IN THE SUPREME COURT OF FLORIDA

TOWN OF BELLEAIR,
a Florida municipal corporation,

Petitioner,

CASE NO. SC02-2149
DCA Case No. 2D01-5717
L.T. Case No. 00-6487-CI-20

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Respondent.
_____/

INITIAL BRIEF OF TOWN OF BELLEAIR, FLORIDA

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INTRODUCTION

> Without question, this opinion is now going to be used to challenge every franchise fee in existence. I also believe that many utilities will now refuse to enter into new franchise agreements, and this source of revenue to local government entities will in effect be eliminated by this opinion. This opinion may result in a substantial reduction in the revenue that pays for local government services.

Alachua County v. State, 737 So. 2d 1065, 1069 (Fla. 1999), (Justice Overton dissenting in an opinion in which Justice Amstead concurred). So it was written and so it occurred.

The Town of Belleair was the plaintiff in the trial court, the appellee in the Second District Court of Appeal and will be referred to throughout this brief as "Belleair" or "the Town." Florida Power Corporation was the defendant in the trial court, the appellant in the Second District Court of Appeal but has since changed its name to Progress Energy Florida. For consistency, the investor-owned power company will be referred to throughout this brief as "FPC."

The decision of the Second District Court of Appeal was rendered in a permissible appeal from a non-final order granting an injunction and a partial summary judgment ordering arbitration. Therefore, the record before this court now includes the three volume appendix to the Initial Brief of Appellant Florida Power Corporation filed by FPC in the Second District Court of Appeal and a fourth volume further supporting FPC's Emergency Motion to Review Order Denying a Stay Pending Appeal so this Court may have an understanding of the factual basis for the trial court's granting of injunctive relief. All cites to the record found in the appendices will

be in the form: (Volume #: Tab#: Page#) for example (I:16:7-10), just as it was in the court of appeal.[1] All cites to the record generated by the Second District Court of Appeal will be in the Form: (R: Page#).

[1]Because this action stemmed from an appeal of a non-final order by the trial court, the Second District Court of Appeal did not originally include the three volume Appendix to Initial Brief of Appellant Florida Power corporation ("Appendix"). The parties agreed that this Appendix is critical to the understanding of the proceedings and all the appendices filed in the Second District Court of Appeal have been provided to this Court as part of the record.

STATEMENT OF THE CASE AND FACTS

Procedurally, this matter came before this court upon the filing of a petition for certiorari review from the decision of the Second District Court of Appeal in Florida Power Corporation v. Town of Belleair, 830 So. 2d 852 (Fla. 2d DCA 2002). The petition seeking to invoke the court's jurisdiction pointed out that the decision of the Second District Court of Appeal was in conflict with the decision of the Fifth District Court of Appeal in Florida Power Corporation v. City of Winter Park, 827 So. 2d 322 (Fla. 5th DCA 2002). The decisions are in conflict concerning the power of a trial court to enter a temporary injunction requiring FPC to maintain the status quo under an existing franchise agreement that was about to expire and to continue to collect and forward, as a "passthrough," franchise fees contracted for in an agreement, the benefits of which FPC had enjoyed for 30 years. Central to that apparent conflict was each appellate court's reading of, reliance upon, or distinguishing of, this court's decision in Alachua County v. State, 737 So. 2d 1065 (Fla. 1999).

Briefing and oral argument in the Winter Park case was completed with the oral argument having been heard in August of 2003. This court then entered its order requiring the petitioner in this case to file a brief and the petitioner now obeys.[2]

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[2] In the interim, arbitration has been completed and an award made. Pursuant to the mandate of the Court of Appeal, the trial court has ordered the franchise fees collected pursuant to the injunction deposited by the Town in an escrow account at Carlton Fields. The Town has complied with the trial court order and disposition of those funds and awaits this court's decision.

In 1971, years prior to the scheduled termination date of the previous franchise agreement, FPC entered into negotiations with the Town and contracted to enter into a new 30-year franchise agreement at an increased franchise fee of 6%. The agreement contained the statutorily mandated clause permitting the Town to purchase the distribution system of FPC at the conclusion of the franchise agreement at an arbitrated price. (I:1:9-10).

As the term of the franchise agreement drew to a close, the Town notified FPC of its intention to explore the purchase of the distribution facility and asked for FPC's cooperation in arriving at a price. FPC refused to cooperate, specifically notifing the Town of its intent to breach the contract and that it refused to voluntarily arbitrate the purchase price for the distribution system.

In September, 2000, the Town filed a Complaint for Declaratory Judgment and Injunctive Relief. The Town subsequently filed a Motion for Partial Summary Judgment concerning its right to arbitrate the purchase price of the distribution facilities and filed a Motion for Temporary Injunctive Relief, seeking to maintain the status quo between the parties until the arbitration was completed and the Town made an offer to purchase the system, or a new franchise agreement was entered into. The findings of fact and conclusions of law set forth in the trial court's original order were supported by the record and are persuasive on the issues raised:

> 6. A "franchise" is a special privilege, which is conferred by a government on individuals or corporations, that does not belong to the citizens of a municipality by common right. When granted, a franchise becomes a property right in the legal sense of the word. Local

> governments may collect franchise fees from utilities, and such fees are not taxes. Unlike other governmental levies, franchise fees are bargained for in exchange for specific property rights relinquished by the cities. Alachua County v. State of Florida, 737 So. 2d 1063 (Fla. 1999).
>
> The franchise fees that are subject to this action were bargained for in exchange for specific property rights relinquished by the Plaintiff. When the Franchise Agreement expires on December 1, 2001 the property rights that were relinquished by the Plaintiff revert back to the Plaintiff.
>
> 7. The Defendant's continuing to use Plaintiff's property without paying for the use of the Plaintiff's property, when the current Franchise Agreement expires, will cause the plaintiff to suffer irreparable harm for which there is no adequate remedy at law. Money will not adequately compensate the Plaintiff for the Defendant's violation of the Plaintiff's property rights after the franchise expires. In addition, the parties agreed that the value of the Defendant's electric facilities at the expiration of the franchise would be determined through arbitration. The right to have an issue determined through arbitration cannot be compensated by money damages in a court of law.
>
> The Plaintiff has a clear legal right to a temporary injunction to maintain the status quo and have the value of Defendant's electric facilities determined through arbitration.
>
> The granting of a temporary injunction will serve the public interest in having franchise agreements enforced to their terms; in having the parties to franchise agreements negotiate the terms of new franchise agreements in good faith when an existing franchise is about to expire; and in preventing the taking of municipal property rights by private utility companies once the franchise expires.

(II:18:2-3).

In exercising its discretion to grant temporary injunctive relief, the court was clearly aware of this court's holding in Alachua County and found a logical distinction

between a municipality, or other local government, unilaterally imposing a new fee for continuing to permit enjoyment of a right it had already conferred to another and a court order entered in litigation to maintain the status quo between litigating parties.

> I am a court and they are a municipality. That is a different thing. They are concerned about, you know, a completely different issue. This is litigation, and the court has a control over litigation and the parties of the litigation. It's fundamentally different than the relationship between a city and any other arm's length entity.
>
> I want you to address that because it's one thing to say that a city just can't go out and ex post facto decide they're going to impose fees on a right they've already given away with no notice to the other side. That is one thing. It's another thing entirely to come in here and say, "Judge, maintain the status quo in this existing dispute between the parties so that neither party gets an unfair advantage during the resolution of the dispute so that one party cannot use delay and use other procedural methods to put themselves in a position of advantage." You see what I'm saying? Those are fundamentally different questions.

(II:16:93-94).

In reaching its decision to grant temporary injunctive relief, the trial court also recognized that the Town's revenue sources were finite and that elimination of the franchise fee represented a reduction in that finite maximum revenue which could be made available to the Town from the operation of a public electric utility within its boundaries. The trial court recognized that, "the City only has limited means of making money." (II:16:87). Moreover, the Court acknowledged that if the Town had already charged the maximum 10 percent utility tax, the elimination of the Franchise Fee would be fiscally detrimental to the Town: "assuming that it was maxed out on what the

statute said it taxed in terms of that along with other things...[i]t would be maxed out and it would actually lose gross revenues?" (II:16:88).

Upon appeal from this order, the Second District Court of Appeal reversed that portion of the trial court's order granting a temporary injunction requiring Florida Power Corporation to continue to collect and remit the franchise fee to the Town during the pendency of the action in the trial court.[3]

[3]While it should be obvious to this court by now, and it will not be repeated, the 6% franchise fee which is based upon each customer's monthly bill, is a "passthrough." The PSC rules and regulations allow the investor-owned utility to collect this fee from the customers and it is not paid from monies that would be otherwise available to FPC as profit (and ultimately a shareholder dividend).

STANDARD OF REVIEW

The granting of an injunction is an equitable remedy that is dependent on the specific facts of the case. See, Plissner v. Goodall Rubber Co., 216 So. 2d 228, 229 (Fla. 3rd DCA 1968); Johnson v. Killian, 27 So. 2d 345, 346 (Fla. 1946).

Trial court orders are cloaked with a presumption of correctness and should remain undisturbed unless the petitioning party can show reversible error. Operation Rescue v. Woman's Health Center., Inc., 626 So. 2d 664, 670 (Fla. 1993), rev'd in part on other grounds, Madsen v. Woman's Health Center., Inc., 512 US 753 (1994).

SUMMARY OF THE ARGUMENT

The decision in Florida Power Corporation v. City of Winter Park, Florida, 827 So. 2d 322 (Fla. 5th DCA 2002) was the correct decision on this issue and the Second District Court of Appeal failed to acknowledge the accepted use of injunctive relief at the conclusion of franchises to resolve "holdover" issues, and failed to give sufficient weight to the critical distinguishing factors between the Town's position and the factual situation in Alachua County v. State, 737 So. 2d 1065 (Fla. 1999). The decision of the Second District Court of Appeal directly impacts the constitutional, statutory and charter rights of municipalities and changes the rules concerning their exercise of the right to franchise out those critical property rights. The decision below ignores the historical relationship between the municipality and the franchisee and effectively grants a investor-owned utility a never ending monopoly to provide electric service despite the expiration of its franchise agreement with the municipality and the municipality's right to have a legal monopoly on providing such services.

Though the dissenters predicted the unintended consequence of Alachua County would be to bring about just such an impasse as the Town faced in the instant case, it is the Town's belief that this stalemate was not an intended consequence of this Court's decision in Alachua County, nor a necessary result of that decision. Alachua County is factually and legally distinguishable on its face from the situation in which the investor-owned utility had a franchise agreement for exclusive service and use of public rights of way for a finite period of time at a bargained-for fee. It is not an abuse of discretion for the trial court to use that bargained-for, market-established

fee as the baseline which establishes the value of the investor-owned utility continuing to enjoy the privilege of profiting from its provision of service and its continued occupation of the public rights of way.

Finally, an injunction is a court order requiring a litigant to maintain the status quo: it is not an action by the local government agency and cannot morph into a tax by a local government agency. The continued collection of the contracted-for franchise fee is not a tax at all, but the imposition of an equitable cost by a court doing equity to maintain the status quo and ensure that the Town does not suffer irreparable harm in the situation where a damage remedy would be inadequate.[4]

[4]Interestingly enough, if the trial court denies the temporary relief and the monthly collection of the fee comes to a halt and it is later determined the "holdover" is unlawful and the Town is entitled to damages, the burden of the "tax" would shift from the consumers who now pay it to the shareholders of the company--at least until the next rate case.

I.

INJUNCTIVE RELIEF ORDERING FPC TO COLLECT AND FORWARD A FRANCHISE FEE

It was the appropriate remedy in this case. As the Fifth District Court of Appeal pointed out, temporary injunctions are appropriate in franchise cases in order to preserve the status quo during litigation or negotiation. Florida Power Corp. v. City of Winter Park, 827 So. 2d 322, 325 (Fla. 5th DCA 2002). The Fifth District held that "an injunction under these circumstances is fair and reasonable (it merely requires Florida Power to pass on to the City the fees collected from the electricity customers) and lawful in that it maintains the status quo during an impasse in negotiations." Winter Park, 827 So. 2d at 325. The Winter Park court also held that an injunction to maintain the bargained-for relationship which existed during the term of the franchise while the parties attempted to negotiate the extension of that contract or a buyout of the system was a proper remedy and one previously approved in franchise cases. Id. Opining that the relationship between a franchisor and a franchisee is similar to that of a landlord and tenant, as the Town had argued in the trial court in this case below, the Fifth District Court of Appeal further opined that the relationship between a franchisor and a franchisee is similar to that of a landlord and tenant and as long as the franchisee remains in possession of the property, the franchisee is a tenant at sufferance at the original "rent value" until a new franchise agreement can be negotiated or, in this case, the arbitration completed. Id.

Standing in stark contrast to the well reasoned and common sense application of established franchise law to the facts in the Winter Park case, which are substantially identical to the facts in the instant case, is the Second District Court of Appeal's decision below. Putting the Alachua County issues aside for the moment, the Second District Court of Appeal, relied solely upon the case of Sanz v. R. T. Aerospace Corp., 650 So. 2d 1057 (Fla. 3rd DCA 1995), for the proposition the trial court cannot, by injunction, extend the terms of a contract after its expiration. Florida Power Corporation v. Town of Belleair, 830 So.2d 852, 854 (Fla. 2d DCA 2002). However, when one reviews the decision in Sanz, it is clear the case is distinguishable from, and totally inapposite to, the facts presented in this franchise case, and irrelevant to the proposition at issue in the trial court below.

In the instant case, the trial court recognized that the Town had asked FPC to go to arbitration months before it filed its complaint and over fifteen months before the court entered its temporary injunction. The court was of the opinion that the arbitration might have been completed if FPC had not required the Town to force it to arbitration. The temporary injunction, issued to maintain the status quo until the franchise was either renegotiated and extended, or the buyout option was exercised, was entered prior to the expiration of the franchise.

In Sanz, on the other hand, the issue was an appeal from a non-final order granting a preliminary injunction prohibiting a former employee from competing with his former employer. Sanz, 650 So. 2d at 1057. Sanz had had a written employment agreement which had a finite three-year term. Id. at 1059. The employment agreement expired and Sanz continued to work for his employer for almost two years before his

employment was terminated. Id. The appellate court in Sanz held that it was an error to enter a preliminary injunction pursuant to the non-compete clauses in a written employment agreement which had been fully performed and had expired by its very terms. Id. at 1060. (Of course, non-compete clauses are controlled by statute under Florida law and strictly construed to limit them.) In the Sanz case, the employee derived no continued benefit from an ongoing relationship with the employer. Moreover, the Sanz court recognized that injunctive relief would have been appropriate if the injunction had been issued before the employment agreement expired. Id. at 1059-1060.

In contrast to the Second District panel's reliance on the Sanz case are a number of cases from around the country that would support the trial court's issuance of injunctive relief under common law principals of implied contract, unjust enrichment, quantum meruit, equitable estoppel and the statutory rights of landlords concerning holdover tenants.

It is clear for example, that a party should not be allowed to enjoy the benefits of a contract once the contract has been terminated or expires, without paying for those privileges. See, City of San Diego v. Southern California Telephone Corp., 266 P. 2d 14 (Cal. 1954) (holding that after the franchise expired, telephone company no longer had permission to use the city streets).

Moreover, pursuant to the equitable doctrine of quantum meruit (implied contract), courts have looked to a prior written agreement between the parties to determine a fair price for goods received or services rendered. For example, in

Westinghouse Credit Corp. v. Grandoff Investments, Inc., 297 So. 2d 104, 106 (Fla. 2d DCA 1974), the purchaser of an office building brought suit against a lessee upon an implied contract theory to recover rent for the lessee's use of extra square footage. Although the extra square footage was clearly not covered within the written lease agreement, the court held there was an implied contract for the lessee to pay for what it used. Westinghouse, 297 So. 2d at 106-107. The court looked to the written lease agreement for the other leased space and determined a per-square-foot value for the implied contract. Id.

The doctrine of unjust enrichment is another equitable remedy which supports the trial court's ordering FPC to continue to collect and forward franchise fees to the Town. Unjust enrichment has been used in a factually similar case to compensate a city for the continued use of its rights of way after a franchise agreement had expired. In the City of Las Cruces v. El Paso Electric Co., 1997 W.L. 1089567 (D.N.M., 1999), the federal trial court considered claims by the City of Las Cruces for unjust enrichment in a circumstance very similar to the one before this court. The El Paso Electric Company had operated a franchise from the city from 1911 to 1994. Las Cruces, 1997 W.L. 1089567 at *1. Those franchise agreements provided that the city would receive franchise payments in exchange for the electric company's right to use and occupy the city's rights of way in order to provide electricity to customers in the city. Id. The parties were unable to agree to the terms of a new franchise agreement but the electric company continued to occupy and use the property of the city. Id. The court applied the three elements of unjust enrichment: 1) that a benefit was

conferred; 2) that there was an acceptance of the benefit; and 3) that the circumstances indicate that enjoyment of the benefit without remuneration would create a harsh and inequitable result. Id. at *3-4, 5. Based on the facts of that case, the court found that the city established a claim for unjust enrichment and found the value of the benefit to be the same fee which had been paid under the written franchise agreement before it had expired. Id. at *5. This decision was affirmed on appeal in City of Las Cruces v. El Paso Electric Co., 166 F. 3d 1220 (10th Cir. (N.M.) 1999).

Nor may a party accept the benefits of a transaction, contract, statute, regulation or order and then take an inconsistent position to avoid corresponding obligations or effects. See, DeShong v. Seaboard Coast Line Railroad Company, 737 F. 2d 1520, 1522 (11th Circuit 1984); Kaneb Services, Inc. v. Federal Savings & Loan Insurance Corp., 650 F. 2d 78, 81 (5th Circuit 1981).

Moreover, Chapter 83, Fla. Stat., specifically provides for the payment of rent by a holdover tenant to a commercial lease. §83.04 Fla.Stat. (2003); §83.06, Fla. Stat. (2003); and §83.11, Fla. Stat. (2003). The commercial tenant remains liable for the same rental payments (and in some cases twice the rental payments) which it paid under the expired or terminated lease. A tenant is not allowed to accept the benefits of possession of the commercial premise while avoiding any duty of payment. Florida Atlantic Marine, Inc. v. Seminole Boat Yard, Inc., 630 So. 2d 219, 221 (Fla. 4th DCA 1993). The Florida rule has long been that the holdover tenant is presumed to accept that tenancy upon the same covenants and terms of the original lease. See, Wingert

v. Prince, 123 So. 2d 277, 279 (Fla. 2d DCA 1960); Security Life and Accident Insurance Co. v. United States, 357 F. 2d 145, 148 (5th Cir. 1966).

II.

THIS COURT'S DECISION IN ALACHUA COUNTY DID NOT INTEND THE CONSEQUENCES RESULTING FROM THE SECOND DISTRICT COURT OF APPEAL DECISION BELOW AND ALACHUA COUNTY IS FACTUALLY AND LEGALLY DISTINGUISHABLE

By FCP's own admissions in its pleadings in the trial court and its emergency motion for stay of the court's order requiring arbitration and imposing the injunction, FPC entered into a contract with the Town in which it bargained for and obtained the exclusive privilege to serve the residents and businesses within the municipal limits of the Town of Belleair for a fixed number of years in exchange for a fixed fee of six percent (6%) of its revenues. (II: 14: 1-5.); (R: 23-31). That franchise agreement, or contract, also granted to FPC the privilege of using the public's rights of way for that purpose. FPC continued to profit from this franchise agreement and enjoy its benefits for the full 30-year term of the agreement, obtaining additional revenues from pole rentals to telecommunications and cable companies as a result of the franchise agreement.

In rendering his order, the trial judge specifically cited to Alachua County v. State of Florida, 737 So. 2d 1063 (Fla. 1999) for the following proposition:

> [A] "franchise" is a special privilege, which is just conferred by a government on individuals or corporations, that does not belong to the citizens of a municipality by common right. When granted, a franchise becomes a property right in the legal sense of the word. Local governments may collect franchise fees from utilities, and such fees are not taxes. Unlike other government levies, franchise fees are bargained for in exchange for specific property rights relinquished by the cities. Alachua County v. State of Florida, 737 So. 2d 1063 (Fla. 1999). The franchise fees

> that are the subject of this action were bargained for in exchange for specific property rights relinquished by the Plaintiff. When the Franchise Agreement expires on December 1, 2001, the property rights that were relinquished by the Plaintiff revert back to the Plaintiff. (II:18:2).

The trial court properly found that FPC's retention of the property rights conferred to it by the Town in the franchise agreement after the agreement expired was similar in nature to an inverse condemnation and as long as FPC wished to continue to enjoy those property rights, and the status quo, FPC had to collect and remit the franchise fees over to the Town. The collection and payment of the franchise fee should continue in order to maintain the respective relationship of the parties as it existed before the dispute arose: a proper purpose for an injunction. See, e.g., Chicago Title Insurance Agency of Lee County, Inc. v. Chicago Title Insurance Co., 560 So. 2d 296 (Fla. 2d DCA 1998).

In order for FPC to make Alachua County an issue in these municipal franchise cases, FPC must persuade this court of three things:

1. FPC is no longer enjoying the rights that were provided to it and which it bargained for under the franchise;
2. The Town is now unilaterally imposing a fee upon FPC that is factually and legally identical to that at issue in Alachua County; and
3. Alachua County is not factually or legally distinguishable from the case at bar.

This FPC cannot do.

In Alachua County, the county had permitted a number of public utilities to enter upon and use public rights of way in perpetuity in return for a one-time-only fee collected pursuant to, or as authorized by, Section 337.401 of the Fla.Stat.[5] Alachua County, 737 So. 2d at 1068. There were no franchise agreements involved in these relationships and when Alachua County later attempted to unilaterally impose a percentage of the revenue fee for the continued enjoyment of the right the county had already conferred on those utilities to support the issuance of a bond, this Court found that action to be an unlawful tax. Id.

The differences between Alachua County and the instant case are patently obvious. Here there was a franchise agreement and the right conferred upon FPC was for a finite and fixed period of time. Those rights have expired. Florida Power continues to enjoy that bundle of rights while avoiding payment for the property rights it continues to enjoy. FPC argues it is illegal for a court to order it to continue to pay for the privilege of usurping those property rights despite the expiration of the

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[5]This is one of the statutes FPC has tried to rely upon, arguing that it gives a utility an absolute right to use a public right of way in return for a permit fee. However, F.S. 337.401(2) is succinct in indicating that the "trustee" for the public right of way **may grant** the use of a right of way for a utility in accordance with such rules and regulations as the authority may adopt. The prohibitory language of the statute is controlling here. **"No utility shall be installed, located or relocated unless authorized by written permit issued by the authority."** § 337.401 Fla. Stat. (2003). The only "permit" ever issued to FPC by Belleair which allowed it to occupy the public rights of way was the written franchise agreement.

agreement and during the pendency of litigation between the parties. Moreover, counties do not enjoy the same powers and privileges as municipalities do in Florida, an additional fact that distinguishes this case from Alachua County.

More importantly, try as it might to re-write the facts, the Town has not unilaterally imposed a fee on FPC, but rather, a COURT has ordered FPC to continue to collect from the users of the electric distribution system, a fee for use.

More importantly, this court in Alachua County did not have in front of it the question of the respective rights, duties, privileges or obligations of a municipality and a investor-owned utility at the conclusion of a franchise agreement. Since that issue was not properly before it, it had no legal reason or justification to address the issue. (Though that did not stop the dissenters from accurately predicting what the indirect consequence of the holding in Alachua County would be.)

III.

RESOLUTION OF THE INJUNCTION/FEES ISSUE REQUIRES THIS COURT TO DECLARE THE APPROPRIATE RELATIONSHIP BETWEEN A MUNICIPALITY AND A PUBLIC ELECTRIC COMPANY AT THE CONCLUSION OF A FRANCHISE AGREEMENT AND MORE GENERALLY UNDER FLORIDA LAW

Local governments clearly possess historical authority to charge fees for the use of public rights of way. Art. VIII, §2, Fla. Const.; §166.021, Fla. Stat. (2003). Local governments have proprietary and regulatory powers over the rights of way and they have title to it as well. See, §337.29, Fla. Stat. (2003); including the proprietary authority to charge "rental fees" for use of the rights-of- way, §337.401, Fla. Stat. (2003).

In Florida, municipalities have long possessed the authority to engage in proprietary activities such as the provision of electric service. Keggin v. Hillsborough County, 71 So. 372 (Fla. 1916); City of Tampa v. Easton, 198 So. 753, 756 (Fla. 1940). Municipalities arose primarily for the purpose of administrating the local affairs of a particular community for the special benefit and advantages of the people living in that community. Kaufman v. City of Tallahassee, 94 So. 697, 698 (Fla. 1922); Easton, 198 So. at 756; City of Miami v. Rosen, 10 So. 2d 307, 309 (Fla. 1942); City of Clearwater v. Caldwell, 75 So. 2d 765, 767 (Fla. 1954).

A municipality acting in its proprietary capacity has been compared to a private business, and may even compete with private business, so long as the activity serves

a public purpose. City of Winter Park v. Montesi, 448 So. 2d 1242, 1244 (Fla. 5th DCA 1984), reh. denied, 456 So. 2d 1182 (Fla. 1984).

As early as 1895, the Florida Supreme Court recognized that a municipality not only had the right to provide electricity to its inhabitants, but it might do so in competition with a private company. Jacksonville Electric Light Co. v. City of Jacksonville, 18 So. 677, 680-683 (Fla. 1895).

It is also well established that the municipality which has a statutory power to provide utility service also has the authority to enter into a franchise with a private company to provide that service through an exclusive franchise agreement. State ex rel. Buford v. Pinellas County Power Co., 100 So. 504, 506-507 (Fla. 1924); St. Joe Natural Gas Co. v. City of Ward Ridge, 265 So. 2d 714, 715 (Fla. 1st DCA 1972), cert. denied, 272 So. 2d 817 (Fla. 1973). The Florida Supreme Court has also held that:

> Under Florida law, municipally-owned electric utilities enjoy the privileges of legally protected monopolies within municipal limits. The monopoly is totally effective because the government of the City, which owns the utility, has the power to preclude even the slightest threat of competition within city limits.

Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968), cert. denied, 395 U.S. 909 (1969).

The Grid Act did not change this. Ameristeel Corporation v. Clark, 691 So. 2d 473, 478 (Fla. 1997), (opining that the "Grid Act" did not extinguish a municipality's prerogative to provide service within its boundaries.)

While a footnote in this Court's opinion in Alachua County calls the theory into question, there are a long line of cases that analogize a fee-for-use of the public right of way to rent and a number of cases which have specifically found six percent of revenues to be a reasonable and justifiable charge for the grant of that privilege. In fact, prior to the dicta in the footnote in Alachua County, Florida courts have had an unbroken history in this regard. See, e.g., City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1966) (opining that a six percent electric franchise fee (identical to that currently paid to Belleair by FPC) is not a tax but consideration for use of municipal rights of way); Telestat Cablevision, Inc. v. City of Riviera Beach, Florida, 773 F. Supp. 383 (S.D. Fla. 1991) (holding that charging five percent of gross revenue as franchise fee for commercial use of rights of way is included within the power of a municipality); Jacksonville Port Authority v. Alamo Rent-A-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 1 (Fla. 1992) (holding fees equal to a percentage of revenue are not a tax but rather a reasonable user fee); Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994).

IV.

CONCLUSION

Reconciliation of the decisions in this case and Winter Park are of critical public importance to Florida's municipalities as well as its public utilities. The Town urges this court to recognize the reconciliation of those opinions on the issue of the appropriate use of an injunction to maintain the status quo pendente lite is not simply a matter of clarifying this court's previous decision in Alachua County or distinguishing it both factually and legally. Rather, a proper resolution of this issue must not only take into account the law of fees and taxes, and the well established concepts of equity, but ultimately this Court must look at the proper power and authority of municipalities under the Constitution, the Municipal Home Rule Act and the municipal Charters authorizing municipalities to act as public utilities, and the proper relationship this creates with those utilities that have previously served customers within the Town's boundaries pursuant to a franchise agreement under the regulation of the Public Service Commission.

Practicality and public interest require FPC to remain in the public rights of ways and serve the citizens until the buyout decision has been made and effectuated or the Town enters into a franchise agreement with FPC or another electric company. FPC will continue to profit from that practical reality, just as it did under the franchise agreement. However, it was not an error to require Florida Power to collect from its customers and pass through to the Town the fee agreed upon to pay for that privilege 30 years ago and which had been paid during the entire term of the agreement. The

decision in the Second District Court of Appeal on this issue should be reversed and the matter remanded to the trial court for the purpose of imposing a continued temporary injunction mandating FPC collect and pay to the Town franchise fees until this matter is resolved and for an order releasing to the Town the funds held in escrow by Carlton Fields.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail this _____ day of September, 2003 to:

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY CERTIFY, this ____ day of September, 2003, that the type, size and style used throughout Initial Brief of Town of Belleair, Florida is Times New Roman 14-Point Font.

LEE WM. ATKINSON, ESQUIRE