

IN THE SUPREME COURT OF FLORIDA
CASE NUMBER SCO2-2149

ORIGINAL

TOWN OF BELLEAIR,
a Florida municipal corporation,

Plaintiff/Petitioner,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant/Respondent,
_____ /

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THOMAS D. HALL

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RESPONDENT'S JURISDICTIONAL BRIEF
On Review From The Second District Court of Appeal

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ABLE OF AUTHORITIES

Case Under Review

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SUMMARY OF ARGUMENT

This Court has jurisdiction to review the decision below. Art. V, § 3(b)(3), Fla. Const. The decision below expressly and directly conflicts with the decision of the Fifth District Court of Appeal in *Florida Power Corporation v. City of Winter Park*, 2002 WL 3109938 (Fla. 5th DCA 2002). The Fifth District acknowledged as much when it certified conflict with the case below. In fact, Florida Power Corporation has invoked the discretionary jurisdiction of the Florida Supreme Court in the Fifth District case, by notice served October 11, 2002.

As explained briefly below, Florida Power Corporation strongly objects to Belleair's characterization of the case below and the *Winter Park* case. Nevertheless, it is clear that the two cases are in conflict. Because Florida Power Corporation is a statewide electric utility that spans more than one appellate district, it is of critical importance that the law relating to its operations remain uniform in the various districts. Thus, because the *Belleair* and *Winter Park* decisions come to opposite conclusions as to the meaning and application of *Alachua County v. State*, 737 So. 2d 1065 (Fla. 1999), this case is important and should be reviewed.

ARGUMENT

Florida Power Corporation does not dispute that conflict exists with *Florida Power Corporation v. City of Winter Park*, 2002 WL 3109938 (Fla. 5th DCA 2002), or that this case is important enough to review. Indeed, the Fifth District certified conflict with the case below, and Florida Power Corporation has invoked the discretionary jurisdiction of the Florida Supreme Court in the Fifth District case, by notice served October 11, 2002. More, this conflict is important as it affects the operations of a statewide utility that spans three appellate districts.

With that said, Florida Power Corporation disagrees with Belleair's characterization of the case below, the *Winter Park* case, and the *Alachua County* decision. While a full explanation of Florida Power Corporation's disagreements can await merits briefing in these cases, two points should be made now.

First, Belleair quotes Justice Overton's dissent in *Alachua County v. State*, 737 So. 2d 1065 (Fla. 1999), as being "Cassandra-like:"

Without question, this opinion is now going to be used to challenge every franchise fee agreement in existence. I also believe that many utilities will now refuse to enter into new franchise agreements, and this source of revenue to local governmental 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.

Id. at 1069. Nothing could be further from the truth. **To** the contrary, the exact opposite has happened. Whereas Florida Power Corporation is ready and willing to enter new franchises with local governments (and in fact has entered many such franchises since *Alachua County v. State*, 737 So. 2d 1065 (Fla. 1999) was decided), it is local governments that have disregarded the *Alachua County* decision and declared that, without any bargained-for franchise, they have the unilateral right to charge rent to public utilities, unrelated to their actual cost of regulating Florida Power Corporation's use of the rights-of-way.

Moreover, this Court's *Alachua County* decision established clear law in Florida. Indeed, seven out of nine district court judges to consider that decision have concluded that what Belleair and Winter Park are attempting to do is to impose an unconstitutional tax in the guise of so-called rent for utilities' use of public rights-of-way to fulfill their statutory duty to serve. *Leon County v. Talquin Electric Cooperative, Inc.*, 795 So. 2d 1142 (Fla. 1st DCA 2001); *Florida Power Corporation v. Town of Belleair*, 2002 WL 1994196 (Fla. 2d DCA 2002); *Florida Power Corporation v. City of Winter Park*, 2002 WL 3109938 (Fla. 5th DCA 2002) (Sawaya, J., dissenting).

In the end, the case below should be reviewed with the *Florida Power Corporation v. City of Winter Park*, 2002 WL 3109938 (Fla. 5th DCA 2002) case, but the result reached by this Court in *Alachua County*, and adhered to by the First and Second District Courts of Appeal, should be approved again as being the law of Florida.

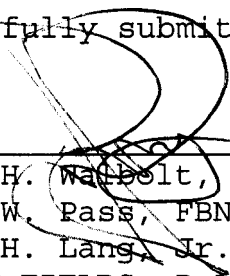
CONCLUSION

For the reasons set forth above, this Court should accept jurisdiction and review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing Jurisdictional Brief has been served by **FEDERAL EXPRESS**, to: Lee Wm. Atkinson, Esquire, Tew, Barnes & Atkinson, L.L.P., Prestige Professional Park, 2655 McCormick Drive, Post Office Box 5124, Clearwater, Florida 33759, attorney for Petitioner, Town of Belleair; on this **FOURTEENTH** day of October, 2002.

I HEREBY FURTHER CERTIFY that the type size and style used in this brief is Courier New 12-Point Font, and that the brief fully complies with Fla. R. App. P. 9.210(a).

By:



Joseph H. Lang, Jr.