IN THE SUPREME COURT OF FLORIDA

ORIGINAL

TOWN OF BELLEAIR,	)	
a Florida	)	
municipal corporation,	)	
Plaintiff/Petitioner,	)	
	)	
v.	)	**Case No. SCO2-2149**
	)	**Second DCA Case No. 2D01-5717**
	)	**L.T. Case No. 6487-CI-007**
FLORIDA POWER CORPORATION,	)	
a Florida corporation,	)	
Defendant/Respondent	)	

On Petition to Review a Decision of
The District Court of Appeal, Second District

AMENDED JURISDICTIONAL BRIEF OF PETITIONER, TOWN OF BELLEAIR, FLORIDA INCLUDING APPENDIX

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LIST OF ABBREVIATIONS USED IN THIS BRIEF

A - _____	-	The Appendix to this Brief
DCA	-	District Court of Appeal
FPC	-	Defendant/Respondent: Florida Power Corporation, a Florida corporation
Petitioner	-	Plaintiff/Petitioner: The Town of Belleair, Florida, a Florida municipal corporation

INTRODUCTION

In Justice Overton's dissent to this Court's decision in Alachua County v. State, 737 So.2d 1065, 1069 (Fla. 1999) there sounds, Cassandra-like, this warning:

> "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 franchise agreements, and the source of revenue to local government entities will in effect be eliminated by this opinion. This opinion may result in a substantial reduction in revenue that pays for local government services."

And so, as it was written, it has been done.

Petitioner, the Town of Belleair, a Florida municipal corporation ("Petitioner"), seeks review of a decision of the Second District Court of Appeal (copy attached) upon its review of an appealable non-final order of the trial court imposing a temporary injunction. The Second DCA reversed the trial court's temporary injunction order requiring Florida Power Corporation to continue to collect and remit a franchise fee to Petitioner during the pendency of the action in the trial court. [A-1, P.41. The decision in the Second DCA expressly and directly conflicts with the Fifth District's decision in Florida Power Corp. v. City of Winter Park, Florida, 2002 WL31093938 (Fla. App. 5 Dist.), that an injunction, requiring FPC to collect and remit the franchise fee at the expiration of the franchise, was the proper remedy in an electrical franchise case where the purpose of the injunction was to maintain the bargained-for relationship which

existed during the term of the franchise while the parties attempted to negotiate an extension of the franchise agreement or a buy-out of the system per the terms and conditions of the franchise agreement.

The decision in the Second DCA directly conflicts with the Fifth DCA decision on this critical issue, and this irreconcilable conflict may spur inconsistent decisions across the Circuits. Moreover, the incongruity between the two District Courts of Appeal decisions obfuscates the constitutional, statutory and charter rights of municipalities which have entered into franchises and are approaching the expiration date of their municipal electric franchise.

Finally, the conflicts directly arise from each Court's diametrically opposed reading of Alachua County v. State, 737 So.2d 1065 (Fla. 1999), a decision of this Court which has proven the rule of unintended consequences.

STATEMENT OF THE CASE AND FACTS

Well before the termination date of the franchise agreement between FPC and the Town, the Town attempted to invoke the arbitration/valuation provision of the contract. FPC refused to honor the clear and unambiguous language of the agreement forcing the Town to file a complaint for a declaratory judgment of the respective rights and obligation of the parties and for injunctive relief.

After some modest discovery, the Town filed a Motion for Partial Summary Judgment on the right to arbitration issue. With the time left before expiration of the franchise agreement diminishing and no attempt to reach an accommodation having been made by FPC, the Town timely filed for temporary injunctive relief and a hearing was held prior to the expiration of the franchise.

Though two distinct motions were before the Court and two separate hearings were held, the trial court issued one order on November 29, 2001, two days before the franchise expired. FPC took an appeal from these two distinct non-final but appealable decisions of the trial court. A stay of the arbitration proceeding, but not the injunction was issued by the Second DCA on January 23, 2002. A final hearing on the respective rights, privileges and obligations of the parties has not been held, nor a permanent injunction issued.

FPC raised the following three issues on appeal: (1) the trial court erred by issuing a mandatory injunction to force Florida Power Corporation to continue to collect and forward pass-through fees for FPC's continued use and occupation of Belleair's right-of-way equaling six percent (6%) of its revenues in the same manner it did under the Franchise Agreement after the franchise agreement expired; (2) the trial court erred by ordering Florida Power Corporation to arbitrate the value of its Belleair facilities instead of deferring to the jurisdiction of the Florida Public Service Commission; and (3) the trial court's arbitration order was unauthorized and violated due process. [A-1, P.3]. With respect to issues (2) and (3) above, the Second DCA, aligned itself with the Fifth District decision in Florida Power Corp v. City of Casselberry, 793 So.2d 1174 (Fla. 5th DCA 2001) and affirmed the trial court's ruling on requiring the arbitration without discussion. [A-1, P.3]. Therefore, the Fifth DCA opinion in Casselberry and the instant case do not form a basis for the exercise of this Court's jurisdiction.

Petitioner does not seek review of the arbitration decision, nor a stay of proceedings below since the Town is eager to complete the arbitration process and make a decision on the exercise of the purchase option in the contract. Only the Second DCA's decision to reverse the non-final Order of the trial court granting temporary injunctive relief creates a conflict over which this Court may exercise discretionary review.

SUMMARY OF THE ARGUMENT

Two Courts of Appeal have reached polar opposite decisions on an issue of great importance to Florida municipalities who have entered into franchise agreements with power companies. The decisions further conflict the interpretation of this Court's opinion in Alachua County a predicted but unintended consequence of that opinion. This Court should reconcile these decisions and clarify Alachua County.

ARGUMENT

I. The Decision Expressly and Directly Conflicts With the Fifth District's Winter Park Decision And Both Decisions are Based on an Interpretation of this Court's Opinion in Alachua County

The Second DCA's reversal of the trial court's mandatory injunction requiring FPC to collect and remit the 6% franchise fee during the pendency of the arbitration directly conflicts with the Fifth DCA's Winter Park decision.

As the Fifth DCA opined, temporary injunctions can be appropriate in franchise cases in order to preserve the status quo during the ongoing litigation. Florida Power Corp. v. City of Winter Park, 2002 WL31093938, *1 (Fla. App. 5 Dist.) More precisely, the Fifth DCA held that "an injunction under these circumstances is fair and reasonable (it merely requires Florida Power to pass on to the Town fees collected from the electricity

customers) and lawful in that it maintains the status quo during an impasse in negotiations." Id. at *2. Furthermore, the Winter Park court 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 agreement or a buy-out of the system was a proper remedy in this case and one previously approved in franchise cases. Florida Power Corp. v. City of Winter Park, Florida, 2002 WL 31093938, *2 (Fla. App. 5 Dist.)

Moreover, the Fifth DCA in the Winter Park Decision held that an injunction is a proper remedy where the purpose of the injunction is to maintain the bargained for relationship which existed during the term of the franchise while the parties attempt to negotiate an extension of that agreement or a buy-out of the system. Florida Power Corp. v. Winter Park, 2002 WL 31093938, *2 (Fla. App. 5 Dist.). The court further opined that the relationship between a franchiser and a franchisee is similar to that of a landlord and tenant and as long as the franchisee remains in possession of the property, FPC is a tenant at sufferance at the original "rent" value until a new franchise agreement could be negotiated or arbitration completed. Id. At *1.

The Fifth DCA distinguished its case from this Court's pronouncement in Alachua County v. State, 737 So.2d 1065 (Fla. 1999), where this Court held that the unilateral ***ex post*** *facto*

imposition of a fee charged to a utility for the continued use of a public right-of-way, which fee was unrelated to the cost of maintaining such public property, was an unconstitutional tax. As the Fifth DCA opined in a footnote, "[a] continuation of the originally agreed-to-fee [franchise feel is simply not a new tax." Florida Power Corp. v. City of Winter Park, 2002 WL31093938 *1 (Fla. App. 5 Dist.) The Winter Park court distinguished Alachua County on the facts: Alachua County did not have a preexisting franchise agreement with the utilities. Id.

The Second DCA, in stark contrast, relied upon Alachua County to reverse the trial court's order for a mandatory injunction at the case at bar. The Second DCA held that "the trial court, cannot, by injunction, extend the terms of a contract after its expiration." [A-1, P.4]. The Second DCA further held that without the franchise agreement to support a negotiated franchise fee, a six percent (6%) flat fee at the expiration of the franchise fee constituted an illegal tax pursuant to Alachua County v. State, 737 So. 2d 1065 (Fla. 1999), because it bore no relationship to the actual cost of regulation or maintenance of Belleair's right-of-way. [A-1, P.4]. Moreover, the majority opinion read Alachua County as suggesting that a 6% flat fee, where no franchise is in place, is an illegal tax. [A-1, P.4].

Based on the explicit conflict in these decisions, the Petitioner seeks review of the Town's right to impose the burdens

of the franchise agreement on FPC while FPC continues to enjoy the benefits of that agreement.

II. The Fifth DCA has Certified Conflict with the Second DCA on this Issue.

At the conclusion of the Winter Park decision, the Fifth DCA explicitly stated "We certify conflict with Florida Power Corp. v. Town of Belleair, 27 Fla. L. Weekly D1951 (Fla. 1st [sic] DCA, August 30, 2002)." Florida Power Corp. v. City of Winter Park, 2002 WL31093938, *2 (Fla. App. 5 Dist.). The Second DCA could not certify conflict with the Fifth DCA at the time of its decision because the Winter Park Decision was not issued at the time of the Second DCA's opinion, and though the Winter Park case is not final, the Fifth DCA's certification of the issue was just in time to allow Petitioner to make a timely request for this Court to exercise its discretionary jurisdiction. The Fifth DCA recognized the inherent conflict between it and the Second DCA. This Court should exercise its discretionary jurisdiction to consider the merit's of the Petitioner's arguments.

CONCLUSION

The decision set forth below in the Second DCA is in direct conflict with a decision in the Fifth DCA and the cases are not distinguishable. It creates a damaging and irreconcilable difference with the Fifth DCA which leaves Florida's municipalities in doubt as to an issue of great

importance to their residents. This Court should accept jurisdiction.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Has been furnished by Lee Wm. Atkinson, Tew, Barnes & Atkinson, L.L.P., to Joseph Lang, Esquire, Carlton Fields, P.A., One Progress Plaza, 200 Central Avenue, Suite 2300, P.O. Box 2861, St. Petersburg, Florida 33731-2861 and to Robert Pass, Esquire, Carlton, Fields, P.O. Drawer 190, Tallahassee, FL 32302-0190 this 11th day of October, 2002.

Lee Wm. Atkinson

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the type, size and style used in this brief is Courier New 12-point in compliance with the applicable rule of appellate procedure.

Lee Wm. Atkinson