

IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,
a Florida corporation,

Petitioner,

vs.

Supreme Court Case No.: SC02-2272
DCA Case Nos.: 5D02-87; 5D01-2470
L.T. Case No.: 01-CI-01-4558-39

CITY OF WINTER PARK,
a municipal corporation
created under the laws
of the State of Florida,

Respondent.

_____ /

AMENDED AMICUS CURIAE BRIEF OF
THE FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC.

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INTRODUCTION

The Florida Electric Cooperatives Association, Inc.'s ("FECA") members provide electricity to more than 700,000 member-consumers in 57 counties and numerous municipalities. Electric cooperatives utilize public rights-of-way to deliver power to their member-consumers at the lowest possible cost. In the vast majority of the jurisdictions that FECA's members serve, they do so without a franchise agreement and they do not pay a franchise fee. However, some of FECA's members have entered into negotiated franchise agreements with a limited number of the jurisdictions in which they serve, and these agreements require the cooperative to remit a franchise fee throughout the duration of the franchise agreement. As with any contract, FECA's members entered into these franchise agreements with expectations that the termination provision in the agreement is enforceable, and that the requirement to collect and remit the fee will terminate on the date set forth in the franchise contract.

FECA made the decision to file an amicus curiae in this case to address the issues of whether a local government can require an electric utility to continue to pay a franchise fee after the franchise fee agreement between the local government and the

utility has expired, and whether a local government can unilaterally impose a percent-of-revenue fee on a utility.

SUMMARY OF THE ARGUMENT

FECA maintains that the fee associated with a franchise agreement cannot be perpetual if the franchise agreement includes a defined termination date that is not ambiguous. FECA also maintains that the unilateral imposition of a percent-of-revenue fee amounts to an unconstitutional tax. In addition, FECA is confident that such a decision will have a chilling effect upon a cooperative's future decision to consider entering into a franchise agreement with a new jurisdiction until such time that there is adequate assurance that the courts will enforce all of the terms in the new franchise agreement without creating any new conditions.

ARGUMENT

I. A City Cannot Require an Electric Utility to Continue to Pay a Franchise Fee After the Franchise Fee Contract has Expired.

Alachua County v. State, 737 So. 2d 1065 (Fla. 1999), is controlling in the instant case and the injunction must be dissolved. In the interest of efficiency, FECA adopts the briefs of Petitioner, the supporting amicus curiae, and the

brief that FECA filed in Alachua County, which is a part of the record in the instant proceeding in Appendix 2, pages 385-422.

II. If Upheld, this Decision will have a Chilling Effect upon Jurisdictions that Wish to Impose a Franchise Fee in the Future.

FECA's members generally are not opposed to entering into franchise agreements with local governments as long as their consumer-members that would pay the fee support the agreement and the terms are acceptable to the cooperative. In fact, at least two¹ of FECA's members have either renewed or entered into new franchise agreements in 2002. Since the fees must be passed directly through to the citizens of the franchising entity, the fee is a negligible cost to the utility and to its customers that are situated outside of the limits of the local government.² If the elected officials decide to assess their citizens through a franchise fee, and the cooperative's member-consumers are not opposed to the fee, cooperatives have been willing to negotiate a franchise agreement with the local government. However, if the instant injunction is upheld, and negotiated terms can be enforced selectively, this will all come to a screeching halt.

¹In 2002 cooperatives signed new franchise agreements with Paxton City, the City of Ocala, the City of Leesburg and the City of Center Hill.

²Rule 25-6.100(7), F.A.C.

After all, why would anyone enter into a franchise agreement with a local government if the local government can unilaterally amend the agreement or selectively extend certain terms as it sees fit? In the case of franchise agreement renewals, why would a local government need to negotiate in good faith if they can continue to impose the expired franchise fee without a new agreement?

It is telling that FECA's members have entered into at least seven new franchise agreements since the Alachua County decision was issued. The concern raised in the Alachua County dissent, that "many utilities will now refuse to enter into new franchise agreements"³, has not come to fruition. Nevertheless, a utility's decision whether to renew or enter into a new franchise agreement is discretionary, and the City cannot impose a percent-of-revenue fee unless it is done pursuant to a valid, negotiated franchise agreement.

III. A Percent-of-Revenue Fee is Per Se an Unconstitutional Tax.

The unilaterally imposed percent-of-revenue fee is an unconstitutional tax because there is no nexus between the fee and the City's cost of regulating Florida Power's facilities. For example, when electricity rates spiked in the late 1970s and

³ Id. at 1069.

early 1980s due to OPEC's manipulation of the oil markets, the percent-of-revenue franchise fees paid to local governments by electric utilities increased proportionally to the spike in electric rates. However, during this same period any increase in the local government's cost of regulating the utility would have been de minimis in relation to the franchise fee revenue increases. Clearly, there is no nexus between the utility's revenues and the local government's cost of regulating the utility, and a unilaterally imposed percent-of-revenue fee cannot survive Alachua County.

CONCLUSION

The fee at issue is an unconstitutional tax. It is unilaterally imposed and there is no nexus between the fee and the City's cost of regulating Florida Power's facilities. For jurisdictions that presently do not impose a franchise fee but hope to do so in the future, the instant decision will be a major obstacle to the creation of a franchise agreement with its utilities. The injunction should be dissolved.

DATED this 21st day of January, 2003.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 21st day of January, 2003 to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210, Florida Rules of Appellate Procedure, this brief is typed using Courier New 12 point, a font which is not proportionately spaced.

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