat. (2002); see also §§ 403.503(4) and (13), Fla. Stat. (2002) (including counties in definition of electric utilities for purposes of Florida Electrical Power Plant Siting Act, which regulates certification and placement of electrical power

plants).

Further, the explicit reference in the Florida Constitution to the proprietary powers of municipalities is an outgrowth of the fact that Florida courts have recognized that cities are <u>more vulnerable</u> to suit than counties because their sovereign immunity is not as pervasive. <u>See</u> <u>Cauley v. City of Jacksonville</u>, 403 So. 2d 379, 381-384 (Fla. 1981) (explaining historical dichotomy in Florida law of liability between counties and municipalities). The courts have held that cities were acting in their "proprietary" capacity when allowing them to be sued. <u>See</u> <u>id.</u> Thus, if anything, this suggests that cities have less power than counties in relation to their citizens.

In any event, the important point is that whether a local government is a county or a municipality, it holds public rights-of-way in its <u>governmental</u> capacity in trust for the public. This Court has long recognized that, even when vested with the full power of the Legislature over public rights-of-way, "a city has no power to sell or barter the streets and alleys which it holds in trust for the benefit of the public." <u>Roney Inv. Co. v. City of Miami Beach</u>, 174 So. 2d 26, 29 (Fla. 1937). For this reason, this Court in <u>Alachua County</u> used the terms "local governments," "cities," and "counties" interchangeably, and relied on precedents involving both

cities and counties, in reaching its decision.

4. It Makes No Difference That the Charge Was Imposed by a Court

Next, Belleair argues that this case is distinguishable from Alachua County because Belleair did not itself impose the charge at issue; it was imposed by the trial court by means of an injunctive decree. This argument, too, is devoid of merit.

Although Belleair did not itself impose the charge, it was Belleair who called upon the trial court to do so. The trial court had no more authority to compel citizens to pay money to the government at the mere behest of the government than the government itself. As we have discussed, courts may not grant remedies unless to enforce some constitutionally cognizable right.

Courts do not have taxing authority. And courts may not aid legislative bodies in doing indirectly what they cannot do directly. See p. 15, supra. Thus, the trial court could no more grant Belleair's request in this case than it could accede to any request by any town council to levy any other tax that the town council had no constitutional authority to impose.

We have already discussed that Belleair demonstrated no clear legal entitlement to the relief it sought, and the

Second District so held. Town of Belleair, 830 So. 2d at 854

5. The Court in Alachua County Addressed the Same Legal Issues in That Case as Here

Finally, Belleair contends that Alachua County is not controlling because the Court did not address the legal relationship between parties to an expired agreement. This is a rehash of the first argument we have addressed above. The parties in both cases stood before the Court without a contract. The same question presented in both cases is what is the source of governmental power to impose a percent-of-revenues charge on public utilities absent their consent? The answer in both cases is the same: aside from the legislatively authorized utilities tax capped at 10 percent, local governments have no authority to impose such a charge.

III. Local Governments Do Not Have Power Under the Constitution to Impose Such a Charge

Belleair concludes its brief by arguing the proposition that this Court in Alachua County squarely rejected, namely, that local governments have the authority to impose a percentage-of-revenues charge as “rent” or under some other nomenclature. We will not belabor the issue. Because the Court conclusively disposed of that argument in Alachua County, Belleair’s final argument, shorn of all the justifications we have discussed above, amounts to an unabashed entreaty for this Court to overrule Alachua County.

That case was decided in 1999. As precedent goes, in our constitutional form of government, the ink is barely dry on that decision. Local governments and utilities alike have relied upon that decision in shaping their relationships ever since. As the record in Winter Park demonstrates, FPC and other utilities have entered into numerous franchise agreements in line with its teachings. Further, with the exception of the split decision by a panel of the Fifth District in Winter Park, every appellate court that has considered the issue has relied upon and enforced this Court's decision Alachua County. See Town of Belleair, 830 So. 2d at 854; Leon County, 795 So. 2d at 1142.

What is equally important, the Legislature has had repeated opportunities to consider and "rectify" the consequences of the Alachua County decision if the Legislature had seen fit to do so. But the Legislature has not undertaken to legislate a different outcome. See Williams v. Jones, 326 So. 2d 425, 436 (Fla. 1975) (Legislature presumed to be aware of court decisions); Schwartz v. Geico Gen. Ins. Co., 712 So. 2d 773, 774 (Fla. 4th DCA 1998) (same). This is for good reason. Alachua County is rooted in a long line of cases that reflect the proper relationship between government and the governed. If municipalities need more tools to raise revenues for local purposes, or if they should be given a different

kind of authority than the Legislature has seen fit to provide over public rights-of-way, then the Legislature is the proper body to address these concerns.

For all these reasons, it would be unseemly and unwarranted for the Court to act now to overrule, or effectively repudiate, such a recent decision. Accordingly, this Court should reject Belleair's arguments, reaffirm its decision in Alachua County, approve the decision below, and disapprove Winter Park.

CONCLUSION

For the foregoing reasons, this Court should approve the decision below and disapprove Winter Park.

Respectfully submitted,

____

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this 17th day of October, 2003.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent Florida Power Corporation and the Appendix To Answer Brief of Respondent Florida Power Corporation has been furnished by Federal Express, to

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this 17th day of October, 2003.

by: ______________________________

Attorney for Petitioner

CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY, this 17th day of October, 2003, that the type size and style used throughout Respondent’s Answer Brief is Courier New 12-Point Font.

by: ______________________________

Attorney for Petitioner